IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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| PACIFIC SHIPYARDS INTERNATIONAL, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>TANADGUSIX CORPORATION and MARISCO, LTD.,<br><br>Defendants. | ) | CV. NO. 02-00088 DAE-KSC |

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
APR 04 2003
at 3 o'clock and 2 min. P.M.
WALTER A. Y. H. CHINN, CLERK

ORDER GRANTING IN PART DEFENDANTS' MOTION TO RECONSIDER AND AMEND JANUARY 31, 2003 ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS IN PART Defendants' Motion to Reconsider and Amend January 31, 2003, Order Granting Defendants' Motion to Dismiss Second Amended Complaint ("Motion"), filed February 13, 2003.

BACKGROUND

The facts at issue in this case have been set forth in previous filings by the respective parties, as well as in this court's orders filed on May 31, 2002, and January 31, 2003 ("May 31, 2002 Order" and "January 31, 2003 Order"

respectively). In the January 31, 2003 Order, this court granted Defendant Tanadgusix Corporation's ("TDX")[1] and Defendant Marisco, Ltd.'s ("Marisco") Motions to Dismiss. Pacific Shipyards International, LLC ("PSI") had alleged in its Second Amended Complaint that TDX and Marisco entered into a fraudulent scheme to obtain the federal surplus drydock, the *Ex-Competent* AFDM-6 ("*Ex-Competent*")[2], from the United States. As a result of this scheme, PSI alleged it was faced with unfair competition and incurred financial loss.

In its Second Amended Complaint, PSI had asserted four new bases for establishing a civil RICO claim against Defendants. The two documents pertinent to the present Motion are (1) the Administrative Order of the United States General Services Administration ("GSA Order"), dated August 2, 2002, and (2) the decision in Tanadgusix Corp. et al. v. Huber, et al., No. A02-0032 CV (RRB) ("Huber"), filed on December 5, 2002, granting summary judgment against TDX and in favor of GSA. PSI attached both items as exhibits to its Opposition to Defendants' Motions to Dismiss.

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[1]TDX is an Alaska corporation with Aleut shareholders, formed under the Alaska Native Claims Settlement Act.

[2]The *Ex-Competent* is a 56-year-old floating drydock formerly owned by the United States.

In its review of the significance of the GSA Order and the Huber decision, this court determined that the GSA Report stopped short of accusing any party of a fraudulent scheme. See January 31, 2003 Order at 8. GSA had found that the Letter of Understanding between TDX and Marisco explicitly set forth the intent of both TDX and Marisco to operate the *Ex-Competent* in Hawaii. However, the two letters drafted by TDX to the government – one dated October 9, 2000, and the other dated January 19, 2001 – represented that TDX's intentions were not to operate the vessel in Hawaii but to prepare it for use in Alaska in keeping with the agreed terms of the transfer. For the purpose of deciding the validity of PSI's assertion that sufficient grounds existed for finding a viable RICO claim against Defendants, the court inferred from the GSA Order that the TDX and Marisco arrangement violated the terms of the transfer document, which had identified the public purpose of the drydock as being for the economic development of St. Paul Island, Alaska, and for the benefit of the Aleuts. Thus, the court determined for the limited purposes of the Motion to Dismiss that certain findings set forth in the GSA Order requiring the return of the *Ex-Competent* to the government "appeared" to establish that TDX had expressed different intentions to different parties in its various exchanges. Id. at 9.

These inferences, necessarily favorable to PSI, nevertheless failed to alter the court's previous determination in its May 31, 2003 Order that PSI lacked standing to assert a RICO claim. Specifically, this court stated that although the factual allegations established a greater likelihood that a fraud may have been committed against the United States by at least TDX, PSI still failed to allege with the particularity required under Fed. R. Civ. P. Rule 9(b) that its multi-million dollar investment in the drydock business was recoverable because of Defendants' allegedly fraudulent mail and wire exchanges involving the *Ex-Competent*." See January 31, 2003 Order at 17.

STANDARD OF REVIEW

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. Plotkin v. Pacific Telephone & Telegraph Co., 688 F.2d 1291, 1292 (9th Cir. 1982). There is a "compelling interest in the finality of judgments which should not be lightly disregarded." Rogers v. Watt, 722 F.2d 456, 459 (9th Cir. 1983).

The Ninth Circuit has articulated two goals that must be accomplished in order for a motion for reconsideration to succeed: "First, [it] must demonstrate some reason why the court should reconsider its prior decision.

Second, [it] must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Stein v. State Farm Mutual Automobile Insurance Company, 934 F. Supp. 1171, 1173 (D. Haw. 1996). Courts have established three grounds which may justify reconsideration of prior orders: 1) an intervening change in controlling law; 2) the availability of new evidence; or, 3) the need to correct clear error or to prevent manifest injustice. Kona Enterprises, Inc. v. Bishop, 229 F.3d 877, 890 (9th Cir. 2000).

