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ERIC G. SWALLOW

10 **BEFORE THE**  
11 **CALIFORNIA GAMBLING CONTROL COMMISSION**  
12 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation and  
13 Statement of Issues Against:

14 **GARDEN CITY, INC., doing**  
15 **business as CASINO M8TRIX**  
16 **(GEGE-000410);**

17 **ERIC G. SWALLOW (GEOW-**  
18 **001330);**

19 **PETER V. LUNARDI III (GEOW-**  
20 **001331);**

21 **JEANINE LYNN LUNARDI**  
22 **(GEOW-003119); and**

23 **THE LUNARDI FAMILY LIVING**  
24 **TRUST, dated August 27, 2008**  
25 **(GEOW-003259).**

26 **1887 Matrix Boulevard**  
27 **San Jose, CA 95110**

28 **Respondents.**

OAH No. 2014060129

**BGC Case No. HQ2014-00001AL**

**RESPONDENT ERIC SWALLOW'S**  
**CLOSING BRIEF**

Date of Trial: August 10, 2015

Hon. Mary-Margaret Anderson

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1 **I. INTRODUCTION**

2 Respondent Eric Swallow ("Mr. Swallow") believes that both he and the Gambling Control  
3 Commission ("the Commission") are bound by the laws of California, including administrative  
4 regulations enacted by the Commission itself. Mr. Swallow also believes, therefore, that the  
5 pertinent statutes and regulations, plus the evidentiary record, provide the only lawful basis for a  
6 decision in this case. (Cal. Gov't Code § 11425.10.) If this is correct, then the charges against him  
7 will be dismissed.

8 Complainant, the Bureau of Gambling Control ("the Bureau"), takes a different view. In  
9 Complainant's Closing Brief ("CCB"), the Bureau (1) ignores key statutes like Business and  
10 Professions Code section 19876, (2) disregards the Commission's own regulations, and (3) offers  
11 up its own view of what the law ought to be even when it is contrary to explicit rules established by  
12 the Legislature and the Commission. If the Bureau is allowed to do this, then it will achieve a  
13 more favorable, albeit temporary, outcome.

14 The decisions before the Court do not rest mainly upon credibility determinations or other  
15 conflicts in the evidence. There are some of these, but they do not predominate. In fact, the record  
16 exonerates Mr. Swallow on the charges, even if the Bureau's evidence -- not the hyperbole, but the  
17 evidence -- is taken as true, so long as the law is applied as written by the Legislature and the  
18 Commission.

19 Mr. Swallow's Closing Brief, therefore, emphasizes the statutes and administrative  
20 regulations overlooked in the CCB. Wherever possible, Mr. Swallow will also point to undisputed  
21 evidence in the record which is fatal to some of the charges. The central thesis is that the law and  
22 the facts, free from distortion or exaggeration, compel a decision in favor of Mr. Swallow.

23 **II. BACKGROUND**

24 Eric Swallow, Peter Lunardi, and Jeanine Lunardi bought Garden City out of bankruptcy  
25 and took over operations in 2007. (Tr. VI at 167:11-168:6.) Mr. Swallow acquired 50% of the  
26 stock. (Ex. 38, § 1.1.) Mr. and Mrs. Lunardi acquired the other 50%, which they later transferred  
27 to a trust. (Exs. 38, § 1.1; CF at 1.) At all times since the purchase, Pete Lunardi has been the  
28 President of Garden City, and the Board of Directors has been comprised of Mr. Lunardi,

1 Mrs. Lunardi and Mr. Swallow. (Tr. III at 78:25-79:3; Tr. IV at 18:13-24.) At the time of  
2 purchase, Garden City used little technology and was in a state of disrepair. (Tr. VI at 165:3-20.)  
3 After taking over, the new owners made numerous changes to the casino's operations, including the  
4 provision of software and games, that improved the casino's financial situation. (Tr. VI at 22:17-  
5 23:14;24:5-15.) These changes constituted an increase in Garden City's income before taxes from  
6 a loss of \$2.6 million for the year ending June 30, 2007 to a profit of \$9.7 million for the six  
7 months ending December 31, 2008, an annualized income before tax of approximately \$19 million.  
8 (Tr. VI at 23:15-24:4; Exs. AU at 5; 11 at 5.) Over the same time period, gaming revenue  
9 increased from \$37 million for the year ending June 30, 2007 to an annualized rate of  
10 approximately \$49 million by the end of 2008. (Tr. VI at 21:14-22:16; Exs. AU at 5; 11 at 5.)

11 **A. THE RELATED ENTITIES**

12 Seeing the value that the new ownership brought to Garden City from new software and  
13 games, Mr. Swallow and Mr. Lunardi met with a certified public accountant, Jerome Bellotti, to  
14 discuss how they might legally minimize their taxes through the formation of Limited Liability  
15 Companies ("LLCs") in Nevada, which has no state income tax. (Tr. VI at 12:12-14:10;15:18-  
16 17:6.) At the time of the meeting, both Mr. Lunardi and Mr. Swallow were considering a move to  
17 Nevada, but neither had yet decided whether or not to actually make the move. (Tr. VI at 14:23-  
18 15:17.) Afterwards, Mr. Lunardi and Mr. Swallow set up three related entities: Profitable Casino,  
19 Potere, and Dolchee (collectively, the "Related Entities").

20 **1. Profitable Casino**

21 Profitable Casino was formed in late 2008 to develop software. (Tr. VI at 169:14-  
22 16;171:13-14.) Its owner was Mr. Swallow. Profitable Casino and Garden City entered into a  
23 contract effective January 1, 2009 in which Profitable Casino would be paid \$400,000 per month,  
24 though the amounts could vary. (Tr. II at 25:22-26:20; Ex. 7 at 400-415.) In exchange, Profitable  
25 Casino provided software, including a human resources program, a chip count program, and a  
26 dealer rotation program, to Garden City that helped Garden City operate the casino. (Tr. II at  
27 25:11-21.) Among the software's numerous features was its real-time analysis software that helped  
28 Garden City management optimize payroll. (Tr. VI at 172:12-20;173:1-7; Ex. DO.) At the time of



1 Profitable Casino's creation, its software contained unique features. (Tr. VI at 172:3-11.)

2                   2.     Potere

3                   Potere was formed in late 2008. (Tr. VI at 10:1-10.) Its owner was Mr. Lunardi. Potere  
4 and Garden City entered into a contract effective January 1, 2009 in which Potere would be paid  
5 \$400,000 per month, though the amounts could vary. (Ex. 7 at 535, § 2(A).) Potere provided  
6 consulting services to Garden City. (Ex. 7 at 540.)

7                   3.     Dolchee

8                   Dolchee was formed in late 2008. (Tr. VI at 9:24-10:4.) Originally, Dolchee was owned  
9 50% by the Swallow Trust and 50% by the Lunardi Trust. (Ex. 34.) From the time of Dolchee's  
10 formation through August of 2010, neither the Swallow Trust nor the Lunardi Trust was licensed  
11 by the Commission. (Ex. CF at 1 (noting that the Commission did not approve the Initial State  
12 Gambling License of the Lunardi Family Living Trust until August 12, 2010).) In 2011, the  
13 Dolchee operating agreement was changed so that Eric Swallow owned 50% of Dolchee and the  
14 Lunardi Trust owned the other 50%. (Tr. I at 143:16-144:8;153:17-23;154:24-155:5; Tr. VI at  
15 72:11-17; Ex. 7 at 586.)

16                  Dolchee and Garden City entered into a contract effective January 1, 2009 in which  
17 Dolchee would be paid \$400,000 per month, though the amounts could be greater than this. (Ex. 7  
18 at 461, § 3.1.1.) Dolchee provided games to Garden City. This provision of games had two  
19 components. First, it provided proprietary games. (Ex. 7 at 460.) Second, Dolchee used analytical  
20 software to optimize the gaming floor by determining which games were most profitable, how  
21 many of each game should be played at a given time, and where these games should be played.  
22 (Tr. II at 110:13-111:8; Tr. VI at 174:4-175:1; Ex. DN.) The use of this software helped Garden  
23 City make money. (Tr. II at 110:13-111:8.)

24                   4.     Tax Agency Review Of Related Entity Payments

25                  Since Profitable Casino, Potere, and Dolchee were formed, there have been several audits  
26 which examined payments from Garden City to these Related Entities. First, the Internal Revenue  
27 Service ("IRS") audited Garden City's 2009 tax return. (Tr. VI at 26:11-27:17; Ex. BK.) During  
28 this audit, the IRS inquired into payments from Garden City to the Related Entities. (Tr. VI 26:25-

1 27:3.) The IRS audit resulted in "No Change" to Garden City's tax return, which was tantamount  
2 to finding the payments from Garden City to the Related Entities for services rendered to be  
3 reasonable. (Tr. VI 27:4-17;29:5-17; Ex. BK.)

4 Second, the California Franchise Tax Board ("FTB") audited the 2009 and 2010 tax returns  
5 of Eric and Deborah Swallow. (Tr. VI at 28:3-7.) Like the IRS, the California FTB examined the  
6 appropriateness of the payments from Garden City to the Related Entities to determine if  
7 Mr. Swallow was paying the appropriate amount of California State taxes. (Tr. VI at 28:8-11.)  
8 The California FTB audit resulted in "No Change" to Eric Swallow's 2009 and 2010 income tax  
9 returns. (Tr. VI at 28:12-21; Ex. DL.)

10 Third, the IRS audited Dolchee's 2011 tax return. (Tr. VI at 31:11-13;31:25-32:3; Ex. FX.)  
11 Again, the IRS examined the size of payments from Garden City to Dolchee. (Tr. VI at 33:9-20.)  
12 And again, the IRS determined the payments to be reasonable and issued a letter showing that "No  
13 Change" needed to be made to Dolchee's 2011 tax return. (*Id.*; Tr. VI at 32:6-16; Exs. FX, 14 at  
14 12.)

15 **B. MR. SWALLOW'S LICENSE HISTORY**

16 1. Garden City, Inc.

17 Eric Swallow was first licensed by the Commission as an owner of Garden City Casino in  
18 2007. (Tr. V at 111:12-14.) Since that time, Mr. Swallow's license was renewed at least once  
19 every two years. (Tr. V at 111:15-19; Cal. Bus. & Prof. Code § 19876(a).) Each time  
20 Mr. Swallow's license was granted, the Commission determined that Mr. Swallow was a person of  
21 good character, honesty and integrity. (Cal. Bus. & Prof. Code § 19857; Tr. IV at 101:19-102:1.)  
22 According to the Bureau, Mr. Swallow's most recent license renewal occurred in 2012 or 2013.  
23 (Tr. V at 111:20-23.) That license<sup>1</sup> was to expire on February 28, 2014. (Ex. GO at 2; Tr. V at  
24 118:3-7.)

25  
26  
27 <sup>1</sup> Mr. Swallow and the Lunardis also filed an application for a state gambling license for a  
28 separate legal entity, Casino M8trix, Inc. (Ex. 3.) But this application was never approved and  
is not the subject of this proceeding. (Tr. 186:24-187:11.)

1 On September 16, 2013, more than 120 days prior to expiration of his then-current license,  
2 Mr. Swallow filed a renewal application for his license. (Tr. V at 117:2-118:16; Ex. CR.) On  
3 February 20, 2014, the Commission "extended the renewal state gambling license for a 90-day  
4 period valid through May 31, 2014." (Ex. AL. at 4.) On May 29, 2014, "the Commission referred  
5 the Renewal State Gambling License application to an evidentiary hearing." (Ex. AO at 2; Ex.  
6 BA/BA1 at 26-27.) The Commission took no action to deny, revoke, suspend, or limit the licenses  
7 of Garden City or any of its endorsees. (*Id.*; Tr. V at 114:10-16;115:3-4.) The only conditions  
8 placed on the license after February 20, 2014 pertained to compliance with licenses issued by the  
9 City of San Jose. (Tr. V at 114:23-115:2; Tr. VI at 86:4-21; Ex. AL.)

10 In addition to his State license, Mr. Swallow was also licensed by the San Jose Division of  
11 Gaming Control ("Division" or "City of San Jose") starting in 2007. (Tr. II at 180:21:24.) On  
12 January 23, 2007, Mr. Swallow received both a Key Employee Gaming License (Ex. CA) and a  
13 Stockowner Gaming License from the Division. (Ex. CB.) In 2010, the Division renewed  
14 Mr. Swallow's Stockowner Gaming License. (Tr. II at 181:9-22;182:11-15.) The renewal was  
15 effective January 6, 2011 until January 6, 2014. (Ex. CG.) In December 2013, the Division issued  
16 both a Landowner License and renewed Stockowner License to Mr. Swallow. (Tr. II at 182:6-9;  
17 Tr. III at 39:16-14; Ex. CS.) The renewal of Mr. Swallow's Stockowner License was effective  
18 January 6, 2014 and is in effect until January 5, 2017. (Ex. CS.) Each of these licensing  
19 determinations affirmed the belief of the Division "that Mr. Swallow was a person of good  
20 character, honesty and integrity." (Tr. II at 180:9-183:16.)

21 2. Hollywood Park Casino/LAX Property, LLC

22 While licensed as an owner of Garden City, on July 6, 2012, Mr. Swallow applied for a  
23 license for LAX Property, LLC ("LAX") to operate at Hollywood Park Casino with Mr. Swallow  
24 as LAX's member. (Ex. 5 at 3-4.) The Commission approved a "temporary license for LAX  
25 Property, LLC and Eric Swallow, sole member" from March 5, 2013, through April 30, 2013, with  
26 conditions. (Ex. AD at 5-6.) On April 18, 2013, the Commission "extended the temporary state  
27 gambling license for LAX Property, LLC and Eric Swallow" through October 31, 2013 with  
28 conditions, including the condition that

1 Eric Swallow must provide to the Bureau of Gambling Control a  
2 valuation and analysis by an independent company of the  
3 commodities and/or services provided as it relates to the gaming  
4 license agreements between Garden City, Inc. (dba Casino M8trix)  
and Dolchee, LLC and software agreements with Profitable Casino,  
LLC. This analysis must be conducted by a CPA firm approved by  
the Bureau. (Emphasis added.)

5 (Ex. AF at 3.) On October 30, 2013, the Commission "extended the temporary state gambling  
6 license for LAX Property, LLC and Eric Swallow" through February 28, 2014. (Ex. AH at 2.) At  
7 the same meeting, the Commission, having received the independent report of Grant Thornton (Ex.  
8 20), removed the condition that Mr. Swallow must provide an independent valuation of analysis of  
9 the agreements between Dolchee and Profitable Casino, and Garden City. (Ex. AH at 2.)

10 On November 18, 2013, Mr. Swallow's agent filed a request to withdraw the application of  
11 LAX, including Mr. Swallow as member. (Ex. FH.) On February 20, 2014, the Commission  
12 extended the temporary license for LAX and Eric Swallow through March 26, 2014. (Ex. AL at 2-  
13 3.) On August 14, 2014, the Commission approved the request to withdraw the application for  
14 State Gambling License of LAX and Mr. Swallow. (Ex. AQ at 4.)

15 C. **REQUESTS MADE TO MR. SWALLOW AND MR. SWALLOW'S**  
16 **RESPONSES**

17 While Mr. Swallow's LAX application for licensure was pending, the Bureau and  
18 Commission sought information from Mr. Swallow related to his LAX application. Relevant to the  
19 Accusation are the following requests and responses:

- 20 • February 21, 2013 – At a hearing on Mr. Swallow's LAX application, the Commission  
21 asked Mr. Swallow numerous accounting questions pertaining to related-party  
22 transactions between Garden City and Profitable Casino and Dolchee. (Ex. 8 at 64:10-  
23 76:4.) Mr. Swallow attempted to answer the questions while informing the Commission  
24 that he was not an accountant ("CPA"). (*Id.* at 65:10-11;65:24-25.)
- 25 • April 18, 2013 – At a hearing on Mr. Swallow's LAX application, the Commission  
26 required Mr. Swallow to provide "a valuation and analysis by an independent company  
27 of the commodities and/or services provided as it relates to the gaming license  
28 agreements between Garden City, Inc. (dba Casino M8trix) and Dolchee, LLC and

1 software agreements with Profitable Casino, LLC." (Ex. AF at 3.)

- 2 • June 13, 2013 – Carlos Soler sent an email to Bob Lytle requesting certain information.  
3 (Ex. 10 at 1.)
- 4 • July 10, 2013 – John Maloney, purporting to represent Eric Swallow in general gaming  
5 matters, sent a letter to the Bureau responding to Mr. Soler's request of June 13, 2013.  
6 (Ex. 10)
- 7 • July 16, 2013 – The Bureau submitted a request containing 100 questions, some of  
8 which contained numerous subparts, for Mr. Swallow to answer. (Ex. AA at 16-25.)  
9 The Bureau required Mr. Swallow to provide the requested information and  
10 documentation no later than August 7, 2013 and informed Mr. Swallow that no  
11 extension of time to respond would be given. (Ex. AA at 25.)
- 12 • On or about August 7, 2013 – Mr. Swallow provided the Bureau with answers to the  
13 100 questions and associated documents. (Exs. AA; FC.)
- 14 • August 29, 2013 – Grant Thornton issued its report entitled Fair Value Analysis of  
15 Certain Intellectual Properties as of March 31, 2013 in response to the Commission's  
16 April 18, 2013 requirement to provide such a report. (Ex. 20.)
- 17 • October 30, 2013 – The Commission removed the condition that Mr. Swallow must  
18 provide an independent valuation of analysis of the agreements between Dolchee and  
19 Profitable Casino, and Garden City. (Ex. EH at 2.)

