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 7 Garrison; Gregg Garrison; Richard Gilleland; Alex Glasscock; Brandon Hansen; Michael L.
 Rockhold, Trustee of The Michael Rockhold Trust; Linn Thompson; Bre Thompson; SISAR Mutual
 8 Water Company; and Denise Wizman, Trustee of the Denise Wizman Revocable Trust.

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

12

13 In the Matter of:
 14 SANTA BARBARA CHANNELKEEPER, a
 California non-profit corporation,
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 Petitioner,
 16
 v.
 17
 18 STATE WATER RESOURCES CONTROL
 BOARD, et al,
 19
 Respondents.
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CASE NO. 19STCP01176
 Judge: Hon. William F. Highberger
TRIAL BRIEF
 Date: March 16, 2021
 Time: 9:30 a.m.
 Dept.: SS10
 Action Filed: September 19, 2014
 Trial Date: March 16, 2022

21 CITY OF SAN BUENAVENTURA, et al.,
 22
 Cross-Complainant,
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 v.
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 25 DUNCAN ABBOTT, an individual, et al.,
 Cross-Defendants.
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1 **I. INTRODUCTION**

2 The issue to be determined at Phase 1 Trial is: Has the City of Ventura met its burden of
3 proof to prove the “sufficient and material interconnectivity” of waters within the Ventura River
4 Watershed. At trial, Cross-Defendants will put on testimony, evidence, and expert opinion that
5 disproves a “sufficient” and “material” interconnectivity within the watershed. Conversely, the
6 City of Ventura’s case will fail because they do not have qualified experts or evidence sufficient
7 to meet their burden of proof on the interconnectivity issue.
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9 To wit, Judge Highberger’s recent Orders (issued on 2/8 and 2/14/22) the Court
10 articulated that the City of Ventura’s burden of proof requires a showing of “sufficient” and
11 “material” connectiveness that impacts reaches 3 and 4 in the summer months. If that were not
12 the case, Judge Highberger’s recent use of those terms, as well as the definition of the term
13 “transaction” used by the Court of Appeal, would be superfluous. Thus, we believe that the use
14 of those qualifying terms has meaning, imposing a burden that requires more than mere
15 interconnectedness. As to Phase I Trial, Judge Highberger’s Order regarding bifurcation did not
16 find that the City’s burden was limited to merely proving that there was any
17 interconnectedness.
18

19 None of the City of Ventura’s or the State’s experts have rendered any opinions
20 regarding what, if any, quantifiable “material” impacts the diversion and pumping of water
21 allegedly has in causing “insufficient flow in reaches 3 and 4 of the [Ventura] river in summer
22 months.” The City of Ventura’s water model is flawed, and the expert that created the model
23 lacks the requisite training, education, and background to be a qualified licensed geologist or
24 hydrogeologist in the State of California. Her opinions, reports, and analyses are prohibited by
25 statutes and regulations based on protecting the public’s health and safety from unlicensed
26 persons practicing geology or hydrogeology in California. Conversely, the Cross-Defendants’
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1 expert Jordan Kear, who is both a Professional Geologist (PG) and Certified Hydrogeologist
2 (CGH), is licensed under the State of California statutes.

3 This case involves Cross-Complainants' attempt to appropriate the water rights of thousands
4 of individual property owners in the Ojai Valley and to claim these water rights for the City of
5 Ventura, through this Groundwater Adjudication and related claims for relief in its *Third Amended*
6 *Complaint*. The crux of the Cross-Complainants' claims involve the City of Ventura's attempt to
7 obtain water supplies from the Ojai Valley, instead of investing in the state water hook-up,
8 conservation measures, and other alternatives for increasing water supplies for the City of Ventura.
9 Cross-Complainants have concocted a means to challenge and attempt to misappropriate riparian
10 and overlies water rights suggestive of a future intent to transfer these water assets to the City of
11 Ventura to supply water for unlimited growth and development.

