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April 22, 2014

VIA U.S. MAIL AND E-MAIL

Zackery P. Morazzini
General Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

RE: Appeal of Denied Petition to add the position of Port Agent to the Conflict of Interest Code of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun ("Board of Pilot Commissioners")

Dear Mr. Morazzini:

Enclosed is the original of the BRIEF OF BOARD OF PILOT COMMISSIONERS ON APPEAL FROM ORDER OF GENERAL COUNSEL, which was e-mailed to you on Tuesday, April 22, 2014.

Sincerely,

A handwritten signature in blue ink that reads "Dennis M. Eagan".

DENNIS M. EAGAN
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

DME:lj

cc w/encl.: Mike Jacob
Vice President & General Counsel
Pacific Merchant Shipping Association

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9 FAIR POLITICAL PRACTICES COMMISSION

10 STATE OF CALIFORNIA

11
12 PACIFIC MERCHANT SHIPPING ASSOCIATION,

13 Appellant,

14 v.

15
16 BOARD OF PILOT COMMISSIONERS FOR THE
BAYS OF SAN FRANCISCO, SAN PABLO, AND
17 SUISUN,

18 Respondent.

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**BRIEF OF BOARD OF PILOT
COMMISSIONERS ON APPEAL FROM
ORDER OF GENERAL COUNSEL**

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INTRODUCTION

This is an appeal from an Order of the General Counsel of the Fair Political Practices Commission dated February 21, 2014. The Order granted the appeal of the Pacific Merchant Shipping Association from a decision of the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun that denied PMSA's petition to add the Port Agent to the Board's Conflict of Interest Code. The Order concluded that "the Port Agent makes or participates in the making of governmental decisions, as defined at Title 2, California Code of Regulations, Sections 18702.4¹ and 18702.2." The Order did not rule on the basic and threshold question whether the Port Agent was a member, officer, employee, or consultant of the Board, and thus a "public official" and a potential "designated employee" who was subject to the Political Reform Act of 1974. However, the Memorandum in support of the Order (hereafter "Memorandum") does treat the Port Agent as an officer of the Board.

The first seven and one-half pages of the Memorandum are devoted to summarizing the applicable law, outlining the procedural background, and setting forth the respective factual assertions and legal arguments of the parties. The critical portion of the Memorandum begins on page 8 with the heading titled, "Application of Law to the Facts Presented on Appeal." What follows, however, is a succession of legal conclusions that are unsupported by subsidiary findings based on specification of supporting evidence. This renders the Memorandum, and thus the Order, fatally defective. The decisions of administrative agencies in quasi-judicial decisions such as this must do the following:

- "Set forth the findings to bridge the analytic gap between the raw evidence and ultimate decision or order"
- Focus "upon the relationships between evidence and findings and between findings and ultimate action"
- Reveal "the analytic route the administrative agency traveled from evidence to action"
- "Draw legally relevant sub-conclusions supportive of it ultimate decision . . . to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions."

¹ The Board assumes that the intended reference in the Order and in the General Counsel's supporting Memorandum was to section 18702.1.

1 (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515-516.)

2 The Memorandum contains numerous conclusory statements that do not satisfy these standards.

3 This brief will demonstrate that the Port Agent is not subject to the Political Reform Act
4 and that, even assuming he were, he does not make or participate in making government decisions,
5 and is therefore not a “designated employee” for purposes of the Board’s Conflict of Interest
6 Code.

7 The brief will also identify the Memorandum’s analytical shortcomings whereby it falls
8 short of the standards set forth above by the Supreme Court.

9 NATURE OF THE CASE

10 Maritime pilots are mariners who assist in the navigation of vessels entering and leaving
11 ports. They have specialized knowledge of local conditions such as tides, winds, currents, and
12 water depths and are thus a valuable resource in safely navigating a vessel in waters with which
13 they are intimately familiar. In this, they contrast with the typical ship’s master, who calls on
14 many ports and is unlikely to have the same detailed knowledge of local waters.

15 For vessels transiting into, out of, and over San Francisco Bay and its tributaries, as well as
16 Monterey Bay, pilotage services are provided by a private business formed as an unincorporated
17 association, the San Francisco Bar Pilots (“Association”). (Exh. A, Decl. of Peter McIsaac, p. 1,
18 ¶¶ 1, 2.) The 58 pilots who are members of the Association control operation of the business and
19 split the profits among themselves. (*Ibid.*) These pilots are licensed and regulated by the Board of
20 Pilot Commissioners, a regional state agency whose jurisdiction is co-extensive with the pilotage
21 grounds in which pilotage services are provided by members of the Association. (Exh. A, pp. 1–2,
22 ¶¶ 3–5.; Exh. B, Decl. of Allen Garfinkle, p. 2, ¶¶ 7–9.)

23 The pilots elect a President of the Association and, pursuant to the statutory directive
24 contained in Harbors and Navigation Code section 1130,2 they also appoint one of their number
25 to act as Port Agent. (Exh. A, pp. 1, 2, ¶¶ 1, 6.) Although the Board must confirm this private
26 appointment, it cannot itself appoint the Port Agent and it has no power to remove the Port Agent.

27
28 ² Unless otherwise indicated, all section references are to the Harbors and Navigation Code.

1 (Exh. A, p. 2, ¶ 6.) The pilot who is Port Agent is subject to additional regulatory direction over
2 and above the regulatory directives that the Board applies alike to all pilots. (Exh. A, p. 2, ¶¶ 4,
3 5.) It has been this way since 1850, when the Board was created to regulate the provision of
4 private pilotage services into and out of San Francisco Bay and on adjacent waters. (See Stats.
5 1850, ch. 18, p. 65.)

6 On September 16, 2013, the Pacific Merchant Shipping Association (“PMSA”) petitioned
7 the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun to add
8 the Port Agent to the list of “designated employees” contained in the Board’s Conflict of Interest
9 Code. By order dated October 24, 2013, the Board concluded that the Port Agent was not a
10 “designated employee” and on that basis denied the petition. In response to the subsequent appeal
11 by PMSA, FPPC’s General Counsel issued the Order and Supporting Memorandum referenced
12 above, granting PMSA’s appeal.

13 **ISSUE PRESENTED**

14 The Political Reform Act of 1974 requires every state agency to adopt a Conflict of Interest
15 Code that lists positions “within the agency” that involve the making or participation in the
16 making of decisions that may foreseeably have a material effect on any financial interest. (Gov.
17 Code, §§ 87300, 87302, subd. (a).) Any violation of a COI Code by a “designated employee” is a
18 violation of chapter 7 of the act. (Gov. Code, § 87300.) “Designated employee” is defined in the
19 act as an “officer, employee, member, or consultant” of a state agency who engages in certain
20 types of agency decisions. (Gov. Code, § 82019, subd. (a).)

21 The principal issue presented is straightforward: is the Port Agent an “officer, employee,
22 member, or consultant” of the Board of Pilot Commissioners? If he’s not, then he’s not a “public
23 official,” not potentially a “designated employee” for purposes of inclusion in an agency’s
24 Conflict of Interest Code, and not subject to the Political Reform Act.

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1 **I. THE PORT AGENT IS NOT AN OFFICER, EMPLOYEE, MEMBER, OR CONSULTANT OF**
2 **THE BOARD**

3 **A. Consultant, Member, Employee**

4 The Memorandum treated the Port Agent as an “officer” of the Board, implicitly rejecting
5 any characterization of him as a consultant to, or a member of employee of, the Board. While a
6 discussion of these latter three categories appears unnecessary at this point, the Board hereby
7 incorporates by reference headings 1A, IB, and 1D at pages 3–4 and 6–7 of its brief dated
8 January 17, 2014.

9 **B. Officer**

10 PMSA’s argument here is that the Port Agent holds an “office” in which he exercises
11 powers “emanating directly from the State” and exercises the powers of the Board “on its behalf.”
12 (PMSA Appeal, pp. 4 & fn. 5, 6.) PMSA characterizes the provision of pilot services as a
13 “sovereign function of government” and says that this “function of government” has been
14 “delegated” by the Board to the Port Agent. (See PMSA Appeal, p. 6.) The argument is that the
15 Port Agent is acting “on behalf of” the Board in implementing a program whereby government
16 itself provides pilotage services. PMSA concludes that this asserted role in implementing a
17 service that is provided by government renders the Port Agent, in effect, an officer of the Board.

18 These statements are premised on the insupportable premise that the Board itself is
19 providing pilotage services and that such services are necessarily a “sovereign” or
20 “governmental” function. But there is nothing inherent in piloting that renders it innately a
21 governmental function. In fact, throughout history, piloting has, with few exceptions, been
22 performed by private parties.

23 The most common model for the provision of pilotage is that of a private pilotage business
24 whose member pilots are subject to “regulation and licensing” by a government agency. (See,
25 e.g., Harb. & Nav. Code, §§ 1101, subds. (e)³ & (g),⁴ 1127, subd. (c).⁵) That is what exists with

26 ³“(e) A program of pilot regulation and licensing is necessary in order to ascertain and
27 guarantee the qualifications, fitness, and reliability of qualified personnel who can provide safe
28 pilotage of vessels entering and using Monterey Bay and the Bays of San Francisco, San Pablo,
and Suisun.”

