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CITY OF SAN BUENAVENTURA

EXEMPT FROM FILING FEES PU[illegible]
TO GOVERNMENT CODE SECTION [illegible]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SANTA BARBARA CHANNELKEEPER, a California non-profit corporation,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, etc., et al.,

Respondents.

CITY OF SAN BUENAVENTURA, etc.,

Cross-Complainant,

v.

DUNCAN ABBOTT, an individual, et al.,

Cross-Defendants.

Case No. 19STCP01176

Judge: Hon. William F. Highberger

RESPONDENT AND CROSS-COMPLAINANT CITY OF SAN BUENAVENTURA'S REPLY BRIEF IN SUPPORT OF DISCOVERY SCHEDULE

Date: July 19, 2021
Time: 3:00 p.m.
Dept: SS10

Action Filed: Sept. 19, 2014
Trial Date: Feb. 14, 2022

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REPLY BRIEF REGARDING DISCOVERY SCHEDULE

I. INTRODUCTION

The City of San Buenaventura ("City") respectfully requests that the Court order a simultaneous expert disclosure for all parties that have retained experts to analyze the Phase 1 trial issues, and that the disclosure occur on September 24, 2021. The City can be prepared to exchange in late August should the Court deem that a more appropriate date for a simultaneous exchange, however, the other parties who have retained experts to analyze the Phase 1 issues are requesting September 24th. The City does not object to that date.

The City received responsive briefs on the timing of experts disclosures from the following parties: (i) State Water Resources Control Board and California Department of Fish and Wildlife ("State Agencies"), (ii) City of Ojai, (iii) the collection of Cross-Defendants known as the East Ojai Group, (iv) Jeffrey Bacon, as trustee of the Villa Nero Trust, and (v) Robert Martin (collectively " Responding Parties"). While each Responding Party discusses its/his own unique positions in this action, there are two common themes that form the crux of the issue: (1) they argue that the Court has discretion to force the City to unilaterally disclose its expert witness information under Code of Civil Procedure Section 843, and (2) they argue that the City should be forced to disclose first because the City has been in this case for a long time, and the City, unlike these other parties, can be ready at an earlier date. These arguments fail for two reasons.

First, while the Court has discretion on some aspects of the expert exchange, by statute it does not have discretion to deviate from the requirement of a "simultaneous" exchange. The Comprehensive Groundwater Adjudication statute does not conflict with the Civil Discovery Act's requirement for a simultaneous exchange, and as such the exchange must be simultaneous. (*See* Code Civ. Proc. § 830, subd. (c) ["[t]he other provisions of the 'code' [i.e. the Code of Civil Procedure] apply to procedures in a comprehensive adjudication to the extent they do not conflict with the provisions of this chapter."].) The Responding Parties are quick to point to Code of Civil Procedure Section 843 subdivision (d), which gives courts the ability to order the "times" and "sequence" of expert disclosures, and they argue that this alone gives the Court discretion to

make one side disclose first, even though the Civil Discovery Act requires a simultaneous exchange. (See e.g., East Ojai Group Br., pp. 2-3.) Section 843 subdivision (d) does not conflict with or supersede the requirements of the Civil Discovery Act; it does not allow for anything other than simultaneous exchanges. Section 843, subdivisions (a) and (b) requires parties to disclose not only the identities of their experts, but also to exchange written reports, modeled after Rule 26 of the Federal Rules of Civil Procedure. This requirement for a report expands upon the Civil Discovery Act, which requires only an attorney declaration, and so while Section 843 subdivision (d) may discuss the court's ability to "time" and "sequence" the simultaneous disclosures by the parties, that refers to the court's ability set different dates and sequencing for what is required to be disclosed, i.e. the exchange of expert identities and expert reports. The Legislature could have easily (and unambiguously) stated that courts have discretion to deviate from the well-settled statutory requirement for a simultaneous exchange when it drafted the Comprehensive Groundwater Adjudication statute. It did not do so, nor did it expressly exempt the Comprehensive Groundwater Adjudication statute from Chapter 18 of the Civil Discovery Act. The only way to harmonize the Comprehensive Groundwater Adjudication statute and the Civil Discovery Act is that the different aspects of what is required to be disclosed in a groundwater adjudication can be sequenced, but each party must disclose simultaneously.

