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 20 NERO TRUST

21 **SUPERIOR COURT OF CALIFORNIA**
 22 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

23 SANTA BARBARA CHANNELKEEPER,
 24 a California non-profit corporation,

25 Petitioner,

26 v.

27 STATE WATER RESOURCES
 28 CONTROL BOARD, a California State
 Agency;
 CITY OF SAN BUENAVENTURA, a
 California municipal corporation,
 incorrectly named as CITY OF
 BUENA VENTURA,

Respondents.

AND RELATED CROSS-ACTION..

Case No. 19STCP01176

BY FAX

ASSIGNED FOR ALL PURPOSES TO
 Judge William F. Highberger
 Department 10

**CROSS-DEFENDANT JEFFREY S.
 BACON, AS TRUSTEE OF THE VILLA
 NERO TRUST, RESPONSE TO CITY OF
 SAN BUENAVENTURA BRIEF
 REGARDING DISCOVERY SCHEDULE**

Date: July 19, 2021
 Time: 3:00 p.m.
 Dept: 10

Complaint Filed: September 19, 2014
 Trial Date: February 14, 2022

1 Cross-Defendant Jeffrey S. Bacon, as Trustee of the Villa Nero Trust ("VNT") submits this
2 response to the Brief Regarding Discovery filed by Cross-Complainant, the City of
3 San Buenaventura ("City") with respect to two issues before the Court: (i) should the Court order
4 concurrent or sequential disclosure of expert witness reports; and (ii) when should expert witness
5 disclosures occur?

6 **I. INTRODUCTION**

7 VNT owns an 8-acre residential parcel with an existing well and some olive trees located
8 north and east of the town of Ojai, in Senior Canyon, which may or may not partly overlie the Ojai
9 Ground Water Basin, and which may or may not overlie the subsurface flows of the Senior
10 Canyon and/or Ladera Creeks. Recent historic consumptive use by VNT has been in a nominal
11 volume, although more distant past irrigation use may have been somewhat higher, but still in a
12 minor amount.

13 VNT has plans to build a new single family home on the parcel and to efficiently irrigate
14 olive trees and other appropriate landscaping. The property has overlying and possibly riparian
15 rights that run with the land, do not require continuous water use, and are not forfeited or deemed
16 abandoned by intermittent water use, nominal water use, or even water non-use. VNT is not a
17 volunteer to this lawsuit. It was sued by the City, filed a form answer on February 16, 2021, and
18 retained Allen Matkins to serve as water co-counsel in April 2021. VNT is a recent and small
19 participant in this litigation, albeit at significant expense, and believes that its parcel, well and
20 water use may be factually and legally irrelevant to the purpose of this litigation. The expert
21 witness report of the City, and, if not economically infeasible and practically impossible to find
22 and retain, its own expert report, may demonstrate that VNT should be exempt from this litigation
23 and not bound by its outcome.

24 California Code of Civil Procedure (CCP) § 833(d) specifically provides:

25 If the court finds that claims of right to extract or divert only minor
26 quantities of water, not to exceed five acre-feet of water per year,
27 would not have a material effect on the groundwater rights of other
28 parties, the court may *exempt* those claimants with respect to those
claims for only minor quantities of water, but a person who is
exempted may elect to continue as a party to the comprehensive
adjudication. (Emphasis added.)

1 Exemption does not mean a stipulation to the proposed Physical Solution. In this case, it
2 should mean dismissal from the adjudication without being bound by the Physical Solution or
3 judgment, but without prejudice to being sued in the future if facts change making it necessary to
4 litigate their water rights and water use. Instead of exempting minor users, the City added VNT to
5 the case seven years after it was commenced, seeks to handicap VNT with an accelerated and
6 unrealistic expert witness schedule, and seeks to bind VNT to a judgment when such may not be
7 necessary or fair.

8 The Draft Proposed Physical Solution imposes a lesser burden on minor water users, but
9 binds them nonetheless. The Draft Proposed Physical Solution also expressly preserves the
10 remaining six causes of action in the Cross-Complaint against VNT and other minor water users,
11 creating a prejudicial cloud on title to their property and water rights despite the complete lack of
12 merit or applicability as to some of those claims. The more fair outcome, if the expert reports
13 support this, is dismissal of all claims against VNT without prejudice. Thus, expert report review
14 is critically important, and the sooner the better for minor water users who have been recently
15 added.

