No. 02-36142

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TANADGUSIX CORPORATION, a native village corporation formed under the Alaska Native Claims Settlement Act, and BERING SEA ECCOTECH, INC., an Alaska Corporation and a wholly owned subsidiary of Tanadgusix Corporation
Plaintiffs-Appellants,
v.
DIEDRE HUBER, Director, Property Management Division, General Services Administration, in her official capacity; STEPHEN A. PERRY, Administrator, General Services Administration, in his official capacity; HECTOR V. BARRETO, Administrator, Small Business Administration, in his official capacity; THE UNITED STATE OF AMERICA; JAMES JOBKAR, Alaska Department of Administration, Division of General Services in his official capacity.
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska
Honorable Ralph R. Beistline

APPELLANTS' OPENING BRIEF

Thomas P. Schlosser, WSBA #06276
Sharon Haensly, WSBA #18158
Rob Roy Smith, WSBA #33798
Morisset, Schlosser, Jozwiak & McGaw
1115 Norton Building
801 Second Avenue
Seattle, Washington 98104-1509
Telephone: (206) 386-5200
Facsimile: (206) 386-7322

Attorneys for Plaintiffs-Appellants Tanadgusix Corporation and Bering Sea Ecotech, Inc.

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CORPORATE DISCLOSURE STATEMENT

Appellants Tanadgusix Corporation ("TDX") and Bering Sea Eccotech ("BSE") file this Corporate Disclosure Statement pursuant to Circuit Rules 21-3 and 26−1 and Fed. R. App. P. 26.1. TDX is a Native Village corporation formed under the Alaska Native Claims Settlement Act ("ANCSA") and is the parent corporation of BSE, which is an Alaska Corporation and a wholly owned subsidiary of TDX. Neither corporation has issued shares of stock to the public.

STATEMENT REGARDING ORAL ARGUMENT

TDX and BSE request oral argument pursuant to Fed. R. App. P. 34(a).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The District Court for the District of Alaska had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1361. The Alaska District Court issued an Order Regarding Summary Judgment Motions ("Order") on December 4, 2002. Excerpts of Record ("ER") 242-59. The clerk entered Judgment on December 5, 2002. ER 260. A notice of appeal was timely filed by TDX and BSE on December 18, 2002. ER 261-67.

STATEMENT OF ISSUES PRESENTED

The Alaska District Court found that there were no genuine issues of material fact in dispute with respect to TDX's and BSE's claims brought against the

General Services Administration ("GSA") and Small Business Administration ("SBA") (collectively "Federal defendants") and the State of Alaska for declaratory and injunctive relief to retain use and ownership of federally donated government surplus property, the drydock *Ex-Competent*. After converting the Federal defendants' motion to dismiss into a motion for summary judgment, the district court ordered summary judgment in favor of the Federal defendants and the State of Alaska, while denying without analysis TDX's and BSE's cross motion for partial summary judgment. TDX now stands to lose the drydock, its investments therein, future participation in federal donation programs, and the numerous economic opportunities afforded by the drydock's operation. The following issues are presented for appeal:

1. Whether the district court erred as a matter of law and misapplied the summary judgment standard when considering cross motions for summary judgment where genuine issues of material fact were in dispute.

2. Whether the district court erred as a matter of law by improperly converting Federal defendants' motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) into a motion for summary judgment under Federal Rule of Civil Procedure 56(b).

STATEMENT OF CASE AND PROCEEDINGS BELOW

This appeal presents a classic David v. Goliath battle couched in terms of contract interpretation. On one side, two federal agencies claim a right to have title to a drydock, lawfully donated as surplus property to TDX, revert to the United States without a hearing of any kind. On the other side is TDX, an Alaska Native Village corporation located on St. Paul Island, and BSE, an Alaska Corporation and a wholly owned subsidiary of TDX, who have invested hundreds of thousands of dollars to receive and rehabilitate the drydrock in order to provide the Aleut people with the prospect of developing technical skills and enhanced employment opportunities. Appellants TDX and BSE appeal an erroneous grant of summary judgment and seek to maintain title to the old Navy drydock *Ex-Competent* for continued use in Hawaii.

This action was initiated by TDX and BSE on February 15, 2002 alleging that the Federal defendants violated the 1949 Federal Property and Administrative Services Act, 40 U.S.C. § 484(j),[1] the Small Business Act, 15 U.S.C.

[1] Public Law 107-217, __ Stat. __ (Aug. 21, 2002) recodified Title 40 of the United States Code. As such, the terms governing the donation of surplus property to public agencies previously found at section 484 of the 1949 Federal Property and Administrative Services Act can now be located at section 549. *See* Addendum. Because the property was transferred under the former statute and appellants used the pre-recodification numbering system before the lower court, this brief continues to use the old United States Code sections when referring to the Act.

§ 636(j)(13)(F), and other laws by obstructing the ability of TDX and BSE to retain possession of the *Ex-Competent* for use in Hawaii, where the former government surplus property has been moored for decades. ER 64-95. On March 21, 2002, GSA, without notice or hearing, declared TDX to be in breach of the Transfer Document, and unilaterally determined that conditional title would revert to the United States on March 22, 2002.

The crux of this appeal turns on the proper application of Fed. R. Civ. P. 56, the interpretation of certain terms in the "Vessel Conditional Transfer Document" ("Transfer Document") and, more generally, upon the intent of the parties when entering into the Transfer Document as expressed by the "Letter of Intent" and incorporated documents (collectively "Transfer Package"). TDX and BSE maintain that nothing in the Transfer Document prevented the operation of the drydock in Hawaii and it was always their intent do so. The Federal defendants maintain that the Transfer Document requires as a condition of TDX's retention of the drydock that it not be used outside the State of Alaska. They make this contention despite the finding of the District Court of Hawaii in a related case that the Transfer Package approved use of the drydock in Hawaii. *Pacific Shipyards*

Int'l v. Tanadgusix Corp., No. 02-00088 (D. Haw., May 31, 2002), *appeal pending*, No. 03-15791 (9th Cir. 2003).[2]

On May 9, 2002, the Federal defendants filed a "motion to dismiss, or in the alternative summary judgment" alleging, *inter alia*, that the district court lacked subject matter jurisdiction to hear the case and that TDX and BSE failed to state a claim for relief. ER 117-96. The Federal defendants offered only one affidavit in support of their alternative theory of summary judgment relating to TDX's Freedom of Information Act ("FOIA") Claim. ER 163. On June 21, 2002, the State of Alaska joined in this motion and moved for summary judgment claiming that TDX owed the Alaska Department of Administration $200,000 in transfer fees. ER 167-68. TDX and BSE filed a cross motion for partial summary judgment on July 1, 2002 on their 1949 Federal Property and Administrative Services Act, Small Business Act, and FOIA claims, and included witness declarations and 124 exhibits demonstrating that TDX and BSE never intended to operate the drydock in Alaska, that the State of Alaska assisted in their plan to

[2] Pacific Shipyards International ("PSI") is a competitor of Marisco in Hawaii. PSI initially sought to block the transfer of the drydock to TDX through a letter writing campaign to federal and state officials, alleging that TDX had defrauded the government by using the drydock in Hawaii. *PSI*, No. 02-00088, Slip Op. at 5. This campaign found sympathetic ears when the GSA Acting Regional Administrator incorrectly told Senator Inouye that TDX planned to move the drydock to Alaska. ER 46-47. TDX never made such an assertion. The Hawaii case involved allegations of racketeering and was dismissed by the court upon

operate in Hawaii, and that the Federal defendants were aware of the drydock's intended use in Hawaii at the time of the donation. ER 169-241.

