

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

AUG 16 2004

at 4 o'clock and 30 min. P.M.  
WALTER A. Y. H. CHINN, CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, <u>ex</u>	)	CIVIL NO. 01-000758 HG-LEK
<u>rel.</u> Pacific Shipyards	)	
International, LLC,	)	
	)	
Plaintiff,	)	ORDER DENYING DEFENDANT
	)	TANADGUSIX CORPORATION'S
vs.	)	MOTION FOR PARTIAL SUMMARY
	)	JUDGMENT REGARDING MEASURE OF
	)	DAMAGES AS TO COUNTS I TO III
TANADGUSIX CORPORATION and	)	AND
MARISCO, LTD.,	)	DENYING PLAINTIFF UNITED
	)	STATES OF AMERICA'S CROSS-
Defendants.	)	MOTION FOR PARTIAL SUMMARY
_____	)	JUDGMENT
	)	AND
	)	GRANTING PLAINTIFF UNITED
	)	STATES OF AMERICA'S MOTION FOR
	)	STAY OF PROCEEDINGS

ORDER DENYING DEFENDANT TANADGUSIX CORPORATION'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT REGARDING MEASURE OF DAMAGES  
AS TO COUNTS I TO III  
AND  
DENYING PLAINTIFF UNITED STATES OF AMERICA'S CROSS-MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
AND  
GRANTING PLAINTIFF UNITED STATES OF AMERICA'S MOTION  
FOR STAY OF PROCEEDINGS

Plaintiff, the United States of America ("Plaintiff" or "the Government"), and Relator, Pacific Shipyards International, LLC ("Relator" or "Pacific Shipyards") have brought suit against Defendants, Tanadgusix Corporation and Marisco, Ltd. ("TDX," "Marisco," and, collectively, "Defendants"), under the qui tam provisions of the False Claims Act, codified at 31 U.S.C. §§ 3729-3733. The Government alleges that TDX conspired with Marisco to obtain the Ex-Competent, a floating drydock, from the United States General Services Administration by submitting false claims and statements to the Government.

Without first obtaining a determination of Defendants' liability, if any, TDX and the Government have filed cross-motions for partial summary judgment on the issue of the proper measure of damages as to Counts I, II, and III of the Government's Complaint.

For the reasons that follow, the Court DENIES both motions for partial summary judgment and GRANTS the Government's Motion for Stay of Proceedings.

#### **PROCEDURAL HISTORY**

On November 13, 2001, Pacific Shipyards International, LLC, filed a Complaint against Defendants as Relator on behalf of the United States, pursuant to the False Claims Act, 31 U.S.C. § 3730b.

On September 26, 2003, the Government filed its Complaint against Defendants. Counts I, II, and III of the Government's Complaint alleged claims under the False Claims Act, 31 U.S.C. §§ 3729(a)(1), (2), (3), and (7).

On April 22, 2004, Defendant TDX filed a Motion for Partial Summary Judgment Regarding Measure of Damages as to Counts I to III, as well as a separate and concise statement of facts in support thereof.

On April 28, 2004, Defendant TDX filed the Original Declaration of Ronald P. Philemonoff.

On June 8, 2004, the Government filed a separate and concise counter-statement of facts in opposition to TDX's motion for partial summary judgment.

On June 9, 2004, the Government filed an Opposition to TDX's Motion for Partial Summary Judgment Regarding Measures of Damages as to Counts I to III and the United States' Cross-Motion for Partial Summary Judgment. On the same date, the Government filed a separate and concise statement of facts in support of its cross-motion.

On June 10, 2004, Relator Pacific Shipyards International, LLC filed a Joinder to the Government's opposition to TDX's motion for partial summary judgment and to the Government's cross-motion for partial summary judgment.

On June 17, 2004, Defendant TDX filed a reply to the Government's opposition to TDX's motion for partial summary as well as a separate and concise statement in support of TDX's opposition to the Government's cross-motion for partial summary judgment.