20 **D. PROCEDURAL HISTORY**

21 On May 6, 2014, the Bureau filed an Accusation ( the "Original Accusation") seeking to  
22 revoke the licenses of Garden City, Inc., doing business as Casino M8trix (GEGE-000410); Eric G.  
23 Swallow (GEOW-001330); Peter V. Lunardi III (GEOW-001331); Jeanine Lynn Lunardi (GEOW-  
24 003119); and The Lunardi Family Living Trust, dated August 27, 2008 (GEOW-003259)  
25 (collectively, "Respondents"). (Ex. CZ at 26.) At the time the Original Accusation was filed, the  
26 Bureau stated that the licenses of the Respondents "will expire on May 31, 2014, unless extended."  
27  
28

1 (*Id.* at 26 ¶ 3.) The Bureau also recommended that the Commission deny<sup>2</sup> the renewal license  
2 applications of Respondents. (*Id.* at 11.) The Original Accusation said nothing about renewal or  
3 nonrenewal of Mr. Swallow's license.

4 On May 29, 2014, the Commission addressed the Renewal of State Gambling Licenses for  
5 Garden City, Inc., Eric Swallow, the Lunardi Family Living Trust, Peter Lunardi III, and Jeanine  
6 Lunardi. (Ex. AO at 2.) The Commission acknowledged that "the accusation and consideration of  
7 approval for a Renewal License application are two separate and distinct processes." (Ex. AO at 2;  
8 *see also* Ex. BA1 at 3-4.) The Commission then said it "referred the Renewal State Gambling  
9 License application to an evidentiary hearing. This action will be consolidated with the filed (May  
10 6, 2014) accusation and will proceed to an administrative hearing before an Administrative Law  
11 Judge." (Ex. AO at 2; *see also* Ex. BA1 at 26.)

12 On March 27, 2015, the Bureau amended the Original Accusation, filing an Accusation and  
13 Statement of Issues (the "Second Accusation"). (Ex. DW.) This pleading, again brought against  
14 Respondents, claimed that the Complainant "brings this Accusation and Statement of Issues solely  
15 in his official capacity as the Chief of the California Department of Justice, Bureau of Gambling  
16 Control." (*Id.* ¶ 1.) It also stated that the licenses of Respondents "expired on May 31, 2014,  
17 subject to the outcome of this Accusation and Statement of Issues." (*Id.* ¶ 3.)

18 On March 30, 2015, the Bureau entered into a proposed Settlement Agreement with Garden  
19 City, the Lunardi Family Living Trust, Peter Lunardi, and Jeanine Lunardi (collectively, "Settling  
20 Respondents"). (Ex. FV.) The Bureau and the Settling Respondents submitted a joint letter to the  
21 Commission in connection with the Stipulated Settlement. (*Id.* at 1 n.1.)

22 On May 14, 2015, the Commission met to discuss the proposed Settlement Agreement.  
23 (Exs. AR; AS; HJ1.) After hearing comments from agents of the Settling Respondents and the  
24 Bureau, the Commission approved the Settlement Agreement. (Exs. DX at 25; HJ1.)

25 On July 21, 2015, the Bureau filed a First Amended Accusation and Statement of Issues  
26 (the "Third Accusation"). (Ex. 1.) Mr. Swallow is the sole Respondent to this pleading. (*Id.*) It

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27  
28 <sup>2</sup> The Bureau did not meet with Respondents prior to recommending denial, as required by  
section 19868(b) of the Business and Professions Code. (Ex. HF.)

1 states that, "[a]t all relevant times, Respondent Garden City, Inc. (Garden City) was a licensed  
2 gambling enterprise, California State Gambling License Number GECE-000410." (*Id.* ¶ 2.) It also  
3 alleges that Mr. Swallow's "license was to expire on May 31, 2014; expiration has been stayed  
4 pending the outcome of this matter." (*Id.* ¶ 4.)

5 **III. JURISDICTION AND DUE PROCESS**

6 **A. DUE TO THE PASSAGE OF TIME THE COMMISSION HAS LOST**  
7 **JURISDICTION OVER THE RENEWAL OF MR. SWALLOW'S LICENSE;**  
8 **BY EXTENSION, THIS COURT HAS NO JURISDICTION TO DECIDE ON**  
9 **RENEWAL OR NONRENEWAL OF HIS LICENSE**

9 Business & Professions Code section 19876 establishes time limits for the renewal of  
10 gambling licenses. Subsection (a) provides:

11 Subject to the power of the Commission to deny, revoke, suspend, or  
12 condition any license, as provided in this Chapter, a license shall be  
renewed biennially.

13 Subsection (b) establishes time limits for both the license holder and the Commission:

14 An application for renewal of a gambling license shall be filed by the  
15 owner licensee ... with the Department no later than 120 calendar  
16 days prior to the expiration of the current license. The Commission  
shall act upon any application for renewal prior to the date of  
expiration of the current license ...

17 Subsection (c) gives the Commission a limited right to extend time in exigent  
18 circumstances:

19 Notwithstanding the provisions of Subdivision (b), if an owner  
20 licensee has submitted an application for renewal prior to the original  
21 expiration date of the current license and the Commission is unable  
to act on the application prior to the expiration date, the Commission  
may extend the current license for up to 180 days.

22 For purposes of this jurisdictional discussion, Mr. Swallow will assume that he was an "owner  
23 licensee" within the meaning of subsection (c), giving the Commission the authority to extend his  
24 then-current license for up to 180 days. "Owner licensee" is a defined term under Business &  
25 Professions Code section 19805(ad); the definition applies to Garden City ("an owner of a  
26 gambling enterprise") but it does not apply to Mr. Swallow, who owns stock in a gambling  
27 enterprise but not the enterprise itself. The Commission long ago lost jurisdiction over  
28 Mr. Swallow's license whether or not he meets the definition of an "owner licensee."

1 In any event, it is undisputed that as of 2013, Mr. Swallow's then-current license was  
2 scheduled to expire on February 28, 2014 (Ex. GO at 2), and that he filed his license renewal  
3 application on or around September 16, 2013,<sup>3</sup> more than 120 days prior to expiration. (Tr. V at  
4 117:2-118; Ex. CR.) On February 20, 2014, the Commission extended Mr. Swallow's license for  
5 90 days, with the new expiration date being May 31, 2014. (Ex. AL at 4.) The Commission's  
6 action on February 20, 2014, was not supported by any showing that it was "unable to act on  
7 [Mr. Swallow's] application prior to the expiration date," as required by section 19876(c).

8 It is also undisputed that at its meeting on May 29, 2014, the Commission took no action on  
9 Mr. Swallow's license, instead referring his renewal application and the Original Accusation to an  
10 evidentiary hearing. (Ex. AO at 2.) The Commission did not deny, revoke, suspend or limit  
11 Mr. Swallow's license on May 29, 2014, or ever. (Tr. V at 114:10-16; 115:3-4; Exs. AO; BA1.)  
12 The only conditions placed on Mr. Swallow's license pertained to license requirements imposed by  
13 the City of San Jose. (Tr. V at 114:23-115:2; Tr. VI at 86:4-21; Ex. AL.)

14 At the latest, the expiration date for Mr. Swallow's license was May 31, 2014. Even if the  
15 Commission had authority under section 19876(c) to extend his license for "up to 180 days," the  
16 record discloses that the Commission only exercised that authority when it granted a 90-day  
17 extension on February 20, 2014. (Ex. AL.) Had the Commission granted a further 90-day  
18 extension on May 29, 2014 -- which it did not do -- Mr. Swallow's license would have expired no  
19 later than August 31, 2014.

20 This leaves a pure question of law. It is not a complicated one. Section 19876(a) says that  
21 "a license shall be renewed biennially," subject to the Commission's power to deny, revoke,  
22 suspend, condition or limit any license. The Commission has never denied, revoked, suspended,  
23 limited or conditioned Mr. Swallow's license. The word "shall" in subsection (a) is mandatory.  
24 (Cal. Bus & Prof. Code § 19.) While acknowledging the two-year deadline, it wasn't until the  
25 Third Accusation was filed on July 21, 2015, more than one year after the deadline had passed, that  
26 the Bureau invented the theory that on some indeterminate date, the expiration of Mr. Swallow's

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27  
28 <sup>3</sup> Garden City also filed its renewal license application more than 120 days in advance of  
expiration. (Ex. GH.)



1 license "has been stayed." <sup>4</sup> (Ex. 1 ¶ 4.) There is not a shred of evidence in the record that the  
2 Commission ever issued a stay of Mr. Swallow's license, as the Bureau's witness, Ms. Luna-Baxter  
3 finally admitted. (Tr. V at 126:35-127:16.) More fundamentally, the gaming laws do not authorize  
4 the issuance of a "stay" of a license, as Ms. Luna-Baxter also admitted (Tr. V at 114:5-9; Tr. VI at  
5 103:3-6.)

6 When asked by the Court to address the issue of jurisdiction, the Bureau pointed out only  
7 that the Commission had enacted a new regulation. (Tr. V at 16:19-17:10.) Indeed there is a new  
8 regulation, effective January 1, 2015, (*see* Cal. Code Regs. tit. 4, div. 18, § 12035), but it has  
9 nothing to do with Mr. Swallow. The new regulation purports to authorize the Commission to  
10 issue something called an "interim renewal license" which has never been issued to Mr. Swallow.  
11 (Ex. DH.) In its published explanation of the new regulation, the Commission explained that it was  
12 needed to prevent licenses from expiring if the renewal process took too long. (Final Statement of  
13 Reasons, California Gambling Control Commission, CGCC-GCA-2014-02-R at 11,  
14 [http://www.cgcc.ca.gov/documents/enabling/2014/FSOR\\_2014\\_1013.pdf](http://www.cgcc.ca.gov/documents/enabling/2014/FSOR_2014_1013.pdf).)

15 Three legal conclusions seem inarguable from the undisputed facts:

16 First, the Commission long ago lost jurisdiction to renew or deny Mr. Swallow's license  
17 under section 19876. The statute required the Commission to act within two years, plus applicable  
18 extensions, if any, up to 180 days, but the Commission did not act. The Bureau's subsequent  
19 invention of a non-existent "stay" finds no support in any statute, or any administrative regulation  
20 that was in effect before 2015.

21 Second, Mr. Swallow cannot lose his license because the Commission did not comply with  
22 its mandatory duty. The Commission and Bureau apparently do not disagree, since the record  
23 shows that Mr. Swallow has at all times since May of 2014 been identified by the Commission as a  
24 license holder in good standing. (Exs. Tr. V at 111:7-9; Tr. VI at 84:6-17; 87:15-16; 92:25-93:19;  
25 Exs. DA; DC at 178; DD at 2; DG at 1.)

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27 <sup>4</sup> In June of 2014, the Commission sent a letter stating that "the State Gambling License for  
28 Casino M8trix has been stayed." (Ex. 2 at 2.) The letter made no mention of Mr. Swallow's  
license and there is no evidence that the Commission ever actually took any step to issue a stay.

1 Third and finally, it follows that Mr. Swallow's license was renewed by operation of law on  
2 May 31, 2014. Section 19876(a) says that "a license shall be renewed by biennially," unless the  
3 Commission denies, revokes, suspends, conditions or limits it. (Emphasis added.) The  
4 Commission took none of those actions within the statutory period; Mr. Swallow has continued to  
5 exercise the powers and responsibilities of a licensee for well over one year from May 31, 2014.  
6 That can only be because his license was renewed for the additional two years spelled out by  
7 section 19876(a).

8 The effect of this renewal on the disciplinary portion of the Accusation is discussed below.  
9 (*See infra* Section V.A.)

10 **B. MR. SWALLOW HAS BEEN DENIED DUE PROCESS**

11 Mr. Swallow is entitled to due process of law. The Administrative Adjudication Bill of  
12 Rights ensures that agency decisions must comply with due process. Included among these rights  
13 is the right that "[t]he adjudicative function shall be separated from the investigative, prosecutorial,  
14 and advocacy functions within the agency." Cal. Gov't Code § 11425.10. Additionally, due  
15 process requires the government attorney to exercise his or her duties "with the highest degree of  
16 integrity and impartiality, and with the appearance thereof." (*People v. Eubanks* 14 Cal. 4th 580,  
17 589 (1996).)<sup>5</sup> The conduct of the Bureau and Commission in this matter demonstrates that  
18 Mr. Swallow has been denied due process of law.

19 1. **The Bureau Impermissibly Paid For The Testimony Of Bryan Roberts And**  
20 **Impermissibly Accepted Financial Contributions From The Lunardis**

- 21 • Peter Lunardi said that paragraphs 1(c) and 4(e) of the Emergency Order (Ex. DV)  
22 (issued May 30, 2014) or Amended Emergency Order (Ex. CX) (issued June 23, 2014)  
23 prevented Garden City from paying Mr. Roberts without prior approval from the  
24 Bureau. (Tr. III at 146:14-148:8; 151:20-152:2.)

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26  
27 <sup>5</sup> Respondent has found no case addressing whether the due process rights described in *Eubanks*  
28 extend to administrative hearings. But, because the Bureau has asserted that Respondent's  
conduct could subject him to criminal liability (CCB at 14:1, 16:3), such due process rights  
ought to attach.

- 1 • Neither the Emergency Order nor Amended Emergency Order contain any provisions  
2 that would preclude payments of monies owed to Mr. Roberts. (Exs. DV, CX.)
- 3 • Garden City did not cancel Mr. Roberts' contract until approximately September 30,  
4 2015, months after the Emergency Order was issued. (Tr. III 150:8-20; Exs. BW, FO,  
5 GT at 9.)
- 6 • The attorney for the Bureau, William Tornngren, prevented Peter Lunardi and Garden  
7 City from paying moneys owed to Bryan Roberts until Mr. Roberts came to sit for an  
8 interview with the Bureau. (Tr. III at 154:5-22; 155:5-7; Exs. FO ("To date, the  
9 Attorney General's Office has directed Mr. Webb to hold all your payments until you  
10 comply with the terms of the Amended Emergency Order, which mandates that you  
11 agree to sit for an interview with counsel for the Casino and the Attorney General's  
12 Office."); GC at 2.)
- 13 • Mr. Roberts was "broke and desperate" when the Bureau was withholding this money.  
14 (Tr. III at 132:19-133:12; 157:4-18; *see also* Ex. FS (disclosing that "the financial and  
15 emotional toll taken on [Mr. Roberts'] family and [Mr. Roberts'] marriage is at the  
16 breaking point."))
- 17 • Mr. Tornngren permitted Mr. Lunardi, and not the Bureau, to pay for Mr. Roberts' travel  
18 and accommodations when Mr. Roberts flew to California to be interviewed by the  
19 Bureau. (Ex. GC at 4.)
- 20 • With Mr. Tornngren's knowledge, Mr. Roberts asked whether he could be paid "pre or  
21 post completion with Mr. Tornngren," Mr. Lunardi's attorney, copying Mr. Tornngren,  
22 told Mr. Roberts "Post completion." (Ex. GF at 3.)
- 23 • Mr. Tornngren did not disclose to any attendees at Mr. Roberts' interview that  
24 Mr. Roberts was being paid in exchange for his statement. (Tr. III at 32:17-33:3; Tr. IV  
25 76:17-24.)
- 26 • Following his interview, Mr. Roberts confirmed receipt of the money to Mr. Tornngren,  
27 among others. (Ex. GC at 1.)
- 28

- 1 • Mr. Torngren<sup>6</sup> also permitted the Lunardis' counsel to interview witnesses on his behalf  
2 to determine whether those witnesses had any relevant information. (Ex. GE  
3 (Mr. Torngren asked Mr. Lunardi's attorney to "give me Josh's last name and to what he  
4 can testify."))

