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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

PHYLLIS FABER, an individual, and ALLIANCE FOR LOCAL SUSTAINABLE AGRICULTURE, an unincorporated organization, DRAKES BAY OYSTER COMPANY, a California corporation,

Petitioners and Plaintiffs,

v.

CALIFORNIA COASTAL COMMISSION, CHARLES LESTER, DOES 1 through 10, inclusive,

Respondents and Defendants.

And Related Cross Actions.

Nos. CIV 1301469 and 1301472
CONSOLIDATED

DRAKES BAY OYSTER COMPANY'S OPPOSITION TO MOTION FOR NEW TRIAL

Hearing Date: August 27, 2014
Time: 8:30 a.m.
Department: B
Judge: Honorable Roy O. Chernus

Accompanying Papers:
Declaration of Phyllis Faber
Declaration of Larry Giambastiani
Declaration of Peter Prows

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I. INTRODUCTION

In June, this Court issued a judgment fully resolving, in favor of petitioners Phyllis Faber and the Alliance for Local Sustainable Agriculture ("ALSA"), all the claims involving these petitioners. Respondent California Coastal Commission now moves for a new trial on three grounds. Each is a sham. The motion should be denied.

The Commission first argues that only one judgment can be issued in a consolidated case. But a case can have two or more judgments. The California Supreme Court has made clear, since at least 1926, that a party is entitled to a judgment when all its claims are resolved even if another party's claims have not been fully resolved. Here the claims of Ms. Faber and ALSA have been fully resolved, and these petitioners are entitled to a judgment.

Second, the Commission argues that this Court did not resolve the claims Ms. Faber and ALSA asserted against Charles Lester, who is the Executive Director of the Commission and was sued only in his official capacity. By resolving all of the claims against the Commission, this Court also resolved all of the claims against Dr. Lester.

Third, the Commission argues that there is "intervening" new law about the environmental baseline that should be considered. But there is no new law. The new case identified by the Commission cites no less than three old cases, all of which state the same rule that is supposedly new. Even if the rule were new law, the motion for a new trial should be denied because the Commission does not argue that the Judgment is inconsistent with the supposedly new law—no doubt because there is no inconsistency. Instead, the Commission repeats the same lack-of-evidence argument it made at great length during oral argument. Repeating a previously made argument is exactly what a party is not allowed to do as part of a motion for a new trial. The Commission should be admonished for breaking this rule and for asserting propositions contrary to well-established law.

The Judgment did not resolve all claims involving petitioner Drakes Bay Oyster Company. The Commission has filed a set of cross-claims against Drakes Bay, and in response Drakes Bay has filed a set of the cross-claims against the Commission. Because these cross-claims remain pending, the Judgment should be considered, with respect to Drakes Bay, to be an interlocutory order that resolves Drakes Bay's petition (which was very similar to the petition filed by Ms. Faber and ALSA)

in favor of Drakes Bay. Since the Judgment does not purport to enter judgment in favor of Drakes Bay, no change in the Judgment is necessary.

Because a final judgment has not been entered in favor of Drakes Bay, the Commission's motion for a new trial does not apply to Drakes Bay, and should be denied. Although the Commission's motion for reconsideration could potentially apply, that motion should be denied because the Court ruled correctly. As noted above, there was no new law; the Judgment is consistent with the new case; and the Commission's motion improperly repeats previously arguments that were previously made and rejected.

The Commission's motions should be denied. The Commission should be admonished.

II. BACKGROUND

A. The Baseline: Oyster Farming On 1950s Racks In A Thriving Environment

Since the Commission's motion refers to the "baseline of existing conditions" (Commission's Memorandum [etc.] ("Mem.") at 2:20-21), the Court may find it useful to have some background information about that baseline.

California has leased Drakes Estero in Point Reyes for shellfish farming since 1934. (Administrative Record ("AR") 731-732.2.[1]) Since the 1950s—long before the Coastal Act—the farm has grown oysters on wooden racks in Drakes Estero. (*Id.* at 693:10-12, 731-732; Declaration of Larry Giambastiani ("Giambastiani Decl.") ¶ 3.)