On June 21, 2004, the Government filed a Reply to TDX's opposition to the Government's cross-motion for partial summary judgment, as well as a separate and concise counter-statement of facts in opposition to TDX's opposition to the Government's cross-motion for partial summary judgment.

On June 22, 2004, Defendant Marisco, Ltd. filed a Joinder to Defendant TDX's opposition to the Government's cross-motion for partial summary judgment.

On June 23, 2004, the Government filed a Motion for Leave to File First Amended Complaint.

On June 28, 2004, the Court heard oral argument with respect to the parties' cross-motions. The Court took the matter under submission. The Court granted the parties leave to file letter briefs in support of their respective positions on the question of whether the Court should reach the issue of how damages should be calculated prior to the determination of Defendants' liability.

On July 2, 2004, the Court received and filed letter briefs from the Government and Defendant TDX regarding their respective positions on the propriety of deciding the appropriate measure of damages in the absence of a finding as to the alleged underlying liability.

On August 4, 2004, the Government filed the Original Declaration of Jeffrey Cohen in support of its motion for stay of proceedings, which was filed on August 6, 2004.

On August 6, 2004, Defendant TDX filed a pleading entitled "Supplemental Memorandum of Law in Support of (1) TDX's Motion for Partial Summary Judgment Regarding Measure of Damages as to Counts I to III, and (2) TDX's Opposition to the United States' Cross-Motion for Partial Summary Judgment."

On August 6, 2004, the Court issued a Minute Order granting Defendants until August 12, 2004 at 12:00 p.m. to file responses to the Government's Motion for Stay of Proceedings. The Court also granted the Government until August 12, 2004 at 12:00 p.m. to file a response to Defendant TDX's Supplemental Memorandum of Law in Support of (1) TDX's Motion for Partial Summary Judgment Regarding Measure of Damages as to Counts I to III, and (2) TDX's Opposition to the United States' Cross-Motion for Partial Summary Judgment.

On August 11, 2004, the Government filed its Opposition to TDX's Supplemental Memorandum of Law in Support of TDX's Motion for Partial Summary Judgment.

On August 12, 2004, TDX filed a Memorandum of Law in Opposition to United States' Motion for Stay of Proceedings.

On August 12, 2004, Defendant Marisco filed an Opposition to the Government's Motion for Stay of Proceedings and Joinder in Defendant TDX's memorandum in opposition to the Government's Motion for Stay of Proceedings.

#### **BACKGROUND**

This dispute stems from the Government's transfer to Defendant TDX, in January of 2001, of the Ex-Competent drydock, a 552-foot long, all-welded, structural steel, self-docking type floating drydock. The transfer was executed pursuant to a Vessel Conditional Transfer Document ("VCTD"), which enumerated a series of conditions and restrictions upon Defendant TDX's use of the drydock.

The Government claims that Defendant TDX has breached the terms of the VCTD by, inter alia, entering into an agreement with Defendant Marisco that violated a prohibition against leasing (or otherwise encumbering) the Ex-Competent, contained in the VCTD. The Government seeks, inter alia, damages for Defendants' alleged

violations of the False Claims Act, codified at 31 U.S.C. § 3729 et seq.

Defendant TDX disputes the Government's allegations and asserts its confidence that it ultimately will prevail in this case, but seeks a determination from this Court as to the proper method for calculating the Government's damages if Defendant TDX were found liable on Counts I, II, and III of the Government's Complaint.

The Government also seeks a determination from this Court as to the proper method for calculating its damages, in the event Defendant TDX is found liable.

In related litigation, styled Tanadgusix Corporation v. Huber et al., No. A02-0032-CV (D. Alaska Dec. 5, 2002), appeal docketed, No. 02 36142 (9th Cir.), the United States District Court for the District of Alaska granted the Government's motion for summary judgment, deciding a number of issues pertinent to this case. Among the issues addressed by the Alaska District Court were whether legal title to the Ex-Competent drydock has reverted from TDX to the Government; whether certain provisions of the VCTD are unambiguous and binding on the parties; and whether TDX maintained full operational control of the Ex-Competent drydock. The order of the Alaska District Court was appealed to the United States Court of Appeals for the Ninth

Circuit. The Court of Appeals heard oral argument on July 7, 2004.

