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13 CITY OF SAN BUENAVENTURA

EXEMPT FROM FILING FEES PURSUANT  
TO GOVERNMENT CODE SECTION 6103

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

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

Case No. 19STCP01176

18 Petitioner,

Judge: Hon. William F. Highberger

19 v.

DEFENDANT AND CROSS-  
COMPLAINANT CITY OF SAN  
BUENAVENTURA'S RESPONSE TO  
BRIEF IN LIEU OF OFFER OF PROOF  
BY ANDREW K. WHITMAN, ET AL.

20 STATE WATER RESOURCES CONTROL  
BOARD, et al,

21 Respondents.

22 CITY OF SAN BUENAVENTURA, et al.,

Date: March 11, 2022

Time: 9:00 a.m.

Dept.: 10

23 Cross-Complainant,

24 v.

Action Filed: Sept. 19, 2014

Trial Date: March 16, 2022

(Phase 1 Trial)

25 DUNCAN ABBOTT, an individual, et al.,

26 Cross-Defendants.  
27  
28

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1 Defendant and Cross-Complainant City of San Buenaventura (Ventura) submits this  
2 response to the brief served by Andrew K. Whitman, Heidi A. Whitman, Nancy L. Whitman, and  
3 John R. and Nancy L. Whitman Family Trust (Whitman) on March 2, 2022 in lieu of the offer of  
4 proof requested by the Court.

5 **I. THE WHITMAN BRIEF FAILS TO RESPOND TO THE COURT’S REQUEST**  
6 **FOR AN OFFER OF PROOF AND IMPROPERLY SEEKS TO REARGUE**  
7 **DECIDED ISSUES**

8 At the February 25, 2022 further trial readiness conference, the Court stated the following:

9  
10 THE COURT: I would take an oral offer of proof now or give you  
11 the chance to give me a written offer of proof by the middle of next  
12 week *as to what you want to prove about the City’s pueblo rights,*  
13 *or the lack thereof, that’s germane to the upcoming trial.*

14 *It’s not obvious to me that I can see how it fits into what*  
15 *we’re trying to adjudicate. But, in fairness, I think you should be*  
16 *able to give your offer of proof.*

17 ...

18 What you’ll offer of proof is – and then I want a written  
19 response from the City as to whether they would stipulate to any of  
20 the things that you’ve put in your offer of proof as being conceded  
21 for the limited purposes of phase 1 trial, as opposed to something  
22 that is contested factually.

23 ...

24 And so far as what I’m attempting to do is ration where the  
25 scarce resources are applied in order to have as cost-effective and  
26 legally and factually sound a trial as possible. *And, at the moment,*  
27 *this to me seems like something so collateral that it really ought to*  
28 *wait until April when the trial is hopefully behind us and then pick*  
*it up. (Emphasis added.)<sup>1</sup>*

29 Rather than providing an offer of proof as requested by the Court, Whitman has filed an  
30 argumentative and factually unsupported brief that repeats legal positions that this Court has  
31 already rejected for purposes of Phase One through its rulings on the three recent motions for  
32 judgment on the pleadings filed by the City of Ojai, the Garrison Group, and Whitman (Motions).  
33 For example, in ruling on Ojai’s and Whitman’s Motions, the Court decided that, subject to proof

34 \_\_\_\_\_  
35 <sup>1</sup> As of the filing of this response, Ventura had only a rough draft, rather than certified, copy of  
36 the transcript of proceedings for February 25, 2020 and excerpted this language from that rough  
37 draft. Ventura will supplement with the certified transcript upon receipt, if necessary.

