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11 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

12 **ADMINISTRATIVE HEARINGS OFFICE**

13 State Water Resources Control Board,
Division of Water Rights, Enforcement Branch,

14 Prosecution,
15 vs.

16 BlueTriton Brands, Inc.,

17 Respondent.
18
19
20

VV: INV 8217

**RESPONDENT BLUETRITON BRANDS,
INC. COMMENTS AND OBJECTIONS ON
ADMINISTRATIVE HEARINGS OFFICE
DRAFT PROPOSED ORDER**

1 Respondent BlueTriton Brands, Inc. (BTB) hereby respectfully submits the following
2 comments on and objections to the draft proposed order (DPO) of the State Water Resources
3 Control Board’s (Board) Administrative Hearings Office (AHO) dated April 21, 2023. The
4 AHO did not provide Respondent BTB reasonably sufficient time to review the DPO, the
5 authorities and testimony and evidence referenced therein, and the administrative record created
6 in these proceedings (totaling approximately 30,000 pages thus far). On April 25, 2023, BTB
7 filed a request for extension to May 19, 2023 to prepare and submit written comments and
8 objections. The AHO denied that request without explanation on April 27, 2023. As such, BTB
9 expressly reserves the right to, and will augment these comments and objections to the Board.

10 BTB objects to the DPO on the grounds that the DPO is inconsistent with law, is not
11 supported by the evidence, and is the result of irregular AHO proceedings and abuse of
12 discretion, resulting in an unfair hearing. Without limitation, the DPO and the AHO proceedings
13 conflict with or ignore applicable provisions of the Water Code, Board regulations, Chapters 4.5
14 and 5 of the California Administrative Procedures Act (commencing with Government Code
15 section 11400), the Bagley-Keene Act (Government Code sections 11120), the due process and
16 equal protection clauses of the United States and California Constitutions, and controlling
17 judicial precedents and decisions.

18 BTB further objects to the DPO on the grounds that the DPO relies on inadmissible
19 evidence and testimony; misstates and mischaracterizes testimony, evidence and legal
20 authorities; and omits reference to or ignores relevant, credible and undisputed testimony,
21 evidence and legal authorities. For example:

22 The DPO bases one finding on photographs that purport to show gullies, a 1901
23 topographic map that BTB objected to as hearsay, and an unsigned letter purportedly dated
24 October 1, 1930 that BTB also objected to as hearsay. The DPO also includes an unexplained
25 citation to the section in the DPO that summarizes the “Story of Stuff Witnesses’ Testimony,” to
26 which BTB lodged several objections, including that the witnesses identified as experts were not
27 qualified to provide the opinion testimony proffered, and the testimony summarized or submitted
28 hearsay documents for which the witnesses did not provide any foundation to establish the

1 authenticity of the documents or to avoid the hearsay rule. The DPO fails to address the
2 objections that BTB raised to this evidence in the course of the hearing and in response to the
3 Prosecution Team and other parties' citations to this inadmissible testimony and these documents
4 in their closing briefs.

5 The remainder of the DPO, including in particular the "background" detailed in Section
6 2.0, cites to documents and testimony submitted during the proceeding without any reference to
7 the objections to that evidence made by BTB in the course of the proceeding and following the
8 submission of the parties' closing briefs. Although the AHO overruled a number of the
9 objections made during the course of the proceeding, the AHO has not made any rulings in
10 response to the objections to the evidence cited in the parties' closing briefs.


11 BTB reiterates each of the evidentiary objections made during the hearing and following
12 the hearing in response to evidence cited in the closing briefs. This includes but is not limited to
13 BTB's objections to: any public comments, including documents and information, submitted
14 after the February 9, 2018 public comment deadline (BTB's January 7, 2022 Motion in Limine
15 to Clarify the Scope of the Record); documents and information introduced by interested parties,
16 the Prosecution Team and the AHO after the issuance of the draft Cease and Desist Order on
17 April 23, 2021 (*id.*); opinion testimony and exhibits offered by persons not properly qualified to
18 testify as "experts" (*id.*); improper rebuttal testimony and exhibits (BTB's March 18, 2022
19 Motion in Limine to Strike and/or Exclude the Prosecution Team's Proposed Rebuttal Testimony
20 and Exhibits); improper sur-rebuttal testimony and exhibits (BTB's April 24, 2022 Motion in
21 Limine to Strike and/or Exclude Proposed Sur-Rebuttal Testimony and Exhibits); and documents
22 submitted without any supporting testimony regarding the source or relevance of such
23 documents. BTB also incorporates by this reference as if fully set forth herein, the objections
24 submitted in response to evidence cited in each of the parties' closing briefs, as well as the
25 attached **Exhibit A**, which lists several (but not all) of the unresolved objections to testimony
26 and documents cited in the DPO. BTB also objects to evidence the AHO staff identified after the
27 close of the hearing and about which no testimony was offered and BTB was provided no
28 opportunity to rebut (see, e.g, DPO at p. 21, fn. 19.)