On December 4, 2002, the Alaska District Court opted to proceed by converting the Federal defendants' motion to dismiss into a motion for summary judgment. ER 247-48. The district court found that there were no genuine issues of material fact in dispute because the language of the Transfer Document was "clear and unambiguous" and the Transfer Package did not "expressly state where the *Ex-Competent* would be put to use . . . clearly impl[ying] that the *Ex-Competent* would be transported to Alaska." ER 253. The district court concluded that because the Federal defendants were unaware that the *Ex-Competent* would be used in Hawaii, TDX was operating the drydock in breach of the Transfer Document and ownership of the *Ex-Competent* must revert to the United States. ER 255-56. The court separately noted that the SBA was entitled to summary judgment because conditional title had already transferred to TDX through the GSA. ER 257. The district court also granted the State of Alaska's motion for summary judgment. ER 258.

TDX and BSE filed a timely notice of appeal with this Court on December 18, 2002. ER 261. Subsequently, TDX and BSE moved for a stay of the district court's order to retain possession of the *Ex-Competent* pending the final disposition

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motion by TDX. *PSI*, No. 02-00088, Slip Op. at 27.

of this case on appeal. On March 5, 2003, the district court stayed its own order, allowing TDX to continue using the drydock in Hawaii.

STATEMENT OF FACTS

A. TDX's and BSE's Interests.

TDX is the Alaska Native village corporation for St. Paul Island organized pursuant to the ANCSA, 43 U.S.C. §§ 1601-1629g. ANSCA separated tribes from their assets; thus, TDX is a profit-making venture with a mandate to aid its Aleut and Indian shareholders who are members of the St. Paul tribal community. ER 20; *see* Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331-55 (1992). Bering Sea Eccotech ("BSE") is TDX's subsidiary. ER 20-21.

It is an understatement to say that St. Paul Island is remote, being located 450 miles east of Russia and 750 air miles from Anchorage. ER 6. The Aleut community suffers from severe economic hardships related to its dependence upon a dwindling fishery resource, its small population, and its isolation. ER 6-13, 235. Since St. Paul Island has never been an easy place to establish a business, TDX and BSE must frequently look elsewhere for economic opportunities. ER 15, 235. Nonetheless, St. Paul Island remains a cohesive homeland for its approximately 500 Aleut and non-Aleut residents. ER 10, 235.

B. The *Ex-Competent.*

The *Ex-Competent* is a 552-foot long floating drydock built in 1944 for the Navy, and moored at Pearl Harbor since 1980. ER 1-2. The drydock operates by submerging, having the customer vessel floated over it, and then rising to lift the vessel. ER 231. The *Ex-Competent* became outdated and was in need of substantial repair;[3] accordingly, the Navy declared the *Ex-Competent* to be excess government property in August 2000, which allowed it to be transferred to another agency, the GSA, for disposition. ER 19, 40. GSA subsequently declared the *Ex-Competent* to be surplus property, clearing the way for its donation to a non-federal entity. ER 41.

C. Efforts to Donate the *Ex-Competent* to TDX and BSE.

The Alaska Department of Administration (in GSA nomenclature, the "State Agency for Surplus Property" or "SASP"), expressed an interest in the drydock and was authorized to donate the property.[4] ER 46, 232. The Alaska SASP is the

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[3] The *Ex-Competent* was not in service-ready shape, having been mothballed for years. The donee had to invest substantial funds in PCB and other hazardous materials remediation and repairs to make the drydock commercially usable.

[4] Although collateral to this appeal, to understand the background of this case it is necessary to discuss the two ways that non-federal entities like TDX or BSE can acquire surplus federal property. First, a SBA-certified small, minority-owned business can seek property under § 8(a) of the Small Business Act to overcome economic disadvantage. 15 U.S.C. § 636(j)(12). Property held by a SASP is transferred to a qualified participant in that State. *Id.* Before the property is transferred, the 8(a) participant must certify that it is eligible to receive the

federally-delegated agency that donates surplus property to eligible Alaskan entities under the 1949 Federal Property and Administrative Services Act, 40 U.S.C. § 484(j). Once GSA makes surplus property available to a SASP requesting donation, the SASP executes certain documents to transfer title, and regulates the property's use through its GSA-approved Plan of Operations. 40 U.S.C. § 484(j)(4)(E).

Following a failed attempt to donate the *Ex-Competent* to another Alaska Native corporation, TDX began working with the SASP to accept the drydock's donation. ER 23-24, 228, 232. At that time, the State of Alaska specifically requested TDX not tow the *Ex-Competent* from Pearl Harbor to Alaska because it would compete with the state owned Alaska Ship and Drydock, the only large drydock in Alaska. ER 231, 233. The SASP also knew that TDX did not own or

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property. 13 C.F.R. § 124.405(d) (2001). Once the SASP receives SBA's "verification" of eligibility, it distributes the property to the 8(a) business. *Id.* § 124.405(d)(3). The 8(a) participant can use the property where it sees fit and borrow against the property, provided the use conforms to its SBA-approved business plan. *Id.* at § 636(j)(13); 13 C.F.R. § 124.405. Alternatively, a "public agency" (which TDX is, as an ANSCA corporation) can acquire surplus property from the GSA under the 1949 Federal Property Act. 40 U.S.C. § 484(j)(4)(E). As with SBA's program, GSA initially transfers the property to the SASP, which then transfers it to an eligible public agency in that State. 41 C.F.R. § 102-37.35 (2002). TDX and BSE sought donation under both means. Originally, the SASP, TDX and BSE agreed that a SBA § 8(a) donation was best way to acquire the *Ex-Competent*. Ultimately, however, for reasons raised but not addressed below, TDX took possession of the drydock under the 1949 Act while the transfer to BSE was on hold.

operate a shipyard, an asset critical to the *Ex-Competent*'s commercial operation. 231-33.

As such, TDX had to find a partner shipyard outside of Alaska to accept the *Ex-Competent*. Eventually, TDX agreed to the donation once it engaged Marisco, Ltd., a willing and experienced shipyard partner in Hawaii. ER 228, 232. Preceding the donation, TDX and the SASP had extensive discussions about the *Ex-Competent's* use in Hawaii in partnership with an experienced shipyard, Marisco, to train Aleut shareholders in the ship repair business. ER 55-61, 228, 232. The SASP diligently assisted TDX and BSE with their efforts to acquire and so use the drydock. ER 232-33. The Alaska SASP knew of, consented to, and assisted with TDX's and BSE's desire to use the drydock in Hawaii to employ and train Aleuts and other Alaskans in ship repair. ER 20-25, 28, 42, 228, 231-34.

Initially, the SASP, TDX and BSE agreed that a SBA § 8(a) donation offered the best way to acquire the *Ex-Competent*. ER 232-33. Accordingly, BSE's 8(a) business plan (which SBA approved) envisioned moving the *Ex-Competent* to Marisco's shipyard for repairs and remediation; placing it into service with Marisco in Hawaii; participating in the vessel's ship repair and drydock services; and training TDX's Aleut and Indian shareholders in ship repair. ER 22, 55-61, 62, 232-33. The SASP helped TDX and BSE draft letters of intent requesting the donation of the *Ex-Competent* and describing the intended use, with

the SASP always fully aware of their plan to use the drydock in Hawaii with a shipyard. ER 228, 233. TDX and Marisco, anticipating BSE's receiving the *Ex-Competent* through the 8(a) program, signed a preliminary letter of understanding in the fall of 2000. ER 25.

