VIA EMAIL ONLY November 21, 2016

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Subject: Dischargers' October 19, 2016 Request to Keep Information Confidential

Dear Mr. Bazel:

The Advisory Team and Board Chair have received the Dischargers' October 19, 2016 Request to Keep Information Confidential, the Prosecution Team's response, dated October 25, 2016, and rebuttals from the Discharger on November 3 and November 21 and the Prosecution Team on November 7, 2016.

After consideration of these submittals, the Board Chair rules that public access to information already filed by the Dischargers and Prosecution Team does not violate the California Constitution, the Public Records Act, or the Information Practices Act. In addition, Civil Code section 3295 is not applicable to these proceedings. Therefore, the Board Chair DENIES the Dischargers' requests to: (1) remove or prevent posting of the information from the Regional Board website; (2) close the hearing to the public when this financial information is being discussed; or (3) seal the information so that it is unavailable in response to record requests. If any party seeks to admit additional financial information, the propriety of maintaining such information in a confidential manner may be reevaluated. Below, the Advisory Team and Board Chair discuss the nature of the information the Dischargers seek to protect from disclosure and the legal standards applicable to it.

I. Nature of the Claimed "Personal Financial Information"

The Dischargers' Request to Keep Information Confidential and their November 3, 2016, rebuttal claimed that "personal financial information" in the Dischargers' own submissions must be kept confidential. Because the information that the Dischargers ask to keep confidential references information in the Prosecution Team's exhibits, the Board Chair and Advisory Team describe the content of both Discharger and Prosecution Team submissions.

A. Dischargers' Submissions

The Dischargers assert that 3 categories of information in their submissions contain sensitive financial information. The first category consists of five paragraphs[1] of Mr. Sweeney's declaration, which contain statements relating to information the Prosecution Team had

[1] Sweeney Decl., ¶¶ 27-29, 31-32, p. 5.

introduced, including the dollar amount of a mortgage he obtained, the valuation of a home that he sold for an unspecified amount; an assertion that he had invested an unspecified portion of the sale of his home into the club; a general statement averring that he has unspecified minority interests in unspecified investment partnerships; ballpark estimates of the amount of his debt, and the dollar amount of proposed fine by BCDC. (Sweeney Decl., p. 5.)

The second category consists of six paragraphs[2] from the declaration of Robert Bucci, a Certified Public Accountant who spoke with Mr. Sweeney and reviewed the Prosecution Team's exhibits supporting his ability to pay. Mr. Bucci asserts that "there has been no verification of any of the information provided by Mr. Sweeney or [Prosecution] Staff." (Bucci Decl., p. 1.) The six challenged paragraphs state the sale price of and value of mortgages on an unspecified piece of property; a recommendation that Board not consider the Prosecution Team's estimate of the value of two residential properties that Mr. Sweeney had sold in the calculation of his net worth; an assertion that Mr. Sweeney has no taxable income, has a limited amount cash and liquid assets, has unspecified minority interests in unspecified investment partnerships; reiterates the estimated amounts of debt that Mr. Sweeney estimated; and values Mr. Sweeney's assets at an amount lower than the Prosecution Team. (Bucci Decl., p. 2-4.)

The third category of claimed personal financial information includes the Dischargers' opposition brief. The first section, IV.D.1, cites to information the Prosecution Team has put forth in support of its estimate of Mr. Sweeney's worth and claims that this information is inaccurate. The second, IV.D.2 cites to Mr. Sweeney's general assertions about his income and the amount of his liquid assets and asserts that Mr. Sweeney will be unable to pay the proposed penalty.

None of the three categories of claimed "personal financial information" contains or references external financial documents other than those that the Prosecution Team included in its initial evidentiary submittals.

B. Prosecution Team's Submissions

The Prosecution Team submitted an assortment of documents in support of its argument that Mr. Sweeney and Point Buckler Club have the ability to pay the proposed ACL penalty. These include an assessor's report, which appears to have been printed from the Solano County Website, of the island; a business report of the Point Buckler Club, which includes the value of mortgages encumbering the Point Buckler Island property; printouts from the Chipps Island Club website; printouts from Westlaw regarding Chipps Island from which the name of the owner has been redacted, and which do not list the purchase price; Westlaw printouts purporting to indicate the sale price and mortgage amounts of Mr. Sweeney's former home in Tiburon; a list of other properties, with redacted addresses, that may or may not have belonged to Mr. Sweeney; transaction details of another property, the value of which was $200,000; a copy of a recorded deed of trust for Point Buckler Island; and printouts of online classified ads indicating that a vessel belonging to Mr. Sweeney is currently for sale for $895,000. (Prosecution Team Initial Evidence Submittal, Exh. 32a.)

