

San Francisco Bay Conservation and Development Commission

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January 8, 2018

TO: Enforcement Committee Commissioners

FROM: Larry Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Marc Zeppetello, Chief Counsel (415/352-3655; marc.zeppetello@bcdc.ca.gov)

SUBJECT: **Scott's Jack London Seafood, Inc.'s Appeal of the Executive Director's Determination that Scott's Is Not Entitled to a Waiver of 15% of the Total Penalty Amount under Cease and Desist and Civil Penalty Order No. CDO 2017.01**
(For Enforcement Committee Meeting on January 18, 2018)

Staff Report

This memorandum summarizes the substantive and procedural background of the appeal of Scott's Jack London Seafood, Inc. ("Scott's") of the Executive Director's determination that Scott's is not entitled to a waiver of 15% of the total penalty amount under Cease and Desist and Civil Penalty Order No. CDO 2017.01 ("Order"), as more fully set forth in the attached documents.

The Commission issued the Order to Scott's on April 7, 2017. A copy of the Order (excluding Attachment A -- Additional Findings) is attached to this memo as Exhibit A.

The Order requires Scott's to cease and desist from all activity in violation of BCDC permit No. 1985.019.09B ("Permit") which regulates its use of the public pavilion in a portion of the Franklin Street plaza at Jack London Square. Among other provisions, the Order also requires Scott's to: (1) submit an application to amend the Permit to (a) request after-the-fact authorization for certain structure components of the pavilion that Scott's had constructed without authorization, and (b) request authorization for a new entrance door to the pavilion; (2) provide public access improvements required by the Permit; (3) record a legal instrument (public access guarantee); and (4) submit monthly statements of events held at the pavilion.

The Order imposes an administrative civil penalty in the amount of \$395,360.00 and requires Scott's to pay the penalty in three equal installments of \$131,786.67 each, over a three-year period, but provides that Scotts shall be entitled to a waiver of 15% of the total penalty amount if the Executive Director determines, in accordance with Paragraph IV.L, that Scott's has complied with the Order and the Permit.

Paragraph IV.L of the Order states as follows:

Scott's shall be entitled to a waiver of 15% of the total penalty amount if the Executive Director determines that Scott's has complied fully and in a timely manner with each and every requirement of Paragraphs III.A, III.B, III.C, III.D, III.E, III.F, III.G, and III.I of this Order and has maintained full compliance with this Order and the Permit through September 1, 2017. By no later than September 15, 2017, the Executive Director shall notify Scott's in writing of his determination as to whether or not Scott's has complied with the referenced requirements of this Order and has maintained compliance with this Order and the Permit through September 1, 2017, and, therefore, whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount.

By letter dated September 15, 2017, the Executive Director determined that Scott's: (1) had not fully complied in a timely manner with all applicable requirements of the Order and had not maintained full compliance with the Order and the Permit through September 1, 2017, and, therefore, (2) is not entitled to receive the 15% waiver of the total penalty amount. A copy of the Executive Director's September 15th letter is attached as Exhibit B.

By letter dated September 27, 2017, Scott's, through its counsel, objected to the Executive Director's determination, sought to appeal it, and, absence reversal of the determination, requested a hearing before the Commission to determine Scott's compliance with the Order. A copy of Scott's counsel's September 27th letter is attached as Exhibit C.

By letter dated October 16, 2017, Scott's, through its counsel, objected to certain conditions in the staff's recommendation on the Commission's consideration of the application to amend the Permit that Scott's had submitted pursuant to the Order. In that letter, among other issues, Scott's noted that it had previously objected to and sought to appeal the Executive Director's determination that it is not entitled to a waiver of 15% of the total penalty under the Order, and Scott's attached a copy of its counsel's September 27th letter.

By letter dated October 18, 2017, the Executive Director reaffirmed his determination that Scott's had not complied fully and in a timely manner with all requirements of the Order, and, therefore, is not entitled to a waiver of 15% of the total penalty amount. On reconsideration, the Executive Director determined that Scott's repeated failures to comply with the monthly event reporting requirement established by Paragraph III.I of the Order – which provides that “Scott's shall submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion” -- are material violations of the Order. The Executive Director also noted that the Order grants the Executive Director sole discretion to determine whether or not Scott's has complied with the Order and the Permit, and that the Order does not give Scott's the right to appeal the Executive Director's determination to the Commission. A copy of the Executive Director's October 18th letter is attached as Exhibit D.

At the Commission meeting on October 19, 2017, representatives of Scott's requested during the public comment period that the Commission review the Executive Director's determination that Scott's had not complied fully and in a timely manner with each and every requirement of the Order, and, therefore, is not entitled to a waiver of 15% of the total penalty amount. In response, Chair Wasserman asked that the matter be scheduled for discussion at a later date. Chair Wasserman subsequently directed that the matter be referred to the Enforcement Committee for consideration and a recommendation to the full Commission.

By letter dated November 7, 2017, Scott's counsel re-argued Scott's position on this matter and once again requested that the Executive Director reverse his decision. A copy of Scott's counsel's November 7th letter is attached as Exhibit E.

San Francisco Bay Conservation and Development Commission

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BCDC ISSUED

Scott's Jack London Seafood, Inc.
2770 Camino Diablo, #B
Walnut Creek, CA 94597

COMMISSION
CEASE AND DESIST AND CIVIL PENALTY
ORDER NO. CDO 2017.01

Respondent.

Effective Date: April 7, 2017

TO SCOTT'S JACK LONDON SEAFOOD, INC.:

I. CEASE AND DESIST

Pursuant to California Government Code Section 66638, Scott's Jack London Seafood, Inc. , and all of its agents and employees, and any other persons acting on behalf of or in concert with it (collectively "Scott's" or "Respondent") is hereby ordered to cease and desist all activity in violation of BCDC Permit No. 1985.019.09B, BCDC Permit No. 1985.019.22A, or the McAteer-Petris Act ("MPA") at Jack London Square in Oakland, as described herein. Specifically, Scott's is ordered to:

A. Cease and desist from violating BCDC Permit Nos. 1985.019.09B and 1985.019.22A, and the McAteer-Petris Act.

B. Fully comply with requirements of Sections III and IV of this Cease and Desist and Civil Penalty Order ("Order").

II. FINDINGS

This Order is based on the following findings. The administrative record in support of these findings and this Order includes: (1) all documents and other evidence cited herein including Attachment A – Additional Findings; and (2) all additional documents listed in the Index of Administrative Record, Attachment B hereto.

A. BCDC Permit No. 1985.019.09B, as amended through October 7, 1997 ("the Permit"), issued jointly to Scott's and the Port of Oakland ("Port"), authorizes the construction, use, and maintenance of a 4,400-square-foot pavilion, in a portion of the Franklin Street Plaza at Jack London Square in Oakland, for shared public and private use at a ratio of 80% public to 20% private, and the installation of café seating, benches, lighting, and other site furnishings within the pavilion and larger, approximately 23,000-square-foot plaza.

B. BCDC Permit No. 1985.019.022A, as amended through October 22, 2014 ("the Port's Permit"), issued to the Port, authorized certain development activities along a six-block section of the Port's waterfront property between Jefferson and Harrison Streets at Jack London Square.

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C. In or about December 2011, Scott's contacted BCDC staff regarding certain modifications to the pavilion proposed by Scott's. Between December 2011 and November 2012, BCDC staff and Scott's continued to discuss, BCDC staff provided comments on, and Scott's sought BCDC staff approval of various potential modifications to the pavilion proposed by Scott's. As of November 2012, staff informed Scott's that it had not obtained BCDC staff approval of its proposed pavilion modifications and stated that Scott's should coordinate with the Port, and that Scott's and the Port should jointly present a revised proposal to BCDC.

D. In December 2012, BCDC staff learned that Scott's had commenced construction of certain modifications to the pavilion without obtaining approval from BCDC staff or the Commission, which upon completion in March 2013, included an unauthorized permanent metal-frame doorway and new retractable wall panel system, and that Scott's had also installed planters in a public access area without authorization.

E. On May 16, 2013, BCDC's Chief of Enforcement issued, pursuant to section 11386 of the Commission's regulations (14 C.C.R. § 11386), an enforcement letter to Scott's and the Port describing a number of alleged violations of the MPA and/or the Permit, including:

1. Construction of an unauthorized metal-framed doorway, storage area, and stage, and installation of multiple planters, in a public access area;
2. Failure to obtain BCDC staff approval of design and construction plans prior to replacing the former tent walls with a retractable wall panel system used to enclose the pavilion;
3. Failure to provide six years of reports of private events in the pavilion;
4. Failure to record a public access legal instrument for the pavilion; and
5. Failing to install and maintain all the public access improvements at the pavilion for at least 292 days per year.

F. The May 16, 2013, enforcement letter directed Scott's and the Port to take certain actions to retain the opportunity to resolve the alleged violations with standardized fines, as specified in 14 C.C.R. § 11386, including:

1. Remove the metal-framed doorway, storage area, and planters from the public access area;
2. Submit and obtain BCDC staff approval of a full set of plans for the retractable wall panel system;
3. Submit six years of past due reports of private events for the pavilion meeting the requirements of the Permit; and
4. Submit and obtain BCDC staff approval of a legal instrument to record the pavilion public access area; and
5. Install and repair certain public access improvements.

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G. Following receipt of the May 16, 2013, enforcement letter, Scott's did not remove the unauthorized structures and improvements. Instead, Scott's continued to use the pavilion for private events and engaged in discussions with BCDC staff over an approximately two-year period regarding the possibility of obtaining after-the-fact approval of some or all of the unauthorized structures or improvements either by BCDC staff, through plan review and approval, or by potential amendments to the Permit and the Port's Permit. Scott's made two presentations regarding their various proposals to BCDC's Design Review Board, on February 10, 2014 and April 6, 2015. As of the date of this Order, Scott's has not removed or obtained approval of the unauthorized construction of the metal-framed entry doorway, storage area and stage, or retractable wall panel system, or of the unauthorized installation of the multiple planters in the public access area.

H. After learning of Scott's unauthorized construction activities in a dedicated public access area, BCDC staff continued its enforcement investigation. That investigation revealed numerous additional alleged violations of the Permit or the Port's Permit, including but not limited to, Scott's extensive non-Permit complaint use of the pavilion for private events over an approximately 12-year period.

I. In or about September 2015, BCDC staff informed Scott's and the Port that the Executive Director intended to initiate an enforcement proceeding regarding the numerous violations of the Permit and the Port's Permit, including, but not limited to the unresolved issues regarding Scott's unauthorized construction in a public access area, that would likely result in the Commission issuing a cease and desist and administrative civil penalty order against Scott's and the Port. Scott's and the Port requested an opportunity to seek to negotiate a proposed settlement with BCDC.