Drakes Bay Oyster Company ("Drakes Bay") is the current owner of that oyster farm, and it has been a good steward of the environment. When it took over operations in 2005, Drakes Bay invested hundreds of thousands of dollars to clean up and improve the farm's operations. (AR 1408:2-13.) Since then, the harbor seal population in Drakes Estero has been growing, and eelgrass is thriving. (*Id.* at 1473:6-7.) The farm's oyster racks provide habitat that likely contributes to the biodiversity and ecological abundance of Drakes Estero. (*Id.* at 796:19-25.) The farm's shellfish, which are filter feeders, improve water quality. (*Id.* at 626:19-627:6, 668:20-669:12.) Drakes Bay is the only source of the oyster shells that are used for the restoration of native oysters in San Francisco

[1] References to the Administrative Record are to the administrative record lodged with this Court by petitioners Phyllis Faber and ALSA in April 2013.

Bay and threatened and endangered species habitat across the State. (*Id.* at 694:10-20.) Drakes Estero is cleaner and in better condition now than it was before the Coastal Act was enacted. (Giambastiani Decl. ¶ 5.)

B. Phyllis Faber Helps Found The Commission

Phyllis Faber is one of the founders of the Coastal Commission. She is a biologist who in 1972 was co-chair of the campaign to enact the predecessor-statute of the Coastal Act. (Declaration of Phyllis Faber ("Faber Decl.") ¶ 2, Exhibit ("Ex") 1 at viii.) That statute created regional coastal commissions and called for the preparation of the California Coastal Plan, which was issued in 1975. (Pub. Res. Code § 27300 (repealed by own terms in 1977); Faber Decl. Ex. 1.)[2] The California Coastal Plan was staunchly supportive of agriculture. "Plan policies seek to support agriculture and to discourage conversion of these highly productive agricultural land to other uses". (Faber Decl., Ex. 1 at 6-7.) In Point Reyes in particular, the California Coastal Plan was clear that "[d]esignation as a Federal wilderness area … should not interfere with existing … agricultural uses." (*Id.* at 218.)

The California Coastal Plan provided the foundation for the current Coastal Act. (*See* Pub. Res. Code § 30002 (Coastal Act based on study); § 30305 (Commission is the successor to regional coastal commissions).) The Coastal Act codifies these agriculture-friendly provisions of the California Coastal Plan, and applies them to aquaculture.[3] It requires that land suitable for aquaculture "shall be protected for that use". (Pub. Res. Code § 30222.5.) And it generally prohibits conversion of agricultural lands "to nonagricultural uses". (Pub. Res. Code § 30242.)

The oyster farm in Drakes Estero is the type of existing agricultural use of the coast that the Coastal Act was intended to protect.[4]

[2] The California Coastal Plan was prepared by the seven coastal commissions created by that statute. (Faber Decl. ¶ 3.) From 1973 until approximately 1981, Ms. Faber served as a Commissioner on one of those seven commissions—the North Central Regional Commission. Ms. Faber became chair of that commission in approximately 1978. (*Id.* ¶ 4.)

[3] The Coastal Act defines aquaculture as "a form of agriculture". (Pub. Res. Code § 30100.2.)

[4] Ms. Faber is familiar with the California Environmental Quality Act ("CEQA"). She has drafted environmental impact reports ("EIRs"), prepared pursuant to CEQA, that analyzed the impacts of various projects on existing farming operations. (Faber Decl. ¶ 6.)

C. The Commission Goes Awry

Until recently, Drakes Bay and the Commission had a cooperative relationship. In 2007, the Commission and Drakes Bay entered into an agreement that provided for the operation of the oyster farm pending the Commission's issuance of a permit. (AR at 97-109.) More recently, when the Commission began voicing additional concerns, Drakes Bay tried to work with the Commission to resolve the issues cooperatively. Drakes Bay and the Commission came "so close" to reaching agreement on those issues. (*Id.* at 1413:15-1414:6.)

But when the last issues couldn't be resolved before the Commission's self-imposed deadline, the Commission rejected on the agreements that were reached and imposed the unreasonable requirements in the 2013 orders at issue here. (*Id.* at 1417:24-1418:5.) In adopting those orders, the Commission voted to exclude all of Drakes Bay's written evidence from the record—a strange and hostile act. (*Id.* at 1477:3-1479:21.) It also entirely ignored the aquaculture-friendly provisions of the Coastal Act. (*See* AR 3-279 (staff report does not cite any of Coastal Act's aquaculture-friendly or agriculture-friendly provisions).) The Commission's extreme vision for Drakes Estero is evident in a declaration filed in this Court, in which the Commission argued that the racks should be wrapped in plastic and the estero doused with toxic bleach. (Declaration of Peter Prows ("Prows Decl."), Ex. 1 at 8:1-3.)

