ORIGINAL

05106C
ALJ(a)
Pub

RECEIVED
2010 NOV 23 PM 2:41
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

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 MOTION FOR LEAVE TO APPEAL NOVEMBER 8, 2010 ORDER DENYING ITS MOTION TO DISMISS AND APPEAL BRIEF

Saul Ewing LLP

Paul M. Heylman
Allison B. Newhart
Carolyn Due
2600 Virginia Avenue, N.W.
Suite 1000 - The Watergate
Washington, D.C. 20037-1922
202.342.3422
202.295.6723 (facsimile)

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607

Counsel for Respondent
The Port of Oakland

MOTION FOR LEAVE TO APPEAL

The Port of Oakland (California) ("Port" or "Respondent") seeks leave to appeal the November 8, 2010 Order denying its Motion to Dismiss on 11th Amendment grounds. The Federal Maritime Commission's ("Commission") rules, and the analogous federal precedent the Commission looks to for guidance, demonstrate that the Port should be given leave to appeal.

Rule 153, 46 C.F.R. §502.153, permits appeals of non-final orders where the Presiding Judge finds it necessary to permit an appeal "to prevent substantial delay, expense or detriment to the public interest, or undue prejudice to a party." As the Presiding Judge noted in *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, "[i]n interpreting this rule, the Commission has cited with approval the precepts applicable to interlocutory appeals in federal court under 28 U.S.C. §1292(b)." 28 S.R.R. 1363, 1367 (2000) (citing *Amzone Int'l, Inc. v. Hyundai Merch. Marine Co.*, 27 S.R.R. 386, 389 (1995)).

Before 1993 there was a conflict among the Federal Circuits as to whether an order denying an 11th Amendment motion to dismiss was immediately appealable. The United States Supreme Court addressed and resolved this issue in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The Court expressly rejected the argument that an 11th Amendment immunity claim was merely a defense to liability and hence not subject to interlocutory appeal. The Court held that the denial of an 11th Amendment motion to dismiss is immediately appealable regardless of whether the motion involves factual complexities requiring trial. In other words, since the 11th Amendment decision determines whether a federal court (and here, the

Commission) has jurisdiction to hear the case on the merits, it should be resolved expeditiously by interlocutory appeal.

The Port's motion for leave to appeal also satisfies the requirements of Rule 153 in this case of first impression for the Commission. The Commission has not had occasion to consider the question of whether a port operating as a trustee for a state – where all port funds are held in trust for the state – is cloaked with the state's 11th Amendment immunity and entitled to assert such immunity.

If the appeal is sustained and the Port is entitled to 11th Amendment immunity, the case is over. If the Port's motion for leave to appeal is denied, then the determination of the Port's 11th Amendment immunity will be delayed until after the final ruling on the merits. If the Port's exceptions are then upheld, the Port will have suffered both unnecessary expense and undue prejudice. The Port will have effectively lost much of the benefit of its immunity, forced to expend – without a likely chance of recovery – significant, scarce, public funds and time continuing to litigate an issue that it should not have had to litigate. Moreover, any time and money the Port spends defending against impermissible claims is not in the public interest because the funds belonging to the State of California are being expended inappropriately.

APPEAL BRIEF

I. PROCEDURAL BACKGROUND

In this case, two marine terminal operating companies owned by Stevedoring Services of America (collectively "SSA") claim that the Port violated the Shipping Act when it entered into a public-private partnership (P3) with a competitor of the SSA. The competitor, Ports America Outer Harbor Terminal,

LLC ("PAOHT"), entered into the P3 agreement with the Port after an extensive RfQ/RfP process. SSA maintains that, in allowing PAOHT to decide what capital investments to make in the P3, and thus failing to impose specific capital investment requirements on PAOHT, the Port violated the Shipping Act.

On July 7, 2010, the Port filed its Motion to Dismiss ("MTD"). The MTD demonstrates why the Port is entitled to invoke the State of California's 11th Amendment immunity. The Port's MTD describes the Port's relationship with the State of California (also referred to as the "State"): The Port operates under a Tidelands Trust, as a Trustee for the State. All Port funds are held in trust for the State, the beneficiary of the Tidelands Trust. The funds may not be used for any non-trust purpose and must be used for the benefit of the State of California in its capacity as trust beneficiary. Hence, Port funds are "state funds" for 11th Amendment purposes, entitling the Port to the State's immunity.

On August 4, 2010, SSA filed a reply in opposition to the Port's MTD ("MTD Opposition") arguing, *inter alia*, that the City of Oakland is not an arm of the state and the Tidelands Trust did not confer 11th Amendment immunity on the Port. On October 5, 2010, the Port submitted a Notice of Supplemental Authority ("NSA") attaching a California statute enacted on September 25, 2010, California Public Resources Code §6009. This statute, which confirms existing law on the Tidelands Trust relationship, describes the State's "absolute" status as beneficiary. On October 8, 2010, the Port filed a Motion to Stay ("MTS") pending resolution of the 11th Amendment MTD. On October 25, 2010, SSA filed a reply in opposition to the MTS ("MTS Opposition").

On November 8, 2010, Judge Wirth issued the Order on Motion to Dismiss and Motion to Stay Proceedings ("Order"). This motion and appeal followed.

II. ARGUMENT

The Port's MTD and the Order contain a comprehensive discussion of the structure and operation of the Port.[1] While the Port does not disagree with much of the Order's analysis of the Port's structure, the Port respectfully submits that the Order's analysis of the application of the 11th Amendment to a Tidelands Trust is incorrect. The Order concluded that Port funds, while held in trust for the State, are not "state funds" within the meaning of 11th Amendment case law, and that the Port's role as Trustee for the State does not entitle the Port to assert the State's immunity. A claim, as here, against a trustee (the Port) acting for the exclusive benefit of a beneficiary that is unquestionably entitled to 11th Amendment immunity (the State) is barred by the 11th Amendment. Moreover, the funds held by the Port are "state funds" under 11th Amendment jurisprudence. For efficiency's sake, this appeal brief will focus on the portions of the Order the Port contends are erroneous.

A. The November 8, 2010 Order.

The Presiding Judge noted the following in analyzing whether the 11th Amendment applies here:

[1] The MTD, NSA, MTS and the Order are incorporated herein by reference and attached hereto as Exhibits 1 – 4 respectively. Claimants' oppositions referenced above are also attached hereto as Exhibits 5 and 6.

- The lands at issue were granted to the City of Oakland in 1911, which took legal title "subject to the express trust imposed in the legislative acts of conveyance." (Order at 4).
- The State of California subsequently amended the trust grant, changing the length of permissible leases. *Id.*
- The State of California has the power to revoke the Tidelands Trust if the land is not being used for trust purposes or not being effectively administered to benefit the people of the State of California. *Id.*
- All income and revenue from operation are deposited in a special fund in the city treasury designated as the Port Revenue Fund. (Order at 5).
- In 1938, the State of California created the State Lands Commission, which was vested with "all jurisdiction and authority remaining in the State" as to, *inter alia*, the lands here. *Id.*
- The Port must file with the State Lands Commission an annual detailed statement of all revenues and expenditures relating to its trust land and assets. *Id.*
- The State Lands Commission exercises oversight over all granted lands. The State Lands Commission reports problems to the legislature, which may revoke or modify the grant. (Order at 5-6).

The Order also describes the operation and structure of the Port as a department of the City of Oakland. This relates to a conventional arm-of-the-

state 11th Amendment analysis, but does not relate to the Port's status as a Tidelands Trustee.

B. The Legal Analysis in the Order.

The United States Supreme Court has expressed that while 11th Amendment immunity is a question of federal law, "that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997). After discussing the structure and operation of the Port, the Order analyzes various aspects of California law. The Order then considers three possible tests[2] in concluding that under California law Tidelands Trust funds – at least at Oakland – are not state funds.

1. California Ports.

As part of the analysis of state law, the Order assesses several California decisions dealing with ports and the issues underlying 11th Amendment immunity. (Order at 8-9). Two cases – one state and one federal – strongly support the Port's position here. In *Mosler v. City of Los Angeles*, 02-CV-02278 (C.D. Cal. 2009), *appeal pending*, the United States District Court for the Central District of California held that payments out of the Tidelands Trust are "payments out of state funds within the meaning of *Belanger*." *Id.* at 8-9.[3] The court in *Mosler* held that the Tidelands Trustee was therefore an arm of the state of

[2] These tests are the D.C. Circuit's *PRPA* test (Order at 9-11), the Ninth Circuit's *Belanger* test (Order at 11-12), and the Commission's *Ceres* test (Order at 12-13).

[3] The Ninth Circuit Court of Appeals uses the five-factor "*Belanger*" test to determine whether an entity is an arm of the state. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d. 248 (9th Cir. 1992).

California because of the Tidelands Trust arrangement.[4] The court also cited a California state court decision that had reached the same result. *Hanson v. Port of Los Angeles*, No. BC 221839 (L.A. Super. Ct. 2001). The *Mosler* and *Hanson* decisions are attached hereto as Exhibits 7 and 8 respectively. In *Hanson,* the court also held that the Port of Los Angeles and the Board of Harbor Commissioners were "arms of the state" and payment of a judgment out of the funds held in trust for the state is payment of "state funds."[5]

This doctrine in California is not limited to ports. Other public entities – such as school districts – manage land and assets in trust for the state. California courts have found that such entities serve as an "arm of the state" within the meaning of 42 U.S.C. § 1983. *See Kirchmann v. Lake Elsinore Unified Sch. Dist.*, 83 Cal. App. 4th 1098, 1101 (Cal. Ct. App. 2000), a copy of which is attached hereto as Exhibit 9. The opinion in *Lake Elsinore* provides that the Section 1983 arm-of-the-state analysis is a "closely related question" to the 11th Amendment arm-of-the-state analysis. *Lake Elsinore* thus demonstrates that entities holding land for the benefit of the State of California are entitled to the same sovereign immunity as the State. *Id.* at 1114.

---

[4] While the issue in *Mosler* is whether the Port of Los Angles is a "person" under the False Claims Act ("FCA"), there is no material difference in the two standards. The plaintiff's arguments in *Mosler* about the 11th Amendment waiver are purely procedural, and do not affect the commonality of the FCA test for "person" and the 11th Amendment test for "arm of the State."

[5] There is another recent federal decision regarding an unrelated Tidelands Trust issue that should not be conflated with the *Mosler* decision. *ATA v. City of Los Angeles*, 577 F. Supp. 2d 1110 (C.D. Cal. 2009), *rev'd on other grounds*, 559 F.3d 1046 (9th Cir. 2009). *See* discussion in MTD at 25, n. 10.

The court in *Lake Elsinore* also addresses when funds that are held by an entity other than the state treasury are nonetheless "state funds." There, the school district funds are paid into the treasury of the county in which the school district sits. Regardless, the funds "belong to the state and the apportionment of the funds to a school district does not get (*sic*) the district a proprietary interest in the funds . . . ." *Id.* at 1111 (citations omitted). Because school district funds are "considered funds of the state," the payment of any judgment from such funds would have "essentially the same practical consequences as a judgment against the State itself." *Id.* at 1112.

The courts in California characterize a payment from a Tidelands Trust as a payment by the State. The Order nonetheless rejects this proposition and instead draws a distinction between the *Hanson* and *Mosler* decisions, where California state and federal courts held that Tidelands Trust funds belong to the State, and the Port of Oakland. This erroneous distinction is based on a provision in the Port of Los Angeles' revenue fund providing that every third year 85% of certain "excess" revenue is returned to the State. This is only one of many factors relied on by the court in *Hanson*, and is not even mentioned in *Mosler*. There is nothing in the *Hanson* or *Mosler* opinions to suggest that this provision was essential, or even important, to the conclusion that trust funds are "state funds." There is certainly nothing in either opinion suggesting that the courts would have found that the Port of Los Angeles was not entitled to the State's immunity absent the 85% provision. Trust funds are trust funds, regardless of whether certain income is paid out to the beneficiary or must be

used for trust purposes. Rather, the appropriate reading of the *Hanson* and *Mosler* decisions is that the Tidelands Trust funds held in trust for the State of California – whether in Los Angeles or Oakland – are state funds for 11th Amendment purposes.

The September 25, 2010 addition to the California Public Resources Code at 6009(c)-(d) confirms the Port's position. Less than two months ago the California legislature enacted, and the Governor of California signed, a law confirming the "absolute" character of the State's interest in the Tidelands Trust. The new statute provides, *inter alia*, that:

- Port lands are held "subject to the public trust for statewide public purposes."
- The State's power and right to control, regulate and utilize the lands when acting within the terms of the public trust is "absolute."
- Tidelands granted 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."
- The Port is required to manage the 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."
- The purposes and uses of the lands held by the Port are statewide concerns.

Cal. Pub. Res. Code at §6009.

The Order contrasts the *Mosler* and *Hanson* decisions with an earlier decision where the "Ninth Circuit found that the port in the City of Long Beach was not entitled to immunity even though it was acting as trustee . . . .". (Order at 8) (citing *City of Long Beach v. Standard Oil Co. of Cal.*, 53 F.3d 337 (9th Cir. 1995)).

There are several important factors to consider in assessing the applicability of *City of Long Beach*. First, the Ninth Circuit's remarks on 11th Amendment immunity are at best *dicta*. The city there was the party that initially invoked the jurisdiction of the federal courts. It claimed that it was the victim of an antitrust conspiracy by defendant oil companies to fix prices for those companies paid crude oil and that it had, as a consequence, been underpaid royalties. One of the defendants counterclaimed against the city, seeking damages for overpayment of those same royalties. An 11th Amendment immune entity cannot invoke the jurisdiction of a federal court for its claim and then claim immunity for a counterclaim arising from the same facts and circumstances. Since the city waived its immunity by bringing suit in the first place, the court did not need to reach the question of whether the city was immune. Any analysis of the city's substantive immunity is unnecessary *dicta* from a precedential standpoint.

Second, 11th Amendment jurisprudence is an evolving area of law that has developed considerably after 1995 and since the United States Supreme Court reinvigorated the 11th Amendment in the late 1990s. The Order quotes the opinion in *City of Long Beach* that "the city has not pointed to any authority

suggesting that this doctrine should be extended to non-state agencies." Order at 8. The Ninth Circuit was thus unwilling to find 11th Amendment immunity for the City of Long Beach given the city's failure to present authority supporting its position.

In contrast, the Port here has identified abundant authority. This includes decisions rendered subsequent to *City of Long Beach* from California state and federal courts (*Hanson* and *Mosler* respectively). Moreover, the new California statute confirms the State's status as beneficiary of the Tidelands Trust and the Port's role as Trustee operating the Port for the benefit of the State and holding Port funds as a Trustee for the State of California.

In sum, the Ninth Circuit's analysis in *City of Long Beach* expressly pointed out that the city there had failed to identify any authority suggesting that 11th Amendment immunity applied to Tidelands Trusts. Here, in contrast, the Port has identified both case law subsequent to *City of Long Beach* holding that Tidelands Trust ports meet the requirements for 11th Amendment immunity, and a new statute confirming the State nature of the Tidelands Trust.

2. The *PRPA* Analysis.

The first of the three tests addressed in the Order is the balancing test applied in the D.C. Circuit in a Commission case involving the Puerto Rico Ports Authority ("PRPA"). (Order at 9 – 10) (analyzing *P.R. Port Auth. v. Fed. Mar. Comm'n.*, 531 F.3d 868 (D.C. Cir. 2008)). In *PRPA*, the D.C. Circuit focused its inquiry on a "balancing test" of the three arm-of-the-state factors: intent, control and overall effect on the treasury. However, the D.C. Circuit did not hold that this was the only way to establish 11th Amendment immunity. It also set forth two

additional methods for an entity to demonstrate eligibility for 11th Amendment immunity. The first additional test is if the state is obligated to pay the judgment. The second additional test is if the entity is acting as an agent for the state. "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." 531 F.3d at 878-79 (emphasis in original).

The tests are independently sufficient – even an entity not eligible under the conventional arm-of-the-state analysis is entitled to 11th Amendment immunity if it meets either one of the other tests. *Id.* at 879. As the Port's MTD clarifies, the Port meets all three alternative tests. (MTD at 28-30). The Order's contrary conclusion rests on an erroneous interpretation of California case law as discussed above. The Commission need go no further than the "payment out of state funds" test to reverse. Since any judgment would be paid out of Tidelands Trust funds, reparations would be a payment out of "state funds," and the Port is entitled to immunity. As described above, Tidelands Trust funds are the property of the State of California and, as held in *Mosler* and *Hanson*, any payment by the Port is a "payment out of state funds within the meaning of *Belanger*." *Mosler*, *supra*, slip op. at 9.

3. The *Belanger* Analysis.

The Port is also entitled to 11th Amendment immunity under the Ninth Circuit *Belanger* test. The *Belanger* test considers five factors to determine whether an entity is an arm of the state for 11th Amendment purposes. *Belanger*, 963 F.2d at 248. The first factor – whether a money judgment would be satisfied

out of "state funds" – is the most important. *Id.* at 251. The second factor - whether the entity performs central governmental functions is also important. *Id.* Again, the Order's determination that the Port is not entitled to 11th Amendment immunity under this test rests largely on the Presiding Judge's conclusion that Tidelands Trust funds are not "state funds." (Order at 12). The proper interpretation of *Hanson*, *Mosler* and *City of Long Beach*, combined with the State of California's recent reaffirmation of its "absolute" status as beneficiary, compels reversal under this test.

4. The *Ceres* Analysis.

The final test analyzed in the Order is the Commission's "*Ceres*" test. (Order at 12-13). The *Ceres* test looks to two factors, the structure of the entity and the risk to the state treasury. Under the *Ceres* test the Commission further divided the structure factor into three components: (1) degree of control; (2) state vs. local concerns; and (3) manner in which state law treats the entity. The application of the *Ceres* test is discussed in detail in the MTD. (MTD at 31-33). This discussion, considered in conjunction with the discussion above about the new California statute and "state funds", compels reversal.

CONCLUSION

For the foregoing reasons, the Port's motion for leave to appeal should be granted, the appeal should be sustained, and the case should be dismissed with prejudice.

Respectfully submitted,

Paul Heylman
Allison B. Newhart
SAUL EWING LLP
2600 Virginia Avenue, N.W.
Suite 1000 - The Watergate
Washington, D.C. 20037-1922
202.342.3422
202.295.6723 (facsimile)
pheylman@saul.com

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607
510.627.1349
510.444.2093 (facsimile)
dchoy@portoakland.com

Attorneys for Respondent Port of Oakland

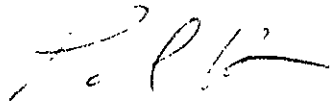
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Motion for Leave to Appeal November 8, 2010 Order Denying Its Motion to Dismiss and Appeal Brief was served by hand and electronic mail on the following:

Anne E. Mickey, Esq.
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, DC 20006
amickey@cozen.com

I further hereby certify that a true and correct copy of Respondent's Motion for Leave to Appeal November 8, 2010 Order Denying Its Motion to Dismiss and 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 908131-1280
jmirkovich@rumlaw.com



Paul M. Heylman

Dated: November 23, 2010

Exhibit 1

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-08

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

COMPLAINANTS

v.

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

RESPONDENT

RESPONDENT'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM

Saul Ewing LLP

Paul M. Heylman
Allison B. Newhart
Carolyn Due
2600 Virginia Avenue, N.W.
Suite 1000 - The Watergate
Washington, D.C. 20037-1922
202.342.3422
202.295.6723 (facsimile)

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607

Counsel for Respondent
The Port of Oakland

CORRECTED AS PER ERRATA – TOC & TOA CORRECTED

Table of Contents

TABLE OF AUTHORITIES

FEDERAL MARITIME COMMISSION CASES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION

SSAT, LLC and SSAT (Oakland) (collectively "SSAT") have brought a Shipping Act claim against the Port of Oakland (California) ("Port"). SSAT, a marine terminal operator (MTO) at the Port at Berths 57-59, claims that the Port impermissibly favored another MTO, Ports America Outer Harbor Terminals, LLC ("PAOHT") at Berths 20-24 to the detriment of SSAT. The Port timely filed its answer and defenses, including the defense that the Port is an arm of the State of California for purposes of the 11th Amendment to the United States Constitution and therefore the Commission lacks jurisdiction over private party claims against the Port. Defense 5 of Answer. The Presiding Judge ordered that any motion to dismiss be filed by July 7, 2010.

The Port hereby moves for dismissal of this case because the 11th Amendment precludes FMC jurisdiction over SSAT's claims. The United States Supreme Court has determined that the 11th Amendment bars private party[1] Shipping Act claims against a state port. *FMC v. S.C. State Port Auth.* 535 U.S. 743 (2002) ("*SCSPA*"). 11th Amendment immunity applies not only to states as named parties, but also to state agents and instrumentalities. *See Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997) ("*Regents*").

The Port functions only as a trustee for the State of California. The land controlled by the Port is held in trust for the State, and all revenue generated from Port operations is part of the corpus of what is called under California law a "Tidelands

[1] This doctrine only applies to private party claims, and does not impair Bureau of Enforcement regulation of state ports.

Trust." The State of California is both the grantor and the beneficiary of the Tidelands Trust. Since the Port functions solely as a trustee for the State, the Port is entitled to the same 11th Amendment immunity as any other agency or instrumentality of the State of California. Accordingly, the Port is immune under the 11th Amendment from all private party Shipping Act claims and SSAT's action must therefore be dismissed for lack of jurisdiction.

STATEMENT OF FACTS

I. Background on the Port of Oakland

The Port of Oakland was established in 1927 to carry out the City of Oakland's duties as tidelands trustee. *See* Charter of the City of Oakland ("City Charter") at Article VII. (Attached hereto as Appendix Exhibit 1) The Port is a public governmental entity. *See id.* The Port handles shipping and transporting cargo into and out of Oakland, CA, to domestic and international destinations. There are eight container terminals as well as two intermodal rail facilities at the Port.

The Port is the fifth busiest port of its kind in the United States, and, as a major gateway for cargo on the west coast of the United States, it serves as a center for containers from all over the world. A substantial amount (close to fifty percent) of the United States' total container cargo volume is handled by Ports in the State of California. As one of three container ports located in California, the Port plays a significant role in the transportation and distribution of a large volume of cargo.

Much, if not all, of the Port sits on submerged lands called tidelands. The California Supreme Court has defined "tidelands" as "those lands lying between the lines of mean high and low tide covered and uncovered successively by the ebb and flow thereof." *Marks v. Whitney*, 6 Cal. 3d 251, 257-58 (1971) (quotations omitted).

Originally owned by the State of California, the State granted the tidelands, in trust, to the City of Oakland. The City of Oakland established the Port to develop, manage, and operate a Port on those tidelands.

II. Establishment of the Port's Tidelands Trust

A. The Tidelands Grants

In 1911, the State of California granted to the City of Oakland – "in trust" – various tidelands that the Port has developed and operates. *See* Chapter 657, Statutes of 1911; as amended by Chapter 59, Statutes of 1917; Chapter 516, Statutes of 1919; Chapter 96, Statutes of 1937; and Chapter 1016, Statutes of 1981[2]; Declaration of David A. Murtha ("Murtha Declaration"), at ¶ 3.[3]

The original trust grant provided that the City of Oakland was to establish a Port for the benefit of the people of California. The trust grant further states that Port lands are held:

> by said city and by its successors in trust for the use and purposes and upon the expressed (sic) conditions following, to wit:
>
> (a) That said lands shall be used . . . only for the establishment . . . of a harbor, and for the construction . . . of wharves, docks, piers, . . .: *provided,* that said city, or its successors, may grant franchises thereon for limited periods . . . for purposes consistent with the trusts upon which said lands are held by the State of California, and with the requirements of commerce or navigation at said harbor.

Chapter 657, Statutes of 1911 (emphasis in original).

[2] Attached in the Appendix as Exhibit 2.

[3] Attached in the Appendix as Exhibit 3.

There are thus three elements to the grant: (1) the land is held in trust; (2) by the City and its successors; (3) "for purposes consistent with the trusts upon which said lands are held by the State of California." All of the lands in the grant are considered tidelands. *See* Murtha Decl. at ¶3. The grant and amendments also contain a non-discrimination provision, which prohibits discrimination by the Port in rates, tolls, or charges for use of its facilities. Chapter 657, Statutes of 1911, as amended by Chapter 59, Statutes of 1917, Chapter 516, Statutes of 1919, Chapter 96, Statutes of 1937.

B. The Port of Oakland Tidelands Trust

As set forth *supra*, the State granted the tidelands to the City of Oakland in 1911. The State is not a passive grantor/beneficiary of this Tidelands Trust. In 1917 the State amended the terms of the trust. While the original 1911 grant permitted leases for "limited periods," the 1917 amendment provided more specific guidance on the operation of the trust, limiting the time for which leases could be granted to 50 years. *See* Chapter 59, Statutes of 1917. Further grants by the State changed the maximum terms of leases to 66 years. *See* Chapter 1016, Statutes of 1981. The legislative grants specify that the tidelands are to be used for the benefit of the State and for the specifically enumerated purposes of commerce, navigation and fisheries. Accordingly, the grants of the tidelands to the City of Oakland established a public trust. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

This structure is common in California. For example, other California ports such as the Port of Los Angeles have similar organic laws. The Port of Los Angeles was created via city charter for purposes of carrying out a tidelands trust. *See Mosler v. City of Los Angeles,* Docket 02-CV-02278 (C.D. Cal. 2009); *Hanson v. Port of Los Angeles*,

No. BC 221839 (L.A. Super. Ct. 2001) at 5-7.[4] The Port of Long Beach also has a similar structure having been created by city charter in order to carry out a tidelands trust granted by the State of California to the City of Long Beach. *See City of Long Beach v. Morse*, 31 Cal. 2d 254, 256-57 (1947); *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 202-03 (1955).

III. The Port as a Tidelands Trustee.

Pursuant to the 1911 legislative grant and subsequent amendments, the City of Oakland holds the Property in trust for the State, to be used for the enumerated purposes set forth in the grant and for the benefit of the people of the State of California. *See* Chapter 657, Statutes of 1911; as amended by Chapter 59, Statutes of 1917; Chapter 516, Statutes of 1919; Chapter 96, Statutes of 1937; and Chapter 1016, Statutes of 1981. Accordingly, the Port is a tidelands trustee for the State of California. The State of California, as the grantor, has the power to revoke the tidelands trust if the tidelands are not used for trust purposes. *See, e.g., Mallon v. City of Long Beach*, 44 Cal. 2d 199, 207-08 (1955). Likewise, the State, as the grantor, can also revoke the trust if the State determines that the Trust is not being effectively administered to benefit all the people of the state. *See City of Coronado v. San Diego Unified Port Dist.*, 227 Cal. App. 2d 455, 474-475 (1964).

To carry out the requirements of the trust grants, the City of Oakland established the Port in 1927 to promote and insure the development, management and operation of the Port. *See* City Charter at § 700 *et seq.* As set forth below, the Port has taken steps

[4] Mosler is on appeal to the Ninth Circuit. The Mosler and Hanson decisions are included in the Appendix as Exhibits 7 and 8.

to operate in a manner that is both self-sufficient and consistent with the enumerated trust purposes.

A. Establishment of the Port Revenue Fund to Hold Trust Revenue

As a tidelands trustee, the Port's responsibility is to use and operate the tidelands for the benefit of the people of the State of California. California State Auditor Report at 5.[5] As a tidelands trustee, the Port may only use its property in manners that are consistent with the purposes stated in the trust grant from the State of California. *See, e.g., Mallon*, 44 Cal. 2d at 207-08. In order to carry out its role as tidelands trustee, the City of Oakland established a fund, called the Port Revenue Fund, to collect and hold revenue that the Port earns from its operations. *See* City Charter, § 717(3); Declaration of Sara Lee ("Lee Decl.") at ¶ 3.[6]

All revenue earned from Port operations is deposited in the Port Revenue Fund. Pursuant to §720 of the City Charter, the Port Revenue Fund is maintained separately from other City Funds, by the Treasurer of the City of Oakland. Lee Decl. at ¶4. The City Treasury holds the Port Revenue Fund. *Id.* at ¶5. The Port Revenue Fund contains only Tidelands Trust funds. The Port does not store or deposit any Tidelands Trust funds in any other bank accounts in the City Treasury. *Id.* at ¶3. For investment purposes, the funds in the City Treasury are pooled and the Port's proportionate share of the investment returns are allocated back to the Port Revenue Fund. *Id.* at ¶6.

[5] Relevant pages of the California State Auditor's Report are attached in the Appendix as Exhibit 4. A full version of the public record is at http://www.bsa.ca.gov/pdfs/reports/2001-107.pdf.

[6] Attached as Exhibit 5 to the Appendix.

The Port can only use the Port Revenue Fund for purposes connected to the Port's operations and development. California Public Resources Code, § 6306 (b); City Charter at § 717(3). Further, under California law, the City of Oakland is not permitted to use the Port Revenue Fund for any city expenditures that are not related to the use or operation of the Port or Tidelands Trust. *See* City Charter at § 717(3); *City of Long Beach v. Morse*, 31 Cal. 2d 254, 258-62 (1947). Even if the Port determines there is a surplus in the Port Revenue Fund, it may only transfer that surplus to the City if such surplus will be used for a Trust-related purpose. *Id.*

The accounting and revenue records for the Port Revenue Fund are maintained separately from all other accounting records for revenues and expenditures of the City of Oakland. Accordingly, the Port prepares a separate financial report for each fiscal year that only addresses Port finances and accounting. *See* Comprehensive Financial Report for FY 2008-09.[7] The Comprehensive Annual Financial Report describes, in detail, every aspect of the Port's financial accounting with respect to the revenue it collects and expenditures it makes relating to the Port.

B. The Port's Relationship to the City of Oakland.

Pursuant to Article VII of the Oakland City Charter, the Port is managed and operated by a Board of Port Commissioners (the "Board"). The Board consists of seven members nominated by the Mayor and approved by the Oakland City Council. City Charter at §§701-702. Each Commissioner is appointed to serve a term of four years. *Id.* at §702. The Board functions as a separate legislative body independent of the

[7] Comprehensive Annual Financial Report ("CAFR"). Relevant pages are attached as Exhibit 6 to the Appendix. A full version of the document public record is at http://www.portofoakland.com/pdf/abou_docu_fina9.pdf.

general management of the City of Oakland. *See* City Charter at §701; *see also City of Oakland v. Hogan,* 41 Cal. App. 2d 333, 343-44 (Cal. Ct. App. 1940); *City of Oakland v. Williams,* 206 Cal. 315, 320 (1929). The Board has exclusive control over matters relating to the Port Area. *See* City Charter at § 701; *Hogan*, 41 Cal. App. 2d at 343-44; *Williams*, 206 Cal. at 320.

The City of Oakland has vested the Board with complete and exclusive power to operate the Port. For example, the Port is authorized to exercise eminent domain power only as a tidelands trustee, and only as to the Port Area, for Port purposes only. *See* City Charter §§ 706(15) and (19). The Port is able to sue and be sued in its own name, "The City of Oakland acting by and through its Board of Port Commissioners." *See* City Charter § 706(1). "[T]he City of Oakland acting by and through its Board of Port Commissioners" is a different juridical entity than "The City of Oakland acting by and through its City Council." *Hogan, supra*, 41 Cal. App. 2d at 343-44; *Williams, supra*, 206 Cal. at 320. The Board is also responsible for the development, operation, and expansion of the Port to meet the needs of commerce, shipping, and navigation of the Port. City Charter at §706(2). Further, the Board is responsible for taking charge of, controlling, and supervising the Port and the tidelands upon which it sits, in order to promote commerce and navigation. *Id.* at §706(3). The City also delegated to the Board "all of the powers pertaining to the waterfront, wharves, dredging machines, or the port and its operation and maintenance." *Id.* at §706(6).[8] In sum, the City retained no power, authority or duty with respect to the operation, development, management or expansion of the Port.

[8] The full list of the Board's duties and responsibilities is set forth in §706 of the City Charter.

The Port's finances are separate and distinct from other City Departments. The Port's audited financial statements note that the Port "acts as trustee for waterfront property serving commercial, recreational and other public access purposes as well as for all its other Tidelands Trust properties." CAFR at ii. The Port prepares its own budget, separate from and independent of the City of Oakland's budget. *See generally id.* at 23. The Port prepares its own annual business plan. *Id.* at iii. As set forth in its audited financial statements, the Port defines operating revenues and expenses as "those revenues and expenses that result from the ongoing principal operations of the Port...primarily of charges for services." *Id.* at 27. The Port defines non-operating revenues as "those revenues and expenses that are related to financing and investing activities and result from non-exchange transactions or ancillary activities." *Id.* at 27. All of these operating and non-operating revenues are related to one or more of the Port's divisions. *Id.* at 6-9; 9-11; 23. The Port also keeps track of its own net assets, which it defines as "the residual interest in the Port's assets after liabilities are deducted and consist of three sections: invested in capital assets, net of related debt; restricted and unrestricted." *Id.* at 3-4; 25. The Port also issues bonds to fund improvements at the Port. *Id.* at 13. In sum, the Port functions as a stand-alone entity that is separate and distinct from the City of Oakland and operates solely as a tidelands trustee for the benefit of the people of California.