**I. PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT REGARDING MEASURE OF DAMAGES AS TO COUNTS I TO III**

**STANDARD OF REVIEW**

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The moving party has the initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. The moving party need not produce any evidence at all on matters for which it does not have the burden of proof. Celotex, 477 U.S. at 325. The moving party must show, however, that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. That burden is met simply by pointing out that there is an absence of evidence to support the nonmovant's case. Id.

If the moving party meets its burden, then the non-movant



must present admissible evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). The opposing party may not defeat a motion for summary judgment in the absence of significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. Fed. R. Civ. P. 56(e); T.W. Elec. Serv., 809 F.2d at 630. Rather, the opposing party must direct the court to specific, triable facts. Fed. R. Civ. P. 56(e). Opposition evidence may consist of declarations, admissions, evidence obtained through discovery and matters judicially noticed. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 322.

Summary judgment for the defendant is appropriate when the plaintiff fails to make a sufficient showing to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial. In ruling on a motion for summary judgment, the court views the facts in the light most favorable to the non-moving party. State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989).

## ANALYSIS

Fed. R. Civ. P. 56(a) and (b) provide that a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment, and a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may move for summary judgment in the party's favor as to all or any part thereof. Fed. R. Civ. P. 56(c) provides, inter alia, that a summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." The rule does not expressly provide for the converse: summary judgment as to the amount of damages while a genuine issue remains as to liability.

A number of courts have declined to consider summary judgment motions seeking a determination as to the method by which damages hypothetically would be calculated if liability was found to lie. See, e.g., Kendall McGaw Laboratories, Inc. v. Community Memorial Hospital, 125 F.R.D. 420, 422 (D. N.J. 1989) (denying cross-motions seeking "a legal 'what if' pronouncement of the appropriate standard by which [actual damage] calculations may, or may not, be made at some future date."); Quintana v. Byrd, 669 F. Supp. 849, 850 (N.D. Ill. 1987) (holding that there is "no such thing" as partial summary judgment on the availability of pecuniary damages where liability remains in

issue); see also United Services Automobile Association v. National Car Rental System, Inc., 2001 WL 1910545, \*6 (W.D. Tex. Sept. 27, 2001) (finding the Plaintiff's motion for partial summary judgment on the measure of damages, filed prior to the determination of liability, procedurally defective due to its request for an advisory opinion); Hoffmann-La Roche Inc. v. Promega Corp., 33 U.S.P.Q. 2d 1641, 1649 (N.D. Cal. 1994) (denying as premature a motion for summary adjudication of patent damages, which was brought prior to the determination of liability). As the United States District Court for the District of New Jersey explained:

A Rule 56 movant may not 'play leapfrog' with his case by seeking a decision whose validity depends on one or more unresolved issues. To allow another result would ignore the chronological structure of trial practice. Just as the events which produce litigation move forward in time, so must the litigation itself. A different arrangement would run the law into a conceptually-backward nonsense; damages do not bring forth liability any more than an injury produces a duty.

Kendall McGaw Laboratories, Inc., 125 F.R.D. at 422 (D. N.J. 1989).

Some courts have entertained motions for partial summary judgment on the measure of damages where the underlying liability remained unresolved. See, e.g., Williams v. J.P. Morgan & Co.,

Inc., 199 F. Supp. 2d 189, 192-93 (S.D.N.Y. 2002); Highland Indus. Park, Inc. v. BEI Defense Systems Co., 192 F. Supp. 2d 942, 944 (W.D. Ark. 2002); United States ex rel. Roby v. Boeing Co., 79 F. Supp. 2d 877, 895 (S.D. Ohio 1999).