12 In this Phase 1 of the bifurcated trial, Cross-Complainants designate Claire Archer as an
13 expert witness "based upon the allegations and contentions that will be tried in the Phase 1 trial; i.e.,
14 the Ventura River watershed and groundwater basin boundaries and the interconnectivity of
15 groundwater and surface water within the watershed and groundwater basins." (Respondent and
16 Cross-Complainant City of San Buenaventura's Expert Witness Disclosures; Declaration of
17 Christopher Pisano, August 31, 2021, Exh. 1, 2:6-9.) Cross-Complainants' allegation that all waters
18 within the Ventura River Watershed are interconnected is purportedly supported by the reports,
19 figures, analyses, models and opinions of Claire Archer.

20 **II. STATEMENT OF FACTS**

21 In *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347 (Del
22 Ch. Oct. 1, 2018), Vice Chancellor Laster noted that the term "material" or "in all material
23 respects" is typically intended by practitioners "to exclude small, *de minimis*, and nitpicky
24 issues that should not derail an acquisition." That understanding of the use of material as a
25 modifier of a representation or covenant in an acquisition agreement could lead one to conclude
26 that a "material default" or a "material contract" is simply one that is, using Ken Adams'
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1 terminology, “nontrivial” or “important enough to merit attention.”

2 In the current case, “material connection between surface and groundwater” can mean
3 exactly as the Court of Appeals in this case found in 2018 - that a material connection would be
4 that which is not small, de minimis, or nitpicky. In the underlying *Channelkeeper* case, the
5 Appellate Court recognized that the material connection between surface and groundwater was
6 at Foster Park, between the Ventura River and the City of San Buenaventura (Ventura Water)
7 well field and surface diversions. That is why the conservation group, Santa Barbara
8 Channelkeeper, brought the action, and why they did not pursue any other entity within the
9 watershed - no one else was materially responsible for Ventura River streamflow depletion and
10 ensuing habitat limitations. Other pumpers and diverters throughout the Ventura River
11 Watershed were (correctly) not sued by Channelkeeper. The City of Ventura, failing to meet its
12 burden of proof of proving material interconnectivity throughout the four basins and the surface
13 waters, fails in its claims for relief in its *Third Amended Complaint*.

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16 Cross-Defendants’ testimony and expert opinion at trial will refute the City of Ventura’s
17 and its experts’ unsubstantiated claims of interconnectivity within the Ventura Watershed.
18 Hydrogeological material connection is a physical correlation, between aquifer strata and the
19 water flowing therein, thereto, or therefrom. Clay strata impede this flow. Clay strata break the
20 correlation between underlying production aquifers and overlying “perched” aquifers and
21 streams by confining and impeding the flow of groundwater. Bedrock and faults do the same
22 laterally and at depth, leading to the delineation of individual groundwater basins.

23
24 A material connection can be measured in real time, over the course of an hour, a day, a
25 water year, pumping season, or series of wet or dry years. These phenomena over the past three
26 decades in the surface and subsurface in this watershed are the empirical observations that will
27 disprove material interconnectivity. As recommended to judges in water adjudications, physical
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1 data and measurements are superior evidence and given priority over the inferior and uncertain
2 vagaries of water modeling. Our case is emblematic that empirical evidence trumps computer
3 simulations and modeling. Indeed, empirical is to be used and relied on when presented to the
4 court.

5 The natural environment in the Ventura River Watershed is dynamic, and changes far
6 more quickly than models can accurately predict – and the lack of interconnectivity can be
7 confirmed in real time in the field with empirical data and observations. By observing
8 consistent creek flow during dry years and wet years, the disconnection of the basins within the
9 Ventura River Watershed can be scientifically confirmed because high water levels in the
10 production aquifers of the Ojai basin or low water levels in the production aquifers of the basins
11 correlated to no observable change in streamflow. Yet the shallow, perched system maintains
12 consistent shallow water levels correlative to the observed streamflow, a clear *de minimus*, (not
13 material), physical correlation but one not large enough to establish a material connection.

14 Despite the expenditures of millions of State and City dollars modeling the Ventura
15 River Watershed, these two government entities have not provided a single quantification of
16 flow from the production aquifers of the Upper Ojai or Ojai basins to the creeks. Cross-
17 Defendants' expert Jordan Kear is a licensed professional in the State of California
18 (Professional Geologist and Certified Geohydrologist.) Experts Schnaar and Claire Archer are
19 neither. Instead of outcome-determinative theoretical water modelling proffered by the City of
20 Ventura, Cross-Defendants' experts and witnesses have physically and empirically observed
21 and recorded Ventura River Watershed creeks in a multitude of hydrologic conditions. Our
22 expert sees no material connection between pumping from the groundwater basins of Ojai and
23 Upper Ojai with streamflow. This statement of fact is predicated on measuring the streamflow
24 exiting the Ojai Basin at least monthly and recording its stage at 10-minute intervals
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1 automatically and measuring groundwater levels in the Ojai Basin with similar frequency.