C. The State's Oversight of Its Trustee – The Port of Oakland.

Although separate from the City, the Port operates on behalf of the State of California, for the benefit of the people of the State of California. *See* California State Auditor Report of October 2001, at p. 5; *Williams*, 206 Cal. at 320. Accordingly, the State of California, through its legislature, has the sole authority to create, alter, amend,

modify or revoke a tidelands trust grant in order to ensure that the tidelands are being administered in a manner that is most suitable to the beneficiaries of the trust, the people of the State of California. *See City of Coronado v. San Diego Unified Port District,* 227 Cal. App. 2d 455, 474 (Cal. Ct. App. 1964).

To carry out its oversight role, the State enacted laws directing the Port, as Trustee, to use funds for certain limited purposes that might arguably be beyond the scope of the initial Tidelands Trust grant. In 1986 the California Legislature enacted Public Resources Code § 6306.2, permitting the Port to use funds in the Port Revenue Fund to acquire certain land outside the trust grant if the Port determined: (1) the trust grant did not contain adequate areas for certain environmental mitigation; (2) the proposed offsite mitigation "best promotes public trust purposes for which sovereign tidelands and submerged lands are held by the state," (3) the land (unless in another tidelands grant) is transferred back to the state; and (4) the mitigation is in the best interest of the state. *Id.*

The State also closely monitors the Port's financial role as trustee. For example, the State requires the Port to maintain GAAP-compliant accounting procedures for the State that provide accurate records of all revenue received from the trust lands and trust assets and all expenditures of those revenues. Cal. Pub. Res. Code. § 6306 (a). The Port must also provide a full accounting every October 1 to the State of California, filing a "detailed statement of all revenues and expenditures relating to trust lands and trust assets" including accrued, unpaid obligations. *Id.* at § 6306 (c). This annual accounting "may take the form of an annual audit prepared by or for the trust grantee." *Id.* In addition to requiring the annual accounting for all revenue and expenditures, the State

maintains control over the use of public trust lands by requiring audits of trust grantees' finances by conducting periodic reviews of how well its trustee Port is complying with its responsibilities to the State. *See* California State Auditor Report of 2001.

Should all this oversight prove inadequate, the State of California has the power to bring lawsuits against tidelands trustees to ensure that the trustees are using trust revenue properly. Cal. Pub. Res. Code § 6301; *see also, e.g., State ex rel. State Lands Comm'n v. County of Orange*, 134 Cal. App. 3d 20 (Cal. Ct. App. 1982).

D. The State Lands Commission

To help implement its responsibility for oversight and control for sovereign tidelands, the State of California established the State Lands Commission in 1938. The California Legislature delegated all jurisdiction that it retains in tidelands that are granted to local municipalities to the State Lands Commission. *See* Cal. Pub. Res. Code § 6301. The State Lands Commission thus exercises jurisdiction and oversight over the use of tidelands granted in trust to various municipalities within the State of California. *See* "Public Trust Policy" for the California State Lands Commission, at www.slc.ca.gov/Policy-Statements/Public_Trust_Policy.pdf; Cal. Pub. Res. Code § 6301. The State Lands Commission is also entrusted with administering public trust lands (which include tidelands) in accordance with statute and the public trust doctrine. *Id.* For example, the Port interfaces with the State Lands Commission on land use issues to ensure that all use of the tidelands is consistent with tidelands trust purposes. Cal. Pub. Res. Code §6301.

Finally, the Public Resources Code requires the Port to submit a Comprehensive Annual Financial Report detailing the Port's revenue, expenditures and debt relating to Port tidelands property to the California State Lands Commission. Additionally, the

State of California has periodically required audits of the Port's finances. *See* California State Auditor Report of 2001.

STATEMENT OF APPLICABLE LAW

The 11th Amendment to the United States Constitution bars federal courts from hearing suits against a state brought by a private party. *SCSPA*, 535 U.S. at 753-54. In 2002 the Supreme Court ruled that private party Shipping Act claims are "suits" within the meaning of the 11th Amendment. Accordingly, the Supreme Court prohibited the Commission from hearing private party claims against states. *Id.* at 760.

There are two essential components to 11th Amendment immunity: there must be (1) "a suit" that is (2) brought against "a state." The Court in *South Carolina State Ports Authority* addressed only the first component – whether a private party Shipping Act claim qualifies as a "suit" under the 11th Amendment. The Court apparently assumed, without deciding, that the South Carolina State Ports Authority qualified as "a state" within the meaning of the 11th Amendment. As a result, the Court did not rule on whether the *SCSPA* was entitled to the same 11th Amendment immunity as the State of South Carolina, nor did the Court provide any direct guidance in *SCSPA* on when a Port is sufficiently linked to a state to claim 11th Amendment immunity as an arm of the state.

I. The 11th Amendment's Application to State Agents and Instrumentalities.

Recent 11th Amendment litigation has primarily focused on the second component of 11th Amendment immunity – whether a particular entity qualifies as an "arm of the state" or a state agent or instrumentality. In recent years the Supreme Court and many of the U.S. Courts of Appeal have addressed whether particular state instrumentalities or agents are entitled to 11th Amendment immunity. Unfortunately, these decisions do not provide a uniform – or at least uniformly worded – test of general

applicability addressing when an entity is sufficiently related to the state to be covered by the 11th Amendment.

The most recent Commission determination on 11th Amendment immunity was issued on April 8, 2009 in Docket 02-08. There, the Commission dismissed a complaint against the Puerto Rico Ports Authority ("PRPA") on 11th Amendment grounds on that basis. The Commission had initially held that PRPA was not entitled to 11th Amendment immunity as it was not an arm of the Commonwealth of Puerto Rico. *Odyssea Stevedoring of P.R., et. al. v. P.R. Port Auth.*, Nos. 02-08, 04-01, 04-06 (Nov. 30, 2006)(Order). The D.C. Circuit overruled the Commission, holding that the Commission had misread the Supreme Court's decision in *Hess* on whether the D.C. Circuit's three factor test was still good law. *P.R. Port Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 870 (D.C. Cir. 2008). In complying with the Circuit's mandate, the Commission did not indicate whether it acquiesced in the Circuit's analysis for subsequent cases.

Two Circuits have potential appellate jurisdiction over this case: the D.C. and Ninth Circuits. There are common underpinnings to each Circuits' test for when an entity is an arm of the state entitled to the state's 11th Amendment immunity, but the two Circuits use differently phrased standards. The D.C. Circuit uses the three factor *PRPA* test, and the Ninth Circuit uses the five factor *Belanger* test. *See* pp. 17-19, *infra*. A review of the tests used by the two potentially reviewing Circuits, as well as the Commission's pre-PRPA test demonstrates that the Port – as a tidelands trustee – is entitled to 11th Amendment immunity.

A. Supreme Court Law on When the 11th Amendment Applies to State Agents and Instrumentalities.

The Court has made several important rulings in recent years describing portions of the proper analysis to use in determining whether an entity is entitled to claim a state's 11th Amendment immunity. The Court identified two different ways it has traditionally approached the question of whether a given entity can claim the state's 11th Amendment immunity. *Regents of the Univ. of California v. Doe,* 519 U.S. 425 (1997). In some cases, the Court has "examined 'the essential nature and effect of the proceeding,'" and in others "focused on the 'nature of the entity created by state law'" to determine whether the entity is an arm of the state entitled to immunity. *Regents, supra*, at 429-430.

The Court further noted that while 11th Amendment immunity is a question of federal law, "that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents, supra*, at 429, n. 5. The Court then noted the importance of a detailed examination of the relevant provisions of the law of the relevant state. *Id.* at n. 6.

While the risk to state funds is commonly discussed in 11th Amendment cases, the mere fact that state funds are not at risk does not rule out 11th Amendment immunity. In *Regents*, the Ninth Circuit applied the *Belanger* test to a case where the state instrumentality was being reimbursed by the U.S. Department of Energy, and held that a state instrumentality lost 11th Amendment protection because the state treasury was not actually liable for paying any judgment in the case. The Supreme Court reversed, holding that the "financial fact" that any judgment would be paid by a third party unrelated to the state treasury did not determine whether the entity was entitled to

11th Amendment immunity. Rather, the Court stated that the proper analysis of whether state funds were being used to pay the judgment focuses on the "legal fact" of the state being liable. The Court interpreted the *Belanger* test in accordance with this analysis, but did not rule on whether the *Belanger* test is the (or an) appropriate way to assess the relationship between the State and the entity in question for 11th Amendment purposes.

B. The Commission's Test(s) for When an Entity is a State Agent or Instrumentality

The Commission's first post-*SCSPA* case was *Ceres v. Maryland Port Administration*, 30 S.R.R. 358 (2004). There, the Commission determined that it could not simply apply a single Circuit's test because the Commission is subject to a multi-venue review process, with two possible appellate courts to which the parties may turn in each case: (1) the Circuit in which the alleged violations occurred and (2) the D.C. Circuit. The Commission then looked to the Fourth Circuit and the First Circuit to develop what it has called "the *Ceres* test."

The *Ceres* test has two parts. The first analyzes the structure of the entity and the second analyzes the risk to the treasury. The structure part of the test looks at three elements: 1) the degree of control exercised by the state over the entity; 2) whether the entity deals with local rather than statewide concerns; 3) the manner in which the applicable state law treats the entity. The treasury part of the test looks at the "risk to the Treasury." The Ceres test has been applied by the Commission in at least three major cases: (1) *Ceres v. MPA*; (2) *Carolina Marine Handling*; and (3) *PRPA*.

1. The "Structure Analysis."

In *Carolina Marine v. South Carolina State Ports Authority*, 30 S.R.R. 1017 (2006) ("CMH" or "Carolina Marine"), the Commission applied the *Ceres* test and found that the Charleston Naval Complex Redevelopment Authority ("RDA") was an arm of the State of South Carolina. The Commission first evaluated the degree of control South Carolina maintained over the RDA. The Commission found that there was a state purpose, delineated in state legislation, establishing the RDA and its powers, including the authority to act as an agent of the state for certain public purposes. The Commission also found that the RDA did not have the power to determine its own membership, instead the state appointed the RDA's members. Additionally, the Commission found that the state controlled RDA in other areas, requiring the RDA to comply with certain legislation and subjecting the RDA to state review and audit. Under this analysis, the Commission concluded that the RDA was under the control of the state.

Second, the Commission evaluated whether the entity performs statewide functions or local functions. The Commission stated that "ports in the United States . . . serve as vital gateways to international commerce, impacting the economies of their respective states." The Commission stated that the transfer of the Charleston Naval Complex to the State of South Carolina was not solely for the enjoyment of North Charleston's citizens, rather it was a deep-water port facility that "is vitally important to all of the citizens of South Carolina." Additionally, the Commission found that the RDA affected the jobs of thousands of South Carolina citizens and positively impacted the economy of the state. This analysis led the Commission to conclude that the RDA performed state functions.

Third, the Commission evaluated the manner in which the applicable state law treats the entity. The Commission first looked to the legislation which created the RDA. The state statute stated that the RDA was a public body, which exercised public and essential governmental powers, including powers to act as an agent of the state. The Commission found that RDA was an agency of the state for certain purposes defined by legislation and so was distinguishable from a political subdivision. The RDA was also distinguishable from a political subdivision because it was required to comply with certain legislation, which the political subdivisions did not. The Commission then went on to define the RDA's character as a state agency. The Commission looked at RDA's membership and found that the RDA had no control over its membership because the state appointed its members. The Commission also found that state legislation expressly provided for RDA to act for the state. The Commission concluded that South Carolina treated RDA as an arm because the state empowered RDA to act as its agent, required RDA to comply with state laws as though it were a state agency (as opposed to a political subdivision), and the state oversaw RDA's activities through the state's Legislative Audit Council, which oversees state agencies and programs.

2. The "Risk to the Treasury" Analysis.

In the second part of the test, the Commission analyzed whether a judgment against the entity would put state funds at risk. Although the RDA generated its own funding through bonds and revenue and received no direct state financial support, some "rural development income" that would otherwise be available to the state went to RDA. The Commission found that this implicated the state funds "somewhat." However, the most important fact for the Commission was RDA's statement that it would seek additional operating revenue from the state if RDA's funds were insufficient to satisfy a

judgment against it. The Commission held that a judgment against RDA could "impact state funds."

3. PRPA.

In *Odyssea Stevedoring of Puerto Rico v. Puerto Rico Port Auth.*, Nos. 02-08, -4-01, 04-06 (Order issued Nov. 30, 2006) the Commission used the *Ceres* test to determine whether the Puerto Rico Port Authority ("PRPA") was an arm of the state. The Commission held that the PRPA was not an arm of the Commonwealth of Puerto Rico. PRPA appealed to the D.C. Circuit, which found that the Commission erred in using the *Ceres* test, and reversed the Commission's decision. *PRPA*, 531 F.3d 868. The Commission dismissed the complaints pursuant to the D.C. Circuit's order as instructed, without expressly stating whether the *Ceres* test is valid, invalid or subject to modification.

C. Circuit Rulings

The Circuits have adopted a variety of tests, sometimes using different language to describe the same test. The two possible appellate venues here are the D. C. and Ninth Circuits. In addition, several other Circuits have either looked at port authorities or rendered decisions that are useful in the analysis here.

1. The D.C. Circuit's PRPA Test.

In *PRPA*, the D.C. Circuit rejected the *Ceres* test, applying a three-part test to determine whether PRPA is an arm of the state. Part one looks to whether the entity was intended to be an arm of the state. Part two determines the degree of state control over the entity. Finally, part three of the test determines the entity's financial relationship with the state and its overall effects on the state treasury. *PRPA*, 531 F. 3d at 873.

Under part one of the test, the Circuit looked at whether the state expressly characterized the entity as a governmental instrumentality. *Id.* at 875. The court found that Puerto Rico legislation described PRPA as a "government instrumentality." *Id.* The Circuit then looked to whether the entity performed state governmental functions - by looking at state legislation which indicated that "PRPA performs its functions to promote the 'general welfare' and to increase 'commerce and prosperity'" for the benefit of Puerto Rico's citizens. *Id.* The Circuit next considered whether the entity is treated as governmental for purposes of other laws. *Id.* at 876. The Circuit found that PRPA was treated like an agency of Puerto Rico because it did not have private owners or shareholders, it did not pay taxes, and it was subject to financial review by the state. It had to submit yearly financial statements to the Governor and its books were examined periodically by the Controller of Puerto Rico. *Id.* The Court found that PRPA was intended to be an arm of the state. *Id.* at 874-877.

Under part two of the test, the Circuit considered how officers and directors were appointed and terminated and whether the Commonwealth required the entity to perform acts in furtherance of government objectives. *Id.* at 877-878. The Circuit found that PRPA had no control over appointment of its directors. Rather the Commonwealth appointed and terminated PRPA officers and directors. *Id.* The Circuit found substantial state control over PRPA because the Commonwealth directed PRPA to perform certain acts and because the PRPA performed acts in furtherance of governmental objectives. PRPA demolished some warehouses and cargo operations for the governmental purpose of increasing tourism. *Id.* at 878. The court concluded that based on these factors that the Commonwealth maintained control over PRPA. *Id.*

Under part three of the test, the court looked to the financial relationship between the state and the entity. PRPA was not financed out of Puerto Rico's funds, but instead was financed with user fees and bonds. *Id.* at 879. Additionally PRPA was able to sue and be sued. *Id.* Nevertheless, the court stated that "the relevant issue is a State's overall responsibility for funding the entity or paying the entity's debts or judgments, not whether the State would be responsible to pay a judgment in the particular case at issue." *Id.* at 878.

Applying the three factor test, the Circuit held that the Commission erred in applying the Ceres test and failing to extend 11th Amendment immunity to PRPA. PRPA was found immune under the 11th Amendment to a private party Shipping Act claim. *Id.* at 881.

2. The Ninth Circuit's Five Part "Belanger Test"

The Ninth Circuit uses the five factor "*Belanger*" test to determine whether an entity is an arm of the state. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d. 248 (9th Cir. 1992). The first and second factors are given the most weight. The first factor, which the Ninth Circuit considers the "most important," is whether a money judgment would be satisfied out of state funds. The second factor is whether the entity performs central government functions. The third factor is whether the entity may sue or be sued. The fourth factor is whether the entity has the power to take property in its own name or only in the name of the state. The fifth factor is the corporate status of the entity.

3. Common Factors

There are significant similarities among the various tests. First, it is important to look to state law defining the structure of the entity. Any legislation that created, directs or otherwise controls the entity can reveal both state intent to create an entity

sufficiently close to share state's immunity, and sufficient state control over the entity to warrant immunity. In addition, all of the tests look to whether there is state review of the entity, including a review of its finances.

Second, it is important to consider whether the entity performs state governmental functions, thereby acting as an agent for the state. As the Commission stated in *Carolina Marine*, "ports in the United States . . . serve as vital gateways to international commerce, impacting the economies of their respective states."

Third, all of the tests look to the how any judgment will be paid. After *Regents* it is manifestly not necessary for the state treasury to actually be at risk of paying a judgment, but the question of whether state money is "legally" if not "financially" at risk is important in all the tests.

II. Under California Law, Tidelands Trust Port Authorities are Trustees for the State.

A. Evolution of the Tidelands Trust Doctrine in California

The concept of the Tidelands Trust predates the American Revolution. It evolved from the common law public trust doctrine, which holds as a bedrock principle that a sovereign holds navigable waterways as a trustee for the benefit of the people of the sovereign for various water-related uses. The doctrine is based on the idea that tide and submerged lands are unique, and that the sovereign ruler holds them in trust for the common use of the people of the sovereign. After the American Revolution, when each of the original colonies became sovereign states, they each succeeded to become trustees of the navigable waterways within their boundaries. *Martin v. Lessee of Waddell*, 41 U.S. 367, 368, 418 (1842). Once admitted to the United States in 1850, California succeeded to the same sovereign rights and duties as the original states.

Pollard v. Hagan, 44 U.S. 212, 230 (1845); *City of Long Beach v. Marshall*, 11 Cal. 2d 609, 614-15 (1938). Thus, once it became a member of the union, California also became a trustee of the navigable waterways within its boundaries. *Marshall*, 11 Cal. 2d at 614-15.

The United States Supreme Court has analyzed and upheld public trust doctrine principles. In *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the Court examined the Illinois State Legislature's grant of the Chicago waterfront to the Illinois Central Railroad. Reasoning that the public, and not the State, actually had ownership rights in the Illinois waterfront, the Court found that the state held the land under navigable waterways subject to a public trust, and did not have the power to transfer the land free and clear of the trust. *Id.* at 453-54.

The *Illinois Central* case continues to be a vital foundation of California public trust law in terms of the scope and depth of the public trust relating to navigable waterways. *See Mallon v. City of Long Beach*, 44 Cal. 2d 199, 203-07 (1955). Courts have continued to recognize that tidelands granted to a city or municipality by the State of California are state lands granted in trust for the people of the State. *See, e.g.*, *Marshall*, 11 Cal. 2d at 614-15; *City of Long Beach v. Morse*, 31 Cal. 2d 254, 259 (1947); *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 203-07 (1955).

Traditionally, under the public trust doctrine, purposes for which tide and submerged lands could be used were commerce, navigation, and fishing. *See*, e.g., Chapter 657, Statutes of 1911; as amended by Chapter 59, Statutes of 1917; Chapter 516, Statutes of 1919; Chapter 96, Statutes of 1937; and Chapter 1016, Statutes of 1981. California courts have interpreted the scope of the public trust doctrine to include

as permissible purposes for the use of lands subject to the trust: open space, ecological preservation, scientific study, and water-dependent or water-oriented recreation. *See Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971). Other uses of lands subject to the tidelands trust are commercial facilities such as warehouses, *e.g.*, *City of Oakland v. Williams*, 206 Cal. 315, 329-30 (1929), and facilities to accommodate visitors to the tidelands, such as hotels, restaurants, and parking lots. *See Martin v. Smith*, 184 Cal. App. 2d 571, 577-78 (Cal. Ct. App. 1960). All of these purposes were found to be related to furthering the trust purposes set forth in the original grants.

Several California state court decisions address the relationship between the State of California and a Tidelands Trust port. In *City of Long Beach v. Morse*, 31 Cal.2d 254 (1947), the California Supreme Court analyzed the obligations created under the Tidelands Trust grant to the City of Long Beach. Fortuitously the Court noted that the 1911 Tidelands Trust grant to Long Beach is identical in relevant part to the 1911 Oakland Tidelands Trust grant. 31 Cal.2d at 261-62. The Court's rulings in *Morse* contains two determinations that are relevant here. First, the Tidelands Trust grantee – be it City or Port – holds Tidelands trust assets only as a trustee for the State, and is subject to general trust rules. Second, the trustee – be it City or Port – can only use trust assets (including earnings on the corpus of the trust) for trust-related purposes. The State remains the beneficiary of the Trust, and as a matter of law the trustee can only act for the benefit of the State.

Interpreting the grant in *Morse*, the California Supreme Court stated that a Tidelands Trust grant "clearly provides that the state's interest in the lands is transferred in trust for certain uses and purposes. The city 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.' " *Id.* at 257. Such a trustee is under the same fiduciary obligation as any private trustee. *Id.* While the City (or its Port designee) can take legal title to the lands "in fee," that title is "held subject to the express trust imposed in the legislative acts of conveyance." *Id.* at 259.

Morse also holds that the Tidelands trustee has no right to use trust assets (including earnings on the trust corpus) for non-trust purposes. The Port can only use the assets or income of the trust for trust purposes. *Id.* at 258. The State is the trust beneficiary, and the funds in the Harbor Revenue Fund can only be used for the benefit of the State. *Id.* at 262.

The California Supreme Court again addressed the relationship between the City of Long Beach as Tidelands Trustee and the State of California as beneficiary in *Mallon v. City of Long Beach*, 44 Cal.2d 199 (1955). After the *Morse* decision, the California legislature passed a statute attempting to partially revoke the Tidelands Trust in Long Beach to permit a portion of the gas and oil revenue from the Tidelands to go to the City. The California Supreme Court rejected the City's claim that as trustee it somehow acquired the revoked portion of the corpus of the trust. *Id.* at 208. Rather, since the regular rules of private trust law apply equally to a Tidelands Trust, any interest in the trust corpus subject to revocation reverts to the State (as beneficiary). *Id.* The Court further held that since the State is prohibited from making gifts to municipalities, it could not give the proceeds covered by the partial revocation to the City. *Id.* at 210.

Based on *Morse* and *Mallon*, two courts in California – one state and one federal – have held a Tidelands Trust port is entitled to 11th Amendment immunity. In *Mosler v.*

City of Los Angeles, Dkt. 02-CV-02278 (C.D. Cal. 2009), the United States District Court for the Central District of California held that payments out of the Tidelands Trust fund are "payments out of state funds within the meaning of *Belanger*." *Id.* at 8-9. Citing *Morse*, the court held that the Tidelands Trustee was therefore an arm of the state of California.[9] The court also noted that a California superior court had recently considered the same issue and reached the same result for the same reason. *Id.*, citing *Hanson v. Port of Los Angeles*, No. BC 221839 (L.A. Super. Ct. 2001). The Port of Los Angeles and the Board of Harbor Commissioners were "arms of the state" and payment of a judgment out of the funds held in trust for the state is payment of state funds.[10]

This doctrine in California is not limited to ports. Other public entities – such as a school district – manage land and assets in trust for the state, and California courts have found that the such entities serve as an "arm of the state" within the meaning of 42 U.S.C. § 1983. *See Kirchmann v. Lake Elsinore Unified Sch. Dist.*, 83 Cal. App. 4th 1098, 1101 (Cal. Ct. App. 2000). The opinion in *Lake Elsinore* provides that the arm of the state analysis under §1983 analysis is "closely related question" to the 11th

[9] While the issue in *Mosler* is whether the Port of Los Angles is a "person" under the False Claims Act, there is no material difference in the two standards. The plaintiff's arguments in *Mosler* about the 11th Amendment waiver are purely procedural, and do not affect that commonality of the FCA test for "person" and the 11th Amendment test for "arm of the State."

[10] There is another recent federal decision regarding an unrelated Tidelands Trust issue that should not be conflated with the *Mosler* decision. In *ATA v. City of Los Angeles*, 577 F. Supp. 2d 1110 (C.D. Cal. 2009), reversed on other grounds, 559 F.3d 1046 (9th Cir. 2009), the Court issued an interim order that discusses whether the Tidelands Trust doctrine rendered the Port immune from federal preemption under FAAA. As the court there notes, the issue in ATA deals with the extent to which Congress has the power to preempt local law. 577 F. Supp. 2d at 9-10. Whatever the merits of that issue, *SCSPA* establishes that Congress does not have the power to authorize private party actions under the Shipping Act against 11th Amendment immune entities. In addition, the Port and City in the ATA case expressly reserved their 11th Amendment immunity defense, and did not submit the issue to the court in the briefing that led to the interim order. (same case name, pacer court docket 2:08-cv-04920 entry (document) 53 at 15, fn. 4 (August 20, 2008). The court was not presented with the 11th Amendment immunity issue by the defendants and the decision was not necessary to the Court's decision to deny the injunction, so even if the decision addressed 11th Amendment immunity, the language would be dicta.

Amendment arm of the state analysis. *Lake Elsinore* thus demonstrates – in a related context – that entities holding land for the benefit of the state of California are entitled the same sovereign immunity as the State. 83 Cal. App. 3d at 1114.

The *Lake Elsinore* decision also addresses when funds that held by an entity other than the state treasury are nonetheless "state funds." There, the school district funds are paid into the treasury of the county in which the school district sits. Despite this, the funds "belong to the state and the apportionment of the funds to a school district does not get the district a proprietary interest in the funds . . . ." 83 Cal.App.4th at 1111 (citations omitted). Thus, because the school district funds are "considered funds of the state" the payment of any judgment from such funds would have "essentially the same practical consequences as a judgment against the State itself." *Id.* at 1112.

ARGUMENT

I. The Port Is Entitled To 11th Amendment Immunity Under The Ninth Circuit's *Belanger* Test.

The *Belanger* test looks to five factors to determine whether an entity is an arm of the state for 11th Amendment purposes. *Belanger*, 963 F.2d at 248. The first factor – whether a money judgment would be satisfied out of state funds – is the most important. *Id.* at 251. The second factor - whether the entity performs central governmental functions is also important. *Id.*

Factor 1: Payments from the Port Revenue Fund are payments "out of State Funds: *Belanger* does not require that a judgment directly attach to the state treasury to be considered a judgment "out of state funds." *Id.* at 252. Any judgment in this case would attach directly to the state funds contained in the Port Revenue Fund. In other

words, the Port's role as Tidelands Trustee means that any judgment adverse to the Port would be paid from Trust Assets. These assets are the property of the State of California, and as held in *Mosler and Hanson*, any payment by the Port is a "payment out of state funds within the meaning of *Belanger*." *Mosler, supra*, slip op. at 9.

Factor 2: The Port performs a state, rather than local, function: The Port also satisfies the second *Belanger* factor. Citing *Hanson*, the federal court in *Mosler* also held that the Tidelands Trustees there satisfied the second of the five *Belanger* factors because the obligations and duties under the trust grant (establishing and running a port) are essentially governmental in character. *Id.* at 8. The state court decision in *Hanson* points out that the funds in the Harbor Revenue Fund "are held in trust for the benefit of all the people of California and not for the benefit of the citizens of the City of Los Angeles." *Hanson, supra*, slip op. at 6. The Tidelands Trust here is also held for the benefit of the entire state, and *Hanson* and *Mosler* decisions apply with equal force here.

The Commission's decision in *Carolina Marine* supports this assessment. There the Commission held that since the land being developed by the RDA was not "a mere parcel of land to be used solely for the enjoyment of" the local residents, but rather a deep water port for all the citizens of South Carolina, the RDA was performing a statewide, as opposed to local, function. Here, it is undisputed that the Port holds the land at issue in trust for all the citizens of California, not just those in Oakland, Alameda County or even the San Francisco Bay area.

The remaining minor *Belanger* factors: While the Port here can be sued in its own name, the Port has no juridical existence outside its role as Tidelands Trustee, and no ability to exercise eminent domain except as a trustee.

Conclusion: The Port easily meets the first and most important of the five *Belanger* factors since payment out of the Port Revenue Fund is a payment "out of state funds within the meaning of *Belanger*." *Mosler, supra*, slip op. at 9. The Port also meets the second factor of the *Belanger* analysis, since operation of the Port is for the benefit of the entire state under the express terms of the trust and under the analysis used by the Commission in *Carolina Marine Handling*.

II. The Port Is Entitled To 11th Amendment Immunity Under The *PRPA* Test.

The D.C. Circuit's *PRPA* test looks to three factors: (1) the State's intent in establishing the entity, (2) the State's control over the entity; and (3) the entity's overall effect on the State treasury. *PRPA*, 531 F.3d at 873. In addition, the Circuit notes that even entities that are not arms of the State can be entitled to 11th Amendment immunity "in a particular case if the entity is acting as an agent of the State or if the State would be obligated to pay a judgment against an entity in a that case." (citations omitted). *Id.* at 878-879.

The Circuit rejected what it characterized as the Commission's attempt to "stretch that principle to also mean that there is no sovereign immunity if the State is not obligated to pay a judgment in the particular case at issue." *Id.* at 879. This, the Circuit stated, would "inappropriately convert a *sufficient* condition for sovereign immunity into the single *necessary* condition for arm-of-the-state status." *Id.* (emphasis in original) In other words, if the State is obligated to pay a judgment against the entity, this by itself

establishes that the entity is entitled to sovereign immunity according to the Circuit. However, the lack of an obligation to use state funds to pay a judgment does not preclude 11th Amendment immunity.

This presents three independently sufficient ways an entity can establish 11th Amendment immunity in the D.C. Circuit. First, the entity can establish that the State is obligated to pay a judgment against the entity. Second, the entity can establish that in the particular activity at issue it was acting as an agent of the state. Third, the entity can satisfy the three-factor test of state intent, state control and overall effect on the State treasury. Because these tests are in the alternative, and if the Port satisfies any one of the tests, it is "sufficient" to meet the D.C. Circuit's standard. Here the Port meets all three of the alternative tests.

First approach (payment of state funds): As discussed *supra.*, under California law, all the assets of the Tidelands Trust are held in trust for the state. The Port, as trustee, cannot use the trust assets for its own purposes, or for any purpose other than the benefit of the state as prescribed in the Trust. The courts in California characterize a payment from a Tidelands Trust as a payment by the state. Here, any judgment against the Port would thus be paid out of state funds. Accordingly, the Port thus satisfies the first of the three possible approaches, and the analysis could end here.

Second approach (acting as agent of the state): Under the second approach, if the entity is acting as an agent of the State "in a particular case" then the entity is entitled to the State's 11th Amendment immunity. *PRPA*, 531 F.3d at 878-879. Here, the Port holds the land in trust for the state, with the Port as a trustee to the State for purpose of operating a Port. In fulfilling its role as trustee, the Port is at least an agent.

Third approach (balancing three factors): Under the third approach, an entity "either or is not an arm of the State" and the status does not change from one case to another. *PRPA*, 531 F.3d at 873. This is a more categorical approach than the "state agent" approach, where the entity can have 11th amendment immunity for one activity, but not for another. This analysis balances three factors.

The first factor is the State's intent as to the entity's status, including the functions the entity performs. *PRPA*, 531 F.3d at 873. In *PRPA*, the Circuit looked to Puerto Rican law to ascertain the intent of the "state" there. *Id.* at 874-875. The analogue here – the law of the state of California – charges the Port with operation as a trustee for the state. While the State of California did not set up the same level of day to day control over the entity as the Commonwealth of Puerto Rico, the State of California has clearly established its intent that the Port act as a Tidelands Trustee and develop and operate a port for the benefit of the people of the State of California.

The second factor is the State's control over the entity. *Id.* at 873. The State requires that the Port provide an annual financial report to the State, non-discrimination in rates, and that the Port operate for the purpose of carrying out the trust terms.

The third factor is "entity's overall effects on the state treasury." *Id.* Under California law, the assets of the Port are held in trust for the State, and judgments against such funds held in trust are treated as if they were claims against the state treasury.

Conclusion: If the Port satisfies any one of the three foregoing approaches, it is entitled to 11th Amendment immunity. Having satisfied each of the tests separately, there can be no question that it is entitled to sovereign immunity.

III. The Port Is Entitled To 11th Amendment Immunity Under The *Ceres* Test.

The *Ceres* test looks to two factors, the structure of the entity and the risk to the state treasury. In *CMH*, the Commission further divided the structure factor into three components: (1) degree of control; (2) state vs. local concerns; and (3) manner in which state law treats the entity.

Degree of Control: The State of California is both the grantor of the Tidelands Trust and the beneficiary of the Trust. As the grantor, the State both established the objectives that the Port is to follow, and set certain guidelines in how the Port is to perform that function. For example, the State has over the years changed the maximum lease terms from "reasonable" to 25 years, then to 50 years and then to 66 years. The State has also required that the Port not discriminate in the rates it charges. While the State does not select the Commissioners, the Board only acts as a trustee to the state and is subject to State oversight. The State, through its Lands Commission, requires that the Port provide it with an annual audited financial statement. This is no mere formality, as the State performs audits on how well the Port performs its function *See* State Auditor Report at p.1; CAFR at p i.

