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6 In Pro Per and Attorney for
7 Heidi A. Whitman, Nancy L.
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9 L. Whitman Family Trust

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF LOS ANGELES

12 SANTA BARBARA CHANNELKEEPER,
13 a California non-profit corporation,

14 Petitioner,

15 v.

16 STATE WATER RESOURCES CONTROL
17 BOARD, A CALIFORNIA STATE AGENCY;
18 CITY OF SAN BUENAVENTURA, a
19 California municipal corporation, incorrectly
20 named as CITY OF BUENAVENTURA,

21 Respondents.

22

CITY OF SAN BUENAVENTURA,
23 a California municipal corporation,

24 Cross-Complainant,

25 v.

26 DUNCAN ABBOTT, an individual, et al.

27 Cross-Defendants.
28

Case No. 19STCP01176
Assigned to Judge William F. Highberger
Dept.: 10

Complaint filed: September 19, 2014

**CROSS DEFENDANTS ANDREW K.
WHITMAN, HEIDI A. WHITMAN,
NANCY L. WHITMAN AND JOHN R.
AND NANCY L. WHITMAN FAMILY
TRUST'S MOTION FOR JUDGMENT
ON THE PLEADINGS**

DATE: JANUARY 18, 2022
TIME: 1:30 P.M.
DEPT.: 10

TO: CROSS-COMPLAINANT CITY OF SAN BUENAVENTURA, ALL PARTIES
AND THEIR ATTORNEYS OF RECORD:

1 PLEASE TAKE NOTICE that on **January 18, 2022 at 1:30 p.m.**, or as soon thereafter as
2 the matter may be heard in Department 10 of the above-entitled Court, located at 312 North Spring
3 Street, Los Angeles, CA, 90012, cross-defendants, Andrew K. Whitman, Heidi A. Whitman,
4 Nancy L. Whitman and John R. and Nancy L. Whitman Family Trust (“Whitman Cross-
5 defendants”), will and hereby do move for judgment on the pleadings as to Sixth Cause of Action
6 of Cross-Complainant City of San Buenaventura’s Third Amended Cross-Complaint pursuant to
7 *Code of Civil Procedure* section 438(b) on the grounds that:

8 (a) As to the sixth cause of action, it fails to state facts sufficient to constitute a cause of
9 action against certain of the cross-defendants (including the Whitman Cross-defendants);

10 (b) As to the sixth cause of action, cross-complainant CITY does not have a cognizable
11 claim to an adjudication (and the Court has no jurisdiction to declare groundwater rights) as
12 against a property owner overlying groundwater who does not extract groundwater (such as cross-
13 defendants Andrew K. Whitman and Heidi A. Whitman);

14 (c) As to the sixth cause of action, cross-complaint CITY does not have a cognizable
15 claim to a judgment (and the Court has no jurisdiction to declare groundwater rights) as against a
16 property owner overlying groundwater whose use of groundwater has not been shown to be
17 unreasonable;

18 (d) As to the sixth cause of action, cross-complaint CITY cannot invoke an adjudication
19 of the Ojai Groundwater Basin and/or the Upper Ojai Groundwater Basin in that the CITY (i)
20 does not own property overlying either the Ojai Groundwater Basin or the Upper Ojai
21 Groundwater Basin; (ii) does not have appropriative rights to groundwater in either the Ojai
22 Groundwater Basin or the Upper Ojai Groundwater Basin; and (iii) does not have prescriptive
23 rights as to groundwater in either the Ojai Groundwater Basin or the Upper Ojai Groundwater
24 Basin. Therefore cross-complainant CITY has no groundwater rights in either basin and CITY
25 does not have any right (has no standing) to initiate a groundwater basin adjudication of those
26 basins;

27 (e) the sixth cause of action exceeds the scope of the cross-complaint permitted by the
28 Court of Appeal in this case in *Santa Barbra Channelkeeper v. City of San Buenaventura* (2018)

1 19 Cal.App.5th 1176 by including cross-defendants not shown to have used groundwater
2 unreasonably or to have created a reduced flow in the Ventura River.