In April 2013, Ms. Faber brought this suit because she believes that the Commission's 2013 orders against Drakes Bay are an abuse of power and will harm the environment, and because she believes that an agency she helped create has lost its way. (Faber Decl. ¶ 5.)

D. The Current State Of The Pleadings

As mentioned, Ms. Faber, together with the Alliance for Local Sustainable Agriculture ("ALSA"), filed a petition for an alternative writ of mandate to invalidate the Commission's 2013 orders. (Petition for Alternative Writ of Mandate (filed April 5, 2013).) The Judgment fully resolves this petition.

Drakes Bay filed a similar petition, which has since been amended. (Amended Petition for Writ of Mandate (filed May 31, 2013).) This Judgment resolves Drakes Bay's amended petition.

The Commission filed a cross-complaint against Drakes Bay, which has since been amended. (Commission's Amended Cross-Complaint (filed August 16, 2013).) That amended cross-complaint, which demands penalties for alleged violations, remains pending.

In response, Drakes Bay filed its own cross-complaint against the Commission, which has since been amended. (Drakes Bay's Amended Cross-Complaint (filed March 17, 2014).) That amended cross-complaint, which asserts that the Commission violated the agriculture-friendly provisions of the Coastal Act and due process, remains pending.

III. ENTRY OF JUDGMENT FOR MS. FABER AND ALSA WAS PROPER

A. Courts May Properly Enter More Than One Judgment In A Case

The premise of the Commission's argument is that courts can enter only one judgment in a case. (Mem. at 4:7, 6:17.) The Commission is wrong. It has long been the law in California that courts may enter two or more judgments in a case. In the *Howe* case from 1926, the Supreme Court held that "[s]eparate parties … may litigate their controversies separately, and may proceed to final judgment without waiting for judgments as to other parties". (*Howe v. Key System Transit Co.* (1926) 198 Cal. 525, 529.) In 2011, the Supreme Court reaffirmed that "'to hold the person whose rights have been finally disposed of bound to wait until the final judgment against the other party before taking an appeal from the judgment against the first party already rendered is wholly unreasonable and finds no warrant in any provision of the Code of Civil Procedure.'" (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 759, quoting *Rocca v. Steinmetz* (1922) 189 Cal. 426, 428, square brackets inserted by *Baycol* court omitted.) Because separate judgments are proper in cases between multiple parties, the premise underlying the Commission's motion is wrong.

The Commission also argues that entry of judgment "is inconsistent with the consolidation order". (Mem. at 2:11.) But that order said nothing at all about judgment in this case. (*See* Order of May 21, 2013 (no mention of judgment).) The Judgment cannot be inconsistent with an order that said nothing at all about judgment.

The Commission asserts that the Court "agreed" at oral argument "that consolidation would mean only one judgment". (Mem. at 5:26.) But the Court's point was that the "identical causes of

action" would be resolved together. (Mem. at 6:1-3.) And that's exactly what the Judgment did. (Judgment at 2:4-10.)

The Court stated that, when cases are consolidated, "[u]sually" there is one judgment. (Mem. at 6:3.) But if there is "usually" one judgment, *sometimes* there is more than one judgment. This is such a case.

The Commission cites three cases that, it says, require the Court "to refrain from entering judgment" until all claims involving all parties have been resolved. (Mem. at 6:14-16.) But none of the cases support that proposition, and they certainly do not overrule the Supreme Court's decisions in *Howe* and *Baycol*. *Sanchez* simply held that a defendant's appearance in one case did not constitute an appearance in a second case consolidated with the first for purposes of trial. (*Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1396.) *Hamilton* held that a defendant's appearance in one case *did* constitute an appearance in a second case consolidated with the first for all purposes. (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1148.) The Commission does not dispute that it has appeared in both consolidated cases, and so *Sanchez* and *Hamilton* do not apply. And the third case, *Morehart*, did not involve any kind of consolidation, holding simply that a "judgment" that did not resolve all of the claims brought by one party is not a final judgment and is not appealable. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) *Morehart* is distinguishable on the ground that this Court's Judgment *does* resolve all of the claims brought by Ms. Faber and ALSA. (*See* Section III.B below.) Because none of these three cases held that courts are prohibited from entering multiple judgments in consolidated cases, they do not bar multiple judgments here.