J. On July 19, 2016, the Executive Director, Scott's and the Port agreed to a settlement in principle on the terms of a proposed stipulated order, subject to review and approval of the proposed order by the Commission's Enforcement Committee and by the Commission.

K. On October 20, 2016, the Enforcement Committee held a public hearing and adopted the staff's recommendation that the Commission issue the proposed stipulated order.

L. On November 3, 2016, the Commission rejected the Enforcement Committee's recommended enforcement decision (i.e., adoption of the proposed stipulated order). The Commission provided comments on certain issues raised by the alleged violations and directed staff to commence a formal enforcement proceeding if staff and Scott's and the Port were unsuccessful in returning to the Enforcement Committee within two months with a different proposed order that responded to and took into account the direction provided by the Commission.

M. By letter dated December 8, 2016, to BCDC's Chief Counsel, Marc Zeppetello, from Scott's counsel, Michael P. Verna, Scott's provided a settlement proposal to staff. After reviewing Scott's proposal, and after further discussions between Mr. Zeppetello and Mr. Verna regarding the prospects for reaching an agreement on a proposed settlement, staff determined that the proposal was not responsive to the Commission's direction and that it would not be

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possible to reach an agreement with Scott's and the Port on a revised proposed stipulated order that would be acceptable to the Commission. Therefore, on December 19, 2016, staff commenced a formal enforcement proceeding by mailing to Scott's and the Port a Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint").

N. On January 23, 2017, Scott's and the Port each submitted their respective Statement of Defense and accompanying supporting documents. On February 16, 2017, the Enforcement Committee held a public hearing on this matter at which it considered the staff's presentation of the Executive Director's recommended enforcement decision, presentations by Scott's and the Port, and public comment by a number of parties. The Enforcement Committee adopted the Executive Director's recommended enforcement decision with modifications. Among other modifications, the Enforcement Committee recommended that the Port be dismissed from this action and that the proposed penalty be reduced from \$841,100 to \$395,360, payable in three annual installments and with the opportunity for Scott's to be entitled to a waiver of 15% of the penalty, in the third year, if Scott's timely complies, and maintains compliance, with this Order.

O. In summary, the violations or categories of violation of the Permit or the Port's Permit documented by BCDC staff's enforcement investigation include the following:

1. Unpermitted development by unauthorized construction in public access areas of a metal-framed entry doorway, wood and metal-framed walls, multiple moveable wall panels and ceiling tracks in the pavilion; storage area and stage; roof extension and planters.
2. Non-Permit compliant use of the pavilion, in violation of Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion, during the period 2004-2015:
 - a. Providing fewer than 292 public use days per year;
 - b. Providing, on average per month during winter season, fewer than five (5) public use weekend days and nights;
 - c. Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
 - d. Holding, on average per month during summer season, more than three (3) private use weekend days and nights;
 - e. Providing fewer than three (3) public use weekend days and nights per month; and
 - f. Holding more than two consecutive private use days.
3. Unpermitted use of the Franklin and Broadway Street plazas by placing tents and stanchions, storing event related equipment (including planters), and displaying promotional vehicles;

4. Untimely submittal of private event schedules as required by Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion;
5. Failure to record a public access legal instrument for the pavilion public access area prior to commencement of construction, as required by Special Condition II-B-3, Permanent Guarantee;
6. Failure to provide all required public access improvements during public use days, as required by Special Condition II.B.5, Improvements Within the Public Access Area; and
7. Failure to obtain plan approval prior to installation of public access improvements, as required by Special Condition II.A, Specific Plans and Plan Review.

P. The pavilion modifications constructed by Scott's including, but not necessarily limited to, the metal entry doorway, retractable wall panel system, roof extension, and storage shed and stage are unauthorized and include components and dimensions that staff has advised Scott's and the Port have adverse impacts on public access requirements of both the Permit and the Port's Permit. Unless and until the Commission acts favorably to approve proposed modifications to the pavilion, the as-built pavilion modifications shall remain unauthorized and subject to removal and/or reconstruction. Moreover, the Commission cannot act on a request to authorize proposed pavilion modifications until Scott's and the Port submit a complete application to amend the Permit that complies with the Commission's regulations pertaining to material amendments to a major permit as outlined in 14 C.C.R. §§10310, 10824, and Appendices D, E, F.

Q. The additional findings set forth in Attachment A hereto, and incorporated by reference herein, more fully describe each of Scott's and the Port's violations or categories of violation, and include information regarding the dates of violation and references to supporting evidence.

III. CONDITIONS

A. On and after the Effective Date of this Order, Respondent shall cease and desist from all activity in violation of the Permit, the Port's Permit, and the McAteer-Petris Act.

B. **Make Public Access Available.** On and after the Effective Date of this Order, Respondent shall make the pavilion and all other public access areas around the pavilion (except for areas occupied by a built-in unauthorized structure, such as the storage shed and pavilion walls and panels) available to the public for unrestricted public access, as required by Special Condition II.B.1 of the Permit and Special Condition B.II.1 of the Port's Permit, except as otherwise provided in accordance with Special Condition II.B.2 of the Permit.

C. **No Storage of Equipment In or Unauthorized Use of Public Access Areas.** On and after the Effective Date of this Order, Scott's shall cease and desist from storing, and shall not store, any restaurant equipment or site furnishings in any required public access areas at any time,

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and shall cease and desist from using, and shall not use, any portion of the Franklin and Broadway plazas for private events, to store any restaurant equipment or site furnishings, or to display promotional materials.

D. Planter Removal. No later than 15 days after the Effective Date of this Order, Scott's shall permanently remove all planters from the area around the pavilion and shall not place or storage planters within the Commission's jurisdiction without Commission authorization.

E. Compliance with Permit Exhibit A, Guidelines for Private Use of Public Pavilion. On and after the Effective Date of this Order, Respondent shall comply fully with Special Condition II.B.2 of the Permit, Public Use of the Pavilion, and shall use the pavilion for private events only as specified in Exhibit A to the Permit, "Guidelines for Private Use of the Public Pavilion," including but not limited to using the pavilion for no more than 73 days of private use annually.

F. Submit Complete Applications to Amend the Permit. No later than 45 days after the Effective Date of this Order, Respondent and the Port shall submit to the Executive Director a fully complete and properly executed application to amend the Permit. The application shall include the following:

1. The application to amend the Permit shall request after-the-fact authorization for the following structural components of the pavilion that Scott's constructed without authorization: (1) the permanent wall and retractable wall panel system along portions of the exterior of the pavilion; (2) the stage along the western interior boundary of the pavilion; (3) the storage area behind the stage; and (4) the structure that connects the roof of the pavilion to the roof of the restaurant. In preparing their application, Respondent and the Port shall take into account the plans depicting the proposed public pavilion modifications presented to the Design Review Board on April 6, 2015, and the DRB's comments on those plans. The application shall also request authorization for new entrance doors into the pavilion, which would be integrated into the retractable wall panel system and installed by Scott's to replace the existing permanent door structure and metal framing at the entrance to the pavilion that Scott's constructed without authorization. The application shall also include: (1) detailed architectural plans for the proposed project including but not limited to new entrance doors and any modifications to the retractable wall panel system necessary to integrate the doors into that system; (2) documentation of discretionary approval and CEQA review from the City of Oakland; (3) a statement of total project costs; and (4) payment of the appropriate application filing fee. The application shall not include a request to increase use of the pavilion for private events.
2. The application to amend the Permit shall include a public access plan for the pavilion and the public access areas around the pavilion based on the conceptual plan that Scott's proposed, and BCDC staff modified, during a meeting on August 28, 2015, that takes advantage of existing elements, considers factors pertaining to existing limitations, and attempts to unify the public space inside and outside of the

pavilion. The plan shall provide high quality chairs placed both inside and outside the pavilion; repair existing paving beneath the pavilion and toward Water Street (some areas have been poorly patched and require replacement pavers); in the plaza east of the pavilion and north of Kincaid's, remove trees, use vertical lights to create and angled "procession" towards the water, incorporate a few simple permanent concrete seawalls around an area with decomposed granite paving (and place tables and chairs within this area), provide benches in a line along the water facing east toward Pescatore restaurant, and provide planted screens around Kincaid's walls and trash areas.

G. Provide Public Access Improvements Required by the Permit. No later than 30 days after the Effective Date of this Order, Respondent shall provide all improvements within the public access area required by Special Condition II.B.5 of the Permit including: (1) at least four public access signs, two permanent and two temporary, to facilitate shoreline public access between Franklin Street and Broadway on the Bay side of Scott's; and (2) at least 15 tables and 35 chairs that are to be in place at all times except when the pavilion is in use for private events or other approved events, as authorized by the Permit.

H. Record Legal Instrument. No later than 30 days after the Effective Date of this Order, excluding the time period(s) during which the draft guarantee is held by staff counsel for review, Scott's and the Port shall submit proof of recordation with Alameda County of a legal instrument that guarantees the public access area required by Special Condition II.B.1 and 2 of the Permit, in accordance with Special Conditions II.B.3 and 4 of the Permit. For reference purposes, the public access area over which the legal instrument is to be recorded is shown on Exhibit A of the Port's Permit as "Scotts Pavilion." The recorded instrument may acknowledge the 66-year restraint on the alienation of granted public trust lands; however, it must affirm that so long as the Permit remains valid, the permittees are required to have a valid recorded instrument guaranteeing the public access required by the Permit and that a failure to provide that dedication will constitute a violation of the Permit.

I. Submit Pavilion Events Schedules. No later than 30 days after the Effective Date of this Order, Scott's shall submit to BCDC all past-due quarterly event schedules, as required by Special Condition II.B.2.c of the Permit. The past-due event schedules to be submitted pursuant to this Paragraph are those for the first quarter of 2013, the 4th quarter of 2015, and the first and second quarters of 2017. In addition, commencing May 15, 2017, Scott's shall submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times.

J. Further Review By The Commission. If Respondent and the Port fail to submit a complete application to amend the Permit by no later than 45 days after the Effective Date of this Order, in accordance with Condition III.F, above, or if the Executive Director has not filed the application as complete by no later than July 10, 2017, the Executive Director shall schedule a public hearing before the Commission to report on the status of Respondent's and the Port's application, their compliance with the Permit since January 1, 2017, and Scott's compliance with the terms of this Order. At such hearing, the Commission may, if recommended by the

Executive Director, order that this enforcement proceeding be reopened and that the Commission consider modifying this Order to revoke the Permit and to order Respondent and the Port to remove any or all structures within the shoreline band on the state tidelands occupied by the pavilion.

IV. CIVIL PENALTY ORDER

A. Government Code Section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation of the MPA or a BCDC permit in an amount of which shall not be less than \$10 nor more than \$2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than \$30,000 for a single violation.

