SHAWN D. HAGERTY, Bar No. 182435
shawn.hagerty@bbklaw.com
BEST BEST & KRIEGER LLP
655 West Broadway, 15th Floor
San Diego, California 92101
Telephone: (619) 525-1300
Facsimile: (619) 233-6118

CHRISTOPHER M. PISANO, Bar No. 192831
christopher.pisano@bbklaw.com
SARAH CHRISTOPHER FOLEY, Bar No. 277223
sarah.foley@bbklaw.com
PATRICK D. SKAHAN, Bar No. 286140
patrick.skahan@bbklaw.com
BEST BEST & KRIEGER LLP
300 South Grand Avenue, 25th Floor
Los Angeles, California 90071
Telephone: (213) 617-8100
Facsimile: (619) 617-7480

Attorneys for Respondent and Cross-Complainant
CITY OF SAN BUENAVENTURA

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BEST BEST & KRIEGER LLP
300 SOUTH GRAND AVENUE, 25TH FLOOR
LOS ANGELES, CA 9-0071

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 OPPOSITION TO CASITAS MUNICIPAL WATER DISTRICT'S MOTION FOR ORDER GRANTING LEAVE TO SERVE UNTIMELY EXPERT WITNESS DISCLOSURES

Date: November 23, 2021
Time: 9:00 a.m.
Dept: SS10

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

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BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

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BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

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BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW
655 WEST BROADWAY, 15TH FLOOR
SAN DIEGO, CALIFORNIA 92101

I. INTRODUCTION

The City of San Buenaventura ("City of Ventura") opposes Casitas Municipal Water District's ("Casitas") motion for leave to serve an untimely expert designation. The motion should be denied for three reasons. First, Casitas fails to show mistake, inadvertence, surprise or excusable neglect, and does not show that the City of Ventura will not face prejudice. Casitas must make such a showing through declaration testimony in order to obtain the relief it now seeks. Casitas offers no evidence in support of its motion. It has not met its burden, and the motion should therefore be denied.

Second, even if Casitas had made a showing of mistake, inadvertence, surprise or excusable neglect through a declaration of counsel or otherwise, its purported "excuse" for not designating any experts on September 24th is without merit. The excuse justifying this motion is that the City of Ventura is trying to expand the scope of the Phase 1 trial beyond the limited issue of hydrogeology. But Casitas is not seeking leave to submit a designation of experts in different disciplines (e.g. a fisheries expert, water rights historian, or botanist), rather it seeks leave to designate an expert in a field it acknowledges is and has always been relevant to the Phase 1 trial: hydrogeology. Casitas is wrong in its argument of a supposed Phase 1 "scope creep." The City of Ventura is not seeking to expand anything, and it ought not be lost on anyone that Casitas and everyone else had the benefit of the City of Ventura's expert disclosures for over three weeks before others were required to designate. But even if Casitas were right and there is scope creep (which there is not), that does not excuse Casitas' failure to at least designate a hydrogeologist at its initial designation date. If Casitas were requesting leave to designate an expert in a different discipline for which it perhaps was previously unaware would be needed for Phase 1, that might have merit. But that is not the request here. Casitas' "excuse" is a ruse, and its claim that it failed to designate because it "made the mistake of taking Ventura at its word" (Motion, p. 7:4) is nothing but a "cheap shot" borne out of desperation.

Third, the motion fails because Casitas improperly asserts that even if it does not now designate the City of Ojai's designated expert Jordan Kear as its expert, Casitas can still designate Mr. Kear as a supplemental or rebuttal expert under Code of Civil Procedure Section 843.

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LOS ANGELES, CA 9-0071

Casitas is incorrect, and its claim of a "no harm no foul" situation misses the point, and ignores the prejudice to City of Ventura. As it stands now, Casitas cannot participate in the supplemental expert designation on December 3rd because it failed to designate in the initial designation date. (*Fairfax v. Lords* (2006) 138 Cal.App.4th 1019, 1026-1027.) But if leave is granted and Casitas designates Mr. Kear, it can then designate Mr. Kear, or potentially even another expert, to critique City of Ventura's experts' opinions on positions that are unique to Casitas and its concerns in the Watershed, and which are far broader than, and potentially have nothing to do with, City of Ojai and its rather limited concerns in this action. Casitas diverts water from the Ventura River, among other sources, for storage in Lake Casitas and delivery of water to users all over the Watershed. It cannot be disputed that its interests are far broader than those of the City of Ojai, which is seemingly concerned with only one of the four basins within the Watershed.

