APPEAL OF DENIAL OF PETITION FILED UNDER GOVT. CODE § 87307

To: FAIR POLITICAL PRACTICES COMMISSION

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Date: November 21, 2013

RE: DECISION of October 24, 2013 by the BOARD OF PILOT COMMISSIONERS FOR THE BAYS OF SAN FRANCISCO, SAN PABLO, AND SUISUN "In the Matter of the Petition of the Pacific Merchant Shipping Association to Include the Port Agent in the Conflict of Interest Code of the Board of Pilot Commissioners For the Bays of San Francisco, San Pablo, and Suisun"

APPEAL UNDER GOVERNMENT CODE §87307

On September 16, 2013, the Appellant Pacific Merchant Shipping Association ("PMSA") brought a Petition under Government Code §87307 of the Political Reform Act of 1974 to the state Board of Pilot Commissioners ("Board") requesting the inclusion of the Port Agent in the Board's Conflict of Interest Code. The Petition is attached as EXHIBIT 1.

On October 24, the Board denied the Petition. The Denial is attached as EXHIBIT 2.

Pursuant to §87307, PMSA hereby submits this timely Appeal of that denial to the Fair Political Practices Commission, acting in its capacity as the "code reviewing body." PMSA is a California mutual benefit corporation headquartered in San Francisco which represents the ocean carriers compelled by law to utilize state-licensed pilots.

QUESTIONS PRESENTED UPON APPEAL

The Questions presented by this Appeal are: (1) whether the Port Agent should be considered a "designated employee" under §82019 of the Political Reform Act as a "public official" per §82048, and therefore listed in an agency Conflict of Interest Code; and, if so, (2) whether the Port Agent should be reportable to the Board of Pilot Commissioners for Conflict of Interest disclosures or should he be treated as a stand-alone "agency" separate and apart from the Board?

BACKGROUND

One principal purpose of the Political Reform Act[1] (the "Act") is to eliminate potential conflicts of interests of state officers. §§ 81001(b), 81002(c). Chapter 7 (commencing with §87100) of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision when the official may have a conflicting financial interest. §87100. Public officials have such a conflict when their decision-making would have a reasonably foreseeable material effect to their financial interests. §87103.

One essential component of enforcing these prohibitions is through the use of agency-promulgated Conflict of Interest Codes and the subsequent disclosure of statements of economic interests by the individuals covered by each Conflict of Interest Code. Article 3 (commencing with §87300) of Chapter 7. Every state agency must promulgate a Conflict of Interest Code (§87300), but the Code is not effective until the FPPC, sitting as the "code reviewing body," has approved or revised the agency's Code. §87303.

The Code may be revised upon petition by a third party – such as the case in the appeal here. §87307. If there is any question regarding the proper level at which public officers should be considered part of a state "agency" then the FPPC, as code reviewing body, is tasked with resolving any ambiguities. §87301.

The Board of Pilot Commissioners is a state agency tasked with regulating and licensing marine pilots. Division 5 (commencing with §1100) of the Harbors and Navigation Code ("HNC"). The Board has adopted a Conflict of Interest Code pursuant to the Political Reform Act. 7 CCR §212.5.

The office of the Port Agent is established by the Legislature to, amongst other things, "carry out the orders of the board and other applicable laws" and to "be responsible for the general supervision and management of all matters related to the … official duties of pilots licensed by the board." HNC §1130. The appointment of an individual to this office is "subject to the confirmation of the board." Id. The Board has promulgated regulations to interpret and administer the duties of this public office. 7 CCR §218. The Board has further declared that when "carrying out his or her duties, the Port Agent shall be primarily guided by the need for safety of persons, property, vessels and the marine environment." 7 CCR §218(c).

The Board's Conflict of Interest Code does not include the Port Agent.

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[1] The Political Reform Act of 1974 (the "Act") is located at Title 9 (commencing with §81000) of the Government Code. All statutory references are to the Government Code, and to Title 9, specifically, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Division 6 (containing Sections 18110 through 18997) of Title 2 of the California Code of Regulations. All regulatory references to "FPPC" are to Title 2, Division 6 of the California Code of Regulations.

ANALYSIS

When enforcing these provisions, the Political Reform Act "should be liberally construed to accomplish its purposes." §81003. Relevant to this specific inquiry, the Act was specifically adopted "to accomplish the following purposes: ... (c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided. ... (f) Adequate enforcement mechanisms should be provided to public officials and private citizens in order that this title will be vigorously enforced." §81002.

Question One: Is the Port Agent a "public official" and "designated employee" for purposes of the Act's rules governing Conflicts of Interest?

Consistent with the Conflict of Interest Code requirements of §87302, and the definition of a "designated employee" at §82019, the FPPC has developed a multi-step analysis to test whether a "public official" has a conflict of interest in any given decision. FPPC §18700(b). The first two prongs of this test – regarding "public official" and "government decision" – are directly relevant to a determination of whether an official should be included in an agency's Conflict of Interest Code.[2]

With respect to the Port Agent, that office meets the first two prongs necessary to determine that he should be listed by the Board as a "designated employee."

STEP ONE: Is the Port Agent a "public official"?

"A 'public official' is broadly defined as any 'member, officer, employee or consultant of a state or local government agency." *Cotton,* A-06-019 (2006). The FPPC regulations direct that analysis of this definition requires one to "[d]etermine whether the individual is a public official, within the meaning of the Act. (See Government Code section 82048; 2 Cal. Code Regs. § 18701.)" FPPC §18700(b)(1). While §82048(a) of the Act defines the term "public official," the regulations detail on how to apply these terms.

The Port Agent meets this broad definition of "public official" as he is a state officer who falls under the "member," "officer" and "employee" designations of the Act.[3]

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[2] Only upon answering these two questions in the affirmative (FPPC §18700(b)(1)-(2)) can the balance of the eight-step test be applied (FPPC §18700(b)(3)-(8)). This is true for the practical reason that only upon the actual disclosure of personal financial interests pursuant to inclusion in a Conflict of Interest Code, can any agency or the public apply the balance of the conflict of interest tests with respect to any one individual's specific economic interests.

[3] The Board, in its denial below, argues that the Port Agent meets none of these designations. The Board only cites FPPC §18701 in its analysis of why the Port Agent should not be considered a "consultant" but with respect to the terms "employee," "member," and "officer" the Board does not offer either a working definition of the terms, does not conduct a full analysis of the application of the terms, does not refer to the terms as further defined by the FPPC, and does not apply the test of *In re Siegel.*

With respect to the term "member":

The Port Agent falls under the open-ended definition of a "member" of the Board of Pilot Commissioners. FPPC §18701(a)(1) broadly states that the term "member" must "include, but not be limited to salaried or unsalaried members of committees, boards or commissions with decisionmaking authority."[4]

The office of the Port Agent is created by the Legislature at HNC §1130 within the Board structure and to carry out the orders of the Board. The Legislature describes the office of Port Agent and its functions under the statutes governing the Board, precisely because this position exercises authority on the Board's behalf, and requires that this office is filled "subject to the confirmation of the board." *Id.* Likewise, the Legislature vests the Board "with all functions and duties relating to the administration of this division," which includes those created in the office of the Port Agent. HNC §1154(a).[5]

Consistently, the Board holds out the Port Agent as a member of the Board's Staff to the public at-large. For example, on the Board's website they maintain a "Staff" page which lists their Port Agent in the same manner and designation as their Investigators and their Board Counsel. EXHIBIT 3. And, during the regular monthly meetings of the Board, the Port Agent has a designated position and name placard designating his public role on the Board's dais, where he sits along with Boardmembers and staff.

In his "member" capacity, the Port Agent exercises "decisionmaking authority" on behalf of the state. FPPC §18701(a)(1)(A)(i)-(iii) describe three conditions which, if any one of the three are present, describe the possession of this authority. Here, the Port Agent's wide swath of public duties contain numerous provisions which represent decisionmaking authority (*see* 7 CCR §218; and, as summarized, Petition, pp. 3-5).

For example, with respect to the assignment of pilots to vessels (7 CCR §218(d)(1)), the Port Agent makes thousands of decisions which are "final" every year, as each assignment is compelled by statute and Board regulation to be undertaken at the Port Agent's direction. This action represents final decisionmaking because a pilot, as a licensee, is subject to "misconduct" and potential revocation of his license by the Board if he or she does not follow the Port Agent's assignments. Similarly, a vessel master that ignores the Port Agent's assignments may be subject to criminal sanctions. With respect to the Port Agent being granted the authority to close the bar to all vessel traffic (7 CCR §218(d)(10)), this power emanates directly from the State. Bar closure is a decision which may have significant economic consequences for the operations of all public ports in the Bay Area, yet it is an authority exclusively granted to the Port Agent by the State.

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[4] The Board does not rely on FPPC §18701(a)(1) in its interpretation of the term "member" and interprets the term precisely in the limited manner which the FPPC says it should "not be limited to."

[5] The Board described one narrow aspect of this relationship in its Denial, below, " as a matter of regulation, the Board has required the Port Agent to perform these [pilot assignments] and other functions." (Denial, at 2) This is an accurate portrayal of the Port Agent exercising authority which emanates from the power of the State. An individual pilot licensee does not possess such authority, only upon the approval of the state agency which first confirms this pilot to the office, may a specific individual exercise these duties.

With respect to the term "officer":

FPPC §18701(a) does not include a definition for the term "officer" under the Act, so it is appropriate to turn to the common law to supply a definition.[6] As case law regarding this term points out: "'the words "public officer," are used in so many senses that it is hardly possible to undertake a precise definition that will adequately and effectively cover every situation.' (52 Cal.Jur.3d, Public Officers and Employees, § 1, p. 162, fn. omitted.)" *People v Olsen,* (1986) 186 Cal.App.3d 257, 265.

Given the Legislature's directive that the terms of the Act be construed liberally, the FPPC has effectuated this intent by not attempting to provide a strict or limiting definition for this term. Agencies applying the Act to potential "officers" likewise should not rely on a limited use of the term.

Under similar inquiries, courts have found that the Port Agent is a public "officer":

- A U.S. District Court found that the Port Agent is "an agent or officer of the Board" when assigning pilots to vessels and that he was consequently entitled to governmental immunity from suit as an officer endowed with Eleventh Amendment protections when performing his public duties. *Regal Stone Ltd. v. Cota (N.D.Cal., Sept. 7, 2010, No. 08-5098 SC) 2010 WL 3504846* (*Regal Stone*). Specifically the court found "Title 7, Division 2 of California's Code of Regulations deals with the Board, and the definition and duties of the Port Agent are contained within, and explained within, this division. See Cal. Code Regs. tit. 7, §§ 202, 218. As the regulations creating the office of Port Agent are found within this division, the Court finds that Port Agent is an agent or officer of the Board." *Id.* at 10. *Regal Stone* is attached as EXHIBIT 4.

- A state Court of Appeal also held that "the Port Agent must be considered a state officer, at least when performing the official duties provided by statute or Board regulation." *Board of Pilot Commissioners, et al. v. Superior Court,* (2013) 218 Cal.App.4th 577, 591. (*Board of Pilot Commissioners, et al.*). Finding the holding in *Regal Stone* regarding sovereign imrnunity persuasive, it found that "neither the Board nor the Port Agent attempt to articulate the purported analytical differences, and neither cite any authority for the argument" that the Port Agent should be protected as a state officer under the 11th Amendment, but not treated as an officer under the Public Records Act. *Id.* at 590. Ultimately, the Court noted that the Board and Port Agent had failed "to explain why one should be permitted to assume the cloak of a state official when it provides protection but to then cast it off in the event it becomes burdensome." *Id.* at 591. *Board of Pilot Commissioners* is attached as EXHIBIT 5.

[6] The FPPC does use the term "officer" in its parallel interpretation of Article 2 filers at FPPC §18701(b)(1)(B).[6] In that section, the phrase "high level officers and employees of public agencies" is used in a manner which is separate and apart from its definition of "members" or "contractors." This is consistent with an interpretation that an "officer" is a public official which does not otherwise fall neatly under the definitions of an "employee," "member," or "contractor." This reinforces the conclusion that the term "officer" must be treated as significant and not dispensed as mere surplusage.

These two holdings are consistent with the ruling of the Supreme Court in *Dibb v. County of San Diego*, (1994) 8 Cal.4th 1200, 1212, regarding use of the term "public officer":

> "[T]wo elements now seem to be almost universally regarded as essential" to a determination of whether one is a "public officer": "First, a tenure of office 'which is not transient, occasional or incidental,' but is of such a nature that the office itself is an entity in which incumbents succeed one another ..., and, second, the *delegation to the officer of some portion of the sovereign functions of government*, either legislative, executive, or judicial." (*Spreckels* v. *Graham, supra*, 194 Cal. at p. 530, italics added.)
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> It seems clear that the italicized phrase quoted above ... is in fact, and was intended to be, consistent with the similar language employed in our leading case on the issue, *Coulter* v. *Pool, supra*, 187 Cal. at page 187. In other words, a public officer (or a county officer) is one who, inter alia, is delegated a public duty to exercise *a part of the governmental functions* of the political unit for which he, as agent, is acting.

The Port Agent also falls under the characteristics as described in *People v. Olsen*, (1986) 186 Cal. App. 3d 257, 265-266 of a "public office and a public officer":

> "One of the prime requisites [of a public office] is that [it] be created by the *constitution* or authorized by some *statute*. And it is essential that the incumbent be clothed with some portion of the sovereign functions of government, either legislative, executive, or judicial to be exercised in the interest of the public. There must also be a duty or service to be performed, and it is the nature of this duty, not its extent, that brings into existence a public office and a *public officer*.[5] Thus, an office, as a general rule, is based on some *law* that defines the duties appertaining to it and fixes the tenure, and it exists independently of the presence of a person in it." (52 Cal.Jur.3d, Public Officers and Employees, § 12, pp. 176-177, fns. omitted.)
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> [Footnote] 5. "In this, and in other respects, he differs from a private officer, who holds his position by contract rather than by election of official appointment, and who duties are performed at the instance and for the benefit of the individual or corporation employing him." (52 Cal.Jur.3d, Public Officers and Employees, §19, p. 182, fns. omitted.)

The office of Port Agent is created by statute. It is not transient, but rather an office in which an individual may serve upon the approval of the Board. It is an office where the function of government is delegated from one state entity – the Board – to another subject to their limitations and controlling statutes. It is not filled by contract or other private agreement, and the purpose of the office is to facilitate public health and safety. Both *Regal Stone* and *Board of Pilot Commissioners* found this authority enough to determine, respectively, that the Port Agent is "an agent or officer of the Board" and "a state officer, at least when performing the official duties provided by statute or Board regulation." [7]

[7] The Board's analysis of the term "officer" in its Denial below is, in its entirety, three sentences long. It points to citation of its own regulations in *Board of Pilot Commissioners*, but then conveniently ignores the case's actual holding. It then relies on its own regulation that requires the election of a President and Vice President from amongst its appointees for the conclusion that the Port Agent is not an "officer" – the Board forwarded, and lost, this narrow interpretation of the term "officer" at the Court of Appeals as to why the Port Agent should not be considered a public official and should not be subject to the Public Records Act.

PMSA also notes that all pilots take a state-administered oath to faithfully serve the state at their initial licensing. To our knowledge, no other occupational licensees of the State do that with the exception of attorneys (who, upon taking such oath bear the rights and responsibilities required of officers of the court when they practice). Moreover, these same state oaths are routinely and typically taken by all "public officers and employees" (*see* California Constitution, Art. 20, Sec. 3). Upon this treatment, it is more likely than not that all pilots have at least some indicia of the responsibilities of state officers, and not simply the Port Agent when acting in his official capacity at issue in this Petition.[8]

Accordingly, relying on the common-law definitions in furtherance of the purposes of public disclosure and the holdings of Courts under similar examinations of the exercise of sovereign authority, the individual who occupies the office of Port Agent must also be considered an "officer" pursuant to the Political Reform Act.

With respect to the terms "consultant" and "employee":

PMSA agrees with the Board's conclusion that the term "consultant" as defined in FPPC §18701(a)(2) precludes its application to the Port Agent for purposes of including him in the Board's Conflict of Interest Code. The Board made this finding because "there is no contract between the Board and the Port Agent. The Port Agent's duties are prescribed by statute and the Board's regulations. (*Board of Pilot Commissioners, supra,* 218 Cal.App.4th at p. 589; Harb. & Nav. Code, §1130; Cal. Code Regs., titl. 7, § 218.). These duties do not arise from any contractual relationship with the Board." Denial, at 3.

However, like with "officer," FPPC §18701(a) does not include a definition for the term "employee" as it is to be applied under the Political Reform Act, so it is appropriate to

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[8] This officer status for all pilots is arguably intrinsic in the nature of the compulsory pilotage at issue here, as the San Francisco Bar Pilots Association has itself described:

> Although the state pilot is typically not a California government employee, he or she performs what is, in large measure, a California government function. A San Francisco Bar Pilot's primary responsibility is to protect the interests of California, which issues the license to pilot and regulates the pilotage operation. In that respect, the principal customer of the pilot's service is not the ship or the ship owner but rather California and its public interests.[3]
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> [3] The U.S. Supreme Court has described this aspect of state pilotage as follows: Pilots hold a unique position in the maritime world and have been regulated extensively both by the State and the Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule, no employer, no person can tell them how to perform their pilotage duties. Bisso v. Inland Waterways Corp., 349 U.S. 85, 93-94 (1955).

Pp. 4, 7-8, EXHIBIT 6 ("OVERVIEW OF STATE PILOTAGE," San Francisco Bar Pilots, 2007) (at http://www.sfbarpilots.com/WhoWeAre/StatePilotage/tabid/93/Default.aspx, visited on 7/20/2011, page since removed)

turn to the common law to supply a definition. That common law test, simply stated, is that an employee is an agent whose principal controls – or has the right to control – the manner and means of the agent's performance of work on its behalf. Restatement (Third) of Agency §7.07 (2006).

California courts follow the "common law tradition" and apply the customary test distinguishing between an employee, on one hand, and an independent contractor, on the other hand. *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, (1989) 48 Cal.3d 341, 350. Consistent with the Restatement, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired...." (*Tieberg, supra,* 2 Cal.3d at p. 946 [unemployment insurance]; see also, e.g., *Isenberg* v. *California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 39 [180 P.2d 11] [same; drawing direct analogy to workers' compensation law]; *Perguica* v. *Ind. Acc. Com.* (1947) 29 Cal.2d 857, 859-861 [179 P.2d 812] [workers' compensation]; *Empire Star Mines Co.* v. *Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43-44 [168 P.2d 686] [unemployment insurance].)" *Id.*

The Board has the right to control the activities of the Port Agent, yet the Port Agent does not act as an independent contractor of the Board. While the Board may choose not to provide effective oversight or management of their Port Agent, he nonetheless exercises his public duties on its behalf. And, the Board, lax oversight notwithstanding, is also often concerned not simply with the Port Agent completing a job on its behalf, but they often will detail the specific means by which the Port Agent must complete his tasks (*see* pilot assignments (7 CCR §218(d)(1)(A)-(C)), incident reporting (§218(d)(6)-(7)), administering drug and alcohol tests (§218(g)-(i)), and conducting billing and collections on behalf of pilots (§219(a))). Application of the traditional control test here only confirms the Board's "right to control the manner and means of accomplishing the result desired" by its Port Agent.

As the Port Agent is not a "consultant" governed by contract, but is controlled by direct legal authority, the Board has the power to detail the means by which its agent performs these tasks with specificity. Consequently, by applying the mutual exclusivity of the terms "employee" and "consultant," the Port Agent squarely falls under the former.

The Board's Denial relies in part on the nature of their financial relationship with the Port Agent, and that pilots are members of a private association which "provides the means for the pilots to conduct their business: pilot boats ... dispatchers ... billing and collection services, and so forth." Denial, at 2. Yet, this ignores the Board's own regulations. Since billing and collection services are specifically identified as public duties of the Port Agent to complete on behalf of all other pilots (7 CCR §219(a)), and there is no control of these revenues by the pilots' Association. With respect to "pilot boats," a pilot boat surcharge exists which is set by the Board, not the Association (HNC §1190(a)(1)(B)); and, "dispatchers" only assign pilots under the direction of the Port Agent's public duty to "Assign Pilots to Vessels", not at the direction of the Association (7 CCR §218(d)(1)).

To assert that the private association of pilots controls the Port Agent in any of these monetary or operational regards simply turns a blind eye to the fact that the state controls the Port Agent and the execution of his public duties.

The Board also argues that "the pilots, as members of the association, share the net revenues generated by their pilotage services. None of the pilots, including the Port Agent, receive any compensation from the Board." Denial, at 2. Certainly methods of compensation may be a relevant factor when evaluating questions of control, however what the Board fails to mention is the critical fact that it is the State which controls pilot revenues, not their Association. HNC §§ 1190 – 1203. It is only pursuant to the application of these statutes that the Port Agent is paid over $400,000 per year, even though he doesn't pilot any vessels during his tenure in that office. He is paid to discharge his public duties out of the proceeds of revenues collected under the imprimatur of the state; just because he is not paid directly from a state account or fund, does not mean that the Port Agent is not being compensated by public means.

Of course, even if the Port Agent received no compensation at all for the execution of his public duties, a gratuitous agent is treated no differently with respect to vicarious liability than one who is paid. Restatement (Third) of Agency §7.07(3)(b) (2006). Indeed, the key principle of being a "gratuitous agent" under common law is that "[a] gratuitous agent acts without a right to compensation." Restatement (Third) of Agency §1.04(3) (2006). Under agency law, "[g]ratuitous agency is a common occurrence" as "agency relationships may arise casually, often when one person agrees to do some service for another that will affect the other's legal position." *Id.,* Comment *c.* Such an agency relationship exists here – whether it is considered gratuitous or not – but even on a much more formal scale, as the individual in question here has sworn an oath to the state, is confirmed by public vote, and performs public duties for the state when he agrees to provide his service as Port Agent for the Board.

Moreover, strict construction of any one factor of the control test is not necessary, since the California Supreme Court has also acknowledged "that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." *S.G. Borello & Sons,* 48 Cal.3d, at 350. When evaluating "the concept of 'employment'" under these circumstances, consideration of employment is "not inherently limited by common law principles" and the "definition of the employment relationship must be construed with particular reference to the 'history and fundamental purposes' of the statute. (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777-778 [100 Cal.Rptr. 377, 494 P.2d 1].)" *Id.,* at 351. Likewise, "Federal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting 'employees.' Where not expressly prohibited by the legislation at issue, the federal cases deem the traditional 'control' test pertinent to a more general assessment whether the overall nature of the service arrangement is one which the protective statute was intended to cover. ([citations omitted])." *Id.,*at 352.

Here, while the Port Agent position may be unusual in some respects, it also represents one of the "infinite variety" of employment arrangements which may fall under the terms of the Act. Since he is not an "independent contractor," it is appropriate that the "employee" status of the Port Agent be considered under the light of the fundamental purposes of the statute which is being implemented. Here, under the Political Reform Act, the definition of "public official" is broadly and liberally construed in the furtherance of its purposes. The purposes of the Act, with respect to the Conflict of Interest statutes, are to identify how public officials may have conflicts and to create adequate enforcement mechanisms to avoid such conflicts. In this regard, the Port Agent should be considered an "employee."

Applying *In re Siegel*:

The Board argues that since the Port Agent is also a member of a private unincorporated association of pilots that he acts in a private capacity outside of the reach of the Political Reform Act. Denial, at 2. However, the FPPC's regulations clearly specify that, "the members of a nonprofit organization may be 'public officials.' (*In re Siegel* (1977) 3 FPPC Ops. 62.)" FPPC §18701, "Comment".[9]

In re Siegel directs that "the true nature of the entity, not merely its stated purpose, should be analyzed in determining whether the entity is public or private within the meaning of the Act." Therefore, we conduct that entity analysis here.

In re Siegel finds that when an otherwise arguably private entity "is intrinsically 'public' in character" such that "[i]t is an almost fictional entity created by the [public] to accomplish the [public's] purposes," that it should be subject to the terms of the Conflict of Interest statutes under the Political Reform Act. The criteria for this test include:

(1) Whether the impetus for formation of the corporation originated with a government agency;
(2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
(3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact they traditionally have performed; and
(4) Whether the Corporation is treated as a public entity by other statutory provisions.

[9] Similarly, application of the Political Reform Act to non-profit corporations has also been deemed appropriate in other sections of the Act aside from the Conflict of Interest provisions, including in the recent case of *FPPC vs. Americans for Responsible Leadership* (Minute Order 10/31/2012)(Case No: 32-2012-00131550-CU-PT-GDS), where the FPPC was given authority to audit and review records of a non-profit corporation even though an out-of-state not-for-profit corporation is not any of the many entities specified in §90002 as subject to the Act. In doing so, the "FPPC argued, and the Court agrees, that the Act must be 'liberally construed to accomplish its purpose'..." *Id.*, at 3.