2 The City of Ventura’s designated expert, Claire Archer, is not licensed as a geologist or
3 hydrogeologist in the State of California. Claire Archer does not meet the minimum educational
4 requirements to qualify for a license as a geologist or hydrogeologist in the State of California.
5 Claire Archer has never served as the licensed professional geologist in responsible charge in
6 California. Claire Archer states she was in responsible charge of her expert report in this matter.
7 Claire Archer has never served as an expert before this case. Her opinions, water model, and expert
8 reports must be rejected based on her failure of licensure with the State of California.

9 Claire Archer’s testimony establishes that she lacks the required license to practice geology
10 for others in California. Claire Archer does not possess the minimum educational requirements to
11 be qualified to take the examination for a license to practice geology or hydrogeology in California.
12 Claire Archer is not qualified or licensed to practice geology or the subspecialty, hydrogeology, for
13 others.

14 The practice of geology for others includes, but is not limited to, the preparation of
15 geological reports, documents or exhibits constituting the practice of geology, when the geological
16 reports, documents or exhibits constituting the practice of geology are disseminated or made
17 available to the public or any individual or combination of individuals other than the employees or
18 staff of such organization in such a manner that the public or said individual or combination of
19 individuals may reasonably be expected to rely thereon or be affected thereby. (Regulations Relating
20 to the Practices of Geology and Geophysics California Code of Regulations Title 16, Division 29 §
21 3003. Definitions. (f).)¹

22 This applies to governmental entities including any commission, board, department, district
23 or division of the state or any political subdivision thereof or of any county, city, or other public
24 body or by the employees or staff members of such commission, board, department, district or
25 division of the state or any political subdivision thereof or of any county, city or other public body.

26 _____
27 ¹ Regulations Relating to the Practices of Geology and Geophysics California Code of Regulations
28 Title 16, Division 29 §§ 3000-3067. https://www.bpelsg.ca.gov/laws/gg_regs_unannotated.pdf

1 (Regulations Relating to the Practices of Geology and Geophysics California Code of Regulations
2 Title 16, Division 29 § 3003. Definitions. (f).)²

3 Expert witness testimony is limited to that which is “[b]ased on matter . . . that is of a type that
4 reasonably may be relied upon by an expert in forming an opinion upon the subject to which his
5 testimony relates . . .” (Evid. Code § 801, subd. (b).) “[U]nder Evidence Code section 801, the trial
6 court acts as a gatekeeper to exclude speculative or irrelevant expert opinion.” (*Sargon Enterprises,*
7 *Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770, emphasis added; see also
8 *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1331 [“Expert opinion testimony based on
9 matter that provides no reasonable basis for the opinion offered is properly excluded under Evidence
10 Code section 801”].) Accordingly, the City of Ventura’s expert is rejected by the Evidence Code
11 as well as her failure of licensure with the State of California.

12 **III. PROCEDURAL POSTURE**

13 The Court in *Santa Barbara Channelkeeper* concluded that “the transaction must be
14 defined to include any diversion and pumping of water that leads to allegedly insufficient flow
15 in reaches 3 and 4 of the [Ventura] river in summer months. This ‘transaction’ is the
16 wrongdoing of which Channelkeeper complains, generalized to include all entities potentially
17 responsible for it.” (*Santa Barbara Channelkeeper* (2018) 19 Cal.App.5th 1176, 1189).

18 In issuing his Order dated 2/8/22, Judge Highberger specifically referenced this and
19 related burden of proof language. (2/8/22 Order, p. 3). Moreover, in his Order issued on
20 2/14/22, Judge Highberger similarly noted that the burden is more than mere interconnectivity,
21 but rather, noted that the burden is “material interconnectedness.” (2/14/22 Order, ¶14). Both
22 the City of Ventura and the related State Water Resources Control Board fail to meet the burden
23 of proof by their failure of experts and their opinions and their reports, and their inability to
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27 ² Regulations Relating to the Practices of Geology and Geophysics California Code of Regulations
28 Title 16, Division 29 §§ 3000-3067. https://www.bpelsg.ca.gov/laws/gg_regs_unannotated.pdf

1 establish a material connectivity of groundwater basins and surface waters that leads to
2 allegedly insufficient flow in reaches 3 and 4 of the Ventura River in summer months.

