CHRISTOPHER J. NEARY
cjneary@pacific.net

JENNIFER M. O'BRIEN
jennifer_m_obrien@yahoo.com

NEARY AND O'BRIEN

ATTORNEYS AT LAW

110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490

FAX: (707) 459-3018
WWW.CJNEARY.COM

(707) 459-5551

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Via E-Mail Only

emona@waterboards.ca.gov

State Water Resources Control Board
Attention Ernest Mona
Hearings and Special Projects
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, California 95814

Re: Millview Proposed Revocation License 5763:
Millview's response to Division's Motion to Submit Rebuttal Evidence

Dear Mr. Mona:

More than anything, Millview is perplexed by the Prosecution Team's request to submit rebuttal evidence.

Mr. Bradley testified at the hearing on April 2, 2013 that he had reviewed an engineering report commissioned by the County of Mendocino in 2002 when it was considering purchasing the subject water right which report concluded that Well 6 was underflow. (RT 117: 16-20.) The Division Prosecution Team suggests that the subject report, which after review can only be characterized as reaching the very conclusion as described by Mr. Bradley in his testimony, is being offered by the Division as "rebuttal evidence." Only had the report reached a different conclusion than as described by Mr. Bradley in his testimony could the evidence be seen as being rebuttal evidence.

So, it is perplexing that the report is offered as rebuttal evidence. In that the report supports Mr. Bradley's testimony it is not properly admitted for purposes of rebuttal on the issue as to whether or not Well 6 is underflow, or to rebut Mr. Bradley's non-expert opinion that Well

6 is underflow. To the extent that the Prosecution Team wishes to corroborate Mr. Bradley's testimony for truthfulness, Millview has no objection to the document being admitted for that very limited purpose of taking notice of the report's existence.

However, beyond that Millview does have an objection in that the report is hearsay. Pursuant to Government Code § 11513 (d) hearsay evidence may be offered to supplement or explain other evidence, but over timely objection shall not be sufficient in and of itself to support a finding, unless it would be admissible over objection in a civil proceeding in court. (Also see Cal. Code Regs., tit. 23 § 648.5.1).

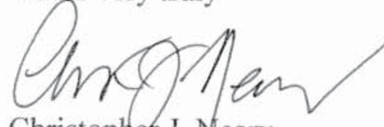
The Prosecution Team in its motion suggests that the evidence is relevant to rebut Mr. Beuving (the Masonite Plant Engineer) who testified that Well 6 and Wells 3 and 5 were used on a rotational basis prior to 2001 when the plant closed and after 2001 when Masonite utilized water through at least 2010 for plant demolition, and domestic purposes. The report makes conclusions in passing that Wells 3 and 5 did not appear to have been recently used in 2002. The report does not supplement or explain other properly admitted evidence. The report is being offered by the Prosecution Team as pure hearsay to *rebut* direct testimony. As such the subject report is not admissible for the purposes being offered by the Prosecution Team---rebuttal.

Mr. Beuving's pre-hearing testimony referred to use of Well 6. (Mill-14.) If the Prosecution Team wanted to use the out of court observations of the author of the report, it should have had the author present to testify. The report's author could then be cross examined as to whether his observations identified the correct wells, there being evidence that at least one well had been taken out of production long before the plant closed. The Prosecution Team could have cross-examined Mr. Beuving on this point, Mr. Beuving being present and available for cross examination. Instead the Prosecution Team seeks to use pure hearsay to *rebut,* not to supplement or explain Mr. Beuving's direct testimony.

The Affidavit of Katherine Mrowka offered by the Prosecution Team in support of its motion states that the Prosecution Team possessed the report, but was unaware that it possessed the report until after the hearing. Millview should not suffer having the hearing reopened to allow the prosecution team to offer pure inadmissible hearsay when it possessed the subject evidence in advance of and at the time of the hearing, could have had the declarant present and available for cross-examination, but did not. Whether it was a tactical decision or an unintentional failure to gather evidence before the hearing makes no difference. The simple fact is that it is unfair and legally impermissible to rebut direct evidence with out- of- court statements of declarants who are not available for cross examination.

In conclusion, Millview does not take a position one way or another as to whether the Board accepts the subject report in evidence for the purpose of supplementing or explaining Mr. Bradley's testimony that he saw the subject report and that it concluded that Well 6 as used by Masonite was underflow of the Russian River. Beyond that, Millview objects to the admission of the report for any other purpose on the basis that it is inadmissible hearsay. As to the conclusions of the report, there is insufficient foundation as to the qualifications of the expert for the report to be accepted as expert opinion.

Yours very truly



Christopher J. Neary
Neary and O'Brien
Attorneys for Millview County Water District

cc: Samantha Olson, Esq.
Allan Lilly, Esq.
Nathan Jacobsen, Esq
Tim Bradley, Millview County Water District