

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

EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE SECTION 6103

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

11 Attorneys for Respondent and Cross-Complainant
12 CITY OF SAN BUENAVENTURA

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF LOS ANGELES

15 SANTA BARBARA CHANNELKEEPER, a
16 California non-profit corporation,

Case No. 19STCP01176

17 Petitioner,

Judge: Hon. William F. Highberger

18 v.

RESPONDENT AND CROSS-
COMPLAINANT CITY OF SAN
BUENAVENTURA'S OPPOSITION TO
THE LOA E. BLISS 2006 REVOCABLE
TRUST'S EX PARTE MOTION FOR
EXTENSION OF TIME AND
DISCLOSURE OF EXPERTS

19 STATE WATER RESOURCES CONTROL
20 BOARD, etc., et al.,

21 Respondents.

22
23 CITY OF SAN BUENAVENTURA, etc.,

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

24 Cross-Complainant,

25 v.

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

26 DUNCAN ABBOTT, an individual, et al.,

27 Cross-Defendants.
28

1 **I. INTRODUCTION**

2 City of San Buenaventura (“City of Ventura”) respectfully opposes the Loa E. Bliss 2006
3 Revocable Trust’s (“Bliss Trust”) motion for an extension of time to disclose an expert or experts.
4 The motion is fatally flawed for two reasons. First and foremost, and leaving aside procedural
5 defects, the motion should be denied because the Bliss Trust does not answer some rather critical
6 questions. How much time does the Bliss Trust need? It does not say. Who does the Bliss Trust
7 expect to retain at this point? It does not say. Where is the Bliss Trust’s proposed expert(s) in
8 terms of performing an analysis and preparing a report? Again, it does not say. The biggest
9 problem with the Bliss Trust’s motion is that none of these important specifics are addressed. As
10 a result, there is no way to tell whether the Bliss Trust’s request, if granted, would lead to a trial
11 continuance, and if so for what duration.

12 In its *ex parte* application the Bliss Trust indicated that it would like to retain two experts,
13 Jordan Kear (current expert for the City of Ojai), and Aquilogic, Inc. (current expert for East Ojai
14 Group). These experts have performed analyses and prepared reports for their existing clients,
15 but their work is in the Ojai Basin, not the Upper Ojai Basin where the Bliss Trust’s land is
16 located. The Bliss Trust has been a party to this lawsuit for over a year, and it has known this
17 entire time of City of Ventura’s claim that the waters in the Watershed, including in the Upper
18 Ojai Basin, are interconnected, and that the use of water in the upper basins has an impact on
19 downstream uses. The Bliss Trust, and all other smaller users, had access to City of Ventura’s
20 expert witnesses reports since August 31, 2021, and this Court has, for some time, encouraged
21 similarly situated parties to work together and pool resources. Yet it seems from its moving
22 papers that the Bliss Trust is still at “square one” in terms of finding and retaining an expert.
23 Unless the Bliss Trust can identify an expert who is well along in performing an analysis of the
24 Upper Ojai Basin, then any requested relief would necessitate an extension of many months, and
25 that would cause serious prejudice, as it would cause the parties to lose the trial date. The City of
26 Ventura, and many others, are actively preparing for the Phase 1 trial in February 2022. The
27 Court should not delay the trial over the request of one landowner, who has not established
28 diligence or good cause.

1 The motion is also flawed due to procedural defects. The Bliss Trust does not identify the
2 statutory basis for its request, but in its brief it identifies Code of Civil Procedure Section 843. As
3 is discussed herein, Section 843 does not provide a statutory mechanism for the Court to address a
4 motion to extend time to designate an expert beyond the deadlines set by the Court. As such, the
5 only statutory basis for this motion is in the Discovery Act, where a motion to submit an untimely
6 expert designation requires a showing of mistake, inadvertence, surprise or excusable neglect, as
7 well as a finding that the City of Ventura will not face prejudice. Bliss Trust must make such a
8 showing through declaration testimony in order to obtain the relief it now seeks. The Bliss Trust
9 offered no such evidence, and for this reason the Bliss Trust has not met its burden, and its
10 motion should be denied.

11
12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 The scope of the Phase 1 hearing, related discovery, and the pre-trial schedule has been
14 the subject of multiple Court status conferences and noticed motion hearings in this matter.

15 On or about February 2, 2021, the Bliss Trust filed its status conference report in advance
16 of the Status Conference scheduled for February 9, 2021. (Declaration of Patrick Skahan
17 (“Skahan Decl.”), ¶ 2, Ex. A.) Its report identified areas of dispute, including that “to the best of
18 [Bliss Trust’s] knowledge and belief: (1) The Upper Ojai basin is a stand-alone basin . . . (3)
19 There is no alleged or actual adverse impact on the fishery or elsewhere based on any extraction
20 of waters from the Upper Ojai basin.” (*Id.* at Ex. A [2/2/21 Bliss Trust Status Conf. Report, at p.
21 3].)