Second, even if (which is not the case here) the Court were to have discretion to set something other than a simultaneous exchange, Responding Parties (or any other party seeking a deviation) would have to make a showing of good cause, and they have not done so. The State Agencies and East Ojai Group indicate that they have experts analyzing the Phase 1 issues, but that their experts will not be ready until September 24th. The City accepts this date for a simultaneous exchange. That these parties cannot be ready earlier is not a reason to penalize the City. Mr. Martin and Mr. Bacon on the other hand argue that they are relatively small and new to this case, and so they should have access to the City's experts' work before they have to disclose. The City is not necessarily opposed to this proposal; in fact, it already proposed that smaller users who do not yet have experts be given an extra seven weeks to hire experts and submit disclosures.

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These parties argue that they need even more time than what the City has proposed, but they really do not explain why, and they offer no evidence showing good cause.

On the issue of good cause, the City of Ojai offers nothing; it does not indicate whether or not it has an expert, nor does it offer any legitimate reason as to why the City should be forced to unilaterally disclosure. The City of Ojai (as well as the East Ojai Group) argues that forcing the City to disclose first will "narrow the issues" for trial. But the issues are already narrow; the trial has been bifurcated and Phase 1 is limited to two discrete issues: (1) whether the Ventura River and its tributaries and groundwater basins within the Ventura River Watershed are interconnected, and (2) what are the boundaries of the basins and the Watershed. These are expert-driven issues. The City will offer at the Phase 1 trial credible expert testimony showing that the basins and surface waters of the Ventura River and its tributaries are interconnected, which will be supported by decades' worth of uncontroverted scientific analyses of the interconnectedness of the Watershed. If the City of Ojai (or the East Ojai Group or any other Cross-Defendant) has evidence showing that last 50 years' of scientific analyses of this Watershed are wrong, and that the Ojai groundwater basins are somehow hydrologically disconnected, then it is all the more imperative that there be a simultaneous exchange of expert information, and that all parties see this contradictory evidence as soon as possible, i.e., in a simultaneous exchange. The Responding Parties do not make a showing of good cause, and so even if the Court has discretion to deviate from the statutorily-mandated "simultaneous exchange," which it does not, it should not do so.

II. THE COURT IS REQUIRED BY STATUTE TO SET A SIMULTANEOUS EXPERT EXCHANGE DATE

Chapter 18 of the Civil Discovery Act, entitled "Simultaneous Exchange of Expert Witness Information" applies to the disclosure of expert witnesses in all civil actions, except for eminent domain proceedings. (Code Civ. Proc. § 2034.010.) The Legislature knew of this law when it wrote the Comprehensive Groundwater Adjudication statute in 2015, but it did not amend the City Discovery Act to exclude groundwater adjudications along with eminent domain cases. In fact, it did the opposite; expressly integrating the Comprehensive Groundwater Adjudication process into the general provisions of the Code of Civil Procedure, including the Civil Discovery

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Act. (Code Civ. Proc. § 830, subd. (c).)This shows a legislative intent to apply Chapter 18 to groundwater adjudications tried under the Comprehensive Groundwater Adjudication statute. (*See Mosser Companies v. San Francisco Rent Stabilization & Arbitration Bd.* (2015) 233 Cal.App.4th 505, 514.) The Civil Discovery Act is the starting point, and it provides for a simultaneous exchange. (Code Civ. Proc. § 2034.260; *see Fairfax v. Lords* (2006) 138 Cal.App.4th 1019, 1027.)