1 BTB also expressly reserves the right to provide further comments and objections to any
2 legal analyses and factual findings made in the DPO and to any revisions to the DPO made by
3 the AHO or the Board.

4 DATE: May 8, 2023

Respectfully submitted,

ELLISON SCHNEIDER HARRIS & DONLAN LLP

6 By  _____

7 Robert E. Donlan
8 Christopher M. Sanders
9 Shawnda M. Grady
Attorneys for Respondent BlueTriton Brands, Inc.

EXHIBIT A

EVIDENTIARY OBJECTIONS TO PROPOSED DRAFT ORDER (DPO)

Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
SOS-29		Doughty Decl FINAL SIGNED	44	Improper foundation testimony; Documents submitted without any supporting testimony regarding relevance.
SOS-30		Frye Decl FINAL SIGNED	44	Improper expert testimony; Recitation of hearsay
SOS-31		Loe Decl FINAL SIGNED	45	Improper expert testimony; Recitation of hearsay
SOS-48		1930-1931 Rowe Field Notes East Twin Creek describing the historic conditions before water was diverted	13	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
SOS-49	FR-69	Rowe Map of Strawberry Canyon	13, 15	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
SOS-51	SOS-44 FR-61	Letter from Rowe to Lippincott describing the springs, creek, and trees	14, 17, 39, 65	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
SOS-53		Unsigned October 1, 1930 Letter Rowe to Lippincott	63	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.
SOS-55	FR-83	Various letters to and from Rowe regarding the water monitoring project	13	Hearsay: No evidence was offered to establish the document is subject to the ancient writings or any other exception to the hearsay rule.

EVIDENTIARY OBJECTIONS TO PROPOSED DRAFT ORDER (DPO)

Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
SOS-280		Sur-Rebuttal Testimony of Amanda Frye	45	Improper expert testimony; Recitation of hearsay
SOS-282		Sur-Rebuttal Testimony of Steve Loe	45	Improper expert testimony; Recitation of hearsay
SOS-287		Sur-rebuttal Declaration of Rachel S. Doughty	45	Improper foundation testimony; Documents submitted without any supporting testimony regarding relevance
SOS-288		Gregory Allord Sur-Sur Rebuttal Testimony	45, 46	Recitation of hearsay without applicable exception; Improper expert testimony.
SOS-295		Gregory Allord Sur-Sur-Rebuttal Summary Slides	46	Recitation of hearsay without applicable exception; Improper expert testimony; Beyond the scope of written testimony.
CBD-1		Testimony of Andrew Zdon	46	Hearsay: CBD-1 p. 3 recites and cites to several other documents without pin cites, including SOS_042, CBD-4, PT-43-45, and “data collected by W.P. Rowe for the truth of the matter asserted.” These cited documents contain hearsay not subject to the ancient writings, adoptive or authorized admissions, or any other exception. An in-court summary of out of court statements does not change the nature of the hearsay.
FR-151		Updated Amanda Frye Testimony and Authentication of exhibits for AHO BTB hearing copy	4	Recitation of hearsay without applicable exception; Improper expert testimony.
Loe-1		Written declaration	47	Recitation of hearsay without applicable exception; Improper expert testimony.

EVIDENTIARY OBJECTIONS TO PROPOSED DRAFT ORDER (DPO)

Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
Loe-2		Rebuttal Testimony	47	Recitation of hearsay without applicable exception; Improper expert testimony.
Bialecki-1		Spring 4, untapped	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-2		Headwater Spring	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-3		Boring complex 1, 1a, 8	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-4		Video of FS water right	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-5		FS water right	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-6		Untapped Spring 4 approximately 80 ft below the borehole complex 1, 1a & 8	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-7		Strawberry Creek headwater spring	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-8		Strawberry Creek headwater spring cavern entrance and rocks at the base of the headwater spring	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.

