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February 7, 2014

Emelyn Rodriguez
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814-2329

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 Ms. Rodriguez:

Enclosed is the original of the SUPPLEMENTAL BRIEF OF BOARD OF PILOT COMMISSIONERS IN OPPOSITION TO APPEAL OF PACIFIC MERCHANT SHIPPING ASSOCIATION, which was e-mailed to you on Friday, February 7, 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:fc

cc w/encl.: Mike Jacob
Vice President and General Counsel
Pacific Maritime Shipping Association

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9 FAIR POLITICAL PRACTICES COMMISSION

10 STATE OF CALIFORNIA

11
12 **PACIFIC MERCHANT SHIPPING ASSOCIATION,**

13
14 Appellant,

15 v.

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

18 Respondent.

**SUPPLEMENTAL BRIEF OF BOARD
OF PILOT COMMISSIONERS IN
OPPOSITION TO APPEAL OF PACIFIC
MERCHANT SHIPPING ASSOCIATION**

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1 **I. IN RECOGNITION THAT THEY ARE NOT “DESIGNATED EMPLOYEES” OF THE STATE,**
2 **THE LEGISLATURE AND THE BOARD HAVE CREATED A SPECIAL CONFLICT-OF-**
3 **INTEREST CODE FOR THE PILOTS AND THE PORT AGENT**

4 In the course of regulating the pilots and the Port Agent, the Legislature has authorized, and
5 the Board has adopted, a special conflict of interest code for the pilots and the Port Agent. This
6 separate conflict of interest code would be unnecessary if either the pilots or the Port Agent were
7 “designated employees” of the Board who were already eligible for inclusion in the Board’s
8 Conflict of Interest Code adopted under the Political Reform Act.

9 Section 1170.3 of the Harbors and Navigation Code¹ requires the Board to adopt a pilot’s
10 conflict of interest code, which “shall include, but need not be limited to, a provision specifying
11 that a pilot shall not have any interest in, or derive any income from, any tugboat [operating on
12 the pilotage grounds].”² The Legislature adopted section 1170.3 in 1984, 10 years after passage of
13 the Political Reform Act of 1974. (Stats. 1984, ch. 1653, § 37.) The enactment of section 1170.3
14 is further evidence that the Legislature does not consider the Port Agent a “designated employee”
15 subject to the Political Reform Act.

16 The Board has carried out section 1170.3’s directive by enacting section 222 of its
17 regulations (Cal. Code Regs., tit. 7, § 222), which covers pilots generally, but also names the Port
18 Agent specifically. “To assure that commerce is not disrupted and that fair competition is
19 maintained among tugboat operators and others who provide vessel assistance services [on the
20 pilotage grounds],” section 222(c) provides that “a pilot shall not have any interest in, or derive

21 ¹ Unless otherwise indicated, all code section references are to the Harbors and Navigation
22 Code.

23 ² The full text of section 1170.3 is as follows:

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

(b) The conflict-of-interest code shall not prohibit the ownership of stock in any
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
may own tugboats in operation on Monterey Bay and the Bays of San Francisco, San Pablo, and
Suisun.

1 any income from, any tugboat in operation on [the pilotage grounds].” Further, section 222
2 recognizes that a pilot may acquire information regarding vessel movements before it is available
3 to others, and it prohibits a pilot from using such information “for financial gain” or giving it to
4 others “who may benefit or otherwise profit from obtaining such information before it is
5 generally available to the public.” (§ 222(a).) Section 222(b) specifically includes the Port Agent
6 in a ban against providing information “obtained . . . by virtue of his or her status as a pilot *or*
7 *Port Agent*, to any entity except as is necessary to the discharge of his or her duties as a pilot *or*
8 *Port Agent*.” (Italics added.)³ Again, if the Port Agent were already subject to inclusion in the
9 Board’s Conflict of Interest Code under the act, this regulation would not be necessary. The
10 regulation implicitly recognizes that the Port Agent is not a “designated employee” within the
11 meaning of the act. “Designated employees” are covered in section 212.5 of the Board’s
12 regulations, which is the Board’s Conflict of Interest Code adopted under the Political Reform
13 Act. Disclosure Category 1 under section 212.5 requires disclosure of business positions or
14 income from tugboats, whereas—for pilots and the Port Agent—such positions or income are
15

16 ³ The complete text of section 222 of the Board’s regulations reads as follows:

17 **§ 222. Conflicts of Interest.**

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

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

(c) To assure that commerce is not disrupted and that fair competition is maintained
among tugboat operators and others who provide vessel assistance services on Monterey Bay or
on the 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.