Here, applying the *In re Siegel* criteria, the Port Agent should be included found to be a "public official" under the Act, as:

(1) the Legislature created the Port Agent's position and created it in order "to carry out the orders of the Board" (HNC §1130), an authority which is potentially co-terminus with the authority of a Board which "is vested with all functions and duties" of the division (HNC §1154);
(2) the only legal source of funding for the activities of the Port Agent are the Legislatively-enacted Pilotage Rates (Chapter 5 (HNC §§1190 – 1196.5));
(3) the principal purpose of the office of the Port Agent is to be "guided by the need for safety of persons, property, vessels and the marine environment," which is a fundamentally public purpose and a primary expression of the assertion of the state's traditional police powers (7 CCR §218(c)); and,
(4) the Port Agent is treated as a "state officer" when executing his public duties under the California Public Records Act and he has been granted Sovereign Immunity under the 11th Amendment of the United States Constitution as an "agent or officer of the Board."

Supporting the fundamental overriding purposes of the Act, the FPPC has found that even the criteria of *In re Siegel* "were not intended to be viewed as constituting a litmus test for determining whether an entity is public for purposes of the Political Reform Act," because strict application of its test may be "simply not necessary" if an entity has been specifically created as a function of state law to effectuate a public purpose. *In re Vonk* (1981) 6 FPPC Ops. 1, 9. In the *Vonk* case, State Fund argued that it was operating in a private capacity, even if it was a "state agency" created by function of law, and therefore it was not subject to the Act. The FPPC rejected this argument, finding that since it did not operate in an exclusively private capacity, the Fund also performed "various regulatory functions ... Its insurance business is thus subordinate to its overriding public purposes." And, therefore, "so long as the Fund's operation creates the opportunity for conflicts of interest, the Commission has an obligation to insure that its officers and employees 'should perform their duties in an impartial manner, free from bias caused by their own financial interests. ..." Section 81001(a)." *Id.*, at 10.

Here, as in *In re Vonk*, the office of the Port Agent is created by function of law alone. HNC §1130. The Board's own regulations establish that its public purposes are primary and principal to its existence (7 CCR §218(c)), thus making any private business interest that the Port Agent has subordinate to his public duties. And, the Port Agent's positions and relationships create the opportunity for conflicts of interest.

Upon analyzing the "true nature of the entity" under the criteria from *In re Siegel* and its similar application under *In re Vonk,* the Port Agent should clearly be treated as a public official. This is fundamental to the purposes of Political Reform, because when – such as here - a public official has private business relationships with those same individuals that he is also required to regulate on behalf of the public, those are precisely the type of economic relationships which are intended to be disclosed under the Act, so as to avoid any potential abuse or appearance of impropriety.

STEP TWO: Is the Port Agent making a governmental decision? [10]

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. FPPC §18702.1. Conversely, therefore, an individual who acts solely in a ministerial, clerical or secretarial capacity is not making a governmental decision. FPPC §18702.4. And, a public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. FPPC §18702.3.

The Board grants this authority to the Port Agent to act in a substantive manner, and not merely in an administrative or ministerial capacity. As noted in our Petition below, the Port Agent is given exceptional autonomy when exercising this authority on behalf of the public, and in the scope of his day-to-day execution of his public duties, the Board has admitted that it does not provide oversight or supervision of the Port Agent. Petition, at 4. And, the execution of the Port Agent's public duties routinely place him in the position of making a governmental decision pursuant to both FPPC §18702.1(a)(3) and (a)(5), whereby he obligates or commits the Board to a course of action by his acts or by his refusals to act. Petition, at 3-5. Similar to the analysis of the application of these rules to the Port Agent as conducted in Step One, above, the power of decision making by the Port Agent emanates from the power of the State.

Likewise, the Board's operating statutes and their application to its own duly-adopted regulations, in turn, obligate the Board to enforce the actions of the Port Agent. For instance, the Board is responsible for reviewing "all reports of misconduct or navigational incidents involving pilots or other matters for which a license issued by the Board may be revoked or suspended" through an incident review process. HNC §1180.3. The statute which describes pilot "misconduct" includes the "willful violation of the rules and regulations adopted by the board for the government of pilots." HNC §1181(h). In its regulation of the duties of pilots at 7 CCR §219, the Board requires that "a pilot ... shall obey all regulations of the Board." §219(n). If a pilot disobeys a regulation of the Board, then it is a matter of misconduct, and the Board must review it pursuant to HNC §1180.3. The Port Agent, by rule, is in turn obligated to report all potential pilot misconduct to the Board for its review and any matters which a Port Agent believes may compromise a pilot's ability to work. 7 CCR §218(d)(6) - (8).

In this framework, the acts of the Port Agent may obligate the Board to undertake disciplinary actions in many respects, should a pilot disobey the Port Agent's orders. For example, one primary regulatory directive of the Board is that the "Port Agent shall ... Assign Pilots to Vessels" (7 CCR §218(d)(1)) and that "[a] pilot shall only pilot the vessels assigned to him or her by the Port Agent" (7 CCR §219(*l*)). Therefore, if the Port Agent assigns a pilot to a vessel and the pilot does not do as directed, this would be a

[10] The Board in its Denial below never got to Step Two of its analysis, having concluded that the Port Agent is not a "designated employee" it did not find it necessary to proceed further with its analysis.

willful violation subject to misconduct proceedings by the Board, and oblige the Board to investigate the matter pursuant to HNC §1180.3.[11] The same is true if a pilot takes vacation without previously clearing this vacation schedule with the Port Agent. 7 CCR §218(d)(2).

Similarly, and as noted in the Petition, even if a Port Agent refuses to assign a pilot to a vessel, without meeting a limited number of exceptions and gaining the approval of the Port Agent, or receiving an affirmative notice from the Port Agent to the Board, a vessel master cannot simply pilot his own vessel without risking a criminal misdemeanor. HNC §1126. And, as noted above, the Port Agent is given the singular responsibility to "close the bar" to all ship traffic. 7 CCR §218(d)(9) – (10). As a practical matter the Port Agent would effectuate this by not assigning any pilots to any vessels which are crossing into or out of the Golden Gate – a condition which a vessel master would challenge only at risk of a possible criminal sanction and a licensed pilot would only challenge at risk of losing his or her license through a misconduct proceeding. Both of which are enforcement obligations of the state.

As the execution of many of his many public duties must necessarily occur in a manner which obligates or commits the Board to enforce his actions, the Port Agent "makes a governmental decision" under FPPC §18702.1.

Question Two: Should the Port Agent be reportable to the Board of Pilot Commissioners for purposes of the Act's rules governing Conflicts of Interest or should he be treated as an "agency" separate and apart from the Board?

Provided that the FPPC finds that the Port Agent is a public official subject to the Political Reform Act, §87301 also provides that "Conflict of Interest Codes shall be formulated at the most decentralized level possible, but without precluding intra-departmental review. Any question of the level of a department which should be deemed an 'agency' for purposes of Section 87300 shall be resolved by the code reviewing body." As the code reviewing body, this responsibility also rests with the FPPC.

<u>Making the Port Agent Reportable to the Board Is Most Consistent with Existing Law</u>

The Board should retain responsibility for the Port Agent, and the Port Agent should not be considered his own "agency," for purposes of §87300.

Placing the Port Agent under the Board's reporting regime should occur based on the Board's existing power to control the Port Agent, its responsibility to confirm the Port

[11] Amongst the many duties of the Port Agent, and the duties of pilots which are dependent upon the affirmative acts of the Port Agent, are the requirement that pilots bill vessels through the Port Agent (§219(a)), that pilots perform a fair share of duties unless illness or other cause determined by the Port Agent is present (§219(b)), or that pilots obtain drug or alcohol testing at the direction of the Port Agent (§219(w)). Pilots are required to notify the Port Agent of incidents (§219(g)), notify the Port Agent of illness or a doctor's prognosis (§219(q)), or of non-carriage of portable pilot laptops (§219(z)).

Agent, and its authority to discipline the Port Agent for "misconduct" under statute. Keeping the Port Agent reportable to the Board in this regard will facilitate the valuable "intra-departmental review" identified by the Legislature and would reinforce the need to maintain formality in the relationship between the Port Agent and Board.

Given the purpose of the Act and its dual focus on transparency and accountability under §81002, the provisions of §87300 should be implemented to a degree that foster both the optimum level of transparency to the public and level of accountability and enforcement to the filing parties. Here, regarding the need to maintain Conflict of Interest Codes "at the most decentralized level," any less decentralization would place the Port Agent at the Board's parent agency level, but the Transportation Agency has only found it necessary to directly manage the Port Agent in exceptional situations (see Petition, Exhibit 4). Yet, any more decentralization would establish the Port Agent as a new and unnecessary one-person reporting regime – essentially a single office "agency" – which would completely eliminate any "intra-departmental review."

Moreover, rather than creating a new reporting category, simply including the Port Agent within the Board's existing Code is consistent with the Board's role in governing the Port Agent's public duties in many respects under existing law. Specifically:

- The Port Agent must "carry out the orders of the Board." HNC §1130(a), 7 CCR §218(a).
- The Port Agent's appointment "is subject to the confirmation of the Board." HNC §1130(a).
- The Port Agent is himself subject to the "misconduct" discipline if he fails to follow the Board's rules and regulations, a condition which would include the enforcement of the Board's Conflict of Interest Code rules. HNC §1181.
- The Board is authorized to execute the duties of the Port Agent. HNC §1154(a).
- The Board is given the exclusive authority to act under the Administrative Procedure Act to promulgate the rules and regulations necessary to administer HNC §1130, but the Port Agent has not been granted the independent authority to do so by the Legislature. HNC §1154(b).
- The Port Agent must make reports to the Board of all incidents and other matters "for which a pilot may be disciplined by the Board." 7 CCR §218(d)(6), (8).
- The Board's parent agency, formerly the Business, Transportation & Housing Agency has issued orders to the Port Agent requiring him to affirmatively exercise his public duties pursuant to Govt. Code §13978.
- The Port Agent is tasked with relaying personal medical information about individual pilots to the Board under 7 CCR §218(f), such medical information about a pilot is confidential, and as a "member of the board, the executive director, the assistant director, or an employee of the board", the Port Agent is subject to civil liability for its unauthorized disclosure. HNC §§1157.1 – 1157.3.
- The Port Agent is tasked with administering drug and alcohol testing of pilots on behalf of the public. 7 CCR §218(g)-(i).
- The Port Agent is responsible for the collection of all public surcharge revenues required to be billed by pilots pursuant to 7 CCR §219(a), and make "payments to

the Board required of pilots by the Code and these regulations" as directed by 7 CCR §218(d)(4) and "transmit monthly all such revenues to the fiduciary agent selected by the Board pursuant to Section 1162 of the Code." 7 CCR §219(a).

- The Port Agent has been designated by the Board as a fiduciary agent of the Board for purposes of administering benefit payments under the San Francisco Pilot Pension Plan pursuant to HNC §1162(a).
- The Port Agent is "an agent or officer of the Board" for purposes of determining federal jurisdiction over his public acts under the 11th Amendment. *Regal Stone.*
- The Port Agent "must be considered a state officer, at least when performing the official duties provided by statute or Board regulation" under the California Public Records Act. *Board of Pilot Commissioners, et al.*
- As a licensed pilot, the Port Agent has sworn an oath to the State as administered to him by the President of the Board pursuant to HNC §1155.

Regarding the financial relationships which exist between the Port Agent and the Board, whereby the Port Agent collects and handles multiple streams of surcharge revenues or makes pension payments on behalf of the state, PMSA does not have first-hand knowledge or evidence of the specifics regarding the Port Agent's handling of public funds. Although there are publicly-available audits which demonstrate the nature of the collections and disbursements of these public surcharges (see, for instance, EXHIBIT 7 ("Audit of Surcharges, Billings and Disbursements, Year Ended December 31, 2011," San Francisco Bar Pilots) they do not specify Port Agent activity in this regard one way or the other. As a result, PMSA does not have the facts upon which the Port Agent may or may not be considered an Article 2 filer pursuant to §§87200 et seq. and therefore only asserts its arguments under Article I of the Act here.

Board's Current Appendix B Covers Most Potential Port Agent Conflicts

With respect to all pilot licensees generally, the existence of potential financial conflicts is readily acknowledged by the Legislature and the Board, which have prohibited pilots from utilizing their positions for financial gain or from having any interest or derive income from tugboat operations. HNC §1158; 7 CCR §222. Likewise, the Board's existing Conflict of Interest Code at 7 CCR §212.5, Appendices A-B, already specifically address many of the anticipated potential conflicts which are inherent in administering a system of pilotage regulation.

Appendix B of the Board's current Code already specifically details and identifies these various economic interests which may constitute a conflict of interest for a pilot who is conducting business on behalf of the Board because two licensed pilots are appointed to the Board by the Governor pursuant to HNC §1150(a)(2). To simply add the Port Agent alongside these two pilots who already file would capture the potential conflicts that the Board has already identified as potentially problematic to their regulatory system.

As specified in Appendix B, such potential conflict disclosure categories may include business income or gifts from various sources including "boat, yards, pilot or tug boats, marine repair and pilot training facilities, marine survey, investigation, and crewing

services, providers of physical examinations for pilots … and commercial vessel[s] which use pilot services." Using these existing categories, if the Port Agent disclosed an interest in a covered company, then the Board and the public would be afforded the opportunity to evaluate the factors in FPPC §18700(b)(3)-(8) and to determine whether or not his decisions could affect that company or his own personal financial interests.

Likewise, since the Port Agent has an affirmative duty to assign pilots to all vessels, if the Port Agent derives direct personal income outside of the statutory rate from a specific vessel operator, the terms of Appendix B would likely require its disclosure. Unfortunately, these conflicts are not merely hypothetical. Given our recent experiences with the Port Agent – occupied at the time by a pilot who would only extend service to ships based on whether individual companies first entered into an agreement to provide payments for service which were in excess of the statutory rates approved by the Legislature, (*see* Petition, Exhibit 4) – this inclusion is imminently justified.

CONCLUSION

For the reasons set forth, the FPPC should approve this §87307 Appeal by PMSA of the Denial of its Petition by the Board of Pilot Commissioners and issue an Order to the Board requiring that it amend its Conflict of Interest Code to include the Port Agent.

Should you have any questions or need to communicate directly with PMSA regarding this Appeal, please contact Vice President and General Counsel Mike Jacob at the foregoing listed contacts or Diane Fishburn, Olson, Hagel & Fishburn, Sacramento, California, who is hereby authorized by PMSA to also act on its behalf as Attorney for Appellant/Petitioner in this matter.

RESPECTFULLY SUBMITTED,

21 November 2013
DATE

Michael Jacob

On Behalf of Appellant/Petitioner
Pacific Merchant Shipping Association
San Francisco, CA

cc: Allen Garfinkle, Executive Director, Board of Pilot Commissioners

Exh 1

PETITION

GOVT. CODE § 87307 PETITION TO BOARD OF PILOT COMMISSIONERS FOR THE BAYS OF SAN FRANCISCO, SAN PABLO, AND SUISUN

To: **Board of Pilot Commissioners, State of California**
660 Davis St.
San Francisco, CA 94111
Attn: Allen Garfinkle, Executive Director

Petitioner: **Pacific Merchant Shipping Association**
250 Montgomery St., Suite 700
San Francisco, CA 94104
Attn: Mike Jacob, Vice President
Phone (415) 352-0710
Fax (415) 352-0717
Email mjacob@pmsaship.com

RE: **Petition for Amendment of the Board of Pilot Commissioners Conflict Of Interest Code, 7 CCR §212.5, to Include Port Agent; Submitted Pursuant to Government Code §87307**

The Pacific Merchant Shipping Association ("PMSA") hereby petitions the Board of Pilot Commissioners ("Board"), in accordance with §87307 of the Political Reform Act of 1974 (Govt. Code §87307), to respectfully request the amendment of the Board's Conflict of Interest Code (7 CCR §212.5) in order to effectuate the inclusion of the Port Agent.

Pursuant to Govt. Code §87307, this Board may be directed to amend its Conflict of Interest Code "in response to a petition submitted by … a resident of the jurisdiction." PMSA is a maritime trade association organized as a non-profit mutual benefit corporation headquartered in San Francisco and a resident of the State of California.

Regulatory Action Sought

Specifically, PMSA requests that "Appendix A" to §212.5 be amended by the Board in response to this petition and specifically list the Port Agent as a public official subject to the Conflict of Interest Code.

Basis for Amendment

Govt. Code §82048(a) of the Political Reform Act provides that a "'Public official' means every member, officer, employee or consultant of a state or local government

agency." The Port Agent's status as a public official was recently confirmed in the ruling of *Board of Pilot Commissioners, et al. v. Superior Court*, (2013) ___ Cal. App. 4th ___, (Cal.. 1st Dist.) (Nos. A136803, A136806). (*ATTACHMENT 1*). In this case, the Court held "that the Port Agent must be considered a state officer, at least when performing the official duties provided by statute or Board regulation."

The Board in *Board of Pilot Commissioners* refused to disclose the Port Agent's records on grounds that he was not a public official and therefore not subject to the Public Records Act. The Board (and intervening party, the San Francisco Bar Pilots Association) in part argued that the Board's formal lack of supervision rendered the Port Agent immune from the requirements of the Public Records Act.

More specifically, the Board and Bar Pilots argued that the Political Reform Act and Public Records Act should be applied on parallel terms; therefore, since the Board has not made the Port Agent reportable under its Conflict of Interest Code, they argued that the Public Records Act was likewise inapplicable to the Port Agent. The Board's opinion was that the Political Reform Act did not extend to the Port Agent[1] and the Bar Pilots' argument was that since the Board did not apply the Conflict of Interest Code to the Port Agent then he could not be considered a public official under the Public Records Act either.[2]

The Court of Appeal decision considered these arguments and rejected them, noting that the Port Agent has already taken "the unequivocal position before the U.S. District Court that he was a state official, acting within the course and scope of that capacity, when assigning pilots. We fail to appreciate the inequity in refusing to allow the Port Agent to take an inconsistent position here. The Port Agent fails to explain why one should be permitted to assume the cloak of a state official when it provides protection, but to then cast it off in the event it becomes burdensome." (*Board of Pilot Commissioners*, at 15).

When performing his "official duties provided by statute or Board regulation" the Port Agent exercises state-granted authority to assert control over the pilotage grounds which may have a material effect on reportable financial interests. The Board should therefore designate the Port Agent under §87302(a) as a "designated employee" – which as the Board is well aware, is not a designation limited only to employees, but one that extends to any position which has the authority to participate in the making of decisions which may have a material effect on any financial interest. Govt. Code §82019(a), (a)(3).

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[1] "My job as Executive Director of the Board does not include supervision or oversight of Captain Horton's activities as Port Agent… Captain Horton does not submit a statement of economic interests to me, as is required of Board members, Board consultants, and Board personnel under the Political Reform Act of 1974 and Board regulation." Declaration of Allen Garfinkle in Support of Opposition, at 2:17-26. (*ATTACHMENT 2*)

[2] "The Port Agent's duties are described in section 218, and neither that section nor any other provision in the regulations contains even the slightest suggestion that the Port Agent is an officer. For example, unlike officers, the Port Agent is not required to file a statement of economic interests pursuant to the Political Reform Act of 1974." San Francisco Bar Pilots, PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM, at pg. 26. (*ATTACHMENT 3*)

With respect to rulemaking, generally, when regulations are not reflective of the most up-to-date statutory changes a rulemaking may be considered "reasonably necessary to effectuate the purpose of the statute [it is implementing, interpreting, making specific or otherwise carrying out.]" Government Code §11342.2. In this instance, the statutes that the Board are required to implement by rule are the Conflict of Interest Codes required by Article 3 (Govt. Code § 87300 et seq.) of Chapter 7 of the Political Reform Act of 1974.

The Board's current Conflict of Interest Code fails to include the position of the Port Agent, who is a public official, acts as an Agent of the state when exercising state-authorized power upon his own discretion, and is directed to complete tasks on behalf of the Board and at its direction, as a matter of law.

The Political Reform Act of 1974 was enacted, in part, to ensure that the "[a]ssets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided." Govt. Code § 81002(c). "Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." Govt. Code § 81001(b). In order to effectuate this required transparency and these goals for the preservation of good government, the provisions of the Political Reform Act "should be liberally construed to accomplish its purposes." Govt. Code §81003.

As the position of Port Agent is under the Board and involves potentially material impacts on potential financial interests, the Board should specifically enumerate the Port Agent in "Appendix A" of 7 CCR §212.5 pursuant to Govt. Code § 87302(a). Upon such an enumeration, the Board should list the Port Agent in a manner similar to the other designated employees in "Appendix B" of the same Conflict of Interest Code.

The office of Port Agent is granted numerous and broad public duties, among which are the duties to oversee and manage all business and licensing affairs of pilots (Harb. & Nav. Code §1130) and to act upon the direct orders of the Board of Pilot Commissioners 7 (CCR §218). In his official capacity the Port Agent is granted the exclusive authority to make many decisions on behalf of the state, including the assignment of pilots to vessels and whether or not to close the bar to all vessel traffic.

The Port Agent's actions obligate the state when acting in his official capacity as his "duties shall be to carry out the orders of the Board, under applicable laws." (7 CCR §218(a)). For instance, because the Port Agent's assignments are made under color of law, disobeying the Port Agent's pilot assignment orders may result in license discipline of a licensee by the Board or risk imposition of criminal liability on vessel operator.[3]

[3] Pilotage is compulsory for all ocean-going vessels with limited exceptions (Harb. & Nav. Code §1125), and only the Port Agent is granted the authority to assign which pilots will pilot each vessel under compulsory pilotage (7 CCR §218(d)(1)). As a result, a pilot must be on call for dispatch by the Port Agent and may only pilot vessels assigned by the Port Agent (7 CCR §219(b), (k), (l)) subject to discipline by the

Port Agent designation as a public official would be consistent with previous application by the Fair Political Practices Commission ("FPPC") of a test for whether a corporation is rendered "a 'public official' within the meaning of Government Code Section 87100." *In re Siegel*, 3 FPPC Ops. 62 (1977). In the *Siegel* opinion, the FPPC determined that when analyzing whether an entity is a public agency that "the true nature of the entity, not merely its stated purpose, should be analyzed in determining whether the entity is public or private within the meaning of the Act." *Id.*, at 3. In this case, the office was created by the Legislature, it is occupied by an individual who is paid principally (if not exclusively) through the application of a tariff adopted by the Legislature, the office was formed to provide public services on behalf of the state Board and at its direction, and the office is treated as public under both the application of the Public Records Act and the exercise of the state's sovereign immunity under the 11th Amendment.

This analysis is consistent with determinations in the context of other port activity, where the exercise of discretionary authority by a public official under a tariff which carries with it the force of law (and potential violations of criminal law), even if in connection with a contractual or business relationship, it is not an exercise of a proprietary interest but rather a key imprimatur of the exercise of governmental authority.[4]

Port Agent inclusion in "Appendix A" is also consistent with the FPPC's guide to "determine whether a given individual has a disqualifying conflict of interest under the Political Reform Act." 2 CCR §18700(b). This FPPC analysis requires a threshold determination as to "whether the individual is a public official, within the meaning of the Act. (See Government Code section 82048; 2 Cal. Code Regs. § 18701.) If the individual is not a public official, he or she does not have a conflict of interest within the meaning of the Political Reform Act." 2 CCR §18700(b)(1).

While the Port Agent acts in an administrative capacity as a state officer, these actions are not "solely ministerial, secretarial, manual, or clerical" and therefore do not fall under an exception to the making a governmental decision test per 2 CCR §18702.4. As testament to the exceptional autonomy with which the Port Agent is able to act in the scope of his public duties, the Board admitted that it exercises virtually no day-to-day control over the Port Agent despite their administrative authority to do so pursuant to 7 CCR §218(a).[5]

Board including license revocation or suspension for "misconduct" (Harb. & Nav. Code §1181). Furthermore, utilization of a pilot who is not a licensee (who, of course, may only be assigned to a vessel by the Port Agent) potentially exposes vessel masters to criminal liability. (Harb. & Nav. Code §1126).

[4] *American Trucking Associations v. City of Los Angeles, et al.*, 569 U.S. ____ (2013). (At 8: "A violation of that tariff provision is a violation of criminal law… So the contract here functions as part and parcel of a governmental program wielding coercive power over private parties … That counts as action "having the force and effect of law" if anything does. The Port here has not acted as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic. … Contractual commitments resulting not from ordinary bargaining [CITE], but instead from the threat of criminal sanctions manifest the government *qua* government, performing its prototypical regulatory role.")