B. Government Code Section 66641.9(a) states:

In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

C. **Nature of the Violations.** Scott's violated the requirements of the Permit repeatedly and consistently, as follows:

1. **Non-permit Compliant Use of the Pavilion.** As documented on pages 8 through 17 in the Violation Report/Complaint, Scott's regularly held more private events than allowed by the Permit and operated the pavilion in numerous other ways that violate the requirements of the Permit.
2. **Unauthorized Use of the Franklin and Broadway Street Plazas.** Scott's regularly displayed a promotional vehicle in the Broadway Street Plaza and stored event-related equipment including planters in the Franklin Street Plaza. Scott's was repeatedly notified that these activities were unauthorized yet continued to commit the violations.
3. **Event Schedules and Scheduling.** Respondent and the Port habitually failed to submit quarterly reports and, to a lesser extent, annual summaries of scheduled events.
4. **Public Access Improvements.** Scott's failed to place the tables, chairs and signs in the pavilion when it was in public use almost continuously since 1998. As of the date of the Violation Report/Complaint, Scott's was posting only one of the two required moveable signs and it was not located in the pavilion where it is required to be located.

5. **Recordation of Legal Instrument for the Public Access Area.** Respondent and the Port have failed to resolve this issue despite the fact that Commission staff provided all the information necessary to achieve compliance with this requirement in a letter dated December 12, 2013.
6. **Failure to Obtain Plan Approval for the Public Access Improvements.** Respondent failed to obtain plan approval for the public tables, chairs and signage prior to constructing the pavilion.

D. **Circumstances of the Violations.** On multiple occasions, BCDC staff described to Scott's the permit requirements and the proper corrective actions and requested that actions and events remain within the authorized numbers. Despite these meetings and communications, the same unauthorized conduct continued. Circumstances of this matter support the conclusion that violating the BCDC permit was an intentional business decision by Scott's, whereby potential BCDC penalties may have been factored into decisions to proceed unabated over at least a 12-year period.

E. **Extent of Violations.** The non-permit compliant elements of the violations have both spatial and temporal components. The facts demonstrate the long duration of these violations and the expansion of private use beyond the limits of the pavilion into the Broadway and Franklin Street Plazas.

F. **Gravity of the Violations.** The open views of the estuary afforded by the space occupied by the pavilion are the only unobstructed views of the estuary that are available to persons approaching from Franklin Street. Therefore, the obstruction of those public views by Scott's unauthorized private events is a significant detriment to the public.

1. **Adverse Impacts on Public Access.** Each and every violation cited in the Violation Report/Complaint adversely impacts existing required physical and visual public access in and adjacent to the pavilion.
2. **Unauthorized Construction of the Pavilion Enclosure System.** Scott's knowingly and intentionally commenced and completed construction of its new pavilion enclosure system without the necessary Commission staff or Commission approval.
3. **Permit Application Filing Process.** Respondent and the Port failed to submit two complete applications to retroactively authorize those elements of the pavilion construction project eligible for retroactive approval. In addition, Respondent has failed to submit a revised public access proposal.
4. **Failure to Cooperate**
 - a. On May 30, 2013, during a site visit with the Commission's Executive Director, Mr. Fagalde stated he would not remove the permanent metal-framed entry doorway;
 - b. During a meeting with Ms. Miramontes and Ms. Klein on April 17, 2014, Mr. Fagalde said he could not remove the permanent metal-framed entry doorway;

- c. During a meeting with Commission staff on November 18, 2014, Mr. Gallagher said he could not remove the permanent metal-framed entry doorway;
- d. As these communications show, it was not a matter of not being able to remove the permanent metal-framed entry doorway from the project for a 3.5-year period, but rather an unwillingness to remove it. This became apparent when, on February 20, 2015, Respondent submitted a plan proposing to replace the permanent metal-framed entry doorway with additional retractable wall panels that include an entry doorway;

G. Susceptible to Removal or Resolution. Whether the violation is susceptible to removal or resolution:

1. Susceptible

- a. The unpermitted construction of the new pavilion enclosure system is susceptible to resolution through the combined removal of portions of the new pavilion enclosure system and after-the-fact approval of the remainder of it; and
- b. The failure to gain approval of a legal instrument to permanently guarantee the public access area and/or record an approved legal instrument is also susceptible to resolution by obtaining staff approval of a legal instrument and subsequently recording it.

The maintenance of public access areas free from storage of restaurant related equipment.

The provision of all required public access improvements (public access tables, chairs and signs).

Use of the pavilion in compliance with the Permit (*i.e.*, 292 days/year of unrestricted public access, etc.).

2. Not Susceptible. The following violations are not susceptible to removal or resolution:

- a. The multitude of past permit non-compliant uses, such as but not limited to the provision of fewer than 292 public access days at the pavilion, from 2004 through 2016 and continuing through the present;
- b. The past installation, storage and display of unauthorized structures and materials in the Broadway and Franklin Street Plazas;
- c. The past failure to submit quarterly reports of proposed events in a timely manner;
- d. The past failure to submit annual reports in a timely manner; and
- e. The failure to provide all of the required public access tables, chairs and signs between 2000 and the present.

H. **Cost to State.** The estimated costs to the state in pursuing this enforcement action total at least 1,109 hours and a cost of over \$83,224 through the date of issuance of the Violation Report/Complaint, and additional costs have accrued since that time.

I. **With Respect to the Violator**

1. **Ability to Pay and Effect on Business.** Scott's has provided "profit/loss" financial statements that include annual net profit figures. For each of the three most recent years, 2014-2016, Scott's earned an average annual net profit of approximately \$548,549. In addition, in response to a subpoena issued by the Executive Director, Scott's has produced its balance sheets for 2014 and 2015. Those balance sheets include the following figures that are relevant to Scott's ability to pay and the effect of any penalty on its ability to continue in business:

Balance Sheet Description	2014	2015
Inter Company Account Receivable (Current Asset)	\$6,048,315	\$6,646,394
Total Current Assets	6,847,473	\$7,229,226
Retained Earnings	\$4,996,157	\$5,394,308
Total Stockholders Equity	\$5,975,582	\$6,245,857

These average annual net profit and balance sheet figures indicate that Scott's has the ability to pay the penalty imposed by the Commission.

2. **Voluntary Removal or Resolution.** The Commission finds no evidence that Scott's has made any effective effort to voluntarily remove the unauthorized structures. Instead, the evidence cited on pages 34 through 38 in the Violation Report/Complaint demonstrates a steady pursuit of project completion and retention of unauthorized construction in direct contradiction to the information and direction provided by BCDC staff. On the contrary, Scott's has protracted this enforcement matter by its stubborn belief that it can perpetually operate the pavilion in disregard of its permit and the law.
3. **Prior History.** Respondent has repeatedly and consistently violating the Permit and the MPA since at least 2000 as shown by the evidence cited in the Violation Report/Complaint and the findings of this Order.
4. **Culpability.** Scott's is fully responsible and thus culpable. Scott's executed the Permit, attesting that it understood the permit conditions, and has proceeded for 15 years to ignore the requirements of its Permit and the MPA, as well as the direction from many members of the BCDC staff.

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5. **Economic Savings.** The Commission is not in a position to quantify any economic savings to Respondent resulting from the violations, but Scott's has clearly benefitted economically from deferring removal of the unauthorized construction at the pavilion while continuing to over use the pavilion for private events. Similarly, Scott's has profited from the events in excess of 73 per year that it holds in the pavilion.

J. **Such other matters as justice may require.** No business located within BCDC's jurisdiction other than Scott's has made such extensive use of a dedicated public access space for private profit. No other business within BCDC's jurisdiction has so flagrantly, extensively, and knowingly violated the terms of its Permit and the MPA. Moreover, as of the date of this Order, all but one of the violations (plan approval) are ongoing and Respondent has neither removed the unauthorized structures, filed as complete the permit amendment application necessary to seek authorization for the unpermitted construction, nor ceased the non-compliant and illegal uses of the pavilion and the unpermitted uses of the Franklin Street Plaza.

K. Based on consideration of the relevant factors set forth in Government Code Section 66641.9(a), the penalty amounts authorized by Government Code Section 66641.5(e), and the preceding findings, the Commission hereby finds that an administrative civil penalty of \$395,360 is justified to resolve this matter. Scott's shall pay the total penalty amount in three equal installments, of \$131,786.67 each, over a three-year period, in accordance with Paragraph IV.M, below. Provided, however, that if the Executive Director determines that Scott's has complied with this Order and the Permit in accordance with Paragraph IV.L, below, Scott's shall be entitled to a waiver of 15% of the total penalty amount, or \$59,304, and this amount shall be deducted from the third annual installment payment.

L. Scott's shall be entitled to a waiver of 15% of the total penalty amount if the Executive Director determines that Scott's has complied fully and in a timely manner with each and every requirement of Paragraphs III.A, III.B, III.C, III.D, III.E, III.F, III.G, and III.I of this Order and has maintained full compliance with this Order and the Permit through September 1, 2017. By no later than September 15, 2017, the Executive Director shall notify Scott's in writing of his determination as to whether or not Scott's has complied with the referenced requirements of this Order and has maintained compliance with this Order and the Permit through September 1, 2017, and, therefore, whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount.

M. Pursuant to Government Code Section 66647, Scott's shall remit payments to the Commission, by cashier's checks, payable to the San Francisco Bay Conservation and Development Commission – Bay Fill Clean-Up and Abatement Fund as follows: (1) within 30 days of the Effective Date of this Order, a payment of \$131,786.67; (2) by no later than May 7, 2018, a payment of \$131,786.67; and (3) by no later than May 7, 2019, a payment of \$131,786.67, unless the Executive Director has determined, in accordance with Paragraph IV.L, above, that Scott's is entitled to a waiver of 15% of the total penalty amount, in which case the payment shall be \$72,482.67.

V. TERMS

A. Under Government Code Section 66641, any person who intentionally or negligently violates any cease and desist order issued by the Commission may be liable civilly in the sum of up to \$6,000 for each day in which such violation persists. In addition, upon the failure of any person to comply with any cease and desist order issued by the Commission and upon the request of the Commission, the Attorney General of the State of California may petition the superior court for the issuance of a preliminary or permanent injunction, or both, restraining the person or persons from continuing any activity in violation of the cease and desist order.

B. This Order does not affect any duties, right, or obligations under private agreements or under regulations of other public bodies.

C. Scott's must conform strictly to this Order.

D. This Order does not constitute a recognition of property rights.

E. This Order is effective upon issuance thereof.

VI. OPPORTUNITY FOR JUDICIAL REVIEW

Under Government Code Section 66639, within thirty (30) days after service of a copy of a cease and desist order issued by the Commission, any aggrieved party may file with the superior court a petition of writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure. Failure to file such an action shall not preclude a party from challenging the reasonableness and validity of the order in any judicial proceedings brought to enforce the order or for other civil remedies.