It would be one thing if Casitas had offered evidence (or at least a representation of counsel) as to what it is planning for its supplemental designation. It did not do so, and cannot do so for the first time on reply. City of Ventura is therefore left to guess as to what kind of new attack Casitas may be planning in a supplemental designation, which may have nothing at all to do with the rather limited analysis Mr. Kear performed for the City of Ojai regarding the Ojai Basin. City of Ventura would see Casitas' analysis for the first time on December 3rd, and would then have no chance to respond. This is prejudice, and Casitas' motion should be denied.

For more than a year, this Court has encouraged the parties to coordinate with like-minded parties and pool their resources on experts. Casitas' counsel attended all of the status conferences and must have heard the Court's urging. Casitas chose to remain on the sidelines as others diligently followed the rules and exchanged expert reports. It would be grossly unfair to allow Casitas to enter the playing field on an equal footing at this stage. Phase 1 will not evaluate individual water extractions, nor will it determine cause and effect. Rather the Phase 1 trial will determine interconnection between surface water and groundwater in the Ventura River Watershed and its four groundwater basins, as well as set the Watershed and basin boundaries. The existing expert reports are more than sufficient. Casitas is not needed for this phase of trial,

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nor should it be let off the hook simply because it now wants to get involved for some unexplained reason. Its motion should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

The scope of the Phase 1 trial, related discovery, and the pre-trial schedule has been the subject of multiple status conferences and hearings in this case.

On April 12, 2021, Casitas filed a status conference report for the April 19th status conference, in which it addressed the potential for bifurcation of the case and the potential that a phase could address "the interconnectedness of groundwater production and surface water flows." (Declaration of Patrick Skahan ("Skahan Decl."), ¶ 3, Ex. B at p. 2:22-23.) Following its April 2021 status report, Casitas did not oppose or otherwise file a response seeking to clarify or express concerns with the City of Ventura's motion to bifurcate. (Skahan Decl., ¶ 4.)

On June 21, 2021, the Court granted City of Ventura's motion to bifurcate and set a further status conference to address a pre-trial discovery and a law and motion schedule. On July 23, 2021, the Court approved a discovery and pre-trial schedule for the Phase 1 trial, where, over City of Ventura's objection, the Court ordered City of Ventura to unilaterally disclose its expert witnesses and reports first, and to do so by August 31, 2021. The Court set September 24th as a second "initial" disclosure date for certain other larger water-using parties, which specifically included Casitas, as well as a third "initial" disclosure date of October 22nd for all remaining parties. Further, "[t]he Court also ordered that after the City [of Ventura] provides its expert disclosure and report, parties may seek relief from the Court-ordered schedule for good cause shown by ex parte application filed before the respective September 24, 2021 and October 22, 2021 deadlines." (Skahan Decl., ¶ 5, Ex. D.)

On July 23, 2021, the Court conducted a status conference, where Casitas' counsel sought clarification of the expert disclosure schedule. This led to the following exchange:

> The Court: Well, given that you will see the City of Ventura's report at the end of August and have a month to retain an expert, would you expect to be

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LOS ANGELES, CA 9-0071

retaining an expert by September 24th to respond to what you view to be as a suspect expert report by the City of Ventura?

Mr. Cosgrove: At this point, we don't know that we do consider it suspect and we would reserve judgment on that until we see it.

The Court: Well, I think the sort ought to be major versus minor and not retained or not. **So you need to put your cards on the table on the 24th or risk only being able to offer a bona fide rebuttal expert.**

Mr. Cosgrove: I have the clarification I requested. Thank you.

(Skahan Decl., ¶ 6, at Ex. E, emphasis added [07/23/21 Tr., at p. 9:10-23].)

Consistent with the Court's order, on August 31, 2021, City of Ventura disclosed its four expert witnesses for Phase 1: (1) Claire Archer, Ph.D. (hydrogeology); (2) Tamara Klug (ecologist and habitat restoration specialist sub-expert providing supporting analysis and opinions for Dr. Archer); (3) Douglas R. Littlefield, Ph.D (expert historian); and (4) Charles H. Hanson, Ph.D. (expert fisheries biologist). (Skahan Decl., ¶ 7.)

On September 24, 2021, a number of parties made their expert witness disclosures, including Cross-defendants California Department of Parks and Recreation, California Department of Fish and Wildlife, State Water Resources Control Board, City of Ojai, East Ojai Group, and Andrew K. Whitman et al. (Skahan Decl., ¶ 8.) Casitas did not designate any expert on the September 24, 2021 court-ordered date, and Casitas did not move *ex parte* for modification of the disclosure dates prior to September 24, 2021 deadline. (*Ibid.*)

On October 13, 2021, which at that point was a full six weeks after City of Ventura had exchanged its experts' reports, and three weeks after Casitas' deadline to submit expert reports of its own, or at least move *ex parte* to modify the schedule, Casitas filed a status conference report wherein it raised concerns about the scope of Phase 1 trial. (Skahan Decl., ¶ 9, Ex. F.) This motion followed.