In order to carry out the Trust purposes, the Port must be delegated certain powers. For example, in *Carolina Marine*, South Carolina used legislation to empower RDA with specific powers to perform its purposes. Similarly, here, the California Public Resources Code empowered the Board to use funds to acquire certain lands outside the Trust grant. By delegating these powers to the Port via statute, the State maintains control over the scope of these powers. For example, although the Board has the power to purchase land outside the trust grant, the California Public Resources Code sets guidelines for the purchase, which includes that it must be in the "best interest of

the state." Thus, any autonomy granted to the Board is ultimately tempered by the significant control and oversight asserted over it by the State of California.

State versus Local Concerns: The Tidelands Trust was established for the benefit of entire State of California. In keeping with the Trust purposes of commerce, shipping, and fishing to benefit the state, the Port facilities allow for domestic and international shipping and trading. Accordingly, state funds are in trust for the benefit of all California citizens, not merely for those in Oakland.

In *Carolina Marine*, the Commission found that the Federal government transferred the Charleston Naval Complex for the benefit of all South Carolina citizens, not just for those in Charleston. The Commission also found that "ports in the United States . . . serve as vital gateways to international commerce, impacting the economies of their respective states." In *Ceres*, the Commission stated that the MPA dealt with statewide concerns because "its oversight of maritime commerce is an essential function" to the State.

As discussed *supra*, similar to the entities in *Carolina Marine* and *Ceres*, the Port similarly performs a state function as a vital gateway for international commerce in California. The Board performs statewide functions in its oversight of the Port. The Board furthers State objectives of promoting commerce and navigation by taking charge of, controlling, and supervising a port which contributes significantly to statewide, national, and international trade and commerce.

California Treatment of Entity: The third element of the first factor addresses how the entity is characterized under state law. California law treats the Port as a trustee to the state. Both state and federal California courts have held that the Port of

Los Angeles immune from suit as an arm of the State. Like the Port of Oakland, the Port of Los Angeles is a trustee of the State of California under the Tidelands Trust. The trust grant that establishes the Port limits its purpose to those consistent with the Trust. The State is a beneficiary of that Trust. The money in the Port Revenue Fund may only be used for trust purposes. Further, any land that the trust has acquired must revert back to the State.

For example, all revenue earned from Port operations must be kept separate from City Treasury funds and monies. All expenditures by the Port are paid from the Port Revenue Fund, which the Board holds in trust for the State of California. Money from the Port Revenue Fund is accounted for separately and independently from other funds in the City Treasury. The State closely monitors the Port's financial role as trustee because the money in the Port Revenue Fund ultimately belongs to the State. The Commission found in *Carolina Marine* that the RDA satisfied the "treasury" part of the *Ceres* test because the RDA would seek funds from the State for judgments exceeding the RDA's funds. Similarly, here, any judgment against the Port would directly impact the state's revenues because any judgment against the Port will be paid by the Port Revenue Fund, just as all other expenditures by the Port are paid.

Conclusion: Although the exact application of the *Ceres* test remains unclear after *PRPA*, the facts here demonstrate that the Port satisfies both factors. Accordingly, the Presiding Judge need not reach the issue of proper application of the *Ceres* test. Based on the foregoing facts, the Port is entitled to the 11th Amendment immunity.

CONCLUSION

For the foregoing reasons, the Port is entitled to 11th Amendment immunity from the private party claims here. Accordingly, the Complaint must be dismissed with prejudice.

Respectfully submitted,

Paul Heylman
Allison B. Newhart

SAUL EWING LLP
2600 Virginia Avenue, N.W.
Suite 1000 - The Watergate
Washington, D.C. 20037-1922
202.342.3422
202.295.6723 (facsimile)
pheylman@saul.com

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607

Counsel for Respondent
The Port of Oakland

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Motion for Summary Judgment and Supporting Memorandum was served by hand on the following:

Anne E. Mickey, Esq.
Sher & Blackwell
Suite 900
1850 M Street, N.W.
Washington, DC 20046

_____
Paul M. Heylman

Dated: July 7, 2010

RECEIVED
2010 JUL 15 AM 10: 54
FEDERAL MARITIME COMM

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-08

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

COMPLAINANTS

v.

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

RESPONDENT

NOTICE OF ERRATA TO RESPONDENT'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM

Saul Ewing

Paul M. Heylman
Allison B. Newhart
Carolyn Due
2600 Virginia Avenue, N.W.
Suite 1000 - The Watergate
Washington, D.C. 20037-1922
202.342.3422
202.295.6723 (facsimile)

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607

Counsel for Respondent
The Port of Oakland

Amendments to the Table of Authorities of Respondent's Motion to Dismiss and Supporting Memorandum to reflect the following typographical errors:

1. Under Federal Cases, *Belanger v. Madera Unified Sch. Dist.*, delete the page numbers and insert "passim."
2. Under Federal Cases, *FMC v. S.C. State Port Auth.*, insert pages "12" and "25."
3. Under State Cases, *City of Coronado v. San Diego Unified Port Dist.*, within the parentheses insert "Cal. Ct. App." before "1964."
4. Under State Cases, the first listing of the *City of Long Beach v. Morse*, delete the page numbers and insert "passim."
5. Under State Cases, delete the second listing of *City of Long Beach v. Morse*.
6. Under State Cases, *City of Oakland v. Hogan*, only the case name should be italicized, the rest should not be italicized. Also, within the parentheses, delete the words "*Ct. of Appeal, 1st Dist.*" and insert "Cal. Ct. App." before "1940."
7. Under State Cases, *City of Oakland v. Williams*, only the case name should be italicized, the rest should not be italicized.
8. Under State Cases, *Kirchmann v. Lake Elsinore Unified Sch. Dist.*, within the parentheses, delete the words "4th Dist." and insert "Cal. Ct. App." before "2000."
9. Under State Cases, *Martin v. Smith*, within the parentheses insert "Cal. Ct. App." before "1960."

10. Under State Cases, add an entry for "*Mosler v. City of Los Angeles,* Docket 02-CV-02278 (C.D. Cal. 2009)" with the page listing of "passim."

11. Under State Cases, *State ex rel. State Lands Comm'n v. County of Orange,* within the parentheses, delete the words "Court of Appeals, 4th Dist." and insert "Cal. Ct. App." before "1982."

12. Under Federal Statutes, delete the entries for "11th Amendment" and the "United States Constitution."

13. Under State Statutes, add an entry for "California Public Resources Code, §6306(c)" at page "10."

14. Under State Statutes, add the word "California" in front of the last entry beginning "Public Resources Code."

15. Under State Statutes, add an entry for "Statutes of 1911, Chapter 657" at pages "3, 4, 5, 22."

16. Under State Statutes, an entry for "Statutes of 1917, Chapter 59" at pages "3, 4, 5, 22."

17. Under State Statutes, add an entry for "Statutes of 1919, Chapter 516" at pages "3, 4, 5, 22."

18. Under State Statutes, add an entry for "Statutes of 1937, Chapter 96" at pages "3, 4, 5, 22."

19. Under State Statutes, add an entry for "Statutes of 1981, Chapter 1016" at pages "3, 4, 5, 22."

20. Under Other Authorities, *Carolina Marine v. SCSPA*, delete the page numbers and insert "passim."

21. Under Other Authorities, *Ceres v. Maryland Port Administration*, add the page number "32."

22. Under Other Authorities, *Hanson v. Port of Los Angeles*, add the page numbers "5" and "25." Also, the entire entry should be listed under the category "State Cases."

23. Under Other Authorities, the second entry of *Odyssea* should be deleted and the page number "18" should be added to the first entry of *Odyssea.*

24. Under Other Authorities, add an entry for the "California State Auditor Report of 2001" at pages "6," "9," "11," and "12."

25. Under Other Authorities, insert the words "Charter of the City of Oakland" in front of all of the section listings.

26. Under Other Authorities, the entry for "§§ 701-702" of the Charter of the City of Oakland should be two entries. One entry for "Charter of the City of Oakland §701" and a separate entry for "Charter of the City of Oakland §702." The page numbers for each entry should be "7" and "8."

27. Under Other Authorities, the entry for "§§ 706(15) and (19)" of the Charter of the City of Oakland should be two entries. One entry for "Charter of the City of Oakland §706(15)" and a separate entry for "Charter of the City of Oakland §706(19)."

28. Under Other Authorities, insert an entry for the "Charter of the City of Oakland §706(3)" at page "8."

29. Under Other Authorities, insert an entry for the "Charter of the City of Oakland §706(6)" at page "8."

30. Under Other Authorities, add an entry for the "Charter of the City of Oakland, Article VII" at pages "2" and "7."

31. Under Other Authorities, add an entry for the "Comprehensive Financial Report for FY 2008-09" at pages "7," "9," and "31."

32. Under Other Authorities, add an entry for the "California State Lands Commission, "Public Trust Policy"" at page "11."

Amendments to Respondent's Motion to Dismiss and Supporting Memorandum to reflect the following typographical errors:

1. Page 2, citation "*See Id.*" should read "*See id.*"
2. Page 3, second citation to "Chapter 657, Statutes of 1911" insert "(emphasis in original)" after the citation.
3. Page 4, first citation to "Chapter 59, St. of 1917" in the first paragraph should read "Chapter 59, Statutes of 1917."
4. Page 5, first citation to "*See* City of Long Beach v. Morse, 31 Cal. 2d 256-57 (1947)", insert "254," after "Cal. 2d."
5. Page 7, footnote 7 delete the word "publice" and insert the word "public" before the word "record."
6. Page 7, footnote 7, delete the link "www.portofoakland.com/pdf/abou_doc_fin9.pdf" and insert "http://www.portofoakland.com/pdf/abou_docu_fina9.pdf."
7. Page 8, for the first citation to "See City Charter," italicize the word "See."
8. Page 8, for the first citation to the "*City of Oakland v. Hogan*," italicize only the case name, the rest of the citation should not be italicized.
9. Page 8, for the first citation to the "*City of Oakland v. Hogan*," within the parentheses, delete the words "*Ct. of Appeal, 1st Dist.*" and insert the words "Cal. Ct. App."
10. Page 8, for the first citation to the *City of Oakland v. Williams*," italicize only the case name, the rest of the citation should not be italicized.
11. Page 9, citation "CAFR at iii" should read "*Id.* at iii."

12. Page 9, citation "CAFR at 27" should read "*Id.* at 27."

13. Page 10, for the citation "*See City of Coronado v. San Diego Unified Port District,* 227 Cal. App. 2d 455, 474 (1964)" insert "Cal. Ct. App." before "1964" within the parentheses.

14. Page 11, for the citation "*State ex rel. State Lands Comm'n v. County of Orange,*" within the parentheses, delete the words "Court of Appeals, 4th Dist." and insert "Cal. Ct. App." before "1982."

15. Page 12, first partial paragraph, first line, delete the word "periodic."

16. Page 12, citation to "*SCSPA* at 753-754" should read "*SCSPA*, 535 U.S. at 753-54."

17. Page 12, citation to "*SCSPA* at 760" should read "*Id.* at 760."

18. Page 12, second full paragraph, second line, delete the initials "*S.C.*" and insert the words "*South Carolina*" in its place.

19. Page 13, first full paragraph, third line, delete the last word "the" after the word "grounds on" and in its place, the word "that" should be inserted, so that it reads "grounds on that."

20. Page 14, first paragraph, seventh line, insert end quotation marks after the word "proceeding" and before the word "and."

21. Page 16, first paragraph, the first line, delete "*SCSPA*" and insert "*South Carolina State Ports Authority*" in the case name.

22. Page 16, first paragraph, second line, insert " or "Carolina Marine"" after "CMH."

23. Page 19, first paragraph, tenth line, delete the second "and."

24. Page 19, first paragraph, tenth line, delete the parentheses surrounding the sentence and capitalize the letter "I" in the word "it."

25. Page 19, first paragraph, last line, in the citation "*Id.* At 874-877," delete "At" and replace it with a lower case "at."

26. Page 20, second paragraph, third line, delete the word "Shippng" and in its place insert the word "Shipping."

27. Page 21, second full paragraph, second line, delete the word "that" so the sentence reads "After *Regents* it is manifestly not necessary for the state treasury to actually be at risk of paying a judgment, but the question of whether state money is "legally" if not "financially" at risk is important in all the tests."

28. Page 22, first partial paragraph, third line, the citation to "*Id.* at 614-15" should read "*Marshall*, 11 Cal. 2d at 614-15."

29. Page 23, for the citation "*See Martin v. Smith*", within the parentheses insert "Cal. Ct. App." before "1960."

30. Page 25, for the citation "*See Kirchmann v. Lake Elsinore Unified Sch. Dist.*", within the parentheses, delete the words "4th Dist." and insert "Cal. Ct. App." before "2000."

31. Page 27, first partial paragraph, third line, insert an ending quotation mark after the word "*Belanger.*"

32. Page 28, last paragraph, fourth line, insert quotation marks around the words "inappropriately convert a *sufficient* condition for sovereign immunity into the single *necessary* condition for arm-of-the-state status."

33. Page 30, first full paragraph, last line, capitalize the letter "S" in the words "state of California."

34. Page 30, second full paragraph, first line, insert the citation "*Id.* at 873" after the sentence "The second factor is the State's control over the entity.

35. Page 30, third full paragraph, first line, insert the citation "*Id.*" after the sentence "The third factor is "entity's overall effects on the state treasury.""

36. Page 31, second paragraph, third line, insert the word "to" after the words "RDA with specific powers."

37. Page 33, first full paragraph, seventh line, delete the words "Similar to the Commission's finding" and replace with the words "The Commission found."

38. Page 33, first full paragraph, seventh line, delete the comma after the words "*Carolina Marine*."

Respectfully submitted,

Paul Heylman
Allison B. Newhart

SAUL EWING LLP
2600 Virginia Avenue, N.W.
Suite 1000 - The Watergate
Washington, D.C. 20037-1922
202.342.3422
202.295.6723 (facsimile)
pheylman@saul.com

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland

530 Water Street, 4th Floor
Oakland, CA 94607

Counsel for Respondent
The Port of Oakland

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Notice of Errata to Respondent's Motion for Summary Judgment and Supporting Memorandum was served by mail on the following:

Anne E. Mickey, Esq.
Sher & Blackwell
Suite 900
1850 M Street, N.W.
Washington, DC 20046

Paul M. Heylman

Dated: July 14, 2010

Exhibit 2

RECEIVED
2010 OCT -5 AM 10: 59
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM.

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

STATEMENT OF SUPPLEMENTAL AUTHORITY REGARDING RESPONDENT'S MOTION TO DISMISS

Respondent the Port of Oakland hereby submits the attached supplemental authority (without argument) regarding the pending motion to dismiss. Attachment 1 is a California statute approved by Governor Schwarzenegger and filed on September 27, 2010 (subject to the statement in Section 4 providing that the statute is not a change, but simply "declaratory of existing law"). Sections 3 and 4 of Attachment 1 (starting near the bottom of page 2 of Attachment 1) add a new section 6009 to the Public Resources Code. Respondent submits that

the new statute is relevant to the analysis at pages 4, 6-11, 19-21 and 26-27 of the Respondent's brief and to the analysis at pages 7-8, 15-19, 24-25 and 28-29 of Complainants' brief.

Paul Heylman, Esq.
Allison B. Newhart, Esq.
Saul Ewing LLP
2600 Virginia Avenue, N.W.
Suite 1000 – The Watergate
Washington, D.C. 20037-1922
Tel: (202) 342-3422
Email: pheylman@saul.com

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607
Tel. (510) 627-1349
Email: dchoy@portoakland.com

Counsel for Respondent
The Port of Oakland

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Statement of Supplemental Authority was served by email and U.S. mail on the following:

Anne Mickey, Esq.
Marc Fink, Esq.
Heather Spring, Esq.
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20036

Joseph N. Mirkovich, Esq.
Russell Mirkovich & Morrow
Suite 1280
One World Trade Center
Long Beach, CA 90831-1280

Paul Heylman

Dated: October 5, 2010

ATTACHMENT 1

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.

O

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 3

RECEIVED
2010 OCT -8 PM 4:15
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-08

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

SSA

v.

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

RESPONDENT

MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF MOTION TO DISMISS ON 11TH AMENDMENT JURISDICTIONAL GROUNDS

Respondent the Port of Oakland ("Port") hereby moves to stay proceedings until resolution of the Port's pending 11th Amendment motion to dismiss. The Port's motion was filed on July 7, 2010 and Complainants ("SSA") filed a reply on August 4, 2010. The Port filed a statement of supplemental authority on October 5, 2010.

1. The Applicable Legal Standard

Two standards arise in 11th Amendment stay cases. One is called the *Landis* standard, and places a lower burden on the moving party. The other is called

the *Virginia Jobber's* standard, and places a somewhat higher burden on the moving party.

Commission ALJ's have issued a number of reported opinions in the last decade addressing requests for a stay pending appeal of unsuccessful 11th Amendment motions. However, these opinions involve requests for a stay pending appeal of an immunity claim that has already been rejected – either by the Presiding Judge or the Commission. Here, there has been no such adverse determination: the Port seeks a stay of the proceedings pending the initial determination on its motion.

The case that comes closest to addressing the propriety of a stay here is *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority*, 28 S.R.R. 1595, 1598-1600 (2000) ("*CMH*"). While *CMH* was in a somewhat different (and very convoluted) procedural posture, it is persuasive authority that the motion for a stay is subject to the lenient standard applicable to a court's control of its docket. *CMH*, 28 S.R.R. at 1598, citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

In addition, one relatively recent FMC Order, without opinion, bears on a stay in the 11th Amendment context. On September 21, 2004 in Docket 04-01 the Commission *sua sponte* vacated a 78 page order denying an 11th Amendment motion issued only two business days earlier, directed the parties to file supplemental briefing schedules, and ordered the proceedings before Judge Trudelle stayed pending further order of the Commission. While mindful of not over-interpreting the Commission's actions, the Commission's action in Docket 04-01 is consistent with a recognition that the 11th Amendment question is a serious issue and should be resolved before proceeding any further.

a. Two different analytical approaches: *Landis* and *Virginia Jobbers*

Judge Guthridge recounted the analytical history of ALJ opinions on requests for stays pending appeal of denied 11th Amendment motions in his comprehensive February 12, 2007 ruling in three cases involving the Puerto Rico Ports Authority. *Odyssea v. PRPA*, FMC Docket 02-08; *Intership v. PRPA*, FMC Docket 04-01; and *San Antonio Marine v. PRPA*, FMC Docket 04-06 (collectively "*PRPA trilogy*"), 30 S.R.R. 1294. Judge Guthridge addressed two tests. The first is the "balancing of interests" test in *Landis, supra,* used by Judge Kline in *South Carolina Maritime Services v. South Carolina State Ports Authority*, FMC Docket No. 99-21 (May 10, 2000) (not reported in S.R.R.) ("SCSPA") and also followed by Judge Dolan in *CMH*. The second test is the "four factor test" articulated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

b. The *Landis* test

Judge Kline's May 10, 2000 decision in Docket 99-21 also involved the appeal of an 11th Amendment motion denied by the Commission to the Circuit (in that case the 4th Circuit). Judge Kline noted that federal trial courts faced with motions to stay proceedings before them (*i.e.* with no prior adverse determination) apply the *Landis* balancing test. Slip Op. at 4-5. Judge Kline's decision thus supports applying the more lenient balancing of interests test here – since the Port seeks only a limited stay to await a decision on an already briefed and submitted motion.[1] The *Landis* balancing of

[1] The Port does not need to meet the "pressing need" standard referred to in *Cherokee Nation of Oklahoma v. U.S.*, 124 F.3d 1413 (Fed. Cir. 1997). It "is only applicable to cases where a decision is being made to 'stay proceedings indefinitely.' " *Harrington v. Wilbur*, 670 F. Supp. 951, 955 (S.D. Iowa

interests test looks to: (1) irreparable harm to the moving party if the stay is not granted; (2) the merits of the appeal; (3) the harm suffered by other parties; and (4) the public interest.

c. The *Virginia Jobbers* test

In the *PRPA trilogy*, Judge Guthridge applied the more stringent *Virginia Jobbers* test to PRPA's request for a stay pending D.C. Circuit review of a Commission decision **denying** an 11th Amendment motion to dismiss. Slip. Op. at 22 The four factor *Virginia Jobbers* test considers: (1) the moving party's strong showing of the likelihood of success on the merits; (2) the irreparable injury to the moving party if the stay is not granted; (3) whether a stay will substantially harm other parties interested in the proceedings; and (4) the public interest. *See PRPA trilogy*, 30 S.R.R. 1324 at 1335-36. Judge Guthridge was not addressing the standard applicable to a motion for a stay **pending** an initial decision (*i.e.* where there was no pre-existing adverse decision holding that the 11th Amendment did not apply). He was only addressing the standard to apply where an adverse decision was being appealed to the Circuit.

d. The distinctions between *Landis* and *Virginia Jobbers*

Judge Guthridge's opinion in the *PRPA* trilogy holds that while the *Virginia Jobbers* and *Landis* standards are "quite similar," there are two differences. Slip Op. at 18-19 [30 S.R.R. 1324 at 1333]. First, under the *Virginia Jobbers* test, the moving party must make a "strong showing" that it is likely to prevail on the merits, whereas under the

---

2009) (citations to *Landis* omitted). The Port's motion seeks a stay only until the 11th Amendment decision here.

Landis test the moving party only need show its position is "not frivolous or trivial." Slip Op. at 18 [*Id.*] Second, difference is that under the *Virginia Jobbers* test the moving party must show that other parties interested in the proceeding would not suffer "substantial harm" if the stay is granted, rather than the *Landis* standard showing the other parties would not suffer the "irreparable harm." Slip Op. at 18 [*Id.*]

2. The Port's Motion to Stay Meets All Four Factors of the *Virginia Jobbers* Test, So Regardless of whether *Landis* or *Virginia Jobbers* Applies, a Stay Should be Granted.

The Port is entitled to a stay regardless of which standard applies, *Landis* or *Virginia Jobbers*. In the interest of brevity we address the more demanding *Virginia Jobbers* test first and then, *a fortiori*, the *Landis* test. Under these tests, the Port must address each factor, but it is not necessary that the Port prevail on each factor to warrant a stay.

a. Likelihood of Success on the Merits: The Port's "Strong Argument" for 11th Amendment Immunity.

The first issue is the strength of the Port's argument for 11th Amendment immunity. The United States Supreme Court's decision in *FMC v. South Carolina State Ports Authority* holds that a private party[2] cannot pursue a Shipping Act claim before the Commission against a respondent entitled to 11th Amendment immunity. 535 U.S. 743 (2002). Hence, after that decision, the only question here is whether the Port is entitled to claim the 11th Amendment immunity of the State of California. We submit that this

[2] This decision does not affect a proceeding by the Bureau of Enforcement.

much is undisputed. The immunity question thus hinges on: (1) whether the Port is a trustee for the State of California for Port revenues; and if so, (2) whether the Port's trustee/beneficiary relationship with the State regarding such State revenues thereby entitles the Port to the State of California's 11th Amendment immunity.

The parties have filed substantial briefs on the issue, but one recent, post-briefing development is relevant to the stay motion. On September 25, 2010, the Governor of California approved California Senate Bill 1350, which adds §6009 to the California Public Resources Code. The entire bill signed by the Governor is appended to the Port's Statement of Supplemental Authority filed on October 5, 2010, and for convenience an enlarged (but otherwise unchanged) copy of the relevant portion (*i.e.* the addition of Public Resources Code §6009) is attached hereto as Exhibit 1. The statute states that it is not a change of the law, but simply declares existing law. A review of this statute and its impact on the arguments in SSA's Reply demonstrates why the Port's 11th Amendment argument is "strong" within the meaning of *Virginia Jobbers*, and *a fortiori* neither trivial nor frivolous under *Landis*.

The parties' briefs of July 7 and August 4 address the Port's 11th Amendment argument under three possible tests: (1) the FMC *Ceres* test used prior to the D.C. Circuit's *PRPA* decision; (2) the 9th Circuit's *Belanger* test; and (3) the D.C. Circuit's *PRPA* test(s). For purposes of discussion, we address the impact of §6009 on each of the three tests.

i. The Port's strong showing of immunity under the FMC pre-*PRPA* "*Ceres*" test.

The Commission's most recent analysis of 11th Amendment immunity is a modified version of the test the Commission developed in the *Ceres* litigation. There are two parts to the test. Part one looks to the structure of the entity claiming immunity. The structural analysis is in turn divided into three subparts: (1) degree of control, (2) whether the entity performs statewide or local functions, and (3) how state law treats the entity. Part two looks at the "risk to the treasury" presented by the claim.

California Public Resources Code §6009 addresses every part and subpart of the *Ceres* test. When considering the impact of the §6009, it is important to note that while the ultimate question of immunity is a federal question, the U.S. Supreme Court stated in *Regents of the University of California v. Doe*, "that federal question can only be answered after considering the provisions of state law that define the agency's character." 519 U.S. 425, 429, n. 5 (1997). The Supreme Court further noted the importance of a "detailed examination of the relevant provisions of California law" to the 11th Amendment analysis. *Id.* at n. 6 (citations omitted).

Part One – Structure of the relationship with the state

Degree of control: SSA's Reply argues that the State of California lacks the requisite control over the Port as the tidelands trustee. By adding §6009, the California Legislature and Governor have refuted this argument. The new Public Resources Code §6009(b) provides that "the state's **power and right to control, regulate and utilize** its tidelands when acting within the terms of the public trust **is absolute**." (Emphasis added.)

In furtherance of the state's "absolute" "power and right to control, regulate and utilize," §6009(c) provides that the tidelands granted 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." Similarly, §6009(d) provides that grantees such as the Port are required to manage state lands "consistent with the terms and obligations of their grants and the public trust, and without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiative, or exercises." Id.

State versus local concerns: SSA asserts that the Port's administration of the Port under a tidelands trust is a local concern, rather than a state-wide concern. SSA's Reply asserts that "[w]hen title to the lands were held by the state, there may have been an argument that use of the lands served a statewide interest. However, when the State conveyed the land to the City of Oakland [to develop a port], the primary benefits of the tidelands were likewise transferred to the people of Oakland." Reply at 18. This argument falls before the new statute. The provisions of §6009(d) above and the language of §6009(e) provide that "[t]he purposes and uses of the tidelands and submerged lands is a **statewide** concern" (emphasis added). It is difficult to imagine a more direct refutation of SSA's argument, as the State has expressly confirmed in §6009(e) that the Port's administration of the tidelands is a matter of statewide concern.

State law treatment of the entity: SSA argues that California law treats the Port as simply another municipal department, beholden only to the City of Oakland for its operation of the Port. §6009 confirms the error of SSA's argument. The California Public Resources Code confirms that the Port is a tidelands trustee and characterizes

the State's power and right to control, regulate and utilize as absolute. §6009(b). California law thus treats the Port as a trustee for the state with respect to Port operations – a clear indicia of the Port's 11th Amendment immunity.

Part Two – Port Assets are State Funds under the 11th Amendment

Part two of the modified *Ceres* analysis looks to whether state funds are at risk to the claim. As the Port's motion pointed out, both the federal and state courts in California have held that claims against port funds are claims against "state funds" for 11th Amendment purposes. Opening Brief at 24-25 (*Mosler* and *Hanson)*. In reply, SSA asserted that the decisions in *Hanson* and *Mosler* are "suspect" and that "the courts appear to have misinterpreted *Mallon v. City of Long Beach*, 44 Cal. 2d 199 (1955) as holding that tidelands revenues have a "state character" and are thus somehow owned by the State." Reply at 23.

The plaintiff's appeal to the Ninth Circuit in *Mosler* is set for oral argument on November 5, 2010. Nothing in §6009 undercuts Judge Otero's decision in *Mosler* that tidelands trust revenues are state funds for purposes of the 11th Amendment analysis – rather §6009 confirms the state's interest in such funds. SSA's argument that *Mosler* and *Hanson* are "suspect" is wrong. They provide the proper characterization of the funds as Public Resources Code §6009 now make it quite clear that in California port revenues are held in trust for the State.

SSA's argument that *Mallon* has been overruled *sub silentio* also fails. The California Supreme Court and subsequent decisions following *Mallon* did not err in describing tidelands revenues as "having a state character." Rather, §6009 confirms that the California Supreme Court described California law correctly.

ii. The Port's strong showing of immunity under the 9th Circuit's *Belanger* test.

The *Belanger* test is disposed of by *Mosler* and *Hanson.* The terms and principles of §6009 confirm the validity of the decisions attacked with such vigor by SSA. Under *Belanger*, the most important factors are whether reparations here would be paid out of "state funds" and whether Port performs a state, rather than local, function. *See* Motion at 26-27. In addition to confirming the *Mosler/Hanson* characterization of Port revenues as state funds, §6009 confirms that the Port is performing a state, rather than local function.

iii. The Port's strong showing of immunity under the D.C. Circuit's *PRPA* test.

Section 6009 also bears on the *PRPA* test of the D.C. Circuit. As the Circuit noted:

> 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).

531 F.3d 868, 878-79 (emphasis in original)

Under Section 6009(c)-(d) the Port meets both prongs of this test, though satisfying either is sufficient to confer 11th Amendment immunity. On the first prong, the Port's status with respect to tidelands trusts revenues – as trustee for the state – more than satisfies this stringent agency standard. On the second prong, as held in *Mosler* and *Hanson*, the Port's revenue constitutes "state funds" for 11th Amendment purposes.

Section 6009 also refutes SSA's analysis under the *PRPA* three factor test alternative method of establishing 11th Amendment immunity. The three factor test looks to: (1) state intent; (2) state control and (3) financial relationship. On the first factor SSA states that "it is quite clear that the State does not intend for Port Department to share in its sovereign immunity." Reply at 28. This assertion rests on claims that the Port is "clearly intended to be a local government entity," that the Port's activities are local rather than a statewide function, and that state has not demonstrated any intent to treat the Port as sharing in the 11th Amendment immunity. *Id.* Section 6009 refutes this argument. On the second factor of "state control" the State of California has declared that its "power and right to control, regulate and utilize" is "absolute." The third factor – the financial relationship – is addressed in the *Mosler/Hanson* discussion above.

b. The Port will be irreparably harmed if the stay is not entered.

Judge Kline held in *SCSPA* that forcing a party to defend a claim where it has 11th Amendment immunity is a Constitutional violation that constitutes irreparable injury as a matter of law, even with no adverse financial impact. *SCSPA* Slip Op. at 11. Judge Kline's decision is solidly based in the Supreme Court decision in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 – 44 (1993) ("*Metcalf & Eddy*") (holding that the denial of an 11th Amendment motion entitles the defendant claiming immunity to an interlocutory appeal because the immunity defense is effectively forfeited if the defendant is forced to await normal post-trial appellate

process). Here, the Port can not only show the Constitutional irreparable injury, but completely separate financial injury.

Email discovery, paper discovery, interrogatories and depositions of senior personnel for SSA and the Port are in process. Absent a stay, the Port will be forced to continue diverting significant executive time and attention to the depositions and to expend significant sums on counsel and other providers in the next eight weeks. The Shipping Act's attorney fee provision provides only for fee awards to prevailing complainants, not prevailing respondents. 46 U.S.C. §41305(b). If a stay is not granted and the Port ultimately Port prevails on the 11th Amendment issue, the Port will have incurred counsel fees and other costs (including the ongoing cost of the email vendor dealing with tens of thousands of emails) that the Port is unlikely to ever recover from SSA. The Port will also suffer the diversion of executive resources, which is more difficult to quantify and even less likely to be recovered. In sum, the Port has shown that it will be seriously and irreparably harmed, both financially and at a Constitutional level, if the case is not stayed.

c. SSA will not suffer substantial harm from a stay, as any harm to SSA from a stay is speculative and compensable by reparations.

In contrast to the irreparable harm suffered by the Port if a stay is denied, any injury to SSA from a stay is speculative. First, there is no harm to SSA from a stay unless SSA ultimately prevails both on the 11th Amendment argument and on the merits. If at the end of this litigation the Port's position on either the 11th Amendment **or**

on the merits is sustained, any delay in reaching that result cannot be said to injure SSA.

Even if SSA does ultimately prevail on both the 11th Amendment issue and the merits, any loss can be remedied by reparations. The only claim of legally cognizable injury to SSA is limited to the delay (if any) in the ultimate resolution of the case arising from the stay. The motion has been briefed and submitted. In the context of the overall case, which could well proceed for several years with appeals, the stay that the Port seeks here is most likely to have only a modest effect on the timing of the final outcome.

SSA is seeking reparations against the Port. Thus, even if the Port is somehow found to be wrong both on the 11th Amendment issue and on the merits, unless the stay would cause SSA additional injury resulting from the stay, SSA's damages are compensable by reparations. The confidentiality order in the case precludes discussion of specifics, but the complaint and the discovery produced by SSA do not suggest any damage not compensable by reparations.

d. The public interest favors a stay.