Unfortunately, bureaucratic delays prevented the proposed donation under the SBA program.[5] At the advice of the Alaska SASP, TDX sought to acquire the *Ex-Competent* through the alternative method, i.e., as a "public agency" under GSA's donation program. ER 232-33; 40 U.S.C. § 484(j). With the SASP's help, TDX and BSE drafted several alternate letters to effectuate either a SBA or GSA transfer. ER 20-22, 233.

The SASP also informed TDX and BSE that GSA donations usually involved a donee's use of the property within the transferring state, but that GSA grants waivers, when necessary, to permit out-of-state use. ER 53, 233. TDX and BSE requested GSA's policy requiring waivers to use donated property outside of the donating State, but were informed that no written policy exists. ER 233.

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[5] Neither the SASP nor TDX knew whether the transfer would ultimately occur pursuant to the 1949 Property Act or the Small Business Act. ER 233. In fact, on February 14, 2001, despite the Alaska SASP's having already executed the transfer to TDX under the GSA program on January 19, 2001, it also completed a "Distribution Document" conveying the *Ex-Competent* from the SASP to BSE. ER 35-36. Two weeks later, the SASP confirmed to SBA that it would proceed with the transfer to BSE. ER 37-39. On May 14, 2001, SBA finally stated that transfer under its 8(a) surplus property program was indefinitely "on hold pending

Appellants learned, however, that GSA has on numerous occasions allowed out-of-state use of donated property without waivers. *See, e.g.,* ER 3-5, 14, 233, 235; *see Osprey Pacific Corp. v. United States*, 41 Fed. Cl. 150 (1998); 41 C.F.R. § 102-37.265.

D. Vessel Conditional Transfer Document.

On January 19, 2001, TDX and the SASP signed a "Vessel Conditional Transfer Document" to complete the first step in conveying ownership under GSA's program. ER 30-33. Conditional title would later be perfected when (1) the SASP received title to the drydock; (2) the SASP and TDX signed a Distribution Document; and (3) TDX took possession of the drydock. 41 C.F.R. § 102-37.205(b). GSA did not sign the Transfer Document; the Alaska SASP signed it on behalf of itself and GSA. ER 32.

Also on January 19, 2001, TDX delivered its Letter of Intent, along with a referenced and attached January 18, 2001, letter from Marisco ("Marisco letter") that "reaffirm[ed] [Marisco's] commitment and interest in putting the [*Ex-Competent*] into service in Hawaii." ER 27-29. The SASP forwarded the Transfer Package to GSA, where the transfer was approved. ER 34-35, 234.

The Transfer Document purported to convey the drydock's conditional title to TDX on an "as is, where is" basis (which was in Hawaii), and stated that

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resolution of certain [unspecified] policy concerns." ER 45.

"delivery is made at the present location of the Property. . . ." (which was also in Hawaii). ER 30. It established a five-year period of restriction on use, and allowed GSA to grant waivers when appropriate. Paragraph 8 states:

> [T]he Donee shall not sell, trade, lease, lend, bail, cannibalize, encumber, or otherwise dispose of the Property, or remove it permanently for use outside the State, without the prior written approval of GSA.

ER 31 (emphasis added). The Transfer Document does not define the term "State."

E. Letter of Intent.

TDX's January 19, 2001 Letter of Intent, which the SASP helped draft, outlined its plan to use the drydock as follows:

> to enhance both business and employment opportunities for shareholders, through operations as a platform for shipbuilding and ship services, and operations as a drydock. Aleut shareholders and the Alaskans will be provided the opportunity to develop skills in welding, metalworking, shipbuilding and repair, as well as hazmat management.

ER 28-29. TDX further stated that the *Ex-Competent* would give "small Alaskan companies like ours the opportunity to improve ourselves economically with capital assets that would be out of our reach in most cases. This is especially important since job opportunities on St. Paul are limited under current economic circumstances." ER 29. The Letter of Intent clarified that rehabilitation would occur at Marisco's shipyard, "our partner in the State of Hawaii." ER 28 (emphasis added).

The Letter of Intent noted that based upon a review of the drydock's bottom thickness, rehabilitation "would be necessary before the AFDM could be feasibly and safely transported any long distances, without incurring significant liability." ER 28. TDX promised to "immediately" begin the drydock's hazardous waste remediation and upgrading its bottom, so that "we can put the vessel into service for its intended purposes, namely operating as a drydock. Based on our projections, this can be accomplished in approximately six to eight months." *Id*. TDX also promised to "retain full control of the operations and management of the vessel." ER 29.

Marisco's letter, dated January 18, 2001 and attached to the Letter of Intent, made clear that the *Ex-Competent* was to remain in Hawaii and that Marisco was "fully prepared to put the Drydock into operation and utilize it for services to our various clients." ER 27.

F. TDX's Possession of the *Ex-Competent* and Relationship with Marisco.

TDX took possession of the *Ex-Competent* on May 2, 2001 and had it moved from Pearl Harbor to temporary mooring. ER 42, 48. TDX and Marisco arranged for environmental surveys, asbestos abatement, and repair. ER 43, 228. Soon thereafter, the *Ex-Competent* was towed to Marisco's shipyard. TDX incurred liability exceeding over one million dollars for moving, decontaminating, and repairing the *Ex-Competent*. ER 50.

In preparation for putting the drydock into service, on January 2, 2002, TDX and Marisco executed an Interim Agreement, superseding their October 2000 letter of understanding, and establishing a preliminary business plan for use of the *Ex-Competent*. ER 62-64. The Interim Agreement complies with the donation's terms by both ensuring that TDX's control over the *Ex-Competent* meets the requirements of the Transfer Document and federal law, and also implementing the plan outlined in the Letter of Intent and Marisco letter for using the drydock in Hawaii with Marisco. *Id*. In pertinent part, the Interim Agreement states:

> Nothing in this Agreement is intended to sell, trade, lease, lend, bail cannibalize, encumber or otherwise dispose of the *Ex-Competent* nor to do any act which is unauthorized without the prior written approval of GSA, nor to allow any act in violation of law or the applicable Vessel Conditional Transfer Document.

ER 64.

Under the Agreement, TDX approves which customers are served by the *Ex-Competent*, and can remove the drydock from Marisco's shipyard at will. ER 62. Both Marisco and TDX solicit customer vessels to use the *Ex-Competent*'s services. *Id.* TDX receives lift and lay day fees for the drydock's use by customer ships, while Marisco receives revenues for repair work on those ships. *Id*. The Interim Agreement became effective before the *Ex-Competent* lifted its first customer ship - a U.S. Coast Guard cutter - later that January.

Appellants TDX and BSE are adversely affected by the district court's erroneous disposition of this case on summary judgment. Genuine material factual disputes exist as to whether TDX and BSE have violated the terms of the Transfer Document and whether the parties intended to leave the donated drydock moored in Hawaii for continued operation in that state.

STANDARDS OF REVIEW

The following standards of review are relevant to this Court's review of the issues presented for appeal.

A. Summary Judgment.

A grant of summary judgment is reviewed de novo. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). Summary judgment is not proper, however, if material factual issues exist for trial. *Meade v. Cedarapids, Inc*., 164 F.3d 1218, 1221 (9th Cir. 1999); *Citicorp Real Estate, Inc*., 155 F.3d 1097, 1103 (9th Cir. 1998); *Warren v. Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). This Court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). A material fact includes inferences that reasonably may be drawn from undisputed facts. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-49 (1986).