The Court recognizes that there is precedent for finding that it may decide the questions raised by the parties' cross-motions for partial summary judgment. The Court finds, however, that such an inquiry at this preliminary stage would be an inefficient and potentially unnecessary use of the Court's time. Whether Defendants TDX and Marisco are liable for the violations alleged remains to be determined. None of the parties have filed dispositive motions regarding Defendants' respective liabilities in this case. The case is not scheduled to go to trial until January 25, 2005. As was the case in Kendall McGaw Laboratories, Inc., the parties in this case are asking the Court to issue a "legal 'what if' pronouncement of the appropriate standard by which [damage] calculations may, or may not, be made at some future date." 125 F.R.D. at 422. If the Court engages in the inquiries and analyses requested by the parties, and Defendant TDX ultimately is found not liable, the Court's resources would have been wasted. The Court DENIES the parties' cross-motions for partial summary judgment.

## II. GOVERNMENT'S MOTION FOR STAY OF PROCEEDINGS

### STANDARD OF REVIEW

A trial court has the inherent authority to control its own docket and calendar. See Yong v. Immigration and Naturalization Service, 208 F.3d 1116, 1119 (9th Cir. 2000) (citing Landis v. North American Co., 299 U.S. 248, 254-55 (1936)). In particular, where the resolution of independent proceedings will affect a case before a trial court, the trial court may find that efficiency and fairness would best be served by the court's entering a stay of the action before the court, pending resolution of the independent proceedings. Id. at 1119-20.

The United States Court of Appeals for the Ninth Circuit has clarified that a trial court may enter a stay of an action before it, pending resolution of independent proceedings, whether the separate proceedings are judicial, administrative, or arbitral in character. Id. at 1120. The Court of Appeals has also clarified that the issues raised in the separate proceedings need not be controlling in the action before the trial court to justify entry of a stay. Id.

## ANALYSIS

As indicated in the Background section, supra, litigation related to this case, styled Tanadgusix Corporation v. Huber et al., No. A02-0032-CV (D. Alaska Dec. 5, 2002), appeal docketed, No. 02 36142 (9th Cir.), is currently pending before the United States Court of Appeals for the Ninth Circuit. The basis of the appeal is an order issued by the United States District Court for the District of Alaska granting a motion for summary judgment filed by the Government.

The Court of Appeals has been asked to decide a number of issues relevant to this case, including whether legal title to the Ex-Competent drydock lies with TDX or the Government, whether the Vessel Conditional Transfer Agreement signed by TDX and the Government is unambiguous, and whether TDX maintained full operational control of the Ex-Competent drydock. The questions before the Court of Appeals in Tanadgusix Corporation v. Huber et al. are relevant to issues presented in the case herein and the appellate court's ruling may be helpful to this Court in deciding the issues presented in this action.

Defendants TDX and Marisco have filed pleadings to reflect their opposition to the Government's motion for a stay of these proceedings. Defendants' oppositions, however, illustrate that

imposing a stay, pending a decision by the appellate court in Huber, would promote judicial efficiency.

Defendants' opposition pleadings raise a number of arguments related to the underlying factual disputes here. Defendants assert that the appellate court's decision in Huber will not result in Defendants being collaterally estopped from raising the issues presented to the United States District Court for the District of Alaska in this proceeding. Defendants also assert that they will be prejudiced by the delay that would result from imposition of a stay.

The Court notes that it is not necessary for the issues presented to the Court of Appeals in Huber to be controlling here in order for this Court to grant a stay. See Yong, 208 F.3d at 1120. The Court believes that the appellate court's ruling in Huber will be helpful to the Court and the parties in this case, even if not binding, to the extent that parallel issues are presented in the two cases. In weighing Defendants' arguments that they would be prejudiced by a delay, the Court does not find such arguments to overcome the factors supporting a stay.

The Court finds that judicial efficiency would be best served by entry of a stay of this action, pending the appellate court's ruling in Tanadgusix Corporation v. Huber et al.