The public interest is served by a stay. The United States Supreme Court held in *Metcalf & Eddy, supra*, that the right to an determination on 11th Amendment immunity is effectively lost to the extent the immune defendant is required to litigate beyond the question of sovereign immunity. Indeed, 11th Amendment protections are considered sufficiently important to trump the general rule that a party can only appeal a final order. *Id.* As shown above, forcing an immune party to litigate on the merits is a Constitutional injury, and irreparable injury as a matter of law, even without regard to

financial injury. The Commission, as a federal agency, should implement the public policy embodied in the 11th Amendment.

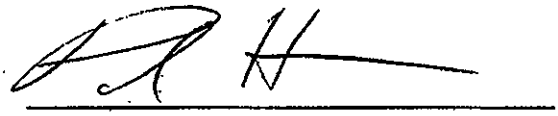
Public policy goes beyond the appropriateness of deciding the Constitutional issue first. At least one non-party has already been drawn into this suit. SSA has moved for an Order permitting its experts and executives to spend up to a week inspecting the facilities of non-party Ports America Outer Harbor Terminals, LLC at Berths 20-24. The Port is also advised that SSA is seeking a subpoena to Ports America. This is not the end of the adverse impact on third parties. Absent a stay, additional non-parties (such as the entities with respect to whom SSA claims damages) will undoubtedly be drawn into merits discovery.

Not only will the stay avoid burdening non-parties, there is also a public interest in not unnecessarily diverting scarce public port resources to this matter. There is no dispute that the Port is a governmental entity – the only dispute is what kind of governmental entity. If the stay is denied, and the Port's position on the 11th Amendment is later upheld, then any further discovery will have been an unnecessary

and unrecoverable waste of public resources. If the Port's position is denied, the only loss – to SSA – can be rectified by reparations. *CMH*, 28 S.R.R. at 1602.

CONCLUSION

For the foregoing reasons, the Port's motion to stay proceedings until resolution of the 11th Amendment motion should be granted.



Paul Heylman, Esq.
Allison Newhart, Esq.
Saul Ewing LLP
2600 Virginia Avenue, NW
Suite 1000, The Watergate
Washington, D.C. 20037-1922
Telephone: (202) 342-3422
Fax: (202) 295-6723
Email: pheylman@saul.com

David Alexander, Esq.
Donnell Choy, Esq.
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607
Tel. (510) 627-1349
Email: dchoy@portoakland.com

Attorneys for Respondent Port of Oakland

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion for Stay was served by hand and by email on the following:

Anne Mickey, Esq.
Marc Fink, Esq.
Heather Spring, Esq.
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20036

With a courtesy copy by email on:

Joseph N. Mirkovich, Esq.
Russell Mirkovich & Morrow
Suite 1280
One World Trade Center
Long Beach, CA 90831-1280

Paul Heylman

Dated: October 8, 2010

Exhibit 1

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 SB 1350, §§3, 4]

Exhibit 4

S E R V E D
November 8, 2010
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 09-08

SSA TERMINALS, LLC and
SSA TERMINALS (OAKLAND), LLC

v.

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

ORDER ON MOTION TO DISMISS AND MOTION TO STAY PROCEEDINGS

I.

On July 7, 2010, the City of Oakland, acting by and through its Board of Port Commissioners ("Port of Oakland" or "Port"), filed Respondent's Motion to Dismiss and Supporting Memorandum ("Motion to Dismiss") moving for dismissal based on Eleventh Amendment sovereign immunity grounds because the Port is trustee for California tidelands. On August 4, 2010, SSA Terminals, LLC and SSA Terminals (Oakland), LLC ("SSAT") filed Complainants' Reply to Respondent's Motion to Dismiss ("Reply to Motion to Dismiss") urging denial of the motion because the Eleventh Amendment does not extend to cities and municipal corporations.

On October 5, 2010, the Port of Oakland filed a Statement of Supplemental Authority Regarding Respondent's Motion to Dismiss. On October 8, 2010, the Port of Oakland filed a Motion to Stay Proceedings Pending Resolution of Motion to Dismiss on 11th Amendment Jurisdictional Grounds ("Motion to Stay") seeking a stay of the proceedings pending the initial determination of its Motion to Dismiss. On October 25, 2010, SSAT filed Complainants' Reply to Respondent's Motion for a Stay of Proceedings ("Reply to Motion to Stay"). On October 25, 2010, non-party Ports America Outer Harbor Terminal, LLC, which may be subject to discovery in the proceeding, submitted a letter supporting the Motion to Stay.

For the reasons stated below, the Motion to Dismiss will be denied and the Motion to Stay will be dismissed as moot. First, the positions of the parties are summarized. Then, the background of the tideland grant governing the Port of Oakland, establishment of the Port of Oakland, and the Port of Oakland's powers will be described. Next is a discussion of the judicial treatment of other California ports and the relevant leading cases establishing the tests used to evaluate Eleventh Amendment claims, all of which extended immunity to the entity at issue. After each case is summarized, the entity at issue is compared to the Port of Oakland. The Port of Oakland, even if it is considered an independent department of the City of Oakland, is not found to be an arm of the state under any of these tests.

II.

The Port of Oakland moves for dismissal, contending that the Eleventh Amendment precludes the Federal Maritime Commission's jurisdiction over SSAT's claims. The Port of Oakland argues that since the Port of Oakland functions solely as a trustee for the State of California's tidelands, the Port of Oakland is entitled to the same Eleventh Amendment immunity as any other agency or instrumentality of the State of California. Motion to Dismiss at 1-2. The Port focuses on recent legislation which says that California's power and right to control its tidelands is absolute; tidelands granted to local entities remain subject to the oversight authority of the state; grantees are required to manage the state's tidelands without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or exercises; and the purposes and uses of tidelands is a statewide concern. Motion to Stay at 5-11 (discussing Cal. Pub. Res. Code § 6009). Accordingly, the Port of Oakland argues that pursuant to the tidelands grant, the State of California retains control over the tidelands and port revenues are held in trust for California. *Id.* The Port of Oakland contends, therefore, that it is entitled to Eleventh Amendment immunity under any of the potential tests.

SSAT asserts that the Port of Oakland is a department of the City of Oakland with no separate legal personality or rights and that because the City of Oakland is a municipal corporation, it is not entitled to share in the State of California's immunity under the Eleventh Amendment. Reply to Motion to Dismiss at 1-2. SSAT argues that California granted the tidelands at issue to the City of Oakland and it is the City that created and controls the Port of Oakland, a local agency with local leadership appointed by the Oakland City Council. Reply to Motion to Dismiss at 14-20. SSAT contends that the Port of Oakland is financially self-sufficient and judgements would not be paid out of state funds. Reply to Motion to Dismiss at 20-23. Moreover, SSAT points out that the new legislation explicitly does not change existing law. Reply to Motion to Stay at 6. Accordingly, SSAT argues that Eleventh Amendment immunity is not available to the Port of Oakland. If immunity applies, there are no arguments regarding whether immunity has been waived.

III.

BACKGROUND

The preeminent purpose of state sovereign immunity is to accord states the dignity that is consistent with their status as sovereign entities. *Federal Maritime Commission v. South Carolina State Ports Auth.*, 535 U.S. 743, 460 (2002). Only states and arms of the state possess immunity from suits authorized by federal law. *Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189, 193 (2006). Although immunity extends to entities which are arms of the state, the Supreme Court has repeatedly refused to extend sovereign immunity to municipalities, even when such entities exercise a slice of state power. *Chatham*, 547 U.S. at 193-94; *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979). *See also Alden v. Maine*, 527 U.S. 706, 756 (1999) (sovereign immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."). The Supreme Court specifically has held that state sovereign immunity bars the Federal Maritime Commission from adjudicating a private party's complaint against a state-run port. *South Carolina State Ports Auth.*, 535 U.S. at 747. Sovereign immunity does not, however, impact the Bureau of Enforcement's ability to pursue violations of the Shipping Act. *Id.* at 768.

No case has addressed whether a tideland trustee relationship is sufficient to extend a state's Eleventh Amendment protection to an entity. Commission cases have addressed the Eleventh Amendment immunity of ports in South Carolina, Puerto Rico, and Maryland. In all three cases, the ports were ultimately found entitled to immunity. *Id.* at 743; *Puerto Rico Ports Auth. v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008); *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 30 S.R.R. 358 (2004). However, the facts in those cases differ in material respects from the facts here. In those cases, the ports were created by the state, controlled by the state, and financed in some form by the state. In contrast, the Port of Oakland was created by the Oakland City Council, is controlled by the Oakland City Council, and its budget is independent of the State of California. Determining whether an entity is an arm of the state is a fact intensive inquiry. Therefore, it is necessary to understand the background of the tideland grant, establishment of the Port of Oakland, and the Port's powers.

Port of Oakland

The states, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). The State of California acquired title to its tidelands as an incident of sovereignty when it became a state in 1850. *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 336 (N.D. Cal. 1986).

In 1911, the State of California granted the City of Oakland its interest in the tidelands at issue. The grant states, in relevant part:

> There is hereby granted to the city of Oakland, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California held by said state by virtue of its sovereignty in and to all tide lands and submerged lands . . . to be forever held by said city and by its successors in trust for the use and purposes and upon the expressed conditions.

Stats. 1911, ch. 657 (Motion to Dismiss, Ex. 2).

The tidelands were to be held in trust subject to conditions including that "said lands shall be used by said city and its successors, only for the establishment, improvement and conduct of a harbor," that "said harbor shall be improved by said city without expense to the state, and shall always remain a public harbor for all purposes of commerce and navigation," and that there "is hereby reserved, however, in the people of the State of California the absolute right to fish in the waters of said harbor, with the right of convenient access to said waters over said land for said purpose." *Id.* Each city took legal title to the lands in fee, but the title is held subject to the express trust imposed in the legislative acts of conveyance. *City of Long Beach v. Morse*, 31 Cal. 2d 254, 259 (1947).

The State of California has amended the original 1911 grant. For example, a 1917 amendment limited the maximum term of leases from "limited periods" to 50 years while a 1981 amendment changed the maximum term to 66 years. Stats. 1917, ch. 59; Stats. 1981, ch. 1016. California has the power to revoke the tidelands trust if the tidelands are not being used for trust purposes or are not being effectively administered to benefit the people of the state. *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 207-08 (1955); *City of Coronado v. San Diego Unified Port Dist.*, 227 Cal. App. 2d 455, 474-75 (Cal. Ct. App. 1964).

The City of Oakland established the Port of Oakland in 1927 to "promote and more definitely insure the comprehensive and adequate development of the Oakland Port through continuity of control, management and operation." Oakland City Charter ("Charter"), Art. VII, § 700. The exclusive control and management of the Port of Oakland is vested in the Board of Port Commissioners ("Board"), which is composed of seven members appointed by the Oakland City Council, upon nomination by the Mayor of Oakland, and who must be *bona fide* residents of the City of Oakland. *Id.* at § 701. Members of the Board may be removed from office by the vote of six members of the Oakland City Council. *Id.* at § 703.

The powers and duties of the Board of Port Commissioners include the complete and exclusive power to make provisions for the needs of commerce, shipping, and navigation of the Port. *Id.* at § 706. The Board may sue or be sued in the name of the City of Oakland, may acquire land in the name of the City, may enter into contracts, and may make leases of any properties belonging to the City. *Id.* at §§ 706(1), (15), (17), 709. Contracts entered into by the Board are subject to the bid limit and race and gender participation programs established by the Oakland City Council. *Id.* at § 710. Permanent places of employment in and under the Board are included within the personnel system of the City of Oakland. *Id.* at § 714.

Regarding financing, the Oakland City Charter states that the Board shall have the power:

> To provide for financing of Port facilities through the issuance of bonds or other forms of debt instruments which are secured by a pledge of, or are payable from, all or any part of the revenues of the Port and/or which may be secured in whole or in part by interests, liens or other forms of encumbrance (other than in or on fee title in land) or lease in property. Such debt instruments shall be issued and sold in such manner and upon such terms and conditions, and shall contain such provisions and covenants, as the Board may fix and establish by the provisions of one or more procedural ordinances. Such debt instruments shall not constitute a debt, liability or obligation of the City of Oakland and shall be payable exclusively from revenues and other assets of the Port.

Id. at § 706(24).

The Board of Port Commissioners is required, on an annual basis, to prepare a budget stating the amount necessary to be raised by tax levy. *Id.* at § 715. In the event that the budget "shall request or provide for the allocation or appropriation to the Port by the Council of any funds raised or to be raised by tax levy or in any manner to be obtained from general revenues of the City," the Oakland City Council "shall have the authority to reject the budget." *Id.* at § 716. All income and revenue from the operation of the Port or from the facilities of the Port are deposited in a special fund in the city treasury designated as the port revenue fund. *Id.* at § 717(3). Surplus money in the port revenue fund may be transferred to the general fund of the City, although it must be used for purposes consistent with the public trust. *Id.* at § 717(3); Cal. Pub. Res. Code § 6306.

In addition to the tidelands granted to various municipalities in California, the State of California also created a State Lands Commission in 1938 vested with all "jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been or may be made." Cal. Pub. Res. Code § 6301. Grantees are required to "establish and maintain accounting procedures, in accordance with generally accepted accounting principles, providing accurate records of all revenues received from the trust lands and trust assets and of all expenditures of those revenues," and must file with the State Lands Commission an annual detailed statement of all revenues and expenditures relating to its trust lands and trust assets. *Id.* Moreover, "[a]ll revenues received from trust lands and trust assets shall be expended only for those uses and purposes consistent with the public trust for commerce, navigation, and fisheries, and the applicable statutory grant or grants." *Id.*

The State Lands Commission policy statement explains:

> The State Lands Commission exercises oversight over all granted lands. Generally, this means the Commission carries out this responsibility by working cooperatively with grantees to assure that requirements of the legislative grants and the Public Trust Doctrine are carried out and to achieve trust uses. The Commission monitors and

> audits the activities of the grantees to insure that they are complying with the terms of their statutory grants and with the public trust. . . . However, where an abuse of the Public Trust Doctrine or violation of a legislative grant occurs, the Commission can advise the grantee of the abuse or violation; if necessary, report to the Legislature, which may revoke or modify the grant; or file a lawsuit against the grantee to halt the project or expenditure.

Reply to Motion to Dismiss, Ex. E at 3 (Public Trust Policy). The Commission itself does not have the power to revoke or modify a grant.

On September 25, 2010, section 6009 was added to the California Public Resources Code. The section states:

> 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 tideland 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.

Cal. Pub. Res. Code § 6009.

Other documents also describe the Port. The Port of Oakland's own financial services division describes the Port as "a Component Unit of the City of Oakland" and as "an independent department of the City of Oakland" and explains that "[e]xclusive control and management of the Port area . . . were delegated to a seven-member Board of Port Commissioners . . . in 1927 by an

amendment to the City Charter." Motion to Dismiss, Ex. 6 at 1 (November 23, 2009). The report states that the "Board has exclusive control of all of the Port's facilities and property, real and personal, all income and revenues of the Port, and proceeds of all bond sales initiated by it for harbor or Airport improvements, or for any other purpose." *Id.*

The California State Auditor, in 2001, described the Port as "an independent, self-supporting department of the city of Oakland charged with managing and operating a seaport, a passenger and cargo airport, and the waterfront real estate in and around the Oakland Estuary." Motion to Dismiss, Ex. 4 at 1 (October 2001 report). The State Auditor explains:

> Because the State granted the waterfront property to the city of Oakland in a series of Tideland Trust grants, most of the property is subject to state tideland grant restrictions. These restrictions require that tideland property and revenues generated by the use of that property be used for tideland purposes, including commerce, navigation, fishing, and public access to the shoreline. Neither the city nor the Port owns the waterfront property; rather, the Port holds the property in trust for the people of California.

Id. at 5.

DISCUSSION

Tideland grants have been made to a number of municipalities in California. Some of those grants have been discussed by other courts. The Ninth Circuit found the port in the City of Long Beach to be entitled to Eleventh Amendment immunity while a district court and state court found the port in Los Angeles not to be entitled to Eleventh Amendment immunity. The treatment of other ports is relevant to the analysis used to determine whether the Port of Oakland is entitled to Eleventh Amendment immunity.

Although the Supreme Court in *South Carolina Ports Authority* addressed the Eleventh Amendment in relationship to Federal Maritime Commission private party litigation, the Court did not discuss the factors to be used to determine whether an entity is an arm of the state. *South Carolina State Ports Auth.*, 535 U.S. at 751 n.6. Indeed, there is no uniform test to determine whether an entity is an arm of the state and the parties suggest consideration under three possible tests. The approach used most recently in a case involving the Federal Maritime Commission was the District of Columbia Circuit's test in *Puerto Rico Ports Authority. Puerto Rico Ports Auth.*, 531 F.3d at 868. Cases addressing other ports in California have utilized the Ninth Circuit's five part *Belanger* test. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992). A different approach was utilized in *Ceres*, where the Commission focused on two factors to determine whether an entity is entitled to Eleventh Amendment protection. *Ceres*, 30 S.R.R. at 358. There are significant similarities among the various tests and under these facts, the different tests yield the same result. Each case, and the facts relevant to its disposition, will be discussed in turn. The

California ports cases will be discussed prior to an analysis of the various tests used to determine Eleventh Amendment sovereign immunity.

California Ports

According to the Supreme Court of California, the Port of Oakland is "the successor of all the rights and powers formerly exercised by said city." *City of Oakland v. Williams*, 206 Cal. 315, 320 (1929). Another case explained that the "Port Commission is a legal entity, created by charter and empowered, by approval of the state legislature, to act as an agency of the municipality. Under such circumstances whatever rights may be given to the municipality may be bestowed upon the agency." *City of Oakland v. Hogan*, 41 Cal. App. 2d 333, 342-43 (Cal. Ct. App. 1940). Moreover, "[s]ince the board acts as the agency of its principal, the city, it is *a* legislative body *of* the municipal corporation." *Id.* at 343 (emphasis in original). This case also stated that the "legislature has generally treated the construction of docks, piers, etc., as a local matter." *Id.* at 356-57.

No cases were identified by the parties or the undersigned which determine whether the Port of Oakland is an arm of the state for Eleventh Amendment purposes, although courts have discussed the immunity of the ports in the City of Long Beach and in Los Angeles. The Ninth Circuit found that the port in the City of Long Beach was not entitled to immunity even though it was acting as a trustee, stating:

> The city argues that it was entitled to the protection of the Eleventh Amendment because it was acting as "trustee" of the lands and was thus "an arm of the state" for purposes of the Eleventh Amendment. The city has not pointed to any authority suggesting that this doctrine should extend to non-state agencies. We would be reluctant to engage in such a radical departure from the law in light of the Supreme Court's repeated and clear admonition that Eleventh Amendment immunity "does not extend to counties and similar municipal corporations."

City of Long Beach v. Standard Oil Co. of Cal., 53 F.3d 337, 1995 WL 268859, at *1 (9th Cir. 1995) (*quoting Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). The Ninth Circuit did not specifically address the *Belanger* factors.

Addressing a different California port, and without mentioning *City of Long Beach*, in 2009, the United States District Court reached the opposite result, stating that "[w]eighing all of the *Belanger* factors, mindful that the first factor is the most important, the Court concludes, as did the *Hanson* court, that the City Defendants are arms of the state." *Mosler v. City of Los Angeles*, CV 02-02278 SJO (RZX), 8 (C.D. Cal. 2009)[1] (Motion to Dismiss, Ex. 8). In *Hanson*, the court held that "[w]eighing 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."

[1] The case is currently on appeal to the Ninth Circuit.

Hanson v. Port of Los Angeles, No. BC 221839, 8 (L.A. Super. Ct. 2001) (Motion to Dismiss, Ex. 7) (italics added) (citations omitted). The Long Beach grant differed in material respects from the Oakland grant at issue, including that in Long Beach, eight-five percent of excess revenue is remitted to the state's treasury. *Id.* at 7.

Puerto Rico Ports Authority

To determine whether an entity qualifies for Eleventh Amendment immunity, the District of Columbia Circuit has "generally focused on the 'nature of the entity created by state law' and whether the State 'structured' the entity to enjoy its immunity from suit." *Puerto Rico Ports Authority* ("PRPA"), 531 F.3d at 873 (citations omitted). The inquiry "required examination of three factors: (1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury. *Id.* at 873; *see also Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986).

In the *Puerto Rico Ports Authority* case, the Court of Appeals for the District of Columbia concluded that "[w]hen considered together, the three arm-of-the-state factors – intent, control, and overall effects on the treasury – lead us to conclude that PRPA is an arm of the Commonwealth entitled to sovereign immunity." *PRPA*, 531 F.3d at 880. In that case, the first factor of intent was established because the enabling act "describes PRPA as a 'government instrumentality of the Commonwealth of Puerto Rico' and 'government controlled corporation;'" PRPA performs functions to promote the general welfare and to increase commerce and prosperity for the benefit of the people of Puerto Rico; PRPA's internal regulations are governed by Puerto Rico laws that apply to Commonwealth agencies generally; PRPA submits yearly financial statements to the legislature and Governor; and the Commonwealth filed an amicus curie brief "emphatically declaring that PRPA is an arm of the Commonwealth entitled to sovereign immunity." *Id.* at 875-76. The second factor of control was established because the Governor controls the appointment of the entire Board and the Governor may remove a majority of the Board at will. *Id.* at 877-78. Although the PRPA was financed largely through user fees and bonds, the determination of the overall effects on the treasury, the third factor, weighed in favor of immunity because some of PRPA's actions could create legal liability for the Commonwealth, and payment for judgments for certain torts would come out of the Commonwealth's coffers. *Id.* at 879-80. Given all of these facts, the District of Columbia Circuit found that PRPA was an arm of the state.

The facts in the case *sub judice* vary significantly from the facts in *Puerto Rico Ports Authority*. There is an argument that the first factor – intent as to the status of the entity, including the functions performed by the entity – weighs in favor of immunity, as the state has expressed an interest in the tidelands and retains oversight through the State Lands Commission. The State of California said that 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" and that the "purposes and uses of tidelands and submerged lands is a statewide concern." Cal. Pub. Res. Code § 6009. On the other hand, the State of California transferred "all the right, title and interest" in the tidelands to the City of Oakland. Stats. 1911, Ch. 657 (Motion to Dismiss, Ex. 2). Although the State of

California has indicated that the purposes and uses of tidelands and submerged lands is a statewide concern, the State has not said that grantees are arms of the state. The State did not create the Port of Oakland, but rather it was created by the Oakland City Council. The Port is referred to as "a Component Unit of the City of Oakland" and "an independent department of the City of Oakland." Motion to Dismiss, Ex. 6 at 1 (November 23, 2009). Because the State of California did not create the Port of Oakland nor define the Port's functions, it is difficult to believe that the State intended the Port of Oakland to be an arm of the State. It is also hard to imagine that the state's dignity would be impacted by a lawsuit filed against the City of Oakland, as suits against the Port must be.

The State of California created the State Lands Commission which has oversight authority of the Port of Oakland, but does not control the actions of the Port or its Board. The State Lands Commission can merely report to the Legislature or file a lawsuit against the grantee to halt a project or expenditure with which it disagrees. Motion to Dismiss, Ex. E at 3. The State of California may revoke or modify its grant to the City of Oakland (and thereby the City's grant to the Port of Oakland) through legislative action. *Mallon*, 44 Cal. 2d at 207-08; *City of Coronado*, 227 Cal. App. 2d at 474-75. Thus, the State Land Commission's control over the Port is limited. As the Supreme Court in *Hess* stated, "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. '[P]olitical subdivisions exist solely at the whim and behest of their State,' yet cities and counties do not enjoy Eleventh Amendment immunity." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) (internal citation omitted). While the State Land Commission does have oversight authority, its ability to control the Port is limited. In addition, the State Lands Commission's authority to audit the Port is similar to the State's authority to audit counties, cities, and other local government agencies, which does not convert those local municipalities into arms of the state.

Part of the intent factor is an evaluation of the functions performed by the entity. The Commission has held that in some states, the functions of a port are a statewide concern. *Carolina Marine Handling, Inc. v. South Carolina State Ports Auth.*, 30 S.R.R. 1017, 1032 (2006); *Ceres*, 30 S.R.R. at 369. However, at least one court in California has stated that the "legislature has generally treated the construction of docks, piers, etc., as a local matter." *Hogan*, 41 Cal. App.2d at 356-57. California granted tidelands to a number of different municipalities in California. Those ports compete against one another. *See, e.g.*, Reply to Motion to Dismiss, Ex. G at 12 (Strategic Plan); Reply to Motion to Dismiss, Ex. H at A-91 to A-93 (Feasibility Report). While the tidelands grant says that the tidelands are held in trust for the benefit of the whole state, and the State of California has declared the tidelands a "statewide concern," the City of Oakland has structured the Board of Port Commissioners to ensure a benefit to the local community. It makes sense that a municipality cannot immunize functions delegated to it by the State of California by creating a separate department or agency to carry out those functions. The City of Oakland itself does not have sovereign immunity and cannot confer sovereign immunity on an entity it creates. Accordingly, the intent factor does not weigh as heavily in its favor as the Port of Oakland contends, where the State of California intended to transfer control over the tidelands to the City of Oakland, the State of California did not create the Port of Oakland, oversight is limited to notifying the legislature or filing a lawsuit, and construction of port facilities has been treated as a local matter.

Regarding the second factor, control of the Port of Oakland rests with the City of Oakland, which appoints and removes the Board of Port Commissioners. When the functions performed by the Port are analyzed, it is clear that the Port was created and is controlled by the City. The Port of Oakland was created by the City of Oakland to control, manage, and operate the Port. Charter, Art.VII, § 700. The Port of Oakland is managed by a Board of Port Commissioners which is nominated by the City's mayor, approved by the City Council, and removed by the City Council. *Id.* at § 702. The facts here are very different than the facts present in the port in Puerto Rico. The City of Oakland clearly controls the Port of Oakland which weighs against finding Eleventh Amendment sovereign immunity.

Regarding the third factor, there is no evidence that any judgments would be payable out of the State of California treasury and the Oakland City Charter indicates that debt instruments issued by the Port "shall not constitute a debt, liability or obligation of the city of Oakland and shall be payable exclusively from revenues and other assets of the Port." *Id.* at § 706(24). California law requires a local public entity, including a public agency or political subdivision, to be responsible for a judgment rendered against it and specifically permits entities to use bonds to raise money to pay for judgments. Cal. Gov't Code, §§ 970.2, 970.8, 975.2. The City Charter creating the Port of Oakland explicitly states that "[s]uch debt instruments shall not constitute a debt, liability or obligation of the city of Oakland and shall be payable exclusively from revenues and other assets of the Port." Charter, Art. VII, § 706(24). Moreover, the initial 1911 grant from the State of California required that "said harbor shall be improved by said city without expense to the state." Stats. 1911, Ch. 657.

The Port Authority is financially self-supporting and any judgements would be paid out of the Port's revenue and assets. There is no evidence that there would be an impact on the state's treasury. The Port argues that money held in the Port Revenue Fund is the property of the State of California, relying on *Mosler* and *Hanson*. However, those cases were reviewing the tidelands grant to the city of Long Beach which required eight-five percent of excess revenue to be remitted to the state's treasury. *Mosler*, CV 02-02278 SJO (RZX) at 8-9; *Hanson*, No. BC 221839 at 7. There is no such requirement in Oakland and the 1911 enabling statute that requires improvement of the Port without expense to the state would control.

Belanger

In *Belanger*, the Ninth Circuit considered the following factors to determine whether a governmental agency is an arm of the state: (1) whether a money judgment would be satisfied out of state funds, (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. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250-51 (9th Cir. 1992). These five factors have been utilized in a number of cases, including *Moser* and *Hanson*, discussed above. In *Belanger*, the court weighed the five factors to determine that the school district was immune to suit under the Eleventh Amendment, finding that the school district's budget was controlled and funded by the state; schooling was a statewide or

central governmental function and the State of California exercised substantial centralized control, including dictating when students could be expelled and which textbooks were used; school districts could sue and be sued in their own name; school districts could own property in their own name; and school districts had the corporate status of state agents. *Id.* at 251-54.

In the case *sub judice*, the Port of Oakland's budget is not controlled or funded by the state and there is no evidence that a judgement would be payable from state funds; as discussed above, the Port of Oakland does not perform central government functions and is not involved in day-to-day decisions; the Port can sue and be sue in its own name; the Port can own property in its own name; and the Port is a creation of the City of Oakland, a municipal corporation. Unlike in *Belanger*, here, the Port of Oakland does not receive funding from the State and the State has not assumed substantial centralized control over the Port, but rather delegated that responsibility to the City of Oakland, which in turn delegated the authority to the Port of Oakland. That the State of California has made a declaration of control, oversight, and statewide concern does not outweigh the other factors. As the Ninth Circuit found in *City of Long Beach*, Eleventh Amendment immunity is not appropriate.

Ceres

In *Ceres*, the Commission considered two factors, the structure of the entity and the risk to the state treasury, to determine whether the Maryland Port Administration ("MPA") was an arm of the State of Maryland. *Ceres*, 30 S.R.R. at 366-67 (2004). The Commission concluded that the MPA had not provided enough evidence to show that a judgment against it would impact the Maryland state treasury. *Id.* at 368-69. Next, the Commission considered the degree of control that the State exercises over the entity; whether the entity deals with local rather than statewide concerns; and the manner in which State law treats the entity. *Id.* at 369. The Commission found that MPA is a constituent unit of the Maryland Department of Transportation and overseen by commissioners who are appointed by the Governor and compensated from funds in the state budget; MPA funds are audited by the State Legislative Auditor; the MPA services an essential government function to the State; and at least one Maryland court had held the MPA immune from suit in state court. *Id.* These facts outweighed the MPA's authority to bring and defend against lawsuits, to lease port facilities and other properties, to enter into contracts in its own name, and to appear in its own name before federal and state agencies. *Id.* Because the State of Maryland exercised a significant degree of control over the MPA, "an entity that deals with statewide concerns and that has been treated as an arm of the state by at least one Maryland state court," the Commission found that a proceeding against MPA would therefore infringe upon Maryland's dignity. *Id.* at 370.

The *Ceres* case shows that no impact on the state treasury combined with the ability to litigate and enter into contracts are not sufficient distance from the state to undermine an argument that an entity is an arm of the state. Those factors are present in the Port of Oakland. However, in the Port of Oakland there are additional indicia of control which impact the analysis of the structure of the entity. Specifically, the Board of Port Commissioners, as discussed above, is not appointed by the state, and is not compensated from funds in the state budget, and no court has held that the

Port of Oakland is an arm of the state. In addition, in the case *sub judice*, the Port of Oakland was created and controlled by the City of Oakland so that the State of California has significantly less control over the Port of Oakland than the State of Maryland had over the MPA. Therefore, in the structure of the entity analysis, although the Port of Oakland deals with a statewide concern, this factor is outweighed by the degree of control exercised by the City of Oakland and the manner in which state law treats the entity. Although the Port, as tidelands trustee is overseen by the State Lands Commission and the State has declared its interest in the tidelands, that is not a sufficient nexus to invoke Eleventh Amendment immunity under this test.

CONCLUSION

The Port of Oakland was created by the City of Oakland, the Board of Port Commissioners is appointed by the Oakland City Council and must be residents of the City of Oakland, and the Port of Oakland may sue and be sued, enter into contracts, and make leases in the name of the City. Contracts are governed by City of Oakland programs and employees are included within the personnel system of the City of Oakland. The Port is financially self-sufficient, although the City may reject its budget. California law requires the harbor to be improved without expense to the State. Although California says that its power and right to control its tidelands is absolute; tidelands granted to local entities remain subject to the oversight authority of the state; grantees are required to manage the state's tidelands without subjugation of statewide to the inclination of local or municipal affairs; and the purposes and uses of tidelands is a statewide concern, under current case law that this is not sufficient to extend Eleventh Amendment immunity to the Port of Oakland. The State Lands Authority has oversight, but can only inform the legislature or file a lawsuit if it believes the land is not being managed within the terms of the grant. Reviewing the creation of the Port of Oakland by the City of Oakland, the degree of control exercised by the City, the lack of impact on the state treasury, and the conflict of legal decisions regarding California ports, the Port of Oakland is not entitled to Eleventh Immunity sovereign immunity protection. Accordingly, the Motion to Dismiss will be denied and the Motion to Stay dismissed as moot.

IV.

For the reasons indicated above, it is hereby ordered that the Motion to Dismiss be **DENIED**. It is further ordered that the Motion to Stay be **DISMISSED AS MOOT**. The parties shall file a joint status report with a proposed schedule for filing Rule 502.95 statements and for presentation of the case by November 17, 2010.

Erin M Wirth

Erin M. Wirth
Administrative Law Judge

Exhibit 5

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

COMPLAINANTS' REPLY TO RESPONDENT'S MOTION TO DISMISS

Complainants, SSA Terminals, LLC and SSA Terminals (Oakland), LLC, jointly referred to herein as "SSAT," by their undersigned counsel, hereby oppose the motion to dismiss filed by the Respondent City of Oakland, acting by and through its Board of Port Commissioners, on July 7, 2010.