1 prohibited outright under both Harbors and Navigation Code section 1170.3 and section 222(c) of
2 the Board's regulations.

3 It is obvious from the foregoing that the Board—acting under a legislative directive
4 separate and apart from the Political Reform Act—has considered possible conflicts-of-interest
5 involving the Port Agent, has identified specific potential conflicts, and has acted to prohibit
6 them. In contrast, PMSA repeatedly speculates—offering not a single concrete example—about
7 what other conflicts might arise in the Port Agent's discharge of the duties that the Board has
8 directed him to perform. If these vague allusions to conflicts were real, they could be brought to
9 the Board's attention and the Board could amend section 222 accordingly .

10 **II. IN DOING WHAT THE BOARD TELLS HIM TO DO, THE PORT AGENT IS NOT MAKING**
11 **“GOVERNMENT DECISIONS”**

12 In its opening brief, the Board dealt with the pivotal question on this appeal: whether the
13 Port Agent is an “officer, employee, member, or consultant” of the Board. (See Gov. Code,
14 § 82019, subd. (a), defining “designated employee.”) He is none of these things, and so we need
15 not proceed further and ask whether he makes “government decisions” or whether any such
16 decisions materially affect his financial interests. (See *id.*, subd. (a)(3) and, for similar inquiries
17 into whether a public official has a conflict of interest, the step-by-step analysis set forth in
18 section 18700(b) of the FPPC regulations.) Only if he fitted within one of these four categories
19 *and, further*, only if he also participated in *government* decisions and those decisions might
20 *foreseeably have a material financial effect on any financial interest* would the Port Agent be
21 classifiable as a “designated employee” under Government Code section 82019 and so be
22 includable in the Board's Conflict of Interest Code. Because PMSA spends considerable time
23 asserting that the Port Agent makes “government decisions,” however, the Board will respond to
24 that assertion here.

25 **A. Compliance by a Private Business With Duties Imposed by Regulation Does Not**
26 **Involve Making of “Government Decisions”**

27 PMSA conflates the Port Agent's compliance with the Board's regulations with the Board's
28 government decisions concerning whether, what, and how to regulate. The only government

1 decisions involved here are those three: whether, what, and how to regulate. All three are made by
2 the Board and none by the Port Agent. While adoption of a regulatory directive by the Board is a
3 “government” decision, obedience to the directive by the Port Agent is not. For instance,
4 assigning pilots to vessels or administering the pilots’ vacation schedule in obedience to the
5 Board’s regulation (Cal. Code Regs., § 218(d)(1), (2)) does not itself involve “government”
6 decisions by the Port Agent. That might be the case only if the Board itself had governmental
7 responsibility for providing pilotage, assigning pilots, administering pilots’ vacations, and so
8 forth, and chose to delegate those governmental tasks to the Port Agent. But the Board itself is not
9 charged by statute with performing any of those functions. As the Court of Appeal held, regarding
10 assignment of pilots, in *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th
11 577, 599:

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

18 So, assigning pilots to vessels (Cal. Code Regs., tit. 7, § 218(d)(1)) is not a “government
19 decision”; it is a decision made in the course of operating the Bar Pilots’ private business. The
20 Board has explicitly charged the Port Agent with that function, however, because it needs
21 someone to hold accountable if the assignment of pilots to vessels does not go smoothly and
22 maritime commerce is adversely affected. Absent this regulatory focus on the Port Agent, the
23 Board’s only recourse would be to give direction to individual pilots, but because the individual
24 pilots do not determine their assignments, this would not be a workable alternative. As pointed
25 out in the Board’s opening brief, this need to have one pilot—selected by the other pilots—to
26 respond to Board directives has been an essential element in the Board’s regulatory structure
27 since the initial regulatory statute was enacted in 1850.