3 This motion for judgment on the pleadings is based upon this written notice, the attached
4 memorandum of points and authorities, the pleadings and other records on file herein.

5 **JUDGMENT ON THE PLEADINGS**

6 1. The Sixth Cause of Action for Comprehensive Adjudication of the Third Amended
7 Cross-complaint fails to state facts sufficient to constitute a cause of action and is beyond the
8 jurisdiction of the Court to issue an order adjudicating groundwater rights as against a property
9 owner overlying groundwater of the Ojai Groundwater Basin. (Code Civ. Proc. § 438 (c)(1)(B)(i)
10 and (ii).)

11 2. The Sixth Cause of Action for Comprehensive Adjudication of the Third
12 Amended Cross-complaint fails to state facts sufficient to constitute a cause of action and is
13 beyond the jurisdiction of the Court to issue an order adjudicating groundwater rights as against
14 a property owner overlying groundwater of the Upper Ojai Groundwater Basin. (Code Civ. Proc.
15 § 438 (c)(1)(B)(i) and (ii).)

16
17 Dated: December 20, 2021

18 */s/ Andrew K. Whitman*

19 _____
20 ANDREW K. WHITMAN, in pro per, and
21 attorney for HEIDI A. WHITMAN, NANCY
22 L. WHITMAN and the JOHN R. and
23 NANCY L. WHITMAN FAMILY TRUST
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1 **I. INTRODUCTION**

2 This litigation arises out of the City of San Buenaventura’s (hereafter CITY) over
3 extraction of water from the Ventura River. The CITY was sued by an environmental watch dog
4 (Santa Barbara Channel Keepers) over the negative impacts that the CITY’s over-extraction of
5 water from the Ventura River had on the ability of steelhead trout to survive in the Ventura River.
6 Rather than reduce its use of Ventura River water, the CITY filed a cross-complaint (the current
7 version is the Third Amended Cross-Complaint - hereafter “3ACC”). CITY apparently contends
8 that it has the right to assert a claim and obtain an adjudication as against anyone within the greater
9 Ventura River watershed. It is the failure of the 3ACC to state facts supporting a claim against
10 certain categories of cross-defendants (property owners overly the Ojai and Upper Ojai
11 Groundwater Basins) that is the subject matter of this motion for judgment on the pleadings.

12 The moving parties are cross-defendants who are property owners who overlie
13 groundwater basins within the same watershed as the Ventura River. However, in the case of
14 cross-defendants Andrew Whitman and Heidi Whitman (the Whitmans), they are sued based on
15 ownership of land overlying the Ojai Groundwater Basin (hereafter OGB). There is no allegation
16 within the 3ACC that the Whitmans currently extract water from the OBG or have ever extracted
17 water from the OBG. Therefore, the Whitman’s do not and cannot reduce the amount of water in
18 the Ventura River during any season.

19 In the case of cross-defendant Nancy Whitman and the John and Nancy Whitman Family
20 Trust (hereafter the Trust), they are sued based on ownership of land overlying the Upper Ojai
21 Groundwater Basin (hereafter UOGB). The water the Trust extracts from the UOGB supports a
22 single-family residential home only and the use of groundwater has not been shown by the 3ACC
23 to be “unreasonable” or to reduce the water in the Ventura River during any season.¹ Furthermore,

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26 ¹ The Trust is also a riparian property but the seasonal creek which runs through the property flows to Sisar Creek
27 and then to Santa Paula Creek and the Santa Clara River. The Trust property is located in the Santa Clara River
28 Watershed. The Trust property is located in a portion of the UOGB that the bulletin 118 describes as flowing
eastward and “groundwater in the eastern part of the basin moves eastward toward Sisar Creek.” Therefore, the
groundwater that the Trust property is over and has access to is not a part of the Ventura River Watershed.

1 Bulletin 118 reveals that groundwater in the east portion of the UOGB is separated from the west
2 portion of the UOGB and that groundwater in the eastern portion flows to Sisar Creek (and the
3 Santa Clara River). Therefore, no matter what the Trust’s current rate of groundwater extraction
4 it cannot reduce the amount of water in the Ventura River during any season.