II. Protections of the Personal Financial Information

Three interrelated areas of law bear on the question on when and how an individual's financial information in possession of a public agency may be disclosed to the public. These are the California Constitution, the Public Records Act, and the Information Practices Act. Here, the Dischargers' submissions reference information put forth by the Prosecution Team. Accordingly, in the interest of resolving issues of confidentiality in a comprehensive manner, the

[2] Bucci Decl. ¶¶ 5-6; 9-12, pp. 2-4.

Advisory Team and Board Chair have considered the need for confidentiality of both the categories of claimed "personal financial information" identified in Dischargers' submissions and the information the Prosecution Team has submitted to support its ability to pay argument. In addition, the Advisory Team and Board Chair have considered and rejected the applicability of Civil Code section 3295, which governs discovery relating to a defendant's financial condition in a suit for exemplary damages, to these proceedings.

A. California Constitution

The California Constitution recognizes an individual's right to privacy, including a right to privacy in some financial information.[3] (*Overstock.com, Inc. v. Goldman Sachs Grp., Inc.*(2014) 231 Cal. App. 4th 471, 503.) However, individuals who find themselves before an adjudicative body such as the Regional Water Board are not generally entitled to privacy in their filings or submissions, and "any financial evidence that the discharger chooses to submit in an enforcement proceeding will generally be treated as a public record." (Enforcement Policy (2010) p. 19; see also Govt. Code §§ 6250, 11120; *Overstock.com v. Goldman Sachs, supra,* 231 Cal. App. 4th, at p. 504 [individual right to privacy must be balanced against right of access to court records]; *Burkle v. Burkle* (2006) 135 Cal. App. 4th 1045, 1063 [right to privacy in financial information "does not mean that parties who come to court, voluntarily or not, are entitled to privacy in respect of court records that are… presumptively public records"].)[4] Only a showing of a "substantial probability of prejudice," resulting from disclosure, or an "overriding interest [demonstrating] that closure is essential to preserve higher values and is narrowly tailored to serve that interest" will the presumption of openness and the public's right of access to records of civil proceedings be overcome. (*Burkle v. Burkle*, *supra,* 135 Cal. App. 4th, at pp. 1063-1064 [citing *Press-Enterprise v. Sup. Ct.*(1984) 464 U.S. 501, 512]; *Universal City Studios v. Sup. Ct.* (2003) 110 Cal. App. 4th 1273, 1279.)

To determine whether sealing of records is warranted, tribunals evaluate four factors: (1) whether there is an overriding interest supporting the sealing; (2) whether there is a substantial probability of prejudice to that interest if the records are not sealed; (3) the sealing is narrowly tailored to serve the overriding interest; and (4) no less restrictive means are available to achieve the overriding interest. (*Universal City Studios v. Sup. Ct., supra,* 110 Cal. App. 4th, at p. 1279 [citing *NBC Subsidiary [KNBC-TV], Inc.* (1999) 20 Cal. 4th 1178, 1217-1218].) Because Dischargers' request to keep the financial information fails to meet the first two prongs of this test, the Advisory Team and Board Chair conclude that sealing of the parties' financial documents, or closing part of the hearing, is not warranted.

1. Dischargers have not identified an "overriding interest" supporting nondisclosure.

Privacy interests in financial information that may properly be considered "overriding" include the interest in protecting individuals from identity theft and misuse of financial information (*Burkle v. Burkle, supra*, 135 Cal. App. 4th, at pp. 1063-1064), or the protection of certain financial information of third parties who have not consented to its release. (*Overstock.com v. Goldman Sachs*, *supra*, 231 Cal. App. 4th p. 505.) Mere unease at the prospect of disclosure of financial details such as income, however, does not, by itself, make a privacy interest overriding.

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[3] Corporations and companies do not share this constitutional right to privacy. *SCC Acquisitions, Inc. v. Sup. Ct.*, 243 Cal. App. 4th 741, 755 (2015).

