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PLB

ORIGINAL

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 REPLY TO COMPLAINANTS' REPLY IN OPPOSITION TO RESPONDENT'S SUPPLEMENTAL BRIEF

INTRODUCTION

Pursuant to the Commission's July 21, 2011 Order, Respondent, The City of Oakland, Acting Through and By Its Board of Port Commissioners ("Port"), hereby replies to the brief (hereafter referred to as "SSAT Reply") filed by Complainants, SSA Terminals and SSA Terminals (Oakland) (collectively "SSAT"). *See* FMC Docket 52.[1] This Reply addresses four issues: (1) the December 15, 2010, Opinion Letter ("SLC Opinion Letter") of the California State Lands Commission ("SLC"); (2) California Public

[1] The FMC Docket references are to the numbers in the Commission's on-line docket in this case.

Resources Code ("PRC") §6009; (3) the *Hanson* and *Mosler*[2] decisions; and (4) SSAT's erroneous analysis of the 11th Amendment.

ARGUMENT

1. The State Lands Commission Opinion Letter confirms the Port's 11th Amendment immunity.

The SLC Opinion Letter provides the analysis of the responsible California agency of why the Port is entitled to 11th Amendment Immunity. SSAT asserts that, legal conclusions aside, the SLC Opinion Letter is "fully consistent with and supportive of" SSAT's position. (SSAT Reply at 12). This assertion rests on a fundamental misunderstanding of the SLC Opinion Letter and California law.

A. The Port holds the tidelands in trust.

SSAT begins its analysis of the SLC Opinion Letter with the assertion that under the 1911 Grant the State "relinquished all title to the tidelands and revenues derived therefrom" and that as grantor "the State has no beneficial interest in the tidelands property." *Id.* SSAT then states that "The SLC's letter confirms both of these points." *Id.* In fact, the SLC Opinion Letter actually reaches the opposite conclusion, determining that the Respondent holds the tidelands and tidelands revenue only as trustee for the State.

The SLC Opinion Letter begins by stating that the SLC is responsible "to oversee the management of sovereign public trust lands and assets by legislative grantees who manage these lands **in trust on behalf of the State of California**." SLC Opinion Letter

[2] The 9th Circuit's decision affirming Judge Otero's ruling in *Mosler*, without reaching the immunity question, was attached to the Port's Supplemental Brief. Attached hereto as Exhibit 1 is Judge Otero's Opinion. It is also attached as Exhibit 8 to the Port's Motion to Dismiss, FMC Docket 12.

at 1. (emphasis supplied). The SLC Opinion Letter then recounts that the tideland grants of "legal title" were subject to the "statutory and common law public trusts." *Id.*

SSAT's claim that California retained no beneficial interest in tidelands property and the resulting revenue is also wrong as matter of law. As Judge Wirth held, "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)." Judge Wirth's Opinion, FMC Docket 29, at 4. The 1911 Grant confirms Judge Wirth's statement, providing that the lands are "to be forever held by said city [Oakland] and by its successors in trust for the use and purposes and upon the express conditions . . . ." of operating the Port. Port Motion to Dismiss, FMC Docket 12, Exhibit 2.

B. California is the beneficiary of the Tidelands Trust.

SSAT also states that the SLC Opinion Letter "confirms" that the State has no legal or beneficial right to the tidelands funds, and therefore the Port "has no basis . . . to claim . . . that payment out of the Port Revenue Fund would equate to payment by the State, ..." (SSAT Reply at 13). SSAT's argument rests on the predicate that even if there is a trust, the 11th Amendment does not apply because "the people" of California, rather than the State, are the beneficiaries of the Tidelands Trust. For 11th Amendment purposes, this is a distinction without a difference: the People and the State are indistinguishable. The Port's Supplemental Brief addresses this point directly, discussing how the holdings in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) and *Cal. ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 45 (N.D. Cal. 1981) support the 11th Amendment sovereign character for tidelands. Port

Supplemental Brief, FMC Docket 51, at 4-5. SSAT cites no contrary authority in response.

C. There are no actions of Respondent outside its Trustee role.

SSAT argues that the Commission's characterization of the case overlooks a "critical distinction" between the Port and the City of Oakland. This alleged distinction does not aid SSAT's argument. The Port was created by the City of Oakland in 1927. *See* Port Motion to Dismiss, FMC Docket 12, at 5-6; Judge Wirth's Opinion at 4. Exclusive control and management of the Port of Oakland is vested in the Board of Commissioners of the Port. *Id.* SSAT concedes that the Port Department "manages the Port of Oakland and serves as landlord for the port tenants such as SSAT and PAOHT." *See* Complainants' Reply to Respondent's Appeal, FMC Docket 42 (attached brief) at 32. All responsibility for administering the Tidelands Trust thus rests with the Port. SSAT has pointed to no entity other than the Port that might qualify as a "marine terminal operator" within the meaning of the 1984 Shipping Act, presenting nothing to suggest that the reach of Shipping Act jurisdiction to a "marine terminal operator" extends beyond the Port in its role as trustee of the Tidelands Trust. For 11th Amendment purposes, the actions challenged by SSAT were all taken in administration of the Tidelands Trust. Given this, the reach of the Complaint here cannot exceed the actions of the Port *qua* Trustee.