[5] See again, Attachment B: "My job as Executive Director of the Board does not include supervision or oversight of Captain Horton's activities as Port Agent." (Declaration of Allen, at 2:17-18). The argument

This discretionary authority is most potentially abused in the breach – as described by the FPPC in 2 CCR §18702.1(a)(5) – whereby a Port Agent could threaten to *withhold* a pilotage assignment from a vessel unless a non-authorized payment was paid to the pilots or *refuse* to assign a pilot to bring a vessel in exchange unless a Port agreed to support legislation which would provide direct enrichment to the Port Agent's Association. Unfortunately, this type of activity is not purely hypothetical, as it was gamesmanship and "threats" of this type which led to the public records act requests at issue in the *Board* decision in the first place. (*ATTACHMENT 4*) Since the office of Port Agent is now definitely public, these conflicts of interest must be guarded against by the Board.

Of course, the scope of any one individual's economic interests is entirely speculative, but given the nature of the office of Port Agent, it is likely that the intersection between the exercise of the Port Agent's duties and his potential economic interests could conceivably range from material impacts to his own personal financial interests, such as his own level of income and vacation, to material impacts to the income and vacations of any one of his business partners at the San Francisco Bar Pilots Association.[6] Such evaluations can only occur if the position of Port Agent itself is included in the Board's Conflict of Interest Code and his interests are properly disclosed under §87302(a).

While acknowledging that the Port Agent must hold a pilot's license to be appointed to the position, thereby unlikely to be disqualified from actions generally, the individual that holds that office may have external business relationships or personal financial holdings which might nonetheless pose specific conflicts of interest to be avoided.[7] For example, because he controls the ability of vessels which are owned and operated by publicly-traded companies involved in interstate and international maritime trade to conduct business at public seaports in the San Francisco Bay and its related waterways, any such interests should also be included and evaluated in his conflict of interest disclosures with respect to materiality. Likewise, the materiality of any specific personal interests which exist in any given situation cannot be evaluated in a vacuum or based on pure speculation

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by the Board that it's formal lack of supervision rendered the Port Agent immune from the requirements of the Public Records Act was rendered impotent by the ruling in *Board of Pilot Commissioners*.

[6] The San Francisco Bar Pilots Association is a for-profit association "business entity" under § 82005 of the Political Reform Act. The Port Agent is the President of the Association, yet the exact nature of the private relationship between the Port Agent and other members of the Association remains unclear to the public and the Board in many respects. The Association claims to have no by-laws, yet the work rules do not describe all of the financial relationships between the parties. PMSA observes that as members of an unincorporated association, the pilots claim relationships that are in some respects partners, some respects shareholders, some respects employees, some respects independent contractors, and that they have common and shared interests in various revenue streams and assets derived from the publicly adopted tariff and surcharges. What is undeniably clear is that all the while, when the Port Agent controls the vacation and work schedules of these individuals by virtue of his public office, he is also simultaneously both in business with and the President of the Association of those same individual licensed pilots, to an undisclosed extent.

[7] While a de facto monopoly for pilotage exists via the San Francisco Bar Pilots Association, there are neither statutory or regulatory rules requiring the Port Agent to have a private financial relationship with other licensees nor any rules barring the Port Agent from having such relationships with other licensees.

at this point, but rather such situations must be evaluated on a case-by-case basis with respect to the interests of the individual appointed to the position based on disclosures.

In conclusion, the recent decision in *Board of Pilot Commissioners* regarding the application of the Public Records Act to the Port Agent makes it clear and conclusive: the Port Agent is a public official who exercises his public duties as an officer of the state. Since the decision in *Board* has rejected the argument that the Port Agent should not be considered a public official, in relevant part here, because he was not subject to the Political Reform Act, the Board should now do the right thing, remain consistent to the parallel arguments that it made in its own opposition to the finding of the Port Agent as public official, and properly amend its Code to include the Port Agent.

If the Board fails to act upon this petition by December 16, 2013 or otherwise fails to amend its Conflict of Interest Code to include the Port Agent, PMSA will seek a direct determination from the FPPC on appeal per §87307.

For the reasons set forth above, PMSA requests that the Board immediately implement the requested changes to the Conflict of Interest Code.

Respectfully Submitted,

Michael Jacob

16 Sept 2013
Date

On Behalf of Petitioner,
Pacific Merchant Shipping Association
San Francisco, CA

ATTACHMENT 1

Filed 8/1/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE BOARD OF PILOT COMMISSIONERS FOR THE BAYS OF SAN FRANCISCO, SAN PABLO AND SUISUN et al., Petitioners. v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. Respondent; PACIFIC MERCHANT SHIPPING ASSOCIATION, Real Party in Interest.	A136803 (San Francisco City and County Super. Ct. No. CPF-12-512320)
SAN FRANCISCO BAR PILOTS et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. Respondent; PACIFIC MERCHANT SHIPPING ASSOCIATION, Real Party in Interest.	A136806 (San Francisco City and County Super. Ct. No. CPF-12-512320)

The California Public Records Act (CPRA) (Govt. Code. § 6250 et seq.) provides for the inspection of public records maintained by state and local agencies. The Pacific Merchant Shipping Association (PMSA), real party in interest in this case, petitioned the

ATTACHMENT 2

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Attorneys for Respondents Board of Pilot Commissioners and Capt. Bruce Horton, as Port Agent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PACIFIC MERCHANT SHIPPING ASSOCIATION, Petitioner, v. **THE BOARD OF PILOT COMMISSIONERS FOR THE BAYS OF SAN FRANCISCO, SAN PABLO, AND SUISUN and CAPT. BRUCE HORTON, in his capacity as Port Agent,** Respondents.	Case No. CPF-12 512320 **DECLARATION OF ALLEN GARFINKLE IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF MANDATE** Date: 09/05/2012 Time: 9:30 a.m. Dept: 302 Judge: The Honorable Harold Kahn Trial Date: Not Set Action Filed: July 3, 2012

I, Allen Garfinkle, declare as follows:

1. I am the Executive Director of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun (Board). My duties as the Executive Director of the Board include, but are not limited to, administration and enforcement of all laws, rules, and regulations of the Board, maintenance of the the records and files of the Board, and the administration of personnel for the Board.

2. I perform my services as Executive Director of the Board at the Board office,

which is located at 660 Davis Street, San Francisco, California.

2. On March 26, 2012, I received the letter attached as Exhibit A, which is a Public Records Act request to the Board from the Pacific Merchant Shipping Association (PMSA). The request seeks documents described as "Pilot Logs" for the years 2002-20011, inclusive, for each licensed pilot who was a pilot during those years. After receipt of the request, I performed a diligent search of the Board's records. The Board does not have the requested documents, and it does not prepare, own, use or retain what are described as "Pilot Logs" in PMSA's request. On April 5, 2012, the Board's counsel, Dennis Eagan, informed counsel for PMSA in writing that the documents described in the request are not in the possession of the Board and are not prepared, owned, used or retained by the Board. A copy of Mr. Eagan's letter is attached as Exhibit B.

3. In my capacity as Executive Director of the Board, I know Captain Bruce Horton. Captain Horton has been designated by the pilots licensed by the Board to serve as the Port Agent, a position described in Harbors and Navigation Code section 1130. Captain Horton is not employed by the Board and receives no compensation for his service as Port Agent from the Board. My job as Executive Director of the Board does not include supervision or oversight of Captain Horton's activities as Port Agent. Captain does not have an office or work space at the Board office. Captain Horton does not have Board staff assigned to or available to him to perform any of his duties as Port Agent. Captain Horton submits certain records and reports to the Board in his capacity as Port Agent. All such records and reports are maintained at the Board office. Captain Horton does not, however. create or maintain any records at the Board office in his capacity as Port Agent or in any other capacity. Captain Horton does not submit a statement of economic interests to me, as is required of Board members, Board consultants, and Board personnel under the Political Reform Act of 1974 and Board regulation.

4. In my capacity as Executive Director of the Board, I do not have access to or

oversight of any records that are prepared, owned, used or retained by the Port Agent or the San Francisco Bar Pilots or at the offices of the San Francisco Bar Pilots, other than records or reports received at the Board from the Port Agent.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is signed on August 10 2012, in San Francisco, California.

ALLEN GARFINKLE

ATTACHMENT 3

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ____

SAN FRANCISCO BAR PILOTS, an unincorporated association, and BRUCE HORTON, in his private capacity as President of the San Francisco Bar Pilots Petitioners, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO Respondent, PACIFIC MERCHANT SHIPPING ASSOCIATION Real Party in Interest.	Court of Appeal Case No. _____ San Francisco Superior Court Case No. CPF-12-512320 ***STAY REQUESTED*** **OF THE SUPERIOR COURT'S SEPTEMBER 18, 2012 ORDER GRANTING MOTION FOR ISSUANCE OF A WRIT**

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM;
STAY REQUESTED

From the Superior Court of the County of San Francisco
Hon. Curtis E. A. Karnow, Judge
(Department 302, (415) 551-3723)

R. SCOTT ERLEWINE (SBN 095106)
CARI A. COHORN (SBN 249056)
PHILLIPS, ERLEWINE & GIVEN LLP
50 California Street, 35th Floor
San Francisco, CA 94111
Telephone: 415-398-0900
Attorneys for Petitioners

7, 2010) 2010 WL 3504846 at *5 ("it is also clear that the Port Agent sometimes acts on behalf of the Bar Pilots, and sometimes on behalf of the Board"); see also Ex. S, pp. BOPC 395-398. For example, the Port Agent represents pilots before the Board and its committees. 7 C.C.R. § 218 (d)(3). Thus, the Port Agent is not a "public officer" as that term has been consistently interpreted by the California courts; nor is he a state officer for purposes of the CPRA.

2. Statutes and regulations applicable to "state agencies" and "state officers" do not apply to the Port Agent

Regulations governing bar pilots and numerous statutory provisions further demonstrate that the Port Agent is not a state agency or state officer. Most tellingly, sections 206 and 207 of Title 7 of the California Code of Regulations identify the officers of the Board: a president and vice president, both of whom are elected by the Board from among its members and who serve a two-year term and may be recalled by the other members; and "such other officers as it considers necessary to carry out the functions of the Board." The Port Agent's duties are described in section 218, and neither that section nor any other provision in the regulations contains even the slightest suggestion that the Port Agent is an officer. For example, unlike officers, the Port Agent is not required to file a statement of economic interests pursuant to the Political Reform Act of 1974. (7 C.C.R. § 212.5, Appendix A; Ex. O, p. BOPC 350, ¶ 3.)

Numerous provisions of the Government Code provide guidance as to who is a state officer, and they uniformly demonstrate that the Port Agent is not such an officer. For instance, section 1001 lists the civil executive officers of the state. This list includes, among others, "four port wardens for the Port of San Francisco; a port warden for each port of entry except San Francisco; five State Harbor Commissioners for San Francisco Harbor; six pilots for each harbor *where there is no board of pilot commissioners*; [and]

ATTACHMENT 4

STATE OF CALIFORNIA

EDMUND G. BROWN JR.
Governor

Department of Alcoholic Beverage Control
Department of Corporations
Department of Financial Institutions
California Highway Patrol
California Housing Finance Agency
Department of Housing & Community Development
Department of Managed Health Care
Department of Motor Vehicles
Board of Pilot Commissioners

TRACI STEVENS
Acting Secretary

Department of Real Estate
Department of Transportation
Office of the Patient Advocate
Office of Real Estate Appraisers
Office of Traffic Safety
California Film Commission
California Office of Tourism
Infrastructure and Economic Development Bank
Public Infrastructure Advisory Commission

BUSINESS, TRANSPORTATION AND HOUSING AGENCY

June 17, 2011

VIA PERSONAL DELIVERY AND FIRST CLASS MAIL

Captain Bruce A. Horton
Port Agent
San Francisco Bar Pilots Association
Pier 9 East End
San Francisco, California 94111

Re: Order Requiring Pilotage of CMA CGM NORMA from the High Seas Through the San Francisco Bay to Dock (Government Code Section 13978)

Dear Captain Horton:

The California Board of Pilot Commissioners (Board), has been closely following rate-setting procedures involving the San Francisco Bar Pilots, and is aware of recent threats to refuse to pilot the CMA CGM NORMA through the San Francisco Bay to dock upon the vessel's scheduled arrival on Saturday, June 18, 2011. This letter directs you to take every lawful action under your authority to ensure that these threats do not materialize. As the Port Agent, you are responsible to supervise and manage matters related to the official duties of bar pilots licensed by the Board. (Harb. & Nav. Code, § 1130, subd. (b).)

The Board is vested with all functions and duties necessary to administer the laws governing bar pilots. (Harb. & Nav. Code § 1154, subd. (a).) It is organized under the California Business, Transportation and Housing Agency (Agency). (Harb. & Nav. Code, § 1150, subd. (a); Gov. Code, § 13975.) As the Acting Agency Secretary, I have the authority to issue orders "deem[ed] appropriate to exercise any power or jurisdiction, or to assume or discharge any responsibility, or to carry out or effect any of the purposes vested by law" in any of the entities within the Agency. (Gov. Code, § 13978.)

Thus, consistent with Government Code section 13978, I hereby order that you, as the Port Agent authorized by Harbors and Navigation Code section 1130, take every action under your authority to ensure the full, complete, and appropriate pilotage of the cargo vessel CMA CGM NORMA from the "SF Buoy" through the San Francisco Bay to dock on Saturday, June 18, 2011, upon the vessel's scheduled arrival at approximately 3:00 p.m.

This order is necessary because there is insufficient time for the Board to conduct a public meeting to consider this issue (Gov. Code § 11120 *et seq.*), and a failure to ensure proper pilotage of CMA CGM NORMA could have serious adverse economic, transportation, and other consequences.

Failure to adhere to the requirements of this Order may result in legal action, including disciplinary proceedings pursuant to the discretion and procedures of the Board.

Sincerely,

TRACI STEVENS
Acting Secretary

Encl: Proof of Service

Cc: Allen Garfinkle, Executive Director, Board of Pilot Commissioners (via electronic transmittal)
Michael Jacob, Vice President, Pacific Merchant Shipping Association
Augustin R. Jimenez, General Counsel, BTH Agency
Gabor Morocz, Deputy General Counsel, BTH Agency

PROOF OF SERVICE

Declaration of Personal Service

The person signing this declaration, below, hereby declares:

I am a citizen of the United States of America and over the age of 18.

I am the Executive Director of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun.

My business address is: 660 Davis Street, San Francisco, California 94111.

On June _____, 2011, at _____ a.m./p.m., I served a copy of the

Order Requiring Pilotage of CMA CGM NORMA from the High Seas Through the San Francisco Bay to Dock (Government Code Section 13978)

by personally delivering said document to Captain Bruce Horton, Port Agent, at the facilities of the San Francisco Bar Pilots Association at Pier 9 East end, San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June _____, 2011, at San Francisco, California.

_____
Allen Garfinkle
Declarant

Laurice Henry-Ross

From: Bruce Horton [b.horton@sfbarpilots.com]
Sent: Friday, June 10, 2011 10:14 AM
To: ops@sfbarpilots.com; Chris Peterson
Cc: Ralph Reynoso; Richard Taylor; portagent@sfbarpilots.com
Subject: Re: CMA/CGM Orfeo on June 5th

Chris,

Until further notice we are not taking vessels greater than 1140' into OIH, and we are not turning vessels greater that 1000' at night.

Regards,
Bruce

--- On **Thu, 6/2/11, Chris Peterson** <*cpeterson@portoakland.com*> wrote:

From: Chris Peterson <cpeterson@portoakland.com>
Subject: CMA/CGM Orfeo on June 5th
To: "ops@sfbarpilots.com" <ops@sfbarpilots.com>
Cc: "Bruce Horton" <b.horton@sbcglobal.net>, "Ralph Reynoso" <RReynoso@portoakland.com>, "Richard Taylor" <RTaylor@portoakland.com>
Date: Thursday, June 2, 2011, 8:56 AM

Staff has advised me that the CMA/CGM Orfeo is due into OICT on June 5th. Based on the vessels stats, this vessel is 1150.59' long. Have we changed the 1140' parameters already for daytime moves? If so, what is the new restricted length in the Inner and Outer Harbor turning basins? Thanks.

Chris Peterson

Chief Wharfinger

Port of Oakland

Off: 510-627-1308

Cell: 510-719-8024

Laurice Henry-Ross

From: Port Agent [portagent@sfbarpilots.com]
Sent: Friday, June 10, 2011 11:25 AM
To: Chris Peterson
Subject: RE: CMA/CGM Orfeo on June 5th

Chris,

We thought we had an agreement on the procedures/costs to bring in these type of vessels and to be able to turn them at night. However, we have had kick-back from CMA-CGM on this agreement. If you have other shipping companies that would like discuss this with me, I would be happy to meet and work toward a mutual agreement to be able to do this work for you and them.

Regards,

Captain Bruce Horton
Port Agent
San Francisco Bar Pilots
1.415.393.0450

From: Chris Peterson [mailto:cpeterson@portoakland.com]
Sent: Friday, June 10, 2011 10:16 AM
To: b.horton@sfbarpilots.com; ops@sfbarpilots.com
Cc: Ralph Reynoso; Richard Taylor; portagent@sfbarpilots.com
Subject: RE: CMA/CGM Orfeo on June 5th

Bruce, can you give me the official reason for this, in writing, so I can notify my tenants? If this is related to the issue you mentioned yesterday, then we should sit down and discuss it. Thanks.

Chris Peterson
Chief Wharfinger
Port of Oakland
Off: 510-627-1308
Cell: 510-719-8024

From: Bruce Horton [mailto:b.horton@sfbarpilots.com]
Sent: Friday, June 10, 2011 10:14 AM
To: ops@sfbarpilots.com; Chris Peterson
Cc: Ralph Reynoso; Richard Taylor; portagent@sfbarpilots.com
Subject: Re: CMA/CGM Orfeo on June 5th

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Until further notice we are not taking vessels greater than 1140' into OIH, and we are not turning vessels greater that 1000' at night.

Regards,
Bruce

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From: Chris Peterson <cpeterson@portoakland.com>
Subject: CMA/CGM Orfeo on June 5th
To: "ops@sfbarpilots.com" <ops@sfbarpilots.com>
Cc: "Bruce Horton" <b.horton@sbcglobal.net>, "Ralph Reynoso" <RReynoso@portoakland.com>, "Richard Taylor" <RTaylor@portoakland.com>
Date: Thursday, June 2, 2011, 8:56 AM

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Chris Peterson

Chief Wharfinger

Port of Oakland

Off: 510-627-1308

Cell: 510-719-8024

Laurice Henry-Ross

From: Port Agent [portagent@sfbarpilots.com]
Sent: Friday, June 10, 2011 2:07 PM
To: Chris Peterson
Subject: FW: PMSA pilotage rate advisory
Attachments: rate memorialization (bopc)(6-10-11).pdf; PMSA Member Advisory 6-9-11.pdf

FYI, this is why we are not going to do the future work.

Open to your coments...

Captain Bruce Horton
Port Agent
San Francisco Bar Pilots
1.415.393.0450

From: Mike Jacob [mailto:MJacob@pmsaship.com]
Sent: Friday, June 10, 2011 12:34 PM
To: Garfinkle, Allen@BOPC
Cc: Knute Michael Miller; Frank Johnston; Morocz, Gabor; dwainwright55@gmail.com; Steve Roberts (capt.roberts@yahoo.com); Osen, Eric (EricOsen); John Cronin at HQ x4220; dennis.eagan@doj.ca.gov; portagent@sfbarpilots.com; John Cinderey
Subject: PMSA pilotage rate advisory

Afternoon Allen,

Please find attached letter to the Board regarding pilotage rates and an advisory sent to the PMSA membership, also attached.

Thanks in advance for your receipt and review of this correspondence.

Have a great weekend,
Mike

Mike Jacob
Vice President
Pacific Merchant Shipping Association
==========
250 Montgomery, Suite 700
San Francisco, CA 94104
(415) 352-0710
(415) 352-0717 fax
www.pmsaship.com

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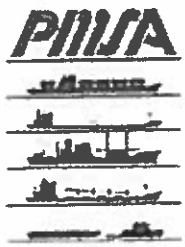

June 10, 2011

Capt. Allen Garfinkle
Executive Director
Board of Pilot Commissioners
660 Davis St.
San Francisco, CA 94111

RE: Memorialization of Pilotage Charge Advisement to PMSA Members

Dear Executive Director Garfinkle:

This letter is to advise the Board of Pilot Commissioners the attached advisement sent to all members of the Pacific Merchant Shipping Association (PMSA) regarding pilotage charges.

It had become apparent following the conclusion of last month's rate hearings that there is confusion regarding the timing and applicability of the new rates and new surcharges that were adopted by this Board as recommendations to the Legislature. Faced with this uncertainty, we felt it best to clarify for our members that the recommendations by this Board are not in effect unless approved by the California State Legislature and, in any event, would not be charged before January 1, 2012.

Given the importance of the need for customers to be fully and accurately apprised of all rates and charges imposed in this pilotage ground, PMSA would respectfully request that, if upon review of this advisement the Board finds any inaccuracy or error herein, the Board would immediately notify us that our advisement to our membership regarding pilotage charges is not a full and accurate representation of the basis on which they may be levied by the San Francisco Bar Pilots. Barring such a notification from the Board we will continue to provide the information in this advisement to our membership.

Thank you in advance for your efforts at helping us maintain fair, transparent and accurate pilotage levies.

Sincerely,

Mike Jacob
Vice President

Enclosure
Cc: Members, Board of Pilot Commissioners
Secretary, Business, Transportation & Housing Agency
Port Agent

Pacific Merchant Shipping Association
250 Montgomery St., Suite 700, San Francisco, CA 94104 (415) 352-0710 fax (415) 352-0717

PMSA MEMBERSHIP ADVISORY

June 9, 2011

TO: Pacific Merchant Shipping Association Membership
FROM: PMSA – San Francisco
RE: Pilotage Rates in San Francisco Bay and River System

Attention PMSA Members:

After receiving inquiries from several members regarding the proper implementation schedule of proposed rate changes in the San Francisco pilotage grounds, please be advised of the following:

- None of the increased rates or new surcharges which were recently recommended by the state Board of Pilot Commissioners are currently in effect. As they are only recommendations to the California State Legislature, they are not effective unless both the Legislature and the Governor concur with the recommendations by the state Board of Pilot Commissioners. This is a condition which has not yet occurred.

- Even if the Legislature concurs with the recommendations by the Board of Pilot Commissioners, none of the increased rates or new surcharges will be in effect until January 1, 2012.

- Please find attached the latest Memorandum from the state Board of Pilot Commissioners to the San Francisco Bar Pilots, dated April 1, 2011, enunciating the only rates and related surcharges which should be applied to your invoices with regard to services to and from sea.

- Please also find attached the current list of additional service codes which are charged against all pilotage activities which relate to services other than pilotage to and from sea, published by the San Francisco Bar Pilots, dated January 1, 2010. With the exception of trip insurance, none of these amounts have changed since 2006.

If you find that you have been prematurely billed under the proposed rate increases or otherwise charged in a manner which does not comport with the current rates, charges or service codes per the attached schedules, you may have been mistakenly invoiced. In such a situation, please work directly with the San Francisco Bar Pilots to rectify any such billing errors. If any such billing errors are not resolved to your satisfaction, please review with your legal counsel and feel free to advise PMSA of the issue – we may provide notification of the irregular billing to the appropriate state authorities.

If you have any further questions regarding these or any other pilotage matters please do not hesitate to contact Mike Jacob in the PMSA San Francisco office at (415) 352-0710 or at mjacob@pmsaship.com.

Laurice Henry-Ross

From: Bruce Horton [portagent@sfbarpilots.com]
Sent: Tuesday, June 14, 2011 9:03 AM
To: Chris Peterson
Subject: Re: PMSA pilotage rate advisory

Another more important reason is CAPA opposing our bill and the extra pilot charges. Looks like Omar is the one going to drive business away. If we can't charge for the extra pilot services I doubt we will ever bring those ships in...

Captain Bruce Horton
Sent from my iPhone

On Jun 14, 2011, at 8:44 AM, Chris Peterson <cpeterson@portoakland.com> wrote:

> Bruce. let me discuss this issue internally and I'll get back to you soon. Thanks.
>
> Chris Peterson
>
> Chief Wharfinger
>
> Port of Oakland
>
> Off: 510-627-1308
>
> Cell: 510-719-8024
>
> **From:** Port Agent [mailto:portagent@sfbarpilots.com]
> **Sent:** Friday, June 10, 2011 2:07 PM
> **To:** Chris Peterson
> **Subject:** FW: PMSA pilotage rate advisory
>
> FYI, this is why we are not going to do the future work.
>
> Open to your coments...
>
> Captain Bruce Horton
>
> Port Agent

Exh 2

State of California

Edmund G. Brown Jr., Governor

Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun
660 Davis Street., San Francisco, CA 94111
Phone: (415) 397-2253 Fax: (415) 397-9463
E-mail: allen.garfinkle@bopc.ca.gov
www.bopc.ca.gov

October 25, 2013

Mr. Michael Jacob
Vice President
Pacific Merchant Shipping Association
250 Montgomery Street, Suite 700
San Francisco, CA 94104

Re: Petition for Amendment of the Board of Pilot Commissioners Conflict Of Interest Code

Dear Mr. Jacob,

Please find enclosed a copy of the Board of Pilot Commissioners decision in the matter of the petition you submitted on behalf of the Pacific Merchant Shipping Association to amend the Conflict Of Interest Code.