5 With respect to the CITY, the 3ACC does not allege that the CITY is a property owner
6 overlying the OGB or the UOGB (the CITY does not overlie, or own land overlying, the OGB or
7 the UOGB). The 3ACC does not allege that the CITY is an appropriator of groundwater from
8 the OGB or the UOGB (the CITY is not an appropriator of OGB or UOGB groundwater). The
9 3ACC does not allege that that the CITY has prescriptive rights to the OGB or the UOGB (the
10 CITY is not an appropriator of OGB or UOGB groundwater).

11 The fact that the CITY is not among those persons or entities who extract groundwater
12 from the OGB or UOGB is described by the Court of Appeal in this case. “In reach 4, about six
13 miles upstream from the mouth of the river, the CITY diverts water with a subsurface dam and
14 extracts groundwater that would otherwise flow into the river.” *Santa Barbara Channelkeeper v.*
15 *City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1181.

16 There is no allegation in the 3ACC that the CITY extracts water at any other point within
17 the watershed. The 3ACC states that the CITY has the right to take water from the Ventura River
18 Watershed. This is an insufficient basis for the CITY to state a claim for groundwater rights as
19 against overlying property owners for the groundwater underlying the OGB or the UOGB.

20 The scope of the 3ACC (not just the sixth cause of action) is overbroad as relates to any
21 cross-defendant who is named solely because they own property overlying the OGB or the UOGB.
22 In *Channelkeeper*, supra, the Court of Appeal addressed a trial court denial of the CITY’s right
23 to assert a cross-complaint. However, in doing so the Court of Appeal did not give the CITY the
24 right to seek indemnity, contribution or shared responsibility for water reductions in the Ventura
25 River as against any owner of property within the Ventura River Watershed without regard to
26 whether the cross-complaint demonstrates the cross-defendant has unnecessarily caused a
27 reduction of the water in the Ventura River.

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1 **II. THE UNDERLYING LAWSUIT**

2 The Ventura River watershed is home to Southern California steelhead trout, a species
3 listed as endangered since 1997. Defendant CITY has been diverting water from the Ventura
4 River since 1870, but plaintiff Santa Barbara Channelkeeper (Channelkeeper) sued the CITY and
5 alleged that the CITY’s diversions are “unreasonable” because of the effect they have on the fish
6 during summer months, when water levels are low. There is no dispute being raised by this Motion
7 whether the CITY holds water rights that allow it to divert water from the Ventura River or either
8 the upper or lower groundwater basins of the Ventura River). But the CITY was sued by
9 Channelkeeper because under the California Constitution there “is no property right in an
10 unreasonable use” of water. *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 145.

11 **III. THIRD AMENDED CROSS-COMPLAINT**

12 Rather than agree to curb the issuance of development permits (to curb the CITY’s
13 diversion of water) the CITY decided to blame someone else; or at least attempt to get someone
14 else to share in the blame. The CITY filed a cross-complaint. The trial court denied the CITY
15 leave to file the cross-complaint. The CITY appealed and the Court of Appeal overruled and
16 allowed a cross-complaint to proceed.

17 The Court of Appeal found that the CITY should be permitted to demonstrate that others
18 had contributed to unreasonable depletion of the Ventura River. “A defendant is generally
19 authorized to file a cross-complaint against a concurrent tortfeasor for partial indemnity on a
20 comparative fault basis, even when such concurrent tortfeasor has not been named a defendant in
21 the original complaint.” Citing *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d
22 578 The court found the CITY is authorized to file a cross-complaint against other water users
23 in the Ventura River watershed, where it alleges that other users are partially responsible for the
24 reduced waterflow in reaches 3 and 4 during summer months.” See *Channelkeeper*, supra, 19
25 Cal.App.5th at 1189-1190. Despite this limited justification for permitting a cross-complaint, the
26 3ACC includes property owners who do not extract water. Property owners overlying the Ojai
27 and Upper Ojai Groundwater Basins are sued by the CITY merely because they hold a
28 constitutional right to use a reasonable amount of groundwater below their property. The 3ACC