1 regard to pilots who provide pilotage services over the San Francisco Bar west of the Golden
2 Gate and on San Francisco, San Pablo, and Suisun Bays as far inland as the Ports of Sacramento
3 and Stockton. (Harb. & Nav. Code, §§ 1100, 1110, 1114.5, 1125.) These pilots also pilot vessels
4 on Monterey Bay. They also hold pilot licenses issued by the U.S. Coast Guard. This template of
5 private pilotage business regulated by government is in use throughout the country. (E.g., N.Y.
6 Nav. Law, §§ 87-89 (2014); Or. Rev. Stat., §§ 776.015–776.991 (2011); Tex. Transp. Code, §§
7 66.001-66.083 (2014); Wash. Rev. Code, §§ 88.16.005–88.16.200 (2013).)

8 Regulation of private pilotage has a long history in California. The Legislature enacted the
9 first statute regulating pilotage on San Francisco Bay in 1850, the first year of statehood. (Stats.
10 1850, ch. 18, p. 65.) Starting with this first statute, regulation of pilotage on the bay has involved
11 licensure of pilots by a board of pilot commissioners (*id.* at § 12), along with a recognition that
12 individual pilots would associate with one another in a private business enterprise in order to
13 spread the costs of providing pilotage—such as pilot boats—over multiple pilots (*id.* at §§ 15,
14 21). From the outset, there was provision for the pilots to “select one from their number, whose
15 duty it shall be to make reports to the Commissioners.” (*Id.* at § 15.) One of these reports
16 concerned the names of the vessels piloted and the fees received from each, along with a paying
17 over to the Board of a percentage of the pilotage fees assessed for support of the Board. (Compare
18 *id.* at § 16 with Harb. & Nav. Code, §§ 1136, 1137; Cal. Code Regs., tit. 7, §§ 218(d)(4), 219(a).)
19 Then as now, the costs of operating the Board were funded by a percentage of the “joint earnings
20 of the pilots.” (Compare *id.* at § 41 with Harb. & Nav. Code, § 1159.2.) The pilots’ earnings were
21 governed by the number and size of ships serviced and by rates set by the statute.

22 Also from the outset, there was provision for suspension or revocation of a pilot’s license
23 for such things as “incapacity,” “misconduct,” and “negligently losing any vessel.” (*Id.* at §§ 14,
24 22.) In common with many other professional licensing statutes, there was no effort to develop

25 _____
(...continued)

26 “(g) Bar pilotage in the Bays of San Francisco, San Pablo, and Suisun has continuously
27 been regulated by a single-purpose state board since 1850, and that regulation and licensing
28 should be continued.”

⁵ “(c) The board shall regulate pilotage on waters of the state as provided in this division.”

1 detailed instructions to pilots in how to perform their professional duties. Once competence had
2 been assessed by examination, the working premise was that the pilots were professionals who
3 knew their business, and that license disciplinary proceedings would suffice to discourage
4 negligence and incompetence. Of note, the business of pilots included not just shiphandling skills
5 but such things as how to distribute the work among themselves (that is, making assignments of
6 pilots to particular vessels). The primary legislative focus was upon ensuring that there were
7 competent pilots who would provide pilotage services in an orderly and efficient manner and
8 without discrimination among vessels based on anticipated revenue.⁶ As the Court of Appeal said
9 recently with specific regard to pilot assignments by the pilots' chosen representative, who is now
10 called the Port Agent:

11 Bar pilotage is a recognized but regulated monopoly, and the Board has statutory
12 licensing and oversight authority. But the individually licensed members of the Bar
13 Pilots render piloting services directly to their maritime clients, not on behalf of the
14 Board. The pilot work rules are generally established by the 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*. (Italics added.)

15 (*Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 599.)

16 As required by statute, the members of the San Francisco Bar Pilots appoint one of their
17 number to serve as the Port Agent. As was the case with the original 1850 statute discussed
18 above, the Legislature determined that certain of the Board's regulatory authority needed to be
19 directed to a single point of contact selected by the pilots from among their number in order for
20 certain regulatory objectives to be achieved. The Board must confirm this appointment by the
21 pilots for it to be effective, but the Board has no power either to appoint the Port Agent or to
22 remove the Port Agent. (Harb. & Nav. Code, § 1130, subd. (a); *Board of Pilot Commissioners*,
23 *supra*, 218 Cal.App.4th at p. 589 ["The Port Agent . . . is only 'confirmed' by the Board without

24 ⁶ We still see this concern for order, efficiency, and non-discrimination in the statute and
25 the Board's regulations. (E.g., Harb. & Nav. Code, § 1138 [penalties for pilot not going to vessel
26 nearest the shore or in the most distress and for pilot refusing to board a vessel when required];
27 Cal. Code Regs., tit. 7, §§ 219(d) [pilot shall always take inbound vessels in their order of arrival,
28 and in case of simultaneous arrivals, the vessel closest to shore shall have priority] & 219(e) [pilot
shall not leave outward-bound vessel inside the 10-fathom curve without the master's
permission].)

1 any provision for his removal.”].) The powers of appointment and removal lie solely with the
2 other pilots.

3 Pilots are subject to regulation by both the U.S. Coast Guard and state and local
4 governments. In California, there is no government agency with statewide authority over pilotage.
5 Instead, there are three models for the involvement of state or local government in the provision
6 of pilotage.

7 One model that contrasts with that in use in New York, Oregon, Texas, and Washington
8 and by the Board is that of the Port of Long Beach, which has contracted with a private pilotage
9 business to provide pilot services to vessels calling at its port. (Exh. A, p. 3, ¶ 8; Exh. B, p. 3,
10 ¶ 11; Port of Long Beach Tariff No. 4, pp. 2,000,046–2,000,056
11 <http://www.polb.com/economics/port_tariff.asp>.) These pilots do not hold pilot licenses issued
12 by the Port of Long Beach and are not regulated by the Port except for prescribed pilotage fees
13 that are set in the Port’s tariff. (Exh. A, p. 3, ¶ 8; Exh. B, p. 3, ¶ 11.) They hold federal pilot
14 licenses issued by the U.S. Coast Guard, but no licenses issued by state, regional, or local
15 government. (*Ibid.*)

16 It is only in the neighboring Port of Los Angeles where the city itself provides pilotage
17 services, using pilots who are civil service employees. (Exh. A, p. 3, ¶ 8; Exh. B, p. 3, ¶ 11; Port
18 of Los Angeles Tariff No. 4, p. 31 <http://www.portoflosangeles.org/finance/tariff_4.asp>.)
19 These pilots hold no licenses other than those issued by the U.S. Coast Guard. (*Ibid.*)

20 PMSA’s argument that the Port Agent is a Board officer because he is discharging the
21 Board’s sovereign function of providing pilotage services collapses in light of the dominant
22 private-business model for the provision of pilot services—a private business model that the
23 SFBP exemplifies. Provision of pilotage is not an innate aspect of sovereignty, nor is it a function
24 exclusively of government.

25 In truth, the relationship between the Board and the Port Agent is one between a regulatory
26 agency and one who is regulated. “The Port Agent . . . has responsibilities imposed by statute and
27 by administrative regulation.” (*Board of Pilot Commissioners, supra*, 218 Cal.App.4th at p. 589.)
28 The Board is the regulating agency and the Port Agent is a principal object of the Board’s

1 regulatory authority. The Board exercises regulatory power over the Port Agent through
2 regulations and occasional directives in furtherance of the state's regulatory regime. (Exh. A, p. 2,
3 ¶¶ 4, 5; Exh. B, p. 2, ¶ 9.) When performing the duties required of him by the state's regulatory
4 program, however, the Port Agent is not acting "on behalf of" the Board or as the Board's
5 "agent." (Exh. B, p. 2, ¶¶ 7-9.) As summarized by the Court of Appeal, "[T]he Board has
6 statutory licensing and oversight authority. But the individually licensed members of [the San
7 Francisco Bar Pilots] render piloting services directly to their maritime clients, not on behalf of
8 the Board. . . . And the Legislature has never given the Board the authority to make pilot
9 assignments or to direct them." (*Board of Pilot Commissioners, supra*, 218 Cal.App.4th at
10 p. 599.)

11 There are many instances where a state regulatory agency requires the performance of
12 functions by private business, but imposition of those duties does not thereby render the private
13 managers who are responsible for compliance "public officials" or "officers" of the regulating
14 agency. The examples are many: railroads are directed to connect to private spurs for shippers
15 and receivers of freight. (Pub. Util. Code, § 560.) They also must maintain fences on both sides of
16 their tracks. (*Id.* at § 7626.) And the Public Utilities Commission requires various reports from,
17 and the maintenance of records by, regulated utilities. (E.g., Pub. Util. Code, §§ 560, 581, 582,
18 3701, 3702, 3703; Cal. Code Regs., tit. 20, §§ 1301-1395.6.)

19 So with the Port Agent, his obedience to and execution of these regulatory duties imposed
20 by the Board does not render him an officer of the Board any more than PG&E's compliance with
21 the regulatory requirements of the PUC renders PG&E's president an officer or employee of the
22 PUC.

