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6 In Pro Per and Attorney for
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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.

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 STATEMENT RE CITY
REFUSAL TO PRODUCE EXPERT
DOCUMENTS/MATERIALS

28 TO: CROSS-COMPLAINANT CITY OF SANBUENAVENTURA, ALL PARTIES
AND THEIR ATTORNEYS OF RECORD:

1 This Court has allowed for further briefing concerning the Computer Model utilized by
2 CITY OF VENTURA (CITY) and the associated protective order concerning the model. At the
3 initial hearing on the motion for approval of the protective order my clients objected on grounds
4 that the CITY has refused to produce the model despite my clients' willingness to sign the
5 protective order.

6 **I. THE CITY SHOULD BE ORDERED TO PRODUCE THE EXPERT'S COMPUTER**
7 **MODEL TO ANY CROSS-DEFENDANT WHO AGREES TO MAINTAIN**
8 **CONFIDENTIALITY OF THE MODEL AND WITHOUT THE NEED TO**
9 **PREPARE AND FILE A MOTION AND OBTAIN APPROVAL OF THE COURT**

10 At the ex parte hearing, the CITY's attorneys attempted to distort the factual setting of the
11 dispute which was created by the CITY. An accurate recounting of how this dispute arose is as
12 follows: After receiving notice of the CITY's ex parte hearing concerning the protective order,
13 legal counsel for a handful of cross-defendants (Andrew K. Whitman) communicated with legal
14 counsel for the CITY and asked that the cross-defendants be added to the names listed in the
15 protective order. It was volunteered that the CITY would not need to immediately send the
16 protected material (computer modeling software) and that it was possible that cross-defendants
17 might not ever request possession of the model.¹ The CITY responded that it would not agree to
18 add my clients to the stipulation unless I had an expert.² I asked the CITY if they had any legal

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21 ¹ The full text of Whitman's communication to the CITY:

22 "I haven't decided yet whether I want the model but I dont want to have to go to court to approve my inclusion in
23 the protective order if I later decide I want it. I think the easiest resolution is to add me to the stip and protective
24 order. At the moment I wouldnt know what I was looking at if I received a copy of the model so don't currently
25 want a copy. If I get someone to help me understand the model (something I am looking into) I would then want
26 a copy of the model and agree to be subject to the protective order provisions. If you agree to add my name to the
27 order (I'm an attorney and represent myself and three others) and also agree that you dont need to send the model
28 unless I request it (either in the order or as a side agreement) then I wouldnt have to make an appearance tomorrow.
Thanks for your consideration."

² The CITY's response: "I am hesitant to agree to your inclusion at this point before you have retained an expert.
The point of this stipulation is that the experts are going to get the model in a form that can be altered or manipulated
so that they can then advise their clients on the merits of the model. The experts can then share the model (or any
portions of it) with their clients, but that must be done in a "read only" mode. From my perspective, that is the
best way to insure that the model is only used for litigation purposes. There is a provision in the Stipulation to add
parties, subject to notice and court approval. I would suggest that once you retain an expert we revisit this issue,
and at that point I may not have any problem with including you as a party to the stipulation."

1 authority for the proposition that they could refuse to produce expert witness material to a party
2 willing to stipulate to a protective order? I further indicated I would oppose the stipulation based
3 upon CITY’s refusal to accommodate my clients.³ The CITY then indicated it would
4 communicate that my clients opposed the ex parte application.⁴ No legal authority for the
5 CITY’s position has ever been provided.

6 When an expert has relied on privileged material to formulate an opinion, the court may
7 exclude their testimony as necessary to enforce the privilege. *Fox v. Kramer* (2000) 22 Cal.4th
8 531, 541. The privilege that is claimed is held by the CITY’s expert and she has the option to not
9 provide testimony and thereby protect her work product. She has also been given the option to
10 have her work protected from dissemination by way of a protective order. What is not an option
11 is for the CITY’s expert to offer opinion testimony that is based upon material that hasn’t been
12 admitted into evidence and without the opportunity of the cross-defendants to examine
13 concerning the details of the actual computer model relied upon. An expert’s opinion that is not
14 supported by the facts is inadmissible. *Sanchez v. Kern Emergency Med. Transp. Corp.* (2017) 8
15 Cal.App.5th 146, 155–156. A judge should not permit an expert to testify to an opinion that is
16 not reasonably based on the evidence. *Pedefferri v. Seidner Enters.* (2013) 216 Cal.App.4th 359,
17 375.

