RUTAN & TUCKER, LLP
Jeremy N. Jungreis (State Bar No. 256417)
jjungreis@rutan.com
Douglas J. Dennington (State Bar No. 173447)
ddennington@rutan.com
Travis Van Ligten (State Bar No. 301715)
tvanligten@rutan.com
18575 Jamboree Road, 9th Floor
Irvine, CA 92612
Telephone: 714-641-5100
Facsimile: 714-546-9035

Attorneys for Cross-Defendant
CASITAS MUNICIPAL WATER DISTRICT a California special district

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, COMPLEX

SANTA BARBARA CHANNELKEEPER, a California non-profit corporation,

Petitioner,

vs.

STATE WATER RESOURCES CONTROL BOARD, a California State Agency; CITY OF SAN BUENA VENTURA, a California municipal corporation, incorrectly named as CITY OF BUENA VENTURA,

Respondents.

CITY OF SAN BUENA VENTURA, a California municipal corporation,

Cross-Complainant,

vs.

DUNCAN ABBOTT, et al.,

Cross-Defendant.

Case No. 19STCP01176

Judge: Hon. William F. Highberger
Dept: 10

CROSS-DEFENDANT CASITAS MUNICIPAL WATER DISTRICT'S REPLY IN SUPPORT OF MOTION TO SERVE EXPERT WITNESS DESIGNATION

Date Action Filed: September 19, 2014
Phase 1 Trial Date: February 14, 2022

Date: November 23, 2021
Time: 9:00 a.m.
Dept: 10

I. INTRODUCTION

The City of Ventura's Opposition fails to respond substantively as to any of the points raised in Cross-Defendant Casitas Municipal Water District ("Casitas") Motion, and has failed to demonstrate any prejudice to the City if the Court were to grant Casitas' Motion. Furthermore, the City's attempt to obfuscate the proper authority for expert designations in groundwater adjudications, which Ventura has stated repeatedly this case is, is further evidence of the City's misapplication of Code of Civil Procedure ("CCP") §§ 843 and 2034.710, *et seq.*

Though it is possible that Ventura or aligned interests may lose a ***tactical advantage*** they might achieve by improperly sidelining Casitas from Phase 1 of the case, granting Casitas' Motion will not result in any ***legal prejudice*** to Ventura or any other party to this litigation. There will be no delays, no changes to the schedule (at least not because of the relief that Casitas is requesting), no inability to depose, and no unfair surprise, the types of things that can properly be characterized as "prejudice." Through its Motion, Casitas is seeking to only rely on the initial designation of Mr. Kear (without any alteration to his existing report), and to then, if deemed necessary by Casitas once the scope of Phase 1 is further clarified by the Court, to potentially submit its own supplemental experts to respond (or not) to new issues raised by Ventura and other parties, at the same time as every other party. As previously indicated in Casitas' motion, Casitas felt compelled to request this flexibility, and to designate an expert after the initial deadline, because the Scope of Phase 1 remains a moving target, hotly contested among the various parties—as evidenced by the myriad of briefs submitted on November 8, each advocating for a different scope of trial in Phase 1. Casitas is willing to be flexible on what constitutes the proper scope of Phase 1 of trial (assuming other material issues are then addressed in Phase 2), but given the present open ended nature of the proceedings, and widespread disagreement among the Parties, Casitas must be able to ensure it can support its positions with expert evidence as may be appropriate in Phase 1. Granting Casitas' motion will allow it to do so without prejudicing anyone.

Ventura contends that if the Court grants Casitas leave to designate expert witnesses, Ventura will lose a perceived strategic advantage before Phase 1 – namely, Ventura candidly

(albeit surprisingly) admits that Ventura wants to prohibit Casitas from participating fully in this proceeding by not allowing them to present their own experts. However, CCP § 843 and §§ 2034.710, et seq., were never intended for use as a prohibitory tool to otherwise limit a party's ability to meaningfully participate in pending proceedings. Rather, they are both designed to provide a trial court judge with flexibility under circumstances where a party may have failed to designate an expert in accordance with the Court's previously established schedule. In other words, these sections are intended to be interpreted in a manner that furthers the interest of justice and fairness to all parties, so that all parties can marshal sufficient evidence to pursue their claims and defenses, provided the relief requested would not materially prejudice other parties. Put simply, CCP § 843 and §§ 2034.710, et seq., are intended to give parties the ability to introduce expert witnesses after the relevant deadlines have passed where there is no prejudice to an existing party that cannot be cured by the Court in so doing; they are not to be strictly construed and enforced in order to protect a perceived procedural advantage claimed by one party (which Ventura admits is the basis for its opposition).

As the Court appears to already realize, Casitas' request should not have been particularly controversial, since the Court clearly has authority under CCP 843 and its own inherent powers to manage and revise case schedules in the interests of justice. Unfortunately, Ventura has indicated that it will go to great lengths to limit Casitas' and other parties' ability to pursue their claims and defenses in a reasonable manner—even where no prejudice can meaningfully occur. Frankly, this whole motion could have been avoided had Ventura simply followed through with its prior agreement not to oppose Casitas' designation of one existing expert witness (utilizing his one existing expert report—which is all this motions seeks). Unfortunately, Ventura wanted to play "hard ball," so here we are.

