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10
11 **BEFORE THE STATE OF CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**

13 **IN THE MATTER OF**
14 **ADMINISTRATIVE CIVIL**
15 **LIABILITY COMPLAINT ISSUED**
16 **AGAINST G. SCOTT FAHEY AND**
17 **SUGAR PINE SPRING WATER, LP**

18 **FAHEY'S REPLY TO PROSECUTION**
19 **TEAM'S SUPPLEMENTAL EVIDENCE**
20 **BRIEF**

1 S. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey), submits the
2 following Reply to Prosecution Team’s Supplemental Evidence Brief (“PT Supp.”).

3 **I. THE EVIDENCE OBJECTED TO IN THE PROSECUTION TEAM’S**
4 **PRE-HEARING MOTION TO STRIKE/IN LIMINE IS RELEVANT AS TO**
5 **WHETHER AN UNLAWFUL DIVERSION OCCURRED PER KEY ISSUE 1**

6 Contrary to Prosecution Team’s arguments (PT Supp. 3:6-6:11), the Fourth Agreement
7 between the City and County of San Francisco (“CCSF”) and Modesto Irrigation District and
8 Turlock Irrigation District (collectively, “Districts”), effectively rendered a significant part of
9 Decision D995, adopted May 4, 1961 (“D995”) obsolete. Since the inception of the Raker Act,
10 the Districts and CCSF have executed four (4) implementing agreements to more efficiently
11 manage the Tuolumne River for the benefit of the Districts and CCSF. As of May 4, 1961, the
12 Third Agreement was in effect, so water diverted by CCSF to its Moccasin Creek power plant
13 was required to be returned to the Districts via Moccasin Creek then to the Tuolumne River.

14 Findings 3 through 6 of D995 (WR-18) state:

15 The water in Moccasin Creek during the applicant’s proposed diversion season is
16 imported by the City and County of San Francisco through the Hetch Hetchy
17 Aqueduct from Tuolumne River and runs through the Moccasin Creek power
18 plant. It is released into the creek channel for the benefit of [Modesto Irrigation
19 and Turlock Irrigation (MID/TID)] districts as required by the Raker Act.
20 [MID/TID] hold License 2425 (A006711) authorizing the diversion of 800 CFS
21 between February 1 and November 30 of each year from the Tuolumne River at
22 the La Grange Dam. A006711 was filed specifically for the purpose of
23 appropriating the releases made from the Moccasin Creek power plant.
24 More water is being diverted and put to beneficial use under License 2425 during
25 the applicant’s proposed diversion season that flows from Moccasin Creek into
26 Tuolumne River.
27 [MID/TID] hold other licenses to appropriate from the Tuolumne River for power
28 purposes at their [Old] Don Pedro project which require all the flow of the river
from July through October of each year.

23 Findings 3, 4, 5, & 6 gave notice that CCSF must release the water it divert upstream of Old Don
24 Pedro Dam to its Moccasin Creek power house back to the Tuolumne via Moccasin Creek, plus
25 Permit 2425 reserves additional waters of the Tuolumne River for the Districts to beneficial use,
26 which means the Districts have the right to use more water than all the unimpaired flow of the
27 Tuolumne River from July through October. Thus, the beneficial use of the Tuolumne River is
28 fully-appropriated to the Districts between July 1 and October 31 of each year, and no one else.

1 The Districts and CCSF then adopted the Fourth Agreement in July of 1966, and
2 construction of the New Don Pedro Reservoir (NDPR) was completed in 1971. Under the Fourth
3 Agreement, as long as CCSF had a positive balance in its Fourth Agreement/NDPR “water-bank”
4 CCSF no longer was obligated to return water diverted to its Moccasin Creek power plant to the
5 Districts. CCSF was no longer obligated to adhere to D995 Findings 3 through 6. The Districts
6 and CCSF started managing the unimpaired flow of the Tuolumne River as prescribe by the
7 Fourth Agreement, thereby rendering those contrary portions of D995 obsolete.

