JOSEPH W. COTCHETT (SBN 036324)
jcotchett@cpmlegal.com
NIALL P. McCARTHY (SBN 160175)
nmccarthy@cpmlegal.com
ERIC J. BUESCHER (SBN 271323)
ebuescher@cpmlegal.com
MALLORY A. BARR (SBN 317231)
mbarr@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

Liaison Counsel for Plaintiffs

JAMES V. NOLAN (SBN 84239)
jvnolan@yololaw.com
DAVID W. JANES (SBN 71334)
dwjanes@yololaw.com
GARDNER, JANES, NAKKEN, HUGO & NOLAN
429 First Street
Woodland, CA 95695
Telephone: (530) 662-7367
Facsimile: (530) 666-9116

Counsel for Plaintiffs City of Oroville; Akers Ranch, et.al.; JEM Farms LP, et al.; and Mary's Gone Crackers, Inc., et al.

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

Coordinated Proceeding
Special Title (Rule 3.550)

OROVILLE DAM CASES

JCCP NO. 4974

Assigned to: James E. McFetridge, Dept. 30

DECLARATION OF JOSEPH W. COTCHETT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STRIKE

Date: **February 15, 2019**
Time: **10:00 a.m.**

I, **JOSEPH W. COTCHETT**, hereby declare as follows:

1. I am a partner at the law firm of Cotchett, Pitre & McCarthy, LLP, one of the counsel for Plaintiffs in the above-captioned case. I have personal knowledge of the matters set forth below and, if called as a witness, I could and would testify competently to the statements herein.

2. On **August 2, 2017**, we filed the first claim for damages resulting from the Oroville Dam spillway collapse in February, 2017.

3. On **October 23, 2017**, I sent a document preservation letter to **Spencer Kenner, Chief Counsel** for Defendant California Department of Water Resources ("DWR"), advising him that we had heard statement of DWR's directive to its employees "that any notes, files, memos, etc. regarding the Oroville Dam crisis, or maintenance upon same, be destroyed."

4. Following that letter, several attempts were made to reach Mr. Kenner at DWR's Sacramento office regarding this request.

5. In the letter, I asked for a notification regarding the documents requested. We attempted to reach Mr. Kenner by telephone several times, and never received the courtesy of a response from Mr. Kenner. A true and correct copy of my October 23, 2017 letter to Mr. Kenner is attached hereto as **Exhibit A**.

6. As a result of Mr. Kenner's total lack of response to serious allegations, my firm noticed the deposition of DWR's person most qualified ("PMQ") to testify on the following topics:

   a. DWR's policies or procedures regarding the preservation and destruction of documents and electronically stored information; and

   b. DWR's dissemination of information concerning the destruction of or duty to preserve documents.

7. On **May 15, 2018**, DWR produced two witnesses to testify on the aforementioned topics: Chief Information Security Officer **Richard Harmonson** and Chief Information Officer **Tim Garza**. Both witnesses testified that they had **NEVER SEEN** a copy of my October 23, 2017 letter to Mr. Kenner, nor did Mr. Kenner ever contact them or request that they investigate the serious allegation brought to light in my letter. (**Harmonson, p. 66; Garza, pp. 45, 48**).

8. A true and correct copy of relevant excerpts of DWR's PMQ Richard Harmonson's May 15, 2018 deposition transcript is attached hereto as **Exhibit B**.

9. At deposition, Mr. Harmonson was asked whether he had ever before seen the October 23, 2017 preservation letter. Mr. Harmonson responded he had not (**Harmonson, p. 66**).

Q. I'll represent to you that Exhibit 7 is a letter from my law office, Cotchett, Pitre & McCarthy, to Spencer Kenner, Chief Counsel for DWR, dated October 23rd, 2017. Have you ever seen this document before?

A. No, I have not.

10. A true and correct copy of relevant excerpts of DWR's PMQ Tim Garza's May 15, 2018 deposition transcript is attached hereto as **Exhibit C**.

11. At deposition, Mr. Garza was asked whether he had ever before seen the October 23, 2017 preservation letter. Mr. Garza responded he had not (**Garza, p. 48**).

Q. I'm looking at Exhibit 7. It's the October 23rd, 2017, letter from Mr. Shapiro's firm to Mr. Kenner, Chief Counsel for the California Department of Water Resources. You saw that letter?

MR. BONA: He's got it in front of him.

BY MR. HARRIS:

Q. Was that the first time you saw that letter today, here at the deposition?

A. Yes.

12. Mr. Garza was further questioned regarding his knowledge of a DWR memo directing that any notes, files, memos, etc. regarding the Oroville Dam crisis or related maintenance be destroyed. Mr. Garza claims to have no familiarity with such a memorandum (**Garza, p. 45**).

Q. I'd like to show you a document that was marked as Exhibit 7 previously. Exhibit 7 is an October 23rd, 2017, letter from my law office to the Chief Counsel of the Department of Water Resources. The letter says that, quote, "Rumors have surfaced to the effect that a memoranda or other form of directive has issued from DWR directing that any notes, files, memo, etc. regarding the Oroville Dam crisis or maintenance upon same be destroyed," end quote. Are you familiar with such a Memorandum?

A. No.

Q. Are you familiar with any other directive which might have directed DWR employees to destroy notes or files relating to the Oroville Dam?

A. No.

///

13. As shown above, neither Mr. Harmonson nor Mr. Garza, DWR's elected PMQs, were never shown my October 23, 2017 preservation letter; nor did they have knowledge relating to Mr. Kenner's inquiry therein.

14. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 31st day of January 2019 at Burlingame, California.

JOSEPH W. COTCHETT

EXHIBIT A

LAW OFFICES
COTCHETT, PITRE & McCARTHY, LLP
LOS ANGELES
SAN FRANCISCO AIRPORT OFFICE CENTER
840 MALCOLM ROAD
BURLINGAME, CALIFORNIA 94010
TELEPHONE (650) 697-6000
FAX (650) 697-0577
NEW YORK

October 23, 2017

Spencer Kenner, Chief Counsel
California Department of Water Resources
P.O. Box 942836, Room 1104
Sacramento, CA 94236-0001

Re: OROVILLE DAM CRISIS / SPILLWAY FAILURE
FEBRUARY 2017

Dear Mr. Kenner,

We represent various individuals who have filed claims pursuant to Gov. Code § 810, *et seq.* involving the above spill. Rumors have surfaced to the effect that a memorandum/memoranda or other form of directive has issued from DWR, directing that any notes, files, memos, etc. regarding the Oroville Dam crisis, or maintenance upon same, be destroyed. While this sounds morally reprehensible, it may be accurate, and we thus call this to your attention. We request that absolutely nothing be destroyed or tampered with, which in any way concerns the design, construction of, inspection, maintenance or repairs upon Oroville Dam, or the Oroville Dam crisis of February, 2017. If such a memo or communication was sent to staff, we request a copy of any such memorandum/memoranda that may have been issued.

We hereby notify the DWR and its contractors and agents, of our request that they not destroy, conceal, or alter any information contained not only in documentary, photographic, videographic, or other tangible form, including all documentary or electronic memorializations sent or received through any form of Social Media, but also any such information stored in electronic or digital form or generated by your computer systems or electronic devices. This information may be relevant to the above matter and be unavailable from any other source. As you may know, such electronic information can easily be inadvertently destroyed, and the failure to take reasonable measures to preserve it can result in serious consequences. *See, e.g.*, *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal. 4th 1. We request that you immediately provide a copy of this Preservation Letter to each contractor with whom DWR has contracted, communicated or engaged, concerning any aspect of the Oroville Dam Project, from 2005 to date, inclusive.

The electronic data and the storage devices in which documents are kept that DWR is obligated to maintain and preserve during the pendency of the investigation of the dam failure include all of the following data and devices, which are in the possession of DWR, including its contractors or agents:

1. Electronic files, including deleted files and file fragments, stored in machine-readable format on magnetic, optical, or other storage media, including hard drives or floppy disks in all DWR instruments, or contractors employed by DWR, desktop computers, laptop computers, home personal computers, and the backup media used for each;

2. E-mail, both sent and received, internally or externally;

3. Telephone files and logs such as voicemail and universal mobile telecommunications system (UMTS) data;

4. Word processing files, including drafts and revisions;

5. Spreadsheets, including drafts and revisions;

6. Databases;

7. Electronic files in portable storage devices, such as floppy disks, compact disks, digital video disks, ZIP drives, thumb drives, or pen drives;

8. Computer-aided design files;

9. Presentation data or slide shows, such as PowerPoint;

10. Graphs, charts, and other data produced by project management software;

11. Data generated by calendaring, task management, and personal information management software, such as Microsoft Outlook;

12. Data created with the use of personal data assistants, such as PalmPilot;

13. Data created with the use of document management software;

14. Data created with the use of paper and electronic mail logging and routing software;

15. Internet and web-browser-generated history files, caches, and "cookies" files generated at the workstation of each employee, contractor or agent of DWR's employ and on any and all backup storage media;

16. Logs of network use by DWR employees, contractors or agents, whether kept in paper or electronic format;

17. Copies of DWR's backup tapes and the software necessary to reconstruct the data on those tapes on each and every personal computer or workstation and network server in your client's control and custody;

18. Electronic information in copiers, fax machines, and printers.

We formally request that you consult with DWR's Supervisors and notify us if there are any questions about our inquiry regarding the documents requested in the first paragraph of this letter.

Very truly yours,

COTCHETT, PITRE & McCARTHY

BY _____
JOSEPH W. COTCHETT
jcotchett@cpmlegal.com

GARDNER, JANES, NAKKEN,
HUGO & NOLAN

BY _____
DAVID W. JANES
dwjanes@yblolaw.com

cc: **Grant Davis, Director**
California Department of Water Resources
P.O. Box 942836, Room 1115-1
Sacramento, CA 942356-0001

Niall P. McCarthy
James V. Nolan

EXHIBIT B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF BUTTE

CITY OF OROVILLE,

Plaintiff(s),

vs. CASE NO. 18CV00163

CALIFORNIA DEPARTMENT OF
WATER RESOURCES, et al.,,

Defendant(s).

AND RELATED ACTIONS.

DEPOSITION OF CALIFORNIA DEPARTMENT OF WATER RESOURCES
PERSON MOST QUALIFIED
RICHARD HARMONSON
Sacramento, California
Tuesday, May 15, 2018
Volume I

Reported by:
Carrie Pederson
CSR No. 4373, RMR, CRR
Job No. 2911102-A
PAGES 1 - 77

right?

A. Yes.

Q. And what was that program?

A. Microsoft Skype.

Q. Do you know approximately what percentage of employees use Microsoft Skype?

A. No.

Q. Greater than 50 percent?

A. I have no idea.

Q. I'm going to mark this as Exhibit 7.

(Exhibit 7 marked)

BY MR. SHAPIRO:

Q. I'll represent to you that Exhibit 7 is a letter from my law office, Cotchett, Pitre & McCarthy, to Spencer Kenner, Chief Counsel for DWR, dated October 23rd, 2017. Have you ever seen this document before?

A. No, I have not.

Q. If you would, just read the first two sentences of the document. I guess I will read them out loud. It says "Dear Mr. Kenner, we represent various individuals who have filed claims pursuant to Government Code Section 810, et seq. involving the above spill. Rumors have surfaced to the effect that a memoranda or other form of directive has issued

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [ ] was [ ] was not requested.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: May 29, 2018

CARRIE PEDERSON

CSR No. 4373

EXHIBIT C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF BUTTE

CITY OF OROVILLE,

Plaintiff(s),

vs. CASE NO. 18CV00163

CALIFORNIA DEPARTMENT OF WATER RESOURCES, et al.,

Defendant(s).

AND RELATED ACTIONS.

DEPOSITION OF CALIFORNIA DEPARTMENT OF WATER RESOURCES

PERSON MOST QUALIFIED

TIM GARZA

Sacramento, California

Tuesday, May 15, 2018

Volume I

Reported by:
Carrie Pederson
CSR No. 4373, RMR, CRR
Job No. 2911102-B
PAGES 1 - 57

BY MR. SHAPIRO:

Q. How much of the data were you able to recover?

A. Basically we lost about 20 percent of our data.

Q. Twenty percent of your entire data or 20 percent of the data that was lost?

A. Twenty percent of the data that was lost.

Q. I'd like to show you a document that was marked as Exhibit 7 previously. Exhibit 7 is an October 23rd, 2017, letter from my law office to the Chief Counsel of the Department of Water Resources. The letter says that, quote, "Rumors have surfaced to the effect that a memoranda or other form of directive has issued from DWR directing that any notes, files, memo, etc. regarding the Oroville Dam crisis or maintenance upon same be destroyed," end quote. Are you familiar with such a Memorandum?

A. No.

Q. Are you familiar with any other directive which might have directed DWR employees to destroy notes or files relating to the Oroville Dam?

A. No.

Q. Would such a directive be consistent with DWR's document management policies?

Q. Any other written documents that you can think of reflecting policies and procedures as to retention of documents?

A. No.

MR. SHAPIRO: I'm going to open it up to co-counsel.

EXAMINATION

BY MR. HARRIS:

Q. I've got just maybe four or five minutes depending upon your answers.

A. Okay.

Q. I'm looking at Exhibit 7. It's the October 23rd, 2017, letter from Mr. Shapiro's firm to Mr. Kenner, Chief Counsel for the California Department of Water Resources. You saw that letter?

MR. BONA: He's got it in front of him.

BY MR. HARRIS:

Q. Was that the first time you saw that letter today, here at the deposition?

A. Yes.

Q. Have you had a chance to read it at all?

A. No.

Q. Could you go ahead and take your time, read the first paragraph for me, and once you're done, just let me know.

MR. BONA: Just the first paragraph?

MR. HARRIS: Yeah, just the first paragraph.

MR. BONA: All right.

(Pause)

THE WITNESS: Okay.

BY MR. HARRIS:

Q. You would agree with me that's a serious charge being leveled against the DWR? Would you agree with that?

A. Yes.

Q. Mr. Kenner, Spencer Kenner, do you work with Mr. Kenner with regard to document retention or preservation?

A. No.

Q. Have you ever worked with him?

A. We work through the legal office when they instruct us which litigation holds to put on which accounts.

Q. Did Mr. Kenner ever come to you or anybody else that you're aware of in DWR to see if they could locate or find any such memo to your knowledge?

A. Not to my knowledge.

Q. Do you know what, if any, investigation was done by the DWR to find out whether or not there were either documents being destroyed or a memo being

distributed requesting that documents be destroyed regarding the Oroville Dam spill?

A. I have no knowledge of any memo.

Q. Have you ever heard of this rumor?

A. No, I have not.

Q. Do you know who Mr. Kenner would go to to investigate something like this?

A. We do receive a request from the legal office to look for particular documents by name on our file system occasionally.

Q. Would Mr. Kenner have the ability or his office have the ability to do this, search for these documents without going to you or someone else in IT?

A. Not enterprise-wide.

Q. Do you have any knowledge as to why Mr. Kenner has not come to you at the present time to have you search to see if this memo exists?

A. He has not came directly to me, but I have no knowledge if he actually addressed anybody else within my shop such as my information security officer.

Q. And who would that be?

A. Richard Harmonson.

Q. Mr. Harmonson was here earlier, and he testified to having no knowledge of this either. Who

else, if anybody, would Mr. Kenner go to to find out if this was a viable rumor or not?

A. Those would be the two common areas, the CIO or the ISO, that would be addressed.

Q. So as far as we're aware here today, he's never come to you, and according to Mr. Harmonson, he's never gone to him. Do you know if there's been anyone else he would go to?

A. Not to my knowledge.

Q. And just a couple questions on the issue of compliance with regard to the employees complying with the retention protocols you have in place.

One of the questions you were asked was whether or not you were aware of any inadvertent loss of documents. In your career at DWR, have you ever become aware of any purposeful destruction of documents by the employees?

A. Yes. I mean people do delete a document if it's no longer required, so I mean they do, you know, select documents that they no longer need. Either old drafts or document in transit, they will delete.

Q. And you wouldn't consider that inadvertent?

A. No.

Q. With regard to -- when I'm talking about purposeful, I'm talking about something that's almost

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [ ] was [ ] was not requested.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: May 29, 2018

CARRIE PEDERSON

CSR No. 4373