5 2. The Bureau And Commission Are Impermissibly Continuing To Withhold  
6 Moneys Owed To Mr. Swallow

- 7 • Mr. Torngren represented to the Commission that there was no threat to the public when  
8 the Accusation was filed. (Ex. BA1-0010 (stating that "when [the Bureau] looked at  
9 this at the front end, and this is a litigation decision that's made obviously within our  
10 office, that we did not view there being a threat to customers or the gambling public.  
11 We did not view there being a threat to the patrons of the—of Garden City, nor to the  
12 employees of Garden City".))
- 13 • The Commission declined to exercise its authority to condition Mr. Swallow's license,  
14 but intimated that the Bureau should do so. (Ex. AO at 2; Ex. BA1 at 12-13 ("[I]f we  
15 put conditions on this . . . license, at this public meeting you also understand that the  
16 cardroom has the authority to ask for a hearing on those conditions and that they may  
17 not be imposed immediately like they could be imposed under an emergency order."))
- 18 • The Bureau issued an Emergency Order and Amended Emergency Order prohibiting  
19 payments to Mr. Swallow. (Exs. DV; CX.)
- 20 • According to the Bureau, the emergency ended by June or July of 2014. (Tr. VI at  
21 158:1-9.) The Bureau did not permit payments to be issued to Mr. Swallow after the  
22 emergency ended. (Tr. VI at 158:19-22; 159:1-3.) The Bureau has provided no legal or  
23 other authority for this action.
- 24 • Instead, although there was no longer any emergency at Garden City, the Bureau and  
25 the Lunardis jointly agreed to withhold moneys owed to Eric Swallow. (Ex. FV at 20,  
26 ¶ 29.)

27  
28 <sup>6</sup> Respondent also notes that the Bureau has continued to serve the Lunardis on each of its filings  
in this matter, including CCB. (CCB at Decl. of Service.)

- 1 • The Commission approved this agreement, to which Mr. Swallow was not a party. (Ex.  
2 DX at 25.) There is no provision of law that permits either the Bureau or Commission  
3 to withhold these moneys owed to Mr. Swallow, and such action is expressly precluded  
4 by the Administrative Adjudication Bill of Rights.
- 5 • Mr. Lunardi hopes to receive the money that is being illegally withheld from  
6 Mr. Swallow. (Tr. III at 176:25-177:15.) And Mr. Tornngren has done nothing to  
7 dissuade Mr. Lunardi's hopes of receiving Mr. Swallow's money. (Tr. III at 178:16-  
8 179:3.)
- 9 • The Bureau has sought to impose fines of \$18.8 million against Mr. Swallow based on  
10 its assertion "that each day that the required disclosure was not made – or an untrue  
11 disclosure was not cured – constitutes a separate violation." (CCB at 43:10-16.) There  
12 is no basis in the law for seeking such fines, and an unbiased prosecutor would not do  
13 so, especially without providing notice of such allegations.

14 3. The Bureau And Commission Engaged In Impermissible *Ex Parte*  
15 Communications Concerning The Merits Of The Accusation

- 16 • The Bureau and Commission engaged in numerous *ex parte* communications  
17 concerning Eric Swallow's case. In particular, Counsel for the Bureau, William  
18 Tornngren, and Stacey Luna-Baxter sent or received such communications. (See Exs.  
19 GL, GM, GZ; HA; HC; HD; HE; HF; HG; HH; HI.)

20 4. The Bureau Did Not Provide Required Notice To Mr. Swallow.

- 21 • Section 19868(b) requires the chief to meet with an applicant before filing a  
22 recommendation of denial with the Commission. (Cal. Bus. & Prof. Code § 19868(b).)  
23 The Bureau, however, did not meet with Mr. Swallow, or any of the Settling  
24 Respondents, prior to filing their recommendation of denial with the Commission.  
25 (Ex. HF.)

26 Any one of these shortcomings would give a person cause to wonder why the Bureau and  
27 Commission weren't following the law. Taken together, it is difficult to view this prosecution as  
28 anything other than an impermissible prosecution with an ulterior motive.

1 Therefore, the charges against Mr. Swallow should be dismissed. It is a question for  
2 another day as to whether this dismissal is with or without prejudice.

3 **IV. MR. SWALLOW IS QUALIFIED FOR CONTINUED LICENSURE**

4 **A. MR. SWALLOW IS A PERSON OF GOOD CHARACTER WHO IS**  
5 **QUALIFIED IN EVERY RESPECT FOR LICENSURE**

6 As discussed above, the Court and the Commission have no jurisdiction over the renewal or  
7 nonrenewal of Mr. Swallow's license. However, if his licensure is nevertheless going to be  
8 adjudicated, or if his character is material to the disciplinary aspect of these proceedings, it may be  
9 useful to summarize the character evidence introduced at the hearing.

10 First, Mr. Swallow has received multiple gambling licenses, which have been renewed both  
11 by the City of San Jose and the State of California. These licenses could not have been granted,  
12 nor renewed, unless he were a person of high character, honesty and integrity. (Tr. II at 131:17-19;  
13 180:13-183:9; Tr. V at 101:16-23; Cal. Bus & Prof. Code § 19857.)

14 Second, there is no evidence that Mr. Swallow has any prior record of arrests, convictions,  
15 or administrative violations because he has none.

16 Third, three witnesses who have known Mr. Swallow for a long period of time, and who  
17 have dealt closely with him in business and civic affairs, testified to his honesty, integrity and good  
18 character. (Tr. VI at 34:13-35:3; 134:7-21; 145:6-148:5.) The only witness personally acquainted  
19 with Mr. Swallow who testified to the contrary was Peter Lunardi. Mr. Lunardi's bias and  
20 untruthfulness are discussed in Section IV.B.2, *infra*. Mr. Lunardi promised to testify against Mr.  
21 Swallow in return for a gentle settlement of the disciplinary case against him and his wife (Ex. FV  
22 at 3 ¶ 6), he enabled and bankrolled the Bureau's intimidation campaign against Brian Roberts, and  
23 he wants millions of dollars belonging to Mr. Swallow which the Bureau has conveniently and  
24 unlawfully kept from Mr. Swallow until now. Partnering with Peter Lunardi and relying upon his  
25 testimony on an issue of character does more damage to the Bureau's stature as a regulator than any  
26 conduct alleged against Mr. Swallow.

27 Fourth, Mr. Swallow has been engaged in business for many years. The record discloses no  
28 evidenced of debts unpaid, promises broken, investors misled or any of the other signature

1 behaviors of an unscrupulous business person. Since it was the Bureau's burden<sup>7</sup> to prove that  
2 Mr. Swallow was unfit or unqualified for licensure, the manifest failure to offer evidence of bad  
3 character is itself an affirmation of Mr. Swallow's integrity.

4 **B. EVIDENCE THAT SHOULD BE GIVEN LITTLE OR NO WEIGHT**

5 If the Court decides to reach the merits of issues in spite of its lack of jurisdiction and the  
6 Due Process violations, a word is in order about how the Court should view (1) evidence pertaining  
7 to the declaration of Bryan Roberts and (2) the testimony of Peter Lunardi. For the reasons that  
8 follow, the Court should assign no weight to any such evidence.

9 1. Bryan Roberts' Statements Should Be Entitled To No Weight

10 As discussed above, Bryan Roberts was desperate and without hope when Mr. Torngren  
11 and the Lunardis withheld money from him. (*See supra* § III.B.1.) Mr. Roberts received \$15,500  
12 in exchange for his declaration. (*Id.*) And Mr. Lunardi paid for the costs of Mr. Roberts' travel.  
13 (*Id.*) As the Court noted, Mr. Roberts was "a biased witness whose declaration was bought and  
14 paid for." (Tr. VII at 67:19-20.) Accordingly, none of Mr. Roberts' declaration, Mr. Roberts'  
15 statements, or any testimony based on Mr. Roberts' statements should be given any weight.

16 2. Peter Lunardi's Biased Testimony Is Contradicted By Independent Means Of  
17 Corroboration

18 Mr. Lunardi and his wife are 50% owners of Garden City through their trust. (Ex. 2 at 6;  
19 Ex. 38.) Today, Mr. Lunardi is both seeking to buy Mr. Swallow's share of Garden City (Tr. III at  
20 121:24-125:3) and seeking to take \$7.1 million being wrongfully withheld from Mr. Swallow. (Tr.  
21 III at 176:25-177:15.) Mr. Lunardi's Settlement Agreement also requires him to testify against  
22 Mr. Swallow. (Ex. FV at 3 ¶ 6 ("Settling Respondents will . . . provide testimony, if  
23 required . . .").) If Mr. Swallow's license were revoked, he would be forced to sell his ownership  
24 in Garden City (Cal. Bus. & Prof. Code § 19882(a)) and Mr. Lunardi's chances of taking the \$7.1  
25 million would increase. Accordingly, Mr. Lunardi has a strong motivation to see Mr. Swallow's  
26 license revoked.

27 \_\_\_\_\_  
28 <sup>7</sup> To the extent there is any of doubt regarding which party has the burden, the Bureau stipulated  
that it has the burden of proof. (Tr. V at 17:11-15.)

1 Mr. Lunardi's bias is demonstrated by the impeachment of his own testimony by the  
2 testimony of other witnesses and the prior statements of Mr. Lunardi and his agents.

- 3 • Mr. Lunardi testified that he did not meet with an accountant about setting up Dolchee,  
4 Potere, or Profitable Casino prior to the formation of these entities. (TR. III at 186:3-  
5 187:12.) But, Mr. Bellotti<sup>8</sup> testified that he met with Mr. Swallow and Mr. Lunardi to  
6 discuss the formation of the Related Entities. (Tr. VI at 14:2-10.) And, Mr. Lunardi  
7 represented to the Commission that these entities were formed based upon advice  
8 received from his accountants and attorneys. (Ex. DX at 12, ¶11 (g) ("The Lunardis  
9 relied upon the advice of legal and accounting professionals in . . . the formation of  
10 entities affiliated with the owners.").)
- 11 • Mr. Lunardi testified that there were no tax savings goals when he agreed to the  
12 structure of the Related Entities. (Tr. III at 97:5-7.) But, Mr. Bellotti testified that  
13 Mr. Lunardi was considering a move to Nevada when the Related Entities were set up  
14 as Nevada LLCs to potentially minimize taxes. (Tr. VI at 14:23-17:6.)
- 15 • Mr. Lunardi testified that payments from the Related Entities were distributions that had  
16 nothing to do with how many Dolchee games were played on a given day. (Tr. III at  
17 189:19-190:3.) But, Mike Conroy testified that Mr. Lunardi told him that, as reflected  
18 in Mr. Conroy's report to the City of San Jose, the fees paid from Dolchee to Garden  
19 City were based on the number of Dolchee games played on a given day. (Tr. IV at  
20 78:15-79:4; Ex. DB.)
- 21 • Mr. Lunardi testified that he did not hire and fire people. (Tr. IV at 16:2-3.) But, when  
22 seeking the Commission's endorsement of the settlement between the Bureau and the  
23 Lunardis, Mr. Lunardi's attorney told the Commission that "the Lunardis swiftly and  
24 deliberately terminated Garden City, Inc.'s relationship with their general manager,  
25 controller, in house counsel, auditor, compliance officer, information technology

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26  
27 <sup>8</sup> Mr. Lunardi, to this day, has continued to employ Mr. Bellotti as his accountant. (Tr. III at  
28 192:4-5; Tr. VI at 8:16-17, 8:24-25.) If, as Mr. Lunardi testified, he had unknowingly paid  
more in taxes than he otherwise should have, it is simply implausible that he would continue to  
employ the accountant who counseled him to do so without his knowledge.



1 service provider, outsourced security and surveillance provider, food and beverage  
2 provider, janitorial services provider, lobbyist spokesperson, and their association with  
3 certain liability companies." (Ex. HJ-01 at 7-8.)

4 Accordingly, because Mr. Lunardi is motivated to see Mr. Swallow's license revoked and  
5 his testimony is contradicted by other, unbiased evidence, the Court should not credit any of  
6 Mr. Lunardi's testimony.

7 C. **PAYMENTS BY TEAM VIEW PLAYER ASSOCIATES TO SECURE**  
8 **STONE DID NOT VIOLATE BUSINESS & PROFESSIONS CODE**  
9 **SECTION 19984(A)**

10 The Bureau's "first cause for discipline and denial of renewal" is that Mr. Swallow violated  
11 Business & Professions Code §19984(a) because "he, directly or indirectly, had a prohibited  
12 interest in, and received prohibited payments from, Team View Player Services, which was a third-  
13 party provider of proposition player services to Garden City." The Bureau is incorrect as a matter  
14 of law.

15 The main reason is that neither Garden City nor Mr. Swallow ever had an "interest, whether  
16 direct or indirect, in funds wagered, lost or won" by Team View Player Services. Here is the  
17 language of the statute:

18 (a) Any agreement, contract or arrangement between a gambling  
19 enterprise and a third-party provider of proposition player services  
20 shall be approved in advance by the department, and in no event shall  
21 a gambling enterprise or the house have any interest, whether direct  
22 or indirect, in funds wagered, lost or won.

23 (Cal. Bus. & Prof. Code § 19984(a).) The plain language of the statute did not forbid all payments  
24 from Team View Player Services to Mr. Swallow. It only forbade Mr. Swallow from having "any  
25 interest, whether direct or indirect, in funds wagered, lost or won" by Team View Player Services.  
26 Neither Garden City nor Mr. Swallow had any such interest.

27 We know that because on separate occasions in 2011 and 2012, the Bureau approved  
28 contracts providing for the payment of more than \$2 million annually from Team View Player  
Services to Garden City. (*See* Exhibit BT ¶15; Exhibit AA-08 ¶15.) *See also* Cal Bus. & Prof.  
Code § 19884(a) (requiring approval of the Bureau for contracts between a gambling establishment  
and a third-party provider of proposition player services; no evidence was presented of disapproval.)

1 One of the contracts was signed by Peter Lunardi, the President of Garden City. (Ex. AA08  
2 at 14.) The other contract was signed by Kathy Reiner, Garden City's CFO at the time. (Ex. BT at  
3 14.) The Bureau has never alleged that these contracts were unlawful in any way, notwithstanding  
4 that they provide for multimillion dollar payments from a third-party provider of proposition  
5 services (Team View Player Services) to a gambling establishment (Garden City). Garden City  
6 plainly had no interest "in funds wagered, lost or won" at the cardroom by Team View Player  
7 Services.

8 Yet in its prosecution of Mr. Swallow, the Bureau argues strenuously and at length (CCB at  
9 10:20-14:14) that payments by Team View Player Associates, which was not a provider of third-  
10 party proposition player services (Ex. 25 at 2-3, No. 5) to Dr. Swallow, who was neither a  
11 "gambling enterprise" nor "the house," were unlawful because Team View Player Associates was  
12 somehow affiliated with Team View Player Services, and because Mr. Swallow may have had a  
13 community property interest<sup>9</sup> in funds received by his wife. Under the statute, the attenuated  
14 relationships between Team View Player Services and Team View Player Associates, and between  
15 the finances of Dr. Swallow and Mr. Swallow, do not even begin to become relevant unless the  
16 contract between Team View Player Associates and Dr. Swallow gave her an "interest, whether  
17 direct or indirect, in funds wagered, lost or won." Dr. Swallow did not acquire any such interest,  
18 any more than Peter Lunardi, Eric Swallow or Garden City acquired such an interest in the  
19 contracts approved by the Bureau between Team View Player Services and Garden City.

20 There is no merit to the accusation that Mr. Swallow violated Business & Professions Code  
21 §19984(a). The Count should be dismissed in its entirety.<sup>10</sup>

22  
23 <sup>9</sup> Dr. Swallow's statement, which is the only evidence that the Bureau offers in support of this  
24 interest, is an out-of-court statement offered for its truth and consequently cannot serve as  
25 support for this finding. Cal. Gov't Code § 11513. Further, this statement is contradicted by a  
26 Sole and Separate Property Agreement signed by Mr. Swallow. (Ex. BQ.)

27 <sup>10</sup> Respondent also notes that the Bureau's allegations depend entirely on the truth of the  
28 information contained in a "Response from Team View and Tim Gustin." (Ex. 25.) These  
statements are hearsay and cannot be the sole basis for a finding. (Cal. Gov't Code § 11513.)  
The Bureau never called Tim Gustin to testify, and the Bureau has provided no other evidence  
proving that any payments were made from Team View Player Services to Team View Player  
Associates, let alone payments that gave Team View Player Associates an "interest, whether  
direct or indirect, in funds wagered, lost or won."

1           **D.     PAYMENTS TO DOLCHEE AND PROFITABLE CASINO WERE NOT**  
2           **DISTRIBUTIONS AND NEITHER IS OWNED BY THE SWALLOW TRUST**

3           The Bureau also alleges that payments to Dolchee and Profitable Casino violated Penal  
4 Code section 337j. (CCB at App. A.) As discussed in section V.B., *infra*, this purported violation  
5 is found nowhere in any Accusation and the cited statute cannot apply to Mr. Swallow. But, even  
6 if this issue was properly raised, the allegation is not supported by substantial evidence because the  
7 Bureau's allegations regarding payments to Dolchee are incorrect. First, the Bureau argues that  
8 payments made by Garden City were distributions rather than payments for services rendered.  
9 (CCB at 24:20-22.) Second, the Bureau argues that Dolchee was owned by the Swallow Trust  
10 rather than Mr. Swallow after 2011. (CCB at 24:4-6; 24 n.22, 24:23-24.) The Bureau is wrong on  
11 both accounts.