23 Further, contrary to PMSA's argument here, the Court of Appeal has concluded that the
24 Port Agent is not an officer of the Board. (*Board of Pilot Commissioners, supra*, 218 Cal.App.4th
25 577, 583, 588.) The Board has two officers, a President and a Vice President. (Cal. Code Regs.,
26 tit. 7, §§ 206, 207.) The Port Agent occupies neither position. (Exh. B, p. 1, ¶ 5.)

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1 **C. There is no Support for the Memorandum’s Conclusion that the Port**
2 **Agent is an Officer of the Board**

3 The Memorandum on this issue says simply: “The materials submitted by both parties in
4 this matter establish that in carrying out his duties, the Port Agent is an officer of the Board. . . .”
5 (Memorandum, p. 8.) And on page 9 it says: “Under the established facts and applicable law, the
6 Port Agent must be considered a state officer when performing the official duties provided by
7 statute and Board regulation.” The facts and law referred to are not identified. There is no
8 supporting explanation for either of these broad conclusions. No facts whatsoever are offered in
9 support of either statement. And the latter statement ignores the requirement that the asserted
10 officer must be an officer “of” and “with” the agency to be eligible for inclusion in the agency’s
11 Conflict of Interest Code. (See Gov. Code, § 82019, subd. (a).) There is an entire absence of the
12 “analytic route” required by *Topanga Assn. for a Scenic Community v. County of Los Angeles*
13 (1974) 11 Cal.3d 506, 515-516.

14 The Memorandum agrees that the term “officer” is not defined in the Act, but then simply
15 refers to other provisions of the Political Reform Act that use the term “officer,” also without
16 defining it. (*Id.* at pp. 8–9.) These other statutory references in no way support a conclusion that
17 the Port Agent is an officer of the Board. They are circular; a non sequitur.

18 The only legal authority proffered comes in footnote 7 on page 9, where *Board of Pilot*
19 *Commissioners, supra*, 218 Cal.App.4th 577, is said to be “consistent” with the Memorandum’s
20 conclusory “finding” that the Port Agent is a “state officer.”

21 This reliance on the Court of Appeal’s holding in *Board of Pilot Commissioners, supra*, 218
22 Cal.App.4th 577, is misplaced. The footnote is apparently based on PMSA’s quotation of the
23 court’s ultimate conclusion that it would, on equitable principles, choose to treat the Port Agent as
24 a state officer for purposes of the California Public Records Act. PMSA’s quotation omitted,
25 however, the page of discussion that preceded this conclusion. That discussion explained that the
26 Port Agent, but not the Board, was estopped from arguing that the Port Agent was not a “state
27 officer” for purposes of the California Public Records Act. When that explanatory material is
28

1 considered, the court's actual holding is revealed as quite different from that suggested by
2 PMSA's truncated excerpt.

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

16 Importantly, the court ruled that it was only the Port Agent, not the Board, that was barred
17 from arguing that the Port Agent was not a "state officer" under the Public Records Act. The
18 court stated: "The Board is, however, correct in its assertion that the doctrine [of judicial
19 estoppel] cannot be applied to it, since it was not a party to the [federal district court] proceeding
20 and has never adopted the position taken in that litigation by the Port Agent." (*Board of Pilot
21 Commissioners, supra*, 218 Cal.App.4th at p. 591, fn. 17.) The court chose not to rule on the
22 Board's argument that, as a matter of statutory interpretation, the Port Agent was not a "state
23 officer" under the Public Records Act, concluding only that, given the Port Agent's arguments in
24 the earlier federal lawsuit, it would treat the Port Agent as a "state officer." (*Id.* at pp. 590–591.)

25 The court's ultimate conclusion was that the Port Agent was not required to produce the
26 records sought because the evidence established that the records were not "public records." (*Id.* at
27 pp. 597–600.) This ruling rendered the court's discussion of the "state officer" issue dicta.
28

1 In any case, the court was not asked to decide, and did not decide, whether the Port Agent
2 was an “officer” of the Board within the meaning of the Political Reform Act provisions
3 concerning COI Codes. That was not an issue in the case. The issue before the court was whether
4 the Port Agent, after application of principles of judicial estoppel, should be regarded as a “state
5 officer” under the Public Records Act, and thus responsible for producing public records in
6 response to requests from the public.

7 **D. References to Where the Port Agent Sits at Meetings or to the Board**
8 **Website’s Listing of Staff and Others Such as Contract Investigators and**
9 **the Port Agent do not Determine Whether the Port Agent is an Officer of**
10 **the Board**

11 Two minor points mentioned in the Memorandum should be dealt with. Neither has any
12 bearing on whether the Port Agent is an officer of the Board.

13 The Memorandum mentions at page 5 that the Board’s website lists the Port Agent as
14 “staff.” Actually, the webpage lists the four employees of the Board, its five contract
15 investigators, the deputy attorney general who sits at the table during Board meetings, and the
16 Port Agent, who also sits at the table during Board meetings. A similar listing appears on the
17 Board’s contact information sheet for various individuals. There, the Port Agent’s name, title, and
18 contact information are not listed under “STAFF.” They are listed under “GENERAL
19 INFORMATION,” preceded by the subheading “San Francisco Bar Pilots.” Another subheading
20 on the sheet under “GENERAL INFORMATION” is titled “Pacific Merchant Shipping
21 Association” and lists “Michael Jacob, Vice President.” (Exh. C, Supp. Decl. of Peter McIsaac,
22 ¶ 3.) These informational listings of the Port Agent and others in Board documents do not
23 determine whether the Port Agent is an officer of the Board.

24 The Memorandum mentions at page 12 that the Port Agent “sits at the Commission table
25 with the members and staff of the Board.” As the Port Agent explains in his Supplemental
26 Declaration (Exh. C, ¶ 5): “For convenience in presenting the reports required of me by the Board
27 and in responding to occasional Board questions seeking information on other Board agenda
28 items, I sit near the end of one of the side tables that is closest to the audience. On occasions
when the Board sits to hear evidence concerning possible pilot discipline, I vacate my seat at the

1 side table and take a seat in the audience.” Where the Port Agent sits when making his required
2 reports to the Board does not determine whether he is an officer of the Board.

3 **II. THE PORT AGENT DOES NOT MAKE, OR PARTICIPATE IN THE MAKING OF,**
4 **GOVERNMENT DECISIONS**

5 PMSA may be arguing that, even if the Port Agent is not an officer of the Board, he must
6 be treated as such because, it is asserted, he makes or participates in the making of government
7 decisions. This argument conflates the Port Agent’s compliance with the Board’s regulations with
8 the Board’s government decisions concerning whether, what, and how to regulate. The only
9 government decisions involved here are those three: whether, what, and how to regulate. All three
10 are made by the Board and none by the Port Agent. While adoption of a regulatory directive by
11 the Board is a “government” decision, obedience to the directive by the Port Agent is not. For
12 instance, assigning pilots to vessels or administering the pilots’ vacation schedule in obedience to
13 the Board’s regulation (Cal. Code Regs., § 218(d)(1), (2)) does not itself involve “government”
14 decisions by the Port Agent. That might be the case only if the Board itself had governmental
15 responsibility for providing pilotage, assigning pilots, administering pilots’ vacations, and so
16 forth, and chose to delegate those “governmental” tasks to the Port Agent. But the Board itself is
17 not charged by statute with performing any of those functions. As the Court of Appeal held,
18 regarding assignment of pilots, in *Board of Pilot Commissioners v. Superior Court* (2013) 218
19 Cal.App.4th 577, 599:

20
21 Bar pilotage is a recognized but regulated monopoly, and the Board has statutory
22 licensing and oversight authority. But the individually licensed members of the Bar
23 Pilots render piloting services directly to their maritime clients, not on behalf of the
24 Board. The pilot work rules are generally established by the Bar Pilots and not by the
25 Board. And the Legislature has never given the Board the authority to make pilot
26 assignments *or to direct them*. (Italics added.)

27 So, assigning pilots to vessels (Cal. Code Regs., tit. 7, § 218(d)(1)) is not a “government
28 decision”; it is a decision made in the course of operating the Bar Pilots’ private business. The
Board has explicitly charged the Port Agent with that function, however, because it needs
someone to hold accountable if the assignment of pilots to vessels does not go smoothly and

1 maritime commerce is adversely affected. Absent this regulatory focus on the Port Agent, the
2 Board's only recourse would be to give direction to individual pilots, but because the individual
3 pilots do not determine their assignments, this would not be a workable alternative. As pointed
4 out in the Board's January 17, 2014 brief, this need to have one pilot—selected by the other
5 pilots—to respond to Board directives has been an essential element in the Board's regulatory
6 structure since the initial regulatory statute was enacted in 1850.

7 Further, none of the other Port Agent duties that PMSA mentions at pages 2 and 3 of its
8 January 17, 2014 brief involve "government decisions" of the Board. Specifically: administration
9 of pilots' vacation schedules (§ 218(d)(2)) is not a governmental responsibility of the Board. Nor
10 is collection of data, preparation of accounts, or payment to the Board of fees collected on its
11 behalf under section 218(d)(4). Nor is incident reporting under section 218(d)(7). Nor is reporting
12 of pilot incapacity under section 218(d)(8). Nor is ensuring that the pilots and pilot vessels on
13 hand are available when needed under section 218(d)(9).