1 sues parties such as the Whitmans merely because they *might* claim or use their groundwater
2 rights the future.²

3 **IV. LEGAL AUTHORITY FOR MOTION FOR JUDGMENT ON THE PLEADINGS**

4 Code of Civil Procedure § 438 allows a party to move for a judgment on the pleadings.
5 Code of Civil Procedure §438(c)(1)(B)(i) and (ii) allows the defendant to move for judgment on
6 the pleadings when the complaint does not state facts sufficient to state a cause of action and/or
7 the court has no jurisdiction over the subject of the cause of action alleged in the complaint. A
8 motion for judgment on the pleadings is governed by C.C.P. §.438. The rules governing demurrer
9 apply. *Cloud v. Northrup Drummond Corp.* (1998) 67 Cal.App.4th 995, 999. A motion for
10 judgment on the pleadings may be made at any time prior to the trial or at the trial itself. *Stupes*
11 *v. Abbassi* (2002) 100 Cal.App.4th 644, 650. A motion for judgment on the pleadings may be
12 made by any party to the action or by the court. C.C.P. §.438(b)(2). A defendant's motion for
13 judgment on the pleadings may be made after the time for demurrer has expired and an answer
14 has been filed. C.C.P. §438(f). A non-statutory motion could be made any time during the lawsuit,
15 even during trial, since the grounds for general demurrer are never waived. *Sofias v. Bank of*
16 *America* (1985) 172 Cal.App.3d 583, 586.

17 **V. IN EVALUATING THE SUFFICIENCY OF A COMPLAINT, CONCLUSORY**
18 **ALLEGATIONS ARE DISREGARDED**

19 When examining the sufficiency of the 3ACC, the court treats as true only the material
20 facts properly pleaded, but not contentions, deductions or conclusions of fact or law. *Moore v.*
21 *Regents of University of California* (1990) 51 Cal.3d 120, 125. In addition, the CITY's sixth
22 cause of action (entitled "Comprehensive Adjudication) is a statutory cause of action subject to
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26 ² The third amended cross-complaint alleges that the Overlying Landowners "... are owners of ... real property
27 located within the Ventura River Watershed and overlying one or more Groundwater Basin ... and they claim ...
28 overlying rights to extract groundwater from one or more of the Watershed's Groundwater Basins, **whether or not**
they have exercised such overlying rights..." 3ACC ¶ 93. With respect to overlying owners who do not operate
a well the 3ACC alleges "Cross-Defendants Roes 551 through 1000 are owners ... holding or claiming to hold
ownership ... interest in real property within the boundaries of the watershed ... " or "claiming some right ... to
water located in the watershed..." 3ACC ¶ 96(1).

1 the rule that statutory actions must be pleaded with factual particularity. *Fisher v. San Pedro*
2 *Peninsula Hospital* (1990) 214 Cal.App.3d 590, 604-605; *Lopez v. Southern Cal. Rapid Transit*
3 *Dist.* (1985) 40 Cal.3d 780, 795.

4 A plaintiff must plead facts with particularity when seeking statutory remedies. *Carter v.*
5 *Prime Healthcare Paradise Valley LLC*, (2011) 198 Cal.App.4th 396, 404. For example, alleging
6 that a defendant acted fraudulently or recklessly is insufficient to state a claim for neglect under
7 the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code §§ 15600 et seq.).
8 Instead, the plaintiff must plead how or in what manner the defendant was neglectful. *Carter*,
9 *supra*, 198 Cal.App.4th at 410–411. The Supreme Court affirmed in *Covenant Care v. Superior*
10 *Court* (2004) 32 Cal.4th 771 that trial courts are to perform the function of gate keeping statutory
11 claims for Elder Abuse by examination of the material factual content of the pleadings, which,
12 because of rules concerning statutory liability, require pleading with factual particularity. *Id.* at
13 790.