EVIDENTIARY OBJECTIONS TO PROPOSED DRAFT ORDER (DPO)

Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
Bialecki-9		Spring Tunnel 2 residual flow pipe approximately thirty feet from the tunnel concrete vault	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-10		Strawberry Creek headwater spring seep and installed valving for monitoring purposes	47	Hearsay; lacks proper foundation regarding source and relevance of information provided.
Bialecki-11		2021-06-03 Ltr to AHO	47	Hearsay; not relevant.
Serrano-1		Asset purchase agreement template	47	Hearsay; not relevant.
Serrano-3		Prior appropriation	47	Hearsay; not relevant.
Serrano-4		Appropriative rights	47	Hearsay; not relevant.
Serrano-5		Water Rights: statement of water diversion and use program	47	Hearsay; not relevant.
Serrano-6		Fully appropriated stream systems	47	Hearsay; not relevant.
Serrano-7		Description of other exhibits	47	Hearsay; not relevant.
FR-153		ETW. (Noted circa 1965 stamped by library June 18, 1978) Development of Arrowhead Springs by ETW. (Referenced in FR 155 as 10 page report by Arrowhead Springs employee ETW	17	Hearsay

EVIDENTIARY OBJECTIONS TO PROPOSED DRAFT ORDER (DPO)

Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
SOS-281		Amanda Frye Sur-Rebuttal Summary Slides	19	Hearsay
PT-312		Rebuttal Testimony - Tomas Eggers	38	<p>Improper rebuttal testimony: Offered to supplement, not rebut.</p> <p>Hearsay: Evidence recited, including SOS-91 and PT-314, are hearsay. No evidence was offered to establish the document is being “offered to prove facts of general notoriety and interest” (Evid. Code § 1341.)</p>
PT-313		Rebuttal Testimony - Natalie Stork (citation not identified as <i>Revised</i> PT-313)	38	<p>Improper rebuttal testimony: Offered to supplement, not rebut.</p> <p>Hearsay: Evidence recited, including SOS-91 and PT-314, are hearsay. No evidence was offered to establish the document is being “offered to prove facts of general notoriety and interest” (Evid. Code § 1341) or to support any other exception to the hearsay rule.</p>
PT-314		1905 USGS Hydrologic Map (citation not identified as <i>Revised</i> PT-314)	38, 43, 46, 62	Hearsay: No evidence was offered to establish the document is being “offered to prove facts of general notoriety and interest” (Evid. Code § 1341) or to support any other exception to the hearsay rule.

EVIDENTIARY OBJECTIONS TO PROPOSED DRAFT ORDER (DPO)

Document	Add'l Ex. Nos.	Description	Page No. in DPO	Objection(s)
PT-316		Written Sur-rebuttal testimony Tomas Eggers	39	Hearsay: Testimony recites and summarizes hearsay contained in other documents, including SOS 49, 51, PT 320. No evidence was offered to demonstrate a basis for the application of the ancient writings or any other exception to the hearsay rule.

1 **PROOF OF SERVICE**

2 I, Patty Slomski, declare that:

3 I am employed in the County of Sacramento, State of California. I am over the age of eighteen
4 and am not a party to the within action. My business address is ELLISON SCHNEIDER
5 HARRIS & DONLAN LLP; 2600 Capitol Avenue, Suite 400; Sacramento, California, 95816.

6 On May 8, 2023, I sent the foregoing document described as:

7 **RESPONDENT BLUETRITON BRANDS, INC. COMMENTS AND OBJECTIONS ON**
8 **ADMINISTRATIVE HEARINGS OFFICE DRAFT PROPOSED ORDER**

9 **VIA ELECTRONIC TRANSMISSION** to the following email address:

10 AdminHrgOffice@Waterboards.ca.gov

11 and to the persons listed on the attached service list.

12
13 I declare under penalty of perjury under the laws of the State of California the foregoing is true
14 and correct and that this declaration was executed on May 8, 2023 at Sacramento, California.

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