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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 FOR THE COUNTY OF LOS ANGELES

11 SANTA BARBARA CHANNELKEEPER,
 12 a California non-profit corporation,

13 Petitioner,

14 v.

15 STATE WATER RESOURCES CONTROL
 16 BOARD, A CALIFORNIA STATE AGENCY;
 17 CITY OF SAN BUENAVENTURA, a
 18 California municipal corporation, incorrectly
 19 named as CITY OF BUENAVENTURA,

20 Respondents.

21 _____
 22 CITY OF SAN BUENAVENTURA,
 23 a California municipal corporation,

24 Cross-Complainant,

25 v.

26 DUNCAN ABBOTT, an individual, et al.

27 _____
 28 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 OBJECTIONS TO
 PROPOSED PROCESSES FOR
 PHYSICAL SOLUTION**

1 The Court should recognize that it grossly unfair to limit litigants to 6 pages when
2 confronted with a 90-page document (the proposed physical solution). The CITY OF SAN
3 BUENAVENTURA (hereafter referred to as CITY) is the bad actor that has caused the overdraft
4 of the Ventura River and the reckless intentional endangerment of its Steelhead Trout population.

5 **I. GENERAL LEGAL BACKGROUND**

6 The “physical solution” that the CITY seeks is an equitable remedy designed to alleviate
7 overdrafts and the consequential depletion of water resources in a particular area, consistent with
8 the constitutional mandate to prevent waste and unreasonable water use and to maximize the
9 beneficial use of California's limited resource. *California American Water v. City of Seaside*
10 (2010) 183 Cal.App.4th 471. Under the “physical solution doctrine,” a court adjudicating a water
11 rights dispute may, within limits, exercise its equitable powers to impose a physical solution to
12 achieve a practical allocation of water to competing interests. *State Water Resources Control Bd.*
13 *Cases* (2006) 136 Cal.App.4th 674. In water cases involving a physical solution, a trial court not
14 only has the power but also has the duty to exercise its power to work out a solution consistent
15 with the policy to beneficially use water. *Water Replenishment Dist. of Southern Cal. v. City of*
16 *Cerritos* (2012) 202 Cal.App.4th 1063 [as modified on denial of reh'g, (Feb. 8, 2012) and review
17 denied (May 9, 2012)].

18 The solution must not, of course, unreasonably or adversely affect the existing legal rights
19 and respective priorities of the parties (see *City of Barstow v. Mojave Water Agency* (2000) 23
20 Cal.4th 1224, 1243–1244, 1250–1251), but a trial court nonetheless has discretion to implement
21 its physical solution within the bounds of its authority. (*Id.* at p. 1256.)

22 Although it is clear that a trial court may impose a physical solution to achieve a practical
23 allocation of water to competing interests, the solution's general purpose cannot simply ignore the
24 priority rights of the parties asserting them. (See *City of Los Angeles v. City of San Fernando*
25 (1975) 14 Cal.3d 199, 290.) In ordering a physical solution, therefore, a court may neither change
26 priorities among the water rights holders nor eliminate vested rights in applying the solution

1 without first considering them in relation to the reasonable use doctrine. (See 1 Rogers & Nichols,
2 Water for California (1967) § 404, p. 549, and cases cited.) See also *City of Barstow v. Mojave*
3 *Water Agency* (2000) 23 Cal.4th 1224.

4 In *City of Barstow v. Mojave Water Agency*, the California Supreme Court clarified that
5 an equitable physical solution that disregards prior legal water rights is not viable/enforceable.
6 The Supreme Court rejected an argument (for a proportionate use allocation) that the State
7 Constitution requires the greatest number of beneficial users that the water supply can support,
8 because the argument omitted the requirement that any water right is subject to the rights of those
9 with lawful priority to the water. The Supreme Court further clarified that there is no equitable
10 discretion on the part of the court to fashion a solution that impinges in any way upon the
11 paramount rights of the owner of property overlying a groundwater resource.

