



FEB 13 2024

CLERK OF THE COURT
BY: *Christina Miller*
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 304

AMERICAN CATALOG MAILERS
ASSOCIATION,

Plaintiff,

v.

FRANCHISE TAX BOARD,

Defendant.

Case No. CGC-22-601363

ORDER DENYING DEFENDANT'S
MOTION TO VACATE AND MODIFY
JUDGMENT

Defendant Franchise Tax Board's motion to vacate and modify judgment was noticed for hearing on February 14, 2024. The Court circulated its tentative ruling in advance of the hearing denying the motion, and the parties stipulated to the tentative ruling, which is hereby adopted.

BACKGROUND

On August 19, 2022, Plaintiff American Catalog Mailers Association ("ACMA") filed a Complaint for declaratory relief against the Franchise Tax Board ("FTB"). ACMA sought a declaratory judgment under Government Code § 11350 declaring the Technical Advice Memorandum No. 2022-01 ("TAM") and FTB Publication 1050 ("Publication 1050") invalid because they contradict Public Law 86-272 ("P.L. 86-272") and the United States Constitution. It also sought a declaratory judgment under Government Code § 11350 declaring the TAM and Publication 1050 invalid because the FTB failed to comply with the California Administrative Procedure Act, Gov. Code §§ 11340-11361 ("APA"). Third

1 and finally, it sought a declaratory judgment under Code of Civil Procedure § 1060 that the TAM and
2 Publication 1050 are invalid, or, in the alternative, limiting the application of TAM and Publication 1050
3 prospectively.

4 On December 13, 2023, the Court granted ACMA’s motion for summary adjudication on its
5 second claim, holding that the TAM and Publication 1050 are invalid “underground regulations” adopted
6 in violation of the APA. The Court thereafter dismissed the remaining causes of action in the Complaint
7 as moot and, on December 18, 2023, entered judgment in ACMA’s favor. The FTB now moves the Court
8 to vacate the judgment and replace it with a modified judgment. ACMA opposes the motion.

9 LEGAL STANDARD

10 Code of Civil Procedure section 663 provides that “[a] judgment or decree, when based upon a
11 decision by the court, . . . may, upon motion of the party aggrieved, be set aside and vacated by the same
12 court, and another and different judgment entered, for either of the following causes, materially affecting
13 the rights of the party and entitling the party to a different judgment: [¶] Incorrect or erroneous legal basis
14 for the decision, not consistent with or not supported by the facts” “Section 663 is designed to
15 enable speedy rectification of a judgment rendered upon erroneous application of the law to facts which
16 have been found by the court or jury or which are otherwise uncontroverted. A section 663 motion is
17 properly made whenever the trial judge draws an incorrect legal conclusion or renders an erroneous
18 judgment upon the facts found by it to exist.” (*Machado v. Myers* (2019) 39 Cal.App.5th 779, 799
19 (cleaned up) [reversing trial court’s judgment pursuant to Code of Civil Procedure section 664.6 on
20 ground that it failed to reflect the terms of the parties’ settlement agreement].)

21 DISCUSSION

22 The FTB raises two grounds for its motion, neither of which warrants extended discussion. The
23 motion verges on the frivolous.¹

24 First, the FTB objects to language in the judgment stating that “[t]he TAM and Publication 1050
25 are . . . declared void and without force or effect, and their guidance may not be relied upon.” (Opening
26

27 ¹ Because the motion is entirely lacking in merit, that ACMA did not circulate the proposed judgment to
28 the FTB’s counsel to review and object to it before it was entered is of no consequence. (Opening Brief,
5; Reply, 5-6.)