8 Fahey has never proposed nor testified to the Board that D 995 is entirely “obsolete.” But
9 it is the fact that now it is not as simple as sending replacement water circa the Third Agreement
10 (as the Prosecution Team argues should be done in this proceeding). Term 20 and Terms 33 and
11 34, in Permits 20784 and 21289, respectively, address the complexities under the Fourth
12 Agreement. Fahey understands that he must replace water as prescribed by the Districts and
13 CCSF in accordance with Terms 20 and 34, so that the Fourth Agreement can function as
14 intended by the owners of NDPR. Prosecution Team has never refuted those factual realities.

15 Furthermore, Fahey has no priority of right to be on the Tuolumne River to divert water
16 on a daily basis year around, but for the Districts and CCSF that stipulate how Fahey shall operate
17 pursuant to their authority. If Fahey had not agreed to the conditions established in Term 20 of
18 Permit 20784 and Term 34 of Permit 21289, then Fahey would not be diverting potable spring
19 water from the Tuolumne River watershed between June 16 and October 31 (hereinafter, the
20 “FASS period”). The reason Fahey would not have been allowed to divert during a FASS period
21 is that, at the time he applied for the right to appropriate water by permit, “water was unavailable
22 for diversion under his priority of right.” (Key Issue 1(a).)

23 The 2014 and 2015 curtailment periods were implemented on the Tuolumne River
24 upstream of NDPR to protect the senior water rights of the Districts and CCSF, which is exactly
25 the purpose of D995 as affected by the Fourth Agreement. In essence, the 2014 and 2015
26 curtailment periods are an extension of the Tuolumne River’s annual FASS periods by their
27 initiation prior to June 16 and ending them on or just after October 31, each respective year. The
28 same “‘physical solution’ that enable beneficial use of water by [Fahey] without material injury to

1 [the Districts and CCSF]” (*City of Lodi v. East Bay Municipal Utility District* (1937) 7 Cal.2d
2 316, 339-341) during a FASS period does the same thing during a curtailment period.

3 Fahey does not claim any water rights other than Permits 20784 and 21289 that would
4 authorize the diversions (Key Issue 1(b)) because Permits 20784 and 21289 have a “physical
5 solution” that enable Fahey to divert when water would otherwise be “unavailable for diversion
6 under his priority of right.” It would be superfluous for Fahey to hold or have to claim another
7 water right in order to divert during a FASS and/or curtailment period. Contrary to Prosecution
8 Team’s argument (PT Supp. 6:12-7:25), Fahey’s letter dated June 3, 2014, informed the Board
9 that a “physical solution” existed that made his diversion and use legally authorized during
10 curtailment, which evidence is a “relevant circumstance [that] should be considered by the State
11 Water Board in determining whether unauthorized diversion of water has occurred.” (Key Issue
12 1(c).) Fahey took steps to avoid the “very serious dilemma” the Board warned diverters of in its
13 Notice of Surface Water Shortage dated February 26, 2009. (Fahey Exhibit 69.) Fahey
14 responded to that Notice by having 88.55 acre feet of foreign water wheeled to NDPR as a credit
15 for future water replacement requirements. Thus, a “physical solution” was created to legally
16 authorize a diversion to continue during a curtailment. If a legal authorization shall allow a
17 diversion to continue during a FASS period, then the same legal authorization shall allow
18 diversion during a curtailment.

19 The Prosecution Team fails to explain how Fahey was supposed to perform the water
20 replacement provisions of the permits in the manner suggested by the Prosecution Team, and still
21 not interfere with the water accounting procedures at NDPR as required under the Fourth
22 Agreement. The closest that the Prosecution Team comes is to agree with Fahey that “the
23 accounting is difficult at [NDPR], and we wanted to provide the maximum leeway we could” by
24 adding Terms 20 and 34 to the permits. (January 25 Transcript, 126:7-15.) The Prosecution
25 Team does not deny the relevance of the Fourth Agreement to Fahey’s performance under his
26 permits, and the Prosecution Team’s witnesses even conceded that CCSF and the Districts
27 provided materials that showed that Fahey could harm the water rights of CCSF and the Districts
28 if he did not comply with Terms 20 and 34. (January 25 Transcript, 127:13-16.) In other words,

1 the proper interpretation of what constitutes compliance with Terms 20 and 34 is directly tied to
2 potential harm to CCSF and the Districts; and what determines potential harm to CCSF and the
3 Districts is non-interference with the “difficult” accounting procedures at NDPR; and what
4 determines the accounting procedures at NDPR is the Fourth Agreement, which partially renders
5 D995 obsolete, as explained above.