12           Regarding the Bureau's first argument, the sole evidence the Bureau cited for the  
13 proposition that payments from Garden City to Dolchee and Profitable Casino were distributions is  
14 Mr. Lunardi.<sup>11</sup> (CCB at 24:20-22.) But, in the testimony that the Bureau relies on, Mr. Lunardi  
15 makes clear that his belief that these payments were distributions came from his accountant. (Tr. III  
16 at 96:23-24; 106:19-20.) And Mr. Lunardi later clarified that Mr. Bellotti is the person who told  
17 him that the Related Entities were "going to allow us to take distributions." (Tr. III at 188:6-23;  
18 *see also* Tr. III at 190:19-24 (testifying that Mr. Bellotti told Mr. Lunardi that the Related Entities  
19 are "set up for our distributions").) Of course, this Court need not rely on Mr. Lunardi's  
20 unqualified, hearsay recitations of what Mr. Bellotti purportedly told him because Mr. Bellotti was  
21 questioned about the related entity payments. (Tr. VI at 41:22-43:4.) Mr. Bellotti testified that the  
22 payments to Dolchee and Profitable Casino were not distributions (Tr. VI at 41:22-24) and that

23                     The payments to Dolchee and Profitable Casino were pursuant to  
24                     their license or royalty agreements or agreements they had. That's  
25                     actually revenue or expense to Garden City.

26                     A distribution is not an expense. These payments to Dolchee and  
27                     Profitable Casino would be an expense to Garden City and income to  
28                     Dolchee or Profitable Casino.

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28 <sup>11</sup> The Bureau chose not to have an expert testify on the topic.

1 (Tr. VI at 42:16-22.) Accordingly, the great weight of the evidence shows that payments from  
2 Garden City to Dolchee and Profitable Casino were not distributions.

3 Second, the Bureau says that Dolchee's members<sup>12</sup> are the Swallow Trust and the Lunardi  
4 Trust. (CCB at 24:4-6; 24 n.22, 24:23-24.) The evidence, however, shows that Mr. Swallow  
5 replaced the Swallow Trust as the owner of Dolchee in 2011. Mr. Swallow testified that Dolchee's  
6 ownership changed from the Swallow Family Trust to Mr. Swallow in 2011. (Tr. I at 143:16-  
7 144:8;153:17-23.) Mr. Swallow stated that in changing the ownership, he "signed a new signature  
8 page for the operating agreement with just [his] name. (Tr. I at 154:24-155:5.) And Mr. Bellotti  
9 testified that he received a copy of this amended operating agreement. (Tr. VI at 72:11-17.)  
10 Further, the K-1s for Dolchee in 2011 listed Eric Swallow, rather than the Swallow Trust, as  
11 Dolchee's member. (Ex. 7 at 586.) Also, the City of San Jose's 2012 investigation of the  
12 ownership of Dolchee revealed that (1) Mr. Kumar described Dolchee as being 50% owned by Eric  
13 Swallow and not the Swallow Trust (Ex. 45 at 6, 8) and (2) Mike Conroy reported that Dolchee  
14 was 50% owned by Mr. Swallow and not the Swallow Trust (Ex. DB at 19.) Finally, Mr. Lunardi's  
15 testimony did not rule out a new agreement. Rather, Mr. Lunardi testified that he did not recall  
16 signing a new agreement. (Tr. III at 109:25-110:8.) Given Mr. Lunardi's attitude towards the  
17 changing of ownership between Mr. Swallow and the Swallow Trust, it is no surprise that he would  
18 not recall such a change in ownership. (See Ex. 45 at 126 (stating that whether Mr. Swallow alone  
19 or the Swallow Trust seek licensure was "Mr. Swallow's decision to do as he pleases."))

20 E. **ALL OF THE COUNTS ALLEGING FALSE OR MISLEADING**  
21 **STATEMENTS, OR FAILURE TO ANSWER QUESTIONS, FAIL BECAUSE**  
22 **THE BUREAU PROVIDED NO EVIDENCE OF MATERIALITY**

23 The false statement and material omission counts are deficient for a variety of reasons set  
24 forth in sections IV.F. and IV.G., *infra*. However, there is a defect common to all of these counts  
25 which makes it unnecessary to reach more specific failings of proof: The Bureau failed even to  
26 offer evidence of materiality, an essential element of each count.

27 <sup>12</sup> The only reason Dolchee's ownership could be material to Mr. Swallow's qualification is if  
28 Dolchee received distributions from Garden City. Because it did not, the ownership of Dolchee  
is not material to anything.

1 The Bureau concedes that materiality is an essential element of the false statement counts  
2 (CCB at 14:26; *See* Cal. Code Regs. tit. 4, div. 18 §§ 12568(b)(1); 12568(c)(4).) Because  
3 materiality is undefined by statute or regulation, the Bureau proposes that to be material, "a fact  
4 [must be one] that a reasonable regulator would want to know in making a [qualification]  
5 decision." (CCB at 14-15 n.17 at 14:27-28, 15:24-28.)

6 Even if that definition were accepted, the false statement counts fail because the Bureau  
7 offered no evidence of materiality under its own definition. None.

8 There was no testimony from any witness about what a "reasonable regulator" would want  
9 to know in making a qualification decision. The CCB substitutes argument for evidence in the  
10 record. (*See, e.g.*, CCB at 17:19-24; 20:11-15.) Ms. Luna-Baxter, the Bureau's witness, had  
11 nothing to offer on these points. On materiality, her testimony was limited to a circular definition:  
12 "material" means that "the Bureau considers it to be material to the investigation, showing the  
13 cause of violation" which is "important to the Bureau." (Tr. V at 56:23-57:2.) As an essential  
14 element of the false statement counts, materiality needed to be proved by substantial evidence; on  
15 this record it was not supported by any evidence.

16 Similarly, the Bureau is required to show that each omission is a "fact material to  
17 qualification." (Cal. Bus. & Prof. § 19859.) The Bureau contends that Mr. Swallow's omissions  
18 need not be material (CCB at 36 n.33, 36:26-28), because section 19859 states, in part, that "[t]he  
19 commission shall deny a license to any applicant who is disqualified for . . . [f]ailure of the  
20 applicant to provide information, documentation, and assurances . . . *requested by the chief.* (CCB  
21 at 36 n.33, 36:26-28; Cal. Bus. & Prof. § 19859 (emphasis added).) "Chief" is defined as "the head  
22 of the entity within the department that is responsible for fulfilling the obligations imposed upon  
23 the department by this chapter." (Cal. Bus. & Prof. § 19805.) "Department" means the  
24 Department of Justice. *Id.*

25 Without citation, the Bureau argues that Mr. Swallow "failed to provide information and  
26 documentation requested by the Bureau's Chief numerous times." (CCB at 36:18-19; *see also* CCB  
27 at 37:1-2; 39:16-17.) At all times, the "Chief" was Wayne Quint. (*See e.g.*, Ex. 2 at 2; Ex. 1 at 25;  
28 DT at 33; Tr. VI at 17-19.) There is no evidence that Wayne Quint sent any communications to

1 Mr. Swallow. The Bureau's implicit interpretation, that any actions by the Bureau are actions by  
2 the Chief, could only be accomplished by rewriting section 19859 to replace the word "chief" with  
3 "department." The Court is, of course, without power to rewrite the statute so such an  
4 interpretation is improper.

5 Accordingly, the Bureau is required to prove that an omission was of a "fact material to  
6 qualification." (Cal. Bus. & Prof. § 19859.) As an essential element of the omissions counts,  
7 materiality needed to be proved by substantial evidence; on this record it was not supported by any  
8 evidence.

9 F. **MATERIALITY ASIDE, MR. SWALLOW'S ALLEGEDLY MISLEADING**  
10 **STATEMENTS DO NOT SUBJECT HIM TO DISCIPLINE**

11 1. Applicable Law

12 The Bureau seeks to punish Mr. Swallow for several statements that it claims are  
13 misleading or untruthful. (CCB at 14:15-16:3.) The Bureau bases its arguments on two statutes,  
14 sections 19857 and 19859 of the Business and Professions Code and associated regulations.  
15 According to the Bureau, each instance, standing alone, requires mandatory revocation and  
16 mandatory denial pursuant to section 19859. (CCB at 14:20-21.) And, according to the Bureau,  
17 taken together, these purportedly misleading and untruthful statements mean that Mr. Swallow  
18 does not have the requisite good character, honesty, and integrity. (CCB at 15:19-20.) The Bureau  
19 is mistaken on both counts.

20 (a) Section 19859

21 The Bureau seeks to discipline Mr. Swallow for his misstatements based on section  
22 12568(c)(4) of the California Code of Regulations and section 19859(b). Section 19859 provides,  
23 in relevant part, that:

24 The Commission shall deny a license to any applicant who is  
25 disqualified for any of the following reasons: . . . (b) Failure of the  
26 applicant to provide information, documentation, and assurances  
27 required by this chapter or requested by the chief, or failure of the  
28 applicant to reveal any fact material to qualification, or the supplying  
of information that is untrue or misleading as to a material fact  
pertaining to the qualification criteria.

1 Cal. Bus. & Prof. Code § 19859. "Applicant" is defined as "any person who has applied for, or is  
2 about to apply for, a state gambling license . . . ." Cal. Bus. & Prof. Code § 19859.

3 One question that arises in connection with this statutory language is whether Mr. Swallow  
4 was an applicant within the meaning of the statutes when the purported misleading statements were  
5 made.

6 When interpreting a statute, this Court should attempt to "ascertain the intent of the  
7 Legislature so as to effectuate the purpose of the law." (*Wilcox v. Birtwhistle*, 21 Cal. 4th 973, 977  
8 (1999).) "Words used in a statute should be given the meaning they bear in ordinary use." (*Id.*) If  
9 the language is ambiguous, a Court should look to extrinsic evidence. (*Id.*) After performing this  
10 analysis, the Court should adopt an interpretation that aligns with the Legislature's intent and  
11 avoids absurd consequences. (*Id.* at 977-78.)

12 Mr. Swallow certainly was an applicant in connection with his license at Hollywood Park  
13 Casino and LAX Properties when the statements were made. But, a plain reading of the statute is  
14 that such statements would result in denial of his LAX application, but not automatically result in  
15 any action on his Garden City application. The reason for this is clear, what is material in one  
16 application is not necessarily material in another. The license at issue in this proceeding is  
17 Mr. Swallow's license in connection with Garden City. No Garden City license application was  
18 pending when the Bureau and Commission asked the questions to which Mr. Swallow purportedly  
19 made misleading statements. And Mr. Swallow's statements were made at hearings and in  
20 documents that were specifically directed to LAX's licensing. As such, Mr. Swallow was  
21 attempting to provide information material to his LAX license, not his Garden City license.  
22 Accordingly, the natural reading of the statute is that Mr. Swallow's statements in connection with  
23 his LAX license could provide grounds to deny that application, but not to disqualify Mr. Swallow  
24 from other licenses not being discussed when the statements were made. Certainly, to the extent  
25 that Mr. Swallow himself was an applicant within the meaning of the statute, there is no evidence  
26 that the agents who spoke on his behalf in connection with his LAX license application were  
27 authorized to speak on his behalf in matters pertaining to his Garden City license, which was not  
28 then at issue.

1 The Commission also implemented section 19859 through the adoption of several  
2 regulations, including section 12568. Section 12568(b) permits the Commission to discipline a  
3 license holder if that person has: "Intentionally misrepresented a material fact on an application or  
4 supplemental application for licensure or registration," or "Intentionally provided untruthful  
5 responses during an investigation by the Bureau, pursuant to Business and Professions Code,  
6 section 19827." (Cal. Code Regs., tit. 4, div. 18 § 12568(b).) Additionally, section 12568(c)  
7 permits the Commission to discipline a licensee "

8 (3) If the Commission finds the holder no longer meets any criterion  
9 for eligibility, qualification, suitability or continued operation,  
10 including those set forth in Business and Professions code sections  
11 19857, 19858, or 19880, as applicable or (4) If the Commission finds  
the holder currently meets any of the criteria for mandatory denial of  
an application set forth in Business and Professions Code sections  
19859 or 19860."

12 (Cal. Code Regs. tit. 4, div. 18 § 12568(c).)

13 The Bureau peppered its brief with arguments pertaining to "mandatory revocation." (CCB  
14 at 14:20-22; 34:23; 36:20; 39:19-20; 41:27.) Quite simply, there is no requirement of mandatory  
15 revocation anywhere in the Statutes or Regulations. It does not appear in any statute cited by the  
16 Bureau as providing authority for discipline. To the extent the Bureau believes that "shall be  
17 subject to revocation by the Commission" in section 12568(c) mandates revocation, it is mistaken.  
18 That language, as used in numerous judicial opinions, indicates that revocation is permissible, not  
19 mandatory. (*Ruess v. Baron*, 217 Cal. 83, 89 (1932) ("Such contract is a mere proposal to sell,  
20 unsupported by sufficient consideration, and subject to revocation by the owner at any time before  
21 the negotiation of a sale or the exercise of such option by the agent to purchase."); *In re Marriage*  
22 *of Holtemann*, 166 Cal. App. 4th 1166, 1175 (2008) ("[A] will is ambulatory in nature, subject to  
23 revocation or modification during the testator's life."); *Brown v. Labow*, 157 Cal. App. 4th 795, 816  
24 (2007) ("Once a Code of Civil Procedure section 998 statutory settlement offer is made, it is  
25 subject to revocation.")) The regulation does not say that the license "shall be revoked by the  
26 Commission." Moreover, the regulations explicitly grant the Commission the authority to "[s]tay,  
27 in whole or in part, the imposition of a revocation or suspension against the holder of a license."  
28 (Cal. Code Regs. tit. 4, div. 18, § 12554(d)(6).) As the Bureau noted, words have meaning (Tr. VI



1 64:14), and the Bureau continues to ignore the import of the words used by the Legislature and the  
2 Commission.

3 The Bureau's interpretation of section 12568 is also incorrect because it would result in a  
4 license holder being disciplined more harshly for unintentionally providing untruthful responses  
5 than for intentionally providing untruthful responses. According to the Bureau, the unintentional  
6 responses would result in "mandatory revocation" pursuant to section 12568(c)(4) while  
7 intentionally untruthful responses could be punished with a range of punishments as permitted in  
8 section 12568(b). An absurd interpretation of the regulations does not effectuate the Legislature's  
9 intent. In reality, the Bureau must prove that Mr. Swallow intentionally misrepresented a material  
10 fact or intentionally provided untruthful responses pursuant to section 12568(b). By drafting a  
11 regulation specific to section 19859(b), the Commission did not mean to include any of section  
12 19859(b) within the meaning of section 12568(c)(4).

13 (b) Section 19857

14 At various points, the Bureau also alleges that Mr. Swallow's conduct violates section  
15 19857(a) and (b). (CCB at 17:17-24; 20:8-20; 22:18-27; 26:18-24; 30:17-25; 34:13-20.) Section  
16 19857 reads as follows:

17  
18 No gambling license shall be issued unless, based on all of the  
19 information and documents submitted, the commission is satisfied  
20 that that the applicant is all of the following: (a) a person of good  
21 character, honesty, and integrity. (b) A person whose prior activities,  
22 criminal record, if any, reputation, habits, and associations do not  
pose a threat to the public interest of this state, or to the effective  
regulation and control of controlled gambling, or create or enhance  
the dangers of unsuitable, unfair, or illegal practices, methods, and  
activities in the conduct of controlled gambling or in the carrying on  
of the business and financial arrangements incidental thereto.

23 Cal. Bus. & Prof. § 19857.

24 Section 12568 of the California Code of Regulations permits, but does not require, the  
25 Commission to revoke a state gambling license "if the Commission finds the holder no longer  
26 meets any criterion for eligibility, qualification, suitability, or continued operation, including those  
27 set forth in Business and Professions Code section 19857 . . ." (Cal. Code Regs. tit. 4, div. 18  
28 § 12568(c)(3).)

1 Character evidence is evidence of a person's propensity or tendency to act in a certain way  
2 under certain circumstances. Here, the majority of the Bureau's allegations of violations of section  
3 19857 appear to be coextensive with the conduct that it claims violates other sections of the Act.  
4 (CCB at 14:15-16:3.) In other words, the crux of the Bureau's allegations pertaining to section  
5 19857 is that a series of acts demonstrates Mr. Swallow does not possess the requisite character to  
6 be licensed. But, by this same logic, if Mr. Swallow's actions do not violate the Act, or the Court  
7 finds violations that do not demonstrate a propensity to act a certain way, revocation under section  
8 19857 is improper.

9 As a preliminary matter, section 19857 discipline is "based on all of the information and  
10 documents submitted." All of the purported information or documents were submitted in  
11 connection with Mr. Swallow's LAX license application. Accordingly, such statements cannot be  
12 considered in connection with Mr. Swallow's Garden City license under this section.