28 Further, none of the other Port Agent duties that PMSA mentions at pages 2 and 3 of its
brief involve “government decisions” of the Board. Specifically: Administration of pilots’

1 vacation schedules (§ 218(d)(2)) is not a governmental responsibility of the Board. Nor is
2 collection of data, preparation of accounts, or payment to the Board of fees collected on its behalf
3 under section 218(d)(4). Nor is incident reporting under section 218(d)(7). Nor is reporting of
4 pilot incapacity under section 218(d)(8). Nor is ensuring that the pilots and pilot vessels on hand
5 are available when needed under section 218(d)(9). Nor is deciding if and when the San Francisco
6 Bar should be closed for safety reasons under section 218(d)(10). All of these responsibilities
7 implicate the orderly operation of a private business that is essential to maritime commerce. But
8 they are not part and parcel of a service provided by government. Instead, as a matter of
9 regulation, government has told the Port Agent: here's what we need you to do to make this
10 essential private service run smoothly; do it. And if the Port Agent doesn't perform adequately,
11 then the Board is able to rectify that with further regulatory controls.

12 There are many instances where a state regulatory agency requires the performance of
13 functions by private business, but imposition of those duties does not thereby render the private
14 managers who are responsible for compliance "public officials" or "officers" or "employees" of
15 the regulating agency. Nor does their compliance with these regulatory requirements involve
16 them in making "government decisions." The examples are many: railroads are directed to
17 connect to private spurs for shippers and receivers of freight. (Pub. Util. Code, § 560.) They also
18 must maintain fences on both sides of their tracks. (*Id.* at § 7626.) And the Public Utilities
19 Commission requires various reports from, and the maintenance of records by, regulated utilities.
20 (E.g., Pub. Util. Code, §§ 560, 581, 582, 3701, 3702, 3703; Cal. Code Regs., tit. 20, §§ 1301–
21 1395.6.)

22 So with the Port Agent, his compliance with the Board's regulatory directives does not
23 involve him in making "government decisions." Nor does obedience to and execution of these
24 regulatory duties imposed by the Board render him an officer or employee of the Board any more
25 than PG&E's compliance with the regulatory requirements of the PUC renders PG&E's president
26 an officer or employee of the PUC.

1 **B. None of the Functions Required of the Port Agent Empower Him to “Obligate”**
2 **the Board to Make “Government Decisions” Dictated by the Port Agent**

3 It is true that the Port Agent must report to the Board various matters that could prompt the
4 Board, in its discretion, to impose discipline against an individual pilot’s license. That reporting
5 obligation is not a “government decision” that in any way “obligates” the Board, however.
6 Anyone can report alleged pilot negligence, malfeasance, or perceived incapacity to the Board,
7 and such reports sometimes come to the Board from private citizens independently of reports
8 from the Port Agent. The key point here is that the Port Agent does not gather and assess
9 evidence to decide whether the allegation is supported by the facts; that is a function initially of
10 the Board’s Incident Review Committee (see § 1180.3) and ultimately of the Board (see
11 § 1180.6). Nor does the Port Agent decide, if the facts warrant some type of license discipline,
12 what that discipline should be. These types of functions are all committed to the Board alone for
13 decision. (*Ibid.*) Yes, these latter decisions are government decisions, but they are made by the
14 Board and not the Port Agent. The Port Agent can simply start the process, as can any private
15 citizen; he cannot control the ensuing investigation nor can he control the ultimate Board decision
16 following completion of the investigation. That is exclusively a Board function. The Port Agent
17 cannot “obligate” the Board to reach any particular government decision in such matters.

18
19 And while violation by a pilot of the Port Agent’s decisions concerning assignments to
20 vessels or the administration of pilot vacation schedules could possibly lead to discipline by the
21 Board, that is for the Board to decide, not the Port Agent. Many types of private conduct and
22 interactions between private parties can lead to sanctions by government, but that does not
23 compel a conclusion that such conduct and interactions are themselves “governmental” in nature.
24 Even if the bar pilots were unregulated, pilot assignments, for instance, would still have to be
25 made by someone in the business who was selected for that purpose. Would such assignments be
26 “government decisions”? Of course not. And the simple fact that the Board might choose to make
27 pilot disobedience to valid vessel assignments of the Port Agent a subject of license discipline by
28 the Board would not transmute such assignments into “government decisions.”