18 The CITY was asked if there was any legal authority for the proposition that it could refuse
19 to provide a party with the materials their expert witnesses rely upon⁵. No response to this inquiry
20 has ever been provided by the CITY.

21 The CITY’s objection is apparently based upon the fact that the Whitman Defendants have
22 not disclosed an expert witness. However, there is no articulation of fact or law that renders
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25 ³ “Can you cite any legal authority for your position at a party who is willing to stipulate to your protective order is
26 not entitled to a model unless they have an expert? I will be opposing the stipulation based upon your refusal to
27 accommodate my clients.”

28 ⁴ “I am posting to the message board that you are opposing the application so that the Court is aware of your
opposition.”

⁵ CITY contends it need not produce the evidence and material relied upon their expert in formulating her opinions
if the cross-defendant has not retained its own expert. For the record the Whitman defendants have designated
Jordan Kier as a non-retained expert.

1 expert retention as relevant to the need to disclose expert materials as part of expert discovery. A
2 party who does not have an expert is nonetheless entitled to obtain the materials the expert relies
3 upon in discovery and to cross-examine the expert concerning the materials that form the basis of
4 the expert's opinion. The computer model that forms the basis of the CITY's requested protective
5 order is precisely the type of evidence that must be disclosed in discovery. Furthermore, no matter
6 what the protective order states the computer model will need to be admitted into evidence if the
7 CITY's expert testifies at trial.⁶

8 The computer model must be part of the evidence if the expert's testimony is to be
9 admitted. In addition, each cross-defendants has the right to depose and cross-examine the
10 CITY's expert on all of her opinions, including the basis of her opinions. Cross-defendants must
11 be permitted to examine the materials the expert relies upon or they are being denied the right to
12 conduct discovery permitted by the Code of Civil Procedure and denied their legal right to cross-
13 examine the expert witness both at deposition and trial. If every cross-defendant isn't given the
14 opportunity to review the material the expert relies upon, then the testimony needs to be excluded.

15 The CITY's position raises an issue previously addressed in this case. The CITY has
16 asserted that the computer model doesn't serve any purpose other than to an expert witness. This
17 Court has expressed repeatedly that it is not an expert concerning hydrogeology. Yet, the Court
18 is required to determine whether hydrogeology experts regularly rely on computer models rather
19 than actual data collection. If the Court concludes yes - an expert should be expected to rely upon
20 computer modeling - then the next question is whether the model is the same type that experts
21 regularly rely upon to form opinions concerning a salient point of testimony.

22 How can this Court decide these foundational questions concerning the admissibility of
23 the expert's testimony without having the computer model itself in evidence and without having
24 an expert witness/special master to compare and contrast the computer model with foundational
25 material that an expert can rely upon? The Court should reconsider the motion to appoint a special

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28 ⁶ The CITY can ask that the computer model be sealed but whether the request will be granted is subject to the First Amendment scrutiny.

1 master to assist the Court given that the CITY has now made it abundantly clear that it will need
2 expert assistance to decide whether the Court can admit the testimony of the CITY's expert.

3 **II. CONCLUSION**

4 There is no basis for the CITY to refuse disclosure of the computer model prepared by
5 and relied upon by the CITY's expert. Any cross-defendant who agrees to maintain the
6 confidentiality of the computer model should receive the model without the need to file a motion.
7 Treating the information with confidentiality is an accommodation to the expert. If that is not a
8 sufficient accommodation in her mind then she should withdraw from testifying. A cross-
9 defendant should not be forced to file a motion (and receive a 100 page opposition from a firm
10 padding its bills). The burden should be on the expert witness and the CITY to demonstrate why
11 the signature on a confidentiality agreement is not sufficient protection of the expert's rights.
12 There is no law which permits an expert's testimony without complete disclosure of the
13 background material the expert relies upon.

14 Respectfully submitted,

15 Dated: January 7, 2022

16 */s/ Andrew K. Whitman*

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18 ANDREW K. WHITMAN, in pro per, and
19 attorney for HEIDI A. WHITMAN, NANCY
20 L. WHITMAN and the JOHN R. and
21 NANCY L. WHITMAN FAMILY TRUST
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