13 Further, the Bureau alleges that certain acts prove Mr. Swallow's character is impeached  
14 because of purported violations of section 19866. (CCB at 17:13-14; 20:8-9; 22:16-18; 26:12-14;  
15 30:13-14; 34:8-9.) Section 19866 states that "an applicant for licensing . . . shall make full and true  
16 disclosure of all information to the department and the commission as *necessary to carry out the*  
17 *policies of this state relating to licensing, registration, and control of gambling.*" (Cal. Bus. &  
18 Prof. Code § 19866 (emphasis added).) As discussed above, Mr. Swallow is not an applicant  
19 within the meaning of the statute. Further, "necessary to carry out the policies of this state relating  
20 to licensing, registration, and control of gambling" must have meaning, and the Court should find  
21 that it is a materiality requirement. The obligation to disclose fully can only extend to items that  
22 are material to the Bureau's license review. To interpret the statute otherwise would lead to an  
23 absurd result, as it would permit the Commission to find that an applicant's omissions immaterial to  
24 qualification do not support a violation under section 19859, but nonetheless support a violation of  
25 section 19857.

26 Finally, in the context of section 19857, it bears emphasis that the only people, other than  
27 Mr. Lunardi, who know Mr. Swallow personally and testified regarding his character are  
28 Mr. Bellotti, Martha Copra and Richard De La Rosa. Each of these witnesses testified that they

1 believe Mr. Swallow to be a person of good character, honesty, and integrity. (Tr. VI at 34:13-35:3;  
2 134;17-21; 135:24-136:3; 146:20-25; 148:2-5.)

3 2. Respondent's Purported Misleading Statements Were Not Made, Were  
4 Misinterpreted, Or Are Not Material

5 Though Mr. Tornngren and the Bureau claim "that words have meaning," (Tr. VI at 64:14)  
6 the Bureau's allegations demonstrate a persistent disregard for the actual words used by  
7 Mr. Swallow and his agents. His actual words show that Mr. Swallow responded appropriately to  
8 the Bureau's questions.

9 (a) Statements About Accountant's Valuation

10 According to the Bureau, "Mr. Swallow stated that he had a written accountant's opinion  
11 regarding the pricing of certain dealings between Garden City and the Related Companies." (CCB  
12 at 16:6-7.) In making this charge, the Bureau takes Mr. Swallow's statement out of context and  
13 ignores a commonsense interpretation.

14 First, there is no dispute that Mr. Swallow was called before the Commission to testify in  
15 connection with his application for LAX and Hollywood Park. (Tr. II at 102:21-104:19.) Prior to  
16 the Commission meeting, Mr. Swallow was not informed that there would be any discussion  
17 regarding Garden City's financing, let alone a specific discussion regarding related-party payments.  
18 (104:25-105:2.) Nevertheless, Mr. Swallow endeavored to respond to the Commission's questions.  
19 (*See Ex. 8.*)

20 When responding to earlier questions from Commissioner Schuetz, Mr. Swallow twice  
21 informed Commissioner Schuetz, as well as the Bureau and Commission attendees and the rest of  
22 the public, that he is not a CPA. (Ex. 8 at 65:10, 65:25.) Nevertheless, Commissioner Schuetz  
23 continued to question Mr. Swallow on accounting matters. (Ex. 8 at 65-69.) Finally,  
24 Commissioner Schuetz asked Mr. Swallow the questions on which the Bureau bases its allegations.  
25 The relevant questions and answers are as follows:

26 Commissioner Schuetz: So how did you come up with the value that  
27 you pay yourself?

28 Mr. Swallow: My CPA firm did that for me.

1 Commissioner Schuetz: And do you have a written opinion to that, or  
2 a written opinion with regards to - -

3 Mr. Swallow: Yes. Yes.

4 Commissioner Schuetz: And is it a qualified or an unqualified  
5 opinion?

6 Mr. Swallow: It is a CPA qualified opinion.

7 Commissioner Schuetz: It's a qualified opinion. So he had absolutely  
8 no reason to question that decision.

9 Mr. Swallow: I'm sorry - -

10 Commissioner Schuetz: That's what a qualified opinion is. Is it  
11 qualified or unqualified?

12 Mr. Swallow: You know, I don't know how to answer that.

13 Commissioner Schuetz: Well, if it's qualified, that means, yeah, I  
14 agree, but I've got some issues and he's going to write what those  
15 issues are on that. Could you provide for sure, and our friends at the  
16 Bureau make sure that we get it, the accountant's qualified or  
17 unqualified opinion as to the pricing model that was used in this  
18 software license?

19 Mr. Swallow: Sure.

20 (Ex. 8, 68:1-69:2)

21 First, Commissioner Schuetz never finished his question, so it is not clear what written  
22 opinion Commissioner Schuetz was asking about, or what written opinion Mr. Swallow was  
23 referring to, when he answered "Yes. Yes." Second, Commissioner Schuetz then asked whether  
24 the written opinion to which Mr. Swallow was referring was "a qualified or an unqualified  
25 opinion." Mr. Swallow's initial response was that it was "a CPA qualified opinion." But, upon  
26 further questioning, it quickly became apparent that Mr. Swallow and Commissioner Schuetz did  
27 not have a shared understanding of the meaning of that phrase, because Mr. Swallow stated that he  
28 wasn't sure how to answer whether the opinion to which he was referring was qualified or  
unqualified.

There is a simple explanation for Mr. Swallow's responses to Commissioner Schuetz's  
vague questions that proves Mr. Swallow was attempting to be truthful. Mr. Swallow was referring  
to related-party payments sections of the audited financial statements. (Tr. I at 59:18-19.) In each

1 fiscal year, Jerry Bellotti, a certified public accountant, audited Garden City's financial statements  
2 and issued a related-party footnote in which the amounts of payments from Garden City to the  
3 Related Entities was approved. (Exs. 12 at 14; 13 at 14; 14 at 12; 15 at 13-14; AW at 14-15.) Of  
4 course, this is a written statement by Mr. Bellotti expressing his opinion regarding the propriety of  
5 these payments. And Mr. Swallow had already informed the Commission that he was not a CPA,  
6 so it is not surprising that he would be confused by a question regarding an accountant's opinion.

7 Further, while the Bureau claims that its requests for a written opinion following the  
8 February 21 meeting went unanswered, this is untrue. The Bureau was already in possession of the  
9 audited financial statements to which Mr. Swallow was referring, and both Mr. Swallow and  
10 Mr. Bellotti supplemented this information with letters explaining the valuation process. (Ex. GW  
11 at 4; Ex. GX.)

12 (b) Statements About Marital Status

13 The Bureau claims that "Mr. Swallow was untruthful or misleading about his marital  
14 status." (CCB at 18:5-6.) Again, the Bureau refuses to consider the meaning of the words of  
15 Mr. Swallow or his agents.

16 First, the Bureau's allegations and arguments rest on a false premise, that being married and  
17 being separated are mutually exclusive concepts. This is patently incorrect. The Bureau's witness,  
18 Mr. Conroy, admitted that it is possible to be both married and separated at the same time. (Tr. IV  
19 at 74:19-21.) And even a legal separation does not end the marriage of two people. (*Monroe v.*  
20 *Sup. Ct. of Los Angeles Cty.*, 28 Cal. 2d 427, 429 (1946) ("A [legal separation] does not end the  
21 marriage.") What changes is the amount of support that one spouse must provide the other. *Id.*

22 In addition, the State's and City's applications, which Mr. Swallow dutifully filled out,  
23 contain only boxes to check marital status and do not contain a space to explain the meaning of the  
24 marital status checked. (Exs. 4 at 2; 6 at 6.) On applications submitted to the State and to the City  
25 of San Jose in early 2012, Mr. Swallow checked a box reporting his marital status as married. (Ex.  
26 4 at 4; Ex. 44 at 4.) Mr. Swallow was married at the time, so this statement was true.

27 In August of 2012, Mr. Swallow reported his marital status as separated. (Ex. 6 at 6.) In  
28 subsequent communications to the Bureau and Commission, Mr. Swallow explained that the

1 separation to which he was referring was not "a legal separation" and that the separation occurred  
2 in "*approximately* 2009." (Ex. 10 at 1 (emphasis added).) Several days later Mr. Swallow again  
3 explained that "[t]he Swallows consider themselves separated effective *approximately* January of  
4 2010." (Ex. 7 at 2 (No. 15) (emphasis added).) This communication also clarified that "[t]here are  
5 no formal, executed legal separation documents between Eric and Deborah Swallow as of yet."  
6 (*Id.* (No. 14).) Though the Bureau apparently believes that "approximately" has no meaning (Tr.  
7 V at 155:18-155:25), it is evident that approximately 2009 and approximately January 2010 are  
8 overlapping and consistent time periods. Equally important is that these are the dates at which the  
9 Swallows "consider themselves separated." In other words, this was presented as the opinion of  
10 Mr. and Dr. Swallow which is not typically an actionable misrepresentation. (*Harazim v. Lynam*,  
11 267 Cal. App. 2d 127, 131 (1968) ("The misrepresentations relied upon must ordinarily be  
12 affirmations of fact; misrepresentations of law or legal opinions expressed by laymen are  
13 insufficient.").)

14 In October and December of 2013, both Mr. and Dr. Swallow filed documents in their  
15 Dissolution of Marriage proceeding. (Exs. 16, 17.) Both Mr. and Dr. Swallow stated that their  
16 date of separation was October 8, 2013. (*Id.*) Of course, the dates of separation in a petition for  
17 dissolution are dates on which the earnings and accumulations of a spouse are the separate property  
18 of that spouse (Cal. Fam. Code § 771(a)), and are distinguished from the dates of separation earlier  
19 provided by Mr. Swallow and his agents to the Bureau, which were explicitly described as *not*  
20 being dates of legal separation. (*Compare* Exs. 16, 17 with Exs. 10 at 1, 7 at 2.)

21 As evidence that the Swallows were not "separated effective January 2010,"<sup>13</sup> the Bureau  
22 cites the organization of Secure Stone and the pledging of assets in connection with the 1887  
23 Matrix Boulevard<sup>14</sup> construction project. (CCB at 20:2-5.) But, this evidence proves nothing.

---

24  
25 <sup>13</sup> The Bureau conveniently omits "approximately" and the non-legal nature of this separation  
26 from its argument. As is the case in the Bureau's prosecution of this matter, it has refused to  
include or analyze facts that do not fit into its narrative.

27 <sup>14</sup> The Bureau apparently concedes that the ownership of Airport Opportunity Fund was changed  
28 in 2011 and that at all times after August 8, 2012, the date on which Garden City began  
operations at 1887 Matrix Boulevard, the real estate was owned solely by Mr. Swallow. (CCB  
at 23 n.21, 23:26-29.)

1 First, as discussed earlier, the Swallows were married and not legally separated during this time.  
2 There is nothing inconsistent with being separated for the Swallows to take certain actions as a  
3 married couple. Second, even if the Swallows were divorced, they could still work together to set  
4 up a business and could still pledge assets of a trust. There is nothing in these actions that is  
5 inconsistent with being separated.

6 Finally, the question of whether a couple can be legally separated while living under one  
7 roof is, to date, an open question. The Supreme Court recently held that living in separate  
8 residences is required to find that spouses are legally separated. (*See In re Marriage of Davis*, 61  
9 Cal. 4th 846, 865 (July 20, 2015).) But, the Court expressly reserved the question as to whether  
10 spouses can be found to have established separate residences while continuing to literally share one  
11 roof. (*Id.* at 849 n.7.) The present record does not show that Mr. Swallow's 2012 and 2013  
12 statements regarding his separation were false or misleading.

13 (c) Statements About Secure Stone Payments Received In 2011

14 The Bureau alleges that Mr. Swallow, through an agent, falsely "represented to the Bureau  
15 that certain income exceeding \$1.4 million from Secure Stone that appeared on [Dr.] Swallow's  
16 2011 tax return related to the sale of her dental practice." (CCB at 20:22-24.) There is no  
17 competent evidence to support this allegation.

18 Administrative hearsay is admissible, but may not be the sole basis for any finding. (Cal.  
19 Gov't Code § 11513(d).) Here, the Bureau relies solely on hearsay to argue that (1) Mr. Swallow's  
20 agents made a statement that "Secure Stone income arose from the sale of [Dr.] Swallow's dental  
21 practice," and (2) Bryan Roberts "never worked with Deborah Swallow in connection with her  
22 dental practice or any other project." (CCB at 21:3-4; 21:12-13.)

23 The only evidence that Mr. Swallow's agent made a statement to the effect that Secure  
24 Stone income arose from the sale of Dr. Swallow's dental practice comes from the written  
25 statements of David Carrillo. These writings are out-of-court statements and are being offered for  
26 their truth. They are hearsay. (Cal. Evid. Code § 1200.) The only testimony regarding these  
27 statements came from Robert Burge. Mr. Burge testified about what Mr. Carrillo told Mr. Burge  
28 about Mr. Carrillo's written statements. (Exs. 32 & 33; Ex. 54; Tr. IV at 88:17-25; 89:19-90:3.)

1 Because this assumes both the truth of Mr. Carrillo's writings, and the truth of Mr. Carrillo's  
2 statements about those writings, it is double hearsay. Such statements are not sufficient to support  
3 a finding of fact that this statement was actually made. (Cal. Gov't Code § 11513.)

4 Further, Mr. Carrillo's statements are expressly contradicted by the later interview of the  
5 person who purportedly made the statement, Deven Kumar, the CFO of Casino M8trix. (Ex. BB1  
6 at 10 (Jonathan Flores: "[W]hy did you tell David Carrillo that monies received by Deborah  
7 Swallow through Secure Stone related to the sale of her dental practice?" Deven Kumar: "I did  
8 not.")) The Bureau, aware of this later statement by Mr. Kumar, has essentially admitted its truth  
9 by continuing to license Mr. Kumar, indicating that they consider him to be a person of good  
10 character, honesty and integrity, even after he denied stating that the sale of Secure Stone had  
11 anything to do with Dr. Swallow's dental practice. (Tr. VI at 113:14-23.)

12 As to Mr. Roberts' statements that he never worked with Deborah Swallow in connection  
13 with her dental practice, those, too, are hearsay. And, as discussed in section III.B.1, *supra*, these  
14 statements are the result of coercion by the Lunardis and the Bureau and violate Mr. Swallow's due  
15 process rights.

16 Accordingly, there is no evidence sufficient to support a finding that Mr. Swallow provided  
17 any untrue statements regarding 2011 Secure Stone payments.<sup>15</sup>

18 (d) Statements About The Interrelationship Between The Swallows'  
19 Business Affairs

20 The Bureau alleges that the statement of Mr. Swallow's agent that "Dr. Swallow's business  
21 affairs are independent of Mr. Swallow" and that "Dr. Swallow has no interest in Casino M8trix"  
22 are false. (CCB at 23:3-5; Ex. 10 at 1.) Again, the Bureau ignores the actual statements made by  
23 Mr. Swallow's agent, and the context in which the statements were made, by bringing up unrelated  
24 issues in an attempt to find a false statement where none exists.

25 The entire text of the first page of the letter written by John Maloney to the Bureau provides  
26 the context in which the statements were made. The text of the first page of the letter is as follows:

27 \_\_\_\_\_  
28 <sup>15</sup> Mr. Swallow also notes that for the reasons described in section IV.C., *supra*, there is no  
evidence regarding impermissible payments from Team View Player Services to Secure Stone.



1 As you are aware, we represent Eric Swallow in general gaming  
2 matters. We are in receipt of the e-mail Mr. Carlos Soler sent to Bob  
3 Lytle on June 13, 2013, regarding Dr. Deborah Swallow and Secure  
4 Stone, LLC. As further outlined herein, while we do not feel that  
5 Dr. Swallow should be an area of focus for the Bureau of Gambling  
Control (the "Bureau"), in the spirit of full cooperation this letter  
serves to provide additional background information regarding the  
relationship between Mr. Swallow and Dr. Swallow, and to address  
the requests posed by Mr. Soler.

6 Please note that Dr. Swallow's business affairs are independent of  
7 Mr. Swallow. Dr. Swallow files separate tax returns, maintains her  
8 own bank accounts, and the money from her businesses ventures is  
9 her money. Likewise, Mr. Swallow files his own tax returns, has his  
10 own bank accounts, and maintains his own businesses. Dr. Swallow  
11 has no interest in Casino M8trix or Hollywood Park Casino. With  
12 the exception of the fact that the two remain legally married, the  
13 suitability of Mr. Swallow should not be influenced [by]  
Dr. Swallow. As Mr. Swallow noted on page 2 of his "Supplemental  
Background Information Form," he and Dr. Swallow are separated.  
Mr. Swallow and Dr. Swallow have been separated since  
approximately 2009. Mr. Swallow and Dr. Swallow have not  
engaged in a legal separation or formal divorce proceedings due to  
concerns regarding the effect a divorce or legal separation could have  
on their three minor, dependent children.