A copy will also follow by U.S. Postal Service.

Respectfully,

Allen Garfinkle
Executive Director

BEFORE THE BOARD OF PILOT COMMISSIONERS FOR THE BAYS OF SAN FRANCISCO, SAN PABLO, AND SUISUN

In the Matter of the Petition of the Pacific Merchant Shipping Association to Include the Port Agent in the Conflict of Interest Code of the Board of Pilot Commissioners For the Bays of San Francisco, San Pablo, and Suisun	**DECISION**

On September 16, 2013, the Pacific Merchant Shipping Association petitioned the Board of Pilot Commissioners to add the Port Agent to the list of "designated employees" contained in the Board's Conflict of Interest Code. The Political Reform Act of 1974 (Gov. Code, §§ 81000-91014) requires each state agency to adopt a Conflict of Interest Code that lists positions "within the agency" that "involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest and for each such enumerated position, the specific types of investments, business positions, interests in real property, and sources of income which are reportable." (Gov. Code, §§ 87300, 87302, subd. (a).) Government Code section 87307 provides that a state agency may at any time amend its Conflict of Interest Code, either upon its own initiative or in response to a petition submitted by, among others, a "resident of the jurisdiction." PMSA has petitioned under this latter provision.

ORDER

Section 87300 of the Government Code requires each state agency to adopt a Conflict of Interest Code governing "designated employees." The Port Agent is not a "designated employee" within the meaning of section 87300. Because a state agency is charged with including only "designated employees" in its Conflict of Interest Code, and because the Port Agent is not a "designated employee" within the meaning of the Political Reform Act of 1974, the Board denies PMSA's petition.

DISCUSSION

I. The Port Agent is not a "designated employee"

It is only an "officer, employee, member, or consultant of [an] agency" that an agency may list as a designated employee in its Conflict of Interest Code, and then only if that person engages in certain types of agency decisions. (Gov. Code, § 82019, subd. (a).) The Port Agent does not fit within any of the four categories.

1. The Port Agent is not an officer of the Board. (*Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 583, 588 (hereafter *Board of Pilot Commissioners*).) The Board has two officers, a President and a Vice President. (Cal. Code Regs., tit. 7, §§ 206, 207.) The Port Agent occupies neither position.

2. The Port Agent is not an employee of the Board. (*Board of Pilot Commissioners*, *supra*, 218 Cal.App.4th at p. 588.) "The Board licenses and regulates pilots on San Francisco

Bay and its tributaries," including the Port Agent. (*Id.* at pp. 582, 583; Harb. & Nav. Code, §§ 1100, 1101, subds. (e), (g).) He and the other licensed pilots are the objects of the Board's regulatory authority by statute and under the Board's regulations (Harb. & Nav. Code, §§ 1100-1203; Cal. Code Regs., tit. 7, §§ 201-237), but neither the Port Agent nor the other pilots whom the Board has licensed are employees of the Board.

All of the pilots, including the Port Agent, are members of a private unincorporated association, the San Francisco Bar Pilots. (*Board of Pilot Commissioners, supra,* 218 Cal.App.4th at pp. 582, 593.) The association provides the means for the pilots to conduct their business: pilot boats and crews, office space, fiscal and other office staff, dispatchers to accept requests for pilotage services from ship's agents, billing and collection services, and so forth. After all expenses are paid, the pilots, as members of the association, share the net revenues generated by their pilotage services. None of the pilots, including the Port Agent, receive any compensation from the Board. (*Id.* at pp. 583, 588.)

There is no employer-employee relationship between the Board and the Port Agent. As required by statute, the members of the San Francisco Bar Pilots appoint one of their number to serve as the Port Agent. The Board must confirm this appointment by the pilots for it to be effective, but the Board has no power either to appoint the Port Agent or to remove the Port Agent. (Harb. & Nav. Code, § 1130, subd. (a); *Board of Pilot Commissioners, supra,* 218 Cal.App.4th at p. 589 ["The Port Agent . . . is only 'confirmed' by the Board without any provision for his removal."].) The powers of appointment and removal lie solely with the other pilots. The Port Agent receives his compensation from the San Francisco Bar Pilots; none comes from the Board. (*Id.* at p. 588.) The Port Agent performs his duties, both as Port Agent and as president of the San Francisco Bar Pilots, at the private offices of the association, which are located at Pier 9 in San Francisco. The Port Agent does not have an office or work space at the Board's office, which is located at 660 Davis Street in San Francisco.

The relationship between the Board and the Port Agent is not one between an employer and an employee, but rather one between a regulatory agency and one who is regulated. "The Port Agent . . . has responsibilities imposed by statute and by administrative regulation." (*Board of Pilot Commissioners, supra,* 218 Cal.App.4th at p. 589.) The Board is the regulating agency and the Port Agent is a principal object of the Board's regulatory authority. The Board exercises regulatory power over the Port Agent through regulations and occasional directives in furtherance of the state's regulatory regime. When performing the duties required of him by the state's regulatory program, however, the Port Agent is not acting "on behalf of" the Board or as the Board's "agent," nor do his actions "obligate the state." (See PMSA pet., p. 3.) "[T]he Board has statutory licensing and oversight authority. But the individually licensed members of [the San Francisco Bar Pilots] render piloting services directly to their maritime clients, not on behalf of the Board. . . . And the Legislature has never given the Board the authority to make pilot assignments or to direct them." (*Board of Pilot Commissioners, supra,* 218 Cal.App.4th at p. 599.) Assigning pilots to vessels or deciding for safety reasons whether to close the San Francisco Bar to shipping, for instance, are not Board functions. Instead, as a matter of regulation, the Board has required the Port Agent to perform these and other functions.

3. The Port Agent is not a member of the Board. (*Board of Pilot Commissioners, supra,* 218 Cal.App.4th at p. 583.) The Board consists of seven voting members, all appointed by the Governor, and one ex officio member, the Secretary of the California State Transportation

Agency, who does not have a vote. (Gov. Code, § 1150.) The Port Agent is neither an appointed nor an ex officio member of the Board.

4. The Port Agent is not a consultant of the Board. The regulations of the Fair Political Practices Commission define a "consultant" as an individual who performs certain types of services for a state agency pursuant to a contract. (Cal. Code Regs., tit. 2, § 18701(a)(2).) There is no contract between the Board and the Port Agent. The Port Agent's duties are prescribed by statute and the Board's regulations. (*Board of Pilot Commissioners*, *supra*, 218 Cal.App.4th at p. 589; Harb. & Nav. Code, § 1130; Cal. Code Regs., tit. 7, § 218.). These duties do not arise from any contractual relationship with the Board.

II. That a court has barred the Port Agent from asserting that he is not a "state officer" under the Public Records Act does not mean that the Board must treat him as one of its officers, employees, members, or consultants under the Political Reform Act of 1974

The basis for PMSA's petition is a recent decision of the California Court of Appeal, *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577. The Court of Appeal was there presented with a question of statutory interpretation: whether the Port Agent was a "state officer" within the meaning of the California Public Records Act. If he was, then he was required under the act to respond to requests from the public for "public records" in his possession. In its decision, the court declined to assess whether the Legislature intended the term "state officer," as used in the Public Records Act, to include the Port Agent. Instead, it held that the Port Agent was barred by the doctrine of "judicial estoppel" from arguing otherwise. (*Id.* at pp. 589-591.) The court noted that the Port Agent had successfully argued in another case that, as a "state official," he was immune from suit in federal district court under the Eleventh Amendment to the United States Constitution. (*Id.* at p. 589.) The court concluded that the Port Agent's legal arguments in the two lawsuits were inconsistent and that it would not permit the Port Agent to argue that he was not a "state officer" under the Public Records Act, regardless of the Legislature's intent as to the meaning of that term. (*Id.* at pp. 590-591.)

Importantly, the court ruled that it was only the Port Agent, not the Board, that was barred from arguing that the Port Agent was not a "state officer" under the Public Records Act. "The Board is, however, correct in its assertion that the doctrine [of judicial estoppel] cannot be applied to it, since it was not a party to the [federal district court] proceeding and has never adopted the position taken in that litigation by the Port Agent." (*Board of Pilot Commissioners*, *supra*, 218 Cal.App.4th at p. 591, fn. 17.) The Court chose not to rule on the Board's argument that, as a matter of statutory interpretation, the Port Agent was not a "state officer" under the Public Records Act, concluding only that, given the Port Agent's arguments in the earlier federal lawsuit, it would treat the Port Agent as a "state officer." (*Id.* at pp. 590-591.) On other grounds, the court concluded that the Board was not required to produce public records in the sole possession of the Port Agent. (*Id.* at pp. 597-600.)

The court was not asked to decide, and did not decide, whether the Port Agent was a "designated employee" within the meaning of the Political Reform Act of 1974. That was not an issue in the case. The issue before the court was whether the Port Agent should be regarded as a "state officer" under the Public Records Act, and thus responsible for producing public records in response to requests from the public.

The Board discusses the case here only because PMSA makes the court's decision the basis for its petition to include the Port Agent in the Board's Conflict of Interest Code. The case has no application here and requires no such result.

First, the Political Reform Act does not use the general term "state officer" in prescribing whom the Board must include in its Conflict of Interest Code. Nowhere does article 3 of chapter 7 of the Political Reform Act, dealing with state agencies' Conflict of Interest Codes, make reference to "state officers" or "public officials." Instead, article 3 mentions only four specific categories of persons who are "designated employees" and so must be included in an agency's COI Code if they engage in certain types of agency decisions: officers, employees, members, and consultants of the agency. (Gov. Code, §§ 82019, 87300.)

As detailed above, the Port Agent is none of these things. He is an object of the Board's regulatory power who does not fit within any of the four categories of "designated employee." Therefore, there is no application here for the Court of Appeal's decision to treat the Port Agent as a "state officer" under the Public Records Act. While the Public Records Act applies to "state officers" generally, the provisions of the Political Reform Act concerning COI Codes focus more narrowly on the "designated employees" of a particular agency charged with adopting a COI Code.

The Political Reform Act of 1974 does use the term "public official," but not in connection with the persons who must be included in a state agency's COI Code. The term the act uses for that purpose is "designated employee." In any case, the definitions of the terms "public official" and "designated employee" in the Political Reform Act share the same root definition: an officer, employee, member, or consultant of a state agency. (Gov. Code, §§ 82019, 82048.) The Port Agent fits within neither definition.

Second, apart from the different terms and the different purposes in the respective legislative directives contained in the Public Records Act and the Political Reform Act, which differences render the Court of Appeal's decision inapposite here, the court's decision to treat the Port Agent as a "state officer" for Public Records Act purposes could have no application against the Board in any case. The court estopped only the Port Agent, not the Board, from arguing that the Port Agent was not a state officer. (*Board of Pilot Commissioners*, *supra*, 218 Cal.App.4th at p. 591, fn. 17.) From the Board's perspective, the Port Agent is not a "state officer" for any purpose, and nothing in the Court of Appeal decision bars it from maintaining that position.

III. Conclusion

For the foregoing reasons, the petition of the Pacific Merchant Shipping Association to include the Port Agent within the Conflict of Interest Code of the Board of Pilot Commissioners is denied.

DATED: October 24, 2013

RADM FRANCIS X. JOHNSTON
President of the Board

Exh 3

STATE OF CALIFORNIA
Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun

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Exh 4

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REGAL STONE LIMITED and FLEET MANAGEMENT, LTD., Plaintiffs, v. JOHN J. COTA, an individual, THE SAN FRANCISCO BAR PILOT'S ASSOCIATION, an unincorporated association, PETER McISAAC, an individual, and RUSSELL NYBORG, an individual, Defendants.	Case No. 08-5098 SC Related cases: 07-5800 SC 07-6045 SC 08-2052 SC 08-2268 SC 08-5096 SC 09-1469 SC ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

On January 19, 2010, Defendants Captain Peter McIsaac ("McIsaac") and Captain Russell Nyborg ("Nyborg")(collectively, "Moving Defendants") filed a Motion to Dismiss. ECF No. 45 ("Mot."). The Motion includes a request for attorney fees. Id. at 6. Plaintiffs Regal Stone Limited ("Regal Stone") and Fleet Management, Ltd., ("Fleet") (collectively, "Plaintiffs") filed an Opposition, and the Moving Defendants submitted a Reply. ECF Nos. 50 ("Opp'n"), 52 ("Reply"). Pursuant to Civil Local Rule 7-1(b), the Court decides the Motion without oral argument. For the following reasons, the Motion to Dismiss is GRANTED, and the request for attorney fees is DENIED.

United States District Court
For the Northern District of California

II. BACKGROUND

This action stems from the allision[1] of the cargo ship M/V COSCO BUSAN with the San Francisco-Oakland Bay Bridge on November 7, 2007. First Amended Compl. ("FAC"), ECF No. 35, ¶ 17. As a result of the allision, approximately 53,000 gallons of bunker fuel spilled into the San Francisco Bay. Id. At the time of the allision on November 7, 2007, Defendant John J. Cota ("Cota") was piloting the cargo ship. Id. ¶ 19.

As explained below, the M/V COSCO BUSAN was required to have a pilot on board, the Board of Pilot Commissioners ("the Pilot Commission" or "the Board") licenses pilots, and a Port Agent supervises the pilots. McIsaac is the current Port Agent, and Nyborg is his immediate predecessor. Mot. at 2 n.3. Plaintiffs allege that "McIsaac has been the Port Agent and the Chief Executive of the BPA [Bar Pilot's Association] since November 2006," and that Nyborg was the Port Agent and Chief Executive "at various times between 1998 and present." Id. ¶¶ 6-7.[2]

Plaintiffs accuse Nyborg of failing to report to the Board that Cota had been convicted of driving under the influence in 1999. Id. ¶ 24. Plaintiffs allege Nyborg also failed to report

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[1] The term "allision" is used in maritime cases to describe an accident involving a moving vessel and a stationary object or vessel. Hochstetler v. Bd. of Pilot Comm'rs for the Bays of San Francisco, San Pablo and Suisun, 6 Cal. App. 4th 1659, 1661 n.1 (Ct. App. 1992).

[2] Moving Defendants point out that the reference to their co-defendants as "The San Francisco Bar Pilot's Association" is an error, and that they should be referred to as the "San Francisco Bar Pilots." Reply at 1 n.1. Unless quoting from Plaintiffs' pleadings, the Court will refer to the San Francisco Bar Pilots as "the Bar Pilots."

United States District Court
For the Northern District of California

that the U.S. Coast Guard suspended Cota's federal piloting license from November 1999 to January 2000. Id.

Plaintiffs allege Nyborg and McIsaac knew or should have known that "Defendant Cota was not medically fit to serve as a marine pilot but [they] nonetheless failed to take the required action to remove Cota from rotation and/or initiate procedures to have Cota disqualified." Id. ¶ 25. Plaintiffs accuse McIsaac and Nyborg, along with the Bar Pilots, of having "unlawfully enabled, aided and abetted Cota to continue to serve as a pilot." Id. ¶¶ 25-26.

Plaintiffs allege that McIsaac, in his capacity as Port Agent, should have closed the bar and prevented vessel traffic on the day of the allision because it was extraordinarily foggy that day. Id. ¶ 27. "By law, it is the responsibility of the Port Agent to close the bar . . . when prevailing conditions threatened public, vessel, or pilot safety." Id. "In sum, had Defendants properly discharged their statutory and common law responsibilities to disqualify and/or prevent Cota from acting as a pilot and to close the bar on the morning of November 7, 2007, no damage to the vessel, the Bay Bridge or the environment would have occurred." Id. ¶ 28.

Count II of Plaintiffs' FAC asserts a claim of negligence against the Bar Pilots and McIsaac based on McIsaac's failure to close the bar on November 7, 2007. Id. ¶¶ 111-115. Count III accuses the Bar Pilots, McIsaac, and Nyborg of "negligent failure to prevent Cota from piloting" by failing to disclose to the Board Cota's medical condition and the DUI incident. Id. ¶¶ 116-122.

United States District Court
For the Northern District of California

Count IV alleges that the Bar Pilots and McIsaac negligently assigned Cota to pilot the M/V COSCO BUSAN on November 7, 2007, because at that time they knew of his prior incidents and his medical condition. Id. ¶¶ 123-129. Count V alleges that the Bar Pilots and McIsaac negligently failed to maintain adequate procedures for determining and monitoring the medical competence of pilots. Id. ¶¶ 130-136. Count XI accuses the Bar Pilots, McIsaac and Nyborg of willful misconduct in that they disregarded that Cota's continued service could result in an accident. Id. ¶¶ 176-78. Plaintiffs seek money damages as indemnity or contribution from Cota, the Bar Pilots, and the Moving Defendants.

McIsaac and Nyborg move to dismiss the claims against them, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, based on the Eleventh Amendment of the United States Constitution, and they seek an award of their attorney fees under section 1198 of the California Harbors and Navigation Code. Mot. at 1.

III. LEGAL STANDARD

When a defendant submits a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing the propriety of the court's jurisdiction. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). As a court of limited jurisdiction, "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). A Rule 12(b)(1)

United States District Court
For the Northern District of California

jurisdictional attack may be facial or factual. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). In a facial attack, the defendant challenges the basis of jurisdiction as alleged in the complaint. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In such a case, the court assumes the truth of the factual allegations, and draws all reasonable inferences in the plaintiff's favor. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). A motion to dismiss should be granted if the plaintiff fails to proffer "enough facts to . . . nudge[] their claims across the line from conceivable to plausible." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1974 (2007).

IV. DISCUSSION

A. Eleventh Amendment Immunity

McIsaac and Nyborg contend the Court has no jurisdiction over the claims asserted against them because they have sovereign immunity under the Eleventh Amendment of the United States

Constitution. Mot. at 2-3. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). The Eleventh Amendment "bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity.'" Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 473 (1987).

"[T]he reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997). The decision to extend sovereign immunity to a public entity turns on whether the entity "is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

Courts in the Ninth Circuit employ a five-factor test to determine whether an entity is an arm of the state:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3]

> whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 250-51 (9th Cir. 1992) (quoting Mitchell v. Los Angeles Community Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988)) (hereinafter the "Mitchell test" or "Mitchell factors"). Courts "must examine these factors in light of the way California law treats the governmental agency." Belanger, 963 F.2d at 251.

B. California's Statutory Scheme

The California Legislature has enacted a statutory scheme to govern pilots for and pilotage of the San Francisco, San Pablo, and Suisun Bays ("the Bays"). Cal. Harb. & Nav. Code §§ 1100-1203. In order to ensure the safety of persons, vessels, and property using the Bays and their tributaries, and to avoid damage to these waters and their surrounding ecosystems, pilotage is mandatory for the classes of vessels that are required by statute to secure pilotage services. Id. § 1100.

1. The Board of Pilot Commissioners

The Board licenses and regulates the pilots. Id. §§ 1150, 1154, 1172. Although originally an independent state agency, the Board became a department of the Business, Transportation and Housing Agency on January 1, 2009. See Pls.' Req. for Judicial Notice ("RJN"), Docket No. 51-3, Ex. C ("Overview").[3] The current

[3] Plaintiffs request the Court to take judicial notice of a document that can be found on the website of the Board entitled "Pilot Commision - Overview." The Court can take judicial notice of facts not subject to reasonable dispute. Fed. R. Evid. 201(b).

United States District Court
For the Northern District of California

version of the statute states: "There is in the Business, Transportation and Housing Agency a Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun, consisting of seven members appointed by the Governor, with the consent of the Senate . . . ." Cal. Harb. & Nav. Code § 1150(a).[4]

2. The Port Agent

Section 1130 of the Code sets out how a Port Agent is appointed and his or her duties:

> A majority of all of the pilots licensed by the board shall appoint one pilot to act as port agent to carry out the orders of the board and other applicable laws, and to otherwise administer the affairs of the pilots. The appointment is subject to the confirmation of the board.

Id. § 1130(a); Cal. Code Regs. tit. 7, § 218(a). "The port agent shall be responsible for the general supervision and management of all matters related to the business and official duties of pilots licensed by the board." Cal. Harb. & Nav. Code § 1130(b); Cal. Code Regs. tit. 7, § 218(b).

> The port agent shall immediately notify the executive director of the board of a suspected violation, navigational incident, misconduct, or other rules violation that is reported to him or her or to which he or she is a witness. The board shall adopt regulations for the manner and

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Although the Court does not need to take judicial notice of this document in its entirety, the Court takes judicial notice of the fact that the Board became a department of the Business, Transportation and Housing Agency on January 1, 2009.

[4] The version of the statute that was in effect from January 1, 2005 to December 21, 2008, stated: "There is in the state government a Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun, consisting of seven members appointed by the Governor, with the consent of the Senate . . . ." Id. (amended 2009).

United States District Court
For the Northern District of California

> content of a notice provided pursuant to this section.

Cal. Harb. & Nav. Code § 1130(c).

The California Code of Regulations provides more information concerning the duties of the Port Agent. The Port Agent assigns pilots to vessels. Cal. Code Regs. tit. 7, § 218(c)(1). The Port Agent shall:

> (2) Prepare and administer the pilots' vacation schedule.
> (3) Represent pilots before the Board and its committees.
> (4) Collect data, prepare accounts, and make the payments to the Board required of pilots by the Code and these regulations . . . .
> (5) Identify each boat used by the pilots and notify the Board of the names of the pilots responsible for the management of each such boat.
> (6) Report to the Board all accidents, groundings, collisions or similar navigational incidents involving vessels to which a pilot has been assigned.
> (7) Report to the Board any matter which, in his or her opinion, affects the ability of a pilot to carry out his or her lawful duties.
> (8) Ensure that at all times adequate pilots are available . . . .
> (9) Order the Bar closed for reasons of public, pilot, or vessel safety.

Id. § 218(c)(2)-(9). "In carrying out his or her duties, the Port Agent shall be primarily guided by the need for safety of persons, property, vessels and the marine environment." Id. § 218(d). The Port Agent must also report pilot absences to the Board. Id. § 218(f). The Port Agent has the authority to direct pilots to undergo timely drug and alcohol testing, and the Port Agent "shall expeditiously inform the U.S. Coast Guard and the Board, orally and in writing, of his or her determination and the basis

United States District Court
For the Northern District of California

therefor." Id. § 218(h).

C. **Plaintiffs' Allegations Concern McIsaac's and Nyborg's Actions or Omissions as Officers or Agents of the Board**

Under the Eleventh Amendment, "a state official is immune from suit in federal court for actions taken in an official capacity." California v. Deep Sea Research, Inc., 523 U.S. 491, 502 (1998). Moving Defendants contend that they are state officials immune from suit. Mot. at 3. Plaintiffs respond that there are fundamental factual questions concerning the relationship of the Moving Defendants to the Bar Pilots and the Board that cannot be resolved until after the parties have an opportunity to engage in discovery. Opp'n at 2-3. Plaintiffs focus on the Moving Defendants' role as Bar Pilots or Chief Executives of the Bar Pilots. Id. at 6. Plaintiffs suggest Port Agents function as "liaisons" between the Bar Pilots and the Board. Id. at 6. Plaintiffs contend that McIsaac and Nyborg were Port Agents of the Bar Pilots, not Port Agents of the Board. Id. at 7 n.5.

The relevant statutes and regulations do not support Plaintiffs' contentions. Title 7, Division 2 of California's Code of Regulations deals with the Board, and the definition and duties of the Port Agent are contained within, and explained within, this division. See Cal. Code Regs. tit. 7, §§ 202, 218. As the regulations creating the office of Port Agent are found within this division, the Court finds that Port Agent is an agent or officer of the Board.

However, it is also clear that the Port Agent sometimes acts

on behalf of the Bar Pilots, and sometimes on behalf of the Board. Although confirmed by the Board, the Port Agent is selected by a majority of the pilots. Id. § 218(a). The Port Agent "[r]epresents pilots before the Board and its committees." Id. § 218(3). When doing so, the Port Agent is acting on behalf of the pilots. See Overview at 5 ("the Port Agent . . . is selected by the pilots to represent them at the Board."). It is not inaccurate, therefore, for Plaintiffs to describe the Port Agent as a liaison between the Bar Pilots and the Board.