12 Under California law, “[p]roper overlying use [of groundwater] ... is paramount, and the
13 right of an appropriator, being limited to the amount of the surplus, must yield to that of the
14 overlying owner in the event of a shortage unless the appropriator has gained prescriptive rights
15 through the taking of nonsurplus waters.” *Hi-Desert County Water Dist. v. Blue Skies Country*
16 *Club, Inc.* (1994) 23 Cal.App.4th 1723, 1730–1731. “Thus, while the rights of all overlying
17 owners in a groundwater basin are correlative and subject to cutbacks when the basin is
18 overdrafted, overlying rights are superior to appropriative rights.” *City of Barstow v. Mojave*
19 *Water Agency*, supra, 23 Cal.4th 1224, 1251–52. Any physical solution that merely allocates
20 pumping rights based on prior production elevates the rights of appropriators and those producing
21 without any claim of right to the same status as the rights of riparians and overlying owners. The
22 approach is unconstitutional and impermissible. *Id.*

23 Water right **priority** has long been the central principle in California water law. The
24 corollary of this rule is that an equitable physical solution **must preserve water right priorities** to
25 the extent those priorities do not lead to unreasonable use. In the case of an overdraft, riparian
26 and overlying use is paramount, and the rights of the appropriator must yield to the rights of the

1 riparian or overlying owner. *City of Barstow*, supra, 23 Cal.4th 1224, 1243. Finally, a trial court
2 cannot define or otherwise limit an overlying owner’s future unexercised groundwater rights, in
3 contrast to the court’s authority to place limitations on unexercised riparian rights. *City of*
4 *Barstow*, supra, 23 Cal.4th 1224, 1249. Thus, the CITY has no authority and this Court has no
5 legal authority to impinge on an overlying owner’s future use of groundwater. Yet, that is the
6 only reason that a significant portion of the cross-defendants are in this case (i.e., overlying
7 landowners who hold the right to extract groundwater in the future but who do not currently pump
8 water from the groundwater basin).

9 It has not been established, nor does the Third Amended Cross-Complaint allege, that
10 there is a current overdraft of the Ojai or Upper Ojai groundwater basins. That is a threshold
11 determination that must be made, and if the basin isn’t in an overdraft status then there is no basis
12 for imposing a physical solution as against cross-defendants who have been joined in the litigation
13 because they are owners of property overlying the groundwater basin [the physical solution can
14 proceed, but as to the Ventura River and its groundwater basin only]. That truth is applicable to
15 both active and inactive extractors who have rights based upon status as overlying the basin. The
16 opportunity to determine that the Ojai Groundwater basin is not in an overdraft status presents a
17 tremendous opportunity for this Court to summarily dismiss the vast majority of all cross-
18 defendants.

19 One who comes into equity must come with clean hands. A court will neither aid in the
20 commission of a fraud by enforcing a contract, nor relieve one of two parties to a fraud from its
21 consequences, where both are *in pari delicto*. Unconscientious conduct in the transaction may
22 give rise to the defense. (See *De Garmo v. Goldman* (1942) 19 Cal.2d 755, 764; *Gavina v. Smith*
23 (1944) 25 Cal.2d 501, 505; *Stein v. Simpson* (1951) 37 Cal.2d 79, 83.)

24 As the court observed in *Precision Instrument Mfg. Co. v. Automotive Maintenance*
25 *Machinery Co.* (1945) 324 U.S. 806, 65 S.Ct. 993: “This maxim is far more than a mere banality.
26 It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with
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1 inequitableness or bad faith relative to the matter in which he seeks relief, however improper may
2 have been the behavior of the defendant. The doctrine is rooted in the historical concept of court
3 of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.
4 This presupposes a refusal to be ‘the abetter of iniquity.’ ” (65 S.Ct. 993, 997)

5 **II. THE FIRST DRAFT OF THE PHYSICAL SOLUTION SHOULD COME FROM**
6 **THE PARTIES, ENTITIES, AND AGENCY’S CHARGED WITH PROTECTION**
7 **OF THE VENTURA RIVER HABITAT [NOT THE CITY – NOT THE PRIMARY**
8 **ABUSER OF WATER OVERDRAFTING].**

9 The CITY should not be a participant in the initial drafting of a physical solution. A
10 physical solution should be devised by the Court with advice from parties, entities, and agencies
11 with responsibility for the Ventura River habitat. The Court should appoint a committee of stake
12 holders with protective interests of the Ventura River. The committee and the protective entities
13 should study the overdraft problem. That body or committee should then draft a meaningful
14 physical solution and present the physical solution to this Court. If the proposed physical solution
15 meets with the Court’s approval, it should then be presented to the CITY for its first opportunity
16 to present a response. The proposed physical solution should also be presented to every person,
17 entity or agency impacted by the solution for their comments. The Court can then rule on a
18 physical solution.