14 (Ex. 10 at 1.) The letter then goes on to address the questions raised by Mr. Soler. (*Id.*)

15 Rather than attempting to show what evidence proves a particular statement in  
16 Mr. Maloney's letter is untrue, the Bureau spends nearly three pages citing out of context,  
17 untrustworthy testimony as support for various conclusions (CCB at 23:7-25:27) before stating that  
18 "Mr. Swallow told the Bureau that his and [Dr.] Swallow's business affairs were separate. He told  
19 the Bureau that she had no interest in Garden City. The evidence shows this was untrue." (CCB at  
20 26:1-3.) These accusations are unsupported by substantial evidence.

21 As a preliminary matter, the Bureau offers no evidence to prove that any statements in  
22 Mr. Maloney's letter can lead to a violation by Mr. Swallow. To discipline Mr. Swallow for the  
23 statements in Mr. Maloney's letter to the Bureau, the Bureau must prove that Mr. Swallow  
24 "[i]ntentionally provided untruthful responses . . ." (Cal. Code Regs. tit. 4, div. 18 § 12568(b)(2).)  
25 Mr. Swallow testified that he did not review the letter before it was sent, did not provide the  
26 information contained in the letter to Mr. Maloney, and was not aware of the letter's existence until  
27 the letter was produced. (Tr. I at 132:4-11.) Because Mr. Swallow was not the source of the  
28 information contained in the letter, and he did not approve the content of the letter before it was

1 sent, it is impossible for the Bureau to prove that Mr. Swallow intentionally provided untruthful  
2 responses. Thus, the content of the letter does not subject Mr. Swallow to discipline.

3           Moreover, the statement in Mr. Maloney's letter that "Dr. Swallow's business affairs are  
4 independent of Mr. Swallow" (Ex. 10 at 1) should not be read to mean that the spouses had no  
5 interest whatsoever in one another's businesses because that same paragraph carved out an  
6 exception in "that [Dr. and Mr. Swallow] remain legally married." (*Id.*) In California, all property  
7 acquired by the spouses during the marriage is community property, except as otherwise provided  
8 by statute. Cal. Fam. Code § 760. With the exception two specific entities, Casino M8trix and  
9 Hollywood Park Casino, Mr. Maloney does not state that the spouses do not have an interest in the  
10 other's entities. Rather, he states that their business affairs are independent and then clarifies the  
11 meaning of this in the next sentences by stating that the Swallows file separate taxes, maintain their  
12 own bank accounts, and that the money from their individual business ventures is their own. (Ex.  
13 10 at 1.) None of the evidence submitted by the Bureau regarding Dolchee, guarantees to  
14 Comerica Bank, or payments to Secure Stone is inconsistent with Mr. Maloney's statement.<sup>16</sup>

15           With respect to an interest in Casino M8trix, Dr. Swallow did not have any interest. On  
16 May 15, 2006, Dr. Swallow signed a document acknowledging that Garden City Casino, Inc. was  
17 Eric Swallow's sole and separate property, and that Dr. Swallow "do[es] not have any ownership  
18 whatsoever in that gambling establishment, including, but not limited to, a community property  
19 interest. (Ex. BI.) Dr. Swallow further stated her understanding that she "cannot lawfully engage  
20 in any activities or conduct for which a registration, a finding of suitability, a permit, or a license is,  
21 or may be, required pursuant to the Gambling Control Act . . . without first obtaining from the  
22 California Gambling Control Commission the appropriate registration, finding of suitability,  
23 permit, or a license. (*Id.*)

24           The sole evidence cited by the Bureau indicating that Dr. Swallow had an interest in Garden  
25 City is a phrase from the Buy-Sell Agreement stating that "[i]f Eric were to die or become

26 \_\_\_\_\_  
27 <sup>16</sup> To the extent that any businesses were owned by the Swallow Trust, these businesses would  
28 not be covered by Mr. Maloney's statements because they were not owned by either  
Mr. Swallow or Dr. Swallow, respectively.

1 incapacitated, then his wife Deborah would take his place." (Ex. 38 at § 5.01.) The cited phrase  
2 appears to apply to active management of the business, not ownership. Permitting Dr. Swallow to  
3 have an active management role in Garden City following Mr. Swallow's death would be a  
4 violation by the Lunardis, not a deceased Mr. Swallow. Second, this section of the agreement  
5 appears to be the subject of drafting errors. The paragraph goes on to refer to both Mr. and  
6 Dr. Swallow "as 50% shareholders" of Garden City that "share equally in distributions from the  
7 Corporation." (*Id.*) However, this statement is inconsistent with the Agreement itself (*Id.* at  
8 § 1.01) and every other piece of evidence in this case regarding the ownership of Garden City.  
9 (*E.g.*, Exs. 2 at 6; BI.) As such, this errant contractual phrase does not impeach Mr. Maloney's  
10 statement that Dr. Swallow has no interest in Casino M8trix. And it certainly does not demonstrate  
11 that Mr. Swallow intentionally provided an untrue statement to the Bureau.

12 (e) Statements About What Dolchee Provided To Garden City

13 The Bureau alleges that "Mr. Swallow's statements were untrue regarding what Dolchee  
14 provided to Garden City." (CCB at 27:2-3.)

15 These allegations arise from the Bureau's misconceptions over what Dolchee does, how  
16 Dolchee's services are provided for under the agreement, and the meaning of statements that other  
17 witnesses provided which support Mr. Swallow's testimony. In other words, the Bureau's  
18 statement that "the gaming analytical software did not exist" is unsupported by the record. (CCB at  
19 30:4-5.)

20 Mr. Swallow testified that Dolchee's analytical software "helped [Garden City] determine  
21 what games were the most profitable games, how many of those games should be put down based  
22 on a combination of the other games that were playing on the gaming floor." (Tr. II at 110:18-22.)  
23 The software helped Garden City determine, "which games should be played tomorrow, and how  
24 many of those games should be played." (*Id.* at 110:23-25.) Mr. Swallow provided images  
25 showing how the software displayed such information. (Tr. VI at 174:9-175:1; Ex. DN at 5.)

26 Mr. Swallow's testimony is not the first time he discussed the Dolchee software. In a  
27 March 13, 2013 response to the Bureau's Request, Mr. Swallow referred to Dolchee as being "in  
28 beta development" in 2008 and stated that "[i]n 2009 and 2010 all 49 games were under the

1 Dolchee Royalty Agreement." (Ex. GX.) He went on to describe "algorithms developed by  
2 Dolchee to optimize table gaming revenue." (*Id.*)

3 Further, there is independent confirmation of the existence of the Dolchee analytical  
4 software. The Commission assigned Grant Thornton to provide an independent assessment of the  
5 valuation of Dolchee and Profitable Casino by conditioning Mr. Swallow's license to require that

6 Eric Swallow must provide to the Bureau of Gambling Control a  
7 valuation and analysis by an independent company of the  
8 commodities and/or services provided as it relates to the gaming  
9 license agreements between Garden City, Inc. (dba Casino M8trix)  
and Dolchee, LLC and software agreements with Profitable Casino,  
LLC. This analysis must be conducted by a CPA firm approved by  
the Bureau.

10 (Tr. V at 64:14-15; Ex. AF at 3.) Grant Thornton, acting independently, estimated the fair value of  
11 the Dolchee analytical software at \$29.5 million. (Ex. 20 at 16.) It provided this valuation after the  
12 Bureau had an opportunity to express its concerns regarding the scope of the Dolchee license to  
13 Grant Thornton. (Tr. V at 86:2-90:1.) How could an independent assessor assign a value of \$29.5  
14 million to a product that does not actually exist in the face of concerns raised by the Bureau  
15 regarding the services provided by Dolchee? The Bureau does not explain because the answer is  
16 that it is simply implausible to believe that Grant Thornton valued a non-existent product at \$29.5  
17 million.

18 Despite this evidence of the existence of the Dolchee analytical software, the Bureau, in  
19 arguing that the Dolchee analytical software does not exist, cites (1) the license agreement between  
20 Dolchee and Garden City (CCB at 28:10-23); (2) Josh Mendiola was not aware of the Dolchee  
21 software (*id.* at 29:2-5); (3) Deven Kumar stated that Dolchee was paid for just games (*id.* at 29:6-  
22 8); (4) Mr. Bellotti's letter to the Bureau and statements to the Commission did not explicitly  
23 mention Dolchee analytical software (*id.* at 29:9-20); and (5) that the Bureau was not shown  
24 Dolchee software on its site visit. (*Id.* at 29:21-30:2.) The Bureau's misleading citations to this  
25 purported evidence do not actually support its claims that the Dolchee software does not exist.

26 First, while the Bureau repeatedly referred to the license agreement between Dolchee and  
27 Garden City, it never actually sought testimony regarding the license granted by the Agreement.  
28

1 Instead, the Bureau sought testimony about the Recitals in the Agreement. (*E.g.*, Tr. I at 111:8-24;  
2 125:25-126:16.) The license grant from Dolchee to Garden City actually provides:

3 [Dolchee] hereby grants to [Garden City] a non-exclusive, non-  
4 transferable, perpetual, non-sub-licensable license to play the  
5 Licensed Game to a licensed gambling facility within the State of  
6 California. *Further, during the Term of this Agreement as set forth  
hereafter, [Garden City] shall have the right to use [Dolchee]'s  
trademarks, copyrights and patents* subject to the terms and controls  
reasonably set forth by [Dolchee].

7  
8 (Ex. 7 at 460-61, § 2 (emphasis added).) Mr. Swallow testified that the Dolchee analytical  
9 software was copyrighted. (Tr. II at 115:13-14.) The scope of the license grant is not limited to  
10 any trademarks, copyrights or patents covering the Licensed Games, but is, instead, a license to all  
11 of Dolchee's copyrights. (*See* Ex. 7 at 460-61, § 2.)

12 Further, in California, a contract is interpreted to reflect the mutual intent of the parties.  
13 (Cal. Civ. Code § 1636.) Mr. Swallow, a signatory to the agreement, is the only party to testify  
14 regarding the mutual intent of the contracting parties. He testified that while the license agreement  
15 "doesn't say analytical software . . . it was thought of as software was . . . part of the games we are  
16 playing." (Tr. I at 125:18-24.) Thus, to the extent the words were ambiguous, Mr. Swallow made  
17 clear that the intent of the parties was that the license agreement between Dolchee and Garden City  
18 includes the right to use Dolchee's copyrighted software.

19 Second, the Bureau cites as evidence that Josh Mendiola was not aware of the Dolchee  
20 software. (CCB at 29:2-5.) This is not inconsistent with the software's existence because  
21 Mr. Swallow testified that only he, Scott Hayden<sup>17</sup> and Mr. Lunardi had access to the software.<sup>18</sup>  
22 (Tr. V at 175:2-6.)

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25  
26 <sup>17</sup> Mr. Hayden was believed to be out of the country (Tr. VI at 175:9-14) and, accordingly, was  
unavailable to testify.

27 <sup>18</sup> The Bureau incorrectly states that this access was to "reports generated by the Dolchee gaming  
28 analytical software" (CCB at 27:12-14) rather than to the software itself. Another case of the  
Bureau failing to give words their meaning.

1 Third, the Bureau cites as evidence that Deven Kumar stated that Dolchee was paid for "just  
2 games."<sup>19</sup> (CCB at 29:6-8.) As discussed above, the Dolchee software was used to determine what  
3 games to play on the floor. Mr. Kumar's interview, to which the Bureau cites, was conducted on  
4 March 20, 2014. (Ex. BB1 at 1.) Mr. Kumar's statements were actually as follows:

5 Casey Tran: So, so the \_\_\_\_\_ with Dolchee, what is the services?

6 Deven Kumar: It's royalty for the games that they created.

7 Casey Tran: So just royalty? Just games?

8 Deven Kumar: It's just royalty. That's what, yup.

9 (EX. BB1 at 25.)

10 Other statements by Mr. Kumar, who is still licensed by the Bureau as a person of good  
11 character, honesty, and integrity (Tr. VI at 113:18-23)) show that he was including the Dolchee  
12 software's functionality within his definition of games. For instance, Mr. Kumar wrote to the  
13 Bureau that "[a]ll 49 games on the floor are covered under *software royalty fee* with Dolchee."  
14 (Ex. GY (emphasis added); Tr. VI at 209:6-8.) In other words, Mr. Kumar told the Bureau that  
15 Dolchee receives a royalty for the provision of software and that, because there are only 49 tables  
16 approved for play at Garden City, every game played was covered under the software royalty  
17 agreement. (Tr. VI at 209:13-18.) Additionally, Mr. Kumar wrote that "[i]n 2012 M8trix paid  
18 Dolchee 11.8 million and the fee was higher due to the new M8trix facility coming on line in  
19 August 2012 and *a total analysis and rework of the gaming table mix* was required for this facility.  
20 (Ex. EZ at 1 (emphasis added).) Taken together, the evidence is clear that Mr. Kumar knew  
21 Dolchee provided software, knew that Dolchee was analyzing the mix of games played at Garden  
22 City and providing input on what to play at each of the games played at the casino's 49 tables, and  
23 that Mr. Kumar communicated this information to the Bureau. Accordingly, Mr. Kumar's  
24 statements support the existence of the Dolchee software, and royalties paid pursuant to the license  
25 agreement between Garden City and Dolchee.

26  
27  
28 <sup>19</sup> Again, the Bureau misconstrues Mr. Kumar's words. Mr. Kumar actually said "[i]t's just  
royalty," which is consistent with being paid a royalty under the license agreement.

1 Fourth, the Bureau cites as evidence Mr. Bellotti's letter to the Bureau and statements to the  
2 Commission that did not explicitly mention Dolchee analytical software (CCB at 29:9-20.) Again,  
3 because the Dolchee software was used to determine what games to play at Garden City, there is  
4 nothing about Mr. Bellotti's statements that is inconsistent with Dolchee providing software to  
5 Garden City.

6 Fifth, Ms. Luna-Baxter testified that she did not see evidence that Dolchee analytical  
7 software existed. (Tr. V at 82:7-18.) Interesting though, is what was not included in Ms. Luna-  
8 Baxter's testimony. She never testified that she asked to see the Dolchee software and was told that  
9 it did not exist or that she asked one of the three people who were aware of the software,  
10 Mr. Swallow, Mr. Lunardi, or Mr. Hayden, to see the software, and they declined. In fact,  
11 Ms. Luna-Baxter testified that she had not seen anything that contradicted the existence of the  
12 gaming analytical software. (*Id.* at 82:20-23.)

13 Finally, a word is in order about Mr. Lunardi's claim that he was not aware of the Dolchee  
14 analytical software. (CCB at 27:15-20.) Mr. Lunardi claimed not to know anything about what  
15 Dolchee provided to Garden City. When first asked whether Dolchee provided anything to Garden  
16 City, Mr. Lunardi testified "[n]ot that I'm aware of, no." (Tr. III at 97:21-23.) And, Mr. Lunardi  
17 testified that he never looked for analytical software or helped develop any of Dolchee's games.  
18 (Tr. III at 100:11-18.) Of course, this latter statement was expressly contradicted by the testimony  
19 of Mr. Bellotti. (Tr. VI at 53:11-15 (testifying that "they provided games . . . to Garden City"); Tr.  
20 VI at 56:11-13 (stating it was correct "that Mr. Lunardi *and* Mr. Swallow had developed games")  
21 (emphasis added).)

22 Accordingly, the only credible evidence proves that Dolchee provided analytical software  
23 to Garden City which helped Garden City determine which games to play on all 49 of its tables.

24 (f) Grant Thornton's Valuation

25 The Bureau alleges that "Mr. Swallow provided the [Grant Thornton] Report," which,  
26 according to the Bureau, "was false and misleading." But, because the Grant Thornton report was  
27  
28

1 an independent report, none of the statements contained in the report are attributable to  
2 Mr. Swallow.<sup>20</sup>

3 The evidence is clear that the Commission required Mr. Swallow to get an independent  
4 valuation of Profitable Casino and Dolchee as a condition for licensure. (Ex. AF at 3 ("Eric  
5 Swallow must provide to the Bureau of Gambling Control a valuation and analysis by an  
6 independent . . . CPA firm approved by the Bureau.") An independent party is one that is "not  
7 related in any way, shape or form to the operation, the ownership, or, in this case, Garden City."  
8 (Tr. VI at 40:22-41:1.) Grant Thornton, a national CPA firm, was retained to issue the independent  
9 party valuation. (Tr. VI at 41:2-3; Ex. 20.) Mr. Swallow had no control over what statements  
10 Grant Thornton made in its report.<sup>21</sup> Accordingly, no discipline can be imposed against  
11 Mr. Swallow for statements in the report.

12 (g) Miscellaneous Assertions

13 Though its allegations are unclear, it appears that the Bureau alleges that (1) Mr. Swallow  
14 provided untrue information to the Bureau because his agent represented that Mr. Swallow had  
15 "taken a lot of measures to ensure to maintain [Dolchee gaming technology and Profitable Casino  
16 software] confidentiality and to license it" while Mr. Swallow did not have written nondisclosure,  
17 confidentiality, trade secret or similar agreements (CCB at 34:25-35:17) and (2) Mr. Swallow  
18 provided misleading information to the Bureau regarding what work Mr. Roberts performed.  
19 (CCB at 35:18-36:3.)

