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BEFORE THE STATE OF CALIFORNIA

9

STATE WATER RESOURCES CONTROL BOARD

10

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

OPPOSITION OF G. SCOTT FAHEY AND
SUGAR PINE SPRING WATER, LP TO
MOTION TO COMPEL PRODUCTION OF
DOCUMENTS IN RESPONSE TO
SUBPOENA DUCES TECUM

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1 I. INTRODUCTION.

2 The Prosecution Team in this administrative proceeding against G. Scott Fahey and Sugar
3 Pine Spring Water, LP (collectively, "Fahey") brought a Motion to Compel Production of
4 Documents in Response to Subpoena Duces Tecum ("Motion To Compel" or "Motion") in order
5 to obtain an order requiring Fahey to disclose two kinds of privileged information. The
6 Prosecution Team inappropriately, and unnecessarily, seeks (1) Fahey's trade secret information
7 about his "per-unit pricing" contained in invoices from water sales, which the Prosecution Team
8 sought in Item 7 of its Subpoena; and (2) Fahey's individual and limited partnership tax returns,
9 which the Prosecution Team sought in Items 8 and 9 of its Subpoena. The Hearing Officers in
10 this proceeding should deny that Motion To Compel in its entirety.

11 The Motion To Compel should be denied as to the water sales invoices (Item 7 of the
12 Subpoena) because the requested disclosure of per-unit pricing information would wrongly
13 disclose Fahey's proprietary, trade secret information, which would harm his business. (*See infra*,
14 section II.A., pages 2-5.) Also, the California Department of Public Health has already
15 recognized that information is exempt from public disclosure. (*See infra*, Section II.B., pages
16 4-6.)

17 The Motion To Compel also should be denied as to the tax returns (Items 8 and 9 of the
18 Subpoena) pursuant to Government Code section 11513, subdivision (e), Revenue and Taxation
19 Code section 19282, Civil Code section 3295, subdivisions (c) and (d), and California Code of
20 Regulations, title 23, section 648.5.1, because of the following:

- 21 • Contrary to the Prosecution team's argument, Fahey's tax returns are unnecessary
22 in this proceeding (*see infra*, section III.B, pages 7-8);
- 23 • Contrary to the Prosecution Team's argument, Fahey's tax returns are not
24 warranted by any inability to pay defense (*see infra*, section III.C, pages 8-9);
- 25 • The Prosecution Team has failed to establish that any of the exceptions to the tax
26 return privilege apply here (*see infra*, section III.D, pages 9-10); and
- 27 • The Motion to Compel violates the express intent of the Legislature to prevent
28 disclosure of the profits and financial condition of a defendant, unless a prima facie showing of

1 liability has first been established by the plaintiff, which the Prosecution Team has not done in
2 this case. (*See infra*, section III.E, pages 10-13.)

3 **II. THE MOTION TO COMPEL SHOULD BE DENIED BECAUSE IT**
4 **IMPROPERLY SEEKS FAHEY’S PROPRIETARY, TRADE SECRET**
5 **INFORMATION.**

6 **A. The Prosecution Team’s Demand for Fahey’s Protected Trade Secrets Will**
7 **Harm Fahey.**

8 As explained above, in a formal administrative adjudication such as the present, “[t]he
9 The Prosecution Team seeks an order compelling Fahey to disclose the documents described in
10 Item 7 of its subpoena, involving water sales from the diversions. The Prosecution Team admits
11 that Fahey’s counsel agreed “to verify the number of gallons sold and the dollar amount received
12 by Sugar Pine for said water, without divulging proprietary information. (Motion, at 2.) The
13 Prosecution Team also concedes that, although Fahey did not provide unredacted invoices or
14 information about per-unit pricing, Fahey did provide “the total dollar amount sold under the
15 invoices.” (Motion, at 4; Declaration of Andrew Tauriainen, Attachment 6 at p. 4.) Thus, Fahey
16 gave the Board the total number of gallons sold and provided the Board with the total amount of
17 sales; the Board can even compute the average per unit price from that disclosed information, if
18 such computation is that necessary to this matter. However, that disclosure was apparently not
19 sufficient for the Prosecution Team, which brought this Motion To Compel in order to obtain
20 Fahey’s proprietary, trade secret information about his unit price per gallon of water. For the
21 reasons explained below, the Hearing Officers should deny that portion of the Motion To Compel
22 in its entirety.