6 The parties to the Fourth Agreement did not disregard the conflicts created by the 1992
7 Agreement and the Fourth Agreement when the Board accepted Fahey’s application A029977 for
8 Permit 20784. That conflict was resolved by CCSF and the District’s mutual acceptance of Term
9 20 in Permit 20784. Several years later Application A031491 for Permit 21289 was accepted,
10 after the Division of Water Rights’ Chief in a Statement to Files, dated January 26, 2004 (Fahey
11 Exhibit 38), recognized a new water exchange agreement with Tuolumne Utilities District (TUD)
12 so *both* Permits could work in unison. CCSF protested the acceptance of application A031491
13 with a letter, dated November 8, 2004. (Fahey Exhibit 40.) In that letter, CCSF asked for
14 “confirmation that the ‘updated’ [TUD] water exchange agreement is inclusive of the quantities
15 required under” both Permits; adding, that CCSF “only intends to notify [Fahey] of the need to
16 provide replacement water when necessary” and “will leave the notification to a judgment on
17 [CCSF’s] part as to whether the need for replacement water is critical.” Thereafter, CCSF further
18 refined Term 20 in Permit 20278 to created Term 34 in Permit 21289. The Districts also
19 protested application A031491. (Fahey Exhibit 41.) One of the Districts’ points of protest, 2E,
20 required “The State Board should evaluate... the diversions under [A031491] in light of the
21 diversions occurring under Permit 20784.” Ms. Mrowka testified that she “served as the lead for
22 processing the application [A031491]...Fahey’s second permit, and addressing the protest to his
23 application. (January 25 Transcript, 44:9-11.) However, she facilitated the issuance of Permit
24 21289 without stating that anything was amiss with Fahey’s modus operandi.

25 CCSF and the Districts intended the exchange agreement to operate pursuant to Term 34
26 of Permit 21289. The Districts determined that the inclusion of the CCSF Term 34 language in
27 Permit 21289 would create “more restrictive and detailed requirements.....sufficient to resolve the
28 Districts’ protest” as stated in their letter dated March 18, 2011. (Fahey Exhibit 53.) Likewise,

1 CCSF memorialized in a letter to Ms. Mrowka, dated March 21, 2011(Fahey Exhibit 54), that it
2 “only intends to notify the applicant of the need to provide replacement water when necessary.”
3 Ms. Mrowka never responded to the CCSF letter dated March 21, 2011, and so did not assert that
4 CCSF was incorrect or that there was any conflict with any portion of *either* permit.

5 The Prosecution Team’s argument, based on D995 and other grounds, that Fahey must
6 provide exchange water to NDPR for all water he diverts during the FASS season, without being
7 first requested to do so by CCSF and the Districts (January 25 Transcript, 45:19-22), directly
8 conflicts with the CCSF letter dated March 21, 2011, which was part of the A031491 approval
9 process and the permit file. (January 25 Transcript, 17:22-25) That CCSF letter to Ms. Mrowka
10 dated March 21, 2011, correctly reflects what was, and is, required by Permits 20784 & 21289.

11 Thus, the non-obsolete provisions of D995 are fully satisfied by Fahey when he follows
12 the requirements of Term 20 and Term 34; i.e, when he does not interfere with the complex water
13 accounting procedures in the Fourth Agreement. The Prosecution Team’s interpretation of the
14 application of Term 19 and D995, however, necessarily requires Fahey to interfere with those
15 water accounting procedures in the Fourth Agreement, in violation of Term 20 and Term 33 and
16 34, of his respective permits. Thus, the D995 issue is completely relevant to Key Issue 1.