20 First, there are numerous instances in which Mr. Swallow took measures to protect the  
21 confidentiality of Dolchee and Profitable Casino's intellectual property. Dolchee's license  
22 agreements with Garden City, Oaks Card Club and San Pablo Lytton Casino each contained

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24 <sup>20</sup> Had the Bureau wanted to prove a violation pertaining to the Grant Thornton report, it should  
25 have sought to introduce evidence regarding what Mr. Swallow told Grant Thornton. The only  
26 statement even approaching this is Ms. Luna-Baxter's hearsay statement that an unnamed  
27 person at Grant Thornton told her that "management" in the report referred to Mr. Swallow.  
This out-of-court statement offered for its truth is insufficient proof. (Cal. Gov't Code  
§ 11513.)

28 <sup>21</sup> The Commission also accepted the report, removing it as a condition from Mr. Swallow's LAX  
temporary license. (Ex. AH at 2.)



1 provisions protecting Dolchee's confidential information. (Ex. 7 at 463, § 12; Ex. 7 at 471, § 12;  
2 Ex. BM at 4, § 12.) And, Profitable Casino's license agreements with Garden City and the 101  
3 Casino required the licensees to maintain the confidentiality of the Profitable Casino software.  
4 (Ex. 7 at 404, § 7.2; Ex. 39 at 5, § 7.2.)

5 Further, the Bureau makes much of the fact that the Grant Thornton valuation is in excess  
6 the money invested. This is a non-sequitor. If the value of a business was limited to the amount  
7 spent in developing it, there would be no point in investing because no return would be possible.  
8 History tells us that some software companies start very small and eventually prosper.

9 Second, the Bureau claims that Mr. Swallow provided misleading information to the  
10 Bureau regarding the work performed by Mr. Roberts. But, the evidence the Bureau cites does not  
11 support the allegation. Garden City paid Mr. Roberts to work on the Profitable Casino software  
12 that was installed and active at Garden City. Profitable Casino paid Mr. Roberts to maintain and  
13 upgrade its software. There is no testimony that the Profitable Casino software installed in Garden  
14 City was the only version of the Profitable Casino software. In fact, Mr. Park testified that the  
15 software in his casino was a beta version (Tr. III at 17:9-15), indicating the existence of multiple  
16 versions of the Profitable Casino software, and Mr. Swallow testified that the software gave a real-  
17 time analysis of dealers. (Tr. VI at 172:15-20.) Such real-time analysis would necessarily be  
18 customized for each licensee, as is common practice in the software industry.

19 **G. RESPONDENT'S PURPORTED OMISSIONS DO NOT SUBJECT HIM TO**  
20 **DISCIPLINE**

21 1. Respondent's Purported Omissions Are Not Punishable By Law

22 In addition to the fact that there is no evidence that the purported omissions were material  
23 (*see supra* § IV.E.), there are other reasons that Mr. Swallow's omissions are not punishable by  
24 law.

25 First, the Bureau did not give Mr. Swallow adequate time to respond to its request. The  
26 Bureau sent its request on July 16, 2013 and demanded a response from Mr. Swallow by August 7,  
27 2013, with no possible extensions. (Ex. 7 at 25.) Such a timeline is not reasonable. The discovery  
28 statutes, which also impose penalties for failure to fully respond, provides guidance for what time  
to respond is reasonable. And those statutes provide for at least 30 days to answer interrogatories,

1 with numerous ways to extend the time to respond. (Cal. Civ. Proc. Code § 2030.260.) A request  
2 to respond in three weeks with no extension possible was not reasonable.

3 Second, section 12568(c)(4) of the Commission's regulations adopts section 19859, which,  
4 as discussed in section IV.E., *supra*, does not permit the punishment of these omissions. Had the  
5 Commission wanted to adopt a regulation punishing failure to respond to the inquiries of the  
6 Bureau or Commission, it certainly knew how to do so as it explicitly imposed this as a ground for  
7 revocation in other Sections of the Regulations. (Cal. Code Regs. tit. 4, div. 18 § 12220.18(f)  
8 ("The Commission may revoke a registration or license . . . [if] [t]he registrant or licensee  
9 concealed or refused to disclose any material fact in any inquiry by the Bureau or the  
10 Commission.")) The failure of the Commission to adopt such a regulation here indicates its  
11 decision not to make such omissions as a ground for revocation.

12 2. Respondent's Purported Omissions, In Context, Are Understandable

13 Mr. Swallow applied for his license at Hollywood Park Casino in July of 2012. (Ex. 5 at 4.)  
14 During the Bureau's investigation on Mr. Swallow pertaining to LAX, the Bureau had more than 10  
15 individuals working on the investigation. (Tr. V at 130:23-131:7.) After conducting this  
16 investigation for more than a year, the Bureau sent a request to Mr. Swallow seeking answers to  
17 various questions number 1 through 100. (Tr. V at 152:18-22; Ex. 7 at 16-25.) Many of these 100  
18 numbered questions contained numerous subparts. (*E.g.*, Ex. 7 at 23, Req. Nos. 78-80.)

19 When sending this request on July 16, 2013, the Bureau imposed an August 7, 2013  
20 deadline and informed Mr. Swallow that no extension of time to respond would be given. (Tr. V at  
21 152:7-16.) According to the Bureau, it did not submit any of the questions at an earlier time  
22 "because [the Bureau's more than 10 investigators] were gathering the questions that we wanted to  
23 ask him." (Tr. V at 154:18-19.) The Bureau imposed this hard deadline despite its failure to  
24 request any of these documents in the year that Mr. Swallow's application had been pending  
25 (152:18-153:4) and, in fact, held off on providing the questions despite a request by Mr. Swallow's  
26 agent for the "list so we can get started on collecting" the requested documents. (Ex. FA.)

27 In response to the questions that the Bureau spent more than a year collecting,  
28 Mr. Swallow, in three short weeks, submitted the documents now marked as Exhibits 7 and AA.

1 This response is in excess of 500 pages and responds to the Bureau's request. Despite the Bureau's  
2 usual procedure that "when [the Bureau] asks for a large amount of information and gets some of it  
3 but not all, the Bureau in some manner sends a communication to the supplier of the information  
4 along the lines of, thank you for what you sent us, but we need answers to [certain] questions," (Tr.  
5 IV at 129:20-130:2) the Bureau never asked Mr. Swallow to provide any further documentation or  
6 otherwise asked him to supplement his response to its request.

7 Finally, it is worth noting that the Bureau's request was sent regarding Mr. Swallow's  
8 licensure at Hollywood Park Casino, but that its only allegations were that Mr. Swallow failed to  
9 provide information pertaining to Garden City. The inference is clear. Mr. Swallow, with limited  
10 time, logically prioritized the questions pertaining to Hollywood Park Casino over those pertaining  
11 to Garden City. And the Bureau, rather than following its typical process and asking for any  
12 omitted documents, engaged in a game of "Gotcha!"

13 Though these purported omissions are not punishable under the law, Mr. Swallow will  
14 address each of them in turn.

15 (a) Mr. Roberts Provided Information Sufficient To Give The Bureau An  
16 Understanding Of Mr. Swallow's Loans

17 The Bureau complains that Mr. Swallow failed to provide certain documents pertaining to  
18 the collateralization of 1887 Matrix Boulevard (CCB at 37:4-38:6.) Indeed, the specific documents  
19 the Bureau cites were not included in Mr. Swallow's response. But, Mr. Swallow did include a  
20 spreadsheet indicating that Comerica had provided loans concerning the building at 1887 Matrix  
21 Boulevard. (Ex. 7 at 255.) And, Mr. Swallow provided relevant loan documentation. (Ex. 7 at  
22 256-340.) This documentation makes reference in numerous places to the specific documents that  
23 the Bureau claims were omitted. (E.g., Ex. 7 at 260, § 2.2; 661, §§ 4.1.3, 4.1.4; 304, § 2.2; 305,  
24 §§ 4.1.3, 4.1.4.) Thus, the Bureau was aware of such agreements and could have followed its  
25 normal procedure and requested the documents had it believed the documents to be material to any  
26 licensing questions. In relation to the Bureau's licensing decision regarding LAX Properties and  
27 LAX casino, such omissions are not material. And, these omissions were not in connection with  
28 the license at issue in the Accusation.

1 (b) The Bureau's Request Did Not Cover Mr. Swallow's Contract With  
2 Bryan Roberts

3 The Bureau's cherry-picked pleading states that "The Bureau requested that Mr. Swallow  
4 'provide complete contracts of all agreements . . . between (a) Bryan Roberts . . . and (b) . . .  
5 Mr. Swallow . . .'" (Ex. 1 at 19, ¶ 46(m).) The actual question submitted by the Bureau states:

6 Please provide complete copies of all agreements, including all  
7 amendments, modifications, and addenda, that existed or were in  
8 effect at any time *between January 1, 2009, and the present* and were  
9 between (a) Bryan Robertson or any entity with which he was or is  
affiliated, on the one hand, and (b) Profitable Casino LLC,  
Mr. Swallow, or any of their affiliates, on the other.

10 (Ex. 7 at 21 (emphasis added).) The agreement referenced by the Bureau became effective in June  
11 of 2007 (Ex. 49 at 8, Preamble) and was for 320 hours of work (Ex. 49 at 9, § 3.2.1.) The  
12 Agreement expires after one year and automatically renews only as it relates to Software  
13 Maintenance Services. (Ex. 49 at 12, § 12.1.) Of course, this implies that if the provision of  
14 Software Maintenance Services is complete, the agreement is no longer in effect. The Agreement  
15 can also be terminated or modified for numerous reasons. (*Id.* at 12-13, §§ 12.2, 12.4.) Quite  
16 simply, the Bureau has offered no evidence to show that the Agreement was in effect after January  
17 1, 2009. Accordingly, Mr. Swallow's response did not contain any omission to this Request.

18 (c) Failure to Provide Information Pertaining to Requests Nos. 69 and 70

19 The Bureau also argues that Mr. Swallow failed to provide all requested information  
20 regarding each person, entity, or company who provided Garden City, Inc. with a licensed game,  
21 and similar information with respect to Dolchee. (CCB at 38:15-39:3.) It is true that Mr. Swallow  
22 did not provide this information. But, there is no evidence that an unlicensed game was ever  
23 played at Garden City, despite the City of San Jose's frequent monitoring of Garden City. (Tr. III  
24 at 33:13-36:4.) So, these omissions were not material and not punishable by law.

25 (d) Omissions Based On The Failure To Provide An Accountant's  
26 Opinion Or The Grant Thornton Report

27 The Bureau recasts its prior misleading information requests as Omissions. For the reasons  
28 discussed in section IV.F.2.f., *supra*, the Bureau's allegations concerning this material are incorrect.

1 Simply stated, Mr. Swallow did not draft the report and no omissions in the report are attributable  
2 to Mr. Swallow.

3 **H. MR. SWALLOW IS NEITHER UNQUALIFIED NOR DISQUALIFIED FOR**  
4 **LICENSURE**

5 The Bureau also argues, as separate causes of action, that Mr. Swallow is both unqualified  
6 and disqualified for licensure. (CCB at 39:22-41:28.) The Bureau largely recycles its unsupported  
7 accusations that Dolchee was not owned by Mr. Swallow (CCB at 40:6-15), Mr. Swallow had an  
8 interest in Secure Stone (CCB at 40:15-22; 41:14-19), and Mr. Swallow made misleading  
9 statements (CCB at 40:23-41:7.) Each of these allegations has already been proven incorrect. (*See*  
10 *supra* §§ IV.C; IV.D; IV.F.)

11 The Bureau does offer one seemingly additional allegation, that "Mr. Swallow's business  
12 practices demonstrate a disregard for prudent business controls and oversight" because they were  
13 "conducted without invoices" and "based on estimates without regard to the monthly amounts set  
14 forth in agreements." (CCB at 41:8-12.) Unsurprisingly, the Bureau makes these allegations  
15 without citation to evidence because the Bureau has offered no evidence in support of this  
16 allegation. There was no testimony regarding what constitutes "prudent business controls and  
17 oversight" and there was no testimony that payments without invoices would violate this purported  
18 standard. The only testimony cited by the Bureau is that of Mr. Swallow. Contrary to the Bureau's  
19 characterization that "Garden City's payments to the Related Entities were based on estimates  
20 without regard to the monthly amounts set forth in agreements" (CCB at 41:11-12), Mr. Swallow  
21 actually testified "We could pay more *for the contract*." (Tr. I at 14 (emphasis added).) And, in  
22 fact, the contracts permitted Garden City to vary the amounts paid to the Related Entities. ((Ex. 7  
23 at 415; 461, § 3.1.1; 535 § 2(A).)

24 Because the Bureau has offered no evidence that Mr. Swallow is unqualified or  
25 disqualified, he continues to be qualified for licensure.

1 **MR. SWALLOW SHOULD NOT BE DISCIPLINED**

2 **A. THE RENEWAL OF MR. SWALLOW'S LICENSE IS WITH PREJUDICE**  
3 **TO THE ACCUSATION**

4 The effect of Mr. Swallow's license renewal by operation of law (*see supra* § III.A.) on a  
5 then-pending Accusation is an issue of first impression. Based on a review of past Commission  
6 actions and the relevant laws, Respondent believes such a renewal is with prejudice to the  
7 Accusation.

8 When the Commission wants to ensure that the renewal of a license is without prejudice to  
9 a pending Accusation, it affirmatively states this as a license condition. (Cal. Code Regs., tit. 4,  
10 div. 18 § 12035 ("The issuance of an interim renewal license does not limit or impair, and is  
11 without prejudice to, any exercise of the discretion vested in the Commission with respect to the  
12 license at issue in the hearing process."); (Ex. AQ at 4 ("[T]he Commission approved the request to  
13 withdraw the State Gambling License Application, **without prejudice.**".))

14 The Accusation, along with the Bureau's recommendation to deny Mr. Swallow's renewal  
15 license application, was filed on May 6, 2014. (Ex. CZ.) Despite its awareness of the Accusation  
16 and denial recommendation (Ex. BA1), the Commission did not deny, revoke, suspend, limit, or  
17 place a condition on Mr. Swallow's license stating that renewal was without prejudice to the  
18 discretion vested in the Commission with respect to the license at issue in the hearing process. (Tr.  
19 V at 114:10-16;114:23-115:4; Exs. AL; AO; BA1.) Accordingly, pursuant to section 19876,  
20 Mr. Swallow's license renewal, by operation of law, was with prejudice to the Accusation, and the  
21 Court does not have jurisdiction over the Accusation.

22 **B. VIOLATIONS OF PENAL CODE SECTION 337(J)(A)(2) WERE NEITHER**  
23 **ALLEGED IN THE THIRD ACCUSATION NOR PROVEN**

24 In Appendix A to the CCB, the Bureau discloses its desire to seek an illegal and  
25 unreasonable multimillion dollar fine against Mr. Swallow for alleged violations of §337(j)(a)(2) of  
26 the Penal Code. These violations were not alleged in the Third Accusation. It would be contrary to  
27 due process for the Court even to consider them.

28 Nevertheless, any such consideration should lead to the summary rejection of what the  
Bureau is trying to do. Penal Code section 377(j)(a)(2) makes it unlawful for an unlicensed person

1 "to receive, directly or indirectly, any compensation or reward or any percentage or share of the  
2 revenue, for keeping, running or carrying on any controlled game." But Mr. Swallow was a  
3 licensed person and could not conceivably violate section 337(j)(a)(2). Is the Bureau trying to say  
4 that Dolchee violated section 337(j)(a)(2)? Where does that appear in the Third Accusation? And  
5 in any event, there is no evidence that Dolchee received any money -- much less "compensation or  
6 reward or any percentage or share" for "keeping, running or carrying on any controlled game." The  
7 undisputed evidence was that Dolchee licensed a game or games. There is a dispute as to whether  
8 it also licensed software. But these licensing activities do not remotely constitute "keeping,  
9 running or carrying on" a controlled game.

10 In its zeal to attack Mr. Swallow, the Bureau has once again advanced a theory which  
11 disregards due process, is legally unsupported, and has no basis in the record.

12 C. **FACTORS IN MITIGATION FAR OUTWEIGH FACTORS IN**  
13 **AGGRAVATION, IF ANY, UNDER § 12556 OF THE ADMINISTRATIVE**  
14 **REGULATIONS**

15 The Commission has enacted detailed disciplinary guidelines "designed to promote fairness  
16 and flexibility in dealing with a wide range of disciplinary scenarios." (Cal. Code Regs. tit. 4, div.  
17 18 § 12550(b).) "Discipline shall be in accordance with the guidelines of this chapter ..." (Cal.  
18 Code Regs. tit. 4, div. 18 § 12554(a).) Among the guidelines is section 12556, Factors In  
19 Mitigation Or Aggravation of Penalty, which details sixteen items to consider.