23 California Code of Regulations, title 23, section 648.5.1, provides that “[a]djudicative
24 proceedings [before the Board] will be conducted in accordance with the provisions and rules of
25 evidence set forth in Government Code section 11513.” Government Code section 11513,
26 subdivision (e), provides that, in a formal administrative adjudication, “The rules of privilege
27 shall be effective to the extent that they are otherwise required by statute to be recognized at the
28 hearing.”

1 California has adopted without significant change the Uniform Trade Secrets Act (UTSA)
2 (Civ.Code §3426 *et seq.*; see *Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th
3 215, 221), which protects trade secret documents from disclosure to the public. Under
4 California’s version of the UTSA, a trade secret consists of “information, including a formula,
5 pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives
6 independent economic value, actual or potential, from not being generally known to the public or
7 to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the
8 subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (Civ. Code
9 §3426.1, subd. (d).) The information sought by the Prosecution Team regarding the unit price per
10 gallon of water sold by Fahey constitutes his proprietary trade secrets.

11 If Fahey is required to disclose the unit price per gallon of water in this public
12 administrative proceeding, then Fahey might as well close down his business as his customers
13 would know exactly what every other one of his customers pays for water and would demand the
14 same price. Fahey’s invoiced customers pay the same unit price for water, with the exception of
15 one of them, hereinafter referred to as the “Special Invoice Customer.” (Declaration of Scott
16 Fahey In Support Of Opposition To Compel Production Of Documents In Response To Subpoena
17 *Duces Tecum* (“Fahey Decl.”), ¶4.) The Special Invoice Customer pays more in order to ensure
18 that it is first in line after Fahey’s contract customers. (Fahey Decl., ¶4.) The contract customers
19 can contractually take any, all, or none of the water as needed after notice. (Fahey Decl., ¶4.)
20 Once the Special Invoice Customer establishes its order, then any water left over goes to the
21 remaining invoiced customers on a first come - first serve basis. (Fahey Decl., ¶4.) The contract
22 customers’ unit price is less than the price charged invoiced customers. (Fahey Decl., ¶4.) If the
23 information about the unit price per gallon of water is made public in this proceeding, as the
24 Board demands, then the invoiced customers of Fahey would leverage the exposed contract unit
25 price and demand a huge reduction in the invoice unit price. (Fahey Decl., ¶4.) In that likely
26 scenario, Fahey could not negotiate individually, and he would be stuck with one price for
27 everyone. (Fahey Decl., ¶4.) As a result, Fahey’s annual income could be reduced up to 75% of
28 its current level. (Fahey Decl., ¶4.)

1 Fahey has carefully protected that per unit pricing from public disclosure. (Fahey Decl.,
2 ¶5.) Sugar Pine Spring Water, LP has no employees, and F. Scott Fahey has carefully protected
3 that per unit pricing information from public disclosure, by not telling, revealing, communicating,
4 or writing to anyone, other than Fahey’s attorneys, that information. (Fahey Decl., ¶5.) If asked
5 by a third-party “How much do bottlers pay for a gallon of spring water?” Fahey replies, “Not
6 enough!” (Fahey Decl., ¶5.) Fahey does not reveal that information. (Fahey Decl., ¶5.) The
7 other Limited Partners of Sugar Pine Spring Water LP do not know the unit prices paid by each
8 respective bottler, and no one else knows that information except Fahey’s attorneys. (Fahey
9 Decl., ¶5.) Furthermore, the Nestles Water North America, Inc. and Fahey have a confidentiality
10 clause within their contract in order to protect the per-unit pricing information, among other
11 things. (Fahey Decl., ¶5.)

12 Thus, the per-unit pricing information that the Prosecution Team seeks in this case not
13 only constitutes a trade secret under Civil Code section 3426.1, subdivision (d), as discussed
14 above, but it is similar to pricing information that courts have found to constitute protectable trade
15 secrets. (*See Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [“Cases have
16 recognized that information related to cost and pricing can be trade secret.”] *See e.g., Courtesy*
17 *Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288 [billing and markup rates
18 “irrefutably” of commercial value]; *SI Handling Systems, Inc. v. Heisley* (3d Cir. 1985) 753 F.2d
19 1244, 1260 [cost and pricing information trade secret]; *Lumex, Inc. v. Highsmith* (E.D.N.Y. 1996)
20 919 F. Supp. 624, 628-630 [pricing, costs, and profit margins treated as trade secrets].)