[4] Whether or not Mr. Sweeney could be *compelled* to produce his tax returns or other financial information is not at issue here because the information the Dischargers request to be sealed was submitted voluntarily. (See *Fortunato v. Sup. Ct.* (2003) 114 Cal. App. 4th 475, 481 [lack of voluntary relinquishment of tax-return privilege was compelling factor in finding that privilege had not been waived].)

(See *Sacramento Cnty. Employees Retirement System v. Sup. Ct.* (2011) 195 Cal. App. 4th 440, 468-469 [citing *Int'l Fed. of Prof. and Tech. Teachers, Local 21, AFL-CIO v. Sup. Ct*. (2007) 42 Cal. 4th 319, 331] [government employees' discomfort or embarrassment at disclosure of pension or salary information did not overcome public interest in knowing this information].) Here, the Dischargers have described no overriding privacy interest that would support sealing any portion of their filings to date. They make conclusory statements that Mr. Sweeney has a "particularly sensitive" or "remarkably high" privacy interest, but do not elaborate on what this interest is. (Request to Keep Information Confidential [Oct. 19, 2016], at p. 2; Rollens Email [Nov. 3, 2016], at p. 2.) The financial information in the Dischargers' submissions is generalized and far from comprehensive, lacking not only sensitive identifying information, such as account or Social Security Numbers, that would reflect a high privacy interest, but also detailed descriptions of assets or liabilities that could reveal conceivably private or sensitive facts about the nature of his investments or the sources of his debt.[5] To the extent that Dischargers' financial information relies on the Prosecution Team's submissions, those submissions contain publicly available information, and accordingly do not implicate a protectable privacy interest.

2. Disclosure does not pose a substantial probability of prejudice to Mr. Sweeney.

Mr. Sweeney has similarly failed to identify a substantial probability of prejudice if the challenged documents are disclosed. He claims, vaguely, that "disclosing confidential information may enable others to decrease the value of his assets." (Rollens Email [Nov. 3, 2016], p. 2.) This speculative concern, which does not describe how these "others" will be able to diminish his worth, does not amount to a probability of prejudice, much less a substantial one. To the extent he is referring to the Regional Board's ability to impose the proposed Administrative Civil Liability, the Board Chair and Advisory Team remind him that accurate, complete information regarding a discharger's ability to pay supports the Regional Board's ability to *reduce* a proposed penalty: as stated in the Enforcement Policy, "[i]f there is strong evidence that an ACL would result in… undue hardship to the discharger, the amount of the assessment may be *reduced* on the grounds of ability to pay." (Enforcement Policy, p. 19 [emphasis added].) Ability to pay information is *not* used to *increase* a penalty. (See *id.*) However, whether or not a discharger has submitted "strong evidence" indicating that it is unable to pay, the Regional Board retains discretion to impose a penalty as proposed. (See *id.)*

In any case, Mr. Sweeney's concern that his assets are at risk of devaluation if they are disclosed is not supported by any of the financial information in the parties' filings, which, as described above, lack specificity and sensitive identifying details that would facilitate theft or misuse. (See *Burkle v. Burkle*, *supra*, 135 Cal. App. 4th, at pp. 1063-1064; see also *SCC Acquisitions, Inc. v. Sup. Ct., supra,* 243 Cal. App. 4th, at p. 755 [the more sensitive the information, the higher the burden of justifying disclosure].)

Disclosure of the generalized information Mr. Sweeney *has* provided, meanwhile, does not pose a risk of financial abuse. (See *Burkle v. Burkle, supra*, 135 Cal. App. 4th, at p. 1066 [sealing of general information about an asset, "including its existence, its value, the provisions of any agreement relating to the asset, and any contentions that may be made about the resolution of disputes over an asset" did not serve purpose of preventing identity theft].) Accordingly, the Advisory Team and Board Chair conclude that the Dischargers have failed to meet their burden of showing that Mr. Sweeney would be substantially prejudiced by release of these documents.

[5] See, *e.g.,* Sweeney Decl., ¶¶ 31-32 (categories of assets described generally as "cars and boats and liquid interests," and categories of debt listing approximate amounts owed for "previous debt" and unspecified "consultants and lawyers.")