Respondent contends that the complaint must be dismissed because it is an arm of the State of California entitled to sovereign immunity under the Eleventh Amendment of the United States Constitution. As discussed in greater detail herein, "[t]he bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations." *Mt. Healthy City Brd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Although often referred to in this proceeding simply as "the Port," the respondent in this case is the City of Oakland. The "Port" is a department of the City

of Oakland with no separate legal personality or rights. Because the City of Oakland is a municipal corporation, it is not entitled to share in the State of California's immunity under the Eleventh Amendment. This should be the end of the analysis and the motion to dismiss should be denied on this basis alone as there is simply no reason to apply an arm of the state test to a municipal department. However, if such a test is applied, it is absolutely clear that the department is not an arm of the state entitled to immunity.

I. BACKGROUND

A. Statement of the Case

On or about November 30, 2009, the City of Oakland, acting by and through its Board of Port Commissioners, entered into a lease agreement with Ports America Outer Harbor Terminal, LLC ("PAOHT") (the "PAOHT Lease"). The PAOHT Lease was entered into on terms that were extremely favorable to PAOHT, and permitted PAOHT to operate at much lower costs than other port tenants. Comparable concessions have not been made available to SSAT. As a result of the unduly preferential terms of its lease, PAOHT is able to undercut SSAT's rates and SSAT is forced to either operate at a significant loss or lose its business to the PAOHT terminal.

On December 11, 2009, SSAT filed the instant complaint seeking a cease and desist order and reparations for injuries caused by violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), including the Respondent's (a) imposing an undue or unreasonable prejudice or disadvantage on SSAT; (b) granting an undue or unreasonable preference or advantage to PAOHT; (c) refusing to deal or negotiate with SSAT; and (d) failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

Respondent filed an answer to the complaint, denying the allegations and raising certain affirmative defenses, including a right to sovereign immunity.

B. The Respondent

The City of Oakland ("City") is a municipal corporation and a "body politic and corporate in name and fact." Charter of the City of Oakland ("Charter"), Art. I, § 100.[1] The City has the "right and power to make and enforce all laws and regulations with respect to municipal affairs." *Id.* at § 106. The form of City government is known as the "Mayor-Council form of government." *Id.* at § 107.

The Council consists of eight elected council members. Charter, Art. II, § 200. The Mayor is nominated and elected from the City at large. Charter, Art. III, § 300. In addition to the council members and the Mayor, the officers of the City include the City Administrator, the City Attorney, the City Auditor, department heads, and members of boards and commissions. Charter, Articles IV, V and VI.

In order to develop and operate the Port of Oakland, the City of Oakland created "a department of the City of Oakland known as the 'Port Department.'" Charter, Article VII, § 700. The Charter provisions creating the Port Department make clear that it does not have an existence that is separate or apart from the City of Oakland. The control and management of the Port Department is vested in the Board of Port Commissioners ("Board"), which is comprised of seven (7) members who are all appointed by the City Council upon nomination of the Mayor. *Id.* at § 701. Each Board member is appointed for a term of four (4) years. *Id.* at § 702. A Board member may be removed by the affirmative vote of six (6) members of the City Council. *Id.* at §

[1] The Charter of the City of Oakland is set forth as Exhibit 1 to Respondent's Motion to Dismiss.

703. All Board members must reside in the City for a period prior to and throughout the term of office. *Id.* at § 701.

Although the Charter delegates various powers to the Port Department, those powers are to be exercised "for and on behalf of the City." Charter, Art. VII, § 706. In this respect, the Port Department may only sue and defend in the name of the City of Oakland, *Id.* at § 706(1); it may only acquire property in the name of the City, *Id.* at § 706(15); and it may exercise the right of eminent domain only on behalf of and in the name of the City. *Id.* at § 706(19). Additionally, the Port enters into contracts—including the lease at issue in this case—in the name of the City of Oakland. *See, e.g.,* Ex. A.

The Board of Port Commissioners annually files a budget with the Council, the City Administrator, and the City Auditor. The budget sets forth "the estimated receipts of the Port, and revenue from other sources, for the ensuing year, and the sums of money necessarily required for the administration of the department, and for maintenance, operation, construction and development of the port and its facilities for the ensuing year, and stating the amount necessary to be raised by tax levy for said purposes." Charter, Art. VII, § 715. The Council has the authority to reject the budget if, *inter alia*, it requests or provides for the allocation or appropriation for the Port by the Council of any funds raised by tax levy or in any manner obtained from the general revenues of the City or it requests the incurring or payment of any financial obligation by the City for the Port's use and benefit. Under these circumstances, the Council can require the budget to be revised to meet with Council approval. *Id.* at § 716.

All incomes and revenues from the operation of the Port, including without limitation all net income from leases, are allocated to and deposited in a fund in the City Treasury, which is

designated the "Port Revenue Fund." Any surplus moneys in the Port Revenue Fund are transferred to the City's General Fund. Charter, Article VII, § 717(3).

II. THE TIDELANDS GRANT

Given that the Motion to Dismiss relies heavily on the "public trust" or "tidelands trust" doctrine, some preliminary discussion of the State of California's grant of the tidelands to the City of Oakland is appropriate.

The State of California ("the State") acquired title to its tidelands as "an incident of sovereignty" when it became a state in 1850. *See City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 336 (N.D. Cal. 1986). "Each state holds title to its tidelands '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 therein freed from the obstruction or interference of private parties.'" *Id.* (citing *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892)). As the court explained in *City of Alameda*, the tidelands trust currently carries with it certain restrictions on conveying the land to private interests.[2] There are, however, no such restrictions on conveying the tidelands to municipalities or other local government entities and the State of California has made many such conveyances.

The City of Oakland received its title to the tidelands upon which the Port of Oakland is built via statutory grants in 1911 and 1931. The relevant language of each of the grants is identical, and provides as follows:

---

[2] Notably, however, certain tidelands were granted to private parties by patent in the early days of California's statehood. *See, e.g., Marks v. Whitney*, 491 P.2d 374 (Cal. 1971). The private owners took title subject to the public trust in the same manner as the municipality grantees. *Id.* at 378. Yet no one would suggest that such private parties are arms of the state.

> There is hereby *granted* to the city of Oakland, a municipal corporation of the State of California, and to its successors, *all of the right, title and interest* of the State of California held by said state by virtue of its sovereignty in and to all lands, tidelands and submerged lands, whether filled or unfilled, included within [the prescribed portion of the City of Oakland] . . . . To be *forever* held by said city, and its successors, in trust for the uses and purposes and upon the express conditions following. . . .

See Statutes 1911, Ch. 657[3] (emphasis added) (Motion to Dismiss, Ex. 2); Statutes 1931, Ch. 621 (Ex. B).

Interpreting identical language in a tidelands grant to the City of Long Beach, the California Supreme Court stated as follows:

> Giving this language its ordinary and reasonable meaning, it would seem clear that the state intended to and did convey whatever title or interest it had in these lands to the city, in fee simple, subject to certain conditions and upon certain trusts. A fee simple is presumed to pass by a "grant" of real property. (Cal. Civ. Code, sec. 1105) The conditions, limiting the use of the lands to harbor purposes, and forbidding alienation of title to private persons, are entirely consistent with a conveyance of the fee simple title; the grantee of an estate on condition subsequent takes the fee, subject only to forfeiture for breach of the condition. In short, there is nothing on the face of the statute which suggests that the city did not take the title to the lands, and the assumption that it did has been made in numerous cases hereinafter mentioned, involving tidelands granted by the state to municipalities, before the present controversy over oil rights arose.

City of Long Beach v. Marshall, 11 Cal.2d 609, 613-14 (Cal. 1938) (internal citations omitted); *see also State Lands Comm'n v. City of Long Beach*, 200 Cal. App. 2d 609, 614 (Cal. Dist. Ct. App. 1962) ("The legislative grant by the state in 1925 and the previous grant in 1911, conveyed the fee simple title to the tidelands to the City of Long Beach subject to the trust specified in the statute.").

Moreover, in *City of Alameda*, the Northern District of California held that conveying the tidelands in fee simple subject to the public trust obligations does not create a reversionary interest in the grantor. In that case, the State of California had transferred tidelands to the City of

[3] As amended by Statutes 1919, Ch. 516; Statutes 1937, Ch. 96; Statutes 1947, Ch. 59.

Alameda and the city in turn conveyed the lands to the United States "forever" for purposes of constructing an air base. The court held that the City had transferred the tidelands in "fee simple subject to the trust restrictions. There was no provision that the land might revert to the City or the State if the United States violated the trust restrictions." *Id.* at 338.

In holding that the city and state held no reversionary interest following the fee simple grant, the district court validated the view of the dissent in *Mallon v. City of Long Beach*, 44 Cal.2d 199 (Cal. 1955). In that case the majority of the Supreme Court of California held that when tidelands or revenues therefrom were no longer needed for trust purposes, they would revert to the state. The well reasoned dissent strongly disagreed, stating that "the only right reserved by the state with respect to the tidelands or their proceeds was its sovereign right to protect the trust and to declare when, if ever, any portion of such lands or their proceeds might no longer be required for the trust purposes and might be released from the trust without any substantial impairment of the trust purposes." *Id.* at 221 (Spence, J. dissent). Judge Spence's now vindicated opinion contains a helpful history of the tidelands grants and a good explanation of the state's limited role following the grants. In this respect, Judge Spence explained that the state was not a "trustor" or "settler" in the traditional sense:

> The state was not the trustor or settler to which the lands or their proceeds would revert upon the termination of the trust. It is true that the state's grant to the city employed the words "in trust for the uses and purposes and upon the express conditions following . . ."; but the grant did not create the trust, which already existed and under which the state itself held the property as trustee, and said grant merely imposed such conditions as the state deemed necessary to protect such preexisting public trust.

Id. at 221-22 (internal citations omitted).

Based on these authorities it is clear that the State of California conveyed the tidelands to the City of Oakland in fee simple. The grant was absolute and permanent, conveying "all right,

title, and interest" of the State to the City "forever." The State's only remaining interest is to act on behalf of the public to enforce the "public trust" conditions of the grant.

III. ARGUMENT

A. Municipalities Are Not Entitled To Sovereign Immunity

The Supreme Court has recognized that "the immunity of States from suit 'is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.'" *N. Ins. Co. of New York v. Chatham Cty. Georgia*, 547 U.S. 189, 193 (2006) (citing *Alden v. Maine*, 527 U.S. 706 (1999)). Not all public entities are, however, entitled to share in a state's sovereignty. "[O]nly States and arms of the State possess immunity from suits authorized by federal law." *Id.* It is well established that municipalities and other public corporations are not immune from suit. The Supreme Court "has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979); *see also Alden v. Maine*, 527 U.S. 706, 756 (1999) ("[sovereign] immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Mt. Healthy City Brd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("cities and counties do not enjoy Eleventh Amendment immunity"); *Brd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S.

356, 368 (2000) ("the Eleventh Amendment does not extend its immunity to units of local government."); *City of Long Beach v. Metcalf*, 103 F.2d 483, 485 (9th Cir. 1939) ("the state's constitutional immunity from suit does not extend to [municipal] corporations."); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 777-78 (9th Cir. 2005) ("The decision to extend sovereign immunity to a public entity turns on whether the entity 'is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.'").

The respondent in this case is the City of Oakland. Although the Port argues that it is "a stand-alone entity that is separate and distinct from the City of Oakland" (Motion to Dismiss at 9), its arguments are not supported by the record. The Port enumerates a number of powers set forth in the City Charter, but fails to mention that those powers can only be exercised for and on behalf of the City. The fact is that the Port does not have an identity that is distinct from the City. It is not a separately incorporated entity. Rather it is a department of the City of Oakland. It can only act on behalf of the City and can only sue or be sued in the name of the City. It owns land in the name of the City, enters into contracts in the name of the City, and its money is maintained in the City treasury. The City Council appoints and has the power to remove each of the Port Commissioners, each of whom is required to reside in the City. *See* Part I.B, *supra*; Motion to Dismiss, Ex. 2.

Moreover, while the Motion to Dismiss frequently refers to the Port Department as the grantee and trustee of the tidelands upon which the port is built, that is clearly not the case. The grant was made by the State of California to the City of Oakland. The State had no role in

creating the Port Department and has no role in directing or otherwise controlling the activities of the Port Department.

The question accordingly is not whether the Port Department is entitled to Eleventh Amendment immunity but rather whether the City is entitled to Eleventh Amendment immunity when it is acting through the Port Department.[4] This issue is squarely addressed in *N. Ins. Co. of N.Y. v. Chatham Cty., Ga.*, 547 U.S. 189 (2006). In that case, Chatham County conceded that Eleventh Amendment immunity did not apply to counties, but contended that it was nevertheless immune from suit when it operated a drawbridge over the Wilmington River. This was so, according to Chatham County, because the State of Georgia had delegated its sovereign authority to build, maintain, and operate bridges to the counties. Chatham County argued to the Supreme Court that the bridge in question was built over tidal waters held in trust by the State of Georgia for the people of that state and argued that delegation of authority with respect to these lands involved the transfer of a "core, sovereign function of the State." *N. Ins. Co. of New York v. Chatham Cty., Georgia,* No. 04-1618, Respondent's Brief on the Merits, 2006 WL 284224, *22-26 (U.S.) (Ex. C). The Supreme Court squarely rejected the County's claims. The Court held in no uncertain terms that a county is not entitled to sovereign immunity even when it is exercising a slice of state power. .The same rationale applies to a municipal corporation, such as the City of Oakland, even if it is exercising authorities granted by the state. As such there is no legal basis

[4] In the D.C. Circuit, "[t]he status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors." *Puerto Rico Ports Auth. v. Fed'l Maritime Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008). As such, the D.C. Circuit could not hold that the City of Oakland is a municipality and thus not an arm of the state, but also hold that the City is an arm of the state when it acts through the Port Department. The City either "is or is not an arm of the state." *Id.* There is no basis to believe that the D.C. Circuit would take the drastic position that the City is always an arm of the state. Even the City has never made such a bold claim to immunity despite being a frequent litigant in federal court.

to claim that the City is an arm of the State of California when it exercises authority over lands granted to it by the State of California.

The Ninth Circuit has also rejected the claim that municipalities in California are converted into arms of the state by virtue of the tidelands grant. In *City of Long Beach v. Standard Oil Co. of Cal.*, 53 F.3d 337, 1995 WL 268859 (9th Cir. 1995) (Ex. D), the court rejected the City of Long Beach's sovereign immunity claims as follows:

> The city argues that it was entitled to the protection of the Eleventh Amendment because it was acting as "trustee" of the lands as was thus "an arm of the state" for purposes of the Eleventh Amendment. The city has not pointed to any authority suggesting that this doctrine should extend to non-state agencies. We would be reluctant to engage in such a radical departure from the law in light of the Supreme Court's repeated and clear admonition that Eleventh Amendment immunity "does not extend to counties and similar municipal corporations." *Mount Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280 (1977). In any event even were we to conclude that the Supreme Court's recent decision in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), should apply to the city as trustee, the city would not be entitled to immunity on the facts of this case.

Id. at *1; *see also City of Long Beach v. F.R. Newport Corp.*, 103 F.2d 483, 485 (9th Cir. 1939) ("Appellants are not the State. One of them—the City of Long Beach—is a municipal corporation and, territorially, a part of the State, but the State's constitutional immunity from suit does not extend to such corporations. The fact, if it be a fact, that appellants are grantees of the State is immaterial." (internal citations omitted)); *American Trucking Assocs., Inc. v. The City of Los Angeles*, 577 F. Supp.2d 1110 (C.D. Cal. 2008) (finding that the City of Los Angeles's claim of sovereign immunity under the tidelands trust theory was unlikely to succeed).

The law is clear. Municipalities are not entitled to share in the sovereign immunity of the states even if they are performing a "slice of state power." Since the City of Oakland is a municipal corporation, it is not entitled to claim immunity even when it is acting through its appointed Board of Port Commissioners.

B. The Port Department Is Not An "Arm of the State"

Because the respondent is the City of Oakland and it is black letter law that municipalities are not arms of the state, it is not necessary to engage in any further analysis. However, even if, for the sake of argument, we analyze the Port Department as a separate entity it would be clear that it is not an arm of the State of California entitled to claim sovereign immunity.

The Supreme Court has considered whether particular entities are entitled to share in the sovereignty of the state on various occasions. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). In determining whether an entity is entitled to immunity the Supreme Court has looked at whether the state clearly structured the entity to share in its immunity. *Hess*, 513 U.S. at 44. When indicators of immunity point in different directions, the Court looks to the twin purposes of the Eleventh Amendment—the dignity of the state and the risk to the public treasury. *Id.* at 47. The Court has further recognized the "vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* at 48.

Different courts have developed varying tests consistent with the *Hess* principles. Recognizing that disappointed litigants can appeal decisions to multiple venues, the Commission has developed its own test drawing from the principles set forth in multiple circuits. That test was developed in *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 30 S.R.R. 358 (FMC, 2004), and has since been applied in *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, 30 S.R.R. 1187 (FMC, 2006) and *Carolina Marine Handling v. South Carolina State Ports. Auth.*, 30 S.R.R. 1017 (FMC, 2006). Consistent with *Hess*, the Commission applies

a two part test, looking first at the structure of the entity and second at the risk to the state treasury. The first part of the test is further broken into three parts: (1) the state's degree of control over the entity, (2) the extent to which the entity address local versus statewide concerns, and (3) the entity's treatment under state law.[5]

The U.S. Court of Appeals for the Ninth Circuit applies a five factor test established in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir. 1988). The Ninth Circuit test largely overlaps with the Commission and D.C. Circuit tests, but breaks out some of the considerations into separate factors. Specifically, the Ninth Circuit considers: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central government 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. *Id.* at 201.

Finally, The D.C. Circuit considers similar factors as the other two tests but uses somewhat different terminology. The test established by the D.C. Circuit in *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986), considers three factors: (1) the state's characterization of the entity, (2) the amount of state involvement or control over

[5] Respondent suggests that this test was called into question by the D.C. Circuit in *Puerto Rico Ports Auth. v. Fed'l Maritime Comm'n*, 531 F.3d 868 (D.C. Cir. 2008). The D.C. Circuit did not, however, opine on the Commission's test. Rather, it simply applied its own test. Moreover, the different result that was reached by the court arose out of the court's application of the test rather than any substantial disagreement about the appropriate factors.

the entity, and (3) the degree of financial independence maintained by the entity and the likelihood of any judgment against the entity being paid by the state. *Id.* at 224-28.[6]

These tests overlap to a great extent and in the end differ very little, if at all. For the sake of completeness, however, we will address each in turn.

1. The Federal Maritime Commission

a. Structure of the Entity

i. Degree of State Control

The City of Oakland is a municipal corporation with complete control over its own affairs. *See, e.g.,* Charter, Art. I, § 100 ("The municipal corporation now existing and known as the City of Oakland shall remain and continue a body politic and corporate in name and fact."); *Id.* at § 106 ("The City shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs."). Respondent does not dispute this fact, but contends that the City's Port Department is controlled by the State of California rather than the City itself. There is no support for this contention.

The Port Department is managed by a Board of Commissioners ("Board") all of whom are nominated by the Mayor and approved by the City Council. Charter, Art. VII, § 702. The City Council exercises general oversight over the Board and may remove any of the Commissioners for cause in the exact same manner as other City boards and commissions. *Id.*

[6] The D.C. Circuit does not have three separate tests as Respondent contends. (Motion to Dismiss at 29.) It simply stated in dicta that there may be instances in which an entity that is not an arm of the state could nevertheless be immune if it was acting as an agent of the state when it took the actions giving rise to the claim, or if the State would be legally required to pay the judgment in that case. *PRPA*, 531 F.3d at 878-79. There is no contention here that City of Oakland or its Port Department entered into the PAOHT Lease or otherwise took the actions underlying this case at the direction of the State. As such, the agency situation being addressed by the court in *PRPA* is not present here. Nor is there anything unique about the facts of this case that would make the State responsible for any judgment.

§ 703. The Port Department may acquire land in the name of the City, and may sue or be sued in the name of the City. *Id.* at § 706(1), (15), (19). Permanent places of employment under the Port Department are part of the City personnel system. *Id.* at § 714. Contracts entered into by the Port Department are subject to the bid limit and race and gender participation programs established by the City. *Id.* at § 710. The Port Department must submit its proposed budget to the City Council. *Id.* at § 715. The Port Department may request allocations or appropriations from the City and the proposed budget must specify the amount necessary to be raised by tax levy. *Id.* The City Council may reject or request revision of any portions of the Port Department's budget that requires funds to be raised by tax levy. *Id.* at § 716. Port revenues are maintained in the City Treasury in the Port Revenue Fund. The fund is first used for the Port Department's operations, but any surplus amounts are transferred to the General Fund of the City. *Id.* at § 717(3).

In contrast to the control exercised by the City, the State plays no role whatsoever in the Port Department's governance or operations. The Port Department does not seek approvals from the State; and the State does not have any authority to direct or veto the actions of the Board. Respondent does not cite to any such authority, but nevertheless contends that the State has control over the Port's activities. Respondent's argument is based solely on its contention that the Port Department holds the tidelands in trust for the state. This is a mischaracterization of the tidelands grants on two accounts. First, the grant of the tidelands was to the City of Oakland, not to the Port Department. Second, the City does not hold the tidelands in trust for the State. As the State did before it, it holds the tidelands in trust for the people. As discussed in Part II above, the State's only remaining interest in the tidelands is ensuring, on behalf of the public, that the City complies with the conditions set forth in the grant. It has delegated this function to

the State Lands Commission ("SLC").[7] The SLC's role in monitoring compliance with the grant does not amount to control for purposes of Eleventh Amendment immunity.

While the SLC monitors the activities of the Port, it does not have any authority to either direct or veto the actions of the Board. The Board is not required to secure approval from the SLC before embarking on development projects or before expending revenues generated from activities on these lands. Nor can the SLC direct the Port to terminate any development projects approved by the Board. The only power the SLC has is to notify the City of any perceived violation of the statutory grant and, "if necessary, report to the Legislature, which may revoke or modify the grant; or file a lawsuit against the grantee to halt the project or expenditure." Public Trust Policy for the California State Lands Comm'n, at 3, (Ex. E); *see also* Motion to Dismiss at 11 (admitting that the State's only remedy if it believes the grant conditions are not being met is to sue the City).

That the State can impose its will upon the City and thus the Port through legislative action or litigation is not evidence of control. To the contrary, it demonstrates that the State can only affect the actions of the Port Department in the same manner that it can affect the actions of any other municipality, local agency, or private citizen. The Supreme Court has held that broad legislative control is not sufficient for the arm of the state analysis:

> [U]ltimate control of every state created entity resides with the State, for the State may destroy or reshape any unit it creates. 'Political subdivisions exist solely at the whim and behest of their State,' yet cities and counties do not enjoy Eleventh Amendment immunity."

Hess, 513 U.S. at 47 (internal citations and original brackets omitted). Rather it is control over the day-to-day operations of the entity that is relevant to the inquiry. Here there is none.

---

[7] While the SLC has "exclusive jurisdiction over all *ungranted* tidelands and submerged lands owned by the State," its jurisdiction over *granted* tidelands is limited to any "jurisdiction and authority remaining in the State." Cal. Pub. Res. Code § 6301.

To the extent that the SLC must sue the City if it believes that the public trust is being harmed, it is in no better position than private parties who may also enforce the grants through litigation. *See Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971) (holding that members of the public have standing to enforce the public trust easement in the tidelands). Certainly no one would claim that the Port Department is controlled by members of the public.

The Port also contends that control is demonstrated by the fact that the Port must follow generally accepted accounting principles and must submit annual audited financial statements to the SLC. Respondent argues that this is "no mere formality, as the State performs audits on how well the Port performs its function." (Motion to Dismiss at 31). The most recent periodic audit of the Port, however, was conducted nearly a decade ago and contains recommendations, not directives. (*See* Ex. F, *see also* Motion to Dismiss at Ex. 4).[8] Moreover, the State Auditor has the authority to audit counties, cities, and other local government agencies. Cal. Gov't Code, §§ 8546.1; 8545.2. Certainly this authority is not intended to convert every local municipality into an arm of the state.

The Port activities themselves are controlled by the City and not the State. The Port was created by the City. It is the City that delegated authorities to the Port and it is the City that can take any delegated authorities away. The City appoints all of the members of the Port's Board of Commissioners and the City has the authority to remove the Commissioners from office. It is evident that the Port Department is controlled by the City and not the State.

[8] Both exhibits contain excerpts from the report titled: California State Auditor, Port of Oakland: Despite its Overall Financial Success, Recent Events May Hamper Expansion Plans That Would Likely Benefit the Port and the Public October 2001("Auditor's Report"). The complete report can be found electronically at http://www.bsa.ca.gov/pdfs/reports/2001-107.pdf.

ii. Local Versus Statewide Concerns

The City of Oakland is a municipal corporation that was indisputably created to address local concerns. Although the Port Department does not have an identity separate from that of the City, if its activities are analyzed separately, this factor weighs against a finding of immunity or is at the very least neutral as it was in *Hess*. In *Hess* the Supreme Court explained that:

> Port Authority functions are not readily classified as typically state or unquestionably local. States and municipalities alike own and operate bridges, tunnels, ferries, marine terminals, airports, bus terminals, industrial parks, also commuter railroads.

Hess, 513 U.S. at 45. As a result, the Court determined that this factor did not weigh in either direction when it determined the status of the Port Authority of New York and New Jersey.

Respondent nevertheless maintains that this factor weighs in favor of immunity because the "Tidelands Trust was established for the benefit of the entire State of California" (Motion to Dismiss at 31). As discussed above, the tidelands trust was not created. Rather it simply came into being when California became a state in 1850. By virtue of its sovereignty, California acquired title to the tidelands, but under the public trust doctrine such lands were to be held in trust for the people of the State of California. When title to the lands were held by the state, there may have been an argument that use of the lands served a statewide interest. However, when the State conveyed the land to the City of Oakland for purposes of developing and maintaining a port in that city, the primary benefits of the tidelands were likewise transferred to the people of Oakland.

The Port Department is responsible for managing and operating 19 miles of waterfront on the eastern shore of San Francisco Bay. The waterfront property under the Port Department's jurisdiction includes a seaport, a passenger, cargo and general aviation airport, and waterfront

real estate.[9] The Port's stated mission "is to increase the region's economic vitality, create jobs, and provide opportunities for waterfront enjoyment, while also generating earnings to reinvest in its activities."[10] As it describes itself:

> The Port is *a local agency,* with a *regional* impact, a national constituency and an international outlook.

Strategic Plan at 1 (Ex. G). The Port of Oakland creates jobs in the city and benefits the local economy, not the state as a whole.[11] Unlike the Port of Charleston, which was at issue in *Carolina Marine Handling, Inc. v. South Carolina State Ports Auth.*, 30 S.R.R. 1017 (FMC, 2006), the Port of Oakland is not a unique entity or the only port of its kind in the State of California. To the contrary, the Port of Oakland is in direct competition with other ports in the state, including the Ports of Long Beach and Los Angeles. In its operation of the Port, the City of Oakland clearly seeks to draw cargo away from its competitor ports in Southern California in order to bring more commerce and jobs to the City, with the result being a loss of jobs and commerce in Los Angeles or Long Beach.[12] *See, e.g.,* Strategic Plan at 8, 12, 14 (Ex. G); Feasibility Report at A-91, A-93, A-97-A-116 (Ex. H). Thus, it is clear that the City operates the Port in a manner that is the most beneficial to Oakland and its residents.

iii. Treatment Under State Law

The Port Department was not created by State law. Rather it was created by the City as a "department of the City of Oakland." Charter, Art. VII, § 700. It is the City that delegates and defines the Port Department's authorities and, as discussed above, the department is subject to

---

[9] Auditor's Report at 5 (Ex. F); Port of Oakland Strategic Plan Summary, FY 2003-2007 Update, at 5 ("Strategic Plan") (Ex. G).

[10] Auditor's Report at 5.

[11] *See generally* Strategic Plan (Ex. G).

[12] The importance to the City are emphasized by the fact that the City Council appoints the Port's Board of Commissioners and each Commissioner is required to be and remain a resident of the City.

municipal requirements such as the civil service regulations and race and gender participation in contracting programs. The Port Department acts on behalf of and in the name of the City of Oakland, and ordinances issued by the Board are considered City ordinances. *See Debro v. Turner Construction Co.*, 2008 WL 772889, *7 (Cal. App.1 Dist.) ("By Charter, the Port is a department of the City and not, as Debro appears to believe, a third party agent. In other words, the Prime Builder Contract is indeed a contract between Turner and the City because the Port itself is a city Department. By the same reasoning, Port Ordinance 1606 is as much a 'City law,' as are the provisions of the Municipal Code upon which Debro relies.")

Under California law, the Port Department is a department of the City of Oakland and thus falls within the definition of "local public entity" under the California Government Code.[13] Judgments against local public entities are paid by the local entities and such entities are required to budget for payment of judgments. Cal. Gov't Code, 970.2, 970.8.

Analysis of all three structure criteria clearly demonstrate that the Port was created by the City and not the State; that it was structured to be a department of the City and not a State agency; and that the Port is controlled by the City and not the State. The structure factor of the Commission's test accordingly weighs heavily against a grant of sovereign immunity.

b. Risk to the State Treasury

This factor examines whether the State would be legally obligated to pay any judgment against the entity. It is not enough that the State might be indirectly affected by any judgment or that the state might voluntarily reimburse the entity. The question is whether the judgment could

[13] "Local public entity" is defined to include "a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State." Cal. Gov't Code, § 900.4. By contrast, "State" is defined by § 900.6 to mean "the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller."

legally be enforced against the state. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997). The primary concern in this regard is "the vulnerability of the State's purse." *Hess*, 513 U.S. at 48.

In this case, the Port does not, and cannot, cite to any legal authority suggesting that a judgment against the City of Oakland would be enforceable against the State, even where the judgment relates to the actions of the Port Department. As in *Hess*, 513 U.S. at 35-38, the City and its Port Department are financially self sufficient and the debts and obligations of the Port Department are liabilities of the City of Oakland and not the State of California. In fact, the tidelands grant specifically provided for the City to develop the port "at no expense to the state." (Motion to Dismiss, Ex. 2). California law requires local public entities to be responsible for their own judgments and the statutes specifically require entities to budget for judgments and permits entities to use bonds to raise money to pay judgments if necessary. Cal. Gov't Code, 970.2, 970.8, 975.2.

The City Charter does not specify whether any judgment against the City when acting through the Port would be paid out of the City's general fund or a judgment fund, or whether the judgment would be paid from the Port's budget. It is clear, however, that the judgment would not be paid by the State and that SSAT would have no ability to seek payment directly from the State.[14] In the absence of such legal liability, this factor must result in a finding of no immunity. While Respondent does not contend that any judgment against the City of Oakland acting by and through the Board of Port Commissioners could be enforced against the State, it nevertheless contends that any payment of the judgment from the Port Department's budget would equate to

[14] This result is not altered by the tidelands grant. *See, e.g., San Diego Unitifed Port District v. Gianturco*, 651 F.2d 1306, 1318, n. 33 (9th Cir. 1981) ("Nothing in the materials cited by CalTrans or amici indicates that the State of California, as settler and representative of the beneficiaries of the trust, bears fiscal liability for misuse of the Port District's land. At oral argument, counsel for CalTrans explicitly disclaimed such primary liability.")

payment from state funds because revenues derived by the Port Department are "the property of the State of California." (Motion to Dismiss at 27).

Respondent's argument regarding ownership of the Port's moneys is based on two cases involving the Port of Los Angeles, *Hanson v. Port of Los Angeles,* No. BC 221839 (L.A. Super. Ct. 2001) and *Mosler v. City of Los Angeles*, CV 02-02278 SJO (RZx) (C.D. Cal. 2009) (Motion to Dismiss, Exs. 7 and 8). In *Hanson*, the Superior Court for the County of Los Angeles determined that the Port of Los Angeles ("POLA") was an arm of the State of California. The court based its analysis in significant part on its understanding of the status of POLA's "Harbor Reserve Fund" under California law. *Mosler* is an unpublished decision of the U.S. District Court for the Central District of California, which relied almost exclusively on the holding in *Hanson.*

Putting aside for a moment the question of whether *Hanson* and *Mosler* were correctly decided, POLA's Harbor Reserve Fund is drastically different than the Port Department's Port Revenue Fund. The Harbor Reserve Fund was required to be created by state statute. *See An Act to amend Section 1 of, and to add Sections 2,3, 4, 5, 6, 7, 8,9, 10, 11, 12, and 13 to, Chapter 651 of the Statutes of 1929, relating to tidelands and submerged lands of the City of Los Angeles*, Statutes 1970, Chapter 1046, § 2 (Ex. I). The State has control over how POLA spends moneys in the Harbor Reserve Fund, *Id.* at § 5, and the majority (85%) of excess revenues in POLA's fund revert to the State. *Id.* at § 6. None of those indicia of state ownership or control exist with the Port Department's Port Revenue Fund.

The Port Revenue Fund is an account created by the City of Oakland (without statutory mandate); and, like the accounts of other city departments,[15] maintained in the City treasury.

[15] Declaration of Sara Lee at ¶ 5 (Motion to Dismiss, Ex. 5).

The funds are separately identified on the books, but they are commingled for investment purposes. The State does not contribute to the account and does not have any right to access funds in the account. Surplus funds do not revert to the State, they revert to the City. Charter, Art. VII, § 717(3). As such, the holdings in *Hanson* and *Mosler* are not applicable to this case.

Even if the facts were more similarly aligned, the reasoning in *Hanson*, which was relied upon in *Mosler*, is suspect. As an initial matter, they are plainly inconsistent with the Ninth Circuit's ruling in *City of Long Beach v. Standard Oil Co. of Cal.*, 53 F.3d 337, 1995 WL 268859 (9th Cir. 1995) (Ex. D), which held that municipalities are not protected by the Eleventh Amendment even where the tidelands are involved. Rather than relying on the city's status as a municipality, both courts purported to apply the five factor arm of the state test employed by the Ninth Circuit. In both cases, however, the courts only discussed two of the five factors. Additionally, the courts appear to have misinterpreted *Mallon v. City of Long Beach,* 44 Cal. 2d 199 (1955) as holding that tideland revenues have a "state character" and thus are somehow owned by the State. (Motion to Dismiss, Ex. 7 at 7). What *Mallon* actually held was that revenues from the tidelands were subject to the same conditions on use as the tidelands themselves and thus had to be used for the benefit of all of the people of the state (i.e., be reinvested in the port) rather than for purely municipal purposes. *See Mallon*, 44 Cal.2d at 211.[16] As discussed in detail in Part II above, the fact that the property was granted to the City with

[16] As discussed above, *Mallon*'s further holding regarding the state's reversionary interest in the tidelands has since been discredited.

conditions on its use does not mean that the ownership of the property was not fully and completely transferred. This applies equally to the revenues derived from that property.[17]

2. Ninth Circuit

a. Whether a money judgment would be satisfied out of state funds

The first element of the *Mitchell* test is the most important in the Ninth Circuit. *See Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992) ("The most crucial question . . . is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." (ellipses in original) (internal quotations omitted)). Consistent with the Supreme Court's mandate, the Ninth Circuit has explained that "this first factor does not focus on whether a possible judgment against the entity would 'impact the state treasury.' Rather, 'the relevant inquiry is whether [the state] will be *legally required* to satisfy any monetary judgment obtains against the [entity].'" *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1182 (9th Cir. 2003). Thus, the Ninth Circuit holds that even if the entity's funds primarily come from the state, unless a judgment can be enforced directly against the state, this factor will not support a finding of immunity. *Id.* at 1182-85.

Respondent contends that this element is met because the judgment would be satisfied out of the Port Revenue Fund; and, according to Respondent, the moneys in the Port Revenue Fund "are the property of the State of California." (Motion to Dismiss at 26-27). As explained above, however, the tidelands property was conveyed to the City in fee simple. While the conveyance was subject to certain conditions, the State did not retain any ownership interest in

[17] We also believe that *Hanson* and *Mosler* misconstrued *The City of Los Angeles v. Pacific Coast Steamship Co.*, 45 Cal. App. 15 (Dist. Ct. App. 1919). That case simply held that the City held the tidelands in a governmental rather than propriety capacity because it was administering the "public trust." *Id.* at *17-18. In referring to the City as "one of the subordinate governmental agencies of the state," the court was merely referring to the City's status as a municipality and political subdivision of the state. Municipalities and political subdivisions are, of course, governmental. But, as local governments they are not arms of the state.

the property. Moreover, the State does not have any control over the use of the Port Revenue Fund as required by *Belanger*, 963 F.2d at 252; *see also Beentjes*, 397 F.3d at 780 ("In *Belanger,* it was the fact that 'the state controlled the budget and would be required to make up any budgetary shortfalls' that made the state treasury vulnerable.").

b. Whether the entity performs central governmental functions

Under this factor, the Ninth Circuit considers not only whether the entity's functions are "a matter of statewide rather than local or municipal concern," but also "the extent to which the state exercises centralized governmental control over the entity." *Beentjes*, 397 F.3d at 782 (*citing Belanger,* 963 F.2d at 253, and *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1044 (9th Cir. 2003). There is no centralized state control over the operations of the Port Department. Resolution of this factor is accordingly straightforward. The activities and role of the Port of Oakland are analogous to the air pollution control districts addressed in *Beentjes.* There the court held that "although the prevention or air pollution is a matter of statewide concern, air pollution control districts perform primarily local governmental functions." *Beentjes*, 397 F.3d at 782. The court further explained that:

> In light of the decentralized structure of air quality enforcement in California, as well as the degree of autonomy enjoyed by local air pollution control districts, we agree with the district court that "while districts derive their authority from the State, they are granted wide latitude to conduct their affairs as they see fit, so long as they maintain standards at least as stringent as those adopted by the State." In short, the District does not perform a central governmental function and this second prong of the *Mitchell* test favors a finding that the District is not an arm of the state.

Id. at 783-84. Similarly, while the port system as a whole is important to the State of California, the Port Department itself solely performs local government functions. The Port Department's operations are not connected in any way to the State. The City, through the Port Department, is

free to conduct the Port's affairs as it sees fit subject only to the conditions set forth in the statutory grants. Under the Ninth Circuit's analysis, this factor would accordingly weigh against a finding of immunity.

c. Whether the entity may sue or be sued

The Ninth Circuit looks next at whether the entity may sue or be sued in its own name or only in the name of the State. The Port Department can only sue or be sued in the name of the City. This accordingly militates in favor of a finding that the entity is more like a municipality than an arm of the state, and that it accordingly is not entitled to immunity.

d. Whether the entity has the power to take property in its own name or only the name of the state

The Port Department does not have the power to take property in the name of the State. It may only hold property in the name of the City. As with the factor above, analysis of this factor supports a finding of no immunity. Moreover, there is no support for Respondent's contention that the Port Department has no existence or ability to exercise eminent domain "except as a trustee" of the tidelands. First, the Port Department was created by the City and has such powers as may be delegated by the City. Its role is not limited in any way by the tidelands grant. The City is certainly free to own land that is outside the scope of the tidelands grant and it is likewise free to delegate authority over such land to the Port Department, which it has done. *See* Charter, Art. VII, § 706(3) (granting the Port Department authority over certain City properties *including* the tidelands granted by the State); § 706(15) (granting the Port Department authority to acquire property on behalf of the City); § 706(19) (granting the Port Department authority to exercise eminent domain in the name of the City). There would be no reason to give the Port Department authority to exercise eminent domain, or otherwise acquire property on

behalf of the City, if such power was limited to the tidelands that have already been conveyed to the City by the State.

Because the Port Department holds property and exercises eminent domain only in the name of the City and not in the name of the State, this factor weighs against a finding of immunity.

e. The corporate status of the entity

Like the school district at issue in *Holz*, the Port Department and the City of Oakland "are one and the same thing so far as corporate status is considered." *Holz*, 347 F.3d 1188. Since the Port Department is a component agency of the City of Oakland, which is a municipal corporation, the Port Department is likewise considered a municipal corporation and not a state agency or instrumentality. As such, this factor weighs against a finding of immunity.

3. D.C. Circuit

a. The State's Intent

To determine the State's intent, the D.C. Circuit looks at whether State law "expressly characterizes [the entity] as a governmental instrumentality rather than as a local governmental or non-governmental entity; whether [the entity] performs state governmental functions; whether [the entity] is treated as a governmental instrumentality for purposes of other [state] laws; and [the state's] representations in this case about [the entity's] status." *PRPA*, 531 F.3d at 874. In *PRPA*, the court examined the enabling statute enacted by Puerto Rico, which was treated as a state for Eleventh Amendment purposes. Here the Port Department was not created by the State, it was created by the City of Oakland through amendment to the City Charter. Since the State did not create the Port Department it cannot have intended for the Port Department to be an arm

of the state. If the intent of the City is considered, the Charter expresses a clear intent to create a "department" within the City government rather than a separate legal entity or an agency or instrumentality of the state. The Board is appointed by the City Council and the Commissioners must be residents of the City. The intent was clearly for the Port Department to be a local governmental entity.

The Port Department does not perform state governmental functions. It manages the Port of Oakland and serves as a landlord for port tenants such as SSAT and PAOHT. In this respect its activities are largely proprietary in nature. As discussed above, *Hess* determined that such functions cannot readily be classified as state rather than local functions. Moreover, the jurisdiction of the Port Department is limited to the local port area in the City of Oakland. In this respect its activities are local or at most regional. They certainly do not have statewide effect.

California law does not treat the Port Department as an instrumentality of the state and the State has not made any representations regarding the status of the Port Department in this case. These elements accordingly also demonstrate a lack of intent to treat the Port Department as an arm of the state.

Based on all of these considerations it is quite clear that the State does not intend for the Port Department to share in its sovereign immunity. As the First Circuit pointed out in *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 63 (1st Cir. 2003), "[i]t would be every bit as much an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty." Here the State did not structure the entity at all and there is no reason whatsoever to believe that either the City or the State intended for the City Department to share in the State's sovereign rights.

b. State Control

The fact that the Port Department is controlled by the City and not the State is discussed above and will not be repeated. It does bear mentioning here, however, that the D.C. Circuit's primary consideration on this element is the manner in which the directors and officers are appointed. *See PRPA*, 531 F.3d at 877. As noted, the State has no role in appointing the Board of Port Commissioners. The Commissioners are nominated by the Mayor and appointed by the City Council. In conjunction with the other indicia of City control, the D.C. Circuit would definitively treat this element as weighing against sovereign immunity.

c. Financial Relationship

The D.C. Circuit looks not just at whether the state would be liable for the judgment in any particular case, but rather at the "State's overall responsibility for funding the entity or paying the entity's debts or judgments." *Id.* at 878. As explained above, the State does not fund the Port Department's activities and has no responsibility for the Port's debts or liabilities. As such, this factor weighs against a finding of immunity.

V. CONCLUSION

The City of Oakland, operating through the Board of Port Commissioners, is a municipal corporation, which, under well established Supreme Court precedent, is not entitled to share in a state's sovereign immunity. This is true even if it is accepted that the City's management of the Port of Oakland constitutes a slice of state power.

Moreover, the Port Department manages the Port of Oakland as an arm of the City of Oakland and not as an agent or arm of the State of California. The port facilities that are the subject of the complaint were conveyed to the City by the State in fee simple. Since the State

held the lands subject to a "public trust" and could only convey as much as it owned, the lands were conveyed with certain conditions attached. The State did not, however, retain any ownership interest in the land; and the State does not retain any authority or control over the land. While the State may act on behalf of the people of California to enforce the terms of the public trust, it may only do so through legislative action or litigation. It has no independent power to direct or control the actions of the City or the Port Department. Nor does the State have ownership interest in or control over the revenues generated by the Port of Oakland. As such, there is no basis to hold that the Port Department is an arm of the State of California.

For all of these reasons, SSAT respectfully requests that the motion to dismiss be denied.

Respectfully submitted,

Marc J. Fink
Anne E. Mickey
Heather M. Spring
Sher & Blackwell LLP
1850 M Street, N.W., Suite 900
Washington, D.C. 20036
Tel: (202) 463-2500
Fax: (202) 463-4950
Email: mfink@sherblackwell.com
Email: amickey@sherblackwell.com
Email: hspring@sherblackwell.com

Attorneys for SSA Terminals, LLC and SSA Terminals (Oakland), LLC

Of Counsel:
Joseph N. Mirkovich
Russell Mirkovich & Morrow
Suite 1280
One World Trade Center
Long Beach, CA 90831-1280
Tel: (562) 436-9911
Fax: (562) 436-1897
Email: jmirkovich@rumlaw.com

Dated: August 4, 2010

Exhibit 6

STAMP & RETURN

RECEIVED
2009 OCT 25 PM 1:1
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

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

COMPLAINANTS' REPLY TO RESPONDENT'S MOTION FOR A STAY OF PROCEEDINGS

Complainants SSA Terminals, LLC and SSA Terminals (Oakland), LLC ("SSAT") hereby reply to the Respondent The City of Oakland, Acting by and Through its Board of Port Commissioners' (the "City of Oakland" or the "City")[1] motion to stay the proceedings pending resolution of the City of Oakland's motion to dismiss on Eleventh Amendment grounds. As the moving party, the burden is on the City of Oakland to demonstrate that a stay in proceedings is required. As discussed in greater detail below, the City has failed to meet that burden. The motion is also directly contrary to the agreement of the parties and the Presiding Officer's Order

---

[1] Throughout these proceedings both parties have generally referred to the respondent as "the Port." SSAT has simply used this as a shorthand reference for the City of Oakland, Acting Through the Board of Port Commissioners. The respondent, however, refers to "the Port" as if it were a separate entity acting on its own and having an independent relationship with the State of California. This is not a proper characterization. Since SSAT does not want to suggest that "the Port" is anything other than the "City of Oakland" it will properly refer to the respondent herein as the "City of Oakland" or "the City."

of June 7, 2010. The timing and content of the motion strongly suggest that the City is using this filing as an opportunity to submit a reply to Complainants' Reply to Respondent's Motion to Dismiss ("SSAT's Reply Brief") in contravention of Commission Rule 74(a), 46 C.F.R. § 502.74(a). The City has not, however, provided any additional argument that alters the result and moreover, has not demonstrated that a stay is warranted.

1. Standard for a Stay

In determining whether a stay is appropriate, the Commission applies the four part test established in *Virginia Petroleum Jobbers Assoc'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958). *See Green Master Int'l Freight Services Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, Docket No. 01-10, 29 S.R.R. 1319, 1323 (FMC, 2003). The factors to be determined under the four-prong test are: (1) likelihood of success on the merits; (2) irreparable harm to the petitioner absent a stay; (3) substantial harm to other parties interested in the proceeding in the face of a stay; and (4) the public interest. *See id.*

The City of Oakland asserts that a different, less stringent, test may also be applicable. According to the City this alternative test substitutes a "frivolous" standard for the likelihood of success standard in the first consideration. Although the City refers to the second test as the "*Landis*" test, it actually appears to be derived from Judge Kline's decision in *South Carolina Maritime Services, Inc. v. South Carolina State Ports Auth.*, 28 S.R.R. 1489 (ALJ, 2000) and not from the Supreme Court's decision in *Landis v. North American Co.*, 299 U.S. 248 (1936). *Landis* addressed whether a case could be stayed pending the outcome of a different case involving the same issues but different parties. The Supreme Court held that such a stay could be appropriate but that courts must be careful to balance the equities on a case by case basis.

Landis did not set forth a specific test for determining whether a stay should be granted and did not find that a moving party must demonstrate that its position is "not frivolous or trivial." (Motion for Stay at 5). The "frivolous" language relied upon by the City actually comes from *South Carolina Maritime Services,* 28 S.R.R. at 1490 and *Carolina Marine Handling, Inc. v. South Carolina State Ports Auth.*, 28 S.R.R. 1595 (ALJ, 2000).[2] As Judge Guthridge explained in *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, 30 S.R.R. 1324 (ALJ, 2007), these two South Carolina cases departed from Commission's use of the *Virginia Petroleum Jobbers* standard and are not binding precedent. *See id.* at 1333 (citing *Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000); *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991). The Commission has consistently followed *Virginia Petroleum Jobbers* and that standard must be used here.

2 Application of the *Virginia Petroleum Jobbers* Factors

a. Likelihood of Success on the Merits

The Respondent in this case is the City of Oakland. Since the Respondent is a municipality, it is black letter law that it is not an arm of the state. *See, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he [Supreme] Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"); *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("[sovereign] immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity

[2] Both cases cited to *United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) for the frivolous standard. *Dunbar* was a criminal case and the holding was limited to stays pending appeal of denied double jeopardy motions. As such it has no applicability here.

which is not an arm of the State."); *Mt. Healthy City Brd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("cities and counties do not enjoy Eleventh Amendment immunity"); *Brd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 (2000) ("the Eleventh Amendment does not extend its immunity to units of local government."); *City of Long Beach v. Metcalf*, 103 F.2d 483, 485 (9th Cir. 1939) ("the state's constitutional immunity from suit does not extend to [municipal] corporations."); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 777-78 (9th Cir. 2005) ("The decision to extend sovereign immunity to a public entity turns on whether the entity 'is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.'").

Though this principle is well established and unassailable, the City of Oakland nevertheless contends that it is entitled to sovereign immunity when it operates the port. In this respect, the City's argument is identical to Chatham County's claim that even though it was a county not generally entitled to sovereign immunity, it was an acting as an arm of the state of Georgia when it operated a drawbridge over tidelands pursuant to delegated state authority. The Supreme Court squarely rejected Chatham County's claim, confirming once again that political subdivisions such as cities and counties are not arms of the state even when they are exercising authorities delegated by the state. *See N. Ins. Co. of New York v. Chatham Cty., Ga.*, 547 U.S. 1689 (2006).

This also disposes of the City's suggestion that it is entitled to immunity on an agency theory. In support of this contention the City of Oakland relies upon a supposed second D.C. Circuit test. (Motion to Stay at 10). The D.C. Circuit did mention in dicta that there may be circumstances in which an entity that is not an arm of the state could nevertheless be immune if it was acting as an agent of the state. *Puerto Rico Ports. Auth. v. Fed'l Maritime Comm'n*, 531 F.3d 868, 879 (D.C. Cir. 2008). The court did not elaborate on this statement, but it seems clear that it was referring to a situation where the actions giving rise to the claim were taken under the specific direction of the state. Any other understanding would be contrary to *Chatham*, and would further be at odds with the D.C. Circuit's own admonition that "an entity either is or is not an arm of the State." *Id.* at 873. Indeed it is impossible to reconcile the City's position regarding its dual status with the D.C. Circuit's holding that:

> The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors. Rather, once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity.

Id. at 873. The simple fact is that the City of Oakland is not an arm of the state for any purpose. As such, it is not entitled to sovereign immunity.

In addressing the likelihood of success on the merits, the City of Oakland completely disregards this well established law and jumps right into the arm of the state analysis. Additionally, as it did in the original motion, it applies the arm of the state analysis to the Port Department as if it were a separate entity rather than to the City of Oakland as a whole. As explained in SSAT's Reply Brief, the Port Department is not a separate entity and was not the recipient of the tidelands grant. As such, it is not appropriate to separately analyze the Port Department under the multipart tests established by the Commission or the various circuits.

Even if the tests are applied for the sake of argument, however, it is clear that the Port Department is controlled by the City of Oakland and is not controlled by the State of California. A detailed analysis of the "control" issue is set forth in SSAT's Reply Brief at pages 14-17, 25-26, and 29, and will not be repeated here. It is, however, important to note that the discussion in the Reply Brief is not altered in any way by the new California Public Resources Code § 6009 as the City contends.

On October 5, 2010, the City of Oakland filed a Statement of Supplemental Authority to bring to the Presiding Officer's attention a new § 6009 that has been added to the California Public Resources Code. Although the statement was filed "without argument," the City used its stay motion as a platform for submitting argument on the new provision. Section 6009 by its explicit terms does not change existing law. Cal. Sen. Bill No. 1350, Sec. 4. As such, all of the cases set forth in SSAT's Reply Brief, including those describing the nature and effect of the tidelands grant (*see* SSAT Reply Br. at 5-8), remain good law. There is no reason for further argument. In any event the pronouncements in § 6009 are quite limited and are in every respect consistent with the arguments set forth in SSAT's Reply Brief.

Section 6009 contains five subsections, each of which simply restate an accepted tidelands trust principle. Paragraph (a) explains that California obtained title to the tidelands, subject to the public trust upon its admission to the United States. Paragraph (b) confirms that so long as the State is acting within the terms of the public trust, its right to control, regulate, and utilize *its* tidelands is absolute. The use of the word "its" limits this clause to the tidelands still owned by the State. As discussed in SSAT's Reply Brief (p. 5-8), "all right, title and interest" in the tidelands on which the Port of Oakland sits were granted to the City of Oakland in 1911 and 1938. *See* Statutes 1911, Ch. 657; Statutes 1931, Ch. 621. The grant has consistently been held

to be a grant in fee simple subject only to the trust conditions. *See, e.g., City of Long Beach v. Marshall,* 11 Cal.2d 609, 613-14 (Cal. 1938); *State Lands Comm'n v. City of Long Beach*, 200 Cal. App. 2d 609, 614 (Cal. Dist. Ct. App. 1962); *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 338 (N.D. Cal. 1986).

In contrast to the "absolute" language of paragraph (b), paragraph (c) provides that the State Lands Commission ("SLC") simply retains "oversight" authority over tidelands that have been granted to local municipalities.[3] The distinction between granted and ungranted lands in paragraphs (b) and (c) mirrors, and is entirely consistent with, existing Public Resources Code § 6301, which provides for the SLC to only have exclusive jurisdiction over *ungranted* tidelands. With respect to *granted* tidelands, § 6301 provides that the SLC may only exercise whatever jurisdiction and authority may remain with the state. New § 6009 confirms that this is solely oversight authority.

As discussed in SSAT's Reply Brief, the oversight authority consists solely of monitoring whether the grantees are using the granted tidelands in accordance with the public trust conditions. The SLC does not directly manage the use of the lands. It cannot direct or veto the actions of the municipality. The only power the SLC has is to notify the City of Oakland of any perceived violation of the trust purposes, report the alleged violations to the state legislature, or bring a legal action to halt the project. *See* Public Trust Policy for the Cal. State Lands Comm'n at 3; Motion to Dismiss at 11.

Even if paragraph (b) was deemed to apply to the granted tidelands, ultimate state control over the granted lands is not the type of control considered in the arm of the state analysis:

---

[3] Moreover, there is no reference to the Port Department as an independent entity as the City contends (Motion for Stay at 8). Rather it is clear that to the extent that there is any state/local relationship in connection with the tidelands, the relationship is between the state and the municipal grantee (the City of Oakland), not a particular department within the City.

> [U]ltimate control of every state created entity resides with the State, for the State may destroy or reshape any unit it creates. 'Political subdivisions exist solely at the whim and behest of their State,' yet cities and counties do not enjoy Eleventh Amendment immunity.

Hess, 513 U.S. at 47 (internal citations and brackets omitted). It is undisputed that the only way the State of California can impose its will on the City of Oakland is through the passage of legislation or through litigation. *See, e.g.,* Public Trust Policy for the California State Lands Comm'n, at 3, (SSAT Reply Br., Ex. E); Motion to Dismiss at 11 (admitting that the State's only remedy if it believes the grant conditions are not being met is to sue the City). There is no question that general control and management of the tidelands has been transferred to and resides with the City of Oakland. Thus, even if the State's ability to alter the terms of the tidelands trust through legislation may be deemed ultimate control, under the precepts of *Hess*, such control does not translate to arm of the state status.

Paragraph (d) provides that the municipal grantees are required to manage tidelands in a manner consistent with the public trust. As noted above, this fact is not in dispute. Additionally, this paragraph again confirms that it is the grantees that manage the lands, not the state.

Paragraph (e) provides that the "purposes and uses of tidelands and submerged lands is a statewide concern." Again, the purpose of the public trust is to use the tidelands in a manner that benefits all of the people of the state. That is not in dispute. With that said, however, the State of California determined that it was in the interest of all of the people of the State of California for the City of Oakland to build and operate a commercial port on the tidelands. So long as the City utilizes the lands and the revenues derived from the lands in furtherance of the port (as opposed to using port funds for purely local benefit) it is satisfying its trust obligations. The actual day-to-day operations of the port do not, however, necessarily have to benefit all of the people of the State of California. If they did, the City through the Port Department would be

forced to consider the statewide effect of every business decision it makes. Surely when the Port Department seeks to draw business from the Ports of Long Beach or Los Angeles it does not first balance the interests of all the people in the state. To the contrary, the Port Department seeks to develop and operate the port in a manner that best serves the City of Oakland and its residents. That is why members of the board are required to be residents of the City. There is no question that the Port Department significantly addresses local concerns.

The City of Oakland also argues that § 6009 supports its argument that revenues derived from the operation of the port are owned by the State and that any judgment against the City in connection with the port would accordingly by paid by the State. There is, however, nothing whatsoever in § 6009 to support this contention. To the contrary, as explained SSAT's Reply Brief, revenues derived from the operation of the port are subject to the conditions of the tidelands trust, but they are otherwise owned, managed, and controlled entirely by the City of Oakland. The City has provided no evidence that the State has any right to access, use, or direct the use of port revenues. The City has further provided nothing to support the notion that the State is legally obligated to pay any judgment relating to the port. Absent such a legal requirement, there is no basis to assert that the State treasury is at risk. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997).

For all of these reasons, and all of the reasons set forth in SSAT's Reply Brief, SSAT respectfully asserts that the City of Oakland has little likelihood of success on the merits.

b. Irreparable Harm to the City of Oakland

The City of Oakland asserts that it will be irreparably harmed if the proceedings are not stayed because its immunity defense will effectively be forfeited if it is forced to defend the claim pending resolution of the motion. The City contends that it will suffer both Constitutional and financial harms.

This argument is outrageous for a number of reasons. First, the City did not file a pre-answer motion to dismiss. To the contrary, it raised sovereign immunity as an affirmative defense, but otherwise proceeded to litigate. It filed an answer, served discovery requests, and served initial responses to SSAT's discovery requests. Although it continuously threatened to move for dismissal on sovereign immunity grounds, it did not do so until given a specific deadline by the Presiding Officer. The motion was ultimately filed seven months after commencement of the litigation. The City's belated claim that participating in this case is an affront to its alleged sovereignty is accordingly not believable.

In addition, the City of Oakland specifically agreed to continue with discovery after it filed the motion to dismiss. That agreement was reflected in the joint status report filed by the parties on June 3, 2010, as well as the Presiding Officer's scheduling order of June 7, 2010. Certainly the City was aware of the scope and costs of discovery at that time. Nothing has changed to justify its reversal of position. Given this fact as well as the timing and content of the motion to stay, it seems that the City's flip flop stems more from its desire to supplement the record with additional argument than it does from any concern about an affront to its sovereign dignity.

This factor accordingly weighs against a stay.

c. Substantial Harm to SSAT

SSAT would be harmed by a delay in the proceedings. SSAT has a right to prompt resolution of its claim. *See* Commission Rule 1, 46 C.F.R. § 502.1. The City has already consistently dragged its feet in responding to SSAT's reasonable discovery requests and now that it is facing deadlines, it is seeking to delay things further. This case already has complicated facts and voluminous time consuming document review. If work stops on the document review as the result of a stay, the efficient resolution of this claim will be seriously impeded.[4]

d. Public Interest

The City contends that the public interest favors a stay because its constitutional rights would be violated in the absence of a stay. This argument fails for the all of the reasons discussed above in connection with the City's alleged irreparable harm.

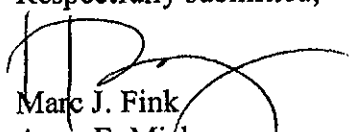
The public interest favors efficient resolution of proceedings. A stay will only lengthen the process and deny SSAT a fair and prompt hearing of its complaint. Moreover, SSAT is not only seeking reparations, it is seeking a cease and desist order. As long as the case continues, the City will continue to violate the Shipping Act to the detriment of SSAT and potentially others. It is not in the public interest for Shipping Act violations to continue in this manner.

[4] It already appears that the existing deadlines will need to be extended in light of the pending motion to compel (which has delayed work on SSAT's expert reports and damages calculations) and pending request for issuance of a third party subpoena.

CONCLUSION

For all of the reasons discussed herein, SSAT respectfully requests that the City of Oakland's motion for a stay of the proceedings be denied.

Respectfully submitted,



Marc J. Fink
Anne E. Mickey
Heather M. Spring
COZEN O'CONNOR
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
Tel: (202) 912-4800
Fax: (202) 912-4830
Email: mfink@sherblackwell.com
Email: amickey@sherblackwell.com
Email: hspring@sherblackwell.com

Attorneys for SSA Terminals, LLC and SSA Terminals (Oakland), LLC

Of Counsel:
Joseph N. Mirkovich
Russell Mirkovich & Morrow
Suite 1280
One World Trade Center
Long Beach, CA 90831-1280
Tel: (562) 436-9911
Fax: (562) 436-1897
Email: jmirkovich@rumlaw.com

Dated: October 25, 2010

Certificate of Service

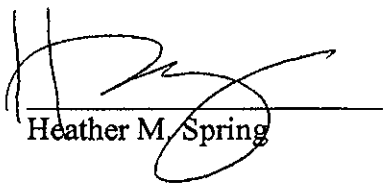
I hereby certify that a true and correct copy of Complainants' Reply to Respondent's Motion for a Stay of Proceedings was served on the following counsel by first class mail postage prepaid and by email on this 25th day of October, 2010:

Paul M. Heylman
Allison B. Newhart
Saul Ewing LLP
2600 Virginia Avenue, N.W.
Suite 1000
The Watergate
Washington, D.C. 20037

Counsel for Respondent

Matthew J. Thomas
Reed Smith LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005

Counsel for Ports America Outer Harbor Terminal, LLC



Heather M. Spring

Exhibit 7

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

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:

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[y]" 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

MINUTES ENTERED
11/05/01
COUNTY CLERK

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:

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

MINUTES ENTERED
11/05/01
COUNTY CLERK

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:

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.

MINUTES ENTERED
11/05/01
COUNTY CLERK

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

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:

MINUTES ENTERED
11/05/01
COUNTY CLERK

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

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

MINUTES ENTERED
11/05/01
COUNTY CLERK

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

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:

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 # (949) 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

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.

AUG 28 2003

ATTEST _____
JOHN A. CLARKE
Executive Officer/Clerk of the Superior
Court of California, County of Los Angeles.

By _____, Deputy

S. OCHOA

Exhibit 8

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA *ex rel* STATE OF CALIFORNIA, *ex rel* STANLEY D. MOSLER, Plaintiffs, v. CITY OF LOS ANGELES, et al., Defendants.	NO. CV 02-02278 SJO (RZx) **ORDER GRANTING IN PART AND DENYING IN PART JOINT DEFENSE MOTION FOR SUMMARY JUDGMENT ON JURISDICTIONAL AND IMMUNITY GROUNDS** [Docket No. 378]

This matter is before the Court on Defendants City of Los Angeles, City of Los Angeles Harbor Department, Port of Los Angeles, and Los Angeles Board of Harbor Commissioners (collectively, the "City Defendants"), Maersk Inc. and Maersk Pacific Limited, n/k/a APM Terminals Pacific Ltd. (collectively, "Maersk"), and Larry A. Keller 's (collectively, "Defendants") Motion for Summary Judgment on Jurisdictional and Immunity Grounds, filed January 20, 2009. Plaintiff and Relator Stanley D. Mosler filed an Opposition, to which Defendants replied. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for March 30, 2009. *See* Fed. R. Civ. P. 78(b). Because of the following reasons, Defendants' Motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

The Port of Los Angeles (the "Port") is a man-made harbor owned and operated by Defendant City of Los Angeles ("City"). In 1986, Congress passed the Water Resources Development Act of 1986, which authorized expansion of the Port, including the creation of an area known as "Pier 400." P.L. 99-662 § 201(b). The Act provided that the Federal Government (the "Government") would pay one half of the project's costs. *Id.* The Water Resources Development Acts of 1988 and 1990 provided that the Government could credit the Port for any expansion work it did that the Government later recommended and approved, or determined to be compatible with the project. P.L. 100-676 § 4(d); P.L. 101-640 § 102(c). In order to obtain these Government funds, the Port had to prepare a feasibility study and receive Government approval of it. P.L. 99-662 § 203.

In 1992, the Corps of Engineers and the Ports of Los Angeles and Long Beach issued a "Final Feasibility Report" ("FFR") regarding future uses of the Port. (FFR, filed as Rowse Decl. Ex. 2.) The FFR included a "2020 Plan" (the "Plan"), which stated its objectives as "accommodating future cargo throughput demands and ship requirements, reducing risks from hazardous cargo, and allowing for more efficient operations of existing terminals." (FFR IV-2.) The Plan called for "a new container terminal" on Pier 400" (FFR V-8), as well as "relocation of four [hazardous] facilities . . . to Pier 400" (FFR VIII-11). The Plan explicitly stated that costs for implementing the Plan would be apportioned between Federal and non-Federal interests as provided in the Water Resources Development Act of 1986. (FFR XIV-1.) In addition to the FFR, the Port created a Port Master Plan in 1980, and a Port Master Plan Amendment 12 ("Amendment 12") in 1992, which designated 195 acres of Pier 400 for the relocation of liquid bulk facilities. (Amendment 12, filed as Mosler Decl. Ex. 111, 10.)

In 1995, the City entered into a "Credit Agreement" ("CA") with the Department of the Army (the "Army"), which provided that the City would advance the costs of implementing the first stage of the "Authorized Project" and the Army would credit the City for work it performed against the non-Federal share of the cost of the Authorized Project. (CA, filed as Mosler Decl. Ex. 11, 2.) In 1997, the City executed a Project Cooperation Agreement ("PCA") with the Army which provided

that the Army would use Federal and City funds to implement the second stage of the Authorized Project. (PCA, filed as Mosler Decl. Ex. 12.) Both the CA and the PCA define the "Authorized Project" as "the recommended plan of improvements generally described in the [Plan], dated September 1992, and subsequently modified August 1993, and approved by the Chief of Engineers on November 24,1993, and as modified and approved by the Secretary on January 26, 1994." (CA 2; PCA 4.) The CA and PCA both list the specific improvements and modifications of which the Approved Project consists, including creating 599 acres of Pier 400 land in five stages. (CA 3-4; PCA 4-6.)

In 2000, the City entered into a long-term lease with Maersk for approximately 485 acres of Pier 400, which is currently used primarily as a container terminal ("Maersk Container Terminal"). (Maersk Mem. Understanding, filed as Rowse Decl. Ex. 3, Ex. B; Term Permit from City to Maersk, filed as Mosler Decl. Ex. 112, 1033.)

Based on the change in use of Pier 400, Mosler brought suit in 2002 against Defendants under the *qui tam* provisions of the False Claims Act (the "FCA") and the California False Claims Act)the "CFCA"), which permits individuals known as "relators" to file suit on behalf of the United States seeking damages from persons who file false claims for federal funds. 31 U.S.C. § 3730(b)(1); Cal Gov. Code § 12652(c)(1). Mosler argues that Defendants fraudulently requested payment of a federal grant and expenditure of Harbor Revenue Funds, because the funds were explicitly authorized for liquid bulk facilities relocation, while Defendants new they would be used for the Maersk Container Terminal instead. Mosler further contends that Defendants were required to obtain Congress' approval for this material change to the Authorized Project.

Mosler also avers that Defendants' construction and use of the Maersk Container Terminal is an unauthorized and unlawful invasion of the United States' navigational servitude, in violation of the Water Resources Development Act, the Federal Rivers & Harbors Act of 1899, 33 U.S.C. §§ 403, 408, and the Army Corps of Engineers regulations, as well as California law governing state waterways. In addition, Mosler alleges Defendants' actions regarding Pier 400 are an invasion of California's navigational servitude. *See* Cal. Const. Art X, § 4; *Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.*, 67 Cal. 2d 408, 416 (1967). Lastly, he claims the Maersk

Container Terminal violates Amendment 12, which specified that 195 acres of Pier 400 would be used for liquid bulk facilities relocation.

Defendants now move for summary judgment on the grounds that: (1) this Court lacks subject matter jurisdiction over Mosler's claims; and (2) City Defendants and Keller are immune from claims under the FCA and the CFCA.[1]

II. DISCUSSION

Summary judgment is proper only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A "material" fact is one that could affect the outcome of the case, and an issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the Court views the evidence in the light most favorable to the non-moving party. *Id.* at 255. In addition, "simply because the facts are undisputed does not make summary judgment appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the undisputed facts, summary judgment is improper." *Miller v. Glen Miller Prods.*, 318 F. Supp. 2d 923, 932 (C.D. Cal. 2004).

A. The Court Has Subject Matter Jurisdiction Over Mosler's Claims Because There Was No Public Disclosure.

Under both the FCA and the CFCA, courts lack subject matter jurisdiction over qui tam actions that are "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a [government] report, hearing, audit, or investigation, or from the news media, unless the action is brought by . . . the person [who] is an original source of the information." 31 U.S.C. § 3730(e)(4)(A); Cal Gov. Code § 12652(d)(3)(A). The FCA defines "original source" as "an individual who has direct and independent knowledge of the information

---

[1] Pursuant to the Court's November 17, 2008 order, Defendants move for summary judgment on jurisdictional and immunity grounds only, reserving their right to raise additional grounds in a later motion if the case proceeds past this stage.

on which the allegations are based and has voluntarily provided the information to the Government before filing an action under [31 U.S.C. § 3730] which is based on the information." 31 U.S.C. § 3730(e)(4)(B). The CFCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit or report that led to the public disclosure." Cal. Gov. Code. § 12652(d)(3)(B). Because the CFCA is "patterned on" the FCA, "federal decisions are persuasive on the meaning of the [CFCA]." *Laraway v. Sutro & Co.*, 96 Cal. App. 4th 266, 274-275 (Cal. Ct. App. 2002).

"The analysis under 31 U.S.C. § 3730(e)(4) is two-pronged. First, the Court must determine whether, at the time the complaint in question was filed, there had been a 'public disclosure' of the 'allegations or transactions' upon which the action is based. If this first question is answered in the negative, the Court has subject matter jurisdiction and does not proceed to the second step. On the other hand, if it is answered in the affirmative, the Court must determine whether the relator was 'an original source of the information.' Only if the relator was an 'original source' may a court exercise jurisdiction over a case brought under the FCA that is based upon publicly disclosed information." *United States ex rel. Longstaffe v. Litton Indus.*, 296 F. Supp. 2d 1187, 1191 (C.D. Cal. 2003) (citing *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419-20 (9th Cir. 1992); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 411 (9th Cir. 1993)). The "twin goals" of this jurisdictional bar are "rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *United States v. Catholic Healthcare W.*, 445 F.3d 1147, 1154 (9th Cir. 2006). Mosler "must establish subject matter jurisdiction by a 'preponderance of the evidence,' using 'competent proof.'" *Litton Indus.*, 296 F. Supp. 2d at 1190 (citing *United States v. Alcan Elec. Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

The "public disclosure" requirement is met if: "(1) there has been a 'public disclosure'; (2) of 'allegations or transactions'; (3) 'in a [government] report, hearing, audit, or investigation, or from

the news media;' and (4) the relator's action is 'based on that public disclosure.'" *Id.* at 1191-92 (citing *United States ex rel. Lindenthal v. Gen. Dynamics Corp.*, 61 F.3d 1402, 1409 (9th Cir. 1995). "A FCA complaint is 'based upon' publicly disclosed allegations if it is 'substantially similar' to publicly disclosed allegations. In other words, the public disclosures must contain 'enough information to enable the Government to pursue an investigation against [the defendants]." *United States ex rel. Hansen v. Cargill, Inc.*, 107 F. Supp. 2d 1172, 1177 (N.D. Cal. 2000) (citing *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1032 (9th Cir. 1998); *Alcan Elec. Eng'g, Inc.*, 197 F.3d at 1018). The publicly disclosed information need not include explicit allegations of fraud to constitute public disclosure. *Id.*

In analyzing whether the transactions underlying a relator's complaint were publicly disclosed, the Ninth Circuit applies the "X + Y = Z" test, which provides: "If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed." *United States ex rel. Found. Aiding the Elderly v. Horizon W.*, No. 99-17539, 2001 U.S. App. LEXIS 27363, at * 7-8 (9th Cir. Sept. 13, 2001) (quoting *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994)). "In a fraud case, X and Y inevitably stand for but two elements: 'a misrepresented state of facts and a true state of facts.'" *Id.* (quoting *Quinn*, 14 F.3d at 655).

In the instant action, Mosler states that "Z" is "Defendants' request for payment of the federal grant and expenditure of Harbor Revenue Funds knowing that the promised benefits of the Authorized Project would not be obtained because the project would instead be constructed and operated as the Maersk Container Terminal" (Rel.'s Opp'n 11.) It follows that "X," the misrepresented state of facts, is Defendants' alleged statements that the funds would be used for bulk liquid facilities relocation. While all parties agree on "X," Defendants contend that "Y" is the current, actual use of Pier 400 as the Maersk Container Terminal, while Mosler argues that "Y" is that Defendants never obtained Congressional approval for the change in use of Pier 400. Pursuant to Mosler's stated "Z" and "X," it appears that "Y," the true state of facts, would be that Defendants never intended to use Pier 400 for liquid bulk facilities relocation.

As Defendants point out and Mosler fails to rebut, the originally planned use of Pier 400 for liquid bulk facilities relocation, and the change in use to the Maersk Cargo terminal, were the subject of multiple journal and newspaper articles. (*See, e.g.*, June 1992, Aug. 1997, Aug. 1998, Dec. 1998, Nov. 2000 *Journal of Commerce* articles, filed as Rowse Decl. Exs. 7-10, 15; May 1999, Oct. 1999 *Daily News* articles, filed as Rowse Decl. Exs. 11, 13; Oct. 1999, Nov. 2001 *Los Angeles Times* articles, filed as Rowse Decl. Ex. 12, 16; Sept. 2001, Oct. 2001 *Daily Breeze* articles, filed as Rowse Decl. Exs. 17-18.) However, Defendants provide no evidence that the allegation that Defendants never intended to use Pier 400 for liquid bulk relocation facilities was publicly disclosed. Accordingly, the Court finds there was no public disclosure of the allegations or transactions on which Mosler's claim is based.

Additionally, although Mosler doesn't frame his "Z" as Defendants' failure to obtain Congressional authorization for the change in Pier 400's use, he alleges that this is part of the fraud, and Defendants have provided no evidence that there was a public disclosure of Defendants' alleged misrepresentation that they had such approval, nor of the alleged true state of facts that they did not. Thus, under either view of Mosler's fraud allegations, there was no public disclosure, and the Court DENIES Defendants' Motion for Summary Judgment on this ground.

B. The City Defendants Are Immune from Suit Under Both the FCA and the CFCA.

1. The City Defendants Are Not "Persons" Within the Meaning of the FCA.

The FCA creates liability for "any person" who commits certain enumerated acts. 31 U.S.C. § 3729(a). The United States Supreme Court has held that the term "person" in the FCA does not "include States for purposes of qui tam liability" and thus the FCA "does not subject a State (or state agency) to liability." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-788 (2000). Likewise, entities that are acting as "arms of the state" are also immune from suit under the FCA. *See Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007) (explaining that courts "must interpret the term 'person' under § 3729 in a way that

avoids suits against 'state instrumentalities' that are effectively arms of the state immune from suit under the Eleventh Amendment").[2]

In deciding whether an entity is an arm of the state, the Ninth Circuit considers five factors: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central government 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 in the name of the state; and (5) the corporate status of the entity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 250-251 (9th Cir. 1992 (citing *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)). The most important factor of this test is whether a money judgment would be satisfied out of state funds, because "a plaintiff who successfully sued an arm of the state would have a judgment with the same effect as if it were rendered against the state." *United States ex re. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004). "To determine whether an entity is an arm of the state, courts look to the way state law treats the entity." *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991).

The City is the trustee of a tidelands trust, known as the Harbor Revenue Fund. The City holds these funds separately from other City funds. (Charter § 656, filed as Rowse Decl. Ex. 23.) These funds are held in trust for the benefit of the people of the state of California. (*See* Defs.' Uncontroverted Fact No. 8; Rel.'s Response); *see also City of Long Beach v. Morse*, 31 Cal. 2d 254, 258-262 (1947) (holding that the state legislature "specified purposes relating to the harbor that it deemed beneficial to the state as a whole and did not authorize the city . . . to use the corpus or the income of the trust for strictly local improvements"). Expenses from the Harbor Department, including litigation costs and judgments, are paid from the Harbor Revenue Fund. Charter § 656. A California superior court recently considered this very issue, and held that the

---

[2] Mosler contends that because courts look to Eleventh Amendment case law in determining what entities are "arms of the state" under the FCA, the Court should consolidate its analysis and hold that because the City Defendants allegedly waived their Eleventh Amendment immunity, the Court need not consider whether they are "persons" under the FCA. However, the Supreme Court has expressly held that the Eleventh Amendment inquiry and the "person" inquiry under FCA are separate, and that the statutory "person" inquiry must be resolved first. *See Vt. Agency of Nat'l Res.*, 529 U.S. at 779-780.

City, the Port, and the Board of Harbor Commissioners were "arms of the state" as tidelands trustee, because "payment of a judgment out of the Harbor Reserve Fund would be payment out of state funds within the meaning of *Belanger*." *Hanson v. Port of Los Angeles*, No. BC 221839, 8 (L.A. Super. Ct. 2001), filed as Rowse Decl. Ex. 24 (granting summary judgment in defendants' favor because they were arms of the state and thus entitled to sovereign immunity). Thus, the first and most important factor supports concluding that the City Defendants are arms of the state in this instance.

In addition, the City Defendants perform central government functions in "performing [their] obligations and duties under the legislation establishing the trust grant," which are "essentially governmental in their character." *Hanson*, No. BC 221839, 4, 8 (citing *City of Los Angeles v. Pac. Coast S.S. Co.*, 45 Cal. App. 15, 17-18 (Cal. Ct. App. 1919)). Weighing all of the *Belanger* factors, mindful that the first factor is the most important, the Court concludes, as did the *Hanson* court, that the City Defendants are arms of the state. Accordingly, they are not "persons" within the meaning of the FCA and thus are not subject to suit under it.[3]

2. The City Defendants Are Not "Persons" Within the Meaning of the CFCA.

Like the FCA, the CFCA also creates liability for "any person" who commits one of the acts listed in the statute. Cal. Govt. Code § 12651(a). The CFCA defines "person" as "any natural person, corporation, firm, association, organization, limited liability company, business or trust." Cal. Gov. Code § 12650(b)(5). The California Supreme Court has held that the legislature had "no intent to include school districts and other public and governmental agencies" in "the scope of the word 'person.'" *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1190 (2006). The *Wells* court noted that the original version of the bill that later became the CFCA "explicitly included, as covered 'persons,' 'any . . . district, county, city and county, city, the state, and any of the agencies and political subdivisions of these entities,'" *id.* at 1191 (citing Assembly Bill No. 1441, 1987-1988 Reg. Sess.), but that these terms were deleted from the final version. The *Wells*

---

[3] Because there is no statutory basis to hold the City Defendants liable under the FCA, the Court does not reach the issue of Eleventh Amendment immunity. *See Vt. Agency of Nat'l Res.*, 529 U.S. at 780.

court concluded based on the legislative history of the CFCA as well as the "traditional rule of statutory construction that, absent express words to the contrary, governmental agencies are not included within the general words of a statute," that "governmental agencies . . . may not be sued under [the CFCA]." *Id.* at 1193.

Federal courts must follow a state supreme court's interpretation of its own statute in the absence of extraordinary circumstances. *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986). If a state high court has not decided an issue, the federal court's task is to predict how the state high court would resolve it. *Id.* In light of the California Supreme Court's holding in *Wells*, the Court concludes that the City Defendants are not "persons" within the meaning of the CFCA, and thus are not subject to suit under it.

C. Keller Is Immune from Suit Under the FCA and the CFCA.

1. Keller Has Qualified Immunity Against Keller's FCA Claims Against Him.

Mosler argues Keller is subject to suit under the FCA and CFCA because "state officials, sued for damages in their individual capacities, are 'persons' within the meaning of 31 U.S.C. § 3729." *Stoner*, 502 F.3d at 1125. However, as the *Stoner* court explicitly noted, "of course, state employees sued under the FCA may be entitled to qualified immunity." *Id.* at n.3. Mosler does not address Defendants' assertion that Keller is entitled to qualified immunity.

Qualified immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). "When a qualified immunity defense is raised at the summary-judgment stage . . . plaintiffs must overcome a 'heavy two-part burden.' Plaintiffs must first establish that the facts adduced to date, viewed in the light most favorable to plaintiffs, show there was a violation of a statutory right. If plaintiffs can do so, they must then show the statutory right was clearly established." *United States ex rel. Burlbaw v. Orenduff*, 400 F. Supp. 2d 1276, 1281 (C.D.N.M. 2005) (internal citations omitted). In a FCA case, the plaintiff "must establish that the evidence, viewed in [his] favor, raises an issue of fact as to whether any defendant *knowingly* presented a false claim to the federal government." *Id.* at 1282. The FCA defines "knowingly" as having actual knowledge of certain information, acting in deliberate ignorance of the truth or falsity of the information, or acting in reckless disregard of the truth or

falsity of the information. 31 U.S.C. § 3729(b). "Therefore, the question becomes whether there is evidence that any defendant deliberately or recklessly, and falsely, submitted claims to the federal government. If there is such evidence, the court must reach the second part of the test, whether at the time defendants acted, it was clearly established that their actions violated the FCA." *Orenduff*, 400 F. Supp. 2d at 1282.

While Mosler does not address Defendants' qualified immunity argument in his Opposition, he states in his declaration that "Keller was aware of the requirements for the Authorized Project from the PCA and Feasibility Study, yet executed the PCA knowing that management would construct a mega-container terminal for Maersk rather than the Authorized Project." (Mosler Decl. ¶ 74.) He further declares that "Keller executed [the] Maersk lease on September 14, 2000 formalizing [an] agreement made in the fall of 1998." (Mosler Decl. ¶ 80.) He also cites a videotape of an August 7, 1998 ceremony at Pier 400 in which Keller states that "phase 2 . . will be the 350-acre container terminal, the world's largest, . . . our Pier 400 container terminal." (Mosler Decl. ¶36.) Lastly, Mosler states that "the Kellers had owned a house as joint tenants with Maersk," and goes on to discuss Keller's alleged conflict of interest in negotiating the Maersk lease because he was previously employed by Maersk. (Mosler Decl. ¶¶ 90, 92-97.) Keller states in his declaration that he "was not involved in any fashion in the preparation" of the FFR or the PCA, and that it "is and was always [his] understanding that the PCA and FFRA allowed for both container terminal and liquid facilities at Pier 400 and did not specify a specific use." (Keller Decl. ¶¶ 21-24.) Despite Mosler's assertions that his evidence demonstrates Keller's knowledge of the actual intended use of Pier 400 at the time he signed the PCA, Mosler's evidence only goes to Keller's knowledge in 1998 and later, not in March 1997 when Keller executed the PCA. Thus, Mosler has failed to "establish that the evidence, viewed in [his] favor, raises an issue of fact as to whether [Keller] *knowingly* presented a false claim to the federal government." *See Orenduff*, 400 F. Supp. 2d at 1282.

Even assuming Mosler's evidence supports an inference that Keller knew Pier 400's actual use when he executed the PCA, Mosler has presented insufficient evidence that this was a "clearly established" violation of the FCA. *See Id.* In support of his argument that Defendants

were required to use a specified portion of Pier 400 for liquid bulk facilities relocation, Mosler cites Amendment 12's statement that 195 acres of Pier 400 would be used for liquid bulk relocation. However, the PCA states only that Federal funding will go towards the "Authorized Project," which it defines as "the recommended plan of improvements generally described in the [Plan]." The PCA itself also lists the specific modifications and improvements which comprise it. Neither the Plan nor the PCA require Defendants to allocate a quantified portion of Pier 400 for bulk liquid relocation. Instead, the Plan states that Pier 400 will be used both for bulk liquid relocation and as a cargo terminal. (FFR VIII-11.) Morever, the Plan explicitly provides that "the actual requirements and designs [of Pier 400's terminals] will be based on future tenants of these terminals and their specific needs and operating goals which will likely require some differences from the module plans." (FFR IV-10.) Therefore, even if Keller knew that the majority of Pier 400 would be used as a cargo terminal when he executed the PCA, this was not a "clearly established" violation of the FCA.

Accordingly, Mosler has failed to meet his "heavy burden" to show that Keller is not entitled to qualified immunity. *See Orenduff*, 400 F. Supp. 2d at 1281. Thus Keller is immune from Mosler's claims against him under the FCA.

2. Keller Is Immune from Suit Under the CFCA.

California Government Code § 820.2 provides that "except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Cal. Gov. Code. § 820.2. "Discretion" refers to "basic policy" and "planning" choices, not "ministerial" or "operational" ones. *Caldwell v. Montoya*, 10 Cal. 4th 972, 980 (1995).

Mosler's allegations that Keller participated in seeking federal funding for the purported bulk liquid relocation use, while actually intending to use the funds for the Maersk Container Terminal, and that Keller had a role in converting the intended use, constitute planning choices, rather than ministerial ones, and thus properly fall under § 820.2. Mosler does not dispute this, but instead states only that this statute involves tort claims and is thus irrelevant to his CFCA claim. However,

as Defendants note, the California Supreme Court has expressly held that § 820.2 applies to common law claims as well as statutory ones, absent a "clear indication of legislative intent that immunity is withheld or withdrawn in the particular case." *Montoya*, 10 Cal. 4th at 986. The CFCA provides no indicia that the state legislature intended public officials to be subject to suit under it for their discretionary decisions. Accordingly, the Court rejects Mosler's claim that § 820.2 is irrelevant to his CFCA claim against Keller, and finds that Keller is indeed immune.

C. Maersk Is Subject to Liability Under Both the FCA and the CFCA.

Defendants argue that because the City Defendants and Keller are not legally capable of violating the FCA and the CFCA, Maersk, an alleged co-conspirator, cannot be liable either. (Defs.' Reply 10.) In response, Mosler states only that "even if its co-conspirators had sovereign immunity, Maersk would remain liable because this action involves FCA and CFCA subsections (a)(1), (a)(2), (a)(3), and (a)(7); [and] CFCA, (a)(8)." (Rel.'s Opp'n 23.)

FCA § 3729(a)(1) and CFCA § 12651(a)(1) create liability for "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, or the State of California, a false or fraudulent claim for payment of approval. FCA § 3729(a)(2) and CFCA § 12651(a)(2) create liability for "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." FCA § 3729(a)(7) and CFCA § 12651(a)(7) create liability for "knowingly mak[ing], us[ing] or caus[ing] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." In both his First Amended Complaint ("FAC") and his Opposition, Mosler fails to allege how Maersk committed any of these acts. Instead, he alleges that due to the changed use of Pier 400, "Maersk thereby improperly gained and will continue to gain the benefits of the project." (FAC ¶ 33.) Although Mosler states generally in his FAC that "Defendants" are liable for these acts, he offers no evidence that Maersk had any role in making fraudulent statements to the Government to obtain funding. Instead, the evidence he offers, which Defendants do not dispute, is that Maersk entered into a lease for property on Pier 400, which is now used as the Maersk Cargo Terminal.

CFCA § 12651(a)(8) creates liability for one who "is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim." Although Mosler alleges in his FAC that Maersk has "improperly gained and will continue to gain" as a result of the alleged false claims, he presents no evidence that Maersk ever learned of the false claim.

Defendants argue that the Court should enter summary judgment in Maersk's favor due to this lack of evidence. However, the limited issue before the Court is whether to grant summary judgment based on lack of subject matter jurisdiction or immunity, not to consider the merits of Mosler's allegations. Accordingly, Mosler's failure to provide sufficient evidence as to the substance of his claims against Maersk is not grounds for granting summary judgment at this time. Accordingly the Court DENIES Defendants' Motion for Summary Judgment on Mosler's FCA § 3729(a)(1), (a)(2), (a)(7), and CFCA § 12651(a)(1), (a)(2), (a)(7), and (a)(8) claims against Maersk.

Lastly, Mosler alleges Maersk is liable for conspiracy to submit false claims pursuant to FCA § 3729(a)(3) and CFCA § 12651(a)(3). These sections create liability for "conspir[ing] to defraud the Government by getting a false or fraudulent claim allowed or paid." General civil conspiracy principles apply to conspiracy claims under the FCA. *United states v. St. Luke's Subacute Hosp. & Nursing Ctr., Inc.*, No. 00-1976, 2004 U.S. Dist. LEXIS 25380, at *16 (N.D. Cal. Dec. 15, 2004). To be liable for general civil conspiracy or conspiracy under § 3729(a)(3), the plaintiff must show "that the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States." *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 639 n.3 (S.D. Tex. 2001) (internal citations omitted). "By its nature, tort liability presupposes that the coconspirator is legally capable of committing the tort, i.e., that he owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." *Mills v. Ramona Tire,* Inc., No. 07-0052, 2007 U.S. Dist. LEXIS 69623, at *20 (S.D. Cal. Sept. 20, 2007) (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511 (1994).

Here, the City Defendants and Keller are not legally capable of violating the FCA or the CFCA, because the City Defendants are not "persons" within the meaning of those statutes, and because Keller has qualified immunity as to Mosler's FCA claims and California Government Code § 820.2 immunity under as to Mosler's CFCA claims. Defendants argue that because the City Defendants and Keller cannot be liable for committing the alleged violations, Maersk cannot have conspired with them to do so. While Defendants are correct that a coconspirator must himself be legally capable of committing the alleged violation–and Defendants do not contest that Maersk is legally capable of violating the FCA and the CFCA–the fact that the remaining Defendants are immune from suit does not necessarily prevent Maersk from being subject to liability for conspiring with them.[4] Therefore, the Court DENIES Defendants' Motion for Summary Judgment on Mosler's FCA § 3729(a)(3) and CFCA § 12651(a)(3) claims against Maersk.

III. RULING

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' Joint Defense Motion for Summary Judgment. The Court sets a status conference for **Monday, May 11, 2009 @ 8:30am** for the parties that remain in the case.

IT IS SO ORDERED.

April 23, 2009

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

[4] The Court will address this issue after it is more fully developed by the parties in future briefing.

Exhibit 9

Westlaw

83 Cal.App.4th 1098, 100 Cal.Rptr.2d 289, 147 Ed. Law Rep. 224, 00 Cal. Daily Op. Serv. 8013, 2000 Daily Journal D.A.R. 10,595
(Cite as: 83 Cal.App.4th 1098)

NORMA KIRCHMANN, Plaintiff and Appellant,
v.
LAKE ELSINORE UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.
No. E026060.

Court of Appeal, Fourth District, Division 2, California.
Sept. 27, 2000.

SUMMARY

The trial court, in an action by a school district employee against the school district for a civil rights violation under 42 U.S.C. § 1983, sustained the district's demurrer on the ground the district was an arm of the state under U.S. Const., 11th A mend., criteria and analysis, and thus was immune from a suit alleging a violation of 42 U.S.C. § 1983. (Superior Court of Riverside County, No. 314830, Victor Miceli, Judge.)

The Court of Appeal affirmed. The court held that local governmental bodies such as cities and counties are considered persons subject to suit under 42 U.S.C. § 1983, but states and their instrumentalities are not. U.S. Const., 11th Amend., criteria and analysis for determining immunity was applicable even though the Eleventh Amendment only prohibits suits against states in federal court. If an entity enjoys Eleventh Amendment immunity, it is also immune from suit under § 1983, even in state court. California statutes and case law demonstrate the state's extensive responsibility for and involvement in the fiscal affairs of school districts, and thus, on balance, the criteria included in that category of factors favored treating the school district as an arm of the state. The factors relating to school districts' political status also, on balance, favored immunity. (Opinion by Richli, Acting P. J., with Ward and Gaut, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Civil Rights § 7.1--Federal Civil Rights Statute--State Immunity.
Local governmental bodies such as cities and counties are considered persons subject to suit under 42 U.S.C. § 1983, but states and their instrumentalities are not.

(2a, 2b, 2c) Civil Rights § 7.1--Federal Civil Rights Statute--State Immunity--Application to School District.
In an action by a school district employee against the school district for a civil rights violation under 42 U.S.C. § 1983, the trial court properly sustained the district's demurrer on the ground the district was an arm of the state under U.S. Const., 11th Amend., criteria and analysis, and thus was immune from suit. This analysis was applicable even though the Eleventh Amendment only prohibits suits against states in federal court. Under United States Supreme Court authority, if an entity enjoys Eleventh Amendment immunity, it is also immune from suit under § 1983, even in state court. California statutes and case law demonstrate the state's extensive responsibility for and involvement in the fiscal affairs of school districts, and thus, on balance, the criteria included in that category of factors favored treating the school district as an arm of the state. The factors relating to school districts' political status also, on balance, favored immunity. The enactment of the Tort Claims Act could not make school districts liable under § 1983 since they were not "persons" subject to such liability under federal law. The elements of, and defenses to, a federal cause of action are defined by federal law.
[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 707.]
(3a, 3b) Federal Courts § 2--Jurisdiction--Eleventh Amendment Immunity-- State Agencies.
The U.S. Const., 11th Amend., prohibition against federal courts hearing any suit in law or equity, commenced or prosecuted against one of the states,

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

encompasses not only actions in which a state is actually named as the defendant, but also certain actions against state agents and state instrumentalities. Whether a particular state agency has the same kind of independent status as a county or is instead an arm of the state, and therefore one of the United States within the meaning of the Eleventh Amendment, is a question of federal law. However a state court is not bound by lower federal court authority. Relevant factors in determining the issue include whether a money judgment against the entity would be satisfied out of state funds; the degree of funding the entity receives from the state; whether the entity has independent authority to raise funds; the extent of state control over the entity's fiscal affairs; whether the entity performs central governmental functions; whether the entity may sue, be sued, and hold property in its own name; the corporate status of the entity under state law; the degree of autonomy enjoyed by the entity; the entity's immunity from state taxation; and the geographic scope of the entity's operation.

COUNSEL

Donal M. Hill for Plaintiff and Appellant.

Walsh & Declues, Jeffrey P. Thompson and Gregory A. Wille for Defendant and Respondent Lake Elsinore Unified School District.

No appearance for Defendants and Respondents Keith McCarthy, Normand Tanguay, David Long, Jeanie Corral, Richard Jenkins, Vick Knight, Jeannine Martineau and Sonja Wilson.

RICHLI, Acting P. J.

The issue in this case is whether the Lake Elsinore Unified School District (the District) is immune from suit under title 42 United States Code section 1983 (hereafter section 1983) as an instrumentality of the State of California. As we will discuss, public education in California is "uniquely a fundamental concern of the State" (*Butt v. State of California* (1992) 4 Cal.4th 668, 685 [15 Cal.Rptr.2d 480, 842 P.2d 1240]), and "[t]he Constitution has always vested 'plenary' power over education not in the districts, but in the State ...." (*Id.*, at p. 688.) Therefore, in accordance with authority of the Ninth Circuit Court of Appeals holding that a California school district is an arm of the state for Eleventh Amendment purposes (*Belanger v. Madera Unified School Dist.* (9th Cir. 1992) 963 F.2d 248, 254), we will conclude the District does enjoy the state's immunity from liability under section 1983.

I. Factual and Procedural Background

The facts are set forth in detail in this court's previous decision in this case, *Kirchmann v. Lake Elsinore Unified School Dist.* (1997) 57 Cal.App.4th 595 [67 Cal.Rptr.2d 268]. Norma Kirchmann, an employee of the District, was suspended for 30 days after she anonymously communicated to bidders on a District construction management contract her view that a conflict of interest existed in the selection process. Kirchmann petitioned for a writ of mandate to overturn the suspension. This court concluded Kirchmann's communication was protected by the First Amendment, and the suspension therefore was improper. (*Id.*, at p. 614.)

Kirchmann then sued the District under section 1983. The District demurred, arguing it was an arm of the state and therefore immune from suit ***1101** under section 1983. The court sustained the demurrer, and Kirchmann appealed.

II. Discussion

A. *The Belanger Decision*

(1) Section 1983 provides, in relevant part, that "[e]very person who ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...." Local governmental bodies such as cities and counties are considered "persons" subject to suit under section 1983. (*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 690-691 [98 S.Ct. 2018, 2035-2036, 56 L.Ed.2d 611].) States and their instrumentalities, on the other hand, are not. (*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 68-69 [109 S.Ct. 2304, 2311, 105 L.Ed.2d 45].)

(2a) To our knowledge, no previous decision has considered the precise question here, whether a California school district should be considered a local governmental body subject to suit under section 1983, or an instrumentality of the state exempt from suit. [FN1] In *Belanger v. Madera Unified School Dist.*, *supra*, 963 F.2d 248 (hereafter *Belanger*), however, the Ninth Circuit Court of Appeals considered a closely related question-whether a California school district was an arm of the state for purposes of the Eleventh Amendment.

> FN1 At least two reported California decisions have involved section 1983 claims against a school district or board, but neither court discussed whether a school district has immunity as a state instrumentality. (*Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598 [15 Cal.Rptr.2d 91]; *McDaniel v. Board of Education* (1996) 44 Cal.App.4th 1618 [52 Cal.Rptr.2d 448].)

(3a) The Eleventh Amendment prohibits federal courts from hearing "any suit in law or equity, commenced or prosecuted against one of the United States ...." The prohibition "encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." (*Regents of Univ. of Cal. v. Doe* (1997) 519 U.S. 425, 429 [117 S.Ct. 900, 903, 137 L.Ed.2d 55].) The *Belanger* court concluded the school district was an arm of the state, [FN2] and therefore enjoyed Eleventh Amendment immunity. The court noted that, ***1102** unlike school districts in most states, California districts were funded primarily by the state. This was attributable to two factors-first, the need to ensure equality of funding as required by *Serrano v. Priest* (1976) 18 Cal.3d 728 [135 Cal.Rptr. 345, 557 P.2d 929], and second, the limitations on local property tax revenues imposed by Proposition 13. Therefore, a judgment against the school district would be paid using state funds. (*Belanger*, *supra*, 963 F.2d at pp. 251-252.)

> FN2 We use the term "arm of the state" because that is the term typically employed in federal decisions considering whether a state entity is entitled to Eleventh Amendment immunity. (See, e.g., *Regents of Univ. of Cal. v. Doe*, *supra*, 519 U.S. 425, 429-430 [117 S.Ct. 900, 904]; *Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 280 [97 S.Ct. 568, 572, 50 L.Ed.2d 471].) The *Belanger* court used the terms "state agency" and "agent of the state." (*Belanger*, *supra*, 963 F.2d at pp. 250-254.) It has been suggested that the terms "state agency" and "arm of the state" may not be synonymous. (*Lynch v. San Francisco Housing Authority* (1997) 55 Cal.App.4th 527, 535 [65 Cal.Rptr.2d 620].) Because *Belanger* employed the same Eleventh Amendment analysis as the decisions which use the term "arm of the state," we do not consider the difference in nomenclature to be significant. We agree with the court in *Lynch v. San Francisco Housing Authority*, *supra*, that "[i]t is the relationship between the entity and the state, not the label attached to the entity," that determines whether the Eleventh Amendment applies. (55 Cal.App.4th at p. 536.)