17 **II. EXHIBIT WR-147 AND THE RELATED “SPILLING” TESTIMONY WAS USED**
18 **BY PROSECUTION TEAM IN THEIR CASE-IN-CHIEF; AND THEY FAILED TO**
19 **FOLLOW THE PROCEDURES TO ASSERT WORK-PRODUCT PROTECTION.**

20 **A. The Hearsay Testimony About “Spilling” Was Used In The Case-In-Chief,**
21 **And Therefore Was Supposed To Be Disclosed Prior To The Hearing.**

22 The Hearing Officers should not allow or admit Exhibit WR-147 and the related hearsay
23 testimony by Samuel Cole and Katherine Mrowka regarding the allegations of NDPR “spilling”
24 in 2011 (“Alleged Spilling Testimony”). (January 25 Transcript, 132:11-133:24, 140:24-141:5,
25 141:20-142:2, 142:16-146:16; January 26 Transcript, 2:21-9:22.) The very first explanation that
26 the Prosecution Team gave for that evidence at the hearing was that the evidence was introduced
27 to “confirm” “an email from Mr. Fahey to TUD in 2011 indicating that he does not need to
28 purchase water because New Don Pedro is being operated to avoid overflow.” (January 25
Transcript, 133:16-20.) However, that alleged “email” is only contained in what the Prosecution

1 Team admits is “Prosecution Team Exhibit WR-72, p. 37,” which is only in the Prosecution
2 Team’s *case-in-chief*. (Petruzzeli Decl., ¶12; PT Supp., 13:10-12, 15:6-8.) In addition, to the
3 extent the Prosecution Team also sought to use the Alleged Spilling Testimony to address Fahey’s
4 statements in Fahey’s “June 3, 2014 letter” (PT Supp., 13:13-20), that June 3, 2014 letter was also
5 a key part of the Prosecution Team’s *case-in-chief*. (WR-1, ¶29; WR-7, ¶14; WR-11, ¶¶12, 13;
6 WR-47; January 25 Transcript, 57:12-25; 59:2-8; 85:3-12.) Exhibit WR-147 is not rebuttal
7 evidence because it “does not include evidence that should have been presented during the
8 case-in-chief of the party submitting rebuttal evidence.” (Notice of Public Hearing, p. 6.) Exhibit
9 WR-147 “applied to the case in chief” and so had to be disclosed prior to the hearing. (PT Supp.,
10 14:12-13 (citing January 21 Order).) Since it was not disclosed prior to the hearing, it is
11 inadmissible.

12 **B. The Alleged Spilling Testimony Is Inadmissible Hearsay.**

13 The Alleged Spilling Testimony is all hearsay, being used for the truth of *many* matters
14 stated in Mr. Cole’s testimony. The Prosecution Team wrongly uses that hearsay testimony as the
15 *only* evidence to support a number of findings on the many new issues that are listed on pages 15
16 through 16 of Fahey’s Supplemental Brief On Evidentiary Objections. Indeed, there is much
17 ‘fruit’ that Prosecution Team seeks to harvest from that ‘poisonous tree.’ For example, because
18 that hearsay evidence is the *only* evidence as to *how much* water was allegedly spilled from
19 NDPR in 2011, the evidence does not even qualify under the hearsay rule as applied by the
20 Prosecution Team. (PT Supp., 20:7-8.) That singular piece of hearsay evidence as to the alleged
21 amount of water that spilled is, in turn, used as the *only* evidence to support the Prosecution
22 Team’s testimony that all of the water that Fahey had wheeled into NDPR was gone prior to the
23 curtailment periods (January 25 Transcript, 140:24-25; 141:1-11, 20-25; 142:1-10; 144:17-145:5);
24 and that evidence is then, in turn, used as the *only* evidence cited by Prosecution Team witnesses
25 for their ultimate conclusion regarding actual harm to downstream uses. (January 26 Transcript,
26 141:16-142:10.) Thus, because the Alleged Spilling Testimony is inadmissible, the Prosecution
27 Team completely fails to prove any actual harm from Fahey’s diversions during curtailment.