1 of interconnection in Phase One, Ventura has standing as a downstream water rights holder,  
2 regardless of the status of its pueblo/treaty rights.<sup>2</sup> Similarly, the Court decided that, subject to  
3 proof of interconnection in Phase One, Ventura may bring its Sixth Cause of Action for a  
4 comprehensive adjudication and physical solution under the Comprehensive Adjudication Statute  
5 as to the four basins and the Ventura River Watershed as alleged. (See Notices of Ruling filed  
6 February 1, 2022 and February 23, 2022.) None of these rulings depend on Ventura’s allegations  
7 regarding pueblo/treaty rights, and Whitman has no basis to reargue these decisions now, when  
8 the Phase One Trial is merely twelve days away. Other than rearguing decided issues, Whitman’s  
9 brief does not provide any new reason why the technical questions of how Ventura has pled  
10 pueblo/treaty rights in the Third Cause of Action are germane to the Phase One issue of  
11 interconnection or why they cannot wait until after the Phase One issue is determined to be  
12 addressed. As explained below, there are multiple reasons why these collateral pleading issues  
13 should be addressed after Phase One.

14 **II. THERE ARE MULTIPLE REASONS WHY ADDRESSING THE PLEADING OF**  
15 **PARTS OF THE THIRD CAUSE OF ACTION SHOULD OCCUR AFTER THE**  
16 **PHASE ONE TRIAL**

17 There are multiple reasons why addressing the technical pleading concerns, raised for the  
18 first time in the Whitman reply<sup>3</sup> to Ventura’s opposition to his Motion for Judgment on the  
19 Pleadings as to the Sixth Cause of Action, should wait until after the conclusion of Phase One.  
20 These reasons include:

21  
22 <sup>2</sup> See transcript of proceedings for January 20, 2022 a p. 32:6-11:

23 MR. HAGERTY: IF WE GET TO THIS, THIS WILL BE A  
24 SEPARATE PHASE OF TRIAL. AND THAT’S THE WAY WE WOULD REQUEST  
25 THAT IT BE TEED UP. BUT, AGAIN, YOUR HONOR, EVEN ABSENT  
26 PUEBLO RIGHTS, THERE IS NO QUESTION ABOUT OUR STANDING. WE --  
27 WE HAVE THE RIGHT UNDER THE COURT OF APPEAL DECISION --  
28 THE COURT: YOU DON'T NEED TO PERSUADE ME OF THAT.

<sup>3</sup> In that reply brief, Whitman focused on one sentence of paragraph 107 of the Third Amended Cross-Complaint that was made on “information and belief.” However, the allegations of the Third Claim for Relief (paragraphs 123-128) are not made on “information and belief.” This pleading question has not been fully briefed, is not properly before the Court on a noticed motion, and has not been the subject of a final decision of this Court. While Ventura believes that its proposal below will resolve any potential issue regarding these technical pleading concern, it does not concede that a pleading defect exists.

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- There is no motion to strike pending related to Whitman’s technical pleading concerns, and the time period set by the Court for hearing all motions (other than motions in limine) prior to Phase One elapsed on January 21, 2022. (See Amended Notice of Ruling filed November 4, 2021 at Ex. A, Revised Discovery and Pre-Trial Schedule for Phase 1 Trial.) Whitman could have brought such a motion at any time prior to that date, but elected instead to file a Motion for Judgment on the Pleadings.
- There is insufficient time prior to the Phase One Trial date to file a noticed motion to strike. Such a noticed motion should be brought, if at all and if necessary, after the Phase One Trial. Because of the unnecessary distraction from the Phase One Trial that this unrelated issue would cause (and has unfortunately already caused), Ventura would oppose any attempt to bring such a motion prior to Phase One.
- Whitman appears to be seeking a summary adjudication of Ventura’s Third Cause of Action, contending that, without a proper motion pending, the Court should “determine” whether Ventura has a “legitimate claim.” (Whitman Brief, p. 2:9-11.) The time to bring a motion for summary judgment/adjudication prior to Phase One elapsed on November 3, 2021. Whitman could have brought such a motion, but elected not to do so. He cannot bring such a motion now, although he could bring such a motion after Phase One is completed, if necessary.
- Whitman has not filed a notice of intent to participate in the Phase One Trial, nor has he sought relief from the Court for the failure to do so. Because the Whitman parties are not participating in the Phase One Trial, the Court, in the judicious allocation of scarce resources, should not consider their untimely and procedurally improper arguments regarding technical pleading issues as Ventura and other parties prepare for and engage in the Phase One Trial. Parties who have elected not to participate in the Phase One Trial should not be permitted to delay it or to interfere with its clearly-defined scope.