3. Conclusion

Because the Dischargers have failed to identify a privacy interest in voluntarily-submitted financial information (or in the Prosecution Team exhibits to which this information refers) that would override the presumption of openness in adjudicative proceedings, and have failed to demonstrate a substantial risk of prejudice from disclosure, the Board Chair and Advisory Team find that the California Constitution does not protect this information from disclosure or warrant the closure of any portion of the hearing to the public.

B. Public Records Act

The records the Dischargers have submitted would also not be exempt from disclosure upon request under the Public Records Act, which declares that the public has a fundamental right to "information concerning the conduct of the people's business." Gov. Code § 6250. The potential exceptions to disclosure under the Act would be Government Code section 6254, subdivision (c), which protects documents from disclosure that would "constitute an unwarranted invasion of personal privacy," and section 6255, the catchall exception. In determining whether disclosure of a document would constitute an "unwarranted invasion of privacy" under section 6254, subdivision (c), the public's interest in disclosure is weighed against the individual's right to privacy. (*Caldecott v. Sup. Ct.* (2015) 243 Cal. App. 4th 212, 221.) A document may only be withheld under section 6255 if the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. (Gov. Code § 6255.) In both cases, the public's interest in disclosure is the same. (See *Braun v. City of Taft* (1984) 159 Cal. App. 3d 332, 345.)

1. For purposes of balancing under sections 6254, subdivision (c), and 6255, the public's interest in disclosure is high.

The public has a strong interest in access to the financial information submitted by both parties in this matter. The information presented by both parties furthers the public interest in understanding the basis for any penalty the Regional Board may impose (see *Caldecott v. Sup. Ct., supra*, 243 Cal. App. 4th, at p. 223 [discussing public interest in knowing how government entities enforce their own policies]), and the "public interest for the discharger to continue in business and bring its operations into compliance." (Enforcement Policy, p. 19.) Moreover, the core purpose of the PRA, to facilitate understanding of the operations or activities of the government, supports disclosure of the documents on the website and availability of hearing records for public review. (See Gov. Code §§ 6250, 6253, subd. (e); *Caldecott v.Sup. Ct., supra*, 243 Cal. App. 4th, at p. 223.), while the policy established by the Bagley-Keene Act "that the proceedings of public agencies be conducted openly" supports open discussion of this information on the record. (Govt. Code. § 11120.)

2. Mr. Sweeney does not have a privacy interest sufficient to make disclosure of the records an "unwarranted invasion of privacy."

As discussed above, Mr. Sweeney's privacy interest in the financial information he has voluntarily submitted to an adjudicative body that is bound to hold public meetings is minimal. Although the Dischargers make conclusory assertions about the confidential nature of this information, they do not explain why or how its disclosure would cause an unwarranted invasion of privacy. They do not allege that disclosure will cause "serious harms," such as "embarrassment, jealousy, or unhealthy comparisons" (*Los Angeles Unif. Sch. Dist. v. Sup. Ct.* (2014) 228 Cal. App. 4th 222, 235), or put Mr. Sweeney at risk of financial predation. (See *Sacramento County Employees' Retirement System v. Sup. Ct.*, *supra,* 195 Cal. App. 4th, at p. 471.) Again, Mr. Sweeney's primary concern seems to be that if he provides detailed financial information, his penalty will be increased, a concern that is not reflective of the Enforcement Policy, which permits consideration of a Discharger's ability to pay to reduce a penalty. (See

Enforcement Policy, p. 19, and discussion in § II.A.2, *supra*.) The Advisory Team and Board Chair cannot independently identify any unwarranted invasion of privacy that would outweigh the public's interest in disclosure: to the extent Dischargers' assertions reference Prosecution Team submissions, the latter documents are either already publicly available or contain publicly available information. To the extent Dischargers make other assertions about Mr. Sweeney's financial status, they are not detailed and reveal little about how Mr. Sweeney earns money or incurs debt.