B. The Judgment Resolves All Claims Brought By Ms. Faber And ALSA

The Commission suggests that all claims brought by Ms. Faber and ALSA have not been disposed of because claims remain pending against Dr. Lester. (Mem. at 6:18-19.) The petition filed by Ms. Faber and ALSA named Charles Lester as a respondent only "in his official capacity" as "the Executive Director of the Commission." (Petition for Alternative Writ of Mandate (filed April 5, 2013) ¶ 12.) Suing Dr. Lester in his official capacity was really just another form of suing the Commission itself. (*See Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 829 ("a suit against a state official in his or her official capacity … is no different from a suit against the State

itself", internal citation and quotation marks omitted); *Lezama v. Justice Court* (1987) 190 Cal.App.3d 15, 23 ("official-capacity suit is against government entity"); *Traverso v. People ex rel. Dep't of Transp.* (1996) 46 Cal.App.4th 1197, 1200 n.1 (because "Caltrans employees are also named defendants in their official capacities" the court "shall refer only to Caltrans as the defendant").) Because the claims against Dr. Lester in his official capacity were no different than the claims against the Commission itself, and because Judgment resolved all claims against the Commission, the Judgment necessarily resolved all claims against Dr. Lester.

The Commission has implicitly conceded this point by treating Dr. Lester and the Commission jointly rather than separately. Its opposition to the writ application was filed jointly on behalf of "respondents", which include both the Commission and Dr. Lester. (*See Respondents'* Memorandum of Points and Authorities in Opposition to Petition for Peremptory Writ of Administrative Mandamus and Complaint for Declaratory Relief (filed May 29, 2013) at 2:27 ("respondents request judicial notice …"), 10:2 ("[r]espondents agree with Petitioners that …"), 15:13-21 (brief submitted on behalf of Commission and Dr. Lester).) Because Dr. Lester opposed the writ application on the merits, the Court's judgment on that writ binds Dr. Lester just as it binds the Commission.

No claims brought by Ms. Faber and ALSA remain pending, and so it would be "wholly unreasonable" to not enter judgment for them now. (*See In re Baycol Cases*, *supra*.)

IV. THE COMMISSION'S ARGUMENT ABOUT "INTERVENING AUTHORITY" IS A SHAM

The Commission argues that "intervening law has rendered the judgment erroneous." (Mem. at 1:9-10.) But the *North Coast Rivers* case the Commission relies on does not create any new law, and the Judgment is not erroneous.

The Commission cites *North Coast Rivers* for the unremarkable principle that the "unusual circumstances" exception to categorical CEQA exemptions "requires consideration of baseline conditions". (Mem. at 10:17-18.) Baseline conditions, according to *North Coast Rivers*, are those "physical conditions existing at the time" the agency makes its decision:

> In determining whether there is a potential for such an adverse change in the environment, the "baseline" environmental conditions against which a project is to be compared are the physical conditions existing

> at the time the agency makes its CEQA determination and/or approves the project.

(*North Coast Rivers Alliance v. Westlands Water Dist*. (2014) 227 Cal.App.4th 832, 872).) *North Coast Rivers* cited and quoted no less than three cases, including a Supreme Court case, for this principle:

> *Communities for a Better Environment [v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310], 321–322 ["the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis …"]; *Citizens for East Shore Parks v. State Lands Com*. (2011) 202 Cal.App.4th 549, 558–559 … [same]; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 ["environmental impacts should be examined in light of the environment as it exists when a project is approved"].

(*North Coast Rivers* at 872, square brackets and quotes in original.) *North Coast Rivers* followed existing precedent; it is not new law.

It should be obvious that *North Coast Rivers* supports the Court's Judgment, and leaves no doubt that the Court applied the proper rule of law. The baseline "physical conditions existing at the time" the Commission issued the 2013 Orders was an 80-year-old farm cultivating shellfish using racks that long predated those Orders. (*See* Section II.A above.) The Court recognized that the Commission's 2013 Orders would change the baseline "physical environment of the Estero and the species that live there":

> [T]he administrative record shows that the Coastal Commission itself recognizes the reasonable possibility its removal and restoration orders may have a significant negative impact on the physical environment of the Estero and the species that live there.

(Judgment at 14:18-21.) Because the Court considered how the orders would negatively impact the baseline, it properly applied the rule that *North Coast Rivers* reaffirmed.