21 **B. The California Department of Public Health Has Already Recognized that the**
22 **Information Sought by the Prosecution Team is Exempt from Public**
23 **Disclosure.**

24 The Prosecution Team has known for months that the information it is seeking in Item 7
25 of its Subpoena (and the instant Motion To Compel) is exempt from public disclosure. On
26 July 29, 2015, at 10:37 a.m., Samuel Cole, of the Enforcement Unit 2, of the Division of Water
27 Rights, of the State Water Resources Control Board, sent an email to Pat Kennelly, Chief of the
28 Food Safety Section, of the Food and Drug Branch, of the California Department of Public
Health. (Declaration of Glen Hansen In Support Of Opposition To Motion To Compel

1 (“Hansen Decl.”), ¶2, Ex. 1, filed and served herewith.) In that email, Mr. Cole discusses Fahey
2 and Water Right Permit nos. 21289 and 20784, and states, in relevant part:

3 A permittee of the Division of Water Rights has indicated that he is
4 annually required to provide CDPH Food & Drug Branch a list of
5 bottlers that have bottled from his spring water source. Can you
6 provide me with *any data* your agency has *on his operation* from
7 January 2014 to current, or point me in the right direction if this
8 information is publicly accessible?

9 Information that the Division would specifically be interested in
10 includes *information regarding his contractors/bottlers (i.e. Nestle*
11 *Arrowhead, Absopure, DS Water, Aquas, etc.), any quantities or*
12 *volume of water that is delivered, and dates that deliveries took*
13 *place.* [Ex. 1 to Hansen Decl. (emphasis added).]

14 In a responsive email to Mr. Cole at 1:08 p.m. that same day, Mr. Kennelly reminded the Water
15 Board representative of the confidential nature of the information that the Water Board was
16 seeking about Fahey’s operations. (Hansen Decl., ¶2, Ex. 1.) Mr. Kennelly stated, in relevant
17 part:

18 Hi Sam, we are familiar with Mr. Fahey’s operations however this
19 information is collected for licensing and investigative purposes
20 and **is exempt from public disclosure under the California**
21 **Public Records Act.** We do not routinely collect or maintain
22 information on the volume of water distributed or quantities
23 involved in individual deliveries, so regardless of its status under
24 the CPRA, we do not have any of that information on file. [Ex. 1
25 to Hansen Decl. (bold and underline added)]

26 Thus, while the California Department of Public Health did not have the specific
27 information that Mr. Cole was looking for about Fahey’s operations, Mr. Kennelly explained that
28 such information was “exempt from public disclosure.” That same information that is “exempt
from public disclosure” is what the Prosecution Team is now seeking to obtain through the instant
Motion To Compel.

Accordingly, the Motion To Compel should be denied as to the water sales invoices
(Item 7 of the Subpoena) because the requested disclosure of per-unit pricing information would
wrongly reveal Fahey’s proprietary trade secrets; because disclosure of the requested trade secret
information would result in harm to Fahey’s business; because such information is unnecessary in
this proceeding in light of the information that Fahey has already provided in response to the

1 subpoena; and because the California Department of Public Health has already determined that
2 the information is exempt from public disclosure, as discussed above.

3 **III. THE MOTION TO COMPEL SHOULD BE DENIED IT SEEKS AN ORDER**
4 **THAT VIOLATES THE TAX RETURN PRIVILEGE.**

5 **A. The Tax Return Privilege Applies To This Administrative Proceeding.**

6 As explained above, in a formal administrative adjudication such as the present, “[t]he
7 rules of privilege shall be effective to the extent that they are otherwise required by statute to be
8 recognized at the hearing.” The Prosecution Team concedes on pages 4 through 5 of its Motion
9 To Compel that the *tax return privilege* applies in the instant administrative proceeding against
10 Fahey.