DATED: April 7, 2017



LAWRENCE J. GOLDZBAND
Executive Director
San Francisco Bay Conservation and
Development Commission

List of Attachments

Attachment A: Additional Findings

Attachment B: Revised Index of Administrative Record

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

September 15, 2017

Liz Gallagher
Scott's Corporate
2770 Camino Diablo, Suite B
Walnut Creek, CA 94597

SUBJECT: Commission Cease and Desist and Civil Penalty Order No. CDO 2017.01

Dear Ms. Gallagher:

As you know, Paragraph IV.L of Commission Cease and Desist and Civil Penalty Order No. CDO 2017.01 (the "Order") provides as follows:

Scott's shall be entitled to a waiver of 15% of the total penalty amount if the Executive Director determines that Scott's has complied fully and in a timely manner with each and every requirement of Paragraphs III.A, III.B, III.C, III.D, III.E, III.F, III.G, and III.I of this Order and has maintained full compliance with this Order and the Permit through September 1, 2017. By no later than September 15, 2017, the Executive Director shall notify Scott's in writing of his determination as to whether or not Scott's has complied with the referenced requirements of this Order and has maintained compliance with this Order and the Permit through September 1, 2017, and, therefore, whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount.

In accordance with Paragraph IV.L of the Order, this letter is to notify Scott's that I have determined that Scott's has not complied fully and in a timely manner with certain requirements of the Order and the Permit and, therefore, is not entitled to a waiver of 15% of the total penalty amount. The reasons for this determination are set forth below.

Paragraph III.F. Paragraph III.F of the Order requires Scott's and the Port of Oakland to submit a fully complete and properly executed application to amend the BCDC permit for the pavilion "no later than 45 days after the Effective Date of this Order." The Effective Date of the Order was April 7, 2017, and, therefore, Scott's and the Port were required to submit a fully complete and properly executed application to amend the permit by no later than May 22nd.

Scott's and the Port submitted their application to amend the permit on April 4th, prior to the Effective Date of the Order. By letter dated May 4, 2017, BCDC staff determined that the application was incomplete pending submission of certain specified information. Scott's and the Port submitted supplemental application materials on May 22nd. By letter dated June 9,

2017, BCDC staff determined that the application was still incomplete and could not be filed pending submission of specified information. However, that June 9th letter noted that Scott's and the Port had responded in excellent fashion to our May 22nd letter and, in light of your responsiveness and the substantial progress that had been made on the public access proposal, BCDC staff would not take the position that Scott's and the Port had failed to comply with the 45-day deadline established by Paragraph III.F.

Unfortunately, after receiving our June 9th letter, it appears that Scott's and the Port lost the incentive and the momentum required to file a complete application. The subsequent failures to provide information are discussed in our letter dated August 15, 2017, which established an amended deadline of August 24th for Scott's and the Port to provide the required information to file the application as complete.

Scott's responded to our August 15th letter on August 24th and finally provided the remaining necessary information to file the application as complete. Because of the assurance we provided in our June 9th letter, *i.e.*, that staff would not take the position that Scott's and the Port had failed to comply with 45-day deadline to file a complete and properly executed application, I have not made a determination that Scott's failed to comply with Paragraph III.F. Nevertheless, it is both noteworthy and troubling that it took Scott's and the Port an additional 94 days (from May 22 to August 24) beyond the 45-day deadline established by Paragraph III.F to submit a fully complete application to amend the permit.

Paragraph III.I. Paragraph III.I of the Order provides, in part, that Scott's shall submit to BCDC all past due quarterly event schedules no later than 30 days after the Effective Date of the Order, as required by Special Condition II.B.2.c of the permit. Scott's complied with this requirement. However, Paragraph III.I further requires:

In addition, commencing May 15, 2017, Scott's shall submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times.

Scott's failed to submit a monthly statement listing all events held at the pavilion in April by May 15th. On June 6, BCDC's Chief Counsel, Marc Zeppetello, sent an email to Scott's counsel, Michael Verna, to inform Mr. Verna, as a courtesy, that Scott's had failed to comply with Paragraph III.I, "before it happens again and there are two violations." Later that day, you sent Mr. Zeppetello a copy of Scott's second quarterly report for 2017, which Scott's had previously submitted to the Port, that included pavilion usage information for April and May, 2017. Also that same day, Mr. Zeppetello spoke with you by phone and explained that the requirement in Paragraph III.I of the Order to submit a monthly pavilion usage statement directly to BCDC is separate and distinct from the permit requirement that Scott's submit quarterly reports to the Port. Mr. Zeppetello followed up on your phone conversation by sending both you and Mr.

Verna an email on June 7th, explaining the difference between the reporting requirements under the permit and the Order and what Scott's needed to do to comply with Paragraph III.I. (A copy of Mr. Zeppetello's June 7th email is attached for your convenience.)

Subsequently, Adrienne Klein, BCDC's Chief of Enforcement, was copied on a July 14th email that Scott's had sent to the Port's property manager and that forwarded a series of related emails from June 12 and June 14, on the subject: "FW: BCDC Permit 19-85(B) Notice of Compliance." Copies of Scott's quarterly reports for the second, third, and fourth quarters of 2017 were attached to this email. The pavilion use information for June contained in the second quarterly report attached to the July 14th email appears to be identical to the information for June contained in the second quarterly report you provided Mr. Zeppetello on June 6th. Moreover, because the July 14th email forwarded prior emails from June 12 and June 14, it appears that the information contained in second quarterly report for the month of June attached to the July 14 email was actually prepared in June, or perhaps earlier, and shows estimated or scheduled pavilion use in June, rather than actual pavilion use for that month. Thus, it appears that Scott's failed to comply with Paragraph III.I by submitting a monthly pavilion usage statement for June by July 15th.

Just as important, Scott's failed to submit a monthly pavilion usage statement for the month of July by August 15th.

Scott's repeated failures to comply with the pavilion-usage reporting requirement of Paragraph III.I are material violations of the Order. As you will recall, two categories of violations at issue in the enforcement investigation that led to the Order were Scott's failure to submit pavilion usage reports as required by the permit and overuse of the pavilion for private events. Scott's failures to comply with Paragraph III.I, notwithstanding that Mr. Zeppetello brought the first violation to Scott's attention (following Scott's failure to submit a monthly statement for April by May 15th) and explained the Commission's requirements to comply with Paragraph III.I, demonstrate a continuing pattern of inability or refusal to comply with basic reporting obligations. Moreover, Scott's failure to comply with Paragraph III.I has prevented BCDC staff from evaluating whether Scott's has exceeded the permit's limitations on private use of the pavilion from the Effective Date of the Order to September 1 for purposes of determining whether Scott's has complied fully with the Permit during this period.

Paragraph III.G. Paragraph III.G of the Order requires Scott's to provide all improvements within the public access area required by Special Condition II.B.5 of the permit including: (1) at least 4 public access signs, two permanent and two temporary; and (2) at least 15 tables and 35 chairs that are to be in place at all times except when the pavilion is in use for private events.

Liz Gallagher
September 15, 2017
Page 4

On August 30, 2017, Adrienne Klein conducted an unannounced site visit when the pavilion was open and available for public access and observed the following violations of permit Special Condition II.B.5 and Paragraph III.G of the Order:

- One moveable public access sign was missing (there were two permanent and one moveable sign present);
- There were 14 tables and 31 chairs in position at the pavilion in accordance with the approved plans. All of the tables should be silver and round, but instead four were silver and square, and ten were brown and round.
- There were two chairs and one table (brown, not silver) located in the public access area south of the storage shed, outside the pavilion, and not in position per the approved plans.

These violations, observed during a single site visit, might not preclude a determination that, on that particular day, Scott's was in substantial compliance with Special Condition II.B.5. However, the relevant standard for determining whether Scott's shall be entitled to a waiver of 15% of the total penalty is whether Scott's "has maintained *full compliance*" with the Order and the Permit.

Conclusion. For all of these reasons, I have determined that Scott's has not complied fully and in a timely manner with each and every applicable requirement of the Order and has not maintained full compliance with the Order and the permit through September 1, 2017. Therefore, Scott's shall not be entitled to a waiver of 15% of the total penalty amount.

Please contact the Commission's Chief Counsel, Marc Zeppetello, at 415/352-3655 or marc.zeppetello@bcd.ca.gov if you have any questions.

Sincerely,



LAWRENCE J. GOLDZBAND
Executive Director

Enc.

LIG/MAZ/go

Thursday, September 14, 2017 at 10:52:42 AM Pacific Daylight Time

Subject: Re: New Monthly Report Scott's Pavilion Usage 2017 - Report for May & Updated Quarter Reports
Date: Wednesday, June 7, 2017 at 3:35:03 PM Pacific Daylight Time
From: Zeppetello, Marc@BCDC
To: Michael Verna
CC: 'Liz Gallagher (Lizg@scottscorp.com)', Klein, Adrienne@BCDC, McCrea, Brad@BCDC, Zeppetello, Marc@BCDC

Mike and Liz,

Section III.I of the order requires Scott's, commencing on 5/15/17, to "submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times." This requirement is separate and distinct from the permit requirement for Scott's to provide quarterly event schedules to the Port (see Special Condition II.B.2.c and Exhibit A, footnote 1). To comply with Section III.I of the order, an email or letter to BCDC (Adrienne and me) with the required information would be sufficient. It would also be acceptable to provide us with a copy of the monthly report you submit to the Port (or CIM Group), but the only information relevant to Section III.I of the order is the report of actual use for the preceding month, not the estimated usage for future months. In other words, the form of submission attached to Liz's June 6 email, or the information in Liz's June 5 email to Jenni, would be acceptable.

I'll take this opportunity to comment on the May 2017 report. The chart in Liz's June 5 email and the Excel spreadsheet entitled 2nd Quarter Pavilion Report 2017 appear to contain the same substantive information re: pavilion use except: the chart in Liz's June 5 email states a total of 6 Events/5 days, whereas the Excel spreadsheet states a total of 5 Events. However, both charts show seven events on six different days during May. Also, it appears that the second event on 5/20/17 did not end until midnight and take down was not completed until 2:00 a.m. the following day, 5/21.

I am not making any compliance determinations at this time, although obviously BCDC reserves the right to do so. However, I will note that, putting aside the issue of pavilion usage continuing until 5/21, the pavilion was in private use for 4 weekend days in May: May 6, 13, 14, and 20. In contrast, Exhibit A to the permit provides for 3 weekend days/nights of private use of the pavilion "on average per month from May through October." Also, footnote 4 of Exhibit A states that the Port will not approve more than two consecutive private events at any time, but there were two sets of consecutive private event days in May: May 3 and 4 and May 13 and 14.