20 Mr. Swallow respectfully submits that the Bureau failed to prove any of the counts charged  
21 against him. If the Court agrees, then a discussion of mitigation or aggravation of penalty is moot.  
22 However, it would be presumptuous for any Respondent to predict the ultimate decision on any  
23 issue under submission.

24 For that reason, Mr. Swallow submits the following analysis of factors in section 12556 as  
25 they may apply to the evidence in this case.

26 There are two potential factors in aggravation. Section 12556(b) is "whether or not the  
27 conduct was knowing, willful, reckless or inadvertent." As discussed above, the false statement  
28 counts and the material omission counts both require intentional conduct. A finding against  
29 Mr. Swallow would necessarily imply at least "knowing" conduct. There does not appear to be any

1 authority on whether, in an administrative proceeding, conduct which is an element of an offense  
2 may also be used to aggravate the penalty.

3 Likewise, sections 12556(c) and (d) refer to the extent to which Respondent cooperated  
4 with, and/or was honest with the Bureau "during the investigation of the violation." Most of the  
5 false statement and material omission counts charge Mr. Swallow with dishonest conduct toward  
6 the Bureau. However, the Bureau has suggested that it sought information from Mr. Swallow as  
7 part of its licensing investigation, not "investigation of [any] violation." Nevertheless, it seems fair  
8 to recognize subsections (c) and (d) as potential factors in aggravation.

9 Arrayed against these three items are a number of unequivocally mitigating facts.

10 Subsection (a) is "violation of any previously imposed or agreed upon condition, restriction  
11 or directive." Never. Mr. Swallow has had conditions previously imposed upon his license (Tr. V  
12 at 114:23-115:2; Tr. VI at 84:18-86:21; Ex. AL at 4.) There is no evidence that Mr. Swallow has  
13 ever violated or otherwise disobeyed any condition upon his license. This factor favors  
14 Mr. Swallow.

15 Subsection (e) is the extent to which the Respondent is willing to reimburse or otherwise  
16 make whole any person who has suffered a loss due to the violation. There is no evidence that any  
17 person suffered a loss due to any alleged violation. That is undoubtedly why Mr. Torngren said to  
18 the Commission on May 29, 2014:

19 When the [Bureau] looked at this at the front end, and this is a  
20 litigation decision that's made obviously within our office, that we  
21 did not view there being a threat to customers or the gambling public.  
We did not view their being a threat to the patrons of the -- of Garden  
City, nor to the employees of Garden City.

22 (Ex. BA 1 at 10.) Since the fundamental purpose of regulation is protection of the public, the fact  
23 that there is no evidence of any person ever needing to be "made whole" by the conduct of  
24 Mr. Swallow is a clear factor in mitigation.

25 Subsection (f) is whether Respondent has initiated remedial measures to prevent similar  
26 violations. In this record there is undisputed evidence that Mr. Swallow has initiated remedial  
27 measure in the form of a binding contract (subject to Commission approval) to sell his stock in  
28 Garden City and thereby exit the gambling business. The CCB says again and again that



1 Mr. Swallow was not honest with gambling regulators. He denies this, but section 12556(f) deals  
2 with remedial measures. If he sells his stock, which he has committed to do (subject to  
3 Commission approval) then he will have no further communications with gambling regulators on  
4 any subject ever again. The likelihood of "similar violations" is zero. A mystery of this case is  
5 why the Bureau would rather expend public resources in fighting with Mr. Swallow while ignoring  
6 his efforts to do what the Bureau says its wants -- exit the gaming business. The remedial  
7 measures undertaken by Mr. Swallow to eliminate any possibility of future disharmony with the  
8 Bureau or the Commission are unequivocal factors in mitigation of any penalty.

9        Subsection (g) is the extent to which Respondent realized an economic gain from the  
10 violation. There was no evidence of an economic gain from any alleged violation. The record  
11 does not dispute that Mr. Swallow paid his taxes, and that patrons and employees of Garden City  
12 were treated fairly. Just as there is no evidence that any of the alleged false statements or  
13 omissions were material, there is no evidence that if he had given a different answer to any  
14 question presented by the Bureau his licensure would have proceeded any differently. This is  
15 another strong factor in mitigation.

16        Subsection (h) is disciplinary history, including repeated offenses of the same or similar  
17 nature, or evidence that the unlawful act was part of a pattern or practice, including the frequency  
18 or duration of any pattern or practice which violated applicable law. Mr. Swallow has no  
19 disciplinary history. He has been repeatedly licensed and relicensed both by the City of San Jose  
20 and the State of California.

21        Subsection (j) is the extent to which there was actual or potential harm to the public or to  
22 any patron. None, as discussed above under Subsection (e).

23        In any fair weighing of factors under section 12566, the evidence supports substantial  
24 mitigation of any penalty which may be imposed, in the event that a disciplinary violation is found.

25        **D. MR. SWALLOW IS NOT SUBJECT TO FINES FOR CONTINUING**  
26        **VIOLATIONS AND ANY PENALTY SHOULD BE REASONABLE**

27        The Bureau argues that (1) "each day that the required disclosure was not made – or an  
28 untrue disclosure was not cured – constitutes a separate violation." (CCB at 43:11-12.) and (2)

1 Mr. Swallow committed 56 separate violations subjecting him to up to \$1.12 million in fines (CCB  
2 at 43:4-5.) The Bureau's first claim is without basis in the law and its second claim is without  
3 support in the record.

4 (a) This Court, And The Commission Is Without Authority To Impose  
5 Additional Fines For A "Continuing Violation."

6 Incredibly, the Bureau asserts that Mr. Swallow should be found guilty of a separate  
7 violation "each day that the required disclosure was not made – or an untrue disclosure was not  
8 cured – constitutes a separate violation." (CCB at 43:11-12.) First, such a continuing violation is  
9 unsupported by law.

10 Section 19930 states, in relevant part, that:

11 In addition to any action that the commission may take against a  
12 license, permit, finding of suitability, or approval, the commission  
13 may also require the payment of fines or penalties. However, no fine  
14 imposed shall exceed twenty thousand dollars (\$20,000) for each  
separate violation of any provision of this chapter or any regulation  
adopted thereunder.

15 (Cal. Bus. & Prof. Code § 19930(c).) The Regulations are in accord. (Cal. Code Regs. tit. 4, div.  
16 18 § 12554(d)(5).) The Bureau cites *Kramer v. Superior Court*, 239 Cal. App. 2d 500, 502 (1966)  
17 for the proposition that "[t]he duty continued; dishonest or misleading disclosure did not put an end  
18 to the duty." (CCB at 43:7-8.) *Kramer* actually held that "violation of the weight limitations [for  
19 vehicles of highway users] are not licenses for continuing violation of the law." (*Kramer*, 239 Cal.  
20 App. 2d at 502.) Obviously, this has nothing to do with a misrepresentation. Moreover, the case  
21 refers to this as a "continuing violation of the law." (*Id.*) It is difficult to conceive of an  
22 interpretation of separate violation in which a continuing violation<sup>22</sup> of the law for a single  
23 misrepresentation is a separate violation from the original misrepresentation itself.

24  
25 <sup>22</sup> Additionally, even if such continuing fines were supported by law, the dates proposed by the  
26 Bureau are without evidentiary support. The Bureau has offered no evidence regarding the  
27 dates it learned of the purported violations. And many of the dates proposed by the Bureau  
28 contradict evidence in the record. For instance, the Bureau instructed Mr. Swallow not to  
respond to its July 16 request after August 7, 2013 (Ex. 7 at 25 ("no later than August 7,  
2013").) To state that Mr. Swallow should ignore this mandate is nonsensical with respect to  
each violation that purportedly happened on August 7, 2013. (CCB at App. A.) Additionally,

(cont'd)

1 In cases that actually discuss a misrepresentation as a "separate violation," the question of  
2 law is actually whether multiple misrepresentations to the same person can be punished as only one  
3 violation or whether each misrepresentation is a separate violation. There is no case in which a  
4 single misrepresentation is punished as a continuing violation. In *People v. Superior Court*, the  
5 Supreme Court addressed "[t]he Attorney General[']s conten[tion] that each misrepresentation  
6 [referred to in sections 17500 and 17536 of the Business and Professions Code]<sup>23</sup> constitutes a  
7 *separate violation* subject to a \$2,500 civil penalty." (9 Cal. 3d 283, 288 (1973) (emphasis  
8 added).) The Supreme Court held that because the treatment of each misrepresentation as a  
9 separate violation would result in a penalty far in excess of what the Legislature intended, that  
10 multiple misrepresentation in the same communication should not be punished as separate  
11 violations. (*People v. Superior Court*, 9 Cal. 3d 283, 289 (1973).) In other words, each  
12 misrepresentation is punishable as a separate violation once at most; and where multiple  
13 misrepresentations are made in the same communication, such misrepresentations should not be  
14 punished separately. (*See also People v. Witzerman*, 29 Cal. App. 3d 169, 180 (1972) ("Each  
15 separate untrue or misleading statement, each time it is made to a member of the public, is a  
16 separate violation of sections 17500 and 17536 . . .").)

17 Other analogous areas of law are in accord. For instance, "[t]he crime of attempted  
18 dissuasion . . . is completed once the defendant takes an immediate step toward having another  
19 person knowingly and maliciously attempt to persuade a witness from assisting in a prosecution. A  
20 *separate violation* of section 136.1, subdivision (b)(2) was completed each time Defendant placed  
21 a call to his sister urging her to persuade Cambell not to go to court." (*People v. Kirvin*, 231 Cal.

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23 

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*(cont'd from previous page)*

24 the Commission accepted the Grant Thornton report and no longer required Mr. Swallow to  
submit it on October 30, 2014. (Ex. AH.)

25 <sup>23</sup> Section 17500 states, in relevant part, that "[i]t is unlawful for any person . . . to make . . . any  
26 statement . . . which is untrue or misleading. Any violation of the provisions of this section is a  
27 misdemeanor punishable . . . by a fine not exceeding two thousand five hundred dollars  
28 (\$2,500)." (Cal. Bus. & Prof. Code § 17500.) And section 17536 stated that "[a]ny person who  
violates any provision of this chapter shall be liable for a civil penalty not to exceed two  
thousand five hundred dollars (\$2,500) for each violation . . ." (Cal. Bus. & Prof. Code  
§ 17536.)

1 App. 4th 1507, 1519 (2014) (emphasis added).) Again, there was no continuing violation, but each  
2 statement was a separate violation.

3 Finally, California statutes authorizing daily fines use explicit language which is  
4 conspicuously absent from Business and Professions Code section 19930. (*See, e.g.*, Cal. Health &  
5 Safety Code § 42400(e) ("Each day during any portion of which a violation of subdivision (a) or  
6 (c) occurs is a separate offense."))

7 (b) The Bureau Has Not Proven Any Of The Alleged 56 Violations.

8 First, 37 of the supposed separate violations are in connection with payments from Garden  
9 City to Dolchee for violating Penal Code § 337j(a)(2) and "[s]haring Garden City's revenues with  
10 an unlicensed person." (CCB at App. A.) As a preliminary matter, the Bureau's pleading does not  
11 seek any discipline under section 337j of the Penal Code or seek to discipline Mr. Swallow for  
12 sharing Garden City's revenues with an unlicensed person. (Ex. 2.) The causes of action brought  
13 by the Bureau are for violation of sections 19823, 19857, and 19859 of the Gambling Control Act.  
14 (Ex. 2.) Attempting to add additional violations now, after the presentation of evidence, is a due  
15 process violation. (Cal. Gov't Code § 11425.10.) Further, as discussed in section IV.D., *supra*, the  
16 payments to Profitable Casino and Dolchee were not distributions, so these entities did not need to  
17 be licensed.

18 Second, eight of the supposed separate violations are in connection with payments to  
19 Secure Stone. Again, the Bureau's pleading did not include a cause of action under section  
20 19984(a). (Ex. 2.) And any such discipline would violate Mr. Swallow's due process rights. (Cal.  
21 Gov't Code § 11425.10. Further, as discussed in section IV.C, *supra*, Mr. Swallow did not violate  
22 section 19984.

23 Third, the Bureau cites as four separate violations Mr. Swallow's purported omission to the  
24 Bureau's July 16, 2015 request. (CCB at App. A.) The Bureau submitted one request containing  
25 multiple questions and Mr. Swallow submitted one response containing multiple answers. Any  
26 omissions should be treated as one violation, not four. Further, as discussed in sections IV.E and  
27 IV.G., *supra*, these purported omissions are not punishable by law nor supported by evidence.  
28

1 Fourth, the Bureau alleges seven separate violations concerning Mr. Swallow's purportedly  
2 untruthful, misleading or false statements. (CCB at App. A.) Each of these purported violations is  
3 indeed separate from one another. But, as discussed in section IV.F., *supra*, the evidence  
4 demonstrates that Mr. Swallow did not commit these acts.

5 To the extent the Court finds any violation, Appendix A alleges, at most, 10 separate  
6 violations (1 for payments to Dolchee; 1 for payments to Secure Stone; 1 for the purported  
7 omissions; and 7 for the purported misleading statements). Because of the mitigation evidence  
8 described above, and the fact that Mr. Swallow paid half of the payment for the Settlement that  
9 Mr. Lunardi entered into on Garden City's behalf, the Court should impose a reasonable fine and a  
10 stayed suspension if it finds any violation.

## 11 VI. CONCLUSION

12 For the reasons stated above, Mr. Swallow respectfully requests that the charges against  
13 him be dismissed, both because the Commission and this Court lack jurisdiction, and because the  
14 Bureau has not met its burden of proof.

15 If the Court nevertheless believes that one or more charges have been sustained, then the  
16 question is what penalty protects the public, which is the paramount goal of the Gambling Control  
17 Act.

18 The CCB does not address this question. Instead it is full of exhortations that  
19 Mr. Swallow's license "must" be revoked and non-renewed because of alleged "mandatory" laws  
20 and regulations. There are no such mandatory outcomes in either the Gaming Control Act or the  
21 Regulations of the Commission. It bears emphasis that under section 12568, discipline far less  
22 than revocation is authorized for such offenses as extortion, loan-sharking, drug-dealing, money  
23 laundering and tax evasion (*see* Cal. Code Regs. tit. 4, div. 18 § 12568(b)(5)-(11).) The Bureau  
24 does not distinguish itself by saying -- wrongly -- that extortionists, loan sharks and drug dealers  
25 are allowed leniency, but the offenses of Eric Swallow are too severe for anything but license  
26 revocation.

27 The public has never needed protection from Eric Swallow. He does not stand accused of  
28 injuring or jeopardizing the public in any way. He has no active part in Garden City, because

1 Mr. and Mrs. Lunardi hold two of the three seats on the Board of Directors. He has sold his  
2 Garden City stock (subject to Commission approval) and wants nothing more than to exit the  
3 gambling business. In light of these facts, and the penalty assessed against Mr. Lunardi, who after  
4 all was president of Garden City at all relevant times, a stayed suspension and a reasonable fine  
5 would be more than sufficient to protect the public and fulfill the purposes of the Gambling Control  
6 Act as well as the regulations of the Commission.

7  
8 Respectfully submitted,

9 DATED: October 2, 2015

10 SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

11  
12 By: Allen Ruby / WJL  
13 Allen Ruby  
14 Attorney for Respondent, Eric Swallow

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1 **PROOF OF SERVICE**  
2 *BGC-HQ2014-00001AL*

3 I, the undersigned, declare that I am over the age of 18 years and not a party to the above-  
4 entitled case. My business address is 525 University Avenue, Suite 1400, Palo Alto, California.

5 On October 2, 2015, I served the attached documents:

6 **RESPONDENT ERIC SWALLOW'S CLOSING BRIEF**

7 on the interested parties in this action by placing a true copy thereon enclosed/attached in/to a  
8 sealed envelope/facsimile cover sheet addressed as follows:

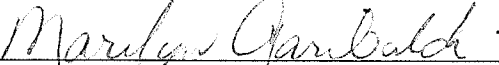
9 William P. Torngren, Esq. Via U.S. Mail & Email  
10 Deputy Attorney General  
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11 P. O. Box 944255  
Sacramento, CA 94244-2550  
12 Telephone: (916) 323-3033  
13 Email: William.Torngren@doj.ca.gov

14  BY PERSONAL SERVICE: By placing a copy of the documents in a sealed envelope or  
15 package and causing the documents to be personally delivered by hand to the offices of the  
addressee(s) listed in the attached Service List.

16  (BY EMAIL) I am readily familiar with the firm's practice of email transmission; on this  
17 date, I caused the above-referenced document(s) to be transmitted by email as noted above and that  
the transmission was reported as complete and without error.

18  BY FIRST CLASS MAIL: By placing a copy of the documents in a sealed envelope or  
19 package and causing the documents to be deposited in the United States mail at Palo Alto,  
20 California, with first class postage fully prepaid and affixed to the offices of the addressee(s) listed  
in the attached Service List.

21 I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct. Executed this 2nd day of October, 2015 at Palo Alto, CA.

23   
24 Marilyn Garibaldi  
25  
26  
27  
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