3 None of the City of Ventura’s or State’s experts have rendered any opinions regarding
4 what, if any, quantifiable “material” impacts the diversion and pumping of water allegedly has
5 in causing “insufficient flow in reaches 3 and 4 of the [Ventura] river in summer months.” The
6 City of Ventura’s water model is flawed, and Claire Archer, the author of the City of Ventura’s
7 expert report that relies on the flawed model, lacks the requisite training, education, and
8 background to be a qualified licensed professional in the State of California. Her opinions are
9 prohibited by statutes and regulations based on protecting the public’s health and safety from
10 unlicensed professionals working in California on complex water resources.

12 The State Water Board’s groundwater-surface water model was not developed using a
13 proper scientific process (e.g., the State Water Board dictated the outcomes of the model in
14 advance to persons that had never developed an integrated groundwater surface water model
15 before), and the model is still a work in progress. At this very moment, on the eve of trial, the
16 State’s model is undergoing required public comment and peer review. The final model will not
17 be available until long after trial. Cross-Defendants have been prejudiced by and continue to be
18 prejudiced by being subjected to multiple “drafts” of the State’s model during the course of
19 discovery that made it impossible to know exactly what model, and what assumptions were
20 being reviewed and utilized by the experts. The State’s model did not undergo peer review and
21 continues to be incomplete and unreliable. Because the model cannot be relied on, and the
22 expert opinions of Preston and Schnaar, which are based upon the State’s model, will be
23 confusing for the trier of fact and should be excluded. (Ev. Code 352, 720, 801, 803.)

26 Preston cannot opine on surface water impacts because he relies on incompetent and
27 speculative data and opinions of Schnaar and his flawed model based on the limitations
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1 imposed by SWRCB and its RFP. Schnaar cannot opine on speculative model results based
2 upon assumptions and incomplete data. (Ev. Code 352, 720, 801-803.) The model is inherently
3 flawed because its projected outcomes regarding the impacts of pumping on surface water
4 are: (1) based on the artificial construct of eliminating all wells in the Ventura River Watershed
5 for purposes of creating alleged “baseline conditions” before irrigated agriculture, “refilling”
6 the Basin to a point where it is overflowing, and then turning all the wells back on after the
7 groundwater overflows—a fantastical scenario (which could take decades if it could happen at
8 all), which does not demonstrate the way the Ojai Basin and the Ventura River currently
9 interact hydrologically; and (2) the model is inconsistent with real world data and
10 measurements and dismisses all real tangible evidence that doesn’t fit into its predefined
11 conditions and assumptions. (Ev. Code 352, 801, 802, 803.)

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14 The modelers could have, but chose not to, conduct aquifer tests, conductivity tests, and
15 other sampling of material in the Ojai Basin to test the degree of transmissivity of the aquitard
16 in the southwestern portion of the Ojai Basin and made assumptions about transmissivity
17 between aquifer layers that are orders of magnitude too low; thus the Preston/Schnaar Model
18 did not, and could have relied upon the best science available. They instead relied on old data,
19 cherry picked to meet the outcomes the State Water Board directed them to obtain and ignored
20 compelling new data that might affect the State’s desired outcome of dedicating all water in the
21 Ventura River Watershed to non-consumptive uses. (Ev. Code 352.)

22 23 **IV. CONCLUSION**

24 The issue to be determined at Phase 1 Trial is that the City of Ventura has failed to meet
25 its burden of proof of the “sufficient and material interconnectivity” of waters within the
26 Ventura River Watershed. Cross-Defendants’ testimony, evidence, and expert opinion
27 disproves a “sufficient” and “material” interconnectivity within the watershed. Conversely, the
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1 City of Ventura's case will fail because they do not have qualified experts or evidence sufficient
2 to meet their burden of proof on the interconnectivity issue.

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DATED: March 2, 2022

GARRISON LAW CORPORATION

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