- 1           • The sole remaining bifurcated issue in Phase One is interconnection.  
2           Interconnection is a threshold issue for each cause of action, including the Third  
3           Cause of Action. In contrast, the technical pleading issues Whitman has raised  
4           about parts of the Third Cause of Action are *not* threshold issues to the question of  
5           interconnection. There is therefore no reason to address them prior to Phase One.  
6           Phase One will not determine water rights (and indeed there has been no discovery  
7           on such matters because discovery has been stayed except for the Phase One Trial  
8           issues) but instead will only determine the threshold issue of interconnection in the  
9           Watershed.<sup>4</sup>  
10          • The results of Phase One may influence the scope of all of Ventura’s claims, and  
11          may require amendment of the Cross-Complaint after Phase One is completed. As  
12          described below, Ventura is willing (without conceding any defect in its current  
13          pleading) to amend the Third Cause of Action to address the concerns raised by  
14          Whitman, who would then be free to challenge the Third Cause of Action, if  
15          desired, through a proper and timely motion. This is a much more efficient way to  
16          address the concerns.

17       **III. VENTURA’S PROPOSED SOLUTION**

18           The Court asked Ventura to file a written response stating whether it can stipulate to  
19           anything that Whitman provides in his offer of proof. Since Whitman did not provide an actual  
20           offer of proof, there is nothing to which Ventura could stipulate, even if it were willing to do so.  
21           However, Ventura proposes the following solution that should be more than sufficient good cause  
22           to defer these technical pleading questions until after the completion of Phase One, while also  
23           preserving the rights of the parties to address these issues later:

- 24           • As previously offered to Whitman through the meet and confer process, Ventura  
25           will agree to amend the Third Amended Cross-Complaint forty-five (45) days after  
26

27           <sup>4</sup> Determining boundaries and extent of the water resource being litigated is an “essential” first  
28           phase of water rights adjudications in order to adjudicate water rights claims “in later  
          proceedings.” (See *Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1006, reh’g  
          denied (Apr. 6, 2021), review denied (July 21, 2021).)

1 the issuance of the decision in the Phase One Trial to conform to the Court’s  
2 decision, and to address the technical pleading issues Whitman has asserted  
3 regarding parts of the Third Claim for Relief. Specifically, Ventura will address  
4 the concerns regarding portions of the allegations that are incorporated into the  
5 Third Claim for Relief being made on “information and belief,” and will add  
6 additional supporting factual allegations to the currently alleged facts in the Third  
7 Claim for Relief, including additional factual allegations regarding compliance  
8 with the claims perfection process under the Treaty of Guadalupe-Hidalgo and  
9 through the United States Court of Claims. After reviewing Ventura’s amended  
10 pleading, Whitman could then raise any arguments thereon in a timely manner  
11 through a proper motion.

- 12 • The Phase One Trial is and will be limited to the sole remaining bifurcated  
13 question of interconnection, and will not involve a determination of water rights,  
14 including the water rights alleged in the Third Claim for Relief. Those issues will  
15 be addressed, if necessary, through a separate phase of trial regarding the issues  
16 asserted in the Third Claim for Relief.

17 **IV. CONCLUSION**

18 Whitman did not respond to the Court’s request at the February 25, 2022 further trial  
19 readiness conference for an offer of proof and instead reargues decided issues. There are multiple  
20 reasons to defer the technical pleading concerns Whitman has raised regarding allegations  
21 incorporated by reference into the Third Claim for Relief until after completion of Phase One  
22 Trial. Although Whitman has not provided any facts or suggestions that Ventura could even  
23 consider stipulating to, Ventura proposes a reasonable and efficient solution that allows the  
24 participating parties to proceed with Phase One while preserving these issues raised by this non-  
25 participating party for determination in an orderly fashion after the completion of the Phase One  
26 Trial.

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Dated: March 4, 2022

BEST BEST & KRIEGER LLP

By: 

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