Responding Parties do not refute the Civil Discovery Act's requirement for simultaneous exchanges. Rather they argue that the Civil Discovery Act does not apply to this case because the Comprehensive Groundwater Adjudication statute has its own expert exchange procedure, set forth in Code of Civil Procedure Section 843. Responding Parties argue that Section 843 is a more specific and later enacted statute, and there is no simultaneous exchange requirement under Section 843 because a court can exercise discretion and order its own timing and sequencing of the disclosures. (Code Civ. Proc. § 843, subd. (d) ["Unless otherwise stipulated by the parties, a party shall make the disclosures of any expert witness it intends to present at trial … at the times and in the sequence ordered by the court."].) Responding Parties' reliance on Section 843 to support their novel argument is misplaced for two reasons.

First, the plain language of Section 843 requires a simultaneous exchange and certainly does not say that the disclosure of expert witness information can be unilateral, i.e., not simultaneous, nor does it give the court discretion to decide that one party must disclose its expert information first. Section 843 subdivision (d) gives the court discretion to order different "times" and "sequences" for the expert disclosures, but that does not (and cannot) apply to when parties must disclose vis-à-vis each other. It is important to note here that Section 843 subdivisions (a) and (b) set forth different requirements from the Civil Discovery Act for the substance of what must be disclosed, i.e., the identity of the expert witness, and a written report from the expert, which must contain (i) a complete statement of the opinions, (ii) the facts and data the expert considered, (iii) the expert's exhibits, (iv) his/her qualifications, (v) a list of all cases in which the expert witness previously testified, and (vi) a statement of the expert's compensation. (Code Civ.

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Proc. § 843, subds. (a)-(b).) The requirement for a written report is not in Chapter 18 of the Civil Discovery Act, which requires only a declaration stating general topics of expert information. (Code Civ. Proc. § 2034.260.) Thus Section 843 requires greater disclosure than does the Civil Discovery Act, but it does not change the requirement that disclosure be simultaneous. This is important for harmonizing the law.

As is noted in the City of Ojai's brief, courts do not construe statutes in isolation, and they must attempt to harmonize the law when possible. (*People v. Pieters* (1991) 52 Cal.3d 894, 899.) (City of Ojai's Br. p. 1:22-23.) The City agrees, and Section 843 must be harmonized with the Civil Discovery Act's requirement for a simultaneous exchange. It makes sense that in using the words "timing" and "sequence" in Section 843 subdivision (d), the Legislature was referring to when the different items of information that are required to be disclosed under Section 843 subdivisions (a) and (b) will be disclosed, for example giving the court discretion to order the parties to disclose the identities of their respective experts first, and then later to disclose their expert reports. This interpretation makes sense because, as Mr. Martin has observed, "there is a finite number of available experts" in this field (Martin Br. p. 2:10), and in some cases parties need to know which experts have retained as early as possible. Of course, in this case the City and other parties proposing the Physical Solution have made their experts available to meet and confer with all parties since last September, so Mr. Martin and the other parties already know the identities of the City's and other proposing parties' experts. Nevertheless, the Civil Discovery Act's requirement for a simultaneous exchange must be harmonized with Section 843 subdivision (d) by interpreting the court's discretion for "timing" and "sequencing" to refer to the different information that must be disclosed, rather than whether some parties must disclose before others. The requirement of simultaneous exchanges in the Civil Discovery Act is consistent with and does not conflict with Section 843, and disclosures must therefore be simultaneous.

Second, as the City explained in its opening brief, there are more causes of action in the City's third amended cross-complaint than just an adjudication under the Comprehensive Groundwater Adjudication statute, and Section 843 does not apply to the other causes of action.