14 Importantly, neither is deciding, for the safety of pilots and for the safety of those vessels
15 that are required to use pilots, whether, under section 218(d)(10) of the Board's regulations, to
16 "close the Bar" to some or all such vessels. This involves the rare circumstance (less than once a
17 year) of withholding pilot services in steep, heavy, and confused seas west of the Golden Gate in
18 the vicinity of the San Francisco Bar. This decision whether to cease providing pilot services on
19 grounds of pilot or vessel safety is not a decision that the Board is empowered by statute to make
20 (see Exh. B, Decl. of Allen Garfinkle, p. 2, ¶ 7), and it is one that the Port Agent would and does
21 make, independent of any directive from the Board, as President of a private pilotage business
22 (see Exh. C, Supp. Decl. of Peter McIsaac, p. 4, ¶ 8).⁷

23 ⁷ Paragraph 8 of Captain Peter McIsaac's Supplemental Declaration details why, how, and
24 when pilot services are withheld from certain vessels west of the Golden Gate (what is referred to
25 as "closing the Bar"): "Section 218(d)(10) of the Board's regulations requires me to 'order the
26 Bar closed for reasons of public, pilot, or vessel safety.' The 'Bar' is the San Francisco Bar, a
27 horseshoe-shaped sand bar located west of the Golden Gate. The U.S. Army Corps of Engineers
28 has dredged a shipping channel through the Bar of sufficient depth to accommodate inbound and
outbound vessels. The passage through the bar is marked by buoys on either side of the channel.
For purposes of the directive, 'closing the Bar' involves a situation where the seas west of the
Golden Gate are such that, for vessels requiring the services of a pilot, (1) pilots cannot safely
board or disembark such vessels; or (2) there is a danger of such vessels with shallower draft

(continued...)

1 All of these responsibilities implicate the orderly operation of a private business that is
2 essential to maritime commerce. But they are not part and parcel of a service provided by
3 government. Instead, as a matter of regulation, government has told the Port Agent: here's what
4 we need you to do to make this essential private service run smoothly. And if the Port Agent
5 doesn't perform adequately, then the Board is able to rectify that with further regulatory controls.

6 As noted earlier, there are many instances where a state regulatory agency requires the
7 performance of functions by private business, but compliance with these regulatory requirements
8 does not involve these businesses or their officers in making "government decisions."

9 **A. None of the Functions Required of the Port Agent Empower Him to**
10 **"Obligate" the Board to Make "Government Decisions" Dictated by the**
11 **Port Agent**

12 It is true that the Port Agent must report to the Board various matters that could prompt the
13 Board, in its discretion, to impose discipline against an individual pilot's license. That reporting
14 obligation is not a "government decision" that in any way "obligates" the Board, however.

15 Anyone can report alleged pilot negligence, malfeasance, or perceived incapacity to the Board,
16 and such reports sometimes come to the Board from private citizens independently of reports
17 from the Port Agent. The key point here is that the Port Agent does not gather and assess
18 evidence to decide whether the allegation is supported by the facts; that is a function initially of
19 the Board's Incident Review Committee (see § 1180.3) and ultimately of the Board (see

20 (...continued)

21 rolling too far over in steep, heavy, and confused seas; or (3) there is danger of such vessels with
22 deeper drafts bottoming out in the trough of a wave in steep seas during ebb tide. Conditions may
23 be such that it is safe to provide pilot services to some vessels but not others. In such situations, I
24 decide that pilot services cannot be safely provided to particular vessels that present special
25 dangers unique to them. In such situations, pilot services are withheld from such vessels only.
26 When I receive a report of such conditions from the SFBP pilot boat that is on station near the
27 westerly end of the channel, 11 miles west of the Golden Gate, I decide that it is unsafe for the
28 SFBP to provide pilot services. I so advise the U.S. Coast Guard's Captain of the Port, or the
Coast Guard duty officer if the Captain of the Port is unavailable, and recommend that the Bar be
closed. If the Coast Guard concurs, the Bar is closed to commercial traffic. On average, these
instances where pilot services are withheld occur less than once a year. My decision does not
affect vessels not required to use a pilot, which includes military vessels, enrolled vessels
engaged in the coastwise trade whose masters have appropriate Coast Guard pilotage
endorsements for their licenses, and vessels under 750 gross tons. My decision whether to cease
providing pilot services on grounds of pilot or vessel safety is one that I would and do make,
independent of any directive from the Board, because of my position as President of the SFBP, a
private business.

1 § 1180.6). Nor does the Port Agent decide, if the facts warrant some type of license discipline,
2 what that discipline should be. These types of functions are all committed to the Board alone for
3 decision. (*Ibid.*) These latter decisions are government decisions, but they are made by the Board
4 and not the Port Agent. The Port Agent can simply start the process, as can any private citizen; he
5 cannot control the ensuing investigation nor can he control the ultimate Board decision following
6 completion of the investigation. That is exclusively a Board function. The Port Agent cannot
7 “obligate” the Board to reach any particular government decision in such matters. These matters
8 are detailed in both the Garfinkle Declaration (Exh. B, ¶ 8) and the Supplemental McIsaac
9 Declaration (Exh. C, ¶ 6).

10 And while violation by a pilot of the Port Agent’s decisions concerning assignments to
11 vessels or the administration of pilot vacation schedules could possibly lead to discipline by the
12 Board, that is for the Board to decide, not the Port Agent. Many types of private conduct and
13 interactions between private parties can lead to sanctions by government, but that does not
14 compel a conclusion that such conduct and interactions are themselves “governmental” in nature.
15 Even if the bar pilots were unregulated, pilot assignments, for instance, would still have to be
16 made by someone in the business who was selected for that purpose. Would such assignments in
17 the course of operating a private business be “government decisions”? No. And the simple fact
18 that the Board might choose to make pilot disobedience to valid vessel assignments of the Port
19 Agent a subject of license discipline by the Board would not transmute such assignments into
20 “government decisions.”

21
22 **B. There is no Support for the Memorandum’s Conclusion that the Port
Agent “Obligates the Board” in Complying With the Board’s Regulations**

23 The Memorandum nonetheless concludes at page 10, without any analytical support, that:
24 “The Port Agent makes a governmental decision when assigning pilots to vessels; this decision
25 commits the Board, which bears the ultimate responsibility for ensuring proper pilot licensing and
26 fitness for duty.” There is no explanation of how assigning pilots to vessels “commits the Board,”
27 nor is it explained how assigning pilots to vessels relates to “ensuring proper pilot licensing” and
28 “fitness for duty.” And the statement conflicts with the Court of Appeal’s statement, cited earlier,

1 that the Board has no responsibility for assigning pilots to vessels. The cited letter from the
2 Acting Secretary of Transportation was simply a directive to the Port Agent to perform his duty to
3 assign pilots to an incoming vessel; in no way did it represent action by the agency to itself assign
4 a pilot; that is not its or the Board's function.

5 The Memorandum goes on to say at page 10 that "closing the Bar" by the Port Agent
6 "commits or obligates the Board to that course of action." Again, there is no explanation of how
7 such a decision by the Port Agent would "commit or obligate" the Board. As explained above, the
8 Board is not empowered by statute to close the Bar. The Memorandum therefore errs in saying at
9 page 11 that "This is a power reserved for the state and delegated to the Port Agent." And
10 contrary to the suggestion in the Memorandum, the SFBP does have the ability as a private
11 business to protect the safety of its pilots and of vessels in dangerous seas by withholding pilot
12 services. As stated in the Supplemental McIsaac Declaration (Exh. C, ¶ 8, lines 22–24): "My
13 decision whether to cease providing pilot services on grounds of pilot or vessel safety is one that I
14 would and do make, independent of any directive from the Board, because of my position as
15 President of the SFBP, a private business."

