TAMARIN AUSTIN, Senior Staff Counsel (SBN 207903)
JULIE MACEDO, Senior Staff Counsel (SBN 211375)
LAURA DRABANDT, Senior Staff Counsel (SBN 235119)
State Water Resources Control Board
1001 I Street, 16th Floor
Sacramento, California 95814
Telephone: 916-323-6847
Fax: 916-341-5896
E-mail: julie.macedo@waterboards.ca.gov

Attorneys for San Francisco Bay Regional Water Quality Control Board Prosecution Team

BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD

SAN FRANCISCO BAY REGION

In the Matter of: COMPLAINT NO. R2-2016-1008 ADMINISTRATIVE CIVIL LIABILITY SWEENEY AND POINT BUCKLER CLUB, LLC POINT BUCKLER ISLAND, SUISUN MARCH, SOLANO COUNTY	EVIDENTIARY OBJECTIONS TO THE "OPPOSITION BRIEF" SUBMITTED BY JOHN D. SWEENEY JOHN D. AND POINT BUCKLER CLUB, LLC

References are to the briefing or evidence submitted on or about October 19, 2016 by John D. Sweeney and Point Buckler Club, LLC, as described more specifically below.

The Prosecution Team recognizes that administrative hearings are not conducted according to the technical rules of evidence (Government Code § 11513(c)), and therefore documents or testimony often is admitted in an administrative hearing that would not be in a court of law. We therefore are not asking that the objectionable statements be struck and removed from the record, but be considered in their entirety or that the Board gives them appropriate weight. Hearsay statements that are unsupported by any other documentation or findings in the record cannot be sufficient in themselves to support a finding. Government Code § 11513(d). In addition, certain statements related to Mr. Sweeney's ability to pay are not supported by the types of documents on which responsible people would rely in the conduct of serious affairs. Government Code § 11513(c). The Prosecution Team therefore requests that the Regional Water Board indicate the non-hearsay evidence that is reliable and sufficient to support a finding if it relies on any of the objectionable statements discussed herein.

1. **Certain statements are hearsay, and should not be relied upon to support a finding without additional evidence.** Government Code § 11513(d).

(a) DWR Pump

The Opposition Brief[1] filed by John D. Sweeney and Point Buckler Club, LLC at 5:9-6:641:17-18, 21-23, states that, "According to the previous owner, the levee was repaired in the early 1990s, and DWR installed the pump." (5:22-24) A citation is provided to the Declaration of John Sweeney, paragraph 3. Mr. Sweeney goes on to declare, "When Mr. Sweeney purchased the island in 2011, the previous owner told him DWR was requiring that the levee be repaired." (6:1-3) Mr. Sweeney's conclusory statements regarding a conversation with the island's prior owner and the use of the pump is hearsay. The dischargers use these hearsay statements, in part, to provide context for their failure to obtain permits prior to repairing the levee. More appropriate and reliable evidence would be a declaration from the previous owner himself, or one from an employee of DWR.

(b) Mr. Sweeney's Declaration – Hearsay and the Inability for Either the Prosecution Team or Regional Water Board to Confirm Such Statements

The statements regarding Mr. Sweeney's net worth are unsupported by documents. Mr. Sweeney states that he is "not comfortable with providing financial documents or more detailed information because I believe the agencies will use this information to lower the value of my assets. (Sweeney Declaration, ¶33) However, without such verified information, neither the Regional Water Board nor the Prosecution Team can appropriately set the penalty. For example, the maximum penalty in this matter is well over $39 million, and the Prosecution Team relied on publicly available documents and the Enforcement Policy factors to lower it what it believes is an appropriate amount. This satisfies the Prosecution Team's burden of moving forward with prima facie evidence, as the inability to pay is an affirmative defense. However, currently the Regional Water Board has nothing but hearsay to refute the Prosecution Team's expert analysis, review of publicly available documents, and the Prosecution Team's recommendation of a fair penalty. Mr. Sweeney can of course refuse to disclose his financial records, but he runs the risk of preventing the Board from making a determination based on evidence submitted in the hearing.

In Mr. Sweeney's declaration, the following statements are unsupported by any evidence in the record and both the Prosecution Team and Regional Water Board have no way to confirm the accuracy of such statements:

(i) If I have to pay a penalty of $4.6 million, or any substantial penalty, I will not be able to pay the permitting costs, provide for mitigation, or do the work to restore the island. (¶24)

[1] Opposition Brief, Cal. Regional Water Quality Control Board, San Francisco Bay Region, ACLC No. R2-2016-1008 (Oct. 19, 2016) (cited herein as "Opposition Brief").

(ii) There is a second mortgage on the property I purchased in July 2016 in the amount of $160,000. (¶27)

(iii) I sold the house the prosecution team referred to as being valued at $200,000. (¶28)

(iv) The proceeds of the sale of my house in Tiburon have been invested in Point Buckler Island and other activities, and are no longer available in cash form. (¶29)

(v) The 100 foot steel hull vessel has been listed for sale for three years. (¶30)

(vi) I retired around 2001, and since then have not been employed by anyone. Nor have I received any wages since 2001. I currently have no net taxable income, and have not had any net taxable income for several years. I have cash in the amount of approximately $80,000. I also have cars and boats and liquid interests in the amount of approximately $85,000. I also have minority contractual interests in investment partnerships that give me no managerial control and no guaranteed or minimum return, and that prohibit me from selling or assigning the interest.