Because the Court has broad discretion to alter its expert witness disclosure schedule under CCP § 843, and because granting the Motion will not result in any prejudice to any party, the Court should grant Casitas' Motion, and allow it to designate Mr. Kear and otherwise participate in the supplemental (and rebuttal) expert witness process per CCP 843.

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II. The Court has Broad Discretion under Code of Civil Procedure Sections 843 and 128

As previously noted in Casitas' motion, and subsequently ignored in Ventura's Opposition, the Court has broad discretion to alter the trial schedule, and allow designation of additional experts, with or without a motion. (CCP §§ 843, 2034.710, et seq.; CCP § 128; s*ee also Santandrea v. Siltec Corp.* (1976) 56 Cal.App.3d 525, 529 ["Every court has the inherent power to regulate the proceedings of matters before it and to effect an orderly disposition of the issues presented."]. Discovery may occur in any sequence authorized by the Court, and only where discovery by one party will serve to materially delay the discovery efforts of another party, is the requirement to file a motion triggered. (CCP 219.020 (b).) Here there can be no delay as Casitas is designating one already designated witness, Jordan Kear, and adopting his already disclosed report. Whether Ventura wishes to so acknowledge or not, CCP § 843 does give the Court significantly broader authority to set and modify the timing and sequence for the use of expert witness disclosures than in a traditional civil discovery case. (See CCP § 843(d) ["Unless 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 rebuttal, at the times and in the sequence ordered by the court."]) This makes sense. Most civil discovery cases involve few experts. Groundwater adjudications are highly expert dependent. The Legislature made a decision to give trial courts greater control when operating under CCP 843. Moreover, it is noteworthy that there are no limitations in section 843 (d) on how many times the Court may alter the times and sequence of witnesses. The times and sequence just have to be per the court's order—whether an initial order or a modified order. Similarly, CCP 128 also gives the court inherent authority to amend its calendar and the trial schedule. (CCP §128 (a)(8) ["Every court shall have the power to . . . amend and control its process and orders so as to make them conform to law and justice."]

In light of this broad authority, the Court clearly has authority to alter its schedule beyond what it previously set—with or without a motion. Ventura's reliance on CCP § 2034.710 et seq. appears entirely misplaced and inconsistent with the procedures established in this case to date.

CCP Section 2034.710 applies where a party has "has failed to submit expert witness information on the date specified in a demand for that exchange." Here, there was no "demand for exchange" by Ventura or any other party served per CCP 2034.210 et seq. Instead, as Ventura concedes in its declaration attending its Opposition, the Parties stipulated to a schedule ultimately approved by the Court "per Code of Civil Procedure section 843." (Skahan Decl. to Ventura's Opposition, ¶4-5; Exs C, D.) There was never a "demand for exchange" so as to trigger the requirements of CCP 2034.710. Nor could there have been. A "demand for exchange" can only occur AFTER the date of trial is set. (CCP 2034.210 (a).) Here, the date establishing expert disclosures was set either before or concurrently with the date of trial for Phase 1—depending on how you read the prior notices of ruling (*Id.*) CCP 2034.210 et seq. is never referenced in any of Ventura's moving papers or notices of ruling—which is not surprising since the City of Ventura never intended to invoke that procedure, cynically raising it for the first time now in order to try and prevent a fellow party from reasonably designating experts per CCP 843. Moreover, accepting Ventura's interpretation would create a procedural quagmire given Ventura's effort to conflate the obligations of two entirely separate and difference procedures for expert witness designation and sequencing per CCP 2034.210 and CCP 843. Ventura's obfuscation is exactly what the Legislature hoped to avoid in passing the Groundwater Adjudication statute. We know this because CCP § 830(c) only allows other portions of the Code of Civil Procedure to apply to a groundwater adjudication, such as this one, where the otherwise applicable procedures of the Civil Discovery Act "do not conflict with the provisions" of the comprehensive adjudication statute such as CCP § 843. Again, more sleight of hand by Ventura.

Finally, as discussed below, even if the factors in CCP § 2034.720 urged by Ventura did apply—which they clearly do not given that the predicate for their application (a demand for exchange per CCP 2034.210 et seq. and non-conflict with CCP 843) is entirely absent as discussed above—Casitas' motion would still satisfy all of the criteria of CCP 2034.720.

III. <u>While Unnecessary, Casitas Demonstrated Compliance with CCP § 2034.720</u>

Casitas did not need to demonstrate compliance with CCP § 2034.720 in order for the

Court to grant the requested relief under CCP § 843. However, in an abundance of caution, Casitas did explain in its motion how it would also be entitled to relief under that section as well. Ventura's arguments to the contrary are conclusory, and fail to respond to the substance of Casitas' positions, and Casitas responds to each such argument in turn.

First, Casitas' request/need to designate an expert witness at this stage is a direct result of surprise and inadvertence, as stated in its motion, because Casitas understood that the scope of the Phase 1 trial would be limited to determining the hydrologic connectivity and interconnectivity of the groundwater basins and surface waters that would be subject to this comprehensive adjudication. Only once it became clear after Ventura's and other parties' subsequent broad designation of experts, and the arguments raised by those parties in various CMC statements and briefs filed before this Court, that the scope of the Phase 1 trial was entirely up in the air (where it remains), did Casitas determine that it needed the ability to designate expert witnesses (both initial and supