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March 3, 2015

VIA E-MAIL AND UPS OVERNIGHT

San Mateo County Harbor District
Board of Harbor Commissioners
400 Oyster Point Blvd.
Suite 300
South San Francisco, CA 94080

Re: *Harbor District Commission Meeting, March 4, 2015 at 6:30 p.m.*
Agenda Item No. 5: Possible Change in Location of Three Captains' Hoist at Pillar Point Harbor

Dear Commissioners:

We represent Three Captains Sea Products, Inc. ("Three Captains") with respect to the unloading hoist (the "Hoist") that was installed on the Johnson Pier pursuant to and in compliance with a lease between Three Captains and the San Mateo County Harbor District ("District"). The Hoist is the topic of Agenda Item No. 5 scheduled to be discussed before the Harbor District Commission ("Commission") at the Meeting to be held on March 4, 2015 at 6:30 p.m. This letter is offered as additional background and to request that the Commission take no action. It is further offered in opposition to Option No. 2.

1. Installation of the Hoist and approval by the San Mateo County Harbor District.

There are three tenants that operate fish buying stations on Johnson Pier in Pillar Point Harbor: Pillar Point Seafood owned and operated by Mike and Kim McHenry; Three Captains Sea Products, owned and operated by Larry Fortado; and Morningstar Fisheries, owned and

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operated by Dave Mallory.¹ Three Captains is the longest continually operating buyer on the Pier, having operated in that location since 1981.

Each Johnson Pier tenant is subject to nearly identical leases which were approved by the District and entered into by the District. Section 9.1(a) of the lease prohibits any use of the Hoist or any of the leased premises for anything other than buying fish and servicing the fishermen,

Tenant shall use the Premises for its commercial fishing line and/or fish unloading business and additional ancillary and compatible uses and services pursuant to paragraph 9.1(b)(vii) of this lease. Tenant shall not use the premises for any other purposes without landlord's prior written consent. (emphasis added).²

Section 9(b)(i) the leases provides:

Tenant shall provide on the Premises all equipment required for the operation of said wholesale fish dealership, including winch and hoist for the purpose of loading or unloading fish or other merchandise to and from vessels, and scales, skiff or equipment storage. Tenant may provide a second winch and hoist at a location approved in advance by the Harbor Master.³ (emphasis added)

Under the terms of the lease between the District and Three Captains, Three Captains has the contractual right to install a second hoist, provided the Harbor Master approves of the location and installation. The Harbor Master's determination is based in contract and the decision is not subject to public comment or review. As stated by Commissioner Bernardo, to Commissioner Brennan on April 16, 2014,

My understanding is that contained within each of the fishbuyers' lease agreements, there is language that specifically states that each fish buyer must work directly with the Harbor Master to select an appropriate location for their hoists. There does not need to be any public comment or Commission approvals whatsoever – if we are to follow our contractual obligations (which we have to, by law). Therefore, in this particular case, Larry Fortado is just following his lease and so is the District.⁴

¹ See Exhibit B, the March 18, 2014 letter from the District to each tenant with section 9.0, excerpted from the leases.

² See Exhibit B, the lease excerpt identified as page 12 (the third page of Exhibit B).

³ See Exhibit B, the lease excerpt identified as page 12 (the third page of Exhibit B).

⁴ See email dated April 16, 2014 from Commissioner Bernardo to Commissioner Brennan regarding the installation of the Hoist. A copy of the Email is attached hereto as Exhibit E.

In compliance with the terms of the lease, on March 28, 2014, the Harbor Master authorized the location and installation of the Hoist at its current location.⁵ Though not expressly allowed under the terms of the Lease, the District imposed restrictions on the installation and period of use under the Lease. In that Letter agreement, the District and Three Captains agreed, in relevant part, that,

The installation will be a “probationary or tentative” installation and location for up to 1 year as a trial for our use review. The end date of the noted one year will be April 1, 2015. Being that this is your equipment, if there is a move required due to issues, the cost of location change will be borne by Three Captains. (emphasis added)

The District’s approval was again confirmed in a September 24, 2014 letter from the District to Three Captains and states, in relevant part,

As you know, at some point in early 2014 and pursuant to section 9.1(b)(i) of the three Captains Seafoods Lease with the San Mateo County Harbor District (District), you requested that the District’s Harbor Master approve the location for installation of a second winch and hoist on the District’s property that you lease. On March 28, 2014, after consideration of a number of factors, including the location of existing fire protection equipment and freezers, as well as the continuing needs of the work dock, the Harbor Master approved the installation of the hoist at the specified location.⁶

In a letter dated September 29, 2014, the District informed the California Coastal Commission of its approval of the Hoist in its current location.⁷ In that letter, the District stated, in relevant part,

We write you just clarify that the role of the district under the lease is limited to approving the location on Johnson appeared of the hoist at issue. . . Consistent with its role, on March 28, 2014 the District’s Harbor Master approved the location of the hoist at the location specified in the above referenced permit application.

The performance of the District’s obligations under the lease and its associated review and analysis is confirmed in the September 24, 2014 letter from the District’s Counsel to the counsel for Pillar Point,

The placement of the additional hoist --- which Three Captains Sea Products, like Pillar Point Seafood, has a right to under Section 9.0(b)(i) of the Lease -- was approved by the District’s Harbor Master after careful consideration of the location of the existing fire protection equipment, the location of existing freezers, and the needs of the work

⁵ See Exhibit C, the March 28, 2014 letter agreement between the District and Three Captains.

⁶ See Exhibit I, the September 24, 2014 letter from the District to Three Captains.

⁷ See Exhibit J, see the letter marked received by the Commission on September 29, 2014.

dark. Locating the hoist and any other location would have required impractical relocation of other facilities, to the detriment of all lessees, including Pillar Point Seafood.⁸

In summary, the District is contractually obligated to provide Three Captains with a location for a second hoist. Three Captains made the request, the District, though the Harbor Master, in compliance with its obligations under the lease, approved the location and installation of the Hoist. Subsequently, and in accordance with the District's directive and the Harbor Master and the District's knowledge and consent, the Hoist was installed. Indeed, by the terms of the lease contracts, only the Harbor Master can designate a location. The Harbor Master did so, in compliance with the Lease, and his decision is final.

There is no evidence that there will be any more congestion on the dock than currently exists, even with the addition of the Hoist. There are only three buyers on the dock, Pillar Point, Three Captains and Morningstar. The addition of the Hoist does not change that fact. There will not be any more trucks or other equipment than would normally be there. Indeed, as outlined by the District's counsel,

Moreover, pursuant to Section 2.1.2 of the Lease, which provision is mirrored in all three leases with wholesalers, tenants must cooperate with each other in operating their respective enterprises and may not interfere with each other's operations.⁹

Furthermore, the Harbor Master imposed additional conditions to eliminate the potential for congestion. In the March 28, 2014 letter agreement between the District and Three Captains, the parties agreed to an established access route around the area designated for the operation of the Hoist.

The working space for the second hoist is to be 25 feet long and 8 feet wide/deep and area will be marked by a red line of paint to identify the space. As part of this activity, the original space across the pier will be given up upon hoist installation and a red line painted in.¹⁰

Not only are the parties are contractually obligated under their leases to work together, as they have for many years prior to the installation of the Hoist, the Harbor Master built into the location selection provisions to eliminate potential congestion. Indeed, the area occupied by each of the tenants, the participants, and the amount of product, remains the same. The only difference the Hoist makes is that it will be more convenient for the fishermen that deliver

⁸ See Exhibit H, the September 23, 2014 letter from Steven D. Miller, General Counsel for the San Mateo County Harbor District to Anthony Lombardo, counsel for Pillar Point Seafoods.

⁹ See Exhibit H.

¹⁰ See Exhibit C.

to Three Captains and load gear because they will not have to go through the building to access the Three Captains hoist. This will allow the same product to move through Johnson Pier faster. There is no evidence that the total revenue payable to the District under the terms of the leases to the three tenants will be reduced by any amount or in any way, and, it may be increased.

2. The parties objecting are doing so for competitive reasons, not because there will be any material change in any of the operations.

The only material objections to the location and installation of the Hoist have come from two parties. Michael McHenry and his son Porter McHenry (under the guise of the Half Moon Bay Fisherman's Marketing Association), direct competitors of Three Captains, and Commissioner Brennan – who acted without the express authority of the Harbor Commission.

The McHenry's own businesses that compete directly with Three Captains, Pillar Point Seafoods and a live bait business which supplies fresh bait to commercial and recreational fishermen. Basically, Three Captain's primary competitor is objecting because the Hoist may provide Three Captains the ability to better and more efficiently service fishermen that sell to Three Captains. Notably, Pillar Point also has two hoists, including one which is on the same side of Johnson Pier only yards away from the Hoist at issue.