1 **C. Prosecution Team Hid The “Spilling” Testimony, In Violation Of The**
2 **Required Procedures For Asserting Work Product Protection.**

3 Prosecution Team’s alleged “work product” argument regarding WR-147 (PT Supp.
4 14:16-15:5) is unavailing. The following qualified immunity rule is the governing procedure
5 regarding the Prosecution Team’s alleged “work product” claim for WR-147:

6 [W]e hold that a witness statement obtained through an attorney-directed
7 interview is entitled as a matter of law to at least qualified work product
8 protection. A party seeking disclosure has the burden of establishing that denial
9 of disclosure will unfairly prejudice the party in preparing its claim or defense or
10 will result in an injustice. If the party resisting discovery alleges that a witness
11 statement, or portion thereof, is absolutely protected because it “reflects an
12 attorney’s impressions, conclusions, opinions, or legal research or theories,” that
13 party must make a preliminary or foundational showing in support of its claim.
14 The trial court should then make an *in camera* inspection to determine whether
15 absolute work product protection applies to some or all of the material. [*Coito v.*
16 *Superior Court* (2012) 54 Cal.4th 480, 499-500 (citations omitted).]

17 [W]e hold that witness statements procured by an attorney are not automatically
18 entitled as a matter of law to absolute work product protection. Instead, the
19 applicability of absolute protection must be determined case by case. An attorney
20 resisting discovery of a witness statement based on absolute privilege must make
21 a preliminary or foundational showing that disclosure would reveal his or her
22 “impressions, conclusions, opinions, or legal research or theories.” Upon an
23 adequate showing, the trial court should then determine, by making an *in camera*
24 inspection if necessary, whether absolute work product protection applies to some
25 or all of the material.” [*Id.* at p. 496 (citation omitted).]

26 The Prosecution Team completely ignored those mandatory prerequisites for work product
27 protection. At no time, including at the hearing itself, did the Prosecution Team ever attempt to:
28 (a) make a preliminary or foundational showing in support of its work product claim for WR-147;
29 (b) allow the Hearing Officers to make an *in camera* inspection to determine whether absolute
30 work product protection applies to some or all of the material; (c) provide an opportunity for
31 Fahey to make a showing that denial of disclosure of Exhibit 147 will unfairly prejudice its
32 preparing its defenses or will result in an injustice; (d) produce the document with any alleged
33 “attorney’s impressions, conclusions, opinion, or legal research or theories” “isolated within the
34 document and ... redacted” (like the manner described in the Hearing Officers’ January 21
35 Order); or (e) give Fahey the opportunity to subpoena the declarant (Mr. Wes Monier at TID), or
36 obtain a statement from the declarant, or even have the declarant testify at the hearing as to his
37 conversation with Mr. Cole. The Prosecution Team knew about those mandatory procedures for

1 work-product protection (see PT Supp. 15:1, citing *Citizens for Ceres v. Superior Court* (2013)
2 217 Cal.App.4th 889, 911-912), but violated those procedures anyway and kept WR-147 hidden
3 from Fahey and the Hearing Officers.¹ Thus, the Prosecution Team’s email and letter to the
4 Hearing Officers on January 21, 2016 that “*The Prosecution Team is not aware of the existence of*
5 *any documents meeting any of the criteria listed on page 10 of the Hearing Officer’s partial*
6 *ruling*” was blatantly misleading as to WR-147, which was used in its *case-in-chief*. Prejudice to
7 Fahey will result if the Alleged Spilling Testimony, including WR-147, is admitted in this case.

8 **IV. REBUTTAL EXHIBIT 153 AND RELATED TESTIMONY ARE NOT**
9 **ADMISSIBLE BECAUSE THEY WERE WRONGLY WITHHELD BY THE**
10 **PROSECUTION TEAM.**

11 Exhibit 153 and related testimony regarding the Tuolumne Watershed Analysis should not
12 be admitted as evidence in this case, as Fahey objected at the Hearing (January 26, 2016
13 Transcript 1:22-16; 7:11-25, 9:5-22), and as explained on pages 18 through 20 of Fahey’s
14 Supplemental Brief On Evidentiary Objections (filed April 11, 2016). Furthermore, there is no
15 evidence in the record regarding when Exhibit 153 was created. (PT Supp. 16:16-21 (citing
16 January 16 Transcript, 11:16-15:25.) That may explain why Fahey, as the expert witness on these
17 matters, could not find this analysis on the Board’s website in December 2015. (PT Supp. 17:7-
18 9.) Furthermore, since this evidence should have been included in Prosecution Team’s case-in-
19 chief, it should have been disclosed prior to the hearing.

20 **V. THE PROSECUTION TEAM RAISES NEW EVIDENTIARY OBJECTIONS**
21 **THAT: (a) VIOLATE THE HEARING OFFICERS’ BRIEFING INSTRUCTIONS;**
22 **(b) ARE ERRONEOUS; AND (c) ARE HIGHLY INAPPROPRIATE.**

23 In its Supplemental Brief, the Prosecution Team wrongly raises additional evidentiary
24 objections that are outside of the three specific issues for which the Hearing Officers only allowed
25 the parties to provide supplemental briefs. (January 26 Transcript, 138:6-25.) On that basis
26 alone, the Hearing Officers should strike those additional objections (which new objections are
27 made at PT Supp., 1:16-19; 6:12-7:8; 18:1-20:9, and outlined below). Furthermore, those new

28 ¹ The Prosecution Team’s practice here of disregarding the requirements for work product protection worked in tandem with the Prosecution Team’s other related policy that “We typically do not prepare privilege logs, because they are burdensome and oppressive.” (Email by Mr. Petruzzelli to Mr. Hansen, December 8, 2015 (Attachment 1 to Petruzzelli Declaration).) The combination of those two practices allowed the Prosecution Team to spring that document on their unsuspecting opponents in a manner that would never be tolerated in the civil courts.

1 objections should be entirely rejected because they are erroneous for the following reasons.

2 First, the Prosecution Team’s new “evidentiary” objection to strike Fahey’s testimony that
3 his diversions do not impact senior rights and beneficial users downstream (PT Supp., 6:12-7:8)
4 should be rejected. Fahey’s testimony is highly relevant as to Water Code section 1055.3 and
5 Key Issue 3. Fahey’s testimony is also relevant as to Key Issue 1 for the reasons articulated in
6 Section I, above. Fahey’s testimony should also be allowed, and the Prosecution Team’s request
7 to strike that testimony should be denied, because that testimony is supported by Prosecution
8 Team’s *own witnesses* who: (a) were unable to identify any such impact to any downstream users,
9 or to the Districts and the City (January 25 Transcript, 75:4-15; 76:77:10-23; 99:15-100:11;
10 102:19-23; 129-8-130:1); (b) admitted that any water released from NDPR is completely under
11 the control of the Districts (January 25 Transcript, 110:20-111:1; 126:7-15; 140:24-141:15); and
12 (c) failed to provide any evidence that any water that Fahey should have otherwise replaced in the
13 manner suggested by Prosecution Team would have been released at all from NDPR to
14 downstream users. Thus, the Prosecution Team’s “evidentiary” objection to Fahey’s testimony
15 illustrates the Prosecution Team’s failure to provide *any* evidence to support one of the most
16 important issues raised in the ACL. (*See* WR-1, ¶50; January 25 Transcript, 141:16-19.)

17 Second, Prosecution Team’s brand new objection to Gary Player’s testimony (PT Supp.,
18 18:2-21) is wrong because: (a) that testimony is self-authenticating; and (b) that testimony does
19 not need to be authenticated since it is being used as reasonable supporting material for the
20 admissible expert witness opinions of both Dr. Ross Grunwald and Fahey, who did testify.
21 (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; *People v. Cooper* (2007) 148 Cal.App.4th 731,
22 746-747; Evid. Code 804(d) [“An expert opinion otherwise admissible is not made inadmissible
23 by this section because it is based on the opinion or statement of a person who is unavailable for
24 examination pursuant to this section.”])

25 Third, in response to the Prosecution Team’s hearsay objection to Fahey’s testimony
26 regarding statements by Mr. Kennedy of TID telling Fahey not to contact TID, the Hearing
27 Officers have already ruled “We’ll allow it in.” (January 25 Transcript, 159:9-18.) Also, Mr.
28 Kennedy’s statements to Fahey are not hearsay in that they imparted information to Fahey, who,

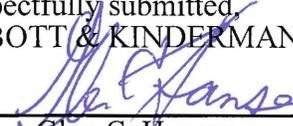
1 believing in the truth of those statements in light of Mr. Kennedy's position and role in the water
2 rights process, acted in conformity with those statements. (*Jazayeri v. Mao* (2009) 174
3 Cal.App.4th 301, 316.) Furthermore, Mr. Kennedy's statements are admissible hearsay here
4 because they supplement similar statements from the City in 2011 (Fahey Exhibit 54) that Fahey
5 would be notified before he is to replace water he diverted under his permits.

6 Fourth, the Prosecution Team raised a new hearsay objection to Fahey's testimony about
7 the statements of Bill Van Dyke. (PT Supp., 19:9-20:9.) However, those statements by the
8 Board's Van Dyke are not hearsay in that they explain the reasonableness of Fahey's reporting
9 conduct in reliance on such statements. (See January 26 Transcript, 104:4-12. *See e.g., Jazayeri,*
10 *supra*, 174 Cal.App.4th at p. 316.) Also, the Prosecution Team's argument is completely
11 inappropriate. That argument consists of *counsel's* own testimony (and not that of a sworn
12 witness), consisting of speculation as to why the *Board's* failure to properly maintain documents
13 in its own permit file is somehow evidence that a certain document does not exist (PT Supp.,
14 19:20-28), for the purpose of opening the door for more testimony from *counsel* about a large
15 amount of *new evidence* of counsel's *research*, which he created *after the hearing*, which
16 evidence not only consists of uncorroborated *hearsay* but also introduces a *new exhibit* in
17 violation of the Hearing Officers' explicit order (January 26 Transcript, 138:5), all for the purpose
18 of proving that some other document in the Board's permit files *must* have been an attachment to
19 a letter. (See Petruzzelli Declaration, ¶¶28-32. PT Supp., 20:1-6.) Seriously? Can Fahey now
20 cross-examine counsel for the Prosecution Team about that evidence? Rather, the Hearing
21 Officers should strike paragraphs 28-32 of Petruzzelli's Declaration and the related argument.

22 Thus, the Prosecution Team's new evidentiary objections are wrongly raised, erroneous,
23 violate a host of procedural and evidentiary rules, and constitute an ongoing pattern of procedural
24 abuse that violates Fahey's due process rights in this proceeding.

25 Dated: April 19, 2016

Respectfully submitted,
ABBOTT & KINDERMANN, LLP

26 By: 
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28 Attorneys for G. Scott Fahey and
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PROOF OF SERVICE

I, Lisa Haddix, declare as follows:

I am employed in the County of Sacramento, over the age of eighteen years and not a party to this action. My business address is 2100 21st Street, Sacramento, California 95818.

On April 19, 2016, I served the foregoing document(s) described as:

FAHEY'S REPLY TO PROSECUTION TEAM'S SUPPLEMENTAL EVIDENCE BRIEF

On the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

SEE ATTACHED SERVICE LIST

X BY MAIL: I placed a true copy in a sealed envelope addressed as indicated above on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

X BY ELECTRONIC SERVICE [EMAIL]: Sending a true copy of the above-described document(s) via electronic transmission from email address lhaddix@aklandlaw.com to the persons listed above on April 19, 2016, before 5:00 p.m. The transmission was reported as complete and without error. [CRC 2.256 (a)(4), 2.260].

BY FEDEX: On the above-mentioned date, I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed on the attached service list. I placed the envelope or package for collection and overnight delivery following our ordinary business practices.

BY PERSONAL SERVICE: I placed a true copy in a sealed envelope addressed to each person[s] named at the address[es] shown and giving same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on April 19, 2016, at Sacramento, California.



Lisa Haddix

1 SERVICE LIST

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