11 While there is no recognized federal or state constitutional right to maintain the privacy of
12 tax returns, “California courts, however, have interpreted state taxation statutes as creating a
13 statutory privilege against disclosing tax returns.” (*Weingarten v. Superior Court* (2002) 102
14 Cal.App.4th 268, 274.) Revenue and Taxation Code section 19282 provides that it is a
15 misdemeanor offense for any member of the Franchise Tax Board or any agent, officer or
16 employee of the state and its political subdivisions to disclose in any manner information
17 contained in personal income tax returns. Inasmuch as the purpose of section 19282 is to
18 encourage taxpayers to make full and truthful declarations in their returns without fear that such
19 information will be used against them, the California Supreme Court has declared that the statute
20 creates a privilege against the disclosure of income tax returns. (*See Webb v. Standard Oil Co.*
21 (1957) 49 Cal.2d 509, 513, affirmed in *Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1,
22 6. *See also Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718-719.) The Supreme Court has
23 further ruled that attempts to avoid the application of the privilege by the indirect means of
24 permitting third parties to obtain copies of tax returns would not be tolerated. (*Webb v. Standard*
25 *Oil Co., supra*, 49 Cal.2d at p. 513; *Sav-On Drugs, Inc. v. Superior Court, supra*, 15 Cal.3d at pp.
26 6-7.) Specifically, in *Webb* the court held that forcing a taxpayer to produce a copy of his state or
27 federal income tax returns in litigation, which the opposing party wished to use for impeachment
28 purposes, would effectively defeat section 19282’s legislative purpose. “The purpose of the

1 privilege is to encourage voluntary filing of tax returns and truthful reporting of income, and thus
2 to facilitate tax collection.” (*Weingarten v. Superior Court* , *supra*, 102 Cal.App.4th at p. 274.)

3 By analogy to Revenue and Taxation Code section 19282, as interpreted in *Webb*, similar
4 nondisclosure provisions in other tax statutes have been construed to prohibit compelled
5 production by the taxpayer of copies of corporation tax returns (*Aday v. Superior Court* (1961) 55
6 Cal.2d 789, 796-797), employment tax returns (*Crest Catering Co. v. Superior Court* (1965) 62
7 Cal.2d 274, 276-277), and sales tax returns (*Sav-On Drugs, Inc. v. Superior Court, supra*, 15
8 Cal.3d 1, 6-7).

9 Although *Webb* and *Sav-On Drugs* occurred in the context of litigation, the Court of
10 Appeal in *King v. Mobile Home Rent Review Board* (1989) 216 Cal. App. 3d 1532, explained that
11 “there is no rule limiting the application of the privilege to adversarial, court proceedings. Nor
12 should there be. The Supreme Court has declared that attempts to avoid the application of the
13 privilege by indirect means are not to be tolerated.” (*Id.* at p. 1537 (citing *Sav-On Drugs, Inc. v.*
14 *Superior Court, supra*, 15 Cal.3d at p. 7.) Thus, the *King* court held that the tax return privilege
15 applies to administrative proceedings:

16 The requirement of providing copies of tax returns in an
17 administrative proceeding is as much an indirect method of
18 obtaining personal tax information as is the attempt to seek copies
19 of returns for discovery purposes. Full disclosure in the preparation
20 of tax returns would not be encouraged by a rule limiting
disclosure of returns to certain kinds of judicial, but not
administrative, proceedings, and would only undermine the policy
behind section 19282. [*Ibid.*]

21 In other words, the privilege against the disclosure of tax returns applies in this administrative
22 adjudication by the Board against Fahey. The instant Motion To Compel concedes that point.

23 **B. The Motion Should Be Denied Because, Contrary To The Prosecution Team’s**
24 **Argument, Fahey’s Tax Returns Are Unnecessary In This Proceeding.**

25 The Prosecution Team argues that “[f]inancial benefit is not a required consideration in
26 the amount of liability for illegal diversion and use of water,” but “[n]evertheless, it has been the
27 experience of the Prosecution Team that the Hearing Officers often want to know how much a
28 person benefitted from the illegal diversion and use of water.” (Motion, at 5.) The Prosecution

1 Team further argues that “[t]he tax returns will show he profited and how much he profited.”
2 (Motion, at 5.) However, there are at least four (4) errors in those arguments.

