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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



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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 party¹ 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 1981²; 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.

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, St. 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 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 www.portoakland.com/pdf/abou_doc_fin9.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 (Ct. of Appeal, 1st Dist. 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. CAFR 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." CAFR 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 (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 (Court of Appeals, 4th Dist. 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 periodic 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* at 753-754. 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. *SCSPA* 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 *S.C. 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 the 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. SCSPA*, 30 S.R.R. 1017 (2006) ("CMH"), 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 *Odyssey 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 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 that 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. *Id.* 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 (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 (4th Dist. 2000). The opinion in *Lake Elsinore* provides that the arm of the state analysis under §1983 analysis is “closely related question” to the 11th Amendment arm of the state analysis. *Lake Elsinore* thus demonstrates – in a related context – that

⁹ While the issue in *Mosler* is whether the Port of Los Angeles 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.

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. 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.” 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 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. Similar to the Commission's finding 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,



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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:

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A handwritten signature in black ink, appearing to read 'P. Heylman', is written above a horizontal line.

Paul M. Heylman

Dated: July 7, 2010