14 The 3ACC seeks a statutory remedy, “comprehensive adjudication” pursuant to Code of
15 Civil Procedure section 830 et seq. As such, as against each cross-defendant against whom the
16 CITY seeks an adjudication the CITY must allege with factual particularity how or in what
17 manner the cross-defendant’s use of groundwater is unreasonable. As to the cross-defendants
18 who are owners overlying the OGB or UOGB the 3ACC fails the pleading requirements.

19 **VI. THE CITY LACKS STANDING TO BRING THE SIXTH CAUSE OF ACTION**
20 **AGAINST OWNERS OVERLYING THE OGB AND UOGB**

21 The CITY’s lack of standing to sue on the sixth cause of action is a jurisdictional defect
22 and the defect is not waived by a cross-defendant’s failure to raise it at the time of first appearing
23 in the action. “Contentions based on a lack of standing involve jurisdictional challenges and may
24 be raised at any time in the proceedings. *Common Cause v. Board of Supervisors* (1989) 49
25 Cal.3d 432, 438. Lack of standing may be raised at any time, even for the first time on appeal.
26 *Associated Builders & Contractors Inc. v. San Francisco Airport Commission* (1999) 21 Cal.4th
27 352, 361. Standing to sue affects the right to relief and goes to the existence of a cause of action
28 against a defendant. When a party lacks standing to sue, the action must be dismissed unless the

1 complaint is amended by substituting a party who has standing to sue. *Cloud v. Northrup*
2 *Drummond Corp.* (1998) 67 Cal.App.4th 995, 1004-1111.

3 The CITY lacks standing to bring the Sixth Cause of Action against owners who overly
4 the OGB and the UOGB because the CITY is not an overlying owner and overlying owners are
5 granted the highest priority of groundwater use. See *Barstow v. Mojave Water Agency* (2000) 23
6 Cal.4th 1224, 1240 [First priority to use groundwater goes to the landowner whose property
7 overlies the groundwater]. Furthermore, the 3ACC does not even identify that the CITY holds
8 any rights with respect to OGB or UOGB groundwater. The CITY only alleges its source of
9 water rights in the most general and conclusory fashion. Its asserts its right with respect to the
10 “Ventura River Watershed” (see 3ACC ¶ 2). This falls short of the requirement to plead with
11 factual specificity how the CITY has any right whatsoever to groundwater underlying the OGB
12 or the UOGB.

13 **VII. THE CITY HAS NO STANDING TO ADJUDICATE THE RIGHTS OF**
14 **PROPERTY OWNERS OVERLYING THE OGB OR THE UOGB**

15 The law as to groundwater rights is unique from other sources of water rights. Courts
16 typically classify water rights in an underground basin as overlying, appropriative, or prescriptive.
17 *City of Barstow*, supra, 23 Cal.4th 1224, 1240 - 41. An overlying right, “analogous to that of the
18 riparian owner in a surface stream, is the owner’s right to take water from the ground underneath
19 for use on his land within the basin or watershed; it is based on the ownership of the land and is
20 appurtenant thereto.” *Id.* One with overlying rights has rights superior to that of other persons
21 who lack legal priority, but is nonetheless restricted to a reasonable beneficial use.

22 “In contrast to owners’ legal priorities, we observe that “[t]he right of an appropriator ...
23 depends upon the actual taking of water. Where the taking is wrongful, it may ripen into a
24 prescriptive right. Any person having a legal right to surface or ground water may take only such
25 amount as he reasonably needs for beneficial purposes. Any water not needed for the reasonable
26 beneficial use of those having prior rights is excess or surplus water and may rightly be
27 appropriated on privately owned land for non-overlying use, such as devotion to public use or
28 exportation beyond the basin or watershed.” *Id.* “When there is a surplus, the holder of prior

1 rights may not enjoin its appropriation. Proper overlying use, however, is paramount and the
2 rights of an appropriator, being *limited to the amount of the surplus*, must yield to that of the
3 overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights
4 through the [adverse, open and hostile] taking of nonsurplus waters. As between overlying
5 owners, the rights, like those of riparians, are correlative; [i.e.,] each may use only his reasonable
6 share when water is insufficient to meet the needs of all.” *City of Barstow*, supra, 23 Cal.4th 1224,
7 1240 - 41.

8 The 3ACC fails to demonstrate that the CITY has any groundwater right with respect to
9 the groundwater underlying the OGB or the UOGB. Therefore, they have no claim to adjudicate
10 with respect to either of those groundwater basins. As stated previously, the CITY is not an owner
11 of property overlying either the OGB or the UOGB. The CITY is not an appropriator either. The
12 allegations of the 3ACC do not articulate with factual specificity that the CITY has ever acquired
13 a right to take groundwater from the OBG or the UOBG and use it in a different basin. The 3ACC
14 also does not demonstrate that the CITY has acquired prescriptive groundwater rights to the OGB
15 or the UOGB. The prescriptive use would need to be “adverse, open and hostile.” The CITY
16 does not pump any water from the OGB or the UOGB. It only takes water from the Ventura
17 River (and Ventura River Groundwater Basin). If there is a manner in which the CITY has taken
18 OBG or UOGB groundwater by appropriation the facts have not been articulated anywhere in the
19 3ACC and therefore the facts don’t exist.

20 Finally, the California Supreme Court has held that a trial court cannot define or otherwise
21 limit an overlying owner’s future unexercised groundwater rights, in contrast to the trial court’s
22 authority to limit unexercised riparian rights. *In re Waters of Long Valley Creek Stream System*
23 (1979) 25 Cal.3d 339, 358 - 359. Therefore, as to those cross-defendants who merely overlie
24 either the OGB or the UOGB who have never exercised the constitutional right to extract and use
25 groundwater (for reasonable and beneficial purposes) this Court has no jurisdiction to issue an
26 order or engage in an adjudication of their future right to use the groundwater underlying their
27 property.

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1 **VIII. THE SCOPE OF THE 3ACC EXCEEDS THE PERMISSIBLE SCOPE OF THE**
2 **CROSS-COMPLAINT**

3 As addressed above, the potential reasonable scope of the 3ACC only encompasses the
4 CITY's right to bring in cross-defendants which the 3ACC demonstrates by material factual
5 allegations have engaged in an unreasonable use of groundwater. As to the Whitman cross-
6 defendants and as to the Trust cross-defendant, the 3ACC fails to allege a single material fact to
7 demonstrate that either cross-defendant has engaged in the unreasonable use of the groundwater
8 which underlies their property.

9 The CITY has referenced repeatedly over the past 12 months that the comprehensive
10 adjudication process mandates that every owner and/or user of groundwater from the basin to be
11 adjudicated must be joined and subject to the adjudication. This only serves to illustrate that
12 process described by C.C.P. section 830 et seq. is not the appropriate vehicle for the CITY to
13 attempt to obtain the remedies permitted by the Court of Appeal. The Court of Appeal made no
14 mention of a groundwater basin wide adjudication including every owner of groundwater rights
15 (without regard to whether the owner even exercised their rights or did exercise their rights but
16 in an unreasonable fashion). The CITY is not barred from bringing an action against persons who
17 have reduced the water in the Ventura River through the unreasonable use of their water rights.
18 The comprehensive adjudication process (C.C.P. § 830 et seq.) greatly exceeds what the Court of
19 Appeal endorsed and authorized the CITY to pursue.

20 **IX. CONCLUSION**

21 The 3ACC does not demonstrate that owners of property overlying the OGB or the UOGB
22 now extract or have ever extracted groundwater. Furthermore, even if the 3ACC did articulate
23 that the owners of property overlying the OGB or the UOGB had extracted groundwater beneath
24 their property, the 3ACC does not include any material facts concerning how the cross-defendants'
25 use of the groundwater is not reasonable or beneficial. Furthermore, the 3ACC fails to articulate
26 how the CITY has any standing to seek an adjudication of groundwater rights related to OGB or
27 UOGB. The CITY is an interloper who does not demonstrate by the 3ACC that it has any rights
28 with respect to the OGB or the UOGB.