B. Dismissal.

Dismissal on the pleadings is proper only if the moving party is clearly entitled to prevail, taking all inferences in favor of the nonmoving party. *Doleman v. Meiji Mutual Life Insurance Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984). While a court's review is limited to the pleadings, the court may properly consider documents attached to the complaint or answers because they are considered part of the pleadings, as well as other documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings." *Parrino v. FHP, Inc*., 146 F.3d 699, 705-06 (9th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998). In ruling on a motion to dismiss, the district court accepts all of the opposing party's allegations of fact as true. *Id.*

C. Contract Interpretation.

When interpreting a contract, the plain language within the four corners of the contract must first be examined to determine the mutual intent of the contracting parties. *United States v. Clark,* 218 F.3d 1092, 1096 (9th Cir. 2000). "Further, business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." *Giove v. Dep't of Transp*., 230 F.3d 1333, 1340-41 (Fed. Cir. 2000). "A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." *Klamath Water Users Protective*

Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000).

"A contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989). If a contractual term is ambiguous, extrinsic evidence may be utilized to interpret the "parties' intent in light of earlier negotiations, later conduct, related agreements, and industry-wide custom." *Pace v. Honolulu Disposal Serv., Inc*., 227 F.3d 1150, 1158 (9th Cir. 2000). Ambiguous provisions in both treaty and non-treaty matters should be "construed liberally" in favor of the Indians. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Doyon, Ltd. v. United States*, 214 F.3d 1309, 1314 (Fed. Cir. 2000) (applying Indian canons and trust responsibility generally to Native Corporations formed pursuant to ANCSA).

SUMMARY OF ARGUMENT

The following summarizes the arguments supporting the issues raised on appeal.

1. The district court erred in granting summary judgment. The district court misapplied the summary judgment standard in three significant ways, each of which independently mandates reversal.

First, the district court failed to independently consider TDX's and BSE's cross motion for partial for summary judgment and never determined whether their claims raised any genuine issues of material fact for trial. On cross motions for summary judgment, the district court must evaluate each motion for summary judgment motion independently. The district court ignored the evidence submitted by TDX and BSE and wholly failed to consider their cross motion.

Second, the district court erroneously determined that there were no material facts in dispute. The Transfer Package provides sufficient ambiguity to raise a material factual dispute. Despite this case's factual complexity, the court ignored appellants' evidence, particularly the declaration of TDX employee Kevin Kennedy (and accompanying exhibits), that explained how the Transfer Document, Letter of Intent, and Marisco Letter comported with the SASP's, TDX's and BSE's plans to operate the drydock in Hawaii with an experienced shipyard. Amazingly, the district court treated the Transfer Document as unambiguous, even though (1) nothing in the Transfer Package required operation in Alaska or prohibited shared use with Marisco and (2) the federal and state defendants offered no evidence to the contrary. The district court improperly decided material disputed facts on summary judgment and denied TDX and BSE the right to a trial regarding the proper interpretation of disputed language in the Transfer Package.

Third, the district court erred in *sua sponte* granting summary judgment for the Federal defendants. The Federal defendants alleged six jurisdictional grounds upon which to dismiss TDX's and BSE's complaint for a failure to state a claim. The Federal defendants failed to offer any evidence in support of their claims to satisfy their evidentiary burden and did not move for summary judgment as to the proper interpretation of the Transfer Package. TDX and BSE moved for partial summary judgment on entirely different grounds. The district court short-circuited the fact finding process and inappropriately granted summary judgment in favor of the Federal defendants.

2. The district court committed reversible error by improperly converting the Federal defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6) into a motion for summary judgment under Fed. R. Civ. P. 56(b).

The district court was simply wrong to treat the Federal defendants' motion to dismiss as a motion for summary judgment simply because it "looked beyond the pleadings" in some unspecified way. Under Fed. R. Civ. P. 12, courts properly consider all documents referenced in a complaint or answer, as well as documents whose authenticity is unquestioned, but are not physically attached to the pleadings without converting a motion to one for summary judgment. The Federal defendants never submitted evidence to refute TDX's and BSE's factual allegations regarding the proper interpretation of the Transfer Package. Converting

the Federal defendants' motion to dismiss on jurisdictional grounds into a motion for summary judgment on the merits apparently allowed the court to feel free to interject its own independent analysis of TDX's factual contentions and second-guess TDX's unopposed factual evidence on the merits. Summary judgment on the merits was not appropriate based on the Federal defendants' motion.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT.

The district court misapplied the well-established summary judgment standard in the following three ways: (1) failing to independently consider TDX's and BSE's cross motions for summary judgment; (2) erroneously resolving disputed genuine material facts on summary judgment; and (3) erroneously granting summary judgment *sua sponte* on issues not raised by the Federal defendants. This Court reviews de novo the evidence evaluated by the summary judgment court in the light most favorable to the nonmovant and asks whether the district court inappropriately resolved material factual disputes. *Barry v. Valence Tech., Inc.*, 175 F.3d 699, 703 (9th Cir. 1999).

A. The District Court Erred By Failing to Consider TDX's and BSE's Evidence on Cross Motions for Summary Judgment.

The district court erred as matter of law in the manner in which it adjudicated TDX's and BSE's, the Federal defendants', and the State defendants'

cross motions for summary judgment. The district court failed to independently consider TDX's and BSE's cross motions.

It is well-settled in this Circuit that "[c]ross-motions for summary judgment do not necessarily mean that there are no disputed issues of material fact, and do not necessarily permit judge to render judgment in favor of one side or other; courts must consider each motion separately to determine whether any genuine issue of material fact exists." *Buckley v. Gomez*, 36 F. Supp. 2d 1216 (S.D. Cal. 1997), *aff'd without published opinion*, 168 F.3d 498 (9th Cir. 1999). "The filing of cross motions does not ensure that summary judgment is in order." *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037 n.5 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001) (acknowledging the district court's responsibility to analyze whether the record on cross-motions for summary judgment demonstrates the existence of genuine issues of material fact, even in those cases in which both parties believe that there are no material factual issues). "A summary judgment cannot be granted if a genuine issue as to any material fact exists." *United States v. Fred A. Arnold, Inc.,* 573 F.2d 605, 606 (9th Cir. 1978)

In fulfilling its duty to review each cross motion separately, the district court must consider the evidence submitted in support of each cross motion. That is because "a simultaneous cross-motion is another means to bring to the district court's attention a controversy over the facts," and most certainly does not mean

that the movants have waived their right to trial. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1137 (9th Cir. 2001). Yet, when presented with cross motions below, the district court violated each of these maxims by completely failing to consider TDX's and BSE's motion for summary judgment and disregarding the evidence submitted by TDX and BSE to determine whether there were any material facts in dispute.

The district court erred by failing to separately evaluate each motion filed. In fact, the entirety of the district court's opinion deals with the Federal defendants' and the State of Alaska's motions for summary judgment. ER 242-59. There is absolutely no discussion or analysis of TDX's and BSE's motion, or the potential material facts in dispute raised therein, except to state that the "Plaintiffs' Cross Motion for partial summary judgment is denied as moot." ER 243. This lack of independent analysis is contrary to the summary judgment standard. "It is well settled that a court's duty to ascertain whether facts remain in contention is not obviated by cross motions for summary judgment." *Eby v. Reb Realty*, 495 F.2d 646, 649 (9th Cir. 1974).

The district court ignored the law, and in essence granted the Federal defendants' and the State of Alaska's summary judgment motions as if they were unopposed. However, TDX and BSE submitted witness declarations and 124 exhibits in opposition, and in support of their motion for summary judgment,

including the Kennedy Declaration that demonstrated credible contrary facts regarding the proper interpretation of the Transfer Package. ER 169-241. In contrast, the federal and state defendants submitted no evidence other than one declaration opposing TDX's FOIA claim. The district court was bound to consider the issues raised and the facts presented by TDX and BSE in their cross motion for partial summary judgment and to not simply dismiss them out-of-hand. Had the court considered TDX's and BSE's motion and supporting evidence, the court could have properly granted summary judgment for TDX and BSE, or in the alternative, held the matter over for trial because of the existence of disputed material facts.[6] In either case, TDX and BSE would have had an opportunity to be heard as to their claims, rather than having the entire matter dismissed without any consideration of their legal and factual position.