Regards, Marc

Marc A. Zeppetello
Chief Counsel
San Francisco Bay Conservation
and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

Telephone: (415) 352-3655
marc.zeppetello@bcdc.ca.gov

From: Michael Verna <mverna@bowlesverna.com>
Date: Tuesday, June 6, 2017 at 10:42 AM
To: Marc Zeppetello <Marc.Zeppetello@bcdc.ca.gov>

Cc: "Liz Gallagher (Lizg@scottscorp.com)" <Lizg@scottscorp.com>

Subject: FW: New Monthly Report Scott's Pavilion Usage 2017 - Report for May & Updated Quarter Reports

See attached from Liz. To whom should Liz be sending these reports at BCDC and is the attached form of submission acceptable?

Michael P. Verna
Bowles & Verna LLP
2121 N. California Blvd., Ste. 875
Walnut Creek, CA 94596
Phone: (925) 935-3300
Fax: (925) 935-0371
www.bowlesverna.com

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From: Liz Gallagher [<mailto:Lizg@scottscorp.com>]

Sent: Tuesday, June 06, 2017 10:26 AM

To: Michael Verna <mverna@bowlesverna.com>

Subject: FW: New Monthly Report Scott's Pavilion Usage 2017 - Report for May & Updated Quarter Reports

These were sent to Jennifer with CIM yesterday

Thanks,

Liz Gallagher



Scott's Corporate
2770 Camino Diablo, Suite B
Walnut Creek, CA 94597
C [510.710.7714](tel:510.710.7714) | O [510.302.0999](tel:510.302.0999) | E lizg@scottscorp.com

From: Kelly Hodgins

Sent: Monday, June 05, 2017 12:10 PM



Richard T. Bowles
Michael P. Verna
Robert J. Westerfield
Richard A. Ergo
K. P. Dean Harper
Bradley R. Bowles
Kenneth B. McKenzie
Jason J. Grnskog
Lawrence D. Goldberg
Cathleen S. Huang
Ethan K. Friedman
William T. Nagle
Cheryl A. Noll
Michael T. Krueger
Malloy L. Homewood
Shelley A. Molineaux
Jonathan W. Lee
Daniel J. Zarchy

Of Counsel
Bruce C. Paltenghi

September 27, 2017

Via Email and U.S. Mail

Lawrence J. Goldzband
Executive Director
San Francisco Bay Conservation and
Development Commission
455 Golden Gate Avenue, Ste. 10600
San Francisco, CA 94102
lgoldzband@bcdc.ca.gov

**Re: Objection to/Appeal of BCDC (L. Goldzband) September 15, 2017 Letter:
Determination that Scott's has not Fully Complied with Commission Cease
and Desist and Civil Penalty Order No. COO 2017.01**

Dear Director Goldzband:

Scott's hereby objects to your determination that "Scott's has not complied fully and in a timely manner with each and every applicable requirement of the Order and has not maintained full compliance with the Order and the permit through September 1, 2017" and to your finding that "Scott's shall not be entitled to a waiver of 15% of the total penalty amount." Scott's respectfully submits the following appeal. Absent reversal of your decision, Scott's asks that a hearing before the full commission be immediately scheduled to determine Scott's compliance with the Cease & Desist Order ("Order") in accordance with Section III.J thereof.

As set forth in detail below and in the attached exhibits, Scott's has complied with each of its reporting requirements under both the Permit and the Order. Further, Scott's has ensured that the appropriate furniture and signage is present and properly located at all possible times, and has reduced the number of events held at the pavilion.

Initially, your September 15, 2017 letter ("Letter") recognizes that Scott's and the Port of Oakland have satisfied their requirements to submit a fully complete and properly executed application to amend Scott's permit for the pavilion within the time limit(s) specifically provided by BCDC and as such finds no grounds thereon to deny Scott's the 15% penalty waiver based thereon. While you note the number of days items took to complete, Scott's respectfully submits

Lawrence J. Goldzband
BCDC Executive Director
September 27, 2017
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that it responded to and addressed many changes required by BCDC staff during the submission process and participated in frequent discussions with BCDC staff and counsel to ensure that all BCDC and Port requirements were satisfied.

Similarly, with regard to the Order's requirement (III.I) that Scott's "submit to BCDC" all past due quarterly event schedules no later than 30 days after the Effective Date of the Order, as required by Special Condition 11.B.2.c of the permit, your Letter acknowledges that Scott's **complied with that requirement**. It is important to point out that Scott's Catering Sales Director, Kelly Hodgins submitted those quarterly reports to Jennifer Koidal at CIM within the 30 day time limit, who then passed them along to BCDC pursuant to the long-established reporting procedure between Scott's, CIM and BCDC. (See, Exhibit "A".)

Scott's followed that same procedure for the monthly usage reports for March through August 2017. Notwithstanding, your Letter asserts while Scott's complied with the *quarterly* reporting requirements by emailing them to Ms. Koidal, Scott's failed to comply with *monthly* usage reporting requirements which were also sent to Ms. Koidal. Scott's submitted all required monthly data to CIM for BCDC's review as required by the Order on time as set forth below and demonstrated by the attached exhibits.

It is disingenuous for BCDC to concede Scott's compliance for submission of quarterly reports to CIM while not conceding compliance for submitting monthly reports, containing virtually the exact same data, in the same manner. CIM represented to Scott's that it was passing everything along to BCDC pursuant to the parties' two year old established procedures. (See email of Ms. Hodgins, Exhibit "B").

Scott's Submission of Monthly Pavilion Usage Statements

(1) April 2017 Usage – Submission by May 15, 2017. Your Letter switches from acknowledging Scott's compliance to a list of alleged non-compliance beginning with your assertion that Scott's "failed to submit a monthly statement listing all events held at the pavilion in April by May 15th." That assertion is demonstrably false. As shown by Exhibit "C", page 1, beginning one month *earlier than required*, Scott's commenced reporting actual pavilion use data (on April 11, 2017 reflecting usage for the month of March, 2017). Scott's aforementioned Catering Sales Director, Kelly Hodgins, also included Scott's usage report for the first quarter of 2017 (through March) and sent this information, just as she had done for the previous two years, to Jennifer Koidal, RPA, Vice President and General manager at the CIM Group in charge of management and operation for Jack London Square.

Similarly, as shown in Exhibit "A", on May 2, 2017, Scott's submitted its April 2017 pavilion usage report as required by the Order. In addition to Scott's usage for April, 2017, Ms.

Lawrence J. Goldzband
BCDC Executive Director
September 27, 2017
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Hodgins provided the outstanding quarterly usage reports which reflected bookings for the second, third and fourth quarters of 2017 discussed above. (See, Exhibit A, pages 3-6) This undeniably proves Scott's *timely* submission of April 2017's usage report. The last page of Exhibit A is a follow up email by Hodgins to Kiodal with an amendment to the quarterly report, also accepted by BCDC.

The Order is silent on how Scott's is supposed to submit its reports to BCDC (and the Port). Ms. Hodgins will testify if called to do so (and she explained to us in her own words) as follows:

*Dear Lawrence [Goldberg/Bowles & Verna LLP],
In regard to reporting Pavilion usage*

I am writing to convey that when I took over doing the pavilion reports, from Steve Hanson in mid-2015, I emailed them directly to Jennifer Koidal. These quarterly reports were sent to Jennifer and cc'd to Liz and Ramiro every quarter. Monthly reports, which started this April, reflecting the previous months pavilion usage have also been sent directly to her.

I have always been under the assumption that Ms. Koidal is our liaison and that she forwards these reports on to BCDC. She has never corrected me and in fact we have had verbal conversations that she was sending along the reports. I have threaded a few emails (see below) showing our early correspondences from two and a half years ago. In regards to the monthly reports we started sending this spring Jenni has responded to a couple of them. She does not always acknowledge when she is in receipt of one of my emails. (Emphasis added.)

*I declare under penalty and perjury that the foregoing is true and correct.
-Kelly Hodgins (See, Exhibit B.)*

(2) May 2017 Usage – Submission by June 15, 2017. As clearly reflected in Exhibit "D", on June 5, 2017, Scott's submitted its report for May 2017 pavilion usage to Ms. Koidal. Again, Scott's report was timely and included updated quarterly reports reflecting Scott's actual pavilion bookings for the months of April through December 2017.

(3) June 2017 Usage – Submitted on June 5, 2017. Only one event took place at the pavilion during the entire month of June, 2017. Details of that event had previously been submitted, twice, to Ms. Koidal for both the Port's and BCDC's consideration. Since there was no change to Scott's pavilion usage for June 2017 from data that had previously been submitted, Ms. Hodgins did not appreciate, nor did anyone at Scott's realize, that BCDC wanted a further

Lawrence J. Goldzband
BCDC Executive Director
September 27, 2017
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report with no change to be submitted by July 15th reflecting actual usage for June, 2017 which Scott's had already reported. Nor did anyone at BCDC ever advise Scott's or CIM that a further report was needed or that event schedules were missing for this month.

(5) Notice of Compliance - Second, Third and Fourth Quarter Event Schedule 2017. On July 17, 2017, Jennifer Koidal of CIM notified Scott's that it had complied with its obligation to submit quarterly event schedules through the end of 2017. These are the same reports for which your Letter acknowledges timely receipt. Attached hereto as Exhibit "E" is a true and correct copy of CIM's Notice of Compliance. Ms. Koidal does not mention that there is any problem with Scott's previously submitted actual usage reports, or that Scott's reporting to CIM to forward to BCDC as Ms. Koidal had discussed with Ms. Hodgins was in any way improper.

Moreover, note that Ms. Koidal's compliance letter of July 17, 2017 was copied to Adrienne Klein of BCDC, yet at no point did she, or anyone else at BCDC, claim that monthly reports (that duplicated the same data as the quarterly reports) were missing or that Scott's submission of these reports to CIM was in violation of the Order. If Ms. Klein or the BCDC felt that Scott's was in violation of the Order for not submitting these reports directly to BCDC, then fundamental fairness requires that Scott's be forewarned of this before issuance of your Letter. But not a word was uttered that failure to cc the BCDC on emails would cost Scott's \$59,304.

(4) July 2017 Usage – Submission by August 15, 2017. Exhibit "F" reflects that on August 3, 2017, Scott's timely reported pavilion usage for the month of July, 2017. In addition, Scott's included an updated report for bookings in the third quarter of 2017. Again, Ms. Hodgins sent the usage and quarterly reports to Ms. Koidal with the understanding that she would share the information with BCDC pursuant to Scott's usage reporting requirement.

(5) August 2017 Usage – Submission by September 15, 2017. Exhibit "G" reflects that on September 4, 2017, Scott's timely reported pavilion usage for August, 2017.

Based on the above and supported by the attached exhibits, several things are apparent. First and foremost is that contrary to your Letter's assertion that Scott's failed to submit the required information, Scott's did indeed submit the required event schedules, and did so before the monthly deadlines. For the one month where Scott's did not submit an independent report, June 2017, Scott's had previously submitted accurate information, *twice*, about a single event, that did not change.

