IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TANADGUSIX CORPORATION, et al.,	
Plaintiffs-Appellants,	
v.	No. 02-36142
UNITED STATES OF AMERICA, et al.,	
Defendants-Appellees.	

FEDERAL APPELLEES' OPPOSITION TO MOTION TO REOPEN

For the reasons set forth below, the federal appellees hereby oppose the motion to reopen or in the alternative to remand, filed in this Court by plaintiffs-appellants on or about July 30, 2004. As set forth in the following discussion, the motion is without basis, and should be denied.

1. This matter was orally argued on July 7, 2004, before Judges Kleinfeld, Hall, and Wardlaw. As the panel is aware, this case arises under a federal program providing for the donation of surplus U.S. government property, through the States, to public entities for use in carrying out public purposes. The basic question on appeal is whether a surplus naval drydock, donated through the State of Alaska to plaintiff Tanadgusix Corp. (TDX), a native Alaskan village corporation, for its use in Alaskan economic development, may instead be used by a third party, in Hawaii, as part of its Hawaiian business operations. As comprehensively discussed at oral argument and

in our brief, the district court was correct in answering "no" to that question. Ruling on cross-motions for summary judgment, the district court properly granted summary judgment here in favor of the federal and state governments.

2. In its motion filed in this Court on or about July 30, 2004, TDX now seeks to reopen the case, or in the alternative to remand the case to the district court for further proceedings. As noted in our brief, the United States has brought a False Claims Act suit against TDX and its Hawaiian partner, Marisco, Ltd., alleging fraud regarding their conduct in connection with the donated drydock. In its motion, TDX claims that recent depositions in the fraud case, conducted in July 2004, have yielded newly discovered documents that shed light on the district court's disposition of the instant matter. On that basis, TDX asserts that reopening is called for.

TDX's motion is meritless. The motion rests chiefly on two documents: (1) a letter from TDX's Chief Executive Officer (CEO) to the State of Alaska, dated October 20, 2000; and (2) a "Vessel Conditional Transfer Document" dated October 24, 2000, signed by TDX's CEO and the State of Alaska. According to the motion, these are newly unearthed documents that warrant reassessment of the district court's judgment below. As we now show, nothing could be further from the truth.

(a). The October 20, 2000 letter from TDX's CEO to the State of Alaska is part of the record of this very case. Indeed, it was made part of the district court record by the

plaintiffs themselves, who included it as Exhibit No. 19 attached to their summary judgment pleadings. Thus, as an initial matter, the October 20, 2000 letter has always been a part of this case, and is not "new" at all.

Equally fundamentally, the letter is entirely irrelevant and lends no support to TDX's position in this litigation. As discussed at length at the July 7 oral argument, TDX seeks to urge that the United States gave explicit written approval of the use of the drydock in Hawaii. As the oral argument conclusively revealed, the record provides no support for that proposition. There is nothing in the October 20, 2000, letter that could fill that gap. The letter is from TDX, not from the Federal Government, and it is addressed to the State of Alaska. It states simply that TDX and its corporate subsidiary (plaintiff BSE) would be interested in acquiring the drydock via the U.S. Small Business Administration (SBA), and would intend, upon a successful acquisition, to move the vessel from Pearl Harbor to a local drydock within two weeks. See Letter, October 20, 2000, from TDX's Chief Executive Officer to State of Alaska. Nothing in the letter even suggests, much less expressly states, that TDX intended to moor the drydock permamently in Hawaii. And in any event, nothing in the letter - which was, as noted, correspondence from TDX to the State of Alaska - could even conceivably reflect the United States Government's written approval of any such arrangement, even putting aside the fact that the letter by its terms contemplates no such arrangement.

Indeed, in its briefs in this appeal, had TDX wished to premise an argument on the basis of the October 20, 2000 letter, it could have done so. TDX plainly knew about the letter, which, after all, was written by TDX's CEO. And, as noted, the letter was made part of the district court record by TDX. Yet nothing in the opening or reply briefs filed by TDX in this appeal sought to make any significant use of the October 20, 2000 letter. As we have shown, the letter has no relevance to the dispositive legal issues in the appeal and lends no support to TDX's arguments. Simply stated, the October 20, 2000, letter that underlies plaintiffs' reopening motion is neither new nor relevant. The contention that it warrants a reopening of this case should be rejected.

(b). As noted, the second item that TDX's motion seeks to rely upon is a "Vessel Conditional Transfer Document" dated October 24, 2000. The document is signed by TDX's CEO, along with the State of Alaska. Thus, like the October 20 letter, TDX is a signatory to the October 24 document, and has therefore known about the document since its inception. Against this backdrop, the October 24 document is not new in any relevant sense. For this reason alone, TDX's attempted reliance on it in its reopening motion is also misplaced.