The court's failure to consider TDX's and BSE's motion for partial summary judgment is a clear error of law and warrants reversal of the district court's grant of summary judgment.

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[6] That TDX and BSE claimed there were no material facts in dispute as to certain questions below does not preclude them now from arguing that disputed facts preclude summary judgment. "[T]he long-established rule is that when opposing parties move for summary judgment, each seeking judgment in its favor, neither is barred from contending later that issues of material fact precluded the entry of summary judgment against it." *Hotel del Coronado Corp. v. Foodservice Equip*

B. The District Court Erred By Finding There Were No Genuine Issues of Material Fact in Dispute With Respect to the Federal defendants.

The district court erred as a matter of law by resolving disputed material facts on a motion for summary judgment. A court lacks authority to grant a summary judgment motion unless a party demonstrates that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). A genuine issue exists if sufficient evidence is presented for a reasonable fact finder to decide the question in favor of the nonmovant. *Guidroz-Brault v. Missouri Pacific R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001). Material facts are those necessary to the proof or defense of a claim, and include inferences that reasonably may be drawn from undisputed facts. *Anderson,* 477 U.S. at 248-49.

The district court erred in finding that the Transfer Package was "clear and unambiguous" in requiring TDX to use the drydock in Alaska. ER 243. The uncontested evidence produced by TDX and BSE refutes the district court's conclusion. Nothing in the Transfer Package facially required TDX operate the *Ex-Competent* in Alaska or prohibited its operation in Hawaii. The district court also ignored TDX's extrinsic evidence regarding the intentions of the contracting parties (TDX and the Alaska SASP on behalf of GSA) and how the Transfer Package comported with their intentions. *See Pace*, 227 F.3d at 1158 (permitting

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Distribs. Ass'n., 783 F.2d 1323, 1325 n.1 (9th Cir. 1986).

the consideration of extrinsic evidence where ambiguities exist). Taken in a light most favorable to TDX and BSE, the Transfer Package presents sufficient ambiguity and uncertainty to present triable issues of fact with respect to the intended location for the operation of and control over the *Ex-Competent*, thereby precluding summary judgment. Each disputed document relied upon by the court is addressed in turn.

1. The Transfer Document Does Not Prohibit Operation of the Drydock in Hawaii.

The district court erred by finding it "clear and unambiguous" that the Transfer Document's references to "State" could only mean the State of Alaska. The Transfer Document never mentions the State of Alaska and nowhere expressly requires the donee to use the drydock in Alaska.[7] ER 30-33. The court's review focused on section 8 of the Transfer Document providing that:

> During the periods of restriction prescribed in (3) and (4) above, the Donee shall not sell, trade, lease, lend, bail, cannibalize, encumber, or otherwise dispose of the Property, or remove it permanently for use outside the State, without the prior approval of GSA.

[7] The Transfer Document does define the SASP. ER 30. This is the source of the court's misunderstanding of the term "State" and the assumption that all other references to "State" must mean Alaska. ER 250. Reaching this erroneous conclusion, the court omitted the relevant portion of the Transfer Document that restricted use of the phrase "State of Alaska" to describing the name the donating agency "(hereinafter called the SASP)." *Compare* ER 30 *with* ER 250 (court's citation using ". . ." to omit relevant phrase).

ER 31 (emphasis added). Even though "Alaska" is not found in the text of this section, the court unabashedly read it into this provision, inserting "of Alaska" after "outside the State" even though such an understanding is far from clear under the language of the Transfer Document. ER 245. The court repeats this misquote of the Transfer Document throughout the Order. ER 243, 245, 250, 253. The error of the district court's analysis is clear from the face of the Transfer Document, as the requirement that TDX not "remove [the *Ex-Competent*] permanently for use outside the State," neither equates "State" with "Alaska" nor suggests that use in Hawaii would be a prohibited "permanent removal."[8]

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[8] The district court also erroneously seemed to believe that TDX's request for such a waiver on July 20, 2001 was an admission that the *Ex-Competent* could not be operated outside of Alaska. ER 250. However, complying with an unwritten GSA policy at the behest of the SASP and GSA officials does not constitute such an admission. The full text of the relevant portion of TDX's letter, which the court omits, states:

> Our Vessel Conditional Transfer Document contains conditions and restrictions, one of which No. (8), forbids removing it permanently for use outside of the State [of Alaska]. . . . We would like the SASP or the GSA to consider such a waiver that would let us operate where we are presently, and relieving [sic] the burden of moving the vessel to Alaska, that No. (8) appears to require.

ER 50. TDX, although still convinced that no legal restriction existed, merely parroted the SASP, presuming *arguendo* that the Transfer Document forbade removing the *Ex-Competent* permanently for use outside of Alaska. TDX and Marisco had invested in the *Ex-Competent*'s improvements and did not want to lose the drydock. The court simply read too much into this request, which, in any event, was not part of the Transfer Package.

The district court's cramped reading of section 8 ignored other sections of the Transfer Document which provide context to determine the meaning of the term "State." *Klamath Water Users*, 204 F.3d at 1210 (finding "[a] written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations"). "The normal rule of construction, of course, is that courts must interpret contracts, if possible, so as to avoid internal conflict." *Trident Ctr. v. Conn. Gen. Life Ins. Co*., 847 F.2d 564, 566 (9th Cir. 1988).

In particular, the district court failed to assess language on the first page of the Transfer Document stating that the donation is "made on a 'as is, where is' basis . . . and delivery is made at the present location of the Property." ER 30. These terms expressly contradict the district court's odd interpretation of section 8. A permissible interpretation of the Transfer Document as a whole requires TDX to accept the *Ex-Competent*, a vessel that has never been in Alaska, "as is, where is," which was, and has for decades been, in Hawaii. *Id.* This reading is supported by the provision that the donee takes delivery at the "present location of the Property," which is also Hawaii. *Id.* As such, it would actually violate the plain language of section 8 of the Transfer Document for TDX to remove the *Ex-Competent* permanently from Hawaii, as that section clearly prohibits TDX from "<u>remov[ing]</u> [the *Ex-Competent*] permanently for use outside the State." ER 31. Plainly, the

"State" from which "removal" is restricted is the state in which the property is located. The *Ex-Competent* has never been in Alaska, and the cost to move the drydock there would exceed its value. ER 50. Based on a review of the Transfer Document as a whole, and construing this business contract with business sense, it is reasonable for the finder of fact to determine that the term "State" may mean either Alaska or Hawaii.[9]

As such, the Transfer Document is subject to multiple reasonable interpretations of fact and the proper adjudication of meaning of the Transfer Document is through trial, not on summary judgment.

2. The Letter of Intent Indicates Intent to Operate the Drydock in Hawaii.

The district court erred by finding that TDX's Letter of Intent "clearly implies" that the *Ex-Competent* would be transported to and used in Alaska. ER 253. The Court erroneously elevated and placed undue emphasis on certain

[9] TDX's interpretation of the term "State" to permit operation in Hawaii is supported by both GSA and SBA regulations. The GSA regulations in effect at the time of the donation permitted an out-of-state donation where "one State agency agrees to distribute donable surplus property to certain specified donees in the adjoining state." 41 C.F.R. § 101-44.206(d) (2001). The GSA regulations that went into effect a year after the donation to TDX took place are even more clear: "May a SASP distribute surplus property to eligible donees of another State? Yes, you may distribute surplus property to eligible donees of another State." 41 C.F.R. 102-37.265 (Jan. 18, 2002). The SBA regulations also permit out-of-state use: "Eligible participants may acquire surplus Federal property from any SASP located in any state . . .." 13 C.F.R. § 124.405(c) (2001).

portions of the Letter of Intent while ignoring the plain intent of the other language in the Letter of Intent. Any other reading besides the district court's tortured interpretation evinces a material factual dispute which requires resolution at trial.