16 The statement that the Port Agent makes governmental decisions for the Board is without
17 basis in fact or law.

18 **C. There is no Support for the Memorandum's Conclusion that the Port**
19 **Agent Participates in Making Governmental Decisions.**

20 The Memorandum's conclusions concerning "participation" in government decisions by the
21 Port Agent are premised on section 18702.2 of the FPPC's regulations. That section, by reference
22 to section 18701(a)(2)(A) of the FPPC 's regulations, says a "public official" participates in
23 making a governmental decision when he or she "advises or makes recommendations to the
24 decisionmaker" designed to "influence" decisions regarding whether to "adopt or enforce a law"
25 or to "issue, deny, suspend, or revoke any . . . license"

26 In this section, the Memorandum at pages 11–13 makes the following statements, all
27 without benefit of any citation to evidence:
28

- 1 • The Port Agent “provides valuable input and information to the Board that helps the
2 Board make a decision with respect to issues [regarding pilot accidents or incidents]”
3 [As detailed in the Garfinkle and Supplemental McIsaac declarations, the Board makes
4 these decisions on its own, based only on the Incident Review Committee’s report and
5 other evidence brought before it; the Port Agent’s only role is to report the incident.]
- 6 • The Port Agent makes “recommendations and analysis regarding pilot availability and
7 absences” [The Port Agent’s reports on these matters are purely informational; he
8 makes no recommendations concerning the factual material in his reports and provides
9 no analysis. See, for example, Appendix 1 to the Supplemental Declaration of Peter
10 McIsaac (Exh. C), which is his monthly report to the Board at the March 2014 Board
11 meeting. And the reports bear no relation to adoption or enforcement of a law or
12 licensing matters.]
- 13 • The Port Agent determines “whether a pilot’s license may be properly renewed or
14 suspended” [As set forth at paragraph 6 of the Supplemental Declaration of Peter
15 McIsaac, the Port Agent does not offer advice or recommendations on these matters.]
- 16 • The Port Agent upholds minimum rest periods and keeps exceptions to a minimum.
17 [This is true, but it has nothing to do with adoption or enforcement of a law or issuance
18 or suspension of licenses. Further, the minimum rest period guidelines originated with
19 the SFBP; they are not a regulation adopted by the Board. (Exh. C, Supp. Decl. of Peter
20 McIsaac, ¶ 4.)]
- 21 • “When the Board does make governmental decisions, application of Regulation
22 18702.2 to the agreed facts indicates that the Port Agent indeed *participates* in making
23 those decisions.” [Once again, there is no explanation of how this broad conclusion was
24 reached or what evidence supports it. There is no indication of what “decisions” are
25 referred to.]
- 26 • The Port Agent presents analysis and opinions to the decisionmakers. [Again, no
27 specification of what decisions are being referred to or how such asserted advice relates
28 to adoption or enforcement of a law or licensing matters.]
- The Port Agent exercises “considerable discretion and judgment” in reporting matters
to the Board regarding a pilot’s ability to carry out his or her duties, “not only in
bringing the matter to the Board’s attention, but also in preparing the materials in an
attempt to persuade the Board.” [Again, there is no evidentiary support offered for this
statement. As detailed in the Garfinkle and Supplemental McIsaac declarations, the
Board makes these decisions on its own, based only on the Incident Review
Committee’s report and other evidence brought before it; the Port Agent’s only role is
to report to the Board]
- The Port Agent, in reporting absences, “must exercise discretion and judgment in
preparing the materials and making the appropriate determination as to the probably
duration of the absence and anticipated return to duty.” [Again, no evidence cited. And
there is no governmental decision here and no relation to adoption or enforcement of a
law or licensing matters. These reports are purely informational, and the anticipated
return date derives from what the Port Agent is told by the pilot and the pilot’s doctor;
there is no “discretion or judgment” exercised by the Port Agent on this issue, since he
lacks any medical expertise.]

The Memorandum ends with this penultimate paragraph:

1 Although many of the reports include statistics and hard data, some of the tasks
2 require the exercise of judgment, with a purpose to influence the Board's decisions.
3 Thus while the Board denies any influence or control that Port Agent reports and/or
4 recommendations may have on the voting members of the Board, the evidence
5 offered by both parties show that the Port Agent's reports, recommendations,
6 opinions and analysis fit squarely within the Act's definition of *participating* in the
7 making of governmental decisions.

8 Once again, these statements are all conclusions, with no supporting facts. Such broad
9 conclusory statements do not comply with what the Supreme Court requires of adjudicatory
10 decisions by administrative agencies. (*Topanga Assn. for a Scenic Community v. County of Los*
11 *Angeles* (1974) 11 Cal.3d 506, 515-516.) A reviewing court cannot be asked to speculate about
12 what evidence and subsidiary findings may have led an agency to such a generalized conclusion.
13 (*Id.* at p. 515.)

14 **III. IN RECOGNITION THAT THEY ARE NOT "DESIGNATED EMPLOYEES" OF THE STATE,**
15 **THE LEGISLATURE AND THE BOARD HAVE CREATED A SPECIAL CONFLICT-OF-**
16 **INTEREST CODE FOR THE PILOTS AND THE PORT AGENT**

17 Conflicts of interest are not confined to government. They exist in private business as well.
18 Such conflicts in the private sector are not reached by the Political Reform Act, which is
19 concerned only with the conflicts of interest of public officials. But the Legislature can and does
20 enact laws that regulate conflicts of interest in the private sector. Persons authorized to write
21 prescriptions, for instance, are barred from becoming licensed to conduct a pharmacy. (Bus. &
22 Prof. Code, § 4111.) Another example is the prohibition against health care licensees referring
23 patients for lab work, diagnosis, testing, or treatment if the licensee or his or her immediate
24 family has a financial interest with the person or in the entity that receives the referral. (Bus. &
25 Prof. Code, § 650.01, subd. (a).)

26 The Legislature has also chosen to regulate the conflicts of interest that can exist for the
27 pilots of the SFBP, who engage in the private business of providing pilot services. In the course
28 of regulating the pilots and the Port Agent, the Legislature has authorized, and the Board has
adopted, a special conflict of interest code for the pilots and the Port Agent. This separate conflict
of interest code would be unnecessary if either the pilots or the Port Agent were "designated
employees" of the Board who were already eligible for inclusion in the Board's Conflict of
Interest Code adopted under the Political Reform Act.

1 Section 1170.3 of the Harbors and Navigation Code requires the Board to adopt a pilot's
2 conflict of interest code, which "shall include, but need not be limited to, a provision specifying
3 that a pilot shall not have any interest in, or derive any income from, any tugboat [operating on
4 the pilotage grounds]."⁸ The Legislature adopted section 1170.3 in 1984, 10 years after passage of
5 the Political Reform Act of 1974. (Stats. 1984, ch. 1653, § 37.) The enactment of section 1170.3
6 is further evidence that the Legislature does not consider the Port Agent a "designated employee"
7 subject to the Political Reform Act.

8 The Board has carried out section 1170.3's directive by enacting section 222 of its
9 regulations (Cal. Code Regs., tit. 7, § 222), which covers pilots generally, but also names the Port
10 Agent specifically. "To assure that commerce is not disrupted and that fair competition is
11 maintained among tugboat operators and others who provide vessel assistance services [on the
12 pilotage grounds]," section 222(c) provides that "a pilot shall not have any interest in, or derive
13 any income from, any tugboat in operation on [the pilotage grounds]." Further, section 222
14 recognizes that a pilot may acquire information regarding vessel movements before it is available
15 to others, and it prohibits a pilot from using such information "for financial gain" or giving it to
16 others "who may benefit or otherwise profit from obtaining such information before it is
17 generally available to the public." (§ 222(a).) Section 222(b) specifically includes the Port Agent
18 in a ban against providing information "obtained . . . by virtue of his or her status as a pilot *or*
19 *Port Agent*, to any entity except as is necessary to the discharge of his or her duties as a pilot *or*
20 *Port Agent*." (Italics added.)⁹ Again, if the Port Agent were already subject to inclusion in the

21 ⁸ The full text of section 1170.3 is as follows:

22 1170.3. (a) The board shall adopt, by regulation, a pilot's conflict-of-interest code, which
23 shall include, but need not be limited to, a provision specifying that a pilot shall not have any
24 interest in, or derive any income from, any tugboat in operation on Monterey Bay and the Bays of
San Francisco, San Pablo, and Suisun. This requirement of divestiture does not apply to the
ownership of barges and vessels similar to barges.

25 (b) The conflict-of-interest code shall not prohibit the ownership of stock in any
26 corporation registered on a national securities exchange or on the National Market System of the
NASDAQ Stock Market, pursuant to Section 78f of Title 15 of the United States Code, which
27 may own tugboats in operation on Monterey Bay and the Bays of San Francisco, San Pablo, and
Suisun.

28 ⁹ The complete text of section 222 of the Board's regulations reads as follows:

(continued...)

1 Board's Conflict of Interest Code under the act, this regulation would not be necessary. The
2 regulation implicitly recognizes that the Port Agent is not a "designated employee" within the
3 meaning of the act. "Designated employees" are covered in section 212.5 of the Board's
4 regulations, which is the Board's Conflict of Interest Code adopted under the Political Reform
5 Act. Disclosure Category 1 under section 212.5 requires disclosure of business positions or
6 income from tugboats, whereas—for pilots and the Port Agent—such positions or income are
7 prohibited outright under both Harbors and Navigation Code section 1170.3 and section 222(c) of
8 the Board's regulations.

9 From the foregoing, one can see that the Board—acting under a legislative directive
10 separate and apart from the Political Reform Act—has considered possible conflicts-of-interest
11 involving the Port Agent, has identified specific potential conflicts, and has acted to prohibit
12 them. In contrast, PMSA repeatedly speculates—offering not a single concrete example—about
13 what other conflicts might arise in the Port Agent's discharge of the duties that the Board has
14 directed him to perform. If these vague allusions to conflicts were real, they could be brought to
15 the Board's attention and the Board could amend section 222 accordingly.

16 _____
17 (...continued)

18 **§ 222. Conflicts of Interest.**

19 (a) It is recognized that a pilot may acquire or have access to information, before it is
20 available to others, about the movement of vessels. A pilot has a duty not to utilize such
21 information for financial gain or to provide such information to others who may benefit or
22 otherwise profit from obtaining such information before it is generally available to the public.

23 (b) A pilot shall not provide information or knowledge regarding vessel schedules obtained
24 by the pilot, by virtue of his or her status as a pilot or Port Agent, to any entity except as is
25 necessary to the discharge of his or her duties as a pilot or Port Agent.