However, Plaintiffs' allegations against McIsaac and Nyborg focus on conduct performed on behalf of the Board, not on behalf of the Bar Pilots. Plaintiffs allege that McIsaac should not have assigned Cota to pilot the M/V COSCO BUSAN, that Nyborg failed to report information concerning Cota, that McIsaac and Nyborg knew Cota was medically unfit to serve as a pilot but failed to report him, and that McIsaac should have closed the bar on November 7, 2007. FAC ¶¶ 23-28. These allegations correspond precisely to the Port Agent's regulatory duties. See Cal. Code Regs. tit. 7, § 218(c) ("The Port Agent shall . . . . [a]ssign Pilots to Vessels . . . . [r]eport to the Board any matter which, in his or her opinion, affects the ability of a pilot to carry out his or her lawful duties . . . [and] [o]rder the Bar closed for reasons of public, pilot, or vessel safety."). Plaintiffs' FAC explicitly states that "[a]t all times alleged herein, Defendants McIsaac and Nyborg were acting within the course and scope of their capacities as Port Agents, as defined by Title 7, California Code of Regulations section 218, and therefore were acting as agents of

United States District Court
For the Northern District of California

the California Board of Pilot Commissioners." FAC ¶ 11. Plaintiffs essentially argue that McIsaac and Nyborg were negligent in their supervision of Cota, and in this supervisory role, McIsaac and Nyborg were acting on behalf of the Board. There is no need for discovery regarding this issue. The Court finds, as a matter of law, that McIsaac and Nyborg were acting as officers or agents of the Board when they engaged in the conduct complained of in Plaintiffs' FAC.

Furthermore, Regal Stone has argued in a related case that McIsaac and Nyborg were acting on behalf of the Board when engaged in the acts or omissions complained of here. In State of California v. Regal Stone et al., Case No. 08-2268, Regal Stone filed a Counterclaim alleging that the Port Agent "is a dual agent, who acts on behalf of the pilots and the Board, depending on the circumstances," alleging that the Port Agent was negligent in carrying out its duties by failing to report matters to the Board and by failing to close the bar, and alleging that the Board "is liable for the negligence of the Port Agent when he acts on behalf of the Board." See Defs.' RJN, ECF No. 53, Ex. 1 ("Regal Stone Countercl.") ¶¶ 26, 68-71.[5] Regal Stone is one of the Plaintiffs in this case. Regal Stone's own allegations in this related case confirms the Court's determination that McIsaac and Nyborg were acting as officers or agents of the Board when they

[5] The Court can take judicial notice of Regal Stone's allegations in State of California v. Regal Stone et al., Case No. 08-2268, a related case that is also before this Court. It is not subject to reasonable dispute that Regal Stone made these allegations.

United States District Court
For the Northern District of California

assigned Cota to pilot the M/V COSCO BUSAN, when they failed to report information concerning Cota's past conduct and medical condition, and when McIsaac failed to close the bar on November 7, 2007.

D. The Board is Immune from Suit

Having determined that McIsaac and Nyborg were acting on behalf of the Board, the next question is whether the Board can be considered an arm of the state immune from suit in federal court. Plaintiffs do not dispute that the Board is an agency of the state. Opp'n at 7. Instead, they contend the Board is not a state agency immune from suit under the Eleventh Amendment. Id. The Court disagrees with Plaintiffs. The Mitchell test establishes that the Board is immune from suit.

1. Money Judgment Satisfied out of State Funds

The first prong of the Mitchell test -- whether a money judgment against the agency would be satisfied out of State funds -- is the "predominant factor." Belanger, 963 F.2d at 251. Plaintiffs contend that a money judgment against the Board would not be satisfied out of state funds because the Pilot Commission Overview states that the Board's expenses "are paid for by industry surcharges on pilotage fees and not by state or local taxes." Overview at 1.

However, the relevant statute provides that:

> All moneys received by the board pursuant to the provisions of any law shall be accounted for at the close of each month to the Controller in the form that the Controller may prescribe and, at the same time on the order of the Controller, all these moneys shall be paid into the State Treasury to the credit of

United States District Court
For the Northern District of California

> the Board of Pilot Commissioners' Special Fund.

Cal. Harb. & Nav. Code § 1159(a). The State Controller appropriates money from this fund in the State Treasury for the payment of the compensation and expenses of the Board and its officers and employees. Id. § 1159(b). These statutes imply that any judgment against the Board would be paid from state funds. See Cal. Gov't Code § 900.6 ("'State' means . . . any . . . board, commission or agency of the State claims against which are paid by warrants drawn by the Controller."), § 965.2(a) ("The Controller shall draw a warrant for the payment of any final judgment . . . against the state . . . .").

The mere fact that a state agency collects fees does not bar it from Eleventh Amendment immunity. See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 431 (1997) (treating state university as arm of the state immune from suit even though university collects fees); Lupert v. California State Bar, 761 F.2d 1325, 1327 (9th Cir. 1985) (treating Board of Governors and Committee of Bar Examiners of the State Bar of California as immune from suit even though State Bar collects fees). The first, and predominant, Mitchell test factor weighs in favor of finding the Board immune from suit.

2. Central Governmental Functions

Plaintiffs contend the Board does not perform central governmental functions because it provides service for one isolated geographic area of the State, and because at the time of the incident, "it was not part of any governmental department."

United States District Court
For the Northern District of California

Opp'n at 9. While it is true that the Board became a department of the Business, Transportation and Housing Agency on January 1, 2009, see Cal. Harb. & Nav. Code § 1150(a), it does not follow that the Board was not performing central governmental functions before that date. The Board "was created by [the] first legislative session of the new state of California in 1850 and has been serving continuously ever since." Overview at 1. While the Board's area of coverage does not extend to the whole state, it is the only state pilot commission in California. Id. at 2. Pilots outside the Board's area of coverage operate under the authority of their federal pilot's license. Id. at 2.

California's statutory scheme shows that the Board performs central governmental functions. The California Legislature "finds and declares that it is the policy of the state to ensure the safety of persons, vessels, and property using Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun, and the tributaries thereof . . . by providing competent, efficient, and regulated pilotage for vessels required by this division to secure pilotage services." Cal. Harb. & Nav. Code § 1100. The Legislature further finds that "[a] program of pilot regulation and licensing is necessary in order to ascertain and guarantee the qualifications, fitness, and reliability of qualified personnel who can provide safe pilotage of vessels entering and using Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun." Id. § 1101(e). "Bar pilotage in the Bays of San Francisco, San Pablo, and Suisun has continuously been regulated by a single-purpose state board since 1850, and that regulation

United States District Court
For the Northern District of California

and licensing should be continued." Id. § 1101(g). Regulating and licensing the Bar Pilots to ensure the safety of person, vessels, and property are central governmental functions. The second Mitchell test factor weighs in favor of finding the Board immune from suit.

3. Other Mitchell Test Factors

Plaintiffs correctly point out that the Board can sue and be sued. See, e.g., Hochstetler, 6 Cal. App. 4th at 1663 (pilot filed petition for writ of mandate in state court seeking to overturn Board's suspension of his state pilot license). However, the Ninth Circuit has found state agencies immune from suit even though they could sue or be sued. In Belanger, the Ninth Circuit noted that the third Mitchell factor "is entitled to less weight than the first two factors," and found California school districts immune even though they can sue or be sued. 963 F.2d at 254.

With regard to the final two factors, Plaintiffs do not contend that the Board can own property in its own name, see Opp'n at 9, and Moving Defendants point out that the Board does not have independent corporate status. Reply at 11. Only the third factor weighs against a finding of immunity, and therefore the Court finds that the Board is a state agency immune from suit under the Eleventh Amendment. As Plaintiffs' FAC focuses on the Moving Defendants' conduct when acting on behalf of the Board, the Court concludes that the Moving Defendants are immune from suit under the Eleventh Amendment and should be dismissed from this case.

E. Attorney Fees

Moving Defendants request that they be awarded fees and

United States District Court
For the Northern District of California

costs. Mot. at 6. Moving Defendants rely on Section 1198(c)(1)(D) of the Harbors and Navigation Code, which provides that "[a] pilot who is the prevailing party shall be awarded attorney's fees and costs incurred in any action to enforce a right to indemnification provided pursuant to this subdivision." Cal Harb. & Nav. Code § 1198(c)(1)(D).

Here, the Court has dismissed the Moving Defendants because the allegations against them focus upon actions that they took, or failed to take, as agents or officers of the Board. See Part IV.C, supra. While pilots can enforce a right to indemnification pursuant to Section 1198(c), there is nothing in the statutory language to indicate that Port Agents can do so when acting on behalf of the Board. Accordingly, the Court DENIES the Moving Defendants' Section 1198 request for attorney fees.

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V. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion to Dismiss filed by Defendants Captain Peter McIsaac and Captain Russell Nyborg, who are hereby DISMISSED from this case WITH PREJUDICE. The Court DENIES their request for attorney fees.

IT IS SO ORDERED.

Dated: September 7, 2010

UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

Exh 5

218 Cal. App. 4th 577, *; 160 Cal. Rptr. 3d 285, **;
2013 Cal. App. LEXIS 612, ***; 41 Media L. Rep. 2492

Cited
As of: Nov 11, 2013

BOARD OF PILOT COMMISSIONERS FOR THE BAYS OF SAN FRANCISCO, SAN PABLO AND SUISUN et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; PACIFIC MERCHANT SHIPPING ASSOCIATION, Real Party in Interest. SAN FRANCISCO BAR PILOTS et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; PACIFIC MERCHANT SHIPPING ASSOCIATION, Real Party in Interest.

A136803, A136806

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

218 Cal. App. 4th 577*; *160 Cal. Rptr. 3d 285*; *2013 Cal. App. LEXIS 612*; *41 Media L. Rep. 2492

August 1, 2013, Opinion Filed

PRIOR HISTORY:]***1]

Superior Court of San Francisco City and County, No. CPF-12-512320, Curtis E. A. Karnow, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, a private organization of pilots and the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun challenged an order of respondent Superior Court of the City and County of San Francisco (California), which granted real party in interest shipping industry association's petition for a writ of mandate compelling production of records under the California Public Records Act, *Gov. Code, § 6250 et seq.*

OVERVIEW: The board's designated port agent also served as president of the pilots' organization. The request for disclosure of records sought pilot log data in the port agent's possession. The port agent replied that the pilot log data was privately maintained by the pilots' organization and was not used in the performance of the port agent's duties assigning pilots. The court held that the port agent was a public officer under *Gov. Code, § 6252, subd. (f)*, because the port agent had the official responsibility of supervising pilots as set forth in *Harb. & Nav. Code, § 1130, subd. (b)*, and Cal. Code Regs., tit. 7, *§ 218*. Moreover, judicial estoppel precluded the port agent, who had prevailed in arguing for public officer immunity in a previous lawsuit, from taking a contrary position. The pilot log data did not constitute a public record in an agency's possession under *Gov. Code, §§ 6252, subd. (e), 6253, subd. (c)*, because no evidence controverted the port agent's declarations that he did not use the data. An individual pilot's assertion in a tax case that the port agent recorded pilot assignments was hearsay and not subject to judicial notice under *Evid. Code, § 452, subd. (d)*.

OUTCOME: The court issued a peremptory writ of mandate directing the superior court to set aside and vacate its order granting the petition for writ of mandate and to enter a new and different order denying that petition.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The superior court granted a petition for a writ of mandate compelling production of records under the California Public Records Act (*Gov. Code, § 6250 et seq.*). The designated port agent of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun also served as president of a private organization of pilots. The request for disclosure of records, submitted by a shipping industry association, sought pilot log data in the port agent's possession. The

port agent replied that the pilot log data was privately maintained by the pilots' organization and was not used in the performance of the port agent's duties assigning pilots. (Superior Court of the City and County of San Francisco, No. CPF-12-512320, Curtis E. A. Karnow, Judge.)

The Court of Appeal issued a peremptory writ of mandate directing the superior court to set aside and vacate its order granting the petition for writ of mandate and to enter a new and different order denying that petition. The court held that the port agent was a public officer (*Gov. Code, § 6252, subd. (f)*) because the port agent had the official responsibility of supervising pilots (*Harb. & Nav. Code, § 1130, subd. (b)*; *Cal. Code Regs., tit. 7, § 218*). Moreover, judicial estoppel precluded the port agent, who had prevailed in arguing for public officer immunity in a previous lawsuit, from taking a contrary position. The pilot log data did not constitute a public record in an agency's possession (*Gov. Code, §§ 6252, subd. (e), 6253, subd. (c)*) because no evidence controverted the port agent's declarations that he did not use the [*578] data. An individual pilot's assertion in a tax case that the port agent recorded pilot assignments was hearsay and not subject to judicial notice (*Evid. Code, § 452, subd. (d)*). (Opinion by Bruiniers, J., with Jones, P. J., and Needham, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Records and Recording Laws § 12--Inspection of Public Records--Scope.--The California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*) provides for the inspection of public records maintained by state and local agencies. The Legislature enacted the CPRA to give the public access to information in possession of public agencies in furtherance of the notion that government should be accountable for its actions and, in order to verify accountability, individuals must have access to government files. Disclosure statutes such as the CPRA and the federal Freedom of Information Act (*5 U.S.C. § 552*) were passed to ensure public access to vital information about the government's conduct of its business. The CPRA embodies a strong policy in favor of disclosing public records. The extent of the CPRA's coverage is a matter to be developed by courts on a case-by-case basis. This decisionmaking process is an unavoidable consequence resulting from the myriad organizational arrangements adopted for getting the business of the government done. Therefore, each arrangement must be examined in its own context.

(2) Statutes § 21--Construction--Legislative Intent--Effectuating Purpose.--A court's role in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law.

(3) Waters § 108--Navigable Waters and Tidelands--Harbors--Pilots.--The enumerated duties of the Port Agent of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun include assigning pilots to vessels (*Cal. Code Regs., tit. 7, § 218, subd. (d)(1)*).

(4) Courts § 40--Decisions and Orders--Doctrine of Stare Decisis--Opinions of Lower Federal Courts--Trial Courts.--A federal trial court decision has no precedential value.

(5) Estoppel and Waiver § 3--Estoppel--Legal Proceedings--Elements.--The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from asserting a position in a legal proceeding that is contrary to a position previously [*579] taken in the same or some earlier proceeding. Judicial estoppel is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. It seems patently wrong to allow a person to abuse the judicial process by first advocating one position, and later, if it becomes beneficial, to assert the opposite. Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. The doctrine applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

(6) Estoppel and Waiver § 3--Estoppel--Legal Proceedings--Application.--Judicial estoppel is an equitable doctrine, and its application, even where all necessary elements are present, is discretionary.

(7) Records and Recording Laws § 12--Inspection of Public Records--Definition of Public Record.--The definition of a public record (*Gov. Code, § 6252, subd. (e)*) is broad and intended to cover every conceivable kind of record that is involved in the governmental process.

(8) Records and Recording Laws § 12--Inspection of Public Records--Scope.--Private nongovernmental records are not subject to the California Public Records Act (*Gov. Code, § 6250 et seq.*).

(9) Records and Recording Laws § 12--Inspection of Public Records--Scope--Document in Possession of Public Officer.--The mere possession by a public officer of a document does not make the document a public record. Any record required by law to be kept by an officer, or which the officer keeps as necessary or convenient to the discharge of his or her official duty, is a public record. The critical question is whether the information contained therein relates to the conduct of the public's business.

(10) *Evidence § 9*--Judicial Notice--Matters Subject to Notice--Court Records--Not Including Truth of Matters Asserted.--While judicial notice may be taken of court records (*Evid. Code, § 452, subd. (d)*), the truth of matters asserted in such documents is not subject to judicial notice. **[*580]**

(11) Records and Recording Laws § 12--Inspection of Public Records--Scope--Document in Possession of Public Officer.--The California Public Records Act (*Gov. Code, § 6250 et seq.*) pertains to disclosable public records in the possession of the agency (*Gov. Code, § 6253, subd. (c)*). Whether the record is in the actual or constructive possession of a public official, the requirement is still that the record be required by law to be kept by that official, or that it be necessary or convenient to the discharge of his or her official duty. An agency has constructive possession of records if it has the right to control the records, either directly or through another person.

(12) Courts § 38--Decisions and Orders--Doctrine of Stare Decisis--Identity of Law and Fact--Points Actually Involved and Decided.--An appellate decision is not authority for everything said in the court's opinion but only for the points actually involved and actually decided.

(13) Records and Recording Laws § 13--Inspection of Public Records--Particular Records--Pilot Log Data Privately Maintained.--The evidentiary record did not support a finding that pilot log data prepared and maintained by a private organization of pilots was, or ever had been, used by the Port Agent of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun in the performance of the port agent's official duty in assignment of bar pilots and is consequently a public record subject to disclosure under the California Public Records Act (*Gov. Code, § 6250 et seq.*). If the data itself was not a public record, the fact that the board could theoretically request it from the pilots's association did not make it so.

[*Cal. Forms of Pleading and Practice (2013) ch. 470C, Public Records Act, § 470C.11.*]

(14) Records and Recording Laws § 12--Inspection of Public Records--Scope.--Records otherwise private do not become public simply by virtue of public interest in their content.

COUNSEL: Kamala D. Harris, Attorney General, John Saurenman, Assistant Attorney General, and Christiana Tiedemann, Deputy Attorney General, for Petitioners in No. A136803.

Phillips, Erlewine & Given, R. Scott Erlewine and Cari A. Cohorn for Petitioners in No. A136806. **[*581]**

No appearance for Respondent.

Flynn, Delich & Wise, Conte C. Cicala; Davis Wright Tremaine, Thomas R. Burke; and Michael C. Jacob for Real Party in Interest.

Ram, Olson, Cereghino & Kopczynski and Karl Olson for Los Angeles Times Communications LLC, California Newspaper Publishers Association and McClatchy Newspapers, Inc., as Amici Curiae on behalf of Real Party in Interest.

JUDGES: Opinion by Bruiniers, J., with Jones, P. J., and Needham, J., concurring.

OPINION BY: Bruiniers, J.

OPINION

[288]** **BRUINIERS, J.**--The California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*) provides for the inspection of public records maintained by state and local agencies. The Pacific Merchant Shipping Association (PMSA), real party in interest in this case, petitioned the trial court for a writ of mandate compelling production under the CPRA of certain records held by Captain Bruce Horton, the then designated port agent of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun **[***2]** (hereafter Port Agent and Board, respectively). The trial court granted the petition. Horton, who also served as president of petitioner San Francisco Bar Pilots (Bar Pilots), seeks a writ of mandate and/or prohibition in this court directing the trial court to set aside its order. The Board separately challenges the trial court order. The Board, Horton,[1] and Bar Pilots all argue that the Port Agent is not a state of-

ficer subject to the CPRA and that the records sought are private, not public.

1 By order of January 28, 2013, we accepted the parties' stipulation to substitute Peter McIsaac, the new president of Bar Pilots and current Port Agent, in place of Horton. Our references to the trial court record, however, necessarily refer to Horton in his then active capacities.

We stayed the trial court's order and requested briefing. After consideration of the petitions, the opposition of PMSA, and the petitioners' replies, we ordered consolidation of the petitions and issued an order to the trial court to show cause why the relief requested should not be granted.[2] [**289] We now grant that relief, finding that, while the Port Agent is, for at least certain purposes, a public officer, PMSA has not [***3] established that the requested records are subject to the CPRA.

2 On April 3, 2013, we granted the joint application of Los Angeles Times Communications LLC, California Newspaper Publishers Association, and McClatchy Newspapers, Inc., to submit briefing as amici curiae (collectively Amici Curiae) in support of PMSA.

[*582]

I. Background and Procedural History

One of the first acts of the California Legislature in 1850 was to establish the Board. (*Harb. & Nav. Code, § 1101, subd. (g).*) The Board licenses and regulates pilots[3] on San Francisco Bay and its tributaries. (*Harb. & Nav. Code, § 1100 et. seq.*)[4] The Board presently consists of seven members, appointed by the Governor with the consent of the Senate, with two members required to be licensed pilots, two members representing the shipping industry, and three public members.[5] (*Harb. & Nav. Code, § 1150.*)

3 A ship's pilot is generally defined as a person duly qualified to conduct a ship into and out of a port or in special waters and who, while in charge, has the whole conduct of the ship's navigation. (Webster's 3d New Internat. Dict. (2002) p. 1716.)

4 "The Legislature finds and declares that it is the policy of the state to ensure the safety of [***4] persons, vessels, and property using Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun, and the tributaries thereof, and to avoid damage to those waters and surrounding ecosystems as a result of vessel collision or damage, by providing competent, efficient, and regulated pilotage for vessels required by this division to secure pilotage services." (*Harb. & Nav. Code, § 1100.*)

"A program of pilot regulation and licensing is necessary in order to ascertain and guarantee the qualifications, fitness, and reliability of qualified personnel who can provide safe pilotage of vessels entering and using Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun." (*Harb. & Nav. Code, § 1101, subd. (e).*)

5 In 2009, the Legislature placed the Board under the authority of the Transportation Agency (formerly the Business, Transportation and Housing Agency). The secretary of that agency serves as an ex officio member of the Board. (*Harb. & Nav. Code, § 1150, subd. (d).*)

Bar Pilots is a private unincorporated association of pilots licensed by the Board. Piloting services are compulsory and monopolistic.[6] Subject to limited exceptions, pilots licensed by the Board have "exclusive authority [***5] ... to pilot vessels from the high seas to Monterey Bay and the Bays of San Francisco, San Pablo, and Suisun and the ports thereof, and from those bays and ports to the high seas," as well as "exclusive authority to pilot vessels within and along the waters of those bays ... ." (*Harb. & Nav. Code, § 1125, subd. (a)*; see *§§ 1132-1133.*) Fees for most, but not all, pilotage services are set by statute. (See *Harb. & Nav. Code, §§ 1190-1191.*) Pilots are required to provide pilotage to vessels requiring a pilot (such as large container, cargo, military, and passenger cruise ships) and are subject to a fine and suspension or revocation of their license if they fail to do so. (*Harb. & Nav. Code, § 1138.*)

6 Pilotage is one of the oldest recognized monopolies. (See *Steinhort v. Commissioner of Internal Revenue (5th Cir. 1964) 335 F.2d 496, 499.*)

PMSA is a private maritime trade association composed of companies that own or operate ocean-going vessels in California waters. Its members pay fees for private pilot services rendered by members of the Bar Pilots. PMSA nominates the shipping industry representatives to the Board. (*Harb. & Nav. Code, § 1150, subd. (a)(2).*) [*583]

The Port Agent is a licensed pilot appointed [***6] by a majority of all licensed pilots, subject to confirmation by the Board. (*Harb. & Nav. Code, § 1130*; *Cal. Code Regs., tit. 7, § 218, subd. (a).*)[7] [**290] The Port Agent's duties are "to carry out the orders of the Board, under applicable laws, and to otherwise administer the affairs of the pilots" (Regs., *§ 218, subd. (a)*), including general responsibility for the "supervision and manage-

ment of all matters related to the business and official duties of pilots" (*Harb. & Nav. Code, § 1130, subd. (b)*; *Regs., § 218, subd. (b)*) and the specific responsibility of assigning pilots to vessels (*Regs., § 218, subd. (d)(1)*). The Port Agent does not serve as a member or officer of the Board and receives no compensation from the Board (see *Regs., §§ 206, 207*); he does, however, have certain reporting obligations to the Board, including:

--Immediate notification of the Board's executive director of a suspected violation, navigational incident, misconduct, or other rules violation to which the Port Agent is a witness or receives a report. (*Harb. & Nav. Code, § 1130, subd. (c)*.)

--Collection of data, preparation of accounts and making of payments to the Board required of pilots by statute and regulation, [***7] including the name, class, high gross tonnage and deep draft of each vessel subject to pilotage. (*Regs., § 218, subd. (d)(4)*.)

--Reports of all accidents, groundings, collisions or similar navigational incidents involving a vessel to which a pilot has been assigned, as well as suspected pilot misconduct, including all pertinent details of the incident as set forth in the regulation. (*Regs., § 218, subd. (d)(6)*.)

--Reports of any matter that in the Port Agent's opinion affects the ability of a pilot to carry out his or her lawful duties. (*Regs., § 218, subd. (d)(8)*.)

--Reports whenever any pilot is absent from duty because of illness lasting longer than seven days, including the nature of the illness, the probable duration of absence and the anticipated date of return to duty. (*Regs., § 218, subd. (f)*.)

7 All further references to "regulations" are to title 7 of the California Code of Regulations.

Beginning in July 2011, PMSA requested records regarding the Port Agent's assignment of pilots to ships transiting the San Francisco Bay. PMSA made document production requests to the Port Agent and to the Board in 2011 (July 15; Aug. 30) and 2012 (Jan. 4; Mar. 26). At issue here are the latter two [***8] requests, which sought disclosure of what PMSA identifies as "Pilot Logs." [*584]

The January 4, 2012 request, from PMSA's counsel and directed to "Capt. Bruce Horton, Port Agent," made a CPRA request for "any and all documents written, utilized or kept current by the Port Agent, including those in electronic format, related to the following: [¶] The annual Pilot Log, which is a document created under the direction of the Port Agent as a memorialization of all pilot assignments to vessels made pursuant to the Port Agent's duties under *[Regulations section] 218[, subdivision] (c)(1)* [(current *subd. (d)(1)*)] and reflects the [*585] administration of pilot vacation schedules pursuant to the Port Agent's duties under *[Regulations section] 218[, subdivision] (c)(2)* [(current *subd. (d)(2)*)]." PMSA alleged that "[t]he annual Pilot Log is completed annually for each pilot in the normal course of affairs to effectuate the Board's requirement that all time be presented to the public pursuant to [*Regulations section 237[, subdivision] (d)* and, under certain circumstances, *[Regulations section] 237[, subdivision] (f)(1)*." Specifically requested were Pilot Logs for the years 2002 through 2011 for each pilot licensed [***9] during the years in question.