A district court's failure to correct clear error constitutes abuse of discretion in the Ninth Circuit. McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999). However, where the motion for reconsideration raises no new arguments, but instead relies on the same arguments made in the party's original opposition, the motion for reconsideration should be denied. See generally Fuller v. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991) (holding that district court properly denied motion for reconsideration where the motion only raised arguments previously addressed by the court).

## DISCUSSION

In this Motion, TDX claims that various statements made by the court in its January 31, 2003 Order constitute "dicta" that should be redacted because of its irrelevance and potential to cause Defendants undue harm in subsequent

proceedings. TDX argues that these statements present incorrect facts that were "not refined by the fires of adversary presentation." See Motion at 4 (citations omitted). The court notes, however, that even were Defendants correct in characterizing the court's statements as dicta, thus rendering their significance to the court's ultimate holding negligible, the cases cited by Defendant TDX only involve the appropriateness of applying dicta in subsequent cases. They do not stand for the proposition that such dicta must be deleted from the original order for its possible precedential effect.

Without ruling on which statements may be dicta for the purposes of subsequent, hypothetical proceedings, the court notes that the exhibits attached to PSI's Opposition were properly considered by the court for the purpose of determining whether PSI's RICO claim could withstand Defendants' Motion to Dismiss. The court was asked to decide whether PSI had a viable claim for asserting that Defendants had engaged in a fraudulent scheme. The procedural posture of the proceeding did not require the court either to adopt or reject the Huber and/or GSA Order's findings as its own. Instead, this court merely sought to accept PSI's factual allegations as true for the purposes of determining whether PSI had any grounds upon which to pursue its action. As established in the January 31, 2003 Order's Standard of Review, "[a]ll allegations of material fact

taken as true and construed in a light most favorable to Plaintiff. Clegg v. Cult Awareness Network, 18 F.3d 752, 753-54 (9th Cir. 1994).

In the January 31, 2003 Order, this court stated: "GSA's official revocation of TDX's ownership of the *Ex-Competent* on August 2, 2002, and the Alaska district court's decision in Huber, filed December 5, 2002, indicate that further investigation into TDX and Marisco's intentions and actions may be warranted." January 31, 2003 Order at 18. Thus, the court recognized that a further evidentiary hearing would be necessary to determine the actual verity of the allegations, as well as the basis for those allegations. However, to resolve the Motions before it, the court was required to construe all reasonable factual allegations in the light most favorable to the nonmoving party, PSI. As noted by PSI in its Opposition to this Motion, in fulfilling its duty to construe all inferences in favor of the Plaintiff the court was required to review the documents presented by PSI to counter assertions made by Defendants in their moving papers. Thus, to address Defendants' claim that PSI's assertions were fabricated and without merit, the court was required to treat the documents upon which PSI based its allegations as true for the purposes of determining the validity of its claims.

In the January 31, 2003 Order, the court did not adopt the findings in the documents as indisputable evidence. Rather, it qualified the statements

identified by Defendants by mentioning the source of the court's inference as well as the document upon which the court had based its inferences. It adopted no statements as evidence but relied on the GSA Order and the Huber opinion to the extent that they enabled the court to draw the proper inferences to decide the issues before it.

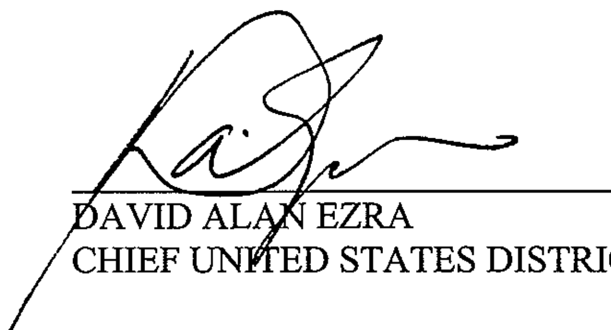
In general, the court finds that the parameters of the court's January 31, 2003 Order are clear such that any inferences drawn from the GSA Order and Huber for the purpose of ruling on Defendants' Motion to Dismiss have limited precedential value; they do not constitute findings of fact. Moreover, in any possible subsequent proceedings, Defendants are not precluded from arguing that parts of the opinion are nothing more than dicta and thus should be treated as such with respect to certain issues. Recognizing Defendants' concerns, however, the court clarifies that its inferences are limited by the standard of review set forth in the January 31, 2003 Order. Indeed, the court did not engage in an evidentiary hearing as to the verity of the factual assertions contained in the GSA Order and Huber decision. Thus, any inferences the court drew from these two documents were for the express purpose of properly deciding Defendants' Motion to Dismiss.

## CONCLUSION

In light of the reasons set forth above, the court GRANTS IN PART Defendants' Motion To Reconsider and Amend January 31, 2003 Order Granting Defendants' Motion to Dismiss Second Amended Complaint.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, 4-4-03.



DAVID ALAN EZRA
CHIEF UNITED STATES DISTRICT JUDGE

Pacific Shipyards International, LLC vs. Tanadgusix Corporation, et al., Civil No. 02-00088 DAE-KSC; ORDER GRANTING IN PART DEFENDANTS' MOTION TO RECONSIDER AND AMEND JANUARY 31, 2003 ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT