RICK HOROWITZ, SBN 248684
2014 TULARE STREET, SUITE 627
FRESNO, CALIFORNIA, 93721
TEL: (559) 233-8886
FAX: (559) 233-8887

Attorney for NAME DELETED

DEPARTMENT OF MOTOR VEHICLES

STATE OF CALIFORNIA

In the matter of the administrative per se hearing concerning the driver privilege of NAME DELETED DL#: DELETED at the Department of Motor Vehicles in Fresno, CA, on July __, 2008, at __:__ a.m.	**HEARING BRIEF**

Please accept this brief as a non-comprehensive summary and assertion of issues I will be raising at the hearing, as well as timely objections to the Department evidence as appropriate.

I

THE FORENSICE REPORT WAS NOT EXECUTED "AT OR NEAR" THE TIME OF ANALYSIS AND THUS DOES NOT QUALIFY AS A HEARSAY EXCEPTION

A. To be admissible, a forensic laboratory report must satisfy the requirements of Evidence Code section 1280.

Licensee objects to the introduction of the report from Central Valley Toxicology, Inc. on the grounds that the exhibit constitutes hearsay and does not qualify under the "official records"

RICK HOROWITZ
2014 Tulare Street
Suite 627
Fresno, California
93721

exception- that is, the report is in violation of *Downer's* requirement that it be completed by the technician(s) "at or near" the event(s) in question. (*Downer v. Zolin* (1995) 34 Cal.App.4th 578, 582 [40 Cal.Rptr.2d 288].) Thus, the Department may not rely primarily upon this document to reach a finding.

A later case overruling *Downer* on other grounds reinforces this rule. (*Lake v. Reed* (1997) 16 Cal.4th 448, 467 [65 Cal.Rptr.2d 860].) In *Lake*, the California Supreme Court considered the question of whether a forensic laboratory report need be sworn in order to be considered as trustworthy evidence at a DMV hearing. (*Id*. at 466-467.) Deciding that the document could be considered despite not being sworn, the Court, in a footnote, stated that "[t]o the extent [*Wheeler* and *Zolin*] are inconsistent with this analysis, those cases are disapproved." (*Id*. at 467, n.11.) After disapproving *Wheeler* and *Zolin* on the question of whether the report must be sworn, the *Lake* Opinion then went on say,

> Finally, to the extent Lake contends the forensic laboratory report comprises insufficient evidence of his BAC because it is inadmissible hearsay, we agree with the Court of Appeal below that the report falls within the public employees record exception to the hearsay rule. (Evid. Code, § 1280.) The report indicates it was prepared "by and within the scope of duty of a public employee," that it was done "near the time of the act" of testing the urine sample, and the "sources of information and method and time of preparation were such as to indicate its trustworthiness."

(*Lake v. Reed, supra,* 16 Cal.4th at 467.)

Thus, the Court affirmed the need for the document to comply with Evidence Code section 1280. The report must be 1) prepared "by and within the scope of duty of a public employee," 2) it must be done "near the time of the act," and the "sources of information and method and time of preparation [must be] such as to indicate its trustworthiness." (*Lake v. Reed, supra,* 16 Cal.4th at 467; *Downer v. Zolin, supra,* 34 Cal.App.4th at 582.)

Analyst Alan D. Barbour apparently conducted his analysis on May 9, 2008, and executed the document on May 15, 2008. This is seven days later (counting each day, as the analysis may have been in the morning of the first day and the signing in the afternoon of the seventh day, resulting in a seventh-day signing).

RICK HOROWITZ
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The report clearly constitutes hearsay: "an out of court statement offered to prove the truth of the matter asserted." It does not qualify for the "official records" exception to the hearsay rule set forth in Evidence Code section 1280(b), since it was not prepared "at or near" the time of the analysis. The report is inadmissible hearsay. (*Downer v. Zolin, supra,* 34 Cal.App.4th at 582.)

B. The forensic laboratory report in this case does not satisfy the requirements of Evidence Code section 1280 because it was not prepared until seven days after the test was performed.

A common example of what constitutes "at or near" to qualify as an exception is a police DUI report, where the reports are typically prepared within an hour or two of the events related. For example, see *Fisk v. Department of Motor Vehicles* (1981) 127 Cla.App.3d 72, 77 [179 Cal.Rtpr. 379, 381], rejected by *McNary v. Department of Motor Vehicles* (1996) 45 Cal.App.4th 688 [53 Cal.Rptr.2d 55], where a report depicting events occurring an hour before the report was written was found by the court to be "at or near" for purposes of section 1280(b).

How late can a document be signed and still qualify for the hearsay exception? In other words, what are the outer limits of "at or near"? In *Downer v. Zolin*, the appellate court addressed a forensic report submitted to the DMV by the Orange County crime laboratory. A blood sample had been drawn on August 11, 1993, and analyzed five days later by analyst #1, six days after the draw by analyst #2; the forensic report was signed by analyst #1 seven days after his analysis and by analyst #2 six days after his. Because the report simply contained a printed date at the top, the court concluded that it was not possible to determine how much time had elapsed between the two analyses and the two signatures. However, the court did provide us with guidelines in footnote 5 of the decision:

> But even if it were [dated], a report prepared nearly a week after the forensic tests were completed *does not fall within the statutory requirement* that the report must be prepared "at or near the time" of the reported event.

Thus, it is clear that a report executed "nearly a week after forensic tests were completed" simply does not qualify for the "official records" exception to the hearsay rule. Since "nearly a

RICK HOROWITZ
2014 Tulare Street
Suite 627
Fresno, California
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week" would logically be less than seven days, and since the court was dealing with a report executed six days after analysis, it obviously follows that any report signed six days or more after the reported analysis automatically fails to fall within the exception set forth in Evidence Code section 1280.

Although the court in *Downer* specifically found that a report executed six days after analysis failed to qualify for the hearsay exception, it left open the question of whether an analyst could recall his or her analysis – that is, whether the report was signed "at or near" the time of analysis – five, four, three or even two days earlier. To repeat: The *Downer* Court did not hold that an execution five days after the analysis was accepted – it simply found that six days was clearly too long. In the current case, the analysis was signed seven – six if you don't count the first day – days after the analysis. It clearly comes under the *Downer* ruling.

It is helpful to understand the basis for the "official records" exception. As with most hearsay exceptions, the reason for admitting the evidence is that there exists some indicia of trustworthiness – that is, that the person signing the document had a clear and independent recollection of events he or she was reporting. At the Orange County Sheriff's crime laboratory, each analyst performs hundreds of blood and urine analyses each week; it is highly unlikely that any analyst could recall one of dozens of analyses conducted days earlier.

The need for "indicia of trustworthiness" has been specifically recognized by the Department. It has prepared a DS 367A form for use in reporting alcohol analyses from blood or urine samples. Trustworthiness is indicated because the result and signature are entered into the document at the same time as the analysis; that is, the analyst would presumably have a "clear and independent recollection" of his or her analysis conducted moments earlier. The fact that the crime laboratory herein chose not to use the DS 367A form is an indication that the "method and time of preparation" of its own delayed reports do not indicate the required trustworthiness.

II
THE FORENSICE REPORT IS INADMISSIBLE SINCE THE PRESUMPTION THAT THE BLOOD-ALCOHOL RESULTS ARE RELIABLE HAS BEEN REBUTTED

The "official records" exception is specifically premised on the rebuttable presumption of Evidence Code section 664 that the preparer's official duties were carried out. In the present

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case, however, the laboratory (1) chose to ignore the Department's contemporaneously-prepared DS 367A form, and (2) delayed preparation of its own document for days after the analyses (and, presumably, after the preparer had conducted dozens of other tests).

For the "official duty" presumption set forth in Evidence Code section 664 to apply, the procedures must be reliable and the requirements of Title 17 must be complied with. (See *McKinney v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 519 [7 Cal.Rptr.2d 18].) Where the laboratory personnel ignore the Department's clear standards as represented by the DS 367A form, and choose to delay preparation of critical documents until long after any human memory could recall one out of many earlier analyses, then it must be concluded that minimum contemporary standards of forensic analysis have not been met and the presumptions disappears. See *People v. Sumstine* (1984) 36 Cal.3d 909, 923 [206 Cal.Rptr. 707, 716]. The burden of establishing a foundation for scientific reliability then shifts to the Department.

CONCLUSION

For the reasons stated, licensee respectfully makes appropriate objections to offered evidence and requests that the pending suspension be set aside.

Thank you for your consideration.

Dated: _____

Respectfully submitted,

_____

Attorney for NAME DELETED

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2014 Tulare Street
Suite 627
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