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III. LEGAL ARGUMENT

A. Casitas Fails to Demonstrate Mistake, Inadvertence, Surprise, or Excusable Neglect

"Late disclosure of experts ... frustrates the very purposes of the discovery statutes, and should be permitted, with appropriate safeguards and limits, only when absolutely necessary to avoid a miscarriage of justice.' [Citation.]" (*Bonds v. Roy* (1999) 20 Cal.4th 140, 147.) The purpose of the expert witness discovery statute in particular is to give fair notice to the opposing party of the expert's expected testimony at trial. (*Id.* at 146.) Delayed disclosure of experts and their proposed testimony "frustrates the very purposes of the discovery statutes, and should be permitted, with appropriate safeguards and limits, only when absolutely necessary to avoid a miscarriage of justice." (*Id.* at 147 [quoting Kennedy & Martin, Cal. Expert Witness Guide (Cont.Ed.Bar 1998) § 10.18, p. 268].) The Court may allow an untimely expert disclosure only if statutory conditions are satisfied under Code of Civil Procedure section 2034.720. (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 541.)

The comprehensive groundwater adjudication statute contains no provision for the Court to consider a motion to submit a tardy expert witness disclosure. (See generally Code Civ. Proc. § 843; see also Code Civ. Proc. § 830, subd. (c) ["The other provisions of this code [including the Discovery Act] apply to procedures in a comprehensive adjudication to the extent they do not conflict with the provisions of this chapter."]) The only statutory basis for Casitas' motion is Code of Civil Procedure section 2034.720, which sets forth the factors for exceptional relief to submit tardy expert witness information. It requires that the Court must determine, among other things (including a lack of prejudice to the non-moving party), that the moving party did **all** of the following:

(1) Failed to submit the information as the result of mistake, inadvertence, surprise, or excusable neglect.

(2) Sought leave to submit the information promptly after learning of the mistake, inadvertence, surprise, or excusable neglect.

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(3) Promptly thereafter served a copy of the proposed expert witness information described in Section 2034.260 on all other parties who have appeared in the action.

(Code Civ. Proc., § 2034.720, subd. (c).)

In other words, a showing of mistake, inadvertence, surprise or excusable neglect is mandatory. A party who seeks relief on the basis of mistake or inadvertence of counsel "must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief." (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399.) Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances. (*Alderman v. Jacobs* (1954) 128 Cal.App.2d 273, 276; see *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.) In determining whether the attorney's mistake or inadvertence was excusable, "the court inquires whether 'a reasonably prudent person under the same or similar circumstances' might have made the same error.' " (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.)

In its motion, Casitas focuses solely on the timing of its request to untimely designate an expert, as well as what it claims to be a lack of prejudice. (Motion, pp. 8:20-9:21.) Casitas ignores the first prong of Section 2034.720(c); it makes no showing of mistake, inadvertence, surprise or excusable neglect. Casitas must make such a showing through declaration testimony in order to obtain the relief it now seeks. (*See* Code Civ. Proc. § 2034.720, subd. (c); *see also Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1424; *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1008.) Here because Casitas did not even not try to make a showing of mistake, inadvertence, surprise or excusable neglect, its motion must be denied.

B. Casitas Fails to Demonstrate Circumstances Entitling it to Relief Where the Court Adopted an Expert Discovery Schedule that Casitas did not Follow

Code of Civil Procedure section 843, subdivision (d) provides that, "[u]nless otherwise stipulated by the parties, a party shall make the disclosures of any expert witness it intends to present at trial, except for an expert witness presented solely for purposes of impeachment or

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rebuttal, **at the times and in the sequence ordered by the court**." (*Id.*, emphasis added.) Casitas notes in its motion that this Court has inherent authority under Code of Civil Procedure Sections 843, (as well as Section 128), and it argues that the Court's inherent authority under these statutes allows for broader discretion than what is authorized under Code of Civil Procedure Section 2034.720. (Motion, pp. 5:13-6:14.) Casitas argues, again without providing evidence, that the Court should exercise its discretion and allow Casitas to designate an expert witness now almost two months after its Court-ordered expert designation date passed. There are several problems with Casitas' argument.

First, the contention that Casitas now needs leave because it was unaware of the scope of the Phase 1 trial is completely without merit. The scope of the Phase 1 trial has not changed; the Phase 1 trial concerns the boundaries of the Watershed and its four groundwater basin and the interconnection between the surface water and groundwater in the Watershed, including the interconnection between surface water and the four groundwater basins and the interconnection between those groundwater basins and the Ventura River and its tributaries.[1] That is all that will be tried and all that has ever been contemplated to be tried in Phase 1 since this case was bifurcated. While City of Ventura designated four experts, three of the experts, Ms. Klug (Botanist), Dr. Hanson (Fisheries), and Dr. Littlefield (Historian) play more of a supporting role for City of Ventura's primary expert, Dr. Archer (Hydrogeologist). Counsel for City of Ventura explained the purpose for each of these experts in the Phase 1 trial at the November 2nd status conference, and how their testimony will support the finding of interconnection, both in terms of the interconnection between surface waters and groundwater within each basin, and also the interconnection between the waters within each basin and the instream surface uses, which is relevant to a finding under Code of Civil Procedure Section 833(c), if necessary. As counsel for City of Ventura clearly articulated, the Phase 1 trial will not, at least in City of Ventura's view, concern issues of cause and effect, or how one parties' use of groundwater may or may not have

[1] City of Ojai has also put forth separate but related legal issues (trial issues 4 and 5) that similarly do not expand the scope of phase 1 trial.

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an impact on the fishery. (Skahan Decl., ¶ 6, Ex. E. pp. 24:10-32:17.) The Phase 1 trial will solely address the issues of interconnection, as well as the Watershed and basin boundaries.

Second, Casitas' argument regarding "scope creep," which again does not exist, also fails because at a minimum Casitas has always known that the Phase 1 trial would involve issues related to hydrogeology, as that is the scientific discipline by which interconnection of surface water and groundwater is shown. It would be one thing if Casitas claims it was surprised by the need to have experts in other disciplines to support hydrogeological opinions of interconnection. But of course that is not what is happening here. Casitas designated nobody (hydrogeologist or otherwise), and its argument now is that it needs a hydrogeologist because it was not aware that the scope of the Phase 1 trial is going to include issues beyond hydrogeology. This argument truly makes no sense. Stated another way, City of Ojai recognized the need to designate Mr. Kear, and it timely designated him on the Court-ordered designation date. Why did Casitas not designate Mr. Kear or another hydrogeologist on September 24th? Casitas does not explain that, nor can it. Casitas sat on its hands, and now it wants to be bailed out.

Finally, as a matter of law Casitas is incorrect in arguing that Sections 843 and 128 give the Court broader discretion to relieve Casitas of its tardiness than Section 2034.720. As stated, the comprehensive groundwater adjudication statute provides that all provisions of the Code of Civil Procedure (including the Discovery Act) apply to the comprehensive adjudication statute to the extent they did not conflict with the comprehensive adjudication statute. (Code Civ. Proc. § 830, subd. (c).) The comprehensive adjudication statute seemingly allows the Court discretion in setting the expert exchange schedule, but it does not provide any statutory guidance regarding how the Court should consider requests for leave when a party does not comply with the scheduling order that is set by the Court. Thus, the Court must look to the Discovery Act, and Section 2034.720 sets the standard for determining whether leave should be given. As is set forth above, Casitas does not meet its burden under Section 2034.720. The motion should be denied.

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C. City of Ventura will be Prejudiced if Casitas is Granted Leave Because Casitas will have Carte Blanche to Attack City of Ventura's Experts in a Supplemental Exchange and Leave the City with no Opportunity to Respond

Pursuant to Code of Civil Procedure section 2034.720, subdivision (b), the Court must make a determination that any party opposing the motion for leave to submit tardy witness information will not be prejudiced in maintaining that party's action or defense on the merits. (Code Civ. Proc. § 2034.720, subd. (b).)

