
From: Boyers, David@Waterboards
Sent: Tuesday, January 14, 2014 4:41 PM
To: Mayer, Alex@Waterboards; Landau, Ken@Waterboards
Cc: Young, Vanessa@Waterboards; 'Tom Terpstra' (tterpstra@thtlaw.com); Creedon, Pamela@Waterboards; Altevogt, Andrew@Waterboards; Herbst, Charlene@Waterboards; Busby, Robert@Waterboards; Walsh, Sean@Waterboards
Subject: Prosecution Team Rebuttal; ACL Complaint No. R5-2013-0592

Mr. Landau and Mr. Mayer:

The Prosecution Team submits the attached rebuttal, in compliance with the Hearing Procedures for ACLC R5-2013-0592, containing legal arguments and supporting evidence to the contentions made by the Discharger in its 6 January 2014 evidence submission. A hard color copy is being sent as well.

In addition, the Prosecution Team makes the following objections to the Discharger's evidence:

1. Objection to the Declaration of Mr. Fuhrman.

- a. Inability to cross-examine: Mr. Fuhrman is not listed as a witness to testify at the hearing on the Discharger's witness list. All adjudicative proceedings before the State and Regional Water Boards are governed by Chapter 4.5 of the Administrative Procedure Act (APA) (commencing with section 11410.10 of the Government Code) as well as sections 801 through 805 of the Evidence Code and section 11513 of Chapter 5 of the APA. (Cal. Code Regs., tit. 23, § 648, subd. (b).) Section 11513 of the APA provides that each party shall have the right "to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination." Although State Water Board regulations confer power on the hearing officer to waive hearing requirements, (Cal. Code Regs, tit. 23, § 648, subd. (d)) the hearing officer cannot waive such requirements if mandated by state or federal law. Because state law requires that parties have the right to cross-examine witnesses, the hearing officer cannot waive this requirement. Additionally, 23 CCR section 648.4(d) states that, "[a]ny witness providing written testimony *shall* appear at the hearing." [emphasis added.] The Hearing Procedures which govern this proceeding similarly provide that "[a]ll witnesses who have submitted written testimony *shall* appear at the hearing to affirm that the testimony is true and correct, and *shall* be available for cross-examination. [emphasis added.] Allowing the declaration of Mr. Fuhrman into the record without giving the Prosecution Team the right of cross-examination would create a severe disadvantage for the Prosecution since Mr. Fuhrman's opinions are directly contrary to

the assertions in the Complaint regarding Mr. Tosta's ability to pay.

- b. Relevance: California Evidence Code section 210 defines "relevant evidence" as evidence, including evidence, "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The declaration of Mr. Fuhrman is not relevant to this proceeding. The declaration is titled, "In the Matter of: Administrative Civil Liability Complaint No. R5-2012-0561" and was prepared specifically in response to ACLC R5-2012-0561. His declaration does not address the violations or contentions made in in ACLC R5-2013-0592 which are the subject of this proceeding. Mr. Fuhrman's declaration is dated July 18, 2013, four months *prior* to the issuance of ACLC R5-2013-0592. Mr. Fuhrman's declaration also includes contentions entirely unrelated to the calculation of economic benefit for this ACL.
- c. Hearsay: The Prosecution Team objects to Mr. Fuhrman's declaration on the basis that it is hearsay evidence, offered to prove the truth of the matter asserted.

For the reasons discussed in a. and b. above, the Prosecution Team requests to exclude the declaration of Mr. Fuhrman. If the Prosecution Team's objection is overruled, the Prosecution Team objects that the declaration is hearsay and cannot be used alone to support a finding.

Finally, because the issues in this proceeding include complex issues related to Mr. Tosta's claims regarding inability to pay, as well as the potential testimony of numerous direct and rebuttal witnesses for the Prosecution, the Prosecution Team respectfully requests that it be afforded 45 minutes to present evidence, cross-examine witnesses and to present a closing statement.

Regards,

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