At least as fundamentally, however, the material contents of the October 24 document are identical, word for word, to the contents of another document that is indisputably part of the district court record in this case and that has played a central

role in the parties' briefing and oral argument. In their briefs in this Court, all parties prominently cited and discussed the "Vessel Conditional Transfer Document" dated January 19, 2001. See Plaintiffs' Summary Judgment Exhibit No. 30, reproduced at Federal Appellees' Supplemental E.R. 4-7. As discussed at length in the parties' briefs and at argument, the drydock at issue here was transferred pursuant to the January 19, 2001, transfer document, and the terms of that document therefore govern the transaction.

In their motion, plaintiffs now propose that the transfer should be governed by the October 24, 2000 transfer document, and not the January 19, 2001 transfer document. On this basis, plaintiffs would have this Court conclude that reopening proceedings are warranted. But plaintiffs have neglected to inform this Court that, as noted above, the October 24, 2000 and January 19, 2001 transfer documents contain the same, verbatim conditions and restrictions. As shown in our brief and at oral argument, the provisions of the January 19, 2001 transfer document legally compel the conclusion that the donated drydock was required to be put into use in Alaska, and could not be moored permanently in Hawaii. Because the conditions and restrictions of the October 24, 2000 document are identical, that document, even if applicable, would necessarily compel the same conclusion. See, e.g., Vessel Conditional Transfer Document ¶8 ("the Donee shall not * * * remove it [i.e., the

donated property] permanently for use outside the State, without the prior written approval of GSA").

In short, there is no merit to TDX's contention based on the October 24, 2000 transfer document. TDX knew about that document the day it signed it, and, in any event, the document contains precisely the same conditions and restrictions as the January 19, 2001 transfer document that all parties including TDX have treated as controlling in this litigation to date. For these reasons, even if the October 24 document were deemed to be applicable, but see Plaintiffs' Summary Judgment Exhibit No. 17, reproduced at Appellants' ER 23 ("This is not a notification of being allocated the vessel but more a getting ready 'in case.'"), nothing in that document could even remotely form a basis for any reopening.

TDX is also wide of the mark in suggesting that the October 24, 2000 document indicates that the drydock was somehow transferred under the auspices of the U.S. Small Business Administration (SBA) rather than the General Services Administration (GSA). The transfer documents refer repeatedly and exclusively to GSA; they do not even mention the SBA. See U.S. Supp. ER 4-7. As fully discussed in the parties' appellate briefs, Federal Government approval of the drydock's donation here was effectuated via GSA, not the SBA, and nothing in the terms of the October 24, 2000 document (like the similarly worded January 19, 2001 document) provides even the slightest suggestion to the contrary.

We note, finally, that there is likewise no merit to TDX's apparent suggestion that reopening should be undertaken because the record contains an unsigned version of the separate "distribution document" memorializing the actual transfer of the vessel to TDX. See Appellants' ER 48. Plaintiffs now seek to "reopen" the matter on the basis of a copy of that document that includes the signature of TDX's representative. We are not aware of any reason why the signed distribution form would trigger any different legal analysis regarding the matters at issue, and the motion discloses none. In any event, what is crucial is that nothing in the "distribution document" to which TDX points even remotely suggests, much less states, that the United States Government was at any point approving permanent use of the donated drydock in Hawaii.

* * * * *

Like the assertions in its brief and at oral argument, the contentions in TDX's motion reflect a fundamental failure to come to grips with the purely legal issues that properly govern the outcome of this litigation. The question here is whether surplus federal property, donated to an Alaskan native group for its use in local Alaskan economic development, may instead be used by a third party, in Hawaii, as part of its Hawaiian business operations. The answer to that question is plainly "no," as the district court properly concluded. Nothing in the record in this case suggests to the contrary; indeed, as we showed in our brief and at oral argument, the record fully

supports, indeed compels, the district court's conclusion. Nothing in plaintiffs' "reopening" motion adds anything to the analysis. Even if they were all considered to be part of the record in this case, the items upon which the motion rests do not even arguably reflect any written approval by the United States Government that the drydock here could properly be used in Hawaii instead of Alaska.

CONCLUSION

For the foregoing reasons, the motion to reopen or in the alternative to remand should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2004, I served the foregoing motion by electronic mail and by causing two copies to be mailed, by overnight mail (**FEDEX**), to:

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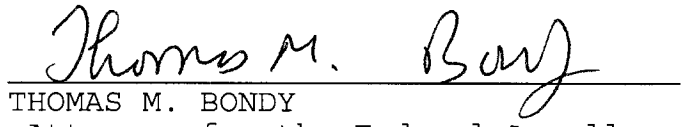

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