22 On June 21, 2021, the Court granted the City’s Motion to Bifurcate and Partial Lifting of
23 the Discovery Stay for matters relevant to the Phase 1 trial on the basin and watershed boundaries
24 and interconnectivity, and set a further status conference to address a pre-trial discovery and a law
25 and motion schedule, and ordered the parties to meet and confer. (Skahan Decl., ¶ 4, Ex. C
26 [Notice of Ruling].)

27 On July 23, 2021, the Court approved a discovery and pre-trial schedule for the Phase 1
28 trial. (Skahan Decl., ¶ 5, Ex. D [Notice of Ruling, at Ex. A].) Over the City’s objections, the

1 Court ordered the City to unilaterally disclose its expert witnesses and reports by August 31,
2 2021, giving all parties ample opportunity to review the City’s experts’ opinions well prior to the
3 date on which their expert disclosures were due. In accordance with the approved schedule,
4 certain specific parties, including Casitas, had to disclose experts and reports by September 24,
5 2021, and all other parties had to disclose experts and reports by October 22, 2021. (*Ibid.*)
6 Further, “[t]he Court also ordered that after the City provides its expert disclosure and report,
7 parties may seek relief from the Court-ordered schedule for good cause shown by ex parte
8 application filed before the respective September 24, 2021 and October 22, 2021 deadlines.”
9 (*Ibid.*)

10 Trustee Loa E. Bliss appeared at the hearing on July 23, 2021, and inquired about
11 clarification on the date parties are required to make expert disclosures. She stated, “[i]t seems to
12 me like it might be useful to be able to have the cut-off date after the small parties have decided
13 whether they are going to call an expert or after they have identified an expert because such
14 testimony could be in tandem with an expert or an expert may recommend having some extra
15 testimony.” (*Id.* at ¶ 6, Ex. E [7/23/21 Tr. at 27:13-18].) The Court responded and described the
16 process of percipient and expert discovery (*id.* at pp. 27 – 30) and ultimately informed Ms. Bliss:

17 The Court: Again, if you were trying to advocate a position at trial, **at some point,**
18 **you have got to find your witnesses.** They have to be competent and know what
19 they are talking about. So I am not going to go find them for you, Mr. Hagerty’s
20 job is not to go find them for you, **you or somebody working on your behalf will**
21 **have to go find them.**

22 (Skahan Decl., ¶ 6, at Ex. E, [07/23/21 Tr., at p. 30:20-26], emphasis added.)

23 On August 31, 2021, the City disclosed the four expert witnesses it may call in Phase 1:
24 (1) Claire Archer, Ph.D. (hydrogeology); (2) Tamara Klug (ecologist and habitat restoration
25 specialist sub-expert providing supporting analysis and opinions for Dr. Archer); (3) Douglas R.
26 Littlefield, Ph.D (expert historian); and (4) Charles H. Hanson, Ph.D. (expert fisheries biologist),
27 consistent with the Court’s order. (Skahan Decl., ¶ 7.)
28

1 On September 24, 2021, a number of parties made their expert witness disclosure,
2 including Cross-defendants California Department of Parks and Recreation, California
3 Department of Fish and Wildlife, State Water Resources Control Board, City of Ojai, East Ojai
4 Group, and Andrew K. Whitman et al. (Skahan Decl., ¶ 8.)

5 On October 22, 2021, the Bliss Trust served its Ex Parte Application for Extension of
6 Time to Serve its Disclosure of Experts, and noted that it was concurrently serving a “disclosure
7 of experts that are **expected** to be retained.” (Ex Parte App., at p. 2, emphasis added.) The Bliss
8 Trust stated it requested the extension of time “to allow certainty of the engagement of the
9 identified experts, to refine and further delineate the information concerning the Upper Ojai basin
10 and groundwater with supplementary material.” (*Ibid.*)

11 On November 10, 2021, the Bliss Trust filed its “Brief and Statement in Support of
12 Motions To For Extension of Time.” It based its motion for an extension of time on grounds that,
13 “it appears at long last it may be possible, with others, to hire an expert and engage an attorney to
14 represent the interests of the Trust, and others similarly situated, concerning the status of the
15 Upper Ojai basin.” (Brief, at 3:13-16.)