2. Public Resources Code §6009 confirms 11th Amendment immunity.

SSAT disputes the Port's interpretation PRC §6009, citing three decisions that SSAT contend limit the State's role here. None of these decisions support SSAT's argument. *City of Long Beach v. Marshall*, 11 Cal. 2d 609 (1938), predates the

California Supreme Court's decision in *Mallon v. City of Long Beach,* 44 Cal. 2d. 199 (1955), so to the extent SSAT asserts that *Marshall* is inconsistent with *Mallon's* holding that the State retains beneficial ownership of port revenues, *Marshall* is no longer good law. Similarly, *State Lands Comm'n v. City of Long Beach*, 200 Cal. App. 2d 609 (2nd Dist. Ct. App. 1962), expressly states that the State held a beneficial interest in the tidelands even after the grant of the lands to the city. 200 Cal. App. 2d at 625. *City of Alameda v. Todd*, 632 F. Supp. 333 (N.D. Cal. 1986), deals with the right of the City of Alameda to convey land to the United States under a specific grant of authority from California. None of these cases suggest that the Port is acting as anything other than a trustee here, or that California is somehow not the beneficial owner of the tidelands.

3. *Hanson* and *Mosler* are persuasive interpretations of California law.

SSAT attacks the *Hanson* and *Mosler* decisions extending sovereign immunity to the Port of Los Angeles on two grounds. SSAT first argues that the Commission should not consider *Hanson* because federal courts (and presumably by analogy the Commission) "have been directed only to look to the State's highest court of instruction. *See Redondo Constr. Corp. v. Puerto Rico Highway and Transp. Auth.*, 357 F. 3d 124, 127-28 (1st Cir. 2004)." (SSAT Reply at 8). The *Redondo* decision does not suggest that federal courts or the Commission must **only** look to the decisions of a state's highest court, or that in the absence of a ruling by the state's highest court the Commission should ignore state lower court decisions. Rather, the reasoning in the *Hanson* decision can be relied on as persuasive. *Spinner Corp. v. Princeville Development Corp.*, 849 F.2d 388, 390 n.2 (9th Cir. 1988) (explaining that while an "unreported decision of a state trial court ... is not binding" the Ninth Circuit "may rely on

it to the extent its reasoning is persuasive") (citing *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F.2d 486, 489 n.5 (9th Cir. 1976) (other citation omitted)).

SSAT also asserts that *Hanson* and *Mosler* are wrongly decided because they fail to address the unpublished portion of an opinion of the Ninth Circuit from 1995. As the rule cited in the Port's Supplemental Brief makes clear, the Ninth Circuit has defined which of its opinions it intends to be precedential authority and which opinions are not precedent. Port Supplemental Brief at 8. The Ninth Circuit decided to issue a ruling on an 11th Amendment argument as part of the unreported – and therefore non-precedential – ruling in the case. *Compare City of Long Beach v. Standard Oil of Cal.*, 1995 WL 268859 (9th Cir. 1995) and *id.* at 46 F.3d 929 (9th Cir. 1995). The Ninth Circuit's determination of the precedential value of its decision should be respected.

On the merits, SSAT asserts that the courts in *Hanson* and *Mosler* "appear to have misinterpreted *Mallon v. City of Long Beach*, 44 Cal. 2d 199 (Cal. 1955) as holding that tidelands revenues have a 'state character' and thus are somehow owned by the State." (SSAT Reply at 10). To decide whether *Hanson* and *Mosler* "misinterpreted" *Mallon*, it is instructive to look at what *Mallon* actually holds. In *Mallon*, the California Supreme Court held that the Tidelands Trust revenues were granted to Long Beach subject to an express trust. 44 Cal. 2d at 205. Therefore, the California Supreme Court held,

> It is clear in the present case that any interest of the city of Long Beach in the tidelands was acquired not as a 'municipal affair,' but subject to a public trust to develop its harbor and navigation facilities for the benefit of the entire state, and was therefore subject to the control of the Legislature. (citations omitted)

44 Cal. 2d at 209

The courts in *Hanson* and *Mosler*, in concluding that the tidelands revenues had a "state character" did not misinterpret *Mallon*. Rather, they applied the unambiguous holding of *Mallon* that Tidelands Trust funds are held by a port only in trust for the State, and that neither a city nor a port has any right to use the funds except for the purposes of the trust. Accordingly, the courts in *Hanson* and *Mosler* concluded – correctly – that all funds in the Harbor Revenue Fund are "state funds" for sovereign immunity purposes.