The relevant portion of the Letter of Intent states the relationship between TDX and Marisco and reaffirms that this is a

> [l]etter of reaffirmation of commitment from Marisco Limited, the shipyard owner, our partner in the State of Hawaii, where rehabilitation will take place. This rehabilitation, based upon our review of the audio gauge review of bottom thickness, would be necessary before the AFDM could be feasibly and safely transported any long distances, without incurring significant liability.

ER 28 (emphasis added). Rather than give the highlighted language referencing Hawaii its plain intent expressing an unmistakable acknowledgement that TDX and BSE had partnered with a shipyard in Hawaii for operation of the drydock, the district court decided to focus on the following sentence, stating that rehabilitation "would be necessary before the AFDM could be feasibly and safely transported any long distances." ER 28. The Court determined that this phrase "certainly does not state that the *Ex-Competent* would be put to use in Hawaii" but rather "clearly implies" that it will be "transported to Alaska following rehabilitation." ER 253 (emphasis in original). This finding flies in the face of the complaint and referenced documents before the court.

TDX's January 19, 2001, Letter of Intent confirmed TDX's and BSE's prior communications with the SASP, and told GSA that TDX's intended use of the *Ex-Competent* was in Hawaii with Marisco. ER 28-29. Not only does this paragraph fail to state that TDX would, or had any plans to, tow the drydock to Alaska and use it there, it was facially evident that material factual issues are in dispute that should not have been decided on summary judgment.

For instance, the district court focused on the phrase "long distances," to find a lack of ambiguity regarding the place of use for the drydock. ER 253. However, it is entirely ambiguous as to what "long distances" means. "Long distances" can permissibly reference transporting the drydock to almost anywhere, and certainly does not say "to Alaska." In support of this interpretation, TDX submitted the declaration of Kevin Kennedy, who explained why he drafted and included the phrase "long distances" in the Letter of Intent, and why that phrase did not suggest that TDX would take the drydock to Alaska. ER 234. Kennedy attested that the sole purpose for including the "long distances" language was as a business precaution with the

> intent of keeping open TDX's future options for using the *Ex-Competent*. We did not want the drydock if we could never move it out of Hawaii, such as to California or elsewhere if the Hawaiian market went sour, or Marisco went bankrupt, or our arrangement with Marisco fell apart.

Id. Contrary to the court's interpretation, the term did not mean that TDX was going to, or was even financially able, to undertake the monumental task of disassembling, insuring, and towing the drydock to another state. The court ignored Kennedy's declaration of uncontested facts and impermissibly read in its own interpretation of the Transfer Package's ambiguities.

The district court also placed unnecessary emphasis on the word "rehabilitation" and independently decided that only rehabilitation was to occur in Hawaii and nothing else. ER 253. This was clear error. The court again ignored the Marsico letter attached to the Letter of Intent which clearly states Marisco and TDX's intent to put the drydock "into service in Hawaii. . . . and utilize it for services to our various clients." ER 27. Using the drydock to service the needs of Marisco's client entails far more than just rehabilitation. At the least, the ambiguity in the Letter of Intent raises a genuine issue of material fact rendering summary judgment inappropriate.

3. The Letter of Intent Indicates That TDX Retains "Full Control" of the *Ex-Competent*.

The district court erred in finding as a matter of law that TDX violated the Transfer Document by using the *Ex-Competent* in partnership with Marisco, a private corporation that was ineligible to receive donations of surplus property. ER 256. TDX, in its Letter of Intent, promised to "retain full control of the operations

and management of the vessel," and the attached Marisco Letter dated January 18, 2001 explained that Marisco would "work with TDX . . . to fulfill all requirements and obligations" of the donation. ER 27, 29.

Rather than focus on these two documents, the district court placed undue importance on Marisco's pre-transfer October 24, 2000 letter of understanding, drafted when an SBA donation seemed imminent, to find that the terms of the drydock's use breached the Transfer Document. ER 256-57 (finding that the letter of understanding's use of the phrase "Marisco may operate and use the vessel for its intended purposes" violated section 8 of the Transfer Document which directs the donee not to "lease, lend, bail, cannibalize, [or] encumber" the property).

That TDX was permitting Marisco to use the drydock for its "intended purposes" does not mean that TDX was waving any right to control its operations. To reach this erroneous conclusion, the court completely disregarded the existence of the Interim Agreement, which became effective on January 2, 2001, and superseded the October 2000 letter of understanding which was merely a "preliminary business plan" subject to subsequent revision. ER 25. The Interim Agreement conformed to the Transfer Document and expressly reaffirmed that "Nothing in the Agreement intended to sell, trade, lease, lend, bail, cannibalize,

encumber, or otherwise dispose of the *Ex-Competent*."[10] ER 64. The court also overlooked the fact that the Marisco Letter helped define the parties' meaning of "full control" by stating that it would simply "put the [drydock] into service in Hawaii" to enable Marisco to employ and train Aleut members in the operation of the drydock in Hawaii with existing clients. ER 27.

Nothing in the relationship between TDX and Marisco even approaches the level of conveyance required to violate section 8 of the Transfer Document. In addition, the court's distorted construction of section 8 of the Transfer Document conflicts with the GSA's prior instances of allowing private, non-eligible entities to share in the use of property donated to public agencies.[11] ER 235. As the Court of Federal Claims held in an analogous case of GSA interference with donated surplus property:

> [P]ublic agencies frequently lease donated property to private companies. In fact, much of the government's activity is carried out by contracting with private parties, many times using government property or materials. The government's latest interpretation of the [1949 Property Act] would render any and all such arrangements unlawful. Unless a donor places restrictions on the use of donated property before it is transferred, that donor loses control over the

[10] Neither the state nor federal agencies claimed that the Interim Agreement violated the donation's terms.

[11] For example, GSA allowed the Port of San Francisco to share use of its donated drydock with the private company San Francisco Drydock under a donation governed by the same paragraph 8 of the Transfer Document. ER 5, 14.

> recipient's use of the property–including the leasing or selling of that property to a third party.

Osprey Pacific Corp., 41 Fed. Cl. at 155. Simply put, there is no factual basis to conclude on summary judgment that the Letter of Intent and Interim Agreement's reference to "full control" precluded the participation of TDX's "partner in Hawaii" in operations of the *Ex-Competent*.

4. Marisco's Letter Indicates Intent to Operate the Drydock in Hawaii.

Referenced in and attached to TDX's Letter of Intent was Marisco's letter of January 18, 2001, which was a "Letter of reaffirmation of commitment from Marisco Limited, the shipyard owner, our partner in the State of Hawaii." ER 27. This letter specifically states the intent of Marisco and TDX to operate, not just rehabilitate, the drydock in Hawaii as follows:

> This letter is to reaffirm our commitment and interest in putting the EX AFDM-6 Drydock into service in Hawaii. . . . We are indeed willing to work with TDX and the Small Business Administration to fulfill all requirements and obligations.

Id. (emphasis added).

The district court, without considering the contrary evidence before it, erroneously declared this letter "not relevant" and made the factual finding that Marisco's use of the word "service" had nothing to do with customers in Hawaii, but rather meant that TDX was making the drydock functional in Hawaii in

preparation for an open-ocean trip to Alaska. ER 254. In so doing, the court interjected its own interpretation of the term and ignored TDX's evidence. The federal and state defendants provided no contrary evidence on this issue.