16 **II. THIS COURT HAS THE POWER TO ORDER A SEQUENTIAL, CONCURRENT**
17 **OR HYBRID SCHEDULE FOR EXPERT WITNESS DISCLOSURES**

18 CCP § 830 *et. seq.* is a specially and specifically adopted set of procedures for conducting
19 comprehensive groundwater adjudications. Although the primary issue in this case is the City's
20 river diversions and impacts on endangered steelhead, and even though the City is not a
21 groundwater pumper or user, the City has chosen to conduct a groundwater adjudication of four
22 basins, thus triggering the applicability of CCP § 830 *et. seq.* CCP § 843(d) authorizes the
23 parties, via stipulation, or this Court via order, to set the schedule and sequence of expert witness
24 disclosures. Section 843(d) provides:

25 Unless otherwise stipulated by the parties, a party shall make the
26 disclosures of any expert witness it intends to present at trial, except
27 for an expert witness presented solely for purposes of impeachment
28 or rebuttal, ***at the times and in the sequence ordered by the court.***
If there is no stipulation or court order, the disclosures of an expert
witness shall be made as follows: (Emphasis added.)

1 Section 843(d) authorizes this Court to determine both the time and sequence for expert
2 witness disclosures. If concurrent disclosure was mandatory and not adjustable by the Court, there
3 would be no basis for CCP § 843(d) to include "sequence" with regard to what a court could order,
4 leaving the court limited to ordering only the timing of expert disclosures. But the legislature
5 expressly authorized a court to do more than set the timing of expert disclosure, it authorized a
6 court to order the *sequence* of disclosures as well.

7 **III. THIS COURT SHOULD ENSURE A FAIR PROCEEDING BY AFFORDING**
8 **THOSE CROSS-DEFENDANTS RECENTLY ADDED BY THE CITY AMPLE**
9 **TIME TO REVIEW THE CITY'S EXPERT REPORT AND, IF WARRANTED,**
10 **RETAINING AND DISCLOSING THEIR OWN EXPERT REPORT**

11 VNT and other small water users recently added to this litigation have no expert assistance
12 at this time. VNT believes that there may be no expert evidence warranting its inclusion in this
13 case. Or there may be expert evidence demonstrating the necessity for VNT to be a party and
14 bound by the judgment. After all this time, the City should be able to provide VNT and others like
15 VNT with the City's expert report now, or in early August, and not in late August or late
16 September. Without prompt disclosure, VNT will be unfairly prejudiced by its late inclusion and
17 access to expert assistance.

18 VNT understands that the City's objection to early disclosure is because (i) it does not want
19 to disclose sequentially, preferring for litigation and advocacy tactical reasons concurrent
20 disclosure with the State and other long-time lawsuit participants who already have experts, and
21 (ii) those other parties prefer or need later dates for concurrent disclosure. Neither rationale is
22 sufficient reason to prejudice VNT. There are several equitable solutions to the City's litigation
23 and advocacy goals that do not prejudice VNT or the City.

24 For example, this Court could order early but restricted expert disclosure by the City to
25 VNT. The City would disclose to VNT the City's expert report and VNT could not share that
26 disclosure with other major parties who have already retained experts until the date the Court
27 orders their expert disclosures. This approach protects both VNT and the City.

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1 Or, the Court could grant at least twelve weeks following the City's disclosure to VNT for
2 VNT to review, evaluate, and if warranted, procure expert assistance. That is impossible with a
3 September 24 disclosure date, and only possible with an August 24 disclosure date if the
4 remainder of the proposed pre-trial procedures are correspondingly extended.

5 Or, the Court could determine that based on the City's decision to add parties so late in the
6 proceedings, and who currently have no expert assistance as a result, any expert report VNT (and
7 others similarly situated) procures will be deemed to be a Supplemental Expert Report, and not
8 due for disclosure until the December 10, 2021 date when other Supplemental Expert Disclosures
9 are due, rather than the November 12 date currently proposed by the City for VNT and similarly
10 situated parties.

11 **IV. CONCLUSION**

12 This Court has the ability to assure fairness for the Phase 1 Trial by issuing an order setting
13 the sequence and timing of expert disclosures. VNT is hopeful that expert disclosures will reveal
14 grounds for its dismissal from the case without being bound by any judgment, or at least grounds
15 for modification of the Draft Proposed Physical Solution as to VNT, plus elimination of certain
16 remaining claims otherwise sought to be preserved by the City against VNT. The Court can
17 assure fairness by ordering early sequential disclosure to VNT, extending the time for VNT to
18 review, evaluate, find, and procure its own expert to allow at least twelve weeks from City
19 disclosure, or deeming any expert report from VNT to be a Supplemental Expert Report and not
20 due until December 10, 2021 under the existing pre-trial schedule. VNT did not

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1 create this scheduling problem. It should not be prejudiced by the schedule desired by the City
2 and other major parties who have been in this lawsuit for many years.

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4 Dated: July 13, 2021

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5
6 By: 

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