16
17 **III. LEGAL ARGUMENT**

18 **A. The Bliss Trust has not Demonstrated Mistake, Inadvertence, Surprise, or**
19 **Excusable Neglect**

20 “Late disclosure of experts ... frustrates the very purposes of the discovery statutes, and
21 should be permitted, with appropriate safeguards and limits, only when absolutely necessary to
22 avoid a miscarriage of justice.’ [Citation.]” (*Bonds v. Roy* (1999) 20 Cal.4th 140, 147.) The
23 purpose of the expert witness discovery statute in particular is to give fair notice to the opposing
24 party of the expert's expected testimony at trial. (*Id.* at 146.) Delayed disclosure of experts and
25 their proposed testimony “frustrates the very purposes of the discovery statutes, and should be
26 permitted, with appropriate safeguards and limits, only when absolutely necessary to avoid a
27 miscarriage of justice.” (*Id.* at 147 [quoting Kennedy & Martin, Cal. Expert Witness Guide
28 (Cont.Ed.Bar 1998) § 10.18, p. 268].) The Court may allow an untimely expert disclosure only if

1 statutory conditions are satisfied under Code of Civil Procedure section 2034.720. (*Perry v.*
2 *Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 541.)

3 The comprehensive groundwater adjudication statute contains no provision for the Court
4 to consider a motion to submit a tardy expert witness disclosure. (See generally Code Civ. Proc.
5 § 843; see also Code Civ. Proc. § 830, subd. (c) [“The other provisions of this code [including the
6 Discovery Act] apply to procedures in a comprehensive adjudication to the extent they do not
7 conflict with the provisions of this chapter.”]) The only statutory basis for Casitas’ motion is
8 Code of Civil Procedure section 2034.720, which sets forth the factors for exceptional relief to
9 submit tardy expert witness information. It requires that the Court must determine, among other
10 things (including a lack of prejudice to the non-moving party), that the moving party did all of the
11 following:

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

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

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

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

19 In other words, a showing of mistake, inadvertence, surprise or excusable neglect is
20 mandatory. Excusable neglect is that neglect which might have been the act of a reasonably
21 prudent person under the same circumstances. (*Alderman v. Jacobs* (1954) 128 Cal.App.2d 273,
22 276; see *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.)

23 In its motion, the Bliss Trust focuses on what would amount to excusable neglect,
24 although it does not refer to the term by that name, instead referring to its efforts as “reasonable
25 diligence.” Regardless of the term that it used, while it appears that the Bliss Trust contacted
26 many people with the hopes of finding legal counsel and an expert, it appears that it has not yet
27 found either. It also appears that the Bliss Trust is not even that far along in getting an expert
28 lined up, and actually having that expert perform an analysis of the Upper Ojai Basin’s
connectivity to the surface waters and the Ventura River Watershed. (Brief, at 4:14-7:25.)

1 The Bliss Trust claims that “it appears at long last it may be possible, with others, to hire
2 an expert and engage an attorney to represent the interests of the Trust, and others similarly
3 situated . . . ” (Brief, at 3:13-16.) The Bliss Trust confirms, however, that it met and conferred
4 with the City in December 2020 on issues of hydrology interconnectivity, but that “it became
5 clear at that point that the City and the Trust would agree to disagree.” (Brief in Support, at p.
6 5:5-6.) Nevertheless, the Bliss Trust has waited over 11 months to retain an expert, and even still
7 it has not retained one. Bliss Trust fails to demonstrate in its motion that it is any more likely to
8 retain an expert if granted an extension of time, than it has been able to do over the past eleven
9 months. The Court gave the Bliss Trust fair warning that it needed to take these steps, and it
10 appears this has not been done. The Court ought not grant this motion, which will by necessity
11 cause a continuance of the Phase 1 trial date, in the mere hope that Bliss Trust can finally
12 coordinate the hiring of an expert, and legal counsel. The Court should deny this motion.

13 **B. The City Would be Prejudiced if this Motion were Granted**

14 Pursuant to Code of Civil Procedure section 2034.720, subdivisions (b) the Court must
15 make a determination that any party opposing the motion for leave to submit tardy witness
16 information will not be prejudiced in maintaining that party’s action or defense on the merits.
17 Bliss Trust’s requested continuance will necessarily lead to a trial continuance, and a substantial
18 one at that. Even if the Bliss Trust is able to retain Aquilogic and/or Mr. Kear as its expert, these
19 experts have done work and prepared and exchanged reports for existing clients in the Ojai Basin,
20 not the Upper Ojai Basin. As this Court is aware from numerous discussion with the parties in
21 this case, issues of connectivity between surface water and groundwater are complicated, time
22 consuming and expensive. The Bliss Trust’s expert, should it retain one, would undoubtedly need
23 months to get up to speed, study the Upper Ojai Basin, perform analyses and prepare a report.
24 This kind of delay should not occur for any one party when the other parties have already
25 exchanged their reports, and are moving forward with expert discovery and otherwise getting
26 ready for the Phase 1 trial. It would be prejudicial to City of Ventura and every other party that is
27 currently preparing for trial to have this kind of continuance at this stage of the proceeding. The
28 motion for leave should be denied because it would result in the prejudice of extreme delay.


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

For all of the reasons set forth herein, the Court should deny the Bliss Trust's motion for an extension of time 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