CONCLUSION

In accordance with the foregoing,

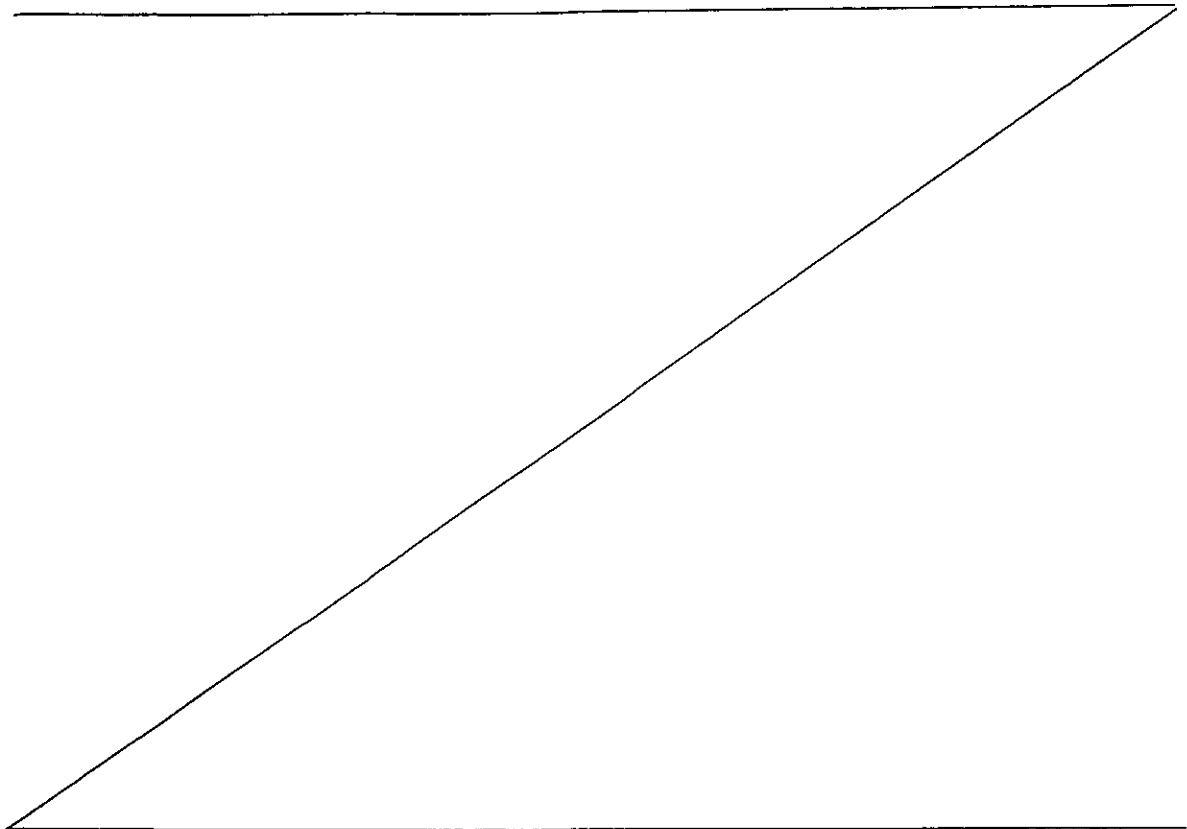
IT IS HEREBY ORDERED:

(1) Defendant TDX's Motion for Partial Summary Judgment Regarding Measure of Damages as to Counts I to III is DENIED;

(2) the Government's Cross-Motion for Partial Summary Judgment is DENIED;

and

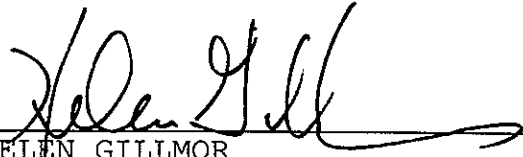
(3) the Government's Motion for Stay of Proceedings is GRANTED.





IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 16, 2004.

  
HELEN GILLMOR  
United States District Judge

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United States of America, ex rel. Pacific Shipyards  
International, LLC v. Tanadgusix Corporation and Marisco LTD, CV  
02-00758 HG-LEK; Order Denying Defendant Tanadgusix Corporation's  
Motion for Partial Summary Judgment Regarding Measure of Damages  
as to Counts I to III and Denying Plaintiff United States of  
America's Cross-Motion for Partial Summary Judgment and Granting  
Plaintiff United States of America's Motion for Stay of  
Proceedings