SSAT's second attack on the applicability of *Hanson* and *Mosler* is that even if they are correctly decided, the sovereign character of funds in the Port of Los Angeles's Harbor Revenue Fund and sovereign character of funds in the Port of Oakland's Port Revenue Fund are "drastically different" and this difference justifies finding that the funds held in the Port Revenue Fund are not sovereign funds even if the funds held in the Harbor Revenue Fund are sovereign funds.

Both funds operate pursuant to PRC §6306, and both are subject to the extensive SLC regulation set out in that statute. PRC §6306.2 regulates Oakland's Port Revenue Fund by legislatively permitting Oakland to use revenue from the Port Revenue Fund to purchase certain land, subject to the SLC permission. The statute further provides that if the purchased land is outside the trust area, title must be transferred to the State (unlike the land inside the trust area, in which the State already has beneficial ownership). The Harbor Revenue Fund is subject to a similar statutory provision for a mitigation purchase. PRC §6306.1. The only difference that SSAT points to is a provision adopted in 1970 relating to certain potential surplus funds. If

SSAT's "drastically different" theory were correct, then under *Hanson* the Port of Los Angeles would not have been entitled to 11th Amendment immunity prior to the 1970 statute, but became immune because of the 1970 amendment. This statute is too slender a reed to change the outcome in *Hanson* and *Mosler* or to distinguish between the sovereign character of the tidelands revenues held in trust by Los Angeles and those held in trust by Oakland.

4. SSAT's remaining arguments why the Port is never entitled to sovereign immunity also fail.

SSAT asserts that the Respondent's argument "is identical to Chatham County's claim that even though it was a county not generally entitled to sovereign immunity, it was acting as an arm of the state of Georgia when it operated a drawbridge over tidelands pursuant to delegated state authority. *See N. Ins. Co. of New York v. Chatham Cty., Ga.*, 547 U.S. 189 (2006)." (SSAT Reply Brief at 3). Chatham's argument is very different than the issue before the Commission here. Chatham argued that it was sovereign immunity because the state **delegated** a governmental function – the maintenance of bridges and highways – to Chatham. Chatham did not claim it was the trustee of a Tidelands Trust. The lack of sovereign immunity where the State has merely delegated a function does not impair the 11th Amendment immunity of a Tidelands Trustee. Indeed, the District Court's decision in *Chatham* notes that Chatham's County's argument was not based on the 11th Amendment, but rather a common law theory of sovereign immunity.[3] *Zurich Insurance Co. v. Chatham County*,

[3] The District Court stated: "However, Defendant asserts as the source of its immunity, not the Eleventh Amendment, but a 'residual sovereign immunity' that arises from common law. *See Gilbert v. Richardson,* 264 Ga. 744, 745-46 (1994); *Fed. Maritime*

2004 WL 5137599, *2 (S.D. Ga. 2004), *aff'd*, 129 Fed. Appx. 602 (11th Cir. 2004), *rev'd* 547 U.S. 189 (2006). This is supported by the terms of the Supreme Court's grant of *certiorari* in *Chatham*. *See* 546 U.S. at 477.

SSAT also argues that the Port cannot step into the role of the beneficiary for 11th Amendment immunity purposes because the Port failed to advise SSAT that the Port was a Tidelands Trustee. This is both incorrect and irrelevant. The Agreement between SSAT and the Port appended to SSAT's Reply expressly states at §1.5 (bates number SSA0000477) that it is subject to the "applicable limitations, conditions, restrictions and reservations contained in and prescribed by" the 1911 and subsequent grants. SSAT's Reply at Exhibit 2, 2. As Judge Wirth noted, the 1911 Grant provides that the land comprising the Port is held in trust. Opinion at 4. Moreover, the Tidelands Trust grant is a matter of law, of which SSAT has constructive knowledge.

Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L.Ed.2d 962 (2002)." 2004 WL 5137599 at *2.

CONCLUSION

For the foregoing reasons, and the reasons stated in the prior briefs, the Commission should hold that the 11th Amendment bars SSAT's claims here.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Reply To Complainants' Reply In Opposition To Respondent's Supplemental Brief was served by First Class Mail and electronic mail on the following:

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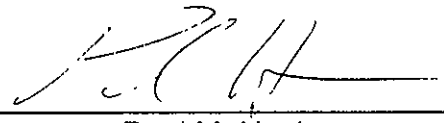

Paul M. Heylman

Dated: August 31, 2011

Exhibit 1

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

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[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

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[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*

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[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.