19 It is fundamentally unfair, and frankly ludicrous, to have the bad actor – The CITY – that
20 has placed the Ventura River in peril – proposing the first draft of a physical solution. This is
21 tantamount to allowing the fox to guard the hen house. This Court should be constantly mindful
22 that it is the CITY’s abuse of the Ventura River water shed that creates the need for an
23 adjudication reducing overdraft from the Ventura River. There are several additional factors the
24 court should consider:

25 The CITY has virtually assured that the physical solution will fail to protect the Ventura
26 River from being in a perpetual overdraft status. Despite being served with the Channelkeeper’s

1 lawsuit exposing the CITY's overdraft of the Ventura River and the detriment to the endangered
2 Steelhead Trout population, the CITY has continued to issue development permits without regard
3 to the CITY's contribution to the overdraft of Ventura River. As a party seeking equitable relief,
4 the unclean hands doctrine is applicable to the CITY. If the Court is not willing to deny the
5 request for adjudication and a physical solution on the basis of its unclean hands, the doctrine at
6 least provides this Court with the discretion to determine that the CITY should initially be denied
7 a seat at the table with respect to the formulation of a physical solution. The physical solution
8 should initially be drafted by persons, entities and agencies who wish to cure and protect the
9 Ventura River (The CITY's only interest in this litigation is to use it to perpetuate its abuse and
10 overuse of the River and to somehow obtain adjudication the CITY has rights with respect to the
11 groundwater in the Ojai and Upper Ojai groundwater basins).

12 **III. THIS COURT SHOULD RULE THAT THE RESERVATION OF RIGHTS IS NOT**
13 **A PROPER INCLUSION IN THE PHYSICAL SOLUTION.**

14 Responding defendants join in the objection by other cross-defendants to the inclusion of
15 any statement of "reserved water rights" in the physical solution. [See Draft Physical Solution -
16 Sections 3.2 and 9.2.] The rights are asserted in other causes of action to the Third Amended
17 Cross-Complaint but those rights cannot be shown to have any relevance to the physical solution.

18 **IV. THIS COURT SHOULD IMMEDIATELY RULE THAT THE PROPONENT OF**
19 **ANY NEW USE OF WATER FROM THE VENTURA RIVER MUST FIRST**
20 **APPLY TO THIS COURT FOR PERMISSION AND ESTABLISH THAT THE**
21 **PROPOSED NEW USE IS BENEFICIAL AND CONSISTENT WITH**
22 **CONSTITUTIONAL WATER USE STANDARDS.**

23 As mentioned in this brief and in others, despite knowledge that demands on the Ventura
24 River have depleted its flow to unacceptable levels the CITY continues to issue development
25 permits that only increase the demands on the Ventura River. The CITY undoubtably has no
26 concern for actually creating solutions for the Ventura River. Instead, the CITY wants to continue
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1 development that will preclude the return to a healthy river. In fact, The CITY builds into its
2 physical solution that it can adjudicate “reserved rights” when the physical solution inevitably
3 fails. In addition, the CITY presumes that the physical solution will include allocations between
4 the interested parties based upon proportionate current water use. Therefore, the CITY moves
5 steadfastly forward with increasing its own demand on the Ventura River by issuing development
6 permits. This will increase the allocation to the CITY in the event the Court applies a
7 proportionate use formula to the physical solution. [Note: as discussed above, proportionate use
8 allocations are unconstitutional. However, the CITY will make the argument either directly or
9 indirectly (by arguing residential units approved since the inception of the suit are “beneficial”).]

10 **V. THE COURT SHOULD IMMEDIATELY RESTRICT THE WATER**
11 **ALLOCATED TO THE CITY FROM THE VENTURA RIVER TO THE**
12 **VOLUMES THAT WERE TAKEN WHEN THE CHANNELKEEPER SUIT WAS**
13 **INITIATED.**

14
15 Respectfully submitted,

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17 Dated: July 15, 2021

/s/ Andrew K. Whitman

18 _____
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20 attorney for HEIDI A. WHITMAN, NANCY
21 L. WHITMAN and the JOHN R. and
22 NANCY L WHITMAN FAMILY TRUST