1 **III. THE FINAL MISSING LINK IN APPELLANT’S ARGUMENT IS THE FAILURE TO OFFER**
2 **ANY EXAMPLES OF A FINANCIAL INTEREST OF THE PORT AGENT THAT MAY BE**
3 **MATERIALLY AFFECTED BY PERFORMANCE OF HIS DUTIES, EVEN ASSUMING THAT**
4 **HE WAS AN OFFICER, EMPLOYEE, MEMBER, OR CONSULTANT OF THE BOARD AND**
5 **EVEN ASSUMING THAT HIS DECISIONS WERE “GOVERNMENT DECISIONS”**

6 Simply cataloging the Port Agent’s Board-imposed duties and then saying, as PMSA does,
7 that we don’t know what financial interests the Port Agent may have, and we don’t know how
8 they might be affected, if at all, by performance of these duties, but there might be something out
9 there, so include him, does not provide a basis for inclusion of the Port Agent in the Board’s
10 Conflict of Interest Code, even if one were to assume that the Port Agent otherwise met the
11 definition of a “designated employee” under Government Code section 82019. (See PMSA’s
12 vague references to “possible” and “potential” conflicts of interest at pages 12–14 of its January
13 17, 2014 letter.)

14 How could administering the pilots’ vacation schedule materially affect a financial interest
15 of the Port Agent? PMSA doesn’t say. How could assignment of pilots to vessels materially affect
16 a financial interest of the Port Agent? PMSA doesn’t say. Simply asking questions without even
17 an attempt to hazard answers does not supply support for concluding that the Port Agent’s
18 performance of his various mandated duties materially affects his financial interests. What would
19 be the disclosure categories that the Board would list for the Port Agent in its Conflict of Interest
20 Code? PMSA offers no clue.

21 Essentially, what PMSA is asking is that the Port Agent be required to disclose all his
22 financial interests, without any attempt at categorization, and then the Board will decide which of
23 those interests merits inclusion in its Conflict of Interest Code. This inverts the process. The
24 burden is upon PMSA to identify what types of financial interests would need to be disclosed. It
25 has not done so. In contrast, in the special conflict of interest code that is set forth in section 222
26 of its regulations, the Board has been quite specific in identifying conflicts for the Port Agent and
27 the other pilots.

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CONCLUSION

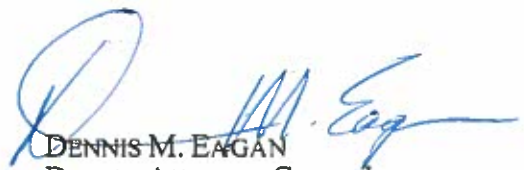
The Board's opening brief establishes that the Port Agent does not meet the threshold definition of a "designated employee"; that is, he is not an "officer, employee, member, or consultant" of the Board. This brief responds to arguments by PMSA concerning elements of the "designated employee" definition that would need to be considered only if the Court of Appeal decision and the Board's argument on the threshold point were to be rejected. As set forth above, the Port Agent is not making "government decisions" and there is no support for the speculation that such decisions might possibly materially affect his financial interests.

Finally, the Legislature's decision to require adoption of a conflict of interest code for the pilots, which code specifically includes the Port Agent, demonstrates that the Port Agent was not covered by the Political Reform Act of 1974, which was passed 10 years prior to the Legislature's requirement of a conflict of interest code for the pilots.

Dated: February 7, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California



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

OK2009310642

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Pacific Merchant Shipping v. Board of Pilot Commissioners, et al.*

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

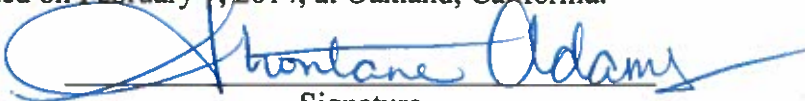
On February 7, 2014, I served the attached **SUPPLEMENTAL BRIEF OF BOARD OF PILOT COMMISSIONERS IN OPPOSITION TO APPEAL OF PACIFIC MERCHANT SHIPPING ASSOCIATION** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550, addressed as follows:

**Mike Jacob
Vice President & General Counsel
Pacific Merchant Shipping Association
250 Montgomery St., 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 February 7, 2014, at Oakland, California.

SHONTANE ADAMS

Declarant


Signature