26 (c) To assure that commerce is not disrupted and that fair competition is maintained among
27 tugboat operators and others who provide vessel assistance services on Monterey Bay or on the
28 Bays of San Francisco, San Pablo or Suisun, a pilot shall not have any interest in, or derive any
income from, any tugboat in operation on Monterey Bay or on the Bays of San Francisco, San
Pablo or Suisun.

(d) Nothing contained in subsection (c) of this section shall prohibit ownership, directly or
indirectly, of stock in any corporation registered on a national securities exchange, pursuant to
Section 78f of Title 15 of the United States Code, even though the corporation may own tugboats
in operation on the waters subject to the Board's jurisdiction.

(e) Nothing contained in subsection (c) of this section shall prohibit any pilot from owning,
directly or indirectly, or controlling any barge or vessel similar to a barge. A barge or a vessel
similar to a barge for purposes of this subsection is a vessel constructed and operated for the
purpose of transporting cargo and which is not used to assist with the movement of vessels.

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CONCLUSION

The Port Agent, along with his fellow pilots, is the object of government regulation. He is not the Board’s “agent” or “acting on behalf of the Board” in furtherance of a “sovereign government function” whereby the Board itself provides pilotage services. Because the Port Agent is not a member, officer, employee, or consultant of the Board, the Board respectfully requests that the Commission affirm the Board’s decision declining to add the Port Agent to the Board’s Conflict of Interest Code.

Dated: April 22, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California



DENNIS M. EAGAN
Deputy Attorney General
*Attorneys for Board of
Pilot Commissioners*

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Exh A

DECLARATION OF PETER McISAAC

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2
3 I, PETER McISAAC, declare:

4 1. I am one of 58 members of the San Francisco Bar Pilots ("SFBP") and have served as
5 a pilot since 1994. I am currently serving my fifth two-year term as President of the SFBP. I was
6 elected president by the other members of the SFBP. I and the other members of the SFBP are
7 maritime pilots. I select and assign pilots to provide piloting services to vessels over the pilotage
8 grounds that are specified in sections 1110 and 1114.5 of the Harbors and Navigation Code,
9 including the San Francisco Bar, which lies west of the Golden Gate; San Francisco, San Pablo,
10 Suisun, and Monterey Bays; and the Sacramento and San Joaquin Rivers as far inland as the Ports
11 of Sacramento and Stockton. Each pilot charges a fee for the pilotage services rendered, which is
12 the liability of the vessel served. The fees are set by the California Legislature.

13 2. The SFBP is a private unincorporated association. It was formed by individual pilots
14 to perform certain functions of common benefit to the pilots. The association provides support for
15 the conduct of the pilots' business, including pilot boats and crews to transport pilots to their
16 assignments, office space and mooring facilities at Pier 9 in San Francisco, fiscal and other office
17 staff, dispatchers to accept requests for pilotage services from ship's agents, billing and collection
18 services, and provision of insurance and other benefits for association employees and the pilots.
19 The purpose of the organization is to operate all aspects of the SFBP's business, both those
20 aspects of the business that are regulated by the Board of Pilot Commissioners and those that are
21 not. After all expenses are paid, the pilots, as members of the association, share net revenues
22 generated by their pilotage services. The SFBP's offices at Pier 9 are not open to the public. The
23 SFBP has 35 employees, consisting of 28 union employees (5 dispatchers and 23 boat personnel)
24 and 6 non-union employees.

25 3. The Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and
26 Suisun ("Board") is a regional state agency that is charged with licensing and regulating the pilots
27 who pilot vessels on the pilotage grounds described in sections 1110 and 1114.5 of the Harbors
28 and Navigation Code. All of the pilots, including me, are required to obtain a license as a pilot

1 from the Board. Under section 1177 of the Harbors and Navigation Code, all pilots are also
2 required to obtain endorsements to their federal license from the U.S. Coast Guard, authorizing
3 them to pilot vessels on the pilotage grounds.

4 4. In furtherance of its regulatory function, the Board, by regulation, has imposed
5 certain duties upon the pilots. The regulations are set forth in title 7 of the California Code of
6 Regulations, sections 201-237. Some of the duties imposed by regulation are directed to all
7 licensed pilots. Section 219 is an example of such a regulation. The Board, by section 218 of its
8 regulations, has imposed other duties specifically applicable to the licensed pilot who is serving
9 as Port Agent.

10 5. Under section 218 of the Board's regulations, the Port Agent is charged by regulation
11 with a range of duties, including assigning pilots to vessels, reporting to the Board incidents that
12 may justify disciplinary action against a pilot, ensuring that adequate pilots and pilot vessels are
13 available for performance of piloting duties, reporting to the Board a pilot's absence due to illness
14 lasting longer than seven days, and ordering the San Francisco Bar closed for reasons of public,
15 pilot, or vessel safety.

16 6. By a vote of the pilots who are members of the SFBP, I was appointed as Port Agent
17 and am currently serving in that position. As authorized by statute, the Board confirmed my
18 appointment, but it did not itself make the appointment. The appointing function lies solely with
19 the membership of the SFBP. I am currently serving my fifth two-year term as Port Agent. At all
20 times during my membership in the SFBP, the pilot serving as President of the SFBP has
21 simultaneously served as Port Agent.

22 7. None of the pilots, including me, are employees of the Board of Pilot Commissioners
23 or any other state agency, and none of us receives any compensation from the Board of Pilot
24 Commissioners or any other state agency. Neither the Board nor any other state agency provides
25 any funding, staff, office space, or other facilities to any of the pilots, including me, with the
26 exception of the two pilots who serve as members of the Board. I perform all of my duties, both
27 as President and Port Agent, at the private offices of the association located at Pier 9.
28

1 8. In the course of my duties as President of the SFBP, I have occasion to communicate
2 and share information with pilots who perform pilotage services in other west coast ports and
3 pilotage grounds. By virtue of these interactions, I am familiar with the manner in which pilotage
4 services are delivered in these other locations. In Oregon and Washington, for instance, the model
5 is similar to the regulatory model used by the Board of Pilot Commissioners for the Bays of San
6 Francisco, San Pablo, and Suisun. That is, local pilots are licensed and regulated by a state
7 agency, but the agency does not itself provide pilotage services; those services are provided by
8 pilots who operate as a private business. The Port of Los Angeles uses a different model. There,
9 the pilots navigating vessels in and out of the Port of Los Angeles are employees of the city's
10 Harbor Department; it is the city itself, through its port, that provides pilotage services. These
11 municipal pilots are not licensed as pilots by the city or its port. Instead, the only pilot licenses
12 that they hold are those issued by the U.S. Coast Guard. Finally, there is the model of the Port of
13 Long Beach. There, pilotage services are provided under a contract between the Port and a
14 privately owned pilotage company, Jacobsen Pilot Service Inc. The Jacobsen pilots are not
15 licensed by any state or regional governmental agency, but do hold pilot licenses issued by the
16 U.S. Coast Guard.

17 9. I am not a member of the Board.

18 10. I am not an officer of the Board.

19 11. I am not a consultant of the Board. There is no contract between the Port Agent and
20 the Board for the performance of services.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct and that this declaration is signed on January 15, 2014, in San
23 Francisco, California.

24
25 
26 PETER McISAAC

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Exh B

DECLARATION OF ALLEN GARFINKLE

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3 1. I am the Executive Director of the Board of Pilot Commissioners for the Bays of San
4 Francisco, San Pablo, and Suisun ("Board"). I was appointed to that position by the Board and
5 have held that position for four years. My position is exempt from state civil service. My duties
6 are set forth in section 1156 of the Harbors and Navigation Code. Among other duties, I
7 administer and supervise the other employees of the Board.

8 2. The Board has three employees other than myself: an Assistant Director, who is
9 exempt from state civil service and is appointed by the Secretary of the California State
10 Transportation Agency, and two state civil service employees, a Staff Services Analyst and an
11 Office Technician, who are appointed by the Board. The Board has no other employees.

12 3. Specifically, Captain Peter McIsaac, the Port Agent, is not an employee of the Board,
13 and I am not charged with directing or supervising his work. Captain McIsaac receives no
14 compensation from the Board for performing the duties required of him by Board regulations or
15 other regulatory directives. Captain McIsaac does not have an office or work space at the Board
16 offices at 660 Davis Street in San Francisco. Nor does he have Board staff or facilities available
17 to him to perform any of the duties that the Board has imposed upon him as Port Agent in
18 furtherance of the Board's regulatory responsibilities.

19 4. The Board has seven voting members, consisting of three public members; two
20 representatives of industry, one from tanker company operations and one from dry cargo
21 operations; and two licensed pilots. The Secretary of the California State Transportation Agency
22 sits ex officio as an eighth, non-voting member of the Board. Captain McIsaac is not a member of
23 the Board.

24 5. The Board has two officers, a President and a Vice President, who are selected from
25 among the membership of the Board. The current President of the Board is Admiral Frank
26 Johnston and the current Vice President is Mr. Dave Connolly. Captain McIsaac is not an officer
27 of the Board.
28

1 6. My duties include administering contracts to which the Board is a party. I am familiar
2 with all such contracts. There is no contract between the Board and the Port Agent for the
3 performance of services or for any other purpose. Captain McIsaac is not a consultant of the
4 Board.