Casitas' requested change to allow it to designate Mr. Kear as its primary expert in modification of the approved schedule would augment the prejudice the City contends it has already incurred by having to unilaterally disclose its expert witnesses and reports in advance of all other parties. It would be one thing if Casitas wanted to designate Mr. Kear for the sole purpose of helping City of Ojai present Mr. Kear and his existing opinions at trial. If that were all Casitas wanted to accomplish by this motion, then there may not be substantial prejudice. But Casitas has not committed to that, and it is entirely unknown at this point what supplemental designation Casitas is contemplating. As City of Ventura notes above, because Casitas did not designate any expert on the initial disclosure date, it cannot designate experts in a supplemental exchange on December 3, 2021. (*See Fairfax, supra,* 138 Cal.App.4th at 1026-1027.) Casitas draws water from and delivers water to a variety of locations throughout the Watershed. It is a much larger player in the Watershed than is non-pumper City of Ojai, which seemingly has an interest in only one of the four basins. Because Casitas did not designate any expert in its initial exchange, City of Ventura cannot possibly anticipate what kind of supplemental designation Casitas may put forth on December 3rd. However, given the disparity between the relative positions of Casitas and City of Ojai, the odds are good that Casitas will attempt a supplemental designation on issues beyond what would otherwise be helpful for City of Ojai. This alone provides the prejudice.

City of Ventura notes here that its counsel raised this very concern about a potential supplemental expert report that is unique to Casitas at the November 2nd hearing, which prompted the Court to set this motion in the first place. (Skahan Decl., ¶ 6, Ex. E. pp. 19:10-20:15) Casitas

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LOS ANGELES, CA 9-0071

could have addressed even in broad terms what it intends to do in a supplemental expert exchange to alleviate City of Ventura's concern and perhaps lessen the claim of prejudice. It did no such thing, instead asserting with a rather broad brush that there is no harm because Casitas only wants to designate an existing expert and that there will be time for depositions. That is not the point. The prejudice is the potential for an entirely different supplemental expert witness opinion on behalf of Casitas that would otherwise not be allowed without leave.

Casitas also argues that there is no prejudice because it can still designate experts and elicit their opinions under Section 843(d), which it asserts allows it to designate rebuttal experts regardless of its failure to timely designate at the initial exchange. (Motion, pp. 3:22-4:4.) This is not so. Section 843(b)-(d) sets forth the requirements for disclosing expert *opinions*, and provides that parties must disclose their expert and supplemental expert *opinions* at the times set by the court, except for those experts who will be offered solely for impeachment and rebuttal. (Code Civ. Proc. § 843, subd. (b) - (d).) The statute goes on to provide that the court can modify disclosure requirements for the expert witnesses who will be presented solely for impeachment and rebuttal. (Code Civ. Proc. § 843, subd. (e).) In short, this statute seemingly sets out a similar process to the Discovery Act for disclosing primary and supplemental expert *opinions*, but it also gives the court the ability to require a disclosure of experts the Discovery Act leaves out, namely undesignated experts who will provide only impeachment or foundational rebuttal *fact testimony*, but not *opinions*. (See Code Civ. Proc. § 2034.310.)

The distinction between what is expert *opinion testimony* and what is otherwise *fact-based testimony*, e.g. impeachment, is critical, and California case law routinely provides that while experts do not need to be disclosed if they are testifying solely to factual matters, e.g. to impeach and otherwise challenge the foundation of an expert on rebuttal who had previously testified to opinions, any expert who is going to offer opinions must be disclosed during expert discovery. (*See Pina v. County of Los Angeles* (2019) 38 Cal.App.5th 531, 549; *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 146; *Kennemur v. State* (1982) 133 Cal.App.3d 907, 925.) This law is well-established.

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Casitas seemingly misreads Section 843, subdivision (d) and is attempting a dangerous argument, namely that any party in this proceeding can bring in any expert(s) he/she/it wishes, and proffer "rebuttal" expert opinions, even if those opinions were not otherwise disclosed during the Court's scheduled initial and supplemental expert disclosure dates. That cannot be the law of the comprehensive adjudication statute, as it is fundamentally at odds with the well-established case law as set forth above.

The bottom line here is that Casitas made a fundamental tactical decision on September 24th when it did not designate an expert, and it is now foreclosed from participating in the expert disclosure process and presenting expert opinions at trial. If the Court wants to set a disclosure of experts who will provide fact-based testimony, but not opinions, under Section 843(e), then the Court can do so, but that does not give Casitas another bite at designating experts who will provide opinions. City of Ventura is prejudiced by this motion as discussed above, and it should be denied.

IV. CONCLUSION

For all of the reasons set forth herein, the Court should deny the motion for leave to serve an expert witness designation.

Dated: November 16, 2021

BEST BEST & KRIEGER LLP

By: _____

SHAWN D. HAGERTY
CHRISTOPHER M. PISANO
SARAH CHRISTOPHER FOLEY
PATRICK D. SKAHAN
Attorneys for Respondent and Cross-Complainant
CITY OF SAN BUENAVENTURA

BEST BEST & KRIEGER LLP
300 SOUTH GRAND AVENUE, 25TH FLOOR
LOS ANGELES, CA 9-0071