On the other side of the issue, there are many fishermen that have voiced support for Three Captains to own the Hoist. That correspondence was transmitted to the Coastal Commission as part of earlier public testimony submission and is included by reference herein. Those fishermen contend that there will be no adverse effects and will actually be benefitted if the Hoist is operational.¹¹

3. The Coastal Act, the Three Captains Permit Application and delays as a result of Commissioner Brennan's interference.

Three Captains obtained all other necessary approvals and permits from San Mateo County.¹² And, but for the actions of Commissioner Brennan, Three Captains would not be waiting for approval of a permit by the California Coastal Commission ("CCC"). Notably, none of the other hoists on Johnson Pier, specifically including those two hoists which are owned and operated by Pillar Point/Mr. McHenry, have sought or have been approved for a permit under the Coastal Act (or any county permits, for that matter). Indeed, it appears that Pillar Point recently removed their hoist, refurbished and rewired it, and then mounted it back on the dock in a different location from where it had historically been situated. It does not appear that Pillar Point sought or obtained any permits, or the permission of the Harbor Master, before

¹¹ See Exhibits P and Q, attached hereto.

¹² See Exhibit F.

relocating the hoist. Nonetheless, Pillar Point Seafoods continues to operate, with the knowledge and consent of the District and the Commission.

With respect to the Coastal Commission Permit application that Three Captains submitted and is currently being considered by the CCC, it appears that the CCC permit may not have been necessary. The Act delegates the authority to issue permits to local governments, including counties and cities. The Act provides that counties and municipalities within the coastal zone are to prepare "local coastal programs" ("Coastal Programs") that determine how development within their jurisdiction is to proceed. Cal Pub Resources Code § 30500. After the local government has prepared a Coastal Program that has been certified by the CCC, "a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program." *Id.* § 30604(b). The Act further states "after a local coastal program ... has been certified ... the development review authority provided for in Chapter 7 [which deals with Permit issuance] shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof." *Id.* § 30159.

Pillar Point, where the Hoist is located, is within the City of Half Moon Bay and the County of San Mateo. Both Half Moon Bay and San Mateo County appear to have Commission-approved Coastal Programs. Therefore, when the County approved the permits for the construction and installation of the Hoist at its current location, presumably the issuance of the other permits also constituted compliance with the requirements of the Coastal Program for the unincorporated areas of San Mateo County.

Notwithstanding, Commissioner Brennan brought the issue of whether CCC approval of the Hoist is required to table.¹³ Even though none of the other hoists had been submitted to the CCC for approval, Three Captains promptly drafted and submitted an application to the Coastal Commission a complete application for the Waiver on September 9, 2014. On October 29, 2014, the California Coastal Commission ("Commission") sent out a "Notice of Proposed Permit Waiver" ("Notice") which stated, in relevant part, that:

Pursuant to Title 14, Section 13238 of the California code of regulations, and based on project plans and information submitted by the applicants regarding the proposed development, executive director of the California coastal commission hereby waives the requirement for it CDP for the following reasons:

The proposed project will facilitate existing marine use by allowing for ongoing operations in support of commercial fishing. It will ensure the economic and commercial use of the

¹³ See the email dated May 21, 2014 from Commissioner Brennan to Renee Ananda of the CCC and attached hereto as Exhibit G.

harbor and reduce congestion at Johnson pier during periods seasonal, high volume, fish-loads. The site does not contain sensitive habitat and the proposed project includes best management practices to avoid and minimize potential impacts to the water quality of the harbor in coastal waters. The project will not have a significant impact on visual resources, public access, or biological resources. For all the above reasons, the proposed project is consistent with chapter 3 of the Coastal Act. . . . [t]his waiver is proposed to be reported to the Commission on November 13, 2014, in Half Moon Bay.

At this point, the Executive Director concluded that the application for the Permit was complete and the Notice was issued on October 29, 2014. In a contemporaneous communication to the District, Renee Ananda stated,

Hello Mr. Grindy (Scott),

Mr. Fortado, Three Captains submitted a complete CDP application and the Executive Director has issued a waiver for the hoist. The issuance of the waiver will be reported to the Commission at the November 13, 2014 meeting as part of the Deputy Director's Report (along with other minor items). Thank you, RTA¹⁴

As indicated in the correspondence dated October 30, 2014, Commissioner Brennan immediately contacted the CCC to object to the Three Captains' waiver application.¹⁵ In that communication, Commissioner Brennan made a Public Records request regarding the Hoist and application. As can be seen in the CCC response to Commissioner Brennan's PRA request, Commissioner Brennan requested that information in her official capacity as a representative of the Board of Commissioners.¹⁶ Commissioner Brennan then set up to meet with Renee Ananda, the CCC representative at 1:30 p.m. on November 6, 2014.¹⁷ After Commissioner Brennan's meeting with the CCC, the CCC removed the Three Captains' waiver application from the November 13, 2014 agenda.¹⁸