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The State Agencies were the only parties to address this issue, and they argue that as long as the City seeks an adjudication under Section 830 *et seq.*, Section 843 necessarily applies. (State Agency Br., p. 3.) But the converse is also true; as long as there are causes of action that are not based on the Comprehensive Groundwater Adjudication statute, the Civil Discovery Act necessarily applies, and this statute demands a simultaneous exchange. If the Court is required to set a simultaneous exchange based on the other causes of action, then that is what the Court must do. Even if Section 843 did in fact allow the Court to deviate from the simultaneous exchange requirement (which it does not), the Court could not do so in this case because there are other causes of action at play for which Section 843 has no applicability. It should be noted here that the Court has bifurcated this case by ***issues***, and not ***causes of action***. A portion of every cause of action will be tried in Phase 1, and as such, the expert exchange must be simultaneous.

III. EVEN IF THE COURT WERE TO HAVE DISCRETION TO ORDER (WHICH IT DOES NOT) THE CITY TO DISCLOSE BEFORE OTHERS, IT SHOULD NOT DO SO BECAUSE RESPONDING PARTIES MADE NO SHOWING OF GOOD CAUSE

Code of Civil Procedure Section 843 is consistent with the Civil Discovery Act in requiring simultaneous expert exchanges of both initial and supplemental experts at specific times prior to the trial. (Code Civ. Proc. §§ 843, subd. (d), 2034.220, 2034.230.) As discussed above, these statutes must be harmonized to require simultaneous exchanges. However, even if Section 843 subdivision (d) did give courts discretion to deviate from the statutorily-mandated simultaneous exchange, it cannot be disputed that the default position under the statute is for a simultaneous exchange. If a party wants a court to deviate from the statute's default position, it must make a showing of good cause. (*See* Code Civ. Proc. § 2034.250, subd. (b) ["The court, for good cause shown, may make any order that justice requires…."].)

None of the Responding Parties has shown good cause to deviate from a simultaneous exchange. The City notes at the outset that not a single Responding Party included a good cause declaration with its/his brief. Without any evidence, these parties have not shown good cause. But regardless of the lack of any evidentiary showing, the arguments alone do not come close to showing good cause. For example, the State Agencies' only reason for requesting that the City

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unilaterally disclose first is that their experts apparently will not be ready prior to late September. (State Agencies Br., pp. 3-4.) Why should the City be penalized (and prejudiced) simply because its experts will ready to exchange in August and the State Agencies' experts will apparently not be ready by then? The State Agencies' position makes no sense, and certainly does not rise to good cause.

The East Ojai Group and City of Ojai attempt to show good cause by arguing that this is a complex case, and that the parties being able to see the City's expert disclosure in advance will help "narrow the issues." (City of Ojai Br., p. 3; East Ojai Br., pp. 2-3.) This argument is a red herring. The East Ojai Group, either intentionally or mistakenly, misstates what the Phase 1 trial is about. It asserts that the issue to be tried is "Do groundwater pumpers affect surface water flow that is harmful to the fishery and therefore should be subject to the physical solution, and if so, to what degree." (East Ojai Group Br., p. 2:23-25.) That is not the issue that this Court bifurcated for trial in Phase 1. Rather, Phase 1 will address the threshold issues of whether the groundwater basins are interconnected with the Ventura River surface waters, and what are the basin and Watershed boundaries. The specific degree to which the East Ojai Group's individual pumping of groundwater affects the surface flow, and whether it is harmful to the fishery to the point where it should be a part of the Physical Solution, is not at issue in Phase 1, and by law it cannot be the issue. It is now settled that individual water rights holders cannot bar the adoption of proposed physical solutions by asserting their groundwater pumping has a limited impact on the water resource at issue because there is "no authority that a court lacks evidentiary support for a Physical Solution merely because any one party regulated thereunder can argue that exempting its pumping from its terms would only minimally diminish the effectiveness of the Physical Solution." (*Antelope Valley Groundwater Cases* (2020) 59 Cal.App.5th 241, 266-67.) The Court of Appeal went on to state: "Indeed, we believe this argument (if credited) would eviscerate the ability of a court to adopt any basin-wide physical solution: if any single water rights holder could bar adoption of a proposed physical solution unless it was exempted from it by asserting its specific unconstrained pumping would have limited impact on the effectiveness of its remaining