1 Brief, 6.) The FTB claims that this language somehow “contradicts well-established California Supreme
2 Court precedent.” (*Id.* at 7.) The FTB is wrong. The California Supreme Court has held squarely that
3 “when the APA applies, administrative policies that are not adopted in accordance with its requirements
4 are ‘void’ regulations that are ‘not entitled to any deference.’” (*Alvarado v. Dart Container Corp. of*
5 *California* (2018) 4 Cal.5th 542, 556 (cleaned up); *Tidewater Marine Western, Inc. v. Bradshaw* (1996)
6 14 Cal.4th 557, 576-577.) By definition, a “void” regulation *is* one that lacks any force and effect, a
7 phrase that is commonly utilized to mean exactly the same thing.

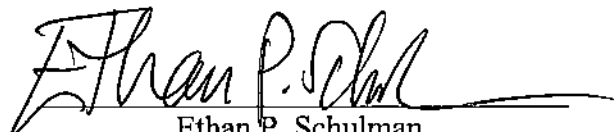
8 An agency may not properly enforce or rely upon a regulation adopted in violation of the APA.
9 (Gov. Code § 11340.5(a) [“No state agency shall issue, utilize, enforce, or attempt to enforce any
10 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule,
11 which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual,
12 instruction, order, standard of general application, or other rule has been adopted as a regulation and filed
13 with the Secretary of State pursuant to this chapter.”].) The FTB concedes as much. (E.g., Reply, 6
14 [“FTB has made clear that audit staff may not rely on statements in the TAM and Publication 1050”].)²
15 Nor may a court properly defer to such a void regulation. As the California Supreme Court explained in
16 *Tidewater*, “To give weight to an improperly adopted regulation in a controversy that pits the agency
17 against an individual member of exactly that class the APA sought to protect would permit an agency to
18 flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received
19 neither.” (14 Cal.4th at 576 (cleaned up); see also, e.g., *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 435
20 [audit method adopted by agency in violation of APA as an invalid and unenforceable underground
21 regulation “merits no weight as an agency interpretation”].) To be sure, the FTB is correct in observing
22 that a “void” regulation is “not necessarily . . . wrong.” (Reply, 6, quoting *Alvarado v. Dart Container*
23 *Corp. of California* (2018) 4 Cal.5th 542, 560.) But that is a non sequitur, since the judgment does not
24 state that the FTB’s interpretation in the TAM and Publication 1050 is “wrong.” As the FTB itself
25 acknowledges, that is “a question for another day.” (Reply, 6.)

26 _____
27 ² The FTB also conceded on summary adjudication that regulations adopted in violation of the APA are
28 void. (See Dec. 13, 2023 Order, 4, quoting Tr., 19:9-12 [“if it is a regulation, we are done, right? I think
that is it. It is void and we don’t have any particular taxpayer to apply it to, and that is that.”].) It repeats
the same concession here. (E.g., Reply, 7.)

1 Second, the FTB contends that the last paragraph of the judgment, which finds that ACMA is the
2 prevailing party and is therefore entitled to recover its costs, should be stricken because the Court has not
3 determined “who is the prevailing party and to what extent.” (Opening Brief, 7.) As the Court finds in
4 the accompanying order, however, ACMA unquestionably is the prevailing party in this action for
5 purposes of Code of Civil Procedure section 1032.³ The Court further finds in that separate order that
6 ACMA is also a prevailing party within the meaning of Code of Civil Procedure section 1021.5, and
7 therefore is entitled to an award of reasonable attorneys’ fees. Nothing in the phrasing of the judgment,
8 therefore, “prejudices” the FTB in the slightest. The FTB’s motion is feckless.

9 IT IS SO ORDERED.

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11 Dated: February 13, 2024


12 Ethan P. Schulman
13 Judge of the Superior Court
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27 ³ While the Court may not have formally made that finding when it entered its judgment, it is not open to
28 serious question. As the FTB concedes, under section 1032 “the Court has discretion to determine the
prevailing party in this action.” (Reply, 8.)


CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Felicia Green, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On February 13, 2024, I electronically served ORDER DENYING DEFENDANT'S MOTION TO VACATE AND MODIFY JUDGMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: FEB 13 2024

Brandon E. Riley, Court Executive Officer

By: 

Felicia Green, Deputy Clerk