Second, the Order is silent on reporting methodology and even with Mr. Zeppetello's explanation of the different reporting requirements cited in your Letter, Scott's reasonably assumed that conveyance of this data to Ms. Koidal at CIM, as it had done for the previous



Lawrence J. Goldzband
BCDC Executive Director
September 27, 2017
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several years (with that data being passed to BCDC each time as evidenced by your acknowledgement of Scott's compliance with its quarterly reporting requirement) was still the correct procedure in this case for both its quarterly and monthly reporting requirements.

Third, your Letter states that the BCDC wanted after-the-fact monthly use reports to be sent directly to BCDC, but nowhere is that stated in the Order. Scott's has made sincere and good faith efforts to comply with the Order's use reporting requirements, and indeed has been in compliance. At no point in this reporting process extending back two years did BCDC ever assert to Scott's that because it is was only reporting monthly to CIM, that BCDC would take the position that Scott's was in violation of the Order and thus would lost the 15% penalty discount.

In fact, the first time the BCDC ever took this position in is your September 15, 2017 Letter. Mr. Zeppetello, with whom Scott's representatives have been in frequent contact, never mentioned to Scott's that there would be such a drastic penalty for reporting monthly usage data to CIM. Not only did CIM tell Scott's that it was sending the data to BCDC, but anyone on BCDC's staff could easily have contacted CIM and asked for Scott's reports to be forwarded if they did not have them since the information BCDC sought had, indeed, been reported on time. And BCDC was well aware for months (at least since July 17, 2017—Exhibit E, cc'd to Adrienne Klein and apparently as early as June 7, 2017 per Mr. Zeppetello's email) that CIM was in receipt of these monthly reports.

What makes this even more frustrating and unfair is that the BCDC received Scott's monthly usage reports from CIM (as admitted in Mr. Zeppetello's email of June 7, 2017) and the quarterly reports (CIM letter of July 17, 2017 cc'd to Ms. Klein) showing the identical information. So what is the point of penalizing Scott's an additional \$59,304 (on top of the original penalty in excess of \$300,000) when the BCDC has always had access to the reports since the Order was issued? If there was a month or two after June that BCDC didn't receive the report from CIM, why didn't the BCDC ask CIM or Scott's for them? Or forewarn Scott's that it would lose its 15% penalty discount if the BCDC was not cc'd on the emails to CIM with the reports?

It is important to put all of this into context. The overriding claim that BCDC raised a year ago through its Violation Report was that Scott's was *overusing* the pavilion and thus depriving the public of access. Scott's current reporting, of which BCDC has received copies and are attached, shows that no overuse is occurring. In fact, far fewer events have been held at the pavilion as a result of the enforcement proceedings. (An unintended side effect of this reduction, of course, is that thousands fewer people have visited Jack London Square for pavilion events or taken advantage of the public access and amenities provided.) So your Letter penalizes Scott's \$59,304 for a reporting/paperwork issue, not a public access issue, when the entire impetus for citing Scott's for violating its Permit was based on a claim of denying public access.

Lawrence J. Goldzband
BCDC Executive Director
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This is not a situation where Scott's failed to report anything. Rather, this issue apparently boils down to who received the emails, not whether Scott's failed to report the data. In this context, penalizing Scott's \$59,304 is entirely unwarranted. Scott's is not overusing the Pavilion; is not in violation of its Permit; and is not in violation with the spirit and letter of the Order. At most, this is a minor technical reporting misunderstanding about to whom the monthly reports were to be sent.

Public Access Signs and Furniture

The second ground for your determination that Scott's is not entitled to its 15% penalty discount involves signage and furniture in the plaza and pavilion. Your Letter acknowledges that conditions observed by Adrienne Klein on a single unannounced visit might not preclude a determination that Scott's was in substantial compliance, however you state that Scott's must maintain "full compliance" to receive the waiver. But this is an impossible standard when it comes to signs and furniture that are not permanently bolted or glued to ground.

As part of the process to comply with the Order, amend the applicable permit(s) and enter into a new License and Concession agreement with the Port of Oakland, Scott's agreed to purchase all new tables and chairs for public access in the pavilion. The required 15 tables and 35 chairs were all scheduled for replacement at the time Ms. Klein observed a few missing or out of place. Shortly following Ms. Klein's visit, all 15 tables and 35 chairs were again present and accounted for, even though Scott's did not purchase any new ones at that time. Rather, the items which had been moved by the public had been located by Scott's staff and returned.

This highlights a constant struggle Scott's experiences with both furniture and signage disappearing because the pieces are, by nature, moveable. Ramiro Carabez, Scott's general manager, will testify if called to do so, on this point:

I, RAMIRO CARABEZ, declare:

Over the last few months [prior to September 19, 2017] the restaurant management, janitorial staff and I have, every day first thing in the morning, been arranging, counting, cleaning and ensuring that all 15 tables and 35 chairs are under the pavilion roof as part of our daily opening routine. On August 29th as I was opening I went to the pavilion and counted 15 tables and 35 chairs. It is important to note that we have experienced an enormous increase on the homeless population and many times we have to go all over the square to retrieve the tables and chairs that they take. On September 14th 15 tables and 35 chairs were counted, but one of the standing movable signs was missing and we were unable to find it, immediately after, one replacement was ordered and it should



Lawrence J. Goldzband
BCDC Executive Director
September 27, 2017
Page 7

arrive by the end of this month (September 30th) Should you have any questions, please feel free to contact me. Thank you. (See, Exhibit "H".)

Scott's has gone to the extraordinary length of ordering extra signs to have quick replacements ready when they disappear. Your requirement of "full compliance" is an impossibility in this context as Scott's does not control the actions of members of the public. The best Scott's can do is send its staff out into the surrounding area every day to search for missing furniture and signs and carry them back to the pavilion when pieces are found, or replace them when items are stolen. As such, it is fundamentally unfair to deny Scott's the 15% penalty discount based on the temporary disappearance of tables, chairs and signs when Scott's is doing everything it can to provide for public access and enjoyment.

Further Review by the Commission / Scott's Demand for a Hearing

Your Letter states that Scott's has not complied with both the Order and the issues originally raised in the Violation Report. Section III.J. of the Order states that if the Executive Director concludes that Scott's is not "in compliance with the terms of the Order", that a hearing with the full commission "shall" be scheduled. If you refuse to accept Scott's objections to your Letter, then Scott's insists that this matter be scheduled for hearing before the full Commission immediately.

We have little doubt that the Commission did not contemplate that BCDC staff would take such a narrow and technical view of Scott's obligations under the Order. Yet your Letter imposes a penalty of \$59,304 on Scott's for (1) not cc'ing BCDC on its emails to CIM reporting monthly usage—even though BCDC staff were aware the monthly reports were going to CIM, never suggested that doing so would subject Scott's to a \$59,304 penalty, and BCDC received copies of the reports anyway; and for (2) acts by members of the public removing chairs and tables from the Pavilion—over whom Scott's has no control—based on a one time, unannounced visit by Ms. Klein. This is unwarranted.

We would appreciate your response, and hopeful reversal of your finding, at your earliest convenience. Thank you.

Very truly yours,

MICHAEL P. VERNA

cc: Marc Zeppetello, Esq. (BCDC)
Joshua Safran, Esq. (Port of Oakland)
Elizabeth Gallagher (Scott's)

EXHIBIT A

From: Kelly Hodgins
Sent: Tuesday, May 02, 2017 5:27 PM
To: jkoidal@cimgroup.com
Cc: Liz Gallagher
Subject: New Monthly Report Scott's Pavilion Usage 2017 - Report for April & Updated Quarter Reports

EXHIBIT A

	Event name	Date	Set up begin	Set up end time	Event Begin	Event End	Take down	Take down end	Event Hours	Total Hours	Guests
April 2017											
Saturday	Mendoza Wedding	4/1/2017	15:00	17:00	17:00	24:00:00	24:00:00	2:00	7	11	187
Saturday	ESCUELA BILINGUE INTERNACIONAL	4/8/2016	15:00	18:00	18:00	0:00	0:00	0:00	6 hours	11 hours	250
Saturday	Carol Yang & Kevin Park Wedding Reception	4/29/2017	14:00	16:00	16:30	20:00	20:00	22:00	3.50	7.50	300
Totals	3 Events										737

Jenni—We had three pavilions during the month of April.
 Have a great evening
 Sincerely,

Kelly Hodgins
 Catering Sales Director



Scott's Jack London Square

#2 Broadway

Oakland, CA 94607

O 510-444-5969 / C 510-384-0463 / E kellyh@scottsjls.com

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From: Kelly Hodgins
Sent: Thursday, May 04, 2017 5:15 PM
To: jkoidal@cimgroup.com
Cc: Ramiro Carabez
Subject: Scott's Updated Quarter Reports

Hi Jenni,
I need to add one more pavilion to this 2nd Quarter.
We will be using the space on Sunday, May 14th—please see revisions

Have a great evening

Sincerely,

Kelly Hodgins
Catering Sales Director



Scott's Jack London Square
#2 Broadway
Oakland, CA 94607
O 510-444-5969 / C 510-384-0463 / E kellyh@scottsils.com

We invite you and a guest to attend a complimentary
Roundtable Luncheon. Please call with the day you would like to attend.

EXHIBIT B

Lawrence Goldberg

Subject: Email to Jennifer Koidal sent 5/2/17/ Letter of Declaration

From: Kelly Hodgins [mailto:kellyh@scottsjls.com]
Sent: Tuesday, September 19, 2017 4:06 PM
To: Lawrence Goldberg <lgoldberg@bowlesverna.com>; Liz Gallagher <Lizg@scottscorp.com>
Subject: RE: Email to Jennifer Koidal sent 5/2/17/ Letter of Declaration

Dear Lawrence,
In regard to reporting Pavilion usage

I am writing to convey that when I took over doing the pavilion reports, from Steve Hanson in mid-2015, I emailed them directly to Jennifer Koidal.

These quarterly reports were sent to Jennifer and cc'd to Liz and Ramiro every quarter. Monthly reports, which started this April, reflecting the previous months pavilion usage have also been sent directly to her.

I have always been under the assumption that Ms. Koidal is our liaison and that she forwards these reports on to BCDC.

She has never corrected me and in fact we have had verbal conversations that she was sending along the reports.

I have threaded a few emails (see below) showing our early correspondences from two and a half years ago.

In regards to the monthly reports we started sending this spring Jenni has responded to a couple of them.

She does not always acknowledge when she is in receipt of one of my emails.

I declare under penalty and perjury that the foregoing is true and correct.
-Kelly Hodgins

From: Steven Hanson [mailto:hansonsteven@gmail.com]
Sent: Friday, January 16, 2015 4:46 PM
To: jbraun@portoakland.com; 'Jennifer Koidal'
Cc: Kelly Hodgins; Liz Gallagher
Subject: Public Pavilion Quarterly submittal for January through March 31 2015
Dear Julie and Jennifer

Attached is the Public Pavilion's bookings for private events through the end of the first quarter as provided to me by the catering department at Scott's.