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regulations, any proposed physical solution could be exposed to a 'death by a thousand cuts' because each objecting water claimant could likewise claim exemption from its regulation under the 'individual de minimus impacts' argument." (*Ibid.*)

The East Ojai Group ignores the Court's bifurcation order, and its argument unravels from there. It and the City of Ojai claim that the issues are complex, and that the City disclosing first will help focus its expert and narrow the issues. Yet the issues to be tried in Phase 1, while technical and expert-driven, are not overly complex. The East Ojai Group acknowledges that it has retained an expert, and it admits that it can meet a September 24, 2021 exchange date. (East Ojai Group Br., pp. 3-4.) This is the same date the City is proposing, and so there is no good cause to deviate from a simultaneous exchange. The East Ojai Group all but admits that it wants to see the City's disclosure first so that it can look for potential challenges before it discloses its own expert's report, and while the City of Ojai does not state whether it has an expert in its brief, it suggests a similar motive. This is improper, and it exactly what the Legislature sought to guard against in imposing a simultaneous exchange. (*Fairfax, supra,* 138 Cal.App.4th at 1027.)

The bottom line here is that the East Ojai Group's expert (and maybe the City of Ojai's expert) will either say that the groundwater basins are interconnected with the surface waters of the Ventura River Watershed, or that these basins are not interconnected. If it is the latter, then this opinion will contradict 50 years' worth of study on the hydrology of this Watershed, and the City and all parties are entitled to see this opinion as soon as possible, and certainly no later than the City's own disclosure. The City has just as much interest in seeing any contrary expert reports, and the disclosures should be simultaneous.

Finally, Mr. Bacon and Mr. Martin argue that they are prejudiced because they do not currently have experts looking at these issues, and thus they ask that the City be ordered to disclose its experts before they are required to disclose. (Martin Br., p. 2; Bacon Br., p. 2.) As the City has stated many times now, it is not opposed to "small user," later-appearing parties like Mr. Bacon and Mr. Martin having additional time to determine whether they need an expert, and having the benefit of reviewing the other parties' disclosures before making that decision. The

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City's proposed schedule calls for initial expert disclosures by larger users who currently have experts looking at the Phase 1 issues to disclose on September 24, 2021, and that smaller users who do not presently have experts can then disclose on November 12, 2021, or seven weeks later. Mr. Bacon and Mr. Martin argue that they should be allowed to disclose at least twelve weeks after the City (Martin Br., p. 3; Bacon Br., p. 5.), but neither offers an explanation, let alone any evidence, as to why twelve weeks is sufficient, but seven weeks is not. They have not shown good cause.

Also, the City notes here that it has no objection to the Court moving up the simultaneous disclosure by four weeks to late August. This would give Mr. Bacon and Mr. Martin almost all the time they have sought. Of course, the State Agencies, the East Ojai Group, and possibly the City of Ojai, would object to that schedule, thus the real dispute is finally exposed. The real dispute here is not between the City and any party, rather it is between the State Agencies, East Ojai Group, and possibly the City of Ojai on the one hand, and Mr. Bacon and Mr. Martin on the other hand. Mr. Bacon and Mr. Martin want about twelve weeks with other parties' experts' reports, but the State Agencies, East Ojai Group and possibly the City of Ojai, cannot be ready that fast. So rather than try to work out mutually agreeable dates, these parties seemingly have "teamed up" on a strategy to try to force the City to disclose before everyone else. While this would probably solve all of their individual problems, it is more gamesmanship than good cause. There is no basis to force the City to unilaterally disclose first, and doing would be completely unfair and prejudicial to the City.

IV. CONCLUSION

For the reasons stated, the City requests that the Court set a discovery schedule that provides for a simultaneous exchange of expert witness information, and that it set the initial expert witness disclosure date of September 24, 2021, or an earlier date between late August and September 24th, as the Court may deem appropriate.

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Dated: July 16, 2021

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