3. The public interest in nondisclosure does not clearly outweigh the public interest in disclosure.

The information submitted does not implicate a public interest in nondisclosure that would support sealing the information under section 6255. In cases where records have been withheld pursuant to this section, nondisclosure has promoted the proper functioning of a public agency, for instance, by encouraging the free and forthright exchange of ideas among agency employees (see *Humane Soc. of the United States v. Sup. Ct of Yolo Cnty* (2013) 214 Cal. App. 4th, 1233, 1259); protecting the confidentiality of public employees' or applicants' job performance or qualifications (see *Los Angeles Unif. Sch. Dist. v. Sup. Ct., supra*, 228 Cal. App. 4th, at p. 253 [teacher test scores]; *Cal. First Amendment Coalition v. Sup. Ct.* (1998) 67 Cal. App. 4th 159, 173-174 [applications of unsuccessful candidates to local government positions]); or preventing interference with the agency's ability to carry out its statutory duties. (See *Los Angeles Unif. Sch. Dist. v. Sup. Ct., supra*, 228 Cal. App. 4th, at pp. 250-251.) Here, by contrast, sealing the financial information submitted by either party to date would not advance the Regional Board's ability to function properly or carry out its statutory obligations; if anything, nondisclosure would damage "the transparency and legitimacy of the Water Boards' enforcement programs" and impede the agency's statutory mandate to make decisions in an open forum. (Enforcement Policy, p. 19; Gov. Code § 11120.)

4. Conclusion

In accordance with the foregoing analysis, exceptions to the Public Records Act do not justify nondisclosure of the financial information submitted by either the Dischargers or the Prosecution Team to date. Therefore, electronic posting of these submissions in accordance with Regional Board policy is appropriate.

C. Information Practices Act

Disclosure of the information that the Prosecution Team and Dischargers have put forth does not violate the provisions of the Information Practices Act (IPA), either. The IPA protects personal information, such the name, address, and "financial matters" of a member of the public, from disclosure unless it meets particular exceptions. (Cal. Civ. Code §§ 1798.3, subd. (a), 1798.24.) Here, to the extent that disclosure of Mr. Sweeney's financial information also discloses personal information as defined in the IPA, such disclosure meets the exception outlined in California Civil Code section 1798.24, subdivision (e). Subdivision (e) permits a regulatory agency to transfer personal information to any person, so long as it is necessary for the agency to perform its lawful duties, and "use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for… regulatory purposes by that agency." Here, disclosure of the financial information to the public is necessary for the Regional Board to comply with its lawful duties to hold open meetings and to administer the Water Code. Gov. Code § 11120; Water Code §§ 13323, 13327. Use of Mr. Sweeney's personal information is needed for the agency's regulatory purposes, which include enforcing violations of state and federal environmental law. (See Water Code § 13327; see also *Cal. Teachers' Assn. v. Cal. Com. on Teacher Credentialing* (2003) 111 Cal. App. 4th. 1001, 1009 [interpreting § 1798.25, subd. (e) to "permit the disclosure of names when they constitute

the basis of [an] allegation"]; *Tom v. Schoolhouse Coins, Inc.* (1987) 191 Cal. App. 3d 827, 830-831 [no violation of IPA for court to order disclosure of third party coin purchasers' names, addresses, and phone numbers in securities investigation].)

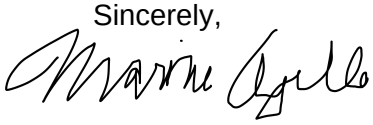
D. Civil Code Section 3295, Subdivision (c), Does Not Prohibit Introduction of Mr. Sweeney's Financial Information Without a Court Order.

Civil Code section 3295, subdivision (c), governs pretrial discovery for plaintiffs seeking exemplary damages, or "damages for the sake of example and by way of punishing the defendant." (Civil Code § 3294, subd. (a).) Because the imposition of administrative civil liability by the Regional Board is not an action to prove "by clear and convincing evidence that [the discharger] has been guilty of oppression, fraud, or malice," exemplary damages are not permissible. (Gov. Code § 3294, subd. (a); see also Water Code §§ 13323 [process for imposing administrative civil liability]; 13327 [describing factors considered in imposition of administrative civil liability]; 13385 [outlining violations for which administrative civil liability may be imposed and maximum dollar amounts of such liability].) Accordingly, the provisions of Civil Code section 3295 do not apply to the Regional Board's proceedings against Dischargers and do not prohibit introduction of Mr. Sweeney's financial information, which, in any case, was not obtained through pretrial discovery, in the absence of a court order.

E. Conclusion

In accordance with the foregoing analysis, the Board Chair has ruled to DENY the Dischargers' request to keep the specified portions of their own submissions, and referenced portions of the Prosecution Team's submissions, confidential. If Dischargers or the Prosecution Team proposes to introduce additional financial information, the Advisory Team and Board Chair may, upon request, evaluate the need for confidentiality of such information, consistent with the analysis above.

Sincerely,



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