3 First, the Prosecution Team’s argument concedes that “financial benefit” is not a
4 necessary element of the Board’s enforcement action against Fahey. For that reason, alone,
5 Fahey’s tax returns are unnecessary. Even the Prosecution Team admits that “public policy
6 prevents unnecessary public disclosure” of tax returns. (See Motion, p. 4 (citing *Premium Service*
7 *Corp. v. Sperry & Hutchinson Co.* (9th Cir. 1975) 511 F.2d 225, 229 (emphasis in original).)

8 Second, the Prosecution Team’s argument has no foundation. Nowhere in the declaration
9 of Andrew Tauriainen (which is cited as support for the above argument) is there any evidence
10 that “the Hearing Officers often want to know how much a person benefitted from the illegal
11 diversion and use of water.”

12 Third, the Prosecution Team’s argument appears to be that the Board’s requesting tax
13 returns is somewhat routine in these adjudication matters. If that is true, then that fact alone is
14 grounds to deny the pending Motion to Compel pursuant to the tax return privilege. The courts
15 have made it clear that “[r]outinely forcing a taxpayer to produce a copy of his or her tax returns
16 in litigation would effectively defeat the legislative purpose.” (*Fortunato v. Superior Court*
17 (2003) 114 Cal.App.4th 475, 482 (citing *Webb v. Standard Oil, supra*, 49 Cal.2d at p. 513).)
18 Again, that prohibition against routine disclosure of tax returns also applies to adjudications such
19 as the present matter. (See *King v. Mobile Home Rent Review Board, supra*, 216 Cal. App. 3d at
20 p. 1537.)

21 Fourth, the Prosecution Team’s argument is based on sheer speculation as to whether or
22 not the tax returns “will show that Fahey profited and how much he profited.”

23 Accordingly, the tax returns are unnecessary in this proceeding, and so the tax return
24 privilege applies here.

25 **C. The Motion Should Be Denied Because, Contrary To The Prosecution Team’s**
26 **Argument, Fahey’s Tax Returns Are Not Warranted By Any Inability To Pay**
27 **Defense.**

28 Fahey’s counsel stated to the Prosecution Team that “Mr. Fahey does not elect to waive
any defenses at this juncture.” (Email from Bart Barringer to Andrew Tauriainen, dated

1 November 5, 2015, at 1:31 p.m. (Attachment 5 to the Declaration of Andrew Tauriainen).) From
2 that statement, the Prosecution Team draws the conclusion that Fahey “implied he would retain
3 the right to raise that [inability to pay] defense, as well as tax returns as evidence to support such
4 a defense” (Motion, at 3.) In other words, the Prosecution Team’s argument is based on its
5 own suspicions, implications and speculation as to what Fahey will attempt to do with the tax
6 returns in the future of this proceeding. Thus, the Prosecution Team’s argument that Fahey’s
7 ability to pay is an “important” issue in this matter (Motion, at 5) is unfounded and incorrect.

8 Furthermore, even if Fahey did assert an inability to pay defense, that does not warrant
9 disclosure of Fahey’s tax returns. Courts have pointed out that the issue of ability to pay does
10 not, by itself, lead to throwing aside the statutory privilege against the disclosure of tax returns.
11 That issue was addressed in *King v. Mobile Home Rent Review Board, supra*, where the Court of
12 Appeal provided the following analysis in an analogous administrative matter:

13 Appellant's argument, that disclosure of respondent,s tax return is
14 permissible because he waived the privilege of confidentiality by
15 voluntarily submitting a hardship application, has no merit. As
16 respondent notes, the rent control ordinance does not compel tax
17 return information. Such requirement is merely an informal
18 administrative policy established after the ordinance was enacted.
19 Moreover, appellant has not shown that verification of
20 respondent’s application will be impossible without the
21 information contained in his returns. (Citation.) Consequently,
22 respondent’s attempt to file a rent increase application does not
23 signify his implied consent to have appellant review his tax
24 returns. [*Id.* at p. 1538.]

25 Similarly in this matter, there are numerous other ways in which Fahey’s ability to pay
26 could be shown without disclosure of Fahey’s tax returns (even if that were an issue). Like the
27 agency in *King*, the Prosecution Team here appears to wrongfully rely on some commonplace
28 practice in connection with an inability to pay defense (“often submit tax records,” Motion, at 5)
as somehow being evidence of either necessity for Fahey’s tax returns, or implied consent of their
disclosure merely by raising that defense. That logic is flawed, as the *King* court demonstrated.

