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By E-Mail

San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
Attn: Marnie Ajello
marnie.ajello@waterboards.ca.gov

Subject: Point Buckler Club, LLC and John D. Sweeney
ACL Complaint No. R2-2016-1008 and Proposed CAO

Dear Ms. Ajello:

On behalf of Point Buckler Club, LLC (the "Club") and John D. Sweeney, I request that Bruce Wolfe be removed from the advisory team and no longer participate in this matter.

Due process requires agencies to separate advocates from decision makers, and prohibits ex parte communications between them:

> While the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisers in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 5.)

In this case, Mr. Wolfe has been part of the prosecution team. He issued cease and desist order no. R2-2015-0038 against the club. He has therefore prosecuted a claim against the club and Mr. Sweeney in this matter. If he was acting as the decision-maker or part of the advisory team in that matter, he should be disqualified on the ground that he was communicating ex parte with the prosecution team. That order was issued as a result of secret communications between

Mr. Wolfe and the prosecution team (which had not even been identified to us as the prosecution team at that time).

Alcoholic Beverage Control reaffirmed the separation and ex parte rules applied by a line of cases reaching back to at least 1950. (*See English v. City of Long Beach* (1950) 35 Cal.2d 155, 159 (holding that an administrative board deprived a person of a fair trial when its decision was based on ex parte communications "of which the parties were not apprised and which they had no opportunity to controvert"); *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587 (holding that "performance of both roles [i.e. advocate for a party and adviser to the tribunal] by the same law office is appropriate only if there are assurances that the advisor for the decision maker is screened from any inappropriate contact with the advocate"); *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 93, 98 (confirming that "it is improper for the same attorney who prosecutes the case to also serve as an advisor to the decision maker", and holding that when an advocate acted as legal advisor to a hearing officer he violated due process); *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 812, 815 (holding that there was a "clear appearance of bias and unfairness" that violated due process when a deputy city attorney represented a party in proceedings before the Board, and then represented the Board itself in proceedings on "a writ petition in the superior court".) Although these cases often involved lawyers, the separate requirement is no limited to lawyers. It arises out of the concept that to ensure a fair trial, a person involved in the prosecution of a matter should not be involved in the decision-making process for that matter.

The State Board imposes a strict separation between the members of the prosecution and advisory teams:

> The hearing officer and the other [State] Board members treat the enforcement team "like any other party." Agency employees assigned to the enforcement team are screened from inappropriate contact with Board members and other agency staff through strict application of the state Administrative Procedure Act's rules governing ex parte communications. (Gov. Code, § 11430.10 et seq.) "In addition, there is a physical separation of offices, support staff, computers, printers, telephones, facsimile machines, copying machines, and rest rooms between the hearing officer and the enforcement team (as well as the hearing team)," according to the Whitney declaration.

(*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 735-736.)

The same strict separation should be applied here.

Because Mr. Wolfe has either violated the separation requirement by moving from the prosecution team to the advisory team in this matter, or has violated the ex parte prohibition by engaging in ex parte discussions about this matter, he is disqualified from participating in the matter and should be removed from the advisory team.

Thank you for considering this request, and please let me know if you need any additional information or legal argument to assist your decision.

Sincerely,

Lawrence S. Bazel

cc: D. Whyte (be e-mail)
L. Drabandt (by e-mail)
T. Austin (by e-mail)
B. Martin (by e-mail)
M. Bullock (by e-mail)
M. Goldman (by e-mail)