[**291] On February 22, 2012, Horton replied that "[t]here is no document maintained by the Port Agent named the 'Pilot Log.' There is a data set that bears headings that are similar to those set forth in your e-mail to [Board counsel] of January 30, 2012. This data, however, is not used by the Port Agent in assigning pilots to vessels or in preparing or administering the pilots' vacation schedule, nor are they supplied to [the Board] in discharge of any obligation to the Board under the provisions of *[Regulations] section 237*[.] [¶] The documents containing this data are documents that are maintained by [Bar Pilots] in its capacity as a private organization and not in connection with any duties imposed upon the Port Agent by statute or by the regulations of [the Board]. For that reason, they are not disclosable under the [CPRA]."

The March 26, 2012 request was directed to the Board and again sought production of the 2002 through 2011 Pilot Logs. Demand was made for "all responsive documents in the [Board's] possession, custody and control, including but not limited to those which are in the possession of your Port Agent." The request further defined a Pilot Log as "a [***10] multi-page document created at the direction of the Port Agent in the normal course of his business under *[Harbors and Navigation Code section] 1130* and to keep track of a Pilot's time. This document is described in proceedings before the United States Tax Court[8] as an annual 'Pilot Log,' which is a document created for each year as a memorialization of all pilot assignments to vessels made pursuant to the Port Agent's duties as further described at *[Regulations section] 218[, subdivision] (c)(1)* [(current *subd. (d)(1)*)] and reflects the administration of pilot vacation schedules pursuant to the Port Agent's duties under *[Regulations section] 218[, subdivision] (c)(2)* [(current *subd. (d)(2)*)]. The Pilot Log is completed annually for each pilot in the normal course of affairs to effectuate the Board's requirement that all time be presented to the public pursuant to *[Regulations section] 237[, subdivision] (d)* and, under certain circumstances, *[Regulations section] 237[, subdivision] (f)(1)*." PMSA further asserted that a Pilot Log "is created in part to comply with the

[Board's] requests to provide the amount of Minimum Rest Period ('MRP') exemptions taken by each [Bar Pilots'] pilot.]***11] An MRP exemption occurs when there is less than twelve hours between the time a Pilot's turn ends (work shift ends) (represented on the pilot log under the heading 'BoB') and the time the Pilot's next turn begins (work shift begins) (represented on the pilot log under the heading 'Ride')."

8 These tax proceedings, *Miller v. C.I.R. (2011) 102 T.C.M. (CCH) 250* (*Miller*), are discussed *post*.

On April 5, 2012, the Attorney General, as counsel for the Board, responded that "The document you describe is not in the possession of [the Board]. If the 'Pilot Log' exists, it is not a document prepared, owned, used or retained by [the Board]. The letter to you dated February 22, 2012, from Capt. Bruce Horton, the Port Agent, which you attached to your request, states that he does not maintain a document called the 'Pilot Log[.]' In any case, the Board's files do not contain such a document. [¶] You state in your letter that the Board is required to produce documents that it does not possess because such documents are maintained by Captain Horton, who serves as Port Agent and also as President of [Bar Pilots], a private organization. To the extent that Captain Horton possesses documents that are producible]***12] [**292] under the [CPRA], he is subject to a direct request under the [CPRA]."

On July 3, 2012, PMSA filed a "Verified Petition for Writ of Mandate Directed to the Board of Pilot Commissioners and its Port Agent Ordering Compliance with the [CPRA]." PMSA sought a peremptory writ directing the Board and Horton, in his capacity as Port Agent, to disclose the Pilot Logs. The trial court permitted Bar Pilots and Horton, in his capacity as the president of Bar Pilots, to intervene in the action.

The answer to the trial court mandate petition again denied that the Port Agent or Bar Pilots had or maintained a Pilot Log. On August 15, 2012, Horton submitted a declaration under penalty of perjury averring that "[t]he Bar Pilots do not maintain any record or records entitled 'Pilot Log' and have not done so at any time during my membership. The Bar Pilots maintain a dataset that includes some of the types of information PMSA apparently seeks through its requests for 'Pilot Logs.' I do not use this dataset in performing my duties as Port Agent. The dataset is not provided to the Board or to members of the public."]*586]

On September 18, 2012, after hearing argument, the trial court granted the writ in part, finding [***13] that "The Port Agent is a public official; among other things, the position was created by the Legislature." The court observed that "[t]he problem here is that the person who acts as Port Agent has *both* a private and public incarnation ... and is at least confirmed by the Board which in turn operates under state law to (i) regulate the actions of pilots and (ii) a wide variety of other things in the public interest. [Citations.] [¶] The 'Pilot Logs' are documents used by the Port Agent in the execution of his public duties including, but not limited to, assigning pilots to vessels and preparing and administering pilot vacation time. These are necessary and convenient to the Port Agent's public duties and are public documents. [Citation.]" The court ordered the Port Agent to, within 30 days, "produce, if extant, the requested 'Pilot Logs' from 2002 [through] 2011."[9] The court otherwise denied the petition.

9 On October 5, 2012, the trial court extended the time to seek appellate review of its order until October 15, 2012.

On September 24, 2012, the executive director of the Board and its custodian of records, Allen Garfinkle, filed a declaration with the court, averring that the [***14] Board did not have the requested Pilot Logs, that the Board does not prepare, own, use, or retain such documents, and that the Board "does not now, and never has, possessed the [Pilot Logs]."

On October 16, 2012, Horton submitted a declaration in response to the court's order, averring in pertinent part that: "3. A small amount of information from the records of the Bar Pilots is submitted to [the Board] in compliance with the Port Agent's reporting duties under the Board's regulations. As Port Agent, I maintain and control this information. The vast majority of the information in the Bar Pilots' records, however, is not submitted to the Board. I maintain and control this latter category of records solely in my private capacity as President of the Bar Pilots. [¶] ... [¶] 5. Some but not all of the information that [PMSA] asserts is contained in the 'Pilot Logs' is used by the Bar Pilots in preparing the report that the Bar Pilots, not the Port Agent, is required to submit to the Board under *[Regulations] section 237[, subdivision](d)* ... . I do not use this information in performing [**293] my duties as Port Agent. Specifically, I do not use the information to assign pilots to vessels, [***15] and I do not use it to prepare or administer pilot vacation time. I am informed and believe that the information used by the Bar Pilots for preparing the report under *[Regulations] section 237[, subdivision](d)* could be retrieved by submitting a query to the electronic database created and maintained by the Bar Pilots. Prior to receiving PMSA's document demands, I was unaware of the existence of the database. I do not use, and have never used, the database in my capacity as Port Agent. I am unaware of any previous Port Agent ever using the data-

base]*587] for any purpose. I have never submitted a query to the database (or asked anyone to do so on my behalf) for any purpose, either in my capacity as Port Agent or in my private capacity as President of the Bar Pilots; to my knowledge, no previous Port Agent has ever done so."

The instant petitions for writ of mandate, seeking to vacate the order requiring production, were filed on October 15, 2012, by Bar Pilots, the Board, and Horton in his private and public capacities.[10] On October 17, 2012, we issued a temporary stay of the trial court's order and set a schedule for briefing. On December 27, 2012, we ordered the petitions consolidated and [***16] issued an order to show cause why the requested relief should not be granted.

10 An order of the trial court under the CPRA, which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. (*Gov. Code, § 6259, subd. (c).*) All further unspecified statutory references are to the Government Code unless otherwise indicated.

II. Discussion

A. *The CPRA*

(1) The CPRA "provides for the inspection of public records maintained by state and local agencies." (*California State University, Fresno Assn., Inc. v. Superior Court (2001) 90 Cal.App.4th 810, 822 [108 Cal. Rptr. 2d 870]* (*CSU*).) "The Legislature enacted the CPRA in 1968 to give the public access to information in possession of public agencies in furtherance of the notion that government should be accountable for its actions and, in order to verify accountability, individuals must have access to government files. [Citation.]"[11] (*Gilbert v. City of San Jose (2003) 114 Cal.App.4th 606, 610 [7 Cal. Rptr. 3d 692].*) "Disclosure statutes such as the [CPRA] and the federal Freedom of Information Act were passed to ensure public access to vital information [***17] about the government's conduct of its business." (*CBS, Inc. v. Block (1986) 42 Cal.3d 646, 656 [230 Cal. Rptr. 362, 725 P.2d 470].*) "The CPRA embodies a strong policy in favor of disclosing public records. [Citations.]" (*Dixon v. Superior Court (2009) 170 Cal.App.4th 1271, 1275 [88 Cal. Rptr. 3d 847].*)

11 "In 2004, California voters approved Proposition 59, which enshrined in our state Constitution the public's right to access records of public agencies. (*Cal. Const., art. I, § 3, subd. (b)* [(requiring that 'the writings of public officials and agencies shall be open to public scrutiny')].) ... The amendment requires the [CPRA] to 'be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.' (*Cal. Const., art. I, § 3, subd. (b), par. (2).*) [However, s]uch was the law prior to the amendment's enactment. [Citation.]" (*BRV, Inc. v. Superior Court (2006) 143 Cal.App.4th 742, 750 [49 Cal. Rptr. 3d 519].*)

[*588]

"[T]he extent of the CPRA's coverage is a matter to be developed by the courts on a case-by-case basis. [Citation.]" (*CSU, supra, 90 Cal.App.4th at p.* [**294] *828.*) "This decision-making process is an unavoidable consequence resulting from 'the "myriad organizational arrangements" adopted "for getting the business of [***18] the government done." ' [Citation.] Therefore, each arrangement must be examined in its own context. [Citation.]" (*Irwin Memorial, etc. v. American National Red Cross (9th Cir. 1981) 640 F.2d 1051, 1054.*)[12]

12 The CPRA "was modeled on its federal predecessor, the Freedom of Information Act," thus the legislative history and judicial construction of the Freedom of Information Act (*5 U.S.C. § 552*) " 'serve to illuminate the interpretation of its California counterpart.' [Citations.]" (*Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1338 [283 Cal. Rptr. 893, 813 P.2d 240].*)

B. *Standard of Review*

Interpretation of the CPRA and its application to undisputed facts is a question of law subject to de novo review. Factual findings made by the trial court will be upheld if based on substantial evidence. (*Versaci v. Superior Court (2005) 127 Cal.App.4th 805, 812 [26 Cal. Rptr. 3d 92].*)

C. *Is the Port Agent a Public Officer*

(2) " 'State agency' means every state office, *officer*, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Article IV (except *Section 20* thereof) or Article VI of the California Constitution." (*§ 6252, subd. (f)*, italics added.)[13] "In attempting to divine how broadly the term 'state agency' can be interpreted, we are limited by rules [***19] of statutory construction ... . [¶] ' "The court's role in construing a statute is to 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citations.]" ' " (*CSU, supra, 90 Cal.App.4th at pp. 828-829.*)

13 Articles IV and VI of the California Constitution deal with the legislative and judicial branches of government.

The Board and Bar Pilots do not deny that the Board itself is a state agency but argue that the Port Agent does not meet any established criteria for being considered a state officer. The Port Agent is not among the Board's designated officers (see *Regs., §§ 206, 207*) and is employed and compensated by Bar Pilots, not by the public. The Port Agent is not among the civil executive officers enumerated in *section 1001*[14] and is selected for the position by the [*589] Bar Pilots's membership (apparently coextensive with his term as president) and is only "confirmed" by the Board without any provision for his removal. (*Harb. & Nav. Code, § 1130*; *Regs., § 218, subd. (a)*.) The Board suggests that the position of Port Agent is "best viewed as a liaison between the licensed pilots and the Board."

14 As the Board notes in its petition, the no [***20] longer existent positions of "port warden" and "harbor commissioner" are among those listed in *section 1001*, but in contrast to the Port Agent, those positions were gubernatorial appointments for terms fixed by statute. (Former Pol. Code, §§ 368, 369, 2520.)

The trial court concluded that the Port Agent is a public official because, "among other things, the position was created by the Legislature." But the difficulty, as the trial court observed, is that the person acting as Port Agent "has *both* a private and public incarnation ... ." Horton himself acknowledged, in his August 17, 2011 response to the CPRA request, that having one person in the "dual capacity" of both Port Agent and Bar Pilots president made it "sometimes difficult to distinguish between the 'private' and 'public' duties of the person who holds both positions."

(3) While the Port Agent, in his capacity as president of Bar Pilots, may have many [**295] entirely private duties and serve as "liaison" with the Board, he also has responsibilities imposed by statute and by administrative regulation. The Port Agent is charged with responsibility "for the general supervision and management of all matters related to the business and *official* [***21] *duties* of pilots." (*Harb. & Nav. Code, § 1130, subd. (b)*, italics added; *Regs., § 218, subd. (b)*, italics added.) The Port Agent's enumerated duties include assigning pilots to vessels. (*Regs., § 218, subd. (d)(1)*.)

No California appellate court has yet addressed the question we confront here. However, at least one federal court has found the Port Agent to be acting as an officer or agent of the Board when assigning pilots to vessels and consequently entitled to *Eleventh Amendment* governmental immunity from suit when performing this task. (*Regal Stone Ltd. v. Cota (N.D.Cal., Sept. 7, 2010, No. 08-5098 SC) 2010 WL 3504846* (*Regal Stone*).) The *Regal Stone* litigation arose from the allision[15] of the M/V Cosco Busan with the San Francisco-Oakland Bay Bridge on November 7, 2007, spilling approximately 53,000 gallons of bunker fuel into the San Francisco Bay. The plaintiffs sued the pilot at the time of the accident, John Cota, McIsaac and his predecessor as Port Agent, Russell Nyborg, and Bar Pilots. Nyborg, McIsaac and Bar Pilots were alleged to have permitted Cota to continue to serve as a pilot when he was "medically unfit" and further alleged that McIsaac negligently failed to close the bar [***22] to vessel traffic in the face of unsafe weather conditions. Nyborg and McIsaac moved to dismiss the complaint on the ground that they were state officials immune from suit. Under the *Eleventh Amendment to the United States Constitution*, "a state official is immune [*590] from suit in federal court for actions taken in an official capacity ... ." (*California v. Deep Sea Research, Inc. (1998) 523 U.S. 491, 502 [140 L. Ed. 2d 626, 118 S. Ct. 1464]*.) The motion to dismiss specifically alleged that "Captains McIsaac and [codefendant] Nyborg, Port Agents of the [Board] *are such officials*." (Italics added.) Accepting this argument, and noting, as did the trial court here, that the Port Agent "sometimes acts on behalf of the Bar Pilots, and sometimes on behalf of the Board," the court found that the plaintiffs' allegations against Nyborg and McIsaac "focus on conduct performed on behalf of the Board, not on behalf of the Bar Pilots." The court found that McIsaac and Nyborg were acting as officers or agents of the Board "as a matter of law" in supervision of Cota and therefore immune from suit.

15 The term "allision," as used in maritime accident cases, describes an accident involving a moving vessel and a stationary object or vessel. (*Hochstetler v. Board of Pilot Comrs. (1992) 6 Cal.App.4th 1659, 1661, fn. 1 [8 Cal. Rptr. 2d 403]*.)

(4) The [***23] Board and the Port Agent correctly note that a federal trial court decision has no precedential value. (*United Firefighters of Los Angeles City v. City of Los Angeles (1989) 210 Cal.App.3d 1095, 1115 [259 Cal. Rptr. 65]*.) PMSA cited the unpublished federal trial court decision in *Regal Stone* below, and cites it here as persuasive authority. (See *Pacific Shore Funding v. Lozo (2006) 138 Cal.App.4th 1342, 1352, fn. 6 [42 Cal. Rptr. 3d 283]* [unpublished federal cases are citable as persuasive, although not precedential, authority].) The Board and the Port Agent also contend that "entirely different legal standards" apply to the analysis of *Eleventh Amendment* sovereign immunity and application of the CPRA, but neither the Board nor the Port Agent attempt

to articulate the purported analytical differences, and neither cite any authority for the argument.

[**296] (5) We find the court's reasoning in *Regal Stone* to be persuasive in many respects. But we find it even more significant that it was the Port Agent (in that case McIsaac) who argued for immunity from suit based on his status as a government official when assigning or supervising pilots, insisting in his pleadings that "it is the Port Agent's official duty to assign pilots to vessels [***24] in accordance with the Board's guidelines" and specifically citing to *Regulations section 218, former subdivision (c)(1)* (current *subd. (d)(1)*).[16] The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, " 'prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.' " (*Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181 [70 Cal. Rptr. 2d 96]* (*Jackson*).)

16 As previously noted, Horton has also expressly acknowledged in this litigation that at least some of the duties performed by the Port Agent are "public."

" ' "[Judicial estoppel] is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. ... 'The policies underlying preclusion of inconsistent positions are "general consideration[s] of the [*591] orderly administration of justice and regard for the dignity of judicial proceedings." ' ..." ' [Citation.] 'It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert [***25] the opposite.' [Citation.]" (*Jackson, supra, 60 Cal.App.4th at p. 181.*) " ' "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] ..." ' [Citation.] The doctrine applies when: '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citations.]" (*Aguilar v. Lerner (2004) 32 Cal.4th 974, 986-987 [12 Cal. Rptr. 3d 287, 88 P.3d 24].*) All are true here.

(6) At oral argument, both the Port Agent and the Board sought to distinguish the factual context of *Regal Stone*, and they contended that it would be inequitable to apply the doctrine in this setting.[17] (See *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal.4th 412, 422-423 [30 Cal. Rptr. 3d 755, 115 P.3d 41]* ["judicial estoppel is an equitable doctrine, and its application, even where all necessary elements are present, is discretionary" (italics omitted)]; [***26[*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One (2003) 111 Cal.App.4th 456, 463 [3 Cal. Rptr. 3d 563]* [judicial estoppel is an equitable doctrine to protect against fraud on the courts].) But in *Regal Stone*, as in this matter, the Port Agent's role in the assignment of pilots, and whether he acts in an official capacity when doing so, was pivotal. And McIsaac took the unequivocal position before the United States District Court that he was a state official, acting within the course and [**297] scope of that capacity, when assigning pilots. We fail to appreciate the inequity in refusing to allow the Port Agent to take an inconsistent position here. The Port Agent fails to explain why one should be permitted to assume the cloak of a state official when it provides protection but to then cast it off in the event it becomes burdensome. We find that the Port Agent must be considered a state officer, at least when performing the official duties provided by statute or Board regulation.[18]

17 The Board is, however, correct in its assertion that the doctrine cannot be applied to it, since it was not a party to the *Regal Stone* proceeding and has never adopted the position taken in that litigation by the Port Agent. We discuss [***27] separately, *post*, the Board's obligations under the CPRA.

18 PMSA appears to broadly suggest that the Port Agent should be considered a state official even when he is "administer[ing] the affairs of the pilots" or engaged in the "general supervision and management of all matters related to the business ... of pilots." (*Regs., § 218, subds. (a), (b).*) We find no authority for such a sweeping assertion but have no need to decide here the precise demarcation between the Port Agent's public and private roles.

[*592[

D. *Are the Pilot Logs Public Records*

(7) For purposes of the CPRA, a public record is defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (*§ 6252, subd. (e).*) "The definition is broad and ' " 'intended to cover every conceivable kind of record that is involved in the governmental process[.]' " ' [Citation.]" (*Coronado Police Officers Assn. v. Carroll (2003) 106 Cal.App.4th 1001, 1006 [131 Cal. Rptr. 2d 553]* (*Coronado Police Officers Assn.*).)

The January 4, 2012 CPRA request by PMSA's counsel to Horton first included a specific demand for production of "[t]he annual [***28[Pilot Log," alleging that it was "a document created under the direction of the Port Agent as a memorialization of all pilot assignments to vessels made pursuant to the Port Agent's duties under [Regulations *section] 218[, subdivision] (c)(1)* [(current *subd. (d)(1))*] and reflects the administration of pilot vacation schedules pursuant to the Port Agent's duties under *[Regulations section] 218[, subdivision] (c)(2)* [(current *subd. (d)(2))*]." The March 26, 2012 CPRA request to the Board mirrored this demand and specifically referenced the United States Tax Court proceeding (*Miller, supra, 102 T.C.M. (CCH) 250*) in support of the request.

PMSA contends that its records requests "seeks to shed light on the inexplicably murky process of assigning pilots to vessels," which PMSA alleges has been a "focal point of inquiry in litigation and policymaking at the federal and state level."[19] PMSA insists that the Pilot Logs [**298] are public records within the meaning of the CPRA "reveal[ing] pilot assignment and [*593] scheduling decisions made by the Port Agent when acting pursuant to Board regulation" and that such decisions "are critical to the provision of safe pilotage."

> 19 It was the M/V Cosco Busan incident [***29] and questions as to the pilot's fitness that led to the Legislature placing the Board under the authority of the Transportation Agency. (*Harb. & Nav. Code, § 1150, subd. (a)*.) The controversy here seems to be focused on the issue of requiring MRP's (minimum rest periods) for pilots to avoid fatigue. A January 23, 2010 vessel incident in Port Arthur, Texas, resulted in an investigation by the National Transportation Safety Board (NTSB) and recommendation that state licensing boards promulgate "hours of service" rules to prevent pilot fatigue. A legislative Joint Sunset Review Committee (*§ 9147.7, subd. (c)*), on February 5, 2012, recommended that the Board promulgate hours of service regulations for pilots in accordance with the NTSB report. The Board, on July 26, 2012, adopted additional reporting requirements for MRP's for pilots. Our Legislature recently amended the Harbors and Navigation Code to require the Board to "conduct a study of the effects of work and rest periods on psychological ability and safety for pilots" and make "recommendations on how to prevent pilot fatigue and ensure the safe operation of vessels." (*Harb. & Nav. Code, § 1196.5, subd. (a)*.) Based on the results of the study, [***30] the Board will be required to "promulgate regulations for pilots establishing requirements for adequate rest periods intended to prevent pilot fatigue." (*Harb. & Nav. Code, § 1196.5, subd. (b)*.) There are no current regulations on the subject. The Bar Pilots's work rules, calling for 12-hour MRP's, are only voluntary guidelines.

(8) But the fact that the Port Agent may act as a public officer in the performance of certain of his duties does not mean that every record in his possession or control thereby becomes a public document subject to the CPRA. As we have discussed, the Port Agent has both private and public incarnations. Bar Pilots is an independent association, with its own facilities and its own records of its operations, and the Port Agent concurrently serves as president of that association. There is no contention that Bar Pilots is a public agency or that its internal private records are subject to the CPRA, even though Bar Pilots makes required annual statistical reports to the Board, which are public record. (*Regs., § 237, subd. (d)*.)[20] Private nongovernmental records are not subject to the CPRA.

> 20 To assist the Board in determining the number of pilot's licenses to be issued, [***31] the Bar Pilots are required to provide a report that includes such information as numbers of vessel moves, bar crossings, bay and river moves; average draft and gross registered tonnage of piloted vessels; numbers of pilots reported sick or injured and the number of days each was unable to perform piloting duties; number of times a pilot resumed duties with less than 12 hours off duty, the contributing circumstances, and actual hours off duty between assignments; and number of days pilots were engaged in Board-mandated training or administrative duties authorized by the Port Agent. (*Regs., § 237, subd. (d)(1)-(12)*.)

(9) "[T]he mere possession by a public [officer] of a document does not make the document a public record. [Citation.]" (*Coronado Police Officers Assn., supra, 106 Cal.App.4th at p. 1006*.) " ' "Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record." [Citation.]' " (*San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762, 774 [192 Cal. Rptr. 415]* (*San Gabriel Tribune*); see *CSU, supra, 90 Cal.App.4th at p. 824* [" 'if a record is kept by an officer because it is necessary or convenient to [***32] the discharge of his official duty, it is a public record' "].) "[T]he critical question is whether the information contained therein relates to the conduct of the 'public's business.' " (*Coronado Police Officers Assn., at p. 1006*.)