In short, the Prosecution Team has failed to demonstrate the requisite necessity for an
order mandating the disclosure of Fahey’s tax returns, even if Fahey has not yet waived his right
to assert an inability to pay defense.

1 **D. The Motion Should Be Denied Because The Prosecution Team Has Failed To**
2 **Establish That Any Of The Exceptions To The Tax Return Privilege Apply**
3 **Here.**

4 The Prosecution Team appears to argue in its Motion To Compel that courts recognize the
5 tax return privilege only when “no rational purpose” would be served by requiring disclosure.
6 (Motion, at 5.) That is not the correct legal standard. As discussed below, the Motion To Compel
7 fails to meet the recognized exceptions to the tax return privilege.

8 Because the statutory tax return privilege is not absolute, it will not be upheld when (1)
9 the circumstances indicate an intentional waiver of the privilege; (2) the gravamen of the lawsuit
10 is inconsistent with the privilege; or (3) a public policy greater than that of the confidentiality of
11 tax returns is involved. (*Schnabel v. Superior Court, supra*, 5 Cal. 4th at p. 721.) This latter
12 exception is narrow and applies only "when warranted by a legislatively declared public policy."
13 (*Ibid.*) In its Motion To Compel, the Prosecution Team has completely failed to establish that any
14 of these narrow exceptions to the privilege apply in this case. That is evident for the following
15 three (3) reasons.

16 First, the Prosecution Team has failed to establish, and cannot establish, that the
17 circumstances of this matter indicate an intentional waiver by Fahey of the privilege. There are
18 no facts presented in the Motion To Compel that indicate such an intentional waiver by Fahey.
19 The Prosecution Team’s argument appears to be based solely on the speculation that unnamed
20 parties who are subject to administrative enforcement actions “also often submit tax records as
21 part of an inability to pay defense.” Such prior experiences are irrelevant here. Unlike the other
22 prior experiences referenced by the Prosecution Team in its motion, Fahey has not voluntarily
23 submitted his tax returns in this matter, and Fahey has not articulated an inability to pay defense.
24 Furthermore, as discussed above, even raising an inability to pay defense is not an intentional
25 waiver by Fahey of the tax return privilege, because disclosing tax returns is not necessary to
26 proving an inability to pay an administrative penalty.

27 Second, the Prosecution Team has failed to establish, and cannot establish, that the
28 gravamen of the allegations against Fahey in the ACL, or his defenses to such allegations, are
inconsistent with the privilege. There is nothing in the gravamen of the allegations against Fahey

1 alleged in the ACL that is inconsistent with the privilege. To the contrary, the Prosecution Team
2 has admitted: “Financial benefit is not a required consideration in the amount of liability for
3 illegal diversion and use of water. (Water Code § 1055.3.)” (Motion, at 5.) Furthermore, the
4 Prosecution Team has completely failed to establish that Fahey’s defenses in this proceeding are
5 inconsistent with the privilege. The Prosecution Team’s reference to Fahey’s “net profit” as
6 being an “important issue on Fahey’s ability to pay” (Motion, at 5) is a red herring, because the
7 Prosecution Team has not established that Fahey’s inability to pay is at issue in this matter. But
8 even if Fahey’s inability to pay is a defense in this case, as explained above, Fahey’s “net profit”
9 can be shown in ways other than tax returns. Thus, the Prosecution Team has failed to establish
10 that any of Fahey’s actual or even theoretical defenses in this administrative adjudication are
11 inconsistent with the tax return privilege.

12 Third, the Prosecution Team has failed to articulate, let alone establish, a legislatively
13 declared public policy in this particular administrative adjudication that is greater than that of the
14 confidentiality of Fahey’s tax returns. Failure to identify a legislatively declared public policy
15 warrants maintaining the confidentiality of the tax returns. (*See e.g., Deary v. Superior Court*
16 (2001) 87 Cal. App. 4th 1072, 1080-1081.)

17 Because the Prosecution Team has failed to establish any one of the three exceptions to
18 the statutory tax return privilege that are recognized by the courts, the instant Motion To Compel
19 should be denied in its entirety.