5 7. Captain McIsaac is not the Board's agent for any purpose. His actions do not bind the
6 Board and he does not act to discharge the duties of the Board. None of the duties of the Port
7 Agent specified in section 218 of the Board's regulations, for instance, are duties of the Board. As
8 examples, the Board has no responsibility to assign pilots to vessels or to order closure of the San
9 Francisco Bar. More generally, the Board itself does not provide pilotage services; those are
10 provided by a private business, the members of which are pilots licensed by the Board. The Board
11 regulates those who provide the services but does not itself provide the services.

12 8. As Executive Director, I am a member of the Incident Review Committee ("IRC").
13 The IRC investigates situations in which a pilot may have been guilty of conduct that would
14 warrant disciplinary action by the Board and makes recommendations to the Board on such
15 matters. At public hearings to review IRC recommendations, the Board takes evidence and
16 decides whether disciplinary action is warranted. Under section 218(d)(6) and (7) of the Board's
17 regulations, the Port Agent is required to report to me "all accidents, groundings, collisions or
18 similar navigational incidents involving vessels to which a pilot has been assigned, as well as
19 suspected pilot misconduct, pilot violations of these regulations or the Harbors and Navigation
20 Code, and other matters for which a pilot may be disciplined by the Board." The Port Agent has
21 no role in deciding whether discipline is appropriate; that is strictly for the Board. In my four
22 years as Executive Director, I do not recall any instance of the Port Agent reporting, or the IRC
23 investigating, an alleged violation by a pilot of a directive by the Port Agent.

24 9. Captain McIsaac is licensed as a pilot by the Board. Along with the other pilots, who
25 are also licensees of the Board, he is regulated by the Board. Such duties as he and the other pilots
26 have are imposed by the regulations of the Board or by the regulatory directives of the Board.
27 These duties, including Captain McIsaac's duties as Port Agent, do not arise by virtue of anything
28 other than the regulations of the Board and the regulatory directives of the Board; there is no

1 other relationship between the Port Agent and the Board—whether by agency, employment, or
2 otherwise—that gives rise to these duties.

3 10. The Board's Conflict of Interest Code under the Political Reform Act is set forth in
4 section 212.5 of the Board's regulations. The Conflict of Interest Code does not include the Port
5 Agent. Another section of the Board's regulations, however, section 222, prescribes a conflict of
6 interest code applicable to all pilots, under the authority of section 1170.3 of the Harbors and
7 Navigation Code.

8 11. Prior to my employment as Executive Director, I was employed as a ship's master for
9 Matson. I captained Matson ships that called periodically at the Port of Los Angeles and the Port
10 of Long Beach. By virtue of those calls, I am familiar with the manner in which pilotage services
11 are provided at those ports. The provision of pilotage services in the Port of Los Angeles differs
12 from that employed in the pilotage grounds regulated by the Board. There, the pilots navigating
13 vessels in and out of the Port of Los Angeles are employees of the city's Harbor Department; it is
14 the city itself, through its port, that provides pilotage services. These municipal pilots are not
15 licensed as pilots by the city or its port. Instead, the only pilot licenses that they hold are those
16 issued by the U.S. Coast Guard. Next door, in the Port of Long Beach, still another means is used
17 to provide pilotage services. In the Port of Long Beach, pilotage services are provided under a
18 contract between the Port and a privately owned pilotage company, Jacobsen Pilot Service Inc.
19 The Jacobsen pilots are not licensed by any state or regional governmental agency, but do hold
20 pilot licenses issued by the U.S. Coast Guard.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct and that this declaration is signed on January 16, 2014, in San
23 Francisco, California.

24
25 

26 ALLEN GARFINKLE

Exh C

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8 Pilot Commissioners

9 FAIR POLITICAL PRACTICES COMMISSION

10 STATE OF CALIFORNIA

12 **PACIFIC MERCHANT SHIPPING ASSOCIATION,**

13 Appellant,

14 v.

16 **BOARD OF PILOT COMMISSIONERS FOR THE
BAYS OF SAN FRANCISCO SAN PABLO, AND
17 SUISUN,**

18 Respondent.

Case No.

**SUPPLEMENTAL DECLARATION OF
PETER McISAAC**

19
20 I, Peter McIsaac, declare:

21 1. I am one of 58 members of the San Francisco Bar Pilots ("SFBP") and have served as
22 a pilot since 1994. I am currently serving my fifth two-year term as President of the SFBP. I was
23 elected President by the other members of the SFBP. I and the other members of the SFBP are
24 maritime pilots. I select and assign pilots to provide piloting services to vessels over the pilotage
25 grounds that are specified in sections 1110 and 1114.5 of the Harbors and Navigation Code,
26 including the San Francisco Bar, which lies west of the Golden Gate; San Francisco, San Pablo,
27 Suisun, and Monterey Bays; and the Sacramento and San Joaquin Rivers as far inland as the Ports
28

1 of Sacramento and Stockton. Each pilot charges a fee for the pilotage services rendered, which is
2 the liability of the vessel served. The fees are set by the California Legislature.

3 2. I hereby incorporate by reference my earlier declaration in this matter, dated January
4 15, 2014. As set forth in paragraphs 7, 9, and 10 of my earlier declaration, I specifically reiterate
5 that I am not an officer, member, or employee of the Board of Pilot Commissioners for the Bays
6 of San Francisco, San Pablo, and Suisun.

7 3. Contrary to the statement by Pacific Merchant Shipping Association in its briefs, I am
8 not listed under the "STAFF" heading of the two-page sheet prepared by Board staff that lists
9 contact information for certain individuals. My name is instead listed, along with numerous
10 others, under the heading "GENERAL INFORMATION," preceded by the subheading "San
11 Francisco Bar Pilots." Another subheading under "GENERAL INFORMATION" is titled
12 "Pacific Merchant Shipping Association" and lists "Michael Jacob, Vice President."

13 4. On the agenda for each Board meeting, the following agenda item appears:

14 Port Agent's Report – San Francisco Bar Pilot (SFBP) Port Agent Capt.

15 Peter McIsaac

16 A) Monthly report on SFBP ship piloting business activity.

17 B) Monthly report on pilot availability and absences.

18 C) Monthly confidential written report of pilots who have been absent for
19 medical reasons (AFMR) presented to Board. Board may go into Closed
20 Session to discuss contents of the Port Agent's confidential report as
21 authorized by Harbors and Navigation Code, section 1157.1.

22 I do not participate in the closed session authorized by this agenda item. My monthly report
23 includes a section on "minimum rest period exceptions." Based on a 1986 private study, the SFBP
24 itself implemented a policy that targets a minimum rest period for pilots of 12 hours after a
25 certain amount of duty time. This guideline is not one issued by the Board, but I report
26 "exceptions" to this guideline at the Board meetings for informational purposes. As a typical
27 example of the three reports referenced in the above agenda item, I have attached as Appendix 1
28

1 to this declaration a true and correct copy of the report that I presented at the Board's March 2014
2 meeting.

3 5. At the monthly Board meetings, the Board members sit in a "horseshoe" table
4 arrangement that has a head table and tables on either side of the head table that extend at right
5 angles from the head table, toward the public seating area. The Board President sits at the head
6 table with two other Board members. The remaining Board members sit at the side tables,
7 immediately adjacent to the Board members at the head table. For convenience in presenting the
8 reports required of me by the Board and in responding to occasional Board questions seeking
9 information on other Board agenda items, I sit near the end of one of the side tables that is closest
10 to the audience. On occasions when the Board sits to hear evidence concerning possible pilot
11 discipline, I vacate my seat at the side table and take a seat in the audience.

12 6. As required by section 218 of the Board's regulations, I make informational reports to
13 the Board. Among these reports are reports of navigational incidents involving pilots. These
14 incidents are then investigated by the Board's Incident Review Committee, consisting of the
15 Board's Executive Director and one public member of the Board. Upon completion of its
16 investigation, the Incident Review Committee makes a report to the Board that includes a
17 recommendation. I do not advise or make any recommendation concerning these
18 recommendations to the Board by the IRC, nor do I independently advise or make
19 recommendations to the Board concerning whether to suspend or revoke a pilot's license. I do not
20 vote on the IRC's recommendation and I do not go into closed session with the Board when it
21 deliberates on the evidence introduced at the hearing. Further, I do not advise or make
22 recommendations to the Board concerning whether to issue or deny a pilot's license.

23 7. Under section 218(d)(3) of the Board's regulations, I am required to "represent pilots
24 before the Board and its committees." In this role, I may have occasion to express the views of
25 the pilots on the proposed adoption of a piece of legislation or the proposed adoption of a Board
26 regulation, but my role in this context is no different from that of any interested party, be it a
27 member of the general public or a trade group such as the Pacific Merchant Shipping Association.