The Commission must recognize that *North Coast Rivers* does not support its motion, because the motion makes no effort to argue that the Judgment is inconsistent with the "baseline" holding in *North Coast Rivers*. The Commission's argument about new law is therefore a sham.

Instead of applying the holding of *North Coast Rivers*, the Commission argues about the sufficiency of the evidence, specifically whether petitioners "sustain[ed] their burden of showing that the key provisions of the 2013 Orders carry a reasonable possibility of adverse impacts". (Mem. at 8:12-13.) The Court may remember that the Commission made exactly the same argument for the

better part of an hour at oral argument—and the Court rejected it. (*See* Judgment at 16:1-7 ("Petitioners have presented substantial evidence ..."); Prows Decl. ¶ 2.)[5]

The Commission's motion, in short, cites "intervening law" that is not new as pretext for rearguing points it made previously, and lost. The motion is a sham, and should be rejected.

V. THE MOTION DIRECTED AT DRAKES BAY SHOULD BE DENIED

Although the Judgment resolves all claims involving Phyllis Faber and ALSA, it does not resolve all claims involving Drakes Bay. Cross-claims brought by the Commission against Drakes Bay remain pending, as do cross-claims brought by Drakes Bay against the Commission. The judgment should therefore be considered to be (1) a final judgment in favor of Ms. Faber and ALSA, plus (2) an interlocutory order ruling in favor of Drakes Bay on the claims in Drakes Bay's petition. Because judgment has not been entered in favor of Drakes Bay, the Commission's motion for a new trial does not apply to Drakes Bay. Although the Commission's motion for reconsideration could potentially apply, that motion should be denied because the order was correctly decided, as explained in section IV above. The Court should therefore deny both motions.[6]

VI. THE COMMISSION SHOULD BE ADMONISHED FOR FILING AN IMPROPER MOTION

A party can be sanctioned for repeating previously rejected arguments in a motion for a new trial. (*Harris v. Rudin* (2002) 95 Cal.App.4th 1332, 1344.) In *Harris*, the Court of Appeal upheld sanctions against a party who had filed motions to set aside the judgment and for new trial that were not "any different, legally or factually, from the previous motions." (*Id*.) Sanctions were upheld even though the Court of Appeal agreed that on the merits that trial court was wrong. (*Id*. at 1335.) Here the essence of the Commission's motion is its argument that petitioner's assertions are not supported by evidence. (Mem. at 8:5-9:27.) This is no different, legally or factually, from what the

[5] In any event, the Commission's argument about the burden is backwards. Once petitioners present evidence showing that unusual circumstances exist generally, then the burden shifts back to respondents to show that specific parts of the project are severable and may proceed without preparation of an EIR. (*See* Pub. Res. Code § 21168.9(b) (order granting writ "shall be limited … *only if* a court finds that" a portion of the project is severable (emphasis added)).) The Commission has made no effort to meet that burden.

[6] The motion for reconsideration does not apply to Ms. Faber and ALSA because a motion for reconsideration is not proper once judgment has been entered. (*Ramon v. Aero. Corp*. (1996) 50 Cal.App.4th 1233, 1238.)

Commission asserted at length during oral argument. The Commission's behavior is therefore sanctionable, and the Commission should be admonished for it.

The Commission has also violated CCP § 128.7(b)(2), which makes sanctionable a contention that is not "warranted by existing law or by a nonfrivolous extension, modification, or reversal of existing law or the establishment of new law." In its motions, the Commission contends that only one judgment can be issued in this case, and that the claims against Dr. Lester in his official capacity as Executive Director of the Commission are different from those asserted against the Commission. Those contentions are contrary to existing law, and the Commission makes no argument, frivolous or otherwise, in support. The Commission should be admonished for this behavior.

Finally, the Commission wasted everyone's time by rejecting a stipulation, offered by Drakes Bay, clarifying that judgment has not been entered in favor of Drakes Bay and proposing a case management conference to discuss the pending cross-complaints. (Prows Decl. Ex. 2 at 2 (letter), Ex. 3 (proposed stipulation), Ex. 4 (Commission's rejection).) The Commission should be admonished.

VII. CONCLUSION

The Commission's motions should be denied, and it should be admonished.

DATED: August 14, 2014.

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By: _____
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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco and my business address is 155 Sansome St., Suite 700, San Francisco, California 94104.

On August 14, 2014, at San Francisco, California, I served the attached document(s):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on August 14, 2014, at San Francisco, California.

Arlene Won