First, the court overlooked the remainder of the letter that specifically limits the scope of the meaning of "service" to include "put[ting] the Drydock into operation and utiliz[ing] it for services to our various clients." ER 27 (emphasis added). Second, the court neglected to consider TDX's unopposed evidence regarding TDX's and Marisco's plans for the drydock in Hawaii, and the Alaska SASP's knowledge of, approval, and guidance in developing those plans. ER 232-34.

Instead, the court exaggerated the importance of the term "interest" to find that Marisco only had a limited desire to repair the *Ex-Competent* in Hawaii and "nothing more." ER 254. Not only does the court's interpretation highlight the factual disputes at issue, the court committed a clear error of contract interpretation by focusing on one term out of context to undermine the parties' intent as expressed in the Transfer Package as a whole. It is absurd to think Marisco's existing clients were going to travel to Alaska to service their vessels in the repaired drydock. TDX's and Marisco's "interest" was to rehabilitate and use the drydock in Hawaii.

5. BSE Could Have Received Title to the *Ex-Competent* After the Execution of the Transfer Document.

The district court erred in finding as a matter of law that BSE could not have obtained title to the *Ex-Competent* through the SBA program "because the *Ex-Competent* had already been transferred to TDX." ER 257. Although TDX obtained paper title to the *Ex-Competent* on January 19, 2001, it did not perfect conditional title to the *Ex-Competent* until it took possession of the drydock on May 2, 2001. ER 42; *see* 41 C.F.R. § 102-37.205(b) (stating "conditional title will pass to the eligible donee when . . . [it] takes possession of the property"). Before that time, uncontested evidence indicates the continuing efforts of the SASP to obtain title to the *Ex-Competent* through the SBA for BSE.[12] ER 23-24, 37-38, 233.

The district court ignored the February 14, 2001 "Distribution Document" completed by the SASP conveying the *Ex-Competent* to BSE under the SBA. ER 35-36. The court also failed to consider subsequent correspondence from the SASP to BSE indicating that they were committed to "proceed with the transfer to Bering Sea Ecotech." ER 37-38. It was only on May 14, 2001, after TDX had

[12] An SBA transfer was more advantageous to both the SASP and BSE because of fewer restrictions on use of surplus property than under a GSA plan. *Compare* 13 C.F.R. § 124.405 (SBA regulations) *with* 41 C.F.R §§ 102-37.230, -.460, -.465, -.470 (GSA donations). BSE could have had a more extensive business plan under the SBA program then was available to TDX under the GSA donation. ER 57.

taken possession of the drydock, that SBA indicated the transfer to BSE was "on hold pending the resolution of certain [unspecified] policy concerns." ER 45. A review of the record would have indicated a material factual dispute regarding the ability of BSE to obtain title through the SBA transfer; the district court erred by granting summary judgment to the SBA.

In sum, the factual issues that remain in dispute are material to the ultimate resolution of this case. ER 244 n.2. Rather than flesh theses issues out at trial, the district court improperly short-circuited the fact finding process. That the district court engaged in improper fact finding is readily apparent. The district court found no ambiguity in the Transfer Document and ignored TDX's and BSE's uncontroverted evidence to wrongly conclude that it "cannot find any evidence" indicating intended use in Hawaii. *Compare* ER 255 *with* ER 227-241 (listing 124 exhibits). To the extent the district court purported to answer these open questions, "such resolution was premature." *Chevron*, 224 F.3d at 1038. In light of the sufficient ambiguity that exists regarding the proper interpretation of the Transfer Package and the proposed transfer to BSE, summary judgment was not appropriate.

C. The District Court Erred By Finding There Were No Genuine Issues of Material Fact in Dispute With Respect to the State of Alaska.

The district court erred as a matter of law by resolving disputed material

facts on a motion for summary judgment in favor of the State of Alaska. The district court ruled in favor of the State of Alaska on the bare conclusion that there were no genuine issues of material fact in dispute because the SASP "was just a conduit" and "has no independent authority" to demand SBA declare BSE eligible to receive the *Ex-Competent* or order GSA to waive any of the provisions of the Transfer Document. ER 258. This finding is clear error.

Kennedy's declaration of uncontested facts demonstrates that the SASP was more than just a pass through agency. The SASP "actively guided" efforts to make the transfer to BSE happen; "outlined" the plan for TDX to obtain the *Ex-Competent* in the event the SBA transfer fell through; "directed [TDX's] letter writing efforts seeking the *Ex-Competent*;" and signed the Transfer Document on behalf of GSA. ER 32, 231-34. GSA was never part of the pre-transfer process. In other words, the SASP acted as a federal agent and representative in pre-transfer discussions, ultimately confirmed and certified TDX's eligibility to GSA, and evaluated TDX's ability to use the vessel for the purposes stated in the Letter of Intent. *See generally* 41 C.F.R. § 102-37. Had the district court considered this evidence, it would have determined that sufficient ambiguity and uncertainty exists to raise a material factual dispute precluding a grant of summary judgment.

D. The District Court Erred By *Sua Sponte* Granting Summary Judgment for the Federal Defendants' on Issues They Did Not Raise Based On Disputed Material Facts.

A district court "may not grant summary judgment on a claim when the party has not requested it." *Kelly v. Arriba Soft Corp*., __ F.3d __ , 2003 WL 21518002 *7 (9th Cir., July 7, 2003). "Sua sponte summary judgment will be proper only when 1) no material dispute of fact exists, and 2) the losing party has had an adequate opportunity to address the issues involved, including adequate time to develop any facts necessary to oppose summary judgment." *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993). As is argued above, numerous material disputes of fact exist as to the meaning of certain terms and the intent of the parties regarding operation of the *Ex-Competent*. The existence of disputed facts alone is sufficient to prevent a *sua sponte* grant of summary judgment here. However, the district court committed a further error of law by erroneously resolving a factual issue upon which no party had actually moved for summary judgment.

TDX, the Federal defendants, and the State of Alaska[13] each sought summary judgment on entirely different issues. TDX's cross motion for summary judgment presented eight issues. Three issues sought affirmation that the drydock was effectively transferred to BSE pursuant to the Small Business Act as follows:

[13] The State of Alaska joined in the Federal defendants' motion and moved for summary judgment on whether TDX owed it $200,000 in transfer fees. ER 167-68.

(1) BSE is eligible to receive the *Ex-Competent* from SBA; (2) SBA *de facto* verified BSE's eligibility; and (3) the SASP's February 14, 2001, Distribution Document validly transferred the *Ex-Competent* to BSE. ER 170. Four issues sought affirmation that TDX did not violate the GSA donation's terms pursuant to the 1949 Federal Property Act as follows: (1) the Alaska SASP's purported cancellation of the Distribution Document is null and void; (2) GSA is not prohibited from permitting donated property to be used outside of the transferring SASP's state; (3) the Transfer Document authorized TDX's use of the *Ex-Competent* in Hawaii with Marisco; and (4) TDX's use of the *Ex-Competent* is a "public purpose" under the 1949 Federal Property Act. *Id.* Appellants also sought a declaration that GSA violated FOIA. *Id*.