28

1 8. Section 218(d)(10) of the Board's regulations requires me to "order the Bar closed for
2 reasons of public, pilot, or vessel safety." The "Bar" is the San Francisco Bar, a horseshoe-shaped
3 sand bar located west of the Golden Gate. The U.S. Army Corps of Engineers has dredged a
4 shipping channel through the Bar of sufficient depth to accommodate inbound and outbound
5 vessels. The passage through the bar is marked by buoys on either side of the channel. For
6 purposes of the directive, "closing the Bar" involves a situation where the seas west of the Golden
7 Gate are such that, for vessels requiring the services of a pilot, (1) pilots cannot safely board or
8 disembark such vessels; or (2) there is a danger of such vessels with shallower draft rolling too far
9 over in steep, heavy, and confused seas; or (3) there is danger of such vessels with deeper drafts
10 bottoming out in the trough of a wave in steep seas during ebb tide. Conditions may be such that
11 it is safe to provide pilot services to some vessels but not others. In such situations, I decide that
12 pilot services cannot be safely provided to particular vessels that present special dangers unique
13 to them. In such situations, pilot services are withheld from such vessels only. When I receive a
14 report of such conditions from the SFBP pilot boat that is on station near the westerly end of the
15 channel, 11 miles west of the Golden Gate, I decide that it is unsafe for the SFBP to provide pilot
16 services. I so advise the U.S. Coast Guard's Captain of the Port, or the Coast Guard duty officer if
17 the Captain of the Port is unavailable, and recommend that the Bar be closed. If the Coast Guard
18 concurs, the Bar is closed to commercial traffic. On average, these instances where pilot services
19 are withheld occur less than once a year. My decision does not affect vessels not required to use a
20 pilot, which includes military vessels, enrolled vessels engaged in the coastwise trade whose
21 masters have appropriate Coast Guard pilotage endorsements for their licenses, and vessels under
22 750 gross tons. My decision whether to cease providing pilot services on grounds of pilot or
23 vessel safety is one that I would and do make, independent of any directive from the Board,
24 because of my position as President of the SFBP, a private business.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is signed on April 21, 2014, in San Francisco, California


PETER McISAAC

OK2014312315
McIsaac Supp Decl 4 21 14.doc

APPENDIX 1
TO
EXHIBIT C

Port Agent Report to BOPC

March 27th, 2014

ABSENT FOR MEDICAL REASONS (AFMR) REPORT:

Captain Michael Sweeney has been AFMR since Dec 19th. He was placed on medical disability leave by a board contracted physician on Dec 20th

Captain Ray Ridens was AFMR from Dec 20th to March 9th.

Captain Roger Kirk has been AFMR since Feb 26th.

RECOMMENDED MINIMUM REST PERIOD EXCEPTIONS:

We continually monitor the dispatch list for possible MRP exceptions. If the potential exception is likely to result in a rest period of less than 10 hours mitigating measures are employed. These measures include, but are not limited to, suspending continuing professional development protocols, cancelling scheduled meetings, cancelling previously granted comp time requests, suspending our internal working rules, or calling in off-watch pilots.

There were three (3) MRP exceptions during the month of February. We currently have 58 licensed pilots which is two less than the 60 authorized.

Feb 21st: Three (3) exception's with the shortest being 9.7 hours. There was 1 pilot AFMR.

PILOT BOAT REPORT:

The P/V California was taken out of service on March 19th to replace a malfunctioning temperature alarm on the starboard generator.

BILLED VESSEL MOVES IN February 2014 COMPARED TO A 3 YEAR AVERAGE:

Bar X's: (500), +3.7%

Bay Moves: (113), +19.9%

River Moves: (52), +22.6%

Total Moves: (611), +7.0%

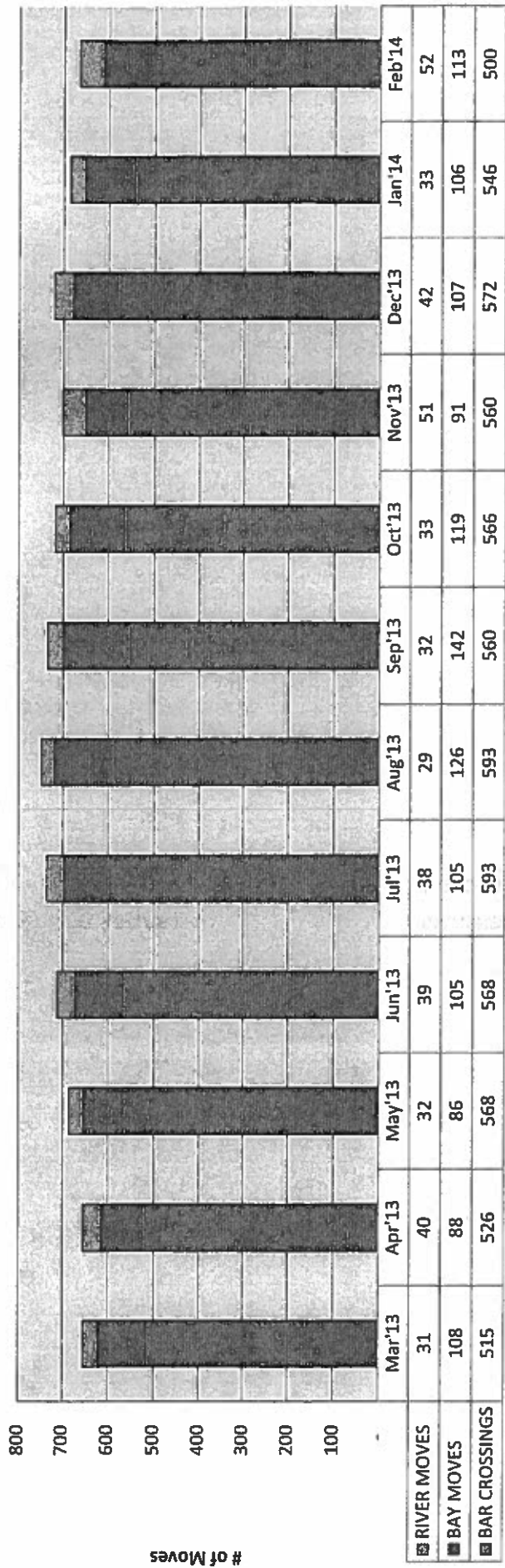
GRT: (26.1M), +9.9%

When compared to 2013 total moves were up 7% and GRT were up 9%.

**SAN FRANCISCO BAR PILOTS
SHIP MOVEMENTS**

| | Mar'13 | Apr'13 | May'13 | Jun'13 | Jul'13 | Aug'13 | Sep'13 | Oct'13 | Nov'13 | Dec'13 | Jan'14 | Feb'14 | TOTAL |
|---------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|-------|
| BAR CROSSINGS | 515 | 526 | 568 | 568 | 593 | 593 | 560 | 566 | 560 | 572 | 546 | 500 | 6,667 |
| BAY MOVES | 108 | 88 | 86 | 105 | 105 | 126 | 142 | 119 | 91 | 107 | 106 | 113 | 1,296 |
| RIVER MOVES | 31 | 40 | 32 | 39 | 38 | 29 | 32 | 33 | 51 | 42 | 33 | 52 | 452 |
| TOTAL | 654 | 654 | 686 | 712 | 736 | 748 | 734 | 718 | 702 | 721 | 685 | 665 | 8,415 |

**San Francisco Bar Pilots
Bar Crossings & Moves - rolling 12 months**



Updated thru:
3/19/2014

2014 SF BAR PILOTS INJURY/ILLNESS REPORT

CONFIDENTIAL

| Surname | First Name | Publication Date | Return to Work Date | Allegation Medical Record (SFR/MR) | Notifiable BOPC (Date) | Medical Disability Effective Date | Equivalent Return Date (BOPC) | Photo-Diary Date (BOPC Doctor) | Nature of Illness | Doctor's Notes Received Dates |
|---------|--------------------|------------------|---------------------|--|------------------------|-----------------------------------|-------------------------------|--------------------------------|--------------------|---|
| C | Raymond Ridens | 12/20/13 | 3/9/2014 | 1st note- 12/21/13 - 12/31/13 (as per own doctor) 2nd note- 12/20/13 - 2/9/14 (as per own doctor) 3rd note- 1/6/14 - 3/9/14 (as per own doctor) | | | | | arm injury | 1st note- 12/21/2013 2nd note - 12/24/2013 3rd note - 1/16/2014 |
| A | Michael Sweeney | 12/19/13 | pending | 1st note- 12/19/13 (as per BOPC doctor) | 12/19/13 | | | | medical evaluation | 1st note- 12/19/2013 |
| A | Roger Kirk | 02/26/14 | pending | 1st note- 2/26/14 - 3/17/14 (as per own doctor) 2nd note- 3/17/14 - 4/14/14 (as per own doctor) | | | | | back injury | 1st note- 3/10/14 2nd note- 3/20/14 |

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Pacific Merchant Shipping Association v. Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun**

No.: **None assigned**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550.

On April 22, 2014, I served the attached **BRIEF OF BOARD OF PILOT COMMISSIONERS ON APPEAL FROM ORDER OF GENERAL COUNSEL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

Mike Jacob
Vice President & General Counsel
Pacific Merchant Shipping Association
250 Montgomery Street, Suite 700
San Francisco, CA 94104

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 22, 2014, at Oakland, California.

Larry Jefferson
Declarant



Signature