In addition, the *Belanger* court noted, public education was a matter of statewide concern in California. The state exercised substantial control over school affairs and maintained beneficial ownership

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

of school district property. The California Supreme Court had described school districts as " 'agencies of the state for the local operation of the state school system.' " (*Belanger, supra,* 963 F.2d at p. 254, quoting *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179 [302 P.2d 574].)

Other Ninth Circuit decisions, and decisions of federal district courts in the Ninth Circuit, similarly have extended Eleventh Amendment immunity to a California county office of education (*Eaglesmith v. Ward* (9th Cir. 1995) 73 F.3d 857, 860); to California community college districts (*Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, 201; *Cerrato v. San Francisco Community College Dist.* (9th Cir. 1994) 26 F.3d 968, 972; *Wasson v. Sonoma County Jr. College Dist.* (N.D.Cal. 1997) 4 F.Supp.2d 893, 901-902; *Stones v. Los Angeles Community College Dist.* (C.D.Cal. 1983) 572 F.Supp. 1072, 1076-1078), and, under *Belanger*, to a city school district. (*Doe v. Petaluma City School Dist.* (N.D.Cal. 1993) 830 F.Supp. 1560, 1577.) At least one California court also has relied on *Belanger* for the proposition that a school district enjoys Eleventh Amendment immunity. (*Cutler-Orosi Unified School Dist. v. Tulare County School etc. Authority* (1994) 31 Cal.App.4th 617, 633 [37 Cal.Rptr.2d 106].)

The District contends that, since under *Belanger* a school district is an arm of the state for Eleventh Amendment purposes, it is an instrumentality of the state for purposes of section 1983 and hence immune from suit under that ***1103** statute. Kirchmann challenges this conclusion on two grounds. First, she argues the fact an entity may be entitled to Eleventh Amendment immunity does not necessarily mean it is immune from suit under section 1983. Second, she argues that, even if the Eleventh Amendment immunity analysis is applicable in determining immunity from suit under section 1983, *Belanger* was incorrect in concluding a California school district enjoys Eleventh Amendment protection.

B. *Applicability of Eleventh Amendment Analysis*

(2b) Kirchmann's first argument is relatively easy to answer. She contends that, because the Eleventh Amendment only prohibits suit against a state in *federal court*, Eleventh Amendment analysis does not control whether an entity can be sued in state court, even on a federal cause of action such as a section 1983 claim.

The fact that a claim against a state or its agency cannot be brought in federal court due to the Eleventh Amendment does not, of course, necessarily mean the claim cannot be asserted in state court either. Tort actions may be brought against the state or its agencies in state court under the California Tort Claims Act (Gov. Code, § 810 et seq.) but may not be brought in federal court, because the consent to suit contained in the act (Gov. Code, § 945) is not a waiver of Eleventh Amendment immunity. (*BV Engineering v. Univ. of Cal., Los Angeles* (9th Cir. 1988) 858 F.2d 1394, 1396; *Riggle v. State of Cal.* (9th Cir. 1978) 577 F.2d 579, 585-586.)

However, the analysis of the United States Supreme Court in *Will v. Michigan Dept. of State Police, supra,* 491 U.S. 58 (hereafter *Will*), and subsequent decisions construing *Will*, make clear that, if an entity enjoys Eleventh Amendment immunity, it is also immune from suit under section 1983, even in state court. The court in *Will* did state that the scope of the Eleventh Amendment and the scope of section 1983 were "[c]ertainly" separate issues. (*Will, supra,* at p. 66 [109 S.Ct. at p. 2310].) But in holding states immune from section 1983 suits, the court noted that section 1983 was enacted in response to the inability or unwillingness of state authorities to protect civil rights. Therefore, although Congress did not establish federal courts as the exclusive forum for section 1983 suits, it plainly intended federal courts to have " 'a paramount role' " in enforcing the statute. (*Will, supra,* at p. 66 [109 S.Ct. at p. 2309].)

In light of that fact, the *Will* court concluded the fact that Congress did not override states' Eleventh

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Amendment immunity against suit in federal court under section 1983 indicated it also did not intend states to be subject to suit in *state court* under section 1983: "Given that a principal purpose behind the ***1104** enactment of § 1983 w as to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983." (*Will, supra,* 491 U.S. at p. 66 [109 S.Ct. at p. 2310].)

From this reasoning it follows that, if an entity is not subject to suit under section 1983 in federal court because of the Eleventh Amendment, Congress presumably did not intend that it be subject to suit under section 1983 in state court either. Accordingly, numerous courts have concluded that, under *Will*, "states and 'governmental entities that are considered "arms of the State" for Eleventh Amendment purposes' are not 'persons' subject to liability under section 1983 *in any forum*." (*Lynch v. San Francisco Housing Authority, supra,* 55 Cal.App.4th 527, 532, italics added; see also *Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443 [because University of California "is an arm of the state under the Eleventh Amendment, it follows from *Will* that UC is not a 'person' within the meaning of § 1983 "]; *Simon v. State Compensation Ins. Authority* (Colo. 1997) 946 P.2d 1298, 1302 ["[U]nder *Will*, an Eleventh Amendment arm-of-the-state analysis must be applied to determine whether a state-created entity is a 'person' under § 1983 "] and decisions cited at p. 1302, fn. 5; *Brooks v. Center for Healthcare Services* (Tex.App. 1998) 981 S.W.2d 279, 284 [Under *Will*, "states and entities that may be characterized as arms of the state for purposes of the Eleventh Amendment may not be held liable under § 1983 "]; *Board of Trustees Hamilton v. Landry* (Ind.Ct.App. 1994) 638 N.E.2d 1261, 1263 [Indiana school corporation was not arm of state entitled to Eleventh Amendment immunity, and therefore was a " 'person' amenable to suit under Section 1983 "].) The United States Supreme Court similarly has stated albeit in dictum, that under *Will* "an entity with Eleventh Amendment immunity is not a 'person' within the meaning of § 1983." (*Howlett by and through Howlett v. Rose* (1990) 496 U.S. 356, 365, 381, fn. 24 [110 S.Ct. 2430, 2437, 2445, fn. 24, 110 L.Ed.2d 332] [declining to decide whether Florida school district is a "person" under § 1983].)

Kirchmann argues this analysis should not apply in California, because by enacting the Tort Claims Act the state has waived sovereign immunity against any and all statutory claims in state court actions, even if the Eleventh Amendment would not permit such a claim to be brought in federal court. She points to Government Code sections 815, which provides that a public entity is not liable for an injury "[e]xcept as otherwise provided by statute," and 811.2, which defines "statute" to include an act of Congress such as section 1983. ***1105**

Kirchmann overlooks the fact that whether an entity is a "person" subject to suit under section 1983 is a matter of *federal* law and is not affected by whether the entity has sovereign immunity under state law. The United States Supreme Court said in *Howlett by and through Howlett v. Rose, supra,* 496 U.S. 356 [110 S.Ct. 2430, 110 L.Ed.2d 332]: "The elements of, and the defenses to, a federal cause of action are defined by federal law. [Citations.] *A State may not, by statute or common law, create a cause of action under § 1983 against an entity whom Congress has not subjected to liability.* [Citation.] Since this Court has construed the word 'person' in § 1983 to exclude States, neither a federal court nor a state court may entertain a § 1983 action against such a defendant." (496 U.S. at pp. 375-376 [110 S.Ct. at pp. 2442-2443], italics added.)

Thus, California cannot, by enacting the California Tort Claims Act, make school districts liable under section 1983 if they are not "persons" subject to section 1983 liability under federal law. As *Will* and its progeny demonstrate, the answer to that

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

question depends on whether an entity is an arm of the state for Eleventh Amendment purposes.

We therefore apply an Eleventh Amendment analysis in deciding whether the District is subject to suit under section 1983.

C. *Whether the District Is an Arm of the State*

Kirchmann's second contention-that *Belanger* was incorrect in holding a California school district to be an arm of the state for Eleventh Amendment purposes-requires more extensive discussion.

1. *Applicable law*

(3b) "[T]he question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law." (*Regents of Univ. of Cal. v. Doe*, *supra*, 519 U.S. 425, 429, fn. 5 [117 S.Ct. 900, 904] (hereafter *Doe*).) Even on matters of federal law, of course, this court is not bound by lower federal court authority. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782-783 [67 Cal.Rptr.2d 357].) *Belanger* therefore does not necessarily control the present case. Instead, we must make an independent determination of federal law. (*Forsyth v. Jones*, *supra,* at pp. 782-783.)

Moreover, whether a state agency enjoys Eleventh Amendment immunity "can be answered only after considering the provisions of state law that define the agency's character." (*Doe*, *supra*, 519 U.S. 425, 429, fn. 5 [117 S.Ct. 900, 904].) Therefore, we also must consider state law in our analysis. ***1106**

2. *Relevant criteria*

"A uniform test for defining the class of entities that share in the state's Eleventh Amendment immunity has not yet developed." (*Lynch v. San Francisco Housing Authority*, *supra*, 55 Cal.App.4th 527, 533.) In general, however, the court must examine "the relationship between the State and the entity in question." (*Doe*, *supra*, 519 U.S. 425, 429 [117 S.Ct. 900, 904].)

Mt. Healthy City Board of Ed. v. Doyle, *supra*, 429 U.S. 274 (hereafter *Mt. Healthy*) is particularly relevant here because it involved a local school board. In *Mt. Healthy*, the court held an Ohio city school board did not enjoy Eleventh Amendment immunity, because the board was "more like a county or city than ... like an arm of the State." (*Id.*, at p. 280 [97 S.Ct. at p. 573].) It noted that under state law school districts were political subdivisions, and the state did not include political subdivisions. Furthermore, although the school board was subject to "some" guidance from the State Board of Education and received "a significant amount of money" from the state, it also had extensive powers to issue bonds and to levy taxes within certain restrictions. (*Id.*, at p. 280 [97 S.Ct. at p. 573].)

Recently, the court in *Lynch v. San Francisco Housing Authority*, *supra*, 55 Cal.App.4th 527 set forth the criteria that federal decisions have found to be relevant in determining whether a state entity should have Eleventh Amendment immunity: whether a money judgment against the entity would be satisfied out of state funds; the degree of funding the entity receives from the state; whether the entity has independent authority to raise funds; the extent of state control over the entity's fiscal affairs; whether the entity performs central governmental functions; whether the entity may sue, be sued, and hold property in its own name; the corporate status of the entity under state law; the degree of autonomy enjoyed by the entity; the entity's immunity from state taxation; and the geographic scope of the entity's operation. (*Id.*, at pp. 533-534 .)

(2c) We believe the criteria identified in *Lynch* usefully can be grouped into two broad categories. The first category, comprising the first four criteria, concerns the degree of state involvement in the entity's fiscal affairs. The second category, compris-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

ing the remaining six criteria, concerns the political status which state law affords the entity. We will organize our analysis around these two categories.

3. *Analysis*

We begin by noting that most courts after *Mt. Healthy* have declined to extend Eleventh Amendment immunity to local school districts and boards. ***1107** In 1990, the United States Supreme Court, citing *Mt. Healthy* but without further analysis, said: "[T]he Eleventh Amendment ... does not afford local school boards ... immunity from suit ...." (*Missouri v. Jenkins* (1990) 495 U.S. 33, 56, fn. 20 [110 S.Ct. 1651, 1665-1666, fn. 20, 109 L.Ed.2d 31].) Lower federal courts, and state courts, have reached the same conclusion. [FN3]

FN3 (See, e.g., *Narin v Lower Merion School Dist.* (3d Cir. 2000) 206 F.3d 323, 331, fn. 6 [Pennsylvania school district]; *Duke v. Grady Mun. Schools* (10th Cir. 1997) 127 F.3d 972, 981-982 [New Mexico school district and board]; *San Antonio School Dist. v. McKinney* (Tex. 1996) 936 S.W.2d 279, 284 [Texas school district]; *Doe v. Knox County Bd. of Educ.* (E.D.Ky. 1996) 918 F.Supp. 181, 183 [Kentucky county board of education]; *Green v. Clarendon County School Dist. Three* (D.S.C. 1996) 923 F.Supp. 829, 850 [South Carolina school district]; *Daddow v. Carlsbad Mun. School Dist.* (1995) 120 N.M. 97, 105-106 [898 P.2d 1235, 1243-1244] [New Mexico school board]; *Board of Trustees Hamilton v. Landry, supra,* 638 N.E.2d at p. 1266 [Indiana school corporation]; *Ambus v. Granite Bd. of Educ.* (10th Cir. 1993) 995 F.2d 992, 997 [Utah school district]; *Stewart v. Baldwin County Bd. of Educ.* (11th Cir. 1990) 908 F.2d 1499, 1511 [Alabama county board of education]; *Rosa R. v Connelly* (2d Cir. 1989) 889 F.2d 435, 437-438 [Connecticut school board]; *Fay v. South Colonie Cent. School Dist.* (2d Cir. 1986) 802 F.2d 21, 27-28 [New York school district]; *Gary A. v. New Trier High School Dist. No. 203* (7th Cir. 1986) 796 F.2d 940, 945 [Illinois school district and board]; *Minton v. St. Bernard Parish School Bd.* (5th Cir. 1986) 803 F.2d 129, 131-132 [Louisiana school board]; *Stoddard v. School Dist. No. 1, etc.* (10th Cir. 1979) 590 F.2d 829, 835 [Wyoming school district]; *Unified School Dist. No. 480 v. Epperson* (10th Cir. 1978) 583 F.2d 1118, 1123 [Kansas school district]; *Campbell v. Gadsden County Dist. School Bd.* (5th Cir. 1976) 534 F.2d 650, 655-656 [Florida school board]; *Adams v. Rankin County Bd. of Ed.* (5th Cir. 1975) 524 F.2d 928, 929 [Mississippi county school system]; but cf. *Hadley v. North Ark. Community Technical College* (8th Cir. 1996) 76 F.3d 1437, 1442 [community college was an arm of the state].)

These decisions, of course, are of limited assistance here, since they all involved school authorities in states other than California. Nonetheless, we will consider the discussion in these decisions to the extent it is relevant in determining whether *Belanger* correctly reached the opposite conclusion with respect to California school districts.

a. *Fiscal affairs*

Of the criteria included in our first broad category-the degree to which the state is involved in an entity's fiscal affairs-the one most often emphasized is the impact that a judgment against the entity would have on the state treasury. The Supreme Court in *Hess v. Port Authority Trans-Hudson Corporation* (1994) 513 U.S. 30 [115 S.Ct. 394, 130 L.Ed.2d 245] (hereafter *Hess*) noted, "... Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." (*Id.,* at p. 48 [115 S.Ct. at p. 404].) The court later noted that the "prevailing view" was that " 'whether any judgment must be

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

satisfied out of the state treasury' " was " 'the most important consideration' in resolving an ***1108** Eleventh Amendment immunity issue." (*Id.,* at p. 51 [115 S.Ct. at p. 406].) The court based its emphasis on the state treasury factor on the fact that the "impetus for the Eleventh Amendment" was "the prevention of federal-court judgments that must be paid out of a State's treasury." (*Id.*, at p. 48 [115 S.Ct. at p. 404].) The court stopped short of saying the state treasury factor was conclusive, but noted that the briefs filed by the states involved in the case before it stated the vast majority of federal circuits had generally accorded the factor " 'dispositive weight.' " (*Id.,* at p. 49 [115 S.Ct. at p. 405].)

In *Doe*, the Supreme Court held that the University of California enjoyed Eleventh Amendment immunity against a breach of contract action even though the federal government had agreed to pay any judgment arising from the action. (*Doe, supra,* 519 U.S. at pp. 430-431 [117 S.Ct. at pp. 904-905].) The court said that, in determining immunity, the relevant factor is "a State's *legal liability for judgments* against a state agency," not the "formalistic question of ultimate financial liability." (*Id.,* at pp. 430-431, [117 S.Ct. at p. 904] italics added.)

Hess and *Doe* could be read to mean that, if a state would not be legally obligated to pay from its treasury a judgment against an entity, the entity is not an arm of the state for Eleventh Amendment purposes, regardless of the degree to which the state is involved in the entity's financial or other affairs. (See, e.g., *Duke v. Grady Mun Schools*, *supra*, 127 F.3d 972, 981 [no immunity where state not legally liable for judgment against school district, even though district received 98 percent of its funds from state]; *San Antonio School Dist. v. McKinney*, *supra* , 936 S.W.2d 279, 284 [no immunity where judgment against a school district would be paid "from the funds of the school district, whether generated locally or appropriated by the State, not from the state treasury"].) In that event, *Belanger*'s conclusion that California school districts are arms of the state because they are principally state funded would be questionable, unless it were also shown that the state treasury would be directly vulnerable to a judgment in the particular case.

As a general matter of California law, the state does not have respondeat superior liability for the acts of a school district. (*Johnson v. San Diego Unified School Dist.* (1990) 217 Cal.App.3d 692, 698-700 [266 Cal.Rptr. 187].) In addition, Government Code section 970, which governs payment of judgments against public entities, distinguishes between "the state or any ... agency of the state claims against which are paid by warrants drawn by the Controller" and a "local public entity." (*Id.*, subd. (c).) Although the definition of "local public entity" in section 970, subdivision (c), does not expressly include a school district, the California Law Revision Commission ***1109** Comment to section 970 states that enactment of the section "permits the repeal of a number of special statutes applying to particular types of local public entities: [former] Educ. Code §§ 35201 (duty of *school district* to pay 'any judgment for debts, liabilities, or damages') ...." (Cal. Law Revision Com. com., 1980 amend., 32A pt. 1 West's Ann. Gov. Code (1995 ed.) foll. § 970, p. 110, italics added.) Thus it appears that, for purposes of paying judgments, a school district is not considered an agency whose liabilities "are paid by warrants drawn by the Controller."

However, we decline to read *Hess* and *Doe* to preclude immunity based on this single factor. *Hess* is unusual in that it involved an entity created by two states with the consent of Congress. The court noted that, because the federal government was involved, subjecting the entity to suit in federal court did not present the Eleventh Amendment problems that might exist with respect to a wholly state-created entity. (*Hess, supra,* 513 U.S. 30, 41 [115 S.Ct. 394, 401].) In fact, the court was required to *presume* the bistate entity did not qualify for immunity, unless it was shown that the states and Congress intended it to be immune. (*Id.*, at pp. 43-44 [115 S.Ct. at pp. 402-403].) No such pre-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

sumption exists with respect to single state entities such as school districts.

Further, as noted, the court in *Hess* stopped short of saying the state's legal liability was dispositive. To the contrary, the court stated the test for immunity as follows: "If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is 'No'-*both legally and practically*-then the Eleventh Amendment's core concern is not implicated." (*Hess, supra,* 513 U.S. at p. 51 [115 S.Ct. at p. 406], italics added.) Similarly, the court said in a previous decision that the purpose of Eleventh Amendment immunity was to "protect the state treasury from liability that would have had *essentially the same practical consequences* as a judgment against the State itself." (*Lake Country Estates v. Tahoe Planning Agcy.* (1979) 440 U.S. 391, 401 [99 S.Ct. 1171, 1177, 59 L.Ed.2d 40], fn. omitted, italics added.)

The italicized language suggests that whether the state is legally liable for a judgment against an entity is only one factor. The court also must consider whether the state is "practically" liable, as would arguably be the case where the state provides the entity's funding and therefore would indirectly end up paying a judgment against it. (See, e.g., *Hadley v. North Ark. Community Technical College, supra,* 76 F.3d 1437, 1439-1441 [community college was arm of state where, even if college could initially pay judgment from other sources, state would ultimately make up budget shortfall].)

The court in *Doe* also did not say legal liability was the only relevant question. To the contrary, it appeared to endorse a flexible approach under ***1110** which a variety of factors would be considered. The court noted that in past cases it had "sometimes examined 'the essential nature and effect of the proceeding,' ... and sometimes focused on the 'nature of the entity created by state law' to determine whether it should 'be treated as an arm of the State,' ...." (*Doe, supra,* 519 U.S. at pp. 429-430 [117 S.Ct. at p. 904], fn. omitted.) The *Doe* court did say that "whether a money judgment against a state instrumentality or official would be enforceable against the State is of *considerable impo rtance* to any evaluation of the relationship between the State and the entity or individual being sued." (*Id.*, at p. 430 [117 S.Ct. at p. 904], italics added.) Again, however, the italicized language suggests that although the liability factor is important, it is only one factor in considering "the relationship between the State and the entity ...."

Additionally, the only question in *Doe*, which the court described as a "narrow" one, was whether the university's ability to seek indemnification from the federal government vitiated its Eleventh Amendment immunity. The court expressly declined to reexamine the Ninth Circuit authority holding the university was an arm of the state. (*Doe, supra,* 519 U.S. at p. 432 [117 S.Ct. at p. 905].) *Doe* thus stands merely for the proposition that the fact state funds are *not* actually used to pay a judgment for which the state *is* legally liable does not *preclude* immunity. It does not follow that the converse is also true, i.e., that if an entity uses funds provided by the state to pay a judgment for which the state is *not* legally liable, there can be no immunity.

Finally, neither *Hess* nor *Doe* gave any indication of disagreement with the immunity analysis employed in *Mt. Healthy*. In fact, both decisions cited *Mt. Healthy*. (*Hess, supra,* 513 U.S. at p. 47 [115 S.Ct. at p. 404]; *Doe, supra,* 519 U.S. at p. 430 [117 S.Ct. at p. 904].) Yet the court in *Mt. Healthy*-the authority most relevant here since it involved a school board-appears not to have considered the legal liability of the state at all. (*Mt. Healthy, supra* , 429 U.S. 274, 280-281 [97 S.Ct. 568, 572-573].) Instead, the court examined "the nature of the entity created by state law," the extent of state guidance and funding, and the entity's independent ability to raise funds. (*Id.*, at p. 280 [97 S.Ct. at p. 573].)

Subsequent decisions have declined to interpret *Hess* and *Doe* as reducing the Eleventh Amendment inquiry to a question of the state's legal liability for a judgment against the entity. In *Gray v. Laws* (4th

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Cir. 1995) 51 F.3d 426, the Fourth Circuit noted that, in fact, *Hess* identified other factors as also relevant, such as the state's characterization of the entity, the entity's functions, and the extent of state control. (*Id.*, at pp. 432-433.) The *Gray* ***1111** court concluded the correct approach under *Hess* was that, if the state treasury *would* be liable for a judgment, that fact was "largely, if not wholly, dispositive," and the entity would be entitled to immunity. (*Gray, supra,* at p. 433.) If, on the other hand, the state's treasury *would not* be affected by a judgment, then the court should consider the other relevant factors, including "whether the state possesses such control over the entity ... that it can legitimately be considered an 'arm of the state.' " (*Id.*, at p. 434.)

The court in *Simon v. State Compensation Ins. Authority, supra,* 946 P.2d 1298 similarly concluded that under *Hess* and *Doe* "the judgment liability factor alone does not resolve whether an entity is entitled to Eleventh Amendment immunity." (*Simon, supra,* at p. 1306.) The court noted that both *Hess* and *Doe* considered other factors as well and that neither rejected the multifactor "balancing" test employed in *Mt. Healthy* despite having the opportunity to do so. Therefore, it concluded the balancing test remained in effect. (*Simon, supra,* at p. 1307.)

Employing that analysis here, we find a number of factors that favor immunity. The California Constitution obligates the state Legislature to "provide for a system of common schools ...." (Cal. Const., art. IX, § 5.) As the *Belanger* court noted, school districts receive their funding primarily from the state. The Education Code provides that the state Controller during each fiscal year shall transfer from the general fund of the state to the state school fund a specified amount per pupil. (Ed. Code, § 14002.) The state Superintendent of Public Education is required to certify to the Controller the amounts estimated to be apportioned to each school during the ensuing fiscal year. (Ed. Code, § 41330.) As the California Supreme Court has recognized, "since the adoption in June 1978 of Proposition 13, limiting local taxation of real property (Cal. Const., art. XIII A), school districts have become more dependent on appropriations by the Legislature for a major part of their revenue." (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 592 [262 Cal.Rptr. 46, 778 P.2d 174], fn. omitted.)

Further, although funds received by school districts are to be paid into the county treasury for the credit of the district (Ed. Code, §§ 41001, 41002), numerous courts have stated that " '[s]chool moneys *belong to the state* and the apportionment of funds to a school district does not give the district a proprietary interest in the funds....' " (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 635 [50 Cal.Rptr.2d 824], italics added; accord, *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1578, fn. 5 [15 Cal.Rptr.2d 547]; *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1525 [7 Cal.Rptr.2d 699].) ***1112** Because school district funds are considered funds of the state, payment of a judgment from such funds would have "essentially the same practical consequences as a judgment against the State itself." (*Lake Country Estates v. Tahoe Planning Agcy, supra,* 440 U.S. 391, 401 [99 S.Ct. 1171, 1177].)

School districts are authorized to raise their own revenues by issuing and selling bonds, with the approval of the electors of the district. However, state law specifies the purposes for which the proceeds may be used. (Ed. Code, § 15100.) In addition, the state Constitution requires that general obligation bond proposals of school districts be approved by a two-thirds vote. (Cal. Const., art. XVI, § 18.) Similarly, while school districts are authorized to impose development charges to finance school construction, the state Legislature has declared that such financing measures are "matters of statewide concern" and for that reason has "occupie[d] the subject matter ... to the exclusion of all other measures" on the subject. (Gov. Code, § 65995, subd. (e); see also *Grupe Development Co. v. Superior*

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Court (1993) 4 Cal.4th 911, 918 [16 Cal.Rptr.2d 226, 844 P.2d 545].)

Finally, although in general the state is not legally responsible for the obligations of a school district, the California Supreme Court has ruled that in some instances the state has a constitutional duty to assume responsibility for the operations of a school district, including its fiscal affairs. In *Butt v. State of California, supra*, 4 Cal.4th 668, a school district lacked funds to complete the final six weeks of its school term. The Supreme Court affirmed an injunction authorizing the state Superintendent of Public Instruction to displace the school board, operate the district through his own administrator, and impose a plan for the district's permanent financial recovery. (*Id.*, at pp. 694, 696, 704.)

The court in *Butt* explained that the California Constitution "makes public education uniquely a fundamental concern of the State ...." (*Butt v. State of California, supra,* 4 Cal.4th at p. 685.) It rejected the state's contention that school districts would "feel free to overspend if encouraged to believe in the availability of State relief." (*Id*, at p. 690.) The court further noted that the state itself had endorsed a policy of emergency conditional loan assistance to districts in financial difficulty. (*Ibid.*; see Ed. Code, § 41320.2.)

California statutes and case law thus demonstrate the state's extensive responsibility for and involvement in the fiscal affairs of school districts. On balance, the criteria included in this category of factors favor treating a school district as an arm of the state.

b. *Political status*

As identified by the court in *Lynch v. San Francisco Housing Authority, supra*, 55 Cal.App.4th 527, the relevant factors in assessing the political ***1113** status afforded a government entity by the state include whether the entity performs central governmental functions; whether the entity may sue, be sued, and hold property in its own name; the corporate status of the entity under state law; the degree of autonomy enjoyed by the entity; the entity's immunity from state taxation; and the geographic scope of the entity's operation. (*Id.*, at pp. 533-534.)

There can be little dispute that the function performed by school districts, the education of the public, is a matter of central governmental concern. In *Butt v. State of California, supra*, 4 Cal.4th 668, the California Supreme Court stated: "Public education is an obligation which the State assumed by the adoption of the Constitution.... '[M]anagement and control of the public schools [is] a matter of state[, not local,] care and supervision....' ... Local districts are the State's agents for local operation of the common school system ...." (*Id.*, at pp. 680-681 .) The court further observed that "[t]he Constitution has always vested 'plenary' power over education not in the districts, but in the State, through its Legislature, which may create, dissolve, combine, modify, and regulate local districts at pleasure." (*Id.*, at p. 688.)

As examples of state regulation of school affairs, the court in *Butt* cited Education Code sections addressing "such matters as county and district organization, elections, and governance...; educational programs, instructional materials, and proficiency testing...; sex discrimination and affirmative action...; admission standards...; compulsory attendance...; school facilities...; rights and responsibilities of students and parents...; holidays...; school health, safety, and nutrition...; teacher credentialing and certification...; rights and duties of public school employees...; and the pension system for public school teachers." (*Butt v. State of California, supra*, 4 Cal.4th 668, 689, citations omitted.)

We recognize that other statutory and constitutional provisions sometimes treat school districts in the same manner as governmental entities which do not enjoy Eleventh Amendment immunity, such as cities and counties, for certain purposes. (See, e.g., Cal. Const., art. XIII B, § 8; Gov. Code, §§ 54240,

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

54951, 82041 [defining school district as "local" government agency]; but see Gov. Code, § 17561 [referring separately to "local agency" and "school district" for purposes of reimbursement for state-mandated costs].) However, "[l]abeling an entity as a 'state agency' in one context does not compel treatment of that entity as a 'state agency' in all contexts." (*Lynch v. San Francisco Housing Authority*, *supra*, 55 Cal.App.4th 527, 534; see also *Doe*, *supra*, 519 U.S. 425, 427, fn. 2 [117 S.Ct. 900, 903] [declining ***1114** to decide "whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others"].) Conversely, it should follow that labeling an entity as a local agency for some purposes also should not compel treatment of it as such for all purposes. For this reason, authority distinguishing between the state and school districts in non-Eleventh-Amendment contexts (e.g., *North Orange County Community College Dist. v. CM School Supply Co.* (1998) 63 Cal.App.4th 362, 366 [73 Cal.Rptr.2d 791]; *LeVine v. Weis* (1998) 68 Cal.App.4th 758, 766 [80 Cal.Rptr.2d 439]) is not controlling.

Moreover, California courts have observed that the state's pervasive involvement in school affairs makes its relationship with school districts qualitatively different from its relationship with entities such as cities and counties: "A school district's relationship to the state is different from that of local governmental entities such as cities, counties, and special districts.... Local school districts are agencies of the state and have been described as quasi-municipal corporations. [Citation.] They are not distinct and independent bodies politic." (*Hayes v. Commission on State Mandates*, *supra*, 11 Cal.App.4th 1564, 1578-1579, fn. 5; accord, *California Teachers Assn v. Hayes*, *supra*, 5 Cal.App.4th 1513, 1524.) This distinction in California law between school districts and cities and counties is especially significant in view of the United States Supreme Court's repeated formulation of the ultimate Eleventh Amendment question as whether an entity "is more like a county or city than it is like an arm of the State" (*Mt. Healthy*, *supra*, 429 U.S. 274, 280 [97 S.Ct. 568, 573]) and whether it "has the same kind of independent status as a county or is instead an arm of the State ...." (*Doe*, *supra*, 519 U.S. 425, 429, fn. 5 [117 S.Ct. 900, 904].)

Similarly, while a California school district's governing board may hold and convey property for the use and benefit of the district (Ed. Code, § 35162), the California Supreme Court has stated that "[t]he beneficial ownership of property of the public schools is in the state.... '[T]he beneficial owner of the fee [of public school property] is the state itself, and ... its agencies and mandatories-the various public and municipal corporations in whom the title rests-are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs.' " (*Hall v. City of Taft*, *supra*, 47 Cal.2d 177, 181-182.) Consequently, a school district's ability to own property does not indicate it is not an arm of the state.

The remaining criteria do not appear to militate strongly one way or the other. School districts may sue and be sued independently of the state (***1115** Ed. Code, § 35162), and they operate within specific geographical limits rather than statewide. But this is also true of community college districts which, as stated previously, have been found to be arms of the state. (Ed. Code, § 72000.) Conversely, although school districts have the same exemption from property taxation as does the state, so do counties and cities, which do not enjoy immunity. (Cal. Const., art. XIII, § 3; Rev. & Tax. Code, § 202 .)

Again, on balance, the relevant criteria favor immunity.

III. Conclusion

In view of the extensive control of the state over the fiscal affairs and political status of school districts, the Ninth Circuit in *Belanger* correctly determined

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

a California school district should be considered an arm of the state for purposes of the Eleventh Amendment. Unlike the Ohio school board involved in *Mt. Healthy*, California school districts are subject to substantially more than "some" state funding and control; in fact, as discussed, beneficial ownership of their funds and other property resides in the state, and they are agencies of the state under state law. Therefore, the District shared the state's immunity from suit under section 1983, and the trial court properly sustained the demurrer.

IV. Disposition

The judgment is affirmed. The District shall recover costs on appeal.

Ward, J., and Gaut, J., concurred.
A petition for a rehearing was denied October 11, 2000, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied January 10, 2001. Brown, J., was of the opinion that the petition should be granted. ***1116**

Cal.App.4.Dist.
Kirchmann v. Lake Elsinore Unified School Dist.
83 Cal.App.4th 1098, 100 Cal.Rptr.2d 289, 147 Ed. Law Rep. 224, 00 Cal. Daily Op. Serv. 8013, 2000 Daily Journal D.A.R. 10,595

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.