In stark contrast, the Federal defendants did not move for summary judgment on any of the issues raised by TDX and BSE, and instead sought dismissal under Rule 12(b)(1) and (6) on purely jurisdictional grounds. ER 121-22. The Federal defendants moved to dismiss as to the following issues: (1) whether plaintiffs suffered sufficient harm to confer standing; (2) whether SBA could be sued for injunctive relief; (3) whether the APA permitted suit against SBA and GSA; (4) whether SBA and GSA had waived sovereign immunity; (5) whether there was a viable claim against SBA and GSA for violating trust responsibilities or an executive order; and (6) whether plaintiffs exhausted their

FOIA administrative remedies.[14] *Id*. TDX presented facts supporting its eight issues that they believed demonstrated the absence of a genuine issue of material fact, and that entitled TDX to judgment as a matter of law. ER 227-41. Neither of the federal nor state defendants offered any evidence to rebut TDX's facts and claims, except on the FOIA claim, and instead relied on entirely different claims to resolve the case. ER 120-66.

Not only did the Federal defendants fail to rebut TDX's and BSE's claims, inexplicably, the district court did not grant summary judgment on any of the six grounds raised in the Federal defendants' motion to dismiss. The district court's order granting summary judgment is based entirely on its interpretation of the Transfer Package outside of the undisputed context of the parties' intent. ER 244. The Federal defendants never met their evidentiary burden that there were no genuine issues of material fact in dispute as to the interpretation of the Transfer Package to warrant judgment in their favor as a matter of law. The district court simply reached its own independent conclusion regarding one factual element of the case and disregarded the bounds of judicial restraint to resolve disputed factual questions without trial.

[14] The propriety of the district court's decision to treat this motion as one for summary judgment is addressed in Section II *infra*.

In sum, the district court committed numerous errors of law and misapplied the summary judgment standard in granting summary judgment in favor of the Federal defendants and the State of Alaska. This Court should reverse the district court's grant of summary judgment and remand this matter with instructions for a trial on the merits to resolve the genuine issues of material fact in dispute.

II. THE DISTRICT COURT ERRONEOUSLY CONVERTED THE FEDERAL DEFENDANTS' MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

This Court reviews de novo the decision to treat a motion to dismiss as a motion for summary judgment. *Ritza v. International Longshoremen's and Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988). Generally, if matters outside the pleadings are considered, the motion to dismiss is to be treated as a motion for summary judgment. *Keams v. Tempe Technical Institute, Inc.*, 110 F.3d 44, 46 (9th Cir. 1997); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir.1985). However, a "motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleading happen to be filed with the court and not expressly excluded." *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 582 (9th Cir. 1983). Documents whose contents are alleged or referenced in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b) motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994),

cert. denied, 512 U.S. 1219 (1994); *Pacific Shipyards International, LLC*, No. CV02-00088, Slip Op. at 6. Such consideration does not automatically convert the motion into one for summary judgment. "Courts tend to use the conversion option only in situations in which the materials extrinsic to the pleadings are incontrovertible and pose discrete and dispositive issues." Moore's Fed. Practice 3d § 12.34[3][a] (listing examples). As is discussed above, the issues decided by the district court were not discrete and were not capable of being properly disposed of on summary judgment.

Federal defendants moved to dismiss on the basis of Rule 12(b)(1) and (6).[15] In converting the 12(b)(6) motion to dismiss into a motion for summary judgment, the district court made the bare assertion that it "had looked beyond the face of the complaint in order to decide the issues presently before it." ER 247. However, the district court never explained what documents it was referring to. As such, it is impossible to truly determine whether the court considered any evidence that was not referenced in TDX's complaint. Reviewing the Order, however, the Court

[15] The district court also committed reversible error by converting the Federal defendants' 12(b)(1) motion regarding lack of subject matter jurisdiction to hear counts 1, 2, 3, and 6 of TDX's and BSE's complaint into a motion for summary judgment. ER 121. This Court has been clear that 12(b)(1) motions are not converted into Rule 56 motions when facts outside the pleadings are considered. *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). The district court had no basis in law to convert Federal defendants' 12(b)(1) motion into a motion for summary judgment.

seemed to rely on nothing more the Transfer Package and the July 20, 2001 letter. ER 243-45. All of the documents contained in the Transfer Package and the letter were referenced or attached to TDX's complaint. ER 65-95. Accordingly, they should have been considered as part of the pleadings and the Federal defendants' motion should have been adjudicated on the basis of Rule 12(b).

Moreover, the district court did not apply the proper standard for when a motion to dismiss should be converted into a motion for summary judgment. A district court "may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint necessarily relies" without converting the motion to dismiss into a motion for summary judgment. *Parrino*, 146 F.3d at 706. This includes documents that are "not physically attached to the pleadings," but are simply referenced therein. *Id*. at 705. Here, no party questions the authenticity of the Transfer Package. It is equally clear that the documents are essential to TDX's case. As such, the district court was simply wrong when it converted the motion to dismiss into a motion for summary judgment.

This error was not harmless. When deciding a case based on a motion to dismiss, courts presume the factual allegations of the complaining party are true, construe the plaintiff's allegations liberally, and draw all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). In other words, since the Federal defendants were not challenging the

merits of TDX's and BSE's claims, the district court would have been obligated to accept TDX's factual allegations regarding the parties' intent in the Transfer Package as true. Converting the Federal defendants' motion to dismiss into a motion for summary judgment eviscerated the presumptions of truthfulness owed TDX. This apparently allowed the court to feel free to interject its own independent analysis of TDX's factual contentions and second-guess TDX's otherwise unopposed factual evidence on the merits, rather than considering the case on procedural and jurisdictional grounds as was sought by the Federal defendants.

The district court committed reversible error in converting Federal defendants' motion to dismiss into a motion for summary judgment. This procedural error, with its attendant substantive effects, provides additional grounds for this Court to vacate the district court's erroneous grant of summary judgment in favor of the Federal defendants.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's December 4, 2002 order on summary judgment, reinstate TDX's and BSE's complaint and remand with instructions that the district court separately evaluate and decide TDX's cross-motion for summary judgment and its accompanying

declarations and exhibits, and if necessary, proceed to trial to resolve disputed material facts.

DATED this _____ day of July, 2003

Respectfully submitted,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

By: _____
Thomas P. Schlosser, WSBA No. 6276
Attorneys for Plaintiffs Tanadgusix Corporation and Bering Sea Eccotech, Inc.

STATEMENT OF RELATED CASES

This appeal is related to *Pacific Shipyards International, LLC v. TDX*, No. CV02-00088 (D. Haw. 2002), *appeal pending*, No. 03-15791 (9th Cir. 2003) as both matters involve the legality of the drydock *Ex-Competent*'s use in Hawaii under the terms of its donation. Counsel is unaware of any other related cases.

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CERTIFICATE OF COMPLIANCE (COC, APDX & COS – no pg #'s)

APPENDIX

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the _____ day of July, 2003, I filed the original and fifteen copies of Appellants' Opening Brief along with the original and five copies of Appellants' Excerpts of Record, with the Ninth Circuit Court of Appeals via Federal Express next day air to:

Clerk of the Court
Cathy A. Catterson
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
95 Seventh Street
San Francisco, CA 94119-3939

I further certify that on the ____ day of July, 2003, I served two copies of Appellants' Opening Brief along with one copy of the Appellants' Excerpts of Record on counsel via First Class Mail to the following addresses:

Marjorie L. Vandor, Assistant Attorney General
Alaska Department of Law
Attorney General, State of Alaska
Dimond Courthouse
P. O. Box 110300
Juneau, AK 99811-0300

Susan K. Ullman
Department of Justice, Civil Division
Federal Programs Branch, Rm. 7328
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Thomas M. Bondy, Attorney
Department of Justice, Civil Division
601 D Street NW, Rm. 9548
Washington, DC 20530

I declare the above to be true and correct under penalty of perjury. Executed this _____ day of July, 2003, at Seattle, Washington.

_____

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