I apologize for the fact that this is tardy, there have only been two scheduled events thus far this year.

I was working on this format for this report.

I will continue refining this report in the future to obtain and present additional qualitative and quantitative information.

Best wishes for the new year.

Thanks

Steve Hanson

hansonsteven@gmail.com

415-314-0172

My website:

<http://sites.google.com/site/hansonstevenwork/>

From: Kelly Hodgins

Sent: Tuesday, June 02, 2015 2:14 PM

To: Jennifer Koidal (jenni@jacklondonsquare.com)

Cc: Ramiro Carabez; Liz Gallagher

Subject: Revisions for 2nd quarter Pavilion Report from Scott's JLS

From: Jennifer Koidal [<mailto:jenni@jacklondonsquare.com>]

Sent: Sunday, September 27, 2015 1:37 PM

To: Kelly Hodgins

Cc: Ramiro Carabez

Subject: RE: Pavilion update

Thank you – I will update schedule for Q3.

Jennifer Koidal, RPA General Manager

JACK LONDON SQUARE

472 Water Street - Oakland, CA 94607

T 510.645.9292 x 210 F 510.645.9760

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From: Kelly Hodgins [<mailto:kellyh@scottsjls.com>]

Sent: Friday, September 25, 2015 3:02 PM

To: Jennifer Koidal

Cc: Ramiro Carabez

Subject: Pavillion update

Hi Jenni

We have a last minute memorial tomorrow in the pavilion.

The guests will arrive at 2 and will hold Nick's celebration of life until 6pm

EXHIBIT C

From: Kelly Hodgins
Sent: Tuesday, April 11, 2017 4:32 PM
To: jkoidal@cimgroup.com
Cc: Liz Gallagher; Ramiro Carabez; Cynthia Warrender
Subject: New Monthly Report Scott's Pavilion Usage 2017 - Report for March & 1st Quarter

EXHIBIT C

March 2017												
Friday	The Salvation Army Alumni Dinner	3/24/2017	16:00	18:00	18:00	21:00	21:00	23:00	3.00	7.00	240	
Friday	8th Annual Powerful Women of the Bay Awards Luncheon	3/31/2017	9:00	11:00	11:00	14:00	14:00	16:00	3.00	7.00	250	

EXHIBIT D

EXHIBIT E

CIM

July 17, 2017

Ms. Kelly Hodgins
c/o Scott's Catering
2 Broadway
Oakland, CA 94607

RE: BCDC Permit 19-85(B)
Notice of Compliance – Second, Third, and Fourth Quarter Event Schedule 2017

Dear Kelly,

Upon review, your revised calendar of events submitted on June 14, 2017 for second, third, and fourth quarter are now in compliance based on the following:

- The revised calendar, with the removal of one event in September, is within the allowable percentage of private use for events on weekend days and nights as stipulated in Exhibit A.

Should you have any questions or concerns, please do not hesitate to contact me to discuss.

Cordially,
Jack London Square (Oakland) Operator, LLC
a Delaware limited liability company
(as managing agent for the Port of Oakland)



Jennifer Koidal, RPA®
Vice President
General Manager

cc Liz Gallagher, Scott's Catering, Walnut Creek
Darla Szalla, CIM Group
Anna Wah, CIM Group
Julia Braun, Port of Oakland
Dorin Tiutin, Port of Oakland
Adrienne Klein, BCDC

EXHIBIT E

EXHIBIT F

From: Kelly Hodgins
Sent: Thursday, August 03, 2017 4:34 PM
To: jkoidal@cimgroup.com
Cc: Liz Gallagher; Ramiro Carabez; Cynthia Warrender
Subject: new monthly report: July Pavilion dates for Scott's JLS Pavilion 3rd quarter 2017.xlsx

Jenni-
 Scott's JLS used the pavilion the approved 4 times in the month of July.

EXHIBIT F

July 2017												
Saturday	Mangvang & Joseph Wedding Reception	7/8/17	13:00	15:00	16:00	20:00	20:00	22:00	4	8	300	
Saturday	Dria & Jason's Wedding Reception	7/15/17	15:00	17:00	17:00	23:00	23:00	1:00	6	10	180	
Thursday	EDMUD Old Timers	7/20/17	15:00	17:00	17:00	21:00	21:00	23:00	4	8	250	
Saturday	DC16 JATTF GRADUATION	29-Jul	15:00	18:00	18:00	23:00	23:00	2:00	5:00	11:00	250	
Totals	4											

From: Admin
Sent: Thursday, August 03, 2017 4:26 PM
To: Kelly Hodgins
Subject: Pavilion 3rd quarter 2017.xlsx

EXHIBIT G

EXHIBIT H

Lawrence Goldberg

Subject:

FW: See below

From: Ramiro Carabez

Sent: Tuesday, September 19, 2017 4:03 PM

To: Liz Gallagher <Lizg@scottscorp.com>

Subject:

I, RAMIRO CARABEZ, declare:

Over the last few months the restaurant management, janitorial staff and I have, every day first thing in the morning, been arranging, counting, cleaning and ensuring that all 15 tables and 35 chairs are under the pavilion roof as part of our daily opening routine. On August 29th as I was opening I went to the pavilion and counted 15 tables and 35 chairs. It is important to note that we have experienced an enormous increase on the homeless population and many times we have to go all over the square to retrieve the tables and chairs that they take. On September 14th 15 tables and 35 chairs were counted, but one of the standing movable signs was missing and we were unable to find it, immediately after, one replacement was ordered and it should arrive by the end of this month (September 30th) Should you have any questions, please feel free to contact me. Thank you.



Ramiro Carabez

General Manager

ramiroc@scottsjls.com

2 Broadway

Oakland, CA 94607

www.scottsjls.com

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

October 18, 2017

Michael P. Verna, Esq.
Bowles & Verna LLP
2121 N. California Blvd., Suite 875
Walnut Creek, CA 94596

SUBJECT: Determination that Scott's Has Not Complied Fully with Commission Cease and Desist and Civil Penalty Order No. CDO 2017.01 (the "Order")

Dear Mr. Verna:

By letter dated September 27, 2017, you objected to and purported to appeal the determination, set forth in my September 15th letter to Liz Gallagher, "that Scott's has not complied fully and in a timely manner with certain requirements of the Order and the Permit and, therefore, is not entitled to a waiver of 15% the total penalty amount." We treat your letter as a request for reconsideration.

My letter discusses three provisions of the Order: Paragraphs III.F, III.I, and III.G. Each of these provisions is discussed further below in light of the arguments made in and documentation attached to your September 27th letter.

Paragraph III.F. Paragraph III.F requires Scott's and the Port to submit a fully complete and properly executed application to amend the permit for the pavilion "no later than 45 days after the Effective Date of this Order." The Order's Effective Date was April 7, 2017, and, therefore, Scott's and the Port were required to have submitted a fully complete application to amend the permit by no later than May 22nd. Scott's and the Port did not submit a fully complete application until August 24th, or 139 days after the Order's Effective Date.

As you know, by letter dated June 9, 2017, BCDC staff determined that the application initially submitted on April 4th and supplemented on May 22nd was still incomplete and could not be filed pending submission of specified information. Nevertheless, staff's June 9th letter stated that Scott's and the Port had done an excellent job of responding to staff's May 22nd letter, and that in light of their responsiveness and the substantial progress that had been made on the public access proposal, staff would not take the position that Scott's and the Port had failed to comply with the 45-day deadline established by Paragraph III.F. I regret that staff did not condition the assurance provided in its June 9th letter on continued diligence by Scott's and the Port to provide the information necessary to complete the application in a timely manner or by a specified date. Had staff done so, I would likely have found that Scott's and the Port failed to comply with the Paragraph III.F deadline. However, in light of the position taken by staff on June 9th, your September 27th letter correctly notes that my determination that Scott's has failed to comply with the Order is not based on Scott's and the Port's unwarranted delay in submitting a fully complete application.

info@bcdc.ca.gov | www.bcdc.ca.gov
State of California | Edmund G. Brown — Governor



EXHIBIT D

Paragraph III.I. Paragraph III.I provides, in part, that “Scott’s shall submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times.”

Nothing in your September 27th letter or the accompanying exhibits demonstrates that Scott’s timely complied with this reporting obligation except for the month of May (as acknowledged in my September 15th letter). Specifically, Scott’s has not refuted that: (1) it failed to submit to BCDC a monthly statement listing all events held the pavilion in April by May 15th; (2) it submitted to BCDC pavilion usage information for April and May on June 6th, only after Mr. Zeppetello informed you, as a courtesy, that Scott’s had already failed to comply with Paragraph III.I on one occasion (i.e., for April, by May 15th), before it happened again and there was a second violation; and (3) despite Mr. Zeppetello having brought the initial violation of this reporting obligation to Scott’s attention, it failed to submit to BCDC monthly statements listing all events held at the pavilion in June and July, by July 15th and August 15th, respectively.

Scott’s argues that it complied with its reporting obligation under Paragraph III.I by submitting pavilion usage information to the Port because the Order does not specify how Scott’s is supposed to submit its reports to BCDC and because it assumed that the Port was sending Scott’s reports to BCDC. Scott’s could have complied with Paragraph III.I if the Port had in fact forwarded to BCDC in a timely manner Scott’s reports of actual pavilion usage for the subject months, but the Port did not do so. To the extent that Scott’s relied on the Port to serve as its agent for purposes submitting the required monthly reports to BCDC, it was Scott’s obligation to ensure that its agent complied with Paragraph III.I; the Port’s failure to submit the reports to BCDC is attributable to Scott’s.

Scott’s complains that finding noncompliance here is “frustrating and unfair” because BCDC staff was aware that the Port’s property manager, CIM, was in receipt of Scott’s monthly reports and could easily have contacted CIM and asked for the reports if staff did not have them. However, while BCDC staff is well aware that the permit requires Scott’s to provide quarterly event schedules to the Port, staff did not know that Scott’s was providing pavilion usage information to the Port on a monthly basis.¹

More importantly, Scott’s fails to appreciate that under the Order, the reporting obligation is Scott’s. It is not BCDC’s responsibility to ask Scott’s or the Port for reports that Scott’s is required to provide. Mr. Zeppetello attempted to prevent this from becoming an issue by calling the first violation of Paragraph III.I to Scott’s attention on June 6th and sending a follow-up email the next day to both you and Ms. Gallagher to explain what Scott’s needed to do to comply with Paragraph III.I. Scott’s has no one to blame but itself for the subsequent reporting violations of failing to submit to BCDC the required monthly pavilion usage reports for July and August.