(vii) I have several additional liabilities. I owe $450,000 for a previous debt. I owe nearly $300,000 to consultants and lawyers. I expect the San Francisco Bay Conservation and Development Commission to impose a fine of $772,000 against me. (¶32)

Mr. Sweeney does not provide documentation to support these statements, which could include the loan or sale documents on previous residences, documents indicating the investment of funds into Point Buckler Island, documentation showing his vessel has been for sale for three years, or documents supporting a $450,000 debt. Such information has not been able to be corroborated and therefore the Regional Water Board cannot base a finding to reduce the penalty issued to the dischargers' on unreliable information. [Government Code § 11513(c), which requires evidence to be admitted if "it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs."] In matters involving debt, the transfer of real or personal property, and ownership interests in investment partnerships, the Regional Water Board should rely on documents, not simply Mr. Sweeney's statements.

Mr. Sweeney also makes a number of statements regarding statements allegedly made by staff at other agencies. *See* Sweeney Declaration, ¶¶12, 14, 16, 34, and 35. He does not identify such staff, or provide evidence of such conversations other than his recollection. Dischargers have provided no names and dates which would allow the Regional Water Board to independently investigate the veracity of his statements.

(c) Mr. Bucci's Declaration – Absence of Financial Documents and Reliance Solely on Mr. Sweeney's Statements

Mr. Bucci is apparently attempting to give an expert opinion on the state of the dischargers' net worth, but it is unclear whether Mr. Bucci had any additional information to consider other than Mr. Sweeney's hearsay statement. ("My comments and conclusions are based on the information provide by Mr. Sweeney, as described below.... There has been no verification of any of the information provided by Mr. Sweeney or [prosecution team] staff." Bucci Declaration, ¶29.) Mr. Bucci is therefore testifying to a conclusion with no more information than the Board has before it. Mr. Bucci was told something by Mr. Sweeney, did no independent verification of the facts, and concludes that Mr. Sweeney's net worth is less than alleged by the Prosecution Team. However, Mr. Bucci's analysis simply compounds the hearsay problem. To wit:

> Staff refers to a second house valued at $200,000 (Id.) Mr. Sweeney reports that he has sold this house. It should therefore not be included in a calculation of his current net worth. (Bucci Declaration, ¶5)
>
> and
>
> Staff refers to a property in Tiburon that sold in 2014 for $3,000,000, and concludes that the sale may have resulted in approximately $2.025 million in potential capital gain. (Id.) According to Mr. Sweeney, the proceeds of that sale have been invested in Point Buckler Island and other activities, and are no longer available in cash form. The proceeds of that sale should therefore not be considered part of Mr. Sweeney's current net worth. (Bucci Declaration, (¶6)

Mr. Bucci has not reviewed receipts, mortgages, or deeds provided by Mr. Sweeney that were not submitted in this hearing. He is stating that Mr. Sweeney told him something, and he accepted it. This is completely different than what the Prosecution Team did to meet its prima facie burden. For example, to determine the value of the equity in the Tiburon property, the Prosecution Team reviewed public record to determine the sale price in 2014, and the mortgages or liens against it at the time. Mr. Sweeney and Point Buckler Club LLC have not done a similar analysis or provided documents to the Board for its review or their expert for review, *even though they bear the burden of proof on this issue.* Mr. Bucci's declaration does not serve to make Mr. Sweeney's statements more reliable or supported by additional evidence upon which the Board can make a finding related to the dischargers' net worth.

2. Certain findings were made by the Regional Water Board at the Hearing on the Cleanup and Abatement Order and Should Not Be Reconsidered in this Hearing.

Res judicata prevents the dischargers from arguing that the Regional Water Board does not have jurisdiction over the levee repair. The doctrine of res judicata holds that a final judgment in a case

governs the identical claim in a subsequent action. As a result, a prior administrative decision may preclude a subsequent administrative or judicial action. Under this doctrine a valid final judgment is conclusive of a claim or defense and bars all parties and persons in privity with the parties from relitigating any issue material to the claim or defense that were or could have been adjudicated in the prior action. (*Takahashi v. Board of Ed. Of Livingston Union School Dist.* (1988) 202 C.A. 3d 1464, 1473-1474 [249 C.R. 578].)

The dischargers contend in their opposition to proposed penalty order that the Regional Water Board has not established jurisdiction over most of the levee. (Opposition Brief, 43:22-23.) Prior to the submission of dischargers' Opposition Brief, the Regional Water Broad reached a final judgment concerning its jurisdiction over the action. It held, "38.3 of the approximately 39 acres of the Site are below the high tide line, fall under Clean Water Act Section 404 jurisdiction, and therefore are waters of the State and United States." (California Regional Water Quality Control Board, San Francisco Bay Region, Cleanup and Abatement Order R2-2016-0038, p. 3, Finding No. 10.) Under Water Code section 13304, the regional water boards have the authority to issue cleanup and abatement orders for the discharge of waste into waters of the State in violation of any waste discharge requirement or other order or prohibition. (Water Code, § 13304 subd. (a).) The San Francisco Regional Water Board made a final determination regarding its jurisdiction over Pt. Buckler Island in the previous CAO hearing. The doctrine of res judicata precludes the dischargers from raising the defense that the Regional Water Board does not have jurisdiction in opposition to the proposed penalty.

Respectfully submitted,

Julie Macedo 11/14/16

Julie Macedo
Counsel for the Prosecution Team