In *Coronado Police Officers Assn.*, for example, a police officers' association sought to inspect a database compiled by the San Diego Public Defender's Office

which included impeachment information gathered from client files and was "supplemented with information gathered from other public information sources, such as court files, civil service proceedings, peace officer reports and newspaper articles." (*Coronado Police Officers Assn., supra, 106 Cal.App.4th at p. 1005.*) Although the database was prepared, used and retained by a public agency, the Fourth District Court of Appeal held that the database was not a public record because it was compiled for [*594[use in its core private function, the representation of criminal defendants.[21] (*106 Cal.App.4th at pp. 1006-1007.*)

> 21 The court further found the database, even if it could be considered a public record, would be exempt from disclosure under the "catchall" exemption under *section 6255.* (*Coronado Police Officers Assn., supra, 106 Cal.App.4th at pp. 1012-1013.*) [***33] Under *section 6255, subdivision (a)*, a public agency may withhold a public record for policy reasons if it can demonstrate that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." As discussed *post*, we conclude that the issue need not be addressed here.

[**299] In ordering disclosure, the trial court here found that "[t]he 'Pilot Logs' are documents used by the Port Agent in the execution of his public duties including, but not limited to, assigning pilots to vessels and preparing and administering pilot vacation time. These are necessary and convenient to the Port Agent's public duties and are public documents." Were this finding supported by substantial evidence, we would view it as dispositive. But we can find no competent evidence in the record before the trial court which would support such a finding.

1. *The Evidentiary Record*

The so-called Pilot Logs apparently first came to light in connection with a federal income tax dispute litigated between the Internal Revenue Service and an individual member of Bar Pilots (*Miller, supra, 102 T.C.M. (CCH) 250*). In that proceeding pilot [***34] Tom Miller, through counsel, joined in a written stipulation (*Miller* Stipulation), reciting that he was a "partner" in Bar Pilots.[22] The stipulation, dated October 18, 2010, included two exhibits (referred to in this litigations as the Pilot Logs) identified as "the [Bar Pilots] piloting record" for Miller for 2005 and 2006 and further described the documents as having been "created by [Bar Pilots] in the normal course of business to keep track of a Pilot's time pursuant to *[Regulations section] 237[, subdivisions](d), (f)(1)*" and "to comply with [the Board's] requests to provide the amount of [MRP] exemptions taken by each ... Pilot." The *Miller* Stipulation also provided detailed explanations for the data columns presented in the Pilot Logs.

> 22 A 2011 consolidated financial statement for Bar Pilots submitted in evidence by PMSA at the trial court indicates that Bar Pilots is "not legally considered a partnership" but has filed partnership tax returns since 1979. Bar Pilots's financial statements filed with the Board are public records. (*Regs., § 236.*)

The *Miller* Stipulation and the attached Pilot Logs for Miller were included as exhibits to PMSA's petition for writ of mandate in [***35[the trial court. The Attorney General made written objection to all PMSA exhibits as lacking foundation and authentication and as hearsay. The Attorney General specifically objected to the "unauthenticated records from a tax court matter" as [*595] "irrelevant to any issue presented in this case." The trial court did not conduct an evidentiary hearing, nor did it expressly rule on any of the evidentiary objections by either side. At oral argument before the trial court, the Attorney General again objected to the court's consideration of the *Miller* documents and argued that the only competent evidence before the court concerning the Pilot Logs was the Port Agent's declaration that he used no such records in the performance of his duties.

In responding to the January 4, 2012 CPRA request, Horton denied that there was any document maintained by the Port Agent named the Pilot Log, but said that "[t]here is a data set that bears headings that are similar to those set forth in your e-mail to [Board counsel] of January 30, 2012." Horton said that the data, however, was not used by the Port Agent in assigning pilots to vessels or in preparing or administering the pilots' vacation schedule and was [***36[not supplied to the Board. [**300] He insisted that "[t]he documents containing this data are documents that are maintained by [Bar Pilots] in its capacity as a private organization and not in connection with any duties imposed upon the Port Agent by statute or by the regulations of [the Board]." Similarly, in responding to the May 26, 2012 request, the Board replied that it had no Pilot Log in its possession, and there "is not a document prepared, owned, used or retained by [the Board]."

In response to the trial court's disclosure order, on August 15, 2012, Horton submitted another declaration under penalty of perjury reiterating his earlier declaration that, while " 'the Bar Pilots maintain a dataset that includes some of the types of information PMSA apparently seeks through its requests for "Pilot Logs[,]" I do not use this dataset in performing my duties as Port Agent. The dataset is not provided to the Board or to

members of the public.'" On October 16, 2012, Horton submitted another declaration, stating, "... Some but not all of the information that [PMSA] asserts is contained in the 'Pilot Logs' is used by the Bar Pilots in preparing the report that the Bar Pilots, not the Port Agent, is required to submit to the Board under *[Regulations] section 237[,* [***37] *subdivision](d)* ... . I do not use this information in performing my duties as Port Agent. Specifically, I do not use the information to assign pilots to vessels, and I do not use it to prepare or administer pilot vacation time. ... Prior to receiving PMSA's document demands, I was unaware of the existence of the database. I do not use, and have never used, the database in my capacity as Port Agent. I am unaware of any previous Port Agent ever using the database for any purpose. I have never submitted a query to the database (or asked anyone to do so on my behalf) for any purpose, either in my capacity as Port Agent or in my private capacity as President of the Bar Pilots; to my knowledge, no previous Port Agent has ever done so." [*596]

2. *Discussion*

The issue is not whether a database containing some or all of the information requested by PMSA exists. The Port Agent admits that it does, and that it is owned and used by Bar Pilots. Nor is the issue an undeniable public interest in safe navigation of vessels in our waterways and avoidance of serious environmental, political, and business consequences that may result from pilot errors.[23] Rather, the question is whether any evidence exists that [***38] the information is possessed and used by the Port Agent in the performance of his official duties and is consequently a public record. We find that there does not.

> 23 PMSA asks us to take judicial notice of four items, including a Board incident review committee report of a near grounding incident near the Richmond wharf on February 18, 2012; news articles concerning a January 7, 2013 allision between an empty oil tanker and a pier of the Bay Bridge; and a copy of the 2012 annual report provided to the Board by Bar Pilots under *Regulation section 237, subdivision (d)*, including the number of exceptions to MRP's. PMSA contends that the documents (which were not provided to the trial court) demonstrate that the pilot assignment data is utilized by both the Board and the Port Agent, and that they "demonstrate the profound public interest in the information PMSA seeks." We deny the request because we do not find them relevant. (*Arce v. Kaiser Foundation Health Plan, Inc. (2010) 181 Cal.App.4th 471, 482 [104 Cal. Rptr. 3d 545]* (*Arce*) [court may decline to take judicial notice of matters that are not relevant to dispositive issues on appeal].) The Bar Pilots annual report is itself a public record (*Regs., § 237, subd. (d)*), [***39[but that does not thereby make public the records from which the report is produced. (*Forsham v. Harris (1980) 445 U.S. 169-171 [63 L.Ed.2d 293, 100 S.Ct. 977]*.) The documents do not address data used by the Port Agent in assigning pilots, and the public interest is a material factor in determining if an *exemption* to release of public documents otherwise subject to disclosure would apply. (*§ 6255.*)

[**301] (10) PMSA relied in the trial court, and relies here, on the *Miller* Stipulation and attached Pilot Logs as evidence "of the existence, source and nature of the documents sought under the CPRA and the extent of the Port Agent's role and duties as a public official." But how? PMSA contends that the trial court properly took judicial notice of the *Miller* documents because they are records of a court of the United States and not subject to reasonable dispute. Despite PMSA's assertion to the contrary, the *Miller* Stipulation and the Pilot Logs are unquestionably hearsay, their content was disputed, and both the Board and Bar Pilots repeatedly objected to their consideration. PMSA insists that the *Miller* Stipulation and Pilot Logs are not hearsay because they were "not offered for the truth of the matter of the content therein, but [***40[to show that, for purposes of CPRA disclosure only, the Pilot Logs exist and reflect the daily activities of the Port Agent to execute his public duties to assign pilots to vessels and to collect data." Even if the Pilot Logs from the *Miller* case could be considered to establish the existence of an information database, statements contained in the *Miller* Stipulation are the only authentication or explanation for any of the information contained within [*597[the Pilot Logs and the only basis for the claim that the Pilot Logs "reflect the daily activities of the Port Agent to execute his public duties to assign pilots to vessels and to collect data." While judicial notice may be taken of court records (*Evid. Code, § 452, subd. (d)*), the truth of matters asserted in such documents is not subject to judicial notice. (*Arce, supra, 181 Cal.App.4th at p. 482.*)[24]

> 24 See *Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1564 [8 Cal. Rptr. 2d 552]*, quoting 2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 2d ed. 1982) § 47.2, p. 1757: " 'What is meant by taking judicial notice of court records? There exists a mistaken notion that this means taking judicial notice of the existence of facts asserted in *every document* of a court file, [***41[including *pleadings* and *affidavits*. However, a court *cannot* take judicial notice of *hearsay allegations*

as being true, just because they are part of a court record or file.' "

In response to evidentiary objections in the trial court, PMSA asserted that the *Miller* Stipulation "directly admit[s] that the Port Agent's recordation of the assignment of pilots is undertaken in the regular course of business in order to fully and accurately comply with a reporting requirement of the state of California" and that "these statements are directly relevant as admissions against interest, since Miller was and is a member of [Bar Pilots]." But there was no evidence presented that Miller is, or ever has been, an officer of Bar Pilots, that he had personal knowledge of any of the business records of Bar Pilots, or that he was authorized in any way to speak on its behalf. And the stipulation is not even a sworn declaration by Miller. It is the product of yet another layer of hearsay--an unverified document submitted and signed by Miller's counsel, who does not purport to have personal knowledge of any of the content.

In contrast, the Port Agent avers that he does not, and has not, prepared or used the Pilot **[***42]** Logs in assigning pilots, and both the Port Agent and the Board confirm that the database is not provided to the Board. In sum, there is no evidence, let alone substantial evidence, to support a finding that the Pilot Logs are "used by the Port Agent in the execution of his public duties including, but not limited to, assigning pilots to vessels and preparing and administering pilot vacation time" or that they are "necessary and convenient to the Port Agent's public duties." In the absence of such evidence, the database of the Pilot **[**302]** Logs cannot be considered public records under the CPRA.

E. *Constructive Possession of the Pilot Logs by the Board*

(11) Both PMSA and Amici Curiae argue that records relating to execution of the Port Agent's public duties are also public records because they are in the constructive possession of the Port Agent and the Board. The CPRA pertains to "disclosable public records in the *possession* of the agency ... ." **[*598]** (*§ 6253, subd. (c)*, italics added.) Relying upon the Board's general administrative control of the Port Agent and its authority over all licensed pilots and pilot reporting requirements (*Regs., §§ 218, 219*), PMSA insists that both the Board and the Port Agent **[***43]** have the right to control the Pilot Log database maintained by Bar Pilots and are therefore in "possession" of those records.

As to the Port Agent, the argument reaches too far. Under PMSA's theory, any and all records held or maintained by a private organization would become public record simply because one of its officers concurrently held a position performing public functions. Whether the record is in the actual or constructive possession of a public official, the requirement is still that the record be required by law to be kept by that official, or that it be " ' "necessary or convenient to the discharge of his official duty." ' " (*San Gabriel Tribune, supra, 143 Cal.App.3d at p. 774*; see *CSU, supra, 90 Cal.App.4th at p. 824.*)

As to the Board, to prevail PMSA must establish that the files (1) qualify as public records and (2) were in the possession of the Board. (*Consolidated Irrigation Dist. v. Superior Court (2012) 205 Cal.App.4th 697, 709 [140 Cal. Rptr. 3d 622]* (*Consolidated Irrigation*).) "Possession" in this context has been interpreted to mean both actual and constructive possession. "[A]n agency has constructive possession of records if it has the right to control the records, either directly or through **[***44]** another person. [Citation.]" (*Id. at p. 710.*) PMSA relies primarily on *Bernardi v. County of Monterey (2008) 167 Cal.App.4th 1379 [84 Cal. Rptr. 3d 754]* (*Bernardi*) in support of its argument. Neither *Consolidated Irrigation* nor *Bernardi* is factually analogous.

(12) In *Consolidated Irrigation*, the petitioner challenged the approval of an environmental impact report (EIR) by the City of Selma (City) and sought a writ of mandate to compel production under the CPRA of, inter alia, records of subconsultants hired by a primary consultant to prepare reports, studies, or certain sections of the EIR. (*Consolidated Irrigation, supra, 205 Cal.App.4th at pp. 702, 709-710.*) The trial court denied the petition. The petitioner contended that the City had the right to control the subconsultants' files based on a provision in the contract between City and the primary consultant that expressly gave the City ownership of all documents and data prepared by the contractor. The petitioner was given access to the contractor's files, and constructive possession of the documents in the contractor's file was not at issue. The court concluded that the contract provision did not give the City ownership rights in the materials in the subconsultant's **[***45]** files and affirmed denial of the petition. (*Id. at pp. 709-711.*) Nothing in **[*599[** the Harbors and Navigation Code or in the Board's regulations gives the Board any rights of ownership of Bar Pilots's records, and Bar Pilots is not a contractual agent of the Board. As PMSA acknowledges, there is no reference to Bar Pilots in the Harbors and Navigation Code. *Bernardi* dealt only with the reasonableness of an award of attorney fees **[**303[** to a successful CPRA petitioner. The trial court's order requiring production of the environmental consultant's file was not appealed. (*Bernardi, supra, 167 Cal.App.4th at pp. 1383, 1392.*) "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citations.]" (*Santisas v. Goodin (1998) 17 Cal.4th 599, 620 [71 Cal. Rptr. 2d 830, 951 P.2d 399].*)

Amici Curiae contend that the Board has the right to obtain the Pilot Log records and therefore "owns" those records. They cite *San Gabriel Tribune* for the proposition that if an agency delegates a duty to a third party, but retains the power and duty to monitor performance of the delegated duty, the third party records relating to the performance of that duty are public. [***46] *San Gabriel Tribune* also involved a contractual agreement, in that instance between a municipality and trash collection service. The trash collection company had a contractual obligation to submit annual financial statements to the city, and the records in dispute consisted of financial data that the company submitted to the city to justify a rate increase the city authorized. (*San Gabriel Tribune, supra, 143 Cal.App.3d at pp. 767-769.*) The court held that those statements were public records subject to disclosure because the contractor had "injected the data into the decision-making process of government" (*id. at p. 778*) and "the City [had] relied on [the statements] in granting the rate increase ..." (*id. at p. 775*). Here the Board has "delegated" nothing, by contract or otherwise.

PMSA suggests that Board is "outsourc[ing] the 'performance of administrative functions' " and that Bar Pilots "is, in many respects, a functional subordinate of the public agency and subject to the execution of its public duties." Bar pilotage is a recognized but regulated monopoly, and the Board has statutory licensing and oversight authority. But the individually licensed members of Bar Pilots render piloting [***47] services directly to their maritime clients, not on behalf of the Board. The pilot work rules are generally established by Bar Pilots and not by the Board. And the Legislature has never given the Board the authority to make pilot assignments or to direct them. The Port Agent has always been allocated that responsibility, and we have already held that he serves as a state officer in doing so.

Nor does the record support Amici Curiae's argument that the Board is attempting to "defeat disclosure by ceding possession and control of [the records] to a third party." So far as the evidence discloses, the database at issue has always been solely prepared and maintained by Bar Pilots and never [*600] provided to the Board, although apparently used in part in preparation of the summary statistical reports from Bar Pilots to the Board required under *Regulations section 237, subdivision (d)*. But the fact that Bar Pilots may use the Pilot Log database to prepare its public summary does not mean that all data used to prepare the report is thereby public. (See *Forsham v. Harris, supra, 445 U.S. at pp. 171-179* [written data generated, owned and possessed by a privately controlled organization funded solely by [***48] federal grants are not records of the federal agency providing the grants if they are not provided to the agency, even if there is a federal right of access to the data].)

F. *Conclusion*

(13) The evidentiary record before us does not support a finding that the Pilot Log data is, or ever has been, used by the Port Agent in the performance of his official [**304] duty in assignment of bar pilots and is consequently a public record. If the data itself is not a public record, the fact that the Board could theoretically request it from Bar Pilots does not make it so.

(14) We do not dismiss the public's interest, articulated by PMSA and Amici Curiae, in safe pilotage of large vessels in the environmentally sensitive confines of the San Francisco Bay. We do not doubt that historic records reflecting individual exemptions from what are now only recommended MRP's in piloting assignments may "shed light on the ... process of assigning pilots to vessels" as PMSA contends. But records otherwise private do not become public simply by virtue of public interest in their content.

As a consequence of well-publicized maritime accidents, the NTSB has recommended that state licensing boards promulgate "hours of service" rules [***49] to prevent pilot fatigue. A legislative committee recently recommended that the Board conduct a manpower utilization study based on actual pilot logs. Our Legislature has now acted on both recommendations, requiring the Board to study the effects of work and rest periods on psychological ability and safety for pilots, and to promulgate pilot regulations establishing requirements for adequate rest periods. (*Harb. & Nav. Code, § 1196.5.*) Presumably the information that PMSA seeks will come to light in that process.

III. DISPOSITION

The petitions filed in this court are granted. Let a peremptory writ of mandate issue directing the superior court to set aside and vacate its September 18, 2012 order granting PMSA's petition for writ of mandate and to enter a new and different order denying that petition. The previously issued [*601] stay shall dissolve upon issuance of the remittitur. (*Cal. Rules of Court, rules 8.490(c), 8.272.*) Petitioners shall recover their costs. (*Cal. Rules of Court, rule 8.493(a)(1)(A).*)

Jones, P. J., and Needham, J., concurred.

Exh 6

Quick Links

CA Harbors and Navigation Code:

CA State Pilot Commission Regulations:

State Pilotage

OVERVIEW OF STATE PILOTAGE

Pilot services are compulsory and monopolistic. California law requires every foreign flag ship (and some U.S. vessels) greater than 750 gross tons to be served by a San Francisco Bar Pilot if the ship is scheduled to pass through the Golden Gate or is to be maneuvered on waters inside the Gate. In the United States, each state has its own compulsory pilotage laws and each state licenses and regulates the pilots operating in its waters. Everywhere in the U.S pilotage is offered only 1) by an exclusive pilot group, or 2) by a statutory rotational system that allocates the work amongst pilot groups.

Competition did not work. Over 100 years ago, competition in piloting was commonplace in the United States. A number of individual pilots or small groups of pilots would operate in a port. They would typically cruise many miles out to sea in order to be the first to speak an incoming vessel. There was no regular, dependable pilot station. A ship might arrive at a port looking for a pilot only to learn that all pilots were off chasing some other ship, usually one that offered a more lucrative assignment. Port interests and ship operators were dissatisfied with this system.

Piloting is an essential service of such paramount importance that its continued existence must be secured by the state and not left open to market forces. [Florida Statutes §310.0015] At the urging of the shipping community in the 1880s, pilots in various ports joined into associations. They remained independent contractors but agreed to work under a single rotation system and to pool their pilot boat, dispatching, and billing activities. The regulatory authorities, usually a statewide or local pilot commission, set the pilotage rates at levels sufficient to sustain the association's operation. This has been the basic framework of the state pilotage system ever since. Every state currently limits the number of pilot licenses that it issues and regulates the rates that pilots may charge and collect for their services. This recognizes that activities involving public safety such as compulsory pilotage are better provided by regulated monopolies.

Competition is Harmful to Compulsory Pilotage.

- Competition is inconsistent with both compulsory pilotage and comprehensive pilotage regulatory systems. Compulsory pilotage is a navigation safety regulation. A San Francisco Bar Pilot's primary responsibility is to protect the interests of California, which issues the license to pilot and regulates the pilotage operation. In that respect, the principal customer of the pilot's service is not the ship or the ship owner but rather California and its public interests. California requires pilots to be available to service all ships that are compelled to take a pilot.

- Competition compromises safety. A large part of piloting is judgment. There is a significant conflict of interest between a vessel owner's economic needs and the public interest in safe passage. It is in the public's best interests for the pilot's judgment to be absolutely free of economic consideration towards the ship owner when piloting his vessel. If pilots must compete against one another to win assignments a pilot might compromise safety considerations to accommodate the financial interest of the ship owner.

- Competition leads to discriminatory service. With a single rotation system, each ship gets the next pilot on turn when the ship needs a pilot, not whenever it suits the pilot. There is no practical way to maintain an availability requirement and a rotation in a competitive setting where ships are able to pick and choose their pilots.

- Competition discourages necessary investment in a pilotage service. A modern, efficient pilotage operation requires pilot boats and crews, berthing, land based pilot station, dispatchers, training programs, the equipment and staff to run a business, radios, and increasingly today, sophisticated electronic navigation equipment. It is difficult to make the investment for these and other items if there is no assurance of getting the available work.

- Competition is economically inefficient. Full service, modern pilot operations require a large capital investment. When two or more groups operate in a single pilotage area, there is inevitable duplication of many expense items such as pilot boats and administration and dispatch services.

- Competition requires a greater regulatory involvement. With competition, a greater level of oversight is required to monitor the activities of the pilots in order to prevent licensing, training, and rate competition abuses.

Conclusion. A compulsory pilotage requirement is by far the most effective mechanism available to protect northern California waters, assure the safety of its people and environment, and to facilitate waterborne commerce. It is effective because it places on the bridge of a ship an individual whose purpose there is to protect the public interest. When a pilot has to compete for ship assignments, particularly assignments from a ship owner or other entity that promotes competition, the pilot knows that his or her livelihood depends on acting in the interests of the person who controls pilot selection rather than the government and its people.

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WHITE PAPER ON STATE PILOTAGE

Every ship in excess of 750 gross tons moving within waters under jurisdiction of the Board of Pilot Commissioners, except a U.S. flag vessel sailing between those waters and another U.S. port, is required to use the services of a San Francisco Bar Pilot. Thus nearly all commercial ships passing through the Golden Gate are served by a San Francisco Bar Pilot. Waters under the jurisdiction of the Board (the pilotage grounds) include all navigable waters inside the Golden Gate extending to and including the Ports of Sacramento and Stockton as well as the shipping channel extending 11 miles westward from the Golden Gate to the SF Buoy. The jurisdictional waters also include Monterey Bay.

The San Francisco Bar pilots, based on years of history, feel that requiring the services of a San Francisco Bar pilot is critical to compulsory pilotage in these waters. Eliminating this system would be bad for Californians, our fragile environment, and the maritime industry. This opinion is shared by the federal and other states' government authorities that regulate the pilotage of international trade vessels.

Non-Competitive Pilotage in the United States

In the United States, pilotage of international trade vessels is provided by the state pilotage system. Each state has its own compulsory pilotage laws covering the ports and waters of the state, and each state licenses and regulates the pilots operating in its waters. Competition is not a feature of this system. In the United States either a single pilot group operates in a pilotage area or, in the case of pilotage waters on a boundary between states, two or more pilot groups operate a joint service under a single rotation or divide the work under a formula provided by law.

Although there is currently no place in the United States where state pilots compete with each other, three states have had some recent experience with competitive pilotage. In the southeast region of Alaska, two groups of pilots formerly operated in genuine competition with each other, largely through contracts with cruise ships, which make up the bulk of their pilotage. That competition was largely the result of several unique pilotage circumstances in that region and was generally regarded as an anomaly. The situation changed, and competition ended, in the fall of 2002 when the members of one of the groups all joined the other. The state pilotage authorities supported the move to one group. It allowed the pilots to avoid the inefficient duplication of expenses and operations and facilitated regulatory oversight.

Two other states, Connecticut and Hawaii, have taken steps to prevent competition by establishing a single state-sponsored rotation system, which divides the work among the pilots on an equitable basis. The practical effect of such a rotation system is to permit two or more separate and independent groups of pilots to operate but to eliminate their competition for piloting assignments. An additional intended effect is to remove most of the incentives for separate pilotage operations. As evidence of that aspect of a rotation system, competition in

Hawaii ended in 2000, before the planned rotation system there went into effect, when the remaining independent pilot re-joined the original pilot group in the state. In Connecticut, multiple pilot groups still exist, but the state's mandatory rotation system is in operation. Every pilot working in Long Island Sound or Connecticut waters under either a New York or Connecticut state pilot license must be part of that rotation.

Over 100 years ago, competition in piloting was commonplace in the United States. A number of individual pilots or small groups of pilots would operate in a port. They would typically cruise many miles out to sea in order to be the first to speak an incoming vessel. There was no regular, dependable pilot station. A ship might arrive at a port looking for a pilot only to learn that all the pilots were off chasing some other ship, usually one that offered a more lucrative assignment. Port interests and ship operators were dissatisfied with this system.

In the 1880's, a series of violent winter storms hit the east coast of the United States. Many pilots who were far out at sea cruising for piloting work were lost. In response, and at the urging of the shipping community, pilots in the various ports began to join into associations. While remaining independent contractors, the pilots agreed to work under a single rotation system and to pool their pilot boat, dispatching, and billing activities and to share other expenses. The regulatory authorities, in most cases a statewide or local pilot commission, would set the pilotage rates at levels sufficient to sustain the association's operation.