Given the timing of the meeting between Commissioner Brennan and the CCC, and the decision to remove the matter from the November 13, 2014 CCC hearing agenda, it is highly likely that the Commissioner's involvement was a material factor in the CCC decision to remove the matter from the November 13, 2014 hearing agenda and the inability of Three Captains to

¹⁴ See Exhibit K, which is a copy of October 29, 2014 correspondence from Renee Ananda to Scott Grindy, the Harbor Master.

¹⁵ See Exhibit L.

¹⁶ See Exhibit N.

¹⁷ See Exhibit M.

¹⁸ See November 7, 2014 entry in the CCC Contact Log (Three Captains Hoist) attached hereto as Exhibit O.

obtain the waiver and utilize the Hoist for the 2014-2015 Commercial Dungeness Crab fishing season.

Moreover, Commissioner Brennan's actions are to the direct benefit of Pillar Point Seafoods, the primary objector to the use of the Hoist. This means that the Commissioner is effectively choosing the interests of one of the District's tenants over the interests of another. While the determination as to whether this is permissible is left to a court of competent jurisdiction, it does not appear to be in good faith. And it is in direct contravention to the express terms of the binding Lease agreement between the District and Three Captains.

Notwithstanding Commissioner Brennan's efforts to delay the consideration of the Three Captains application, Three Captains received notification that its application is again complete and consideration is tentatively scheduled consideration by the CCC at the April 2015 hearing.

4. **The Letter Agreement between the District and Three Captains means that the District cannot direct the relocation of the Hoist without substantive reason and that can only be developed after a period of use – and if "issues" relating to that use arise.**

The March 28, 2014 Letter agreement expressly states that the installation will be subject to a "use review" and can be relocated only if there are "issues". Given that the Hoist has not been cleared for use, the District and the Commission have no data or information upon which it may rely to require the relocation of the Hoist. The clear intent of the Letter Agreement is for Three Captains to be able to utilize the Hoist for a year, after it is cleared for actual operation. Indeed, as recognized by Commissioner Bernardo, under the terms of the Lease, the Commission has no authority to interfere with or modify the terms of the Lease which specifies that Harbor Master shall select the location for the second hoist. Any action on the part of the Commission to modify that agreement, or to cause the relocation of the Hoist, will be arbitrary, capricious and will leave Three Captains no choice but to seek immediate review by a Court of competent jurisdiction.

5. **Conclusion.**

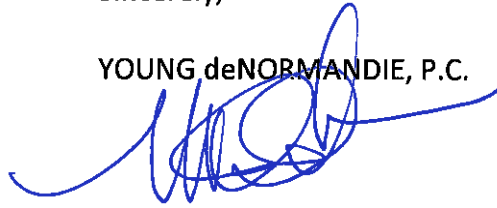
Three Captains followed the rules. It did everything it was required to under the Lease. It requested that the Harbor Master select a location for the hoist as provided under the Lease. The Harbor Master identified a location. Three Captains erected a Hoist at the identified location after expending more than \$75,000.00 in planning, permitting and installation. When the District requested that Three Captains obtain a permit directly from the CCC, Three Captains submitted an application, at great expense. Three Captains complied with every request from the Harbor Master regarding the Hoist. It took no steps without first notifying the Harbor Master and obtaining consent. Indeed, the Harbor Master (and therefore the District) has approved or ratified the Hoist installation at every step.

Three Captains requests that the Commission take no action with respect to Agenda Item 5. The matter is not ripe for determination because the CCC application process is not complete and the Hoist has not ever been utilized. Three Captains is entitled to and should be provided a year from the date that the Hoist may be utilized to use the Hoist before the matter may be considered. When the Hoist location is again considered, it should be at the sole discretion of the Harbor Master pursuant to the express terms of the Lease.

Thank you for your time and consideration.

Sincerely,

YOUNG deNORMANDIE, P.C.



Mark Scheer

Enclosures

cc: (via email only)
Sabrina Brennan (w/encs.)
Tom Mattusch (w/encs.)
Nicole David (w/encs.)
Robert Bernardo (w/encs.)
Pietro Parravano (w/encs.)
Steven Miller, counsel for the Harbor District (w/ encs.)