20 **E. The Motion To Compel Violates The Express Intent Of The Legislature To**
21 **Prevent Disclosure Of The Profits And Financial Condition Of A Defendant,**
22 **Unless A Prima Facie Showing Of Liability Has First Been Established.**

23 California courts and the Legislature are especially protective of the financial privacy of
24 parties in legal proceedings. That is why courts (and the Legislature) have established procedural
25 requirements that mandate that a party must make a prima facie showing of liability of the other
26 party before the other party is forced to disclose that other party’s financial information,
27 especially tax returns. For example, even where a defendant is accused of having committed
28 something as egregious as “malice, oppression, or fraud,” the courts require such preliminary
showing of liability before financial information can even be obtained for punitive damages.

1 purposes (which financial information is required to be shown by the plaintiff for such a claim).
2 Thus, Civil Code section 3295 “authorizes a court, for good cause, to issue a protective order at
3 the request of a defendant requiring a plaintiff seeking punitive damages to produce evidence of a
4 prima facie case for damages under Civil Code section 3294 prior to the introduction of evidence
5 of the financial condition of the defendant.” (*Cobb v. Superior Court* (1979) 99 Cal.App.3d 543,
6 550 & fn. 4. *See Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 67 [“Section 3295 was
7 enacted in 1979 to protect defendants from the premature disclosure of their financial condition
8 when punitive damages are sought.”]) Subdivision (d), of section 3295, provides:

9 The court shall, on application of any defendant, preclude the
10 admission of evidence of that defendant's profits or financial
11 condition until after the trier of fact returns a verdict for plaintiff
12 awarding actual damages and finds that a defendant is guilty of
13 malice, oppression, or fraud in accordance with Section 3294.
14 Evidence of profit and financial condition shall be admissible only
15 as to the defendant or defendants found to be liable to the plaintiff
16 and to be guilty of malice, oppression, or fraud. Evidence of profit
17 and financial condition shall be presented to the same trier of fact
18 that found for the plaintiff and found one or more defendants guilty
19 of malice, oppression, or fraud.

20 As for discovery prior to a trial on such a punitive damages claim, subdivision (c), of
21 section 3295, provides that “[n]o pretrial discovery” by the plaintiff shall be permitted with
22 respect to either “[t]he profits the defendant has gained by virtue of the wrongful course of
23 conduct of the nature and type shown by the evidence,” or “[t]he financial condition of the
24 defendant,” unless the court enters an order permitting such discovery. That subdivision explains
25 that such an order can only be issue under the following strict procedural requirements:

26 [T]he plaintiff may subpoena documents or witnesses to be
27 available at the trial for the purpose of establishing the profits or
28 financial condition, and the defendant may be required to identify
29 documents in the defendant's possession which are relevant and
30 admissible for that purpose and the witnesses employed by or
31 related to the defendant who would be most competent to testify to
32 those facts. Upon motion by the plaintiff supported by appropriate
33 affidavits and after a hearing, if the court deems a hearing to be
34 necessary, the court may at any time enter an order permitting the
35 discovery otherwise prohibited by this subdivision if the court
36 finds, on the basis of the supporting and opposing affidavits
37 presented, that the ***plaintiff has established that there is a
38 substantial probability that the plaintiff will prevail on the claim***
39 pursuant to Section 3294 [i.e., punitive damages based on malice,
40 oppression, or fraud.] Such order shall not be considered to be a

1 determination on the merits of the claim or any defense thereto and
2 shall not be given in evidence or referred to at the trial. [Bold and
emphasis added]

3 Thus, if a defendant who is alleged to have committed something as egregious as “malice,
4 oppression, or fraud” cannot be required to disclose “the profits the defendant has gained by
5 virtue of the wrongful course of conduct” or “the financial condition of the defendant” until after
6 the plaintiff has “established that there is a substantial probability that the plaintiff will prevail on
7 the claim” for punitive damages, then certainly a target of the Board in a formal adjudication such
8 as the present case should not have to disclose such financial information either, unless the
9 Prosecution Team makes a similar showing. That is true even if “financial benefit” was a
10 required consideration in the amount of liability for illegal diversion and use of water, which the
11 Prosecution Team admits in its Motion to Compel that it is not.