This has been the basic framework of the state pilotage system ever since. Some state laws such as California's - mandate that all pilots belong to one group or use the pilot boats or training program of a single group. In other places, the one-association structure simply developed by custom and practice with the support, either direct or implicit, of the pilot commission. Every state currently limits the number of pilot licenses that it issues and regulates the rates that pilots may charge and collect for their services.

As these features of the state pilotage system developed, the judgment was made that economic regulation and close oversight of pilots' professional activities would be preferable to competition. Despite the strong U.S. national policy favoring free enterprise and equal opportunity capitalism, governmental authorities have recognized that some activities, particularly those involving public safety or essentially governmental services, are better provided by regulated monopolies. Compulsory pilotage is one such activity.

An excellent, current statement of this judgment can be found in a section of the pilotage statute for the State of Florida. A copy of the section is included at the end of this paper. The statement begins with the declaration, Piloting is an essential service of such paramount importance that its continued existence must be secured by the state and not left open to market forces.

Until 1984, competition to pilot ships inland (as opposed to from and to the ocean or across the bar) existed in our pilotage grounds. Various independent inland groups competed, some promising shipping agents lower costs but sacrificing safety by using fewer or less capable tug assists, offering to move a vessel with insufficient margin of safety when others would not, providing kickbacks and providing pilots that had not undergone a rigorous selection and training regimen. The am1984 amalgamation of these groups into the San Francisco Bar Pilots and under the oversight of the pilot commission ended these unsafe practices.

Some Reasons Why Competition is Harmful to Compulsory Pilotage

The following is a brief summary of several of the reasons often given for favoring economic regulation over competition in compulsory pilotage. Many of these are reflected in the Florida statute.

1. Competition is inconsistent with the nature and function of both compulsory pilotage and comprehensive pilotage regulatory systems.

Compulsory state pilotage is not simply a business. In fact, it is significantly different even from other professional services, most of which are normally provided through a private contract with a willing consumer. The United States Supreme Court has said that pilotage is a unique institution and must be judged as such.[1] On that basis, the Court has repeatedly held that specific features of state pilotage systems are exempt from many of the laws that govern purely private businesses, including the antitrust laws.[2]

Compulsory pilotage is a navigation safety regulation. Although the state pilot is typically not a California government employee, he or she performs what is, in large measure, a California government function. A San Francisco Bar Pilot's primary responsibility is to protect the interests of California, which issues the license to pilot and regulates the pilotage operation. In that respect, the principal customer of the pilot's service is not the ship or the ship owner but rather California and its public interests. [3]

State pilotage is provided through a comprehensive regulatory system, which does far more than merely license individuals. In addition to requiring ships to take a pilot, the system seeks to ensure that trained, competent, and physically capable pilots are available 24 hours a day,

365 days a year and that all ships are treated on an equal, non-discriminatory basis. In order to accomplish that, California requires pilots to be available to service all ships that are compelled to take a pilot, and requires the pilot association to maintain training programs, pilot boats, dispatch services, rotation systems, and all the other types of equipment and support services needed for a modern, efficient, and safe pilotage operation. Competitive private businesses are not held to those types of obligations.

2. Competition compromises safety.

A large part of piloting is judgment. A San Francisco Bar Pilot often has to decide between different courses of action, for example whether a ship should proceed with a movement in poor visibility or other unexpected conditions, whether a ship should wait for particular tide or current conditions, whether one route or maneuver should be used rather than another that might take more time, or whether a ship should move at a higher than normal speed in order to keep to its schedule. San Francisco Bar Pilots are expected to exercise independent judgment in making these types of decisions and to resist any pressures that are inconsistent with the interests of safety.

A 1986 study conducted at the request of the legislature of Florida described the impact of competition on this aspect of piloting very well:

There is a significant conflict of interest between a vessel owner's economic needs and the public interest in safe passage. It is in the public's best interests for the pilot's judgment to be absolutely free of economic consideration to the ship owner when piloting his vessel. If pilots must compete against one another to win assignments, there is likelihood that a pilot will compromise safety considerations in order to accommodate the financial interest of the ship owner, for in so doing, he will have a competitive edge over another pilot.[4]

This is not merely a matter of academic speculation or theory. The reality is that pilots who compete for work do things that they would refuse to do for safety reasons in a non-competitive setting. Contrary to what proponents of competition in piloting claim, this cannot be prevented by regulatory oversight alone. That certainly was the case in northern California before the amalgamation of the competing inland groups into the San Francisco Bar Pilots.

3. Competition leads to discriminatory service.

Where pilotage is provided on a non-competitive basis through a comprehensive regulatory system, each ship can be assured that it will receive the same level of pilotage service. In a competitive situation, pilots typically prefer and pursue the customers offering the more regular, the higher volume, the more lucrative, or the easiest work. In short, some pilots in those settings skim the cream. A ship that arrives at the sea buoy or is ready to leave a berth may find that the pilot it was expecting elected to take a more desirable assignment or to service another ship under an exclusive contract. These potential situations encourage rebates, kickbacks, and other illegal activities as both pilots and ships/agents seek preferential treatment.

In the traditional, non-competitive state pilotage operation as in northern California, pilots are required to be available at all times and to all ships equally. With a single rotation system, each ship gets the next pilot on turn when the ship needs a pilot, not whenever it suits the pilot. In addition, by spreading out the work among the pilots, the rotation provides a greater assurance that the pilot will be sufficiently rested and otherwise physically and mentally prepared for the assignment. Not only pilotage services but administrative and support activities and training can be performed in a regular, orderly fashion. Finally, a rotation system ensures that pilots maintain experience on the full range of different ship types and pilotage jobs.

There is no practical way to maintain an availability requirement and a rotation in a competitive setting where ships are able to pick and choose their pilots.

4. Competition discourages necessary investment in a pilotage service.

Although piloting is a personal service provided by an individual, pilotage operations are relatively capital intensive. A modern, efficient pilotage operation such as the San Francisco Bar Pilots, requires pilot boats and crews, berthing, land based pilot station, dispatchers, training programs, the equipment and staff to run a business, radios, and increasingly today, sophisticated electronic navigation equipment. It is difficult to make the investment for these and other items if there is no assurance of getting the available work. In this respect, the pilot operation is similar to a public utility. A major difference, however, is that the public utility holding a regulated monopoly typically has thousands or perhaps millions of different customers. The San Francisco Bar Pilots, on the other hand, depends on far fewer customers for its work. Those customers have much greater economic power and a stronger bargaining position than the pilots and can very easily dictate to the pilot group.[5]

Experience with the pilotage of coastwise vessels in the United States and, particularly in northern California, has shown that competitive pilotage leads to ill-equipped, unstable,

marginal operations. Some coastwise ship operators will use part-time federally licensed pilots who operate out of their homes, have no established continuing training program, and have none of the supporting services or equipment expected of a state pilot group. These pilots are considered by their patrons to be good enough - unless the weather is bad, the ship requires some more difficult than usual maneuvering or an adequate pilot boat is needed. In those cases, the ship operator will turn to the state pilot group.

5. Competition is economically inefficient.

In view of the large capital investment required of full service, modern pilot operations, when two or more groups operate in a single pilotage area, there is inevitably duplication of many items of expense, such a pilot boats, and administration and dispatch services. With a goal of rate regulation being to insure that pilotage fees are no higher than necessary, this duplication of expense is contrary to the public interest.

This point was made during a 1993 rate review conducted by the State of Hawaii's Department of Commerce and Consumer Affairs. The Department's Division of Consumer Advocacy, a state entity charged with protecting the public interest in regulated rate cases, argued that so long as two pilot groups in the state chose to operate separately, pilotage rates should not reflect the unnecessary duplication of expenses as a result of that decision. According to the Division: The existence of two pilot organizations results in a very inefficient pilotage system in Hawaii. ... Since they do not share information or resources, there is necessarily a duplication of staffing requirements and an inefficient use of resources.[6]

6. Competition requires a greater level of regulatory involvement in pilotage.

Experience with the few instances of competition in state pilotage has shown that the burdens placed on the regulatory authorities are much greater with competition than without competition, particularly in the areas of licensing, training and rates. In the non-competitive, one-association setting, there is little incentive to shortcut the license or training process in order to add additional pilots quickly or to offer rebates or engage in other types of illegal rate practices. With competition, a greater level of oversight is required in order to monitor the activities of the pilots to prevent these types of abuses.

Training is an especially difficult regulatory problem in competitive pilotage. Despite all the recent advances in simulation and classroom instruction, the main ingredient in the training of a pilot is still hands-on training on the bridge of a ship under the direction of a senior pilot. When two separate competing groups operate in one area, often a trainee cannot get the necessary trips on all types of vessels and in all pilotage areas from a single pilot group. Even if it were possible to enforce a requirement that pilots train their future competitors, the cooperative and trusting relationship needed for training cannot be mandated. Pilotage authorities where competition exists have thus found that they have to oversee all the details of training to a degree not required in a one-association, non-competitive setting

The pilotage authorities in states that have had competing pilot groups have indicated that the major part of their work was dealing with the effects of competition. In Hawaii and Connecticut, the frustrations and regulatory burdens attributable to the competitive pilotage in those places were cited as a primary reason for each state's decision to implement a mandatory single rotation as a means of eliminating competition. In Alaska, a past Marine Pilot Coordinator estimated that he and the pilot commission spent more time dealing with the one pilotage region with competition (Southeastern Alaska) than with the other two regions combined.

The experience that competition leads to more, not less, regulation contradicts the claim of proponents of competition that when ship operators can select their own pilots, the system will essentially run itself.

Conclusion

In the opinion of the San Francisco Bar Pilots, a compulsory pilotage requirement is by far the most effective mechanism available to California to protect northern California waters, assure the safety of its people and environment, and to facilitate waterborne commerce. It is effective because it places on the bridge of a ship crossing the bar into San Francisco Bay an individual whose purpose in being there is to protect the public interest. When a pilot has to compete for ship assignments, particularly assignments from a ship owner or other entity that promotes competition, the pilot knows that his or her livelihood depends on acting in the interests not of the government and its people but of the person who controls the selection of the pilot. When a pilot's role is compromised in this fashion, the purpose of the compulsory pilotage requirement is frustrated.

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Section 310.0015, West's Florida Statutes Annotated (1997)

(1) Piloting is an essential service of such paramount importance that its continued existence must be secured by the state and may not be left open to market forces.

(2) Because safety is the primary objective in the regulation of piloting by the state and because of the significant economies of scale in delivering the service, the requirement of a large capital investment in order to provide required service, and the fact that pilots are supplying services that are considered essential to the economy and the public welfare, it is determined that economic regulation, rather than competition in the marketplace, will better serve to protect the public health, safety, and welfare.

(3) The rate-setting process, the issuance of licenses only in numbers deemed necessary or prudent by the board, and other aspects of economic regulation of piloting established in this chapter are intended to protect the public from the adverse effects of unrestricted competition which would result from an unlimited number of licensed pilots being allowed to market their services on the basis of lower prices rather than safety concerns. This system of regulation benefits and protects the public interest by maximizing safety, avoiding uneconomic duplication of capital expenses and facilities, and enhancing state regulatory oversight. The system seeks to provide pilots with reasonable revenues, taking into consideration the normal uncertainties of vessel traffic and port usage, sufficient to maintain reliable, stable operations. Pilots have certain restrictions and obligations under this system, including, but not limited to, the following:

(a) Pilots may not refuse to provide piloting services to any person or entity that may lawfully request such services, except for justifiable concerns relating to safety, or, in the case of a vessel planning a departure, for nonpayment of pilotage.

(b) Pilots may not unilaterally determine the pilotage rates they charge. Such pilotage rates shall instead be determined by the Pilotage Rate Review Board, in the public interest, as set forth in §310.151.

(c) Pilots shall maintain or secure adequate pilot boats, office facilities and equipment, dispatch systems, communication equipment and other facilities, and equipment and support services necessary for a modern, dependable piloting operation.

(d) The pilot or pilots in a port shall train and compensate all member deputy pilots in that port. Failure to train or compensate such deputy pilots shall constitute a ground for disciplinary action under §310.101. Nothing in this subsection shall be deemed to create an agency or employment relationship between a pilot or deputy pilot and the pilot or pilots in a port.

[1] Kotch v. Bd. of River Port Pilot Comrs, 330 US 552, 557-58 (1947).

[2] The application of federal and state U.S. antitrust laws to the activities of pilots (as opposed to activities of state authorities, which are exempt from federal antitrust law) is beyond the scope of this discussion. In general, activities of pilots and pilot groups that are undertaken to implement the policies and requirements of a state regulatory system are exempt from the antitrust laws under the State Action Immunity Doctrine. Other activities of the pilots are not, and distinguishing between the two types of activities can be difficult.

[3] The U.S. Supreme Court has described this aspect of state pilotage as follows:
Pilots hold a unique position in the maritime world and have been regulated extensively both by the State and the Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties.
Bisso v. Inland Waterways Corp., 349 U.S. 85, 93-94 (1955).

[4] Report by Special Master John J. Upchurch, Florida Senate Economic, Community, and Consumer Affairs Committee, January, 1986, pages 27-28.

[5] Economists describe this type of market situation as a monopsony and regard it as potentially dangerous and contrary to the public interest. It is one reason for having regulated pilotage rates and other state law measures intended to protect pilots from the superior economic and bargaining power of shipowners.

[6] Division of Consumer Advocacy's Statement of Position With Respect to the Hawaii Pilot Association's Amended Petition for Change of Pilotage Rates, July 9, 1993, page 2.

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Exh 7

SHEA LABAGH DOBBERSTEIN

Certified Public Accountants, Inc.

April 9, 2012

RECEIVED APR 12 2012

RECEIVED APR 12 2012

Mr. Allen Garfinkle
Executive Director
BOARD OF PILOT COMMISSIONERS
660 Davis Street
San Francisco, CA 94111

Dear Allen:

Please find enclosed ten (10) bound copies and one (1) unbound copy of the December 31, 2011 Audit of Surcharges, Billings and Disbursements for SAN FRANCISCO BAR PILOTS and SAN FRANCISCO BAR PILOTS BENEVOLENT AND PROTECTIVE ASSOCIATION.

Very truly yours,

SHEA LABAGH DOBBERSTEIN
Certified Public Accountants, Inc.

RONALD K. SIMONIAN, CPA

RKS:RR:mk
Enclosures

505 Montgomery Street, 5th Floor • San Francisco, CA 94111 • Tel 415 397-4444 • Fax 415 981-0898
1700 S. El Camino Real, Suite 500 • San Mateo, CA 94402 • Tel 650 579-7200 • Fax 650 579-1041

RECEIVED APR 12 2012

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Audit of Surcharges, Billings and Disbursements

Year Ended December 31, 2011

(With Independent Auditors' Report Thereon)

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Year Ended December 31, 2011

Table of Contents

SHEA LABAGH DOBBERSTEIN

Certified Public Accountants, Inc

Independent Auditors' Report

THE STATE OF CALIFORNIA BOARD OF PILOT COMMISSIONERS
FOR THE BAYS OF SAN FRANCISCO, SAN PABLO, AND SUISUN

We have audited, in accordance with auditing standards generally accepted in the United States of America, the consolidating financial statements of SAN FRANCISCO BAR PILOTS and SAN FRANCISCO BAR PILOTS BENEVOLENT AND PROTECTIVE ASSOCIATION for the year ended December 31, 2011, and have issued our report thereon dated March 13, 2012. We have also audited the accompanying schedules of surcharges, billings and disbursements on pages 2-7 of SAN FRANCISCO BAR PILOTS and SAN FRANCISCO BAR PILOTS BENEVOLENT AND PROTECTIVE ASSOCIATION, for the year ended December 31, 2011. These schedules are the responsibility of the Company's management. Our responsibility is to express an opinion on these schedules based on our audit.

We conducted our audit of the schedules of surcharges, billings and disbursements on pages 2-7 in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the schedules of surcharges, billings and disbursements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the schedules of surcharges, billings and disbursements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall schedule presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the schedules of surcharges, billings and disbursements referred to above present fairly, in all material respects, the surcharges, billings and disbursements of SAN FRANCISCO BAR PILOTS and SAN FRANCISCO BAR PILOTS BENEVOLENT AND PROTECTIVE ASSOCIATION for the year ended December 31, 2011, in conformity with accounting principles generally accepted in the United States of America.

SHEA LABAGH DOBBERSTEIN
Certified Public Accountants, Inc.

Shea Labagh Dobberstein

April 3, 2012

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SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Schedule of Board Operations Surcharges.
Billings and Disbursements

Year Ended December 31, 2011

Unremitted Board Operations Surcharges at December 31, 2010	$ 395,878
Less: Amount of 2010 Surcharges Remitted in 2011	(395,878)
Unremitted 2010 Surcharges Remaining at December 31, 2011	-
Total Board Operations Surcharge Billings for 2011	1,777,272
Less: Total 2011 Board Operations Surcharges Remitted in 2011	(1,603,693)
Unremitted Board Operations Surcharges at December 31, 2011	$ 173,579

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Schedule of Pilot Trainee Training Surcharges,
Billings and Disbursements

Year Ended December 31, 2011

Unremitted Pilot Trainee Training Surcharges at December 31, 2010	$	41,625
Less: Amount of 2010 Surcharges Remitted in 2011		(41,625)
Unremitted 2010 Surcharges Remaining at December 31, 2011		-
Total Pilot Trainee Training Surcharge Billings for 2011		528,528
Less: Total 2011 Pilot Trainee Training Surcharges Remitted in 2011		(448,954)
Unremitted Pilot Trainee Training Surcharges at December 31, 2011	$	79,574

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Schedule of Pilot Continuing Education Surcharges,
Billings and Disbursements

Year Ended December 31, 2011

Unremitted Pilot Continuing Education Surcharges at December 31, 2010	$	54,945
Less: Amount of 2010 Surcharges Remitted in 2011		(54,945)
Unremitted 2010 Surcharges Remaining at December 31, 2011		-
Total Pilot Continuing Education Surcharge Billings for 2011		874,860
Less: Total 2011 Pilot Continuing Education Surcharges Remitted in 2011		(743,415)
Unremitted Pilot Continuing Education Surcharges at December 31, 2011	$	131,445

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Schedule of Pilot Vessel Surcharges,
Billings and Disbursements

Year Ended December 31, 2011

Unrecovered Pilot Vessel Surcharges at December 31, 2010	$	286,025
Less: Amount of 2010 Surcharges Received in 2011		(286,025)
Unrecovered 2010 Surcharges Remaining at December 31, 2011		-
Total Pilot Vessel Surcharge Billings for 2011		2,782,735
Less: Total 2011 Pilot Vessel Surcharges Received in 2011		(2,710,578)
Unrecovered Pilot Vessel Surcharges at December 31, 2011	$	72,157

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Schedule of Recovery of Costs for Construction and/or Service
Life Extension Or Modification of Pilot Vessels

Year Ended December 31, 2011

	PV California	PV San Francisco	PV Drake	Total
Unrecovered Balance at December 31, 2010 (Note 3)	$ 471,640	$ 499,456	$ 8,798,317	$ 9,769,413
Additional Costs Incurred in 2011	-	-	-	-
Less: Surcharges Applied in 2011	(471,640)	(499,456)	(1,954,118)	(2,925,214)
Unrecovered Balance at December 31, 2011	$ -	$ -	$ 6,844,199	$ 6,844,199

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Schedule of Pilot Pension Plan Surcharges,
Billings and Disbursements

Year Ended December 31, 2011

Undisbursed Pilot Pension Plan Surcharges at December 31, 2010	$ 602,567
Less: Amount of 2010 Surcharges Disbursed in 2011	(602,567)
Undisbursed 2010 Surcharges Remaining at December 31, 2011	-
Total Pilot Pension Plan Surcharge Billings for 2011	7,391,394
Less: Total 2011 Pilot Pension Plan Surcharges Disbursed in 2011	(6,848,487)
Undisbursed Pilot Pension Plan Surcharges at December 31, 2011	$ 542,907

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Notes to Schedules of Surcharges, Billings and Disbursements

Year Ended December 31, 2011

(1) Nature of Operations

The San Francisco Bar Pilots ("Bar Pilots") is an affiliated group of individuals who have been licensed by the State of California Board of Pilot Commissioners to have the exclusive authority to pilot vessels from the high seas to the bays of San Francisco, San Pablo, Suisun, and Monterey and to the tributaries, ports and harbors of those bays, and from those bays and ports to the high seas. The boats and equipment are owned or leased by the San Francisco Bar Pilots Benevolent and Protective Association ("Benevolent"), a California corporation owned by the individual pilots. The Benevolent is a membership association incorporated under the laws of the State of California. The individual members are licensed pilots with each member having equal interest in the property of the Benevolent.

(2) Summary of Significant Accounting Policies

(a) Basis of Accounting

The Bar Pilots and the Benevolent's (collectively, the "Companies") financial statements have been prepared on the accrual basis of accounting in accordance with accounting principles generally accepted in the United States of America.

(b) Use of Estimates

The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

(c) Pilot Pension Plan

Under the terms of the San Francisco Pilot Pension Plan, actual pension payments may vary from target pension payments depending on whether pension plan surcharges funding pension plan disbursements are greater or less than anticipated. Actual surcharge collections and pension plan payments will be greater than expected if tonnage is greater than anticipated; also, actual surcharge collections and pension plan payments will be lower than expected if tonnage is less than anticipated. During 2011, actual tonnage was greater than anticipated, with the result that actual surcharges collected and pension plan payments were greater than total target pensions by $393,464.

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Notes to Schedules of Surcharges, Billings and Disbursements

Year Ended December 31, 2011

(d) Revenue

Bar Pilots recognize surcharge revenue upon completion of a pilotage. In accordance with State of California Harbors and Navigation Code, Division 5, Bar Pilots bill and collect surcharges for vessels piloted. These surcharges are for the operations of the State of California Board of Pilot Commissioners, as well as for pilot trainee training, pilot continuing education, the construction and/or service life extension or modification of pilot vessels, and the San Francisco Pilot Pension Plan. When collected, these funds are paid directly to the State of California, disbursed to beneficiaries of the Pilot Pension Plan or to providers of administrative services to the Pilot Pension Plan, or retained by the Bar Pilots in accordance with applicable law and regulations. The surcharges for the year ended December 31, 2011 were determined as follows:

Surcharge	Calculation
Board Operations Surcharge	January 1, 2011 – June 30, 2011 = 6.6% of all pilotage fees. July 1, 2011 – December 31, 2011 = 3.0% of all pilotage fees.
Pilot Trainee Training Surcharge	$11 per trainee per vessel movement.
Pilot Continuing Education Surcharge	$105 per vessel movement.
Pilot Vessel Surcharge	Applicable mill rate per high gross registered ton for each vessel subject to the basic bar pilotage fee. Mill rates were as follows during the year: January 1, 2011 – March 31, 2011 = .01097 April 1, 2011 – June 30, 2011 = .00945 July 1, 2011 – September 30, 2011 = .00945 October 1, 2011 – December 31, 2011 = .00327
Pilot Pension Plan Surcharge	Applicable mill rate per high gross registered ton for each vessel piloted. Mill rates were as follows during the year: January 1, 2011 – March 31, 2011 = .02269 April 1, 2011 – June 30, 2011 = .02253 July 1, 2011 – September 30, 2011 = .02226 October 1, 2011 – December 31, 2011 = .02126

During the year ended December 31, 2011, the Bar Pilots collected $71,389 more in Pilot Vessel Surcharges than were applied to eligible costs.

SAN FRANCISCO BAR PILOTS
AND
SAN FRANCISCO BAR PILOTS
BENEVOLENT AND PROTECTIVE ASSOCIATION

Notes to Schedules of Surcharges, Billings and Disbursements

Year Ended December 31, 2011

(3) Unrecovered Balance of Costs of Construction and/or Service Life Extension or Modification

Bar Pilots recognize vessel surcharge revenue for the construction of and/or service life extension or modifications of the pilot vessels. Between 2001 and 2006, certain vessel surcharge remittances were allocated for taxes and apron repairs. Those remittances were previously assigned to and allocated among the PV California and PV San Francisco.

In the analysis of the current year, it was determined a more proper allocation and disclosure would have been to not affect the prior unrecovered balance of Recovery of Costs for Construction and/or Service Life Extension of the respective vessels, but rather have those allocations stand alone as miscellaneous allocations. The result is an amendment to the unrecovered balances of PV California and PV San Francisco at December 31, 2010 of $316,726 (PV California) and $378,065 (PV San Francisco). This amendment has no financial impact on San Francisco Bar Pilots.

(4) Administrative Expenses

Administrative expenses related to surcharges not subject to being remitted to the State of California are made up of professional fees and other charges. During the year ended December 31, 2011, no expenses were incurred or paid related to the pilot vessel surcharges. During the year ended December 31, 2011, administrative expenses related to the pilot pension plan were incurred and paid as follows:

Type of Expenditure		Amount
ADP Payroll Services	$	3,205
Certified Public Accountant Services		19,000
SFBP Administration Services		3,840
	$	26,045