¹ On June 14th, Adrienne Klein, BCDC’s Chief of Enforcement, was copied on an email that Scott’s had sent to the Port’s property manager attaching “revised updated pavilion reports” for the second, third, and fourth quarters. Ms. Klein assumed these attachments were the quarterly schedules for private events required under the permit, not both retrospective reports of events that had occurred for the prior months and scheduled events for future months. As discussed in my September 15th letter, Ms. Klein was also copied on a July 14th email that Scott’s sent to the Port’s property manager forwarding the same sets of three quarterly reports that had been attached to Scott’s June 14th email and, therefore, the second quarterly report shows scheduled, and not actual, pavilion use for June. Ms. Klein did not receive another email regarding pavilion usage until October 10th, when she was copied on another email from Scott’s to the Port’s property manager providing the “New Monthly Report for Scott’s Pavilion Usage 2017 for September & Updated Remaining Quarterly Reports.” Thus, it appears that Scott’s did not begin monthly reporting of actual pavilion usage until October, after receiving my September 15th letter.

As stated in my September 15th letter, Scott's repeated failures to comply with the Paragraph III.I monthly reporting requirement are material violations of the Order. On this basis, I reaffirm my determination that Scott's has not complied fully and in a timely manner with each and every applicable requirement of the Order and has not maintained full compliance with the Order and the Permit through September 1, 2017.

I shall briefly address two related issues. First, Scott's claims that its pavilion usage reports attached to your September 27th letter show that no overuse is occurring. Whether or not that is the case is not clear, given the discrepancies in the different quarterly reports prepared on different dates and the uncertainty as to whether the reports show scheduled versus actual pavilion usage for certain month. However, the key point for compliance purposes is that Scott's did not provide pavilion usage information to BCDC for the relevant months until after September 1st, in response to my September 15th letter, rather than on a monthly basis as required by the Order.

Second, though the Order provides for the Executive Director to make a compliance determination as of September 1, 2017, for purposes of determining whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount, please bear in mind that the Order, including Paragraph III.I, remains in effect. Therefore, Scott's continues to be required to submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion and the duration of each event, including both setup and breakdown times.

Paragraph III.G. Paragraph III.G requires Scott's to provide all improvements within the public access area required by Special Condition II.B.5 of the permit including: (1) at least 4 public access signs, two permanent and two temporary; and (2) at least 15 tables and 35 chairs that are to be in place at all times except when the pavilion is in use for private events. My September 15th letter described staff's observations during an August 30th site visit of a number of violations of the requirements of Special Condition II.B.5 with respect one public access sign and certain furnishings. In response, your September 27th letter argues that maintaining "full compliance" with the Special Condition II.B is an impossible standard, particularly given that the public may move furnishings and remove signs.

We appreciate the information provided by your September 27th letter regarding Scott's efforts to ensure that the required signs and public access improvements are in place at all times. While not excusing the violations observed during staff's August 30th site visit, upon reconsideration, those violations are excluded as a basis for my determination that Scott's has not maintained full compliance with the Order and the permit through September 1, 2017.

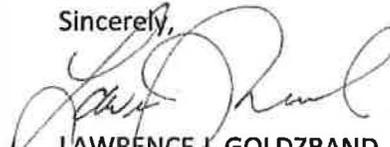
The Order Does Not Provide for an Appeal to the Commission. If I refuse to accept Scott's objections, Scott's demands that this matter be scheduled for a hearing before the Commission pursuant to Paragraph III.J of the Order. Paragraph III.J provides only for the Executive Director to schedule further review by the Commission if Scott's and the Port fail to submit a complete application to amend the permit by 45 days after the Order's Effective Date or if the application has not been filed as complete by July 10th. The opportunity for further review by the

Michael Verna, Esq.
October 18, 2017
Page 4

Commission under Paragraph III.J is moot now that the application to amend the Permit has been filed as complete. Moreover, Paragraphs IV.K and IV.L of the Order grant the Executive Director sole discretion to determine whether or not Scott's has complied with the Order and the permit through September 1, 2017. The Order does not give Scott's the right to appeal this determination to the Commission.

Conclusion. For the above reasons, I reaffirm my determination that Scott's has not complied fully and in a timely manner with each and every applicable requirement of the Order and has not maintained full compliance with the Order through September 1, 2017. Therefore, Scott's shall not be entitled to a waiver of 15% of the total penalty amount.

Please contact the Commission's Chief Counsel, Marc Zeppetello, at (415) 352-3655 or marc.zeppetello@bcdc.ca.gov, if you have any questions.

Sincerely,

LAWRENCE J. GOLDZBAND
Executive Director

LG/MAZ/gg



Richard T. Bowles
Michael P. Verna
Robert I. Westerfield
Richard A. Ergo
K. P. Dean Harper
Bradley R. Bowles
Kenneth B. McKenzie
Jason J. Granskog
Lawrence D. Goldberg
Cathleen S. Huang
Ethan K. Friedman
William T. Nagle
Cheryl A. Noll
Michael T. Krueger
Mallory L. Homewood
Shelley A. Molineaux
Jonathan W. Lee
Daniel J. Zarchy

Of Counsel
Bruce C. Paltenghi

November 7, 2017

Via Email and U.S. Mail

Lawrence J. Goldzband
Executive Director
San Francisco Bay Conservation and
Development Commission
455 Golden Gate Avenue, Ste. 10600
San Francisco, CA 94102
larry.goldzband@bedc.ca.gov

Re: Denial of 15% Waiver to Scott's Jack London Seafood, Inc.
BCDC Cease and Desist and Civil Penalty Order No. CDO 2017.01

Dear Mr. Goldzband:

Scott's appreciates the Commission's decision to grant a hearing to review the propriety of your decision to deny it the 15% discount authorized by the Cease and Desist and Civil Penalty Order No. CDO 2017.01 (the "Order"). We understand that the tentative date for that hearing is January 18, 2018, but please advise if this is incorrect. By this letter, we ask that you reconsider, yet again, your decision concerning Scott's compliance with the Order so that a full hearing before the Commission can be avoided.

As admitted in your letter of October 18, 2017, the *only* basis for your decision to deny Scott's this discount of \$59,304 is because the Port's property manager (CIM) did not forward Pavilion event calendars for June and July to BCDC staff timely (even though you've also admitted that BCDC was ultimately apprised of Scott's usage for those two months). As you clearly stated in that letter:

"Scott's could have complied with Paragraph III.I if *the Port* had in fact forwarded to BCDC in a timely manner Scott's reports of actual pavilion usage for the subject months, but the Port did not do so." (Goldzband letter, Oct. 18, 2017, p. 2; emphasis added).

The Port is still a co-permittee with Scott's and the landlord to whom Scott's has reported Pavilion usage for years. And BCDC staff knew that Scott's was sending its event reports to the Port's property manager, CIM (as evidenced by Mr. Zeppetello's June 7 email and Ms. Klein's

Lawrence J. Goldzband
BCDC Executive Director
November 7, 2017
Page 2

receipt of CIM's Notice of Compliance on July 17). Yet never did BCDC staff state that failure of Scott's to carbon copy the BCDC on these monthly emailed reports would be considered a material violation of the Order by Scott's subjecting it to a \$59,304 penalty. Nor have you penalized the Port, as co-permittee, for this alleged violation of the Order. By your own admission, you are penalizing Scott's for the Port's failure to forward two emailed reports.

Moreover, your October 18, 2017 letter makes clear that your decision to penalize Scott's was *not* based on Pavilion overusage by Scotts or any refusal to provide public access to the Pavilion. So *even if* the Port had forwarded Scott's June and July event reports to BCDC on July 15 and August 15, respectively, there is *nothing* BCDC would have done with them as they don't disclose any permit violation. We know this because the BCDC *admits receiving* the reports for June and July Pavilion usage later yet it took no action as a result nor claimed any permit violation.

As you know, neither the Permit nor the Order specify how these monthly event reports are to be disseminated. Here, Scott's complied with both the Order and Permit. It provided all quarterly and monthly pavilion use data to CIM as had been required of Scott's for the preceding years. The Permit requires Scott's to submit quarterly event data to CIM (not to cc those cover emails to the BCDC) and CIM is to then forward that information to BCDC. Your October 18, 2017 letter agrees that sending quarterly data to CIM was in compliance with the Permit. But you then assert that Scott's "materially violated" the Order because it did not copy the BCDC on two emails to CIM enclosing the June and July monthly reports, *even though* you apparently concede that Jennifer Koidal of CIM told Scott's she was forwarding those reports to BCDC. There is no dispute that Scott's provided timely and accurate data reflecting actual pavilion usage, times, dates, etc. to CIM. And there is no dispute that the BCDC received the quarterly reports disclosing the *same* data contained on the monthly reports for June and July.

Scott's reasonably understood that when the quarterly prospective event schedules matched the monthly after the fact schedules, it was not necessary to duplicate its reporting on usage as everyone had accurate data already. Scott's did not know that the BCDC wanted the same data again after-the-fact for June when there was no change. And no one from the BCDC told Scott's that duplicative data was required under the Order. A far more logical approach would have been for BCDC staff to ask for an update on scheduled pavilion events that changed from previously submitted quarterly report already forwarded to BCDC by CIM and if there was no change, to stand on the accurate quarterly data.

And indeed, it is this confusion that has lead Scott's and the BCDC to modify the Amended Permit to create a live calendar system accessible on line by Scott's, the Port and BCDC so that updated and accurate usage data is readily available without the cumbersome periodic reporting system for which you are proposing to fine Scott's \$59,304. While Scott's has agreed to develop such an online calendar and database, this condition highlights Scott's point

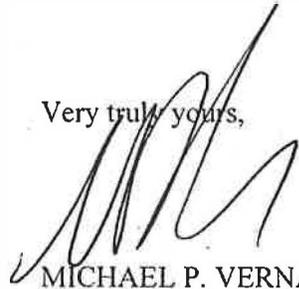
Lawrence J. Goldzband
BCDC Executive Director
November 7, 2017
Page 3

that even BCDC staff concedes that the current reporting method is far too confusing and fraught with unintended mistakes.

It is a shame that after all of the collaborative work undertaken by the parties to resolve past differences, that there is yet another chasm to cross. The Commission (not BCDC staff) proposed and authorized the 15% discount to Scott's, unless Scott's materially violated the Order. Not cc'ing BCDC staff on two emails to the Port's property manager for June and July usage that did not disclose any permit violation cannot be construed as a material violation, especially when the BCDC was ultimately provided with the June and July schedules anyway and took no action as a result. Be mindful that the June and July reports disclosed a total of only four events—clearly not Pavilion overusage or a permit violation.

Once again, Scott's asks that you save the parties and the Commission the time and expense associated with yet another hearing and reverse your decision. Failing that, we ask that this letter, along with our letter of September 27, 2017 and your letters of September 15, 2017 and October 18, 2017, be submitted to the Commission as part of the record for the hearing on this matter.

Very truly yours,



MICHAEL P. VERNA

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