12 In its Motion to Compel, the Prosecution Team has made no such showing like that
13 required under section 3495. Thus, the Motion to Compel should be denied in its entirety because
14 it is an inappropriate attempt to circumvent the Legislature’s unequivocal policy of protecting
15 such confidential financial information in a legal proceeding.

16 If the Prosecution Team argues that this administrative proceeding does not have any rules
17 or policies mandating such a preliminary procedure like that in section 3295, then the Hearing
18 Officers should institute such a procedure in this case in order to adhere to not only the
19 unequivocal public policy established by the Legislature in section 3295, but also the clear
20 statutory privilege recognized by the courts regarding tax returns.

21 As to the argument by the Prosecution Team that there is no separate penalty phase in this
22 administrative hearing in which such financial information is separately considered, the Hearing
23 Officers should bifurcate the hearing in order to comply with the Legislature’s clear intent
24 expressed in subdivision (d), of section 3295. There is nothing inherently unique about the
25 instant administrative proceeding that warrants an exemption from that strong public policy to
26 protect the financial information of defendants. The Prosecution Team should not be permitted to
27 circumvent that legislative intent and strong public policy by its Motion to Compel.

28

1 **IV. CONCLUSION.**

2 The Motion To Compel should be denied as to the water sales invoices (Item 7 of the
3 Subpoena) because the requested disclosure of per-unit pricing information would wrongly reveal
4 Fahey's proprietary trade secrets; because disclosure of the requested trade secret information
5 would result in harm to Fahey's business; because such information is unnecessary in this
6 proceeding in light of the information that Fahey has already provided in response to the
7 subpoena; and because the California Department of Public Health has already determined that
8 the information is exempt from public disclosure.

9 As an alternative potential resolution of this dispute over the unit price per gallon of
10 water, Fahey is willing to provide the non-redacted invoices to the Hearing Officers so that they
11 could conduct an *in camera* review of the invoices in order to confirm that the information
12 already provided by Fahey is correct, *provided that* the Board agree that the invoices are sealed,
13 are not made public and are only provided for the sole purpose of that *in camera* review to
14 confirm the information already provided.

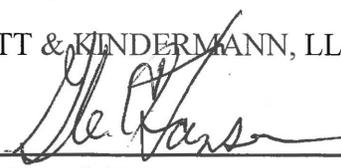
15 The Motion To Compel should be denied as to the tax returns (Items 8 and 9 of the
16 Subpoena) because the Prosecution Team has not established that any recognized exception to the
17 privilege against the disclosure of income tax returns applies in this matter. Nor has the
18 Prosecution Team made any preliminary showing that there is a substantial probability that the
19 Board will prevail on its claim against Fahey, as required under the legislative public policy
20 articulated in Civil Code section 3295.

21
22 Dated: December 8, 2015

Respectfully submitted,

23 ABBOTT & KINDERMANN, LLP

24
25 By: _____


26 Glen C. Hansen
27 Attorneys for G. Scott Fahey and
28 Sugar Pine Spring Water, LP

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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 December 8, 2015, I served the foregoing document(s) described as:

- 1. **OPPOSITION OF G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO SUBPOENA DUCES TECUM**
- 2. **DECLARATION OF GLEN HANSEN IN SUPPORT OF OPPOSITION TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO SUBPOENA DUCES TECUM**
- 3. **DECLARATION OF SCOTT FAHEY IN SUPPORT OF OPPOSITION TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO SUBPOENA DUCES TECUM**

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 December 8, 2015, before 5:00 p.m. The transmission was reported as complete and without error. [CRC 2.256 (a)(4), 2.260].

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on December 8, 2015, at Sacramento, California.



Lisa Haddix

1 **SERVICE LIST**

2
3 Division of Water Rights
4 State Water Resources Control Board
5 Attention: Ernest Mona
6 PO Box 2000
7 Sacramento, CA 95812-2000

Via email and U.S. Mail

8 Kenneth P. Petruzzelli
9 1001 I St., 16th Floor
10 Sacramento, CA 95814
11 Telephone: (916) 319-8577
12 Facsimile: (916) 341-5896
13 kenneth.petruzzelli@waterboards.ca.gov

Via email only

14 **DIVISION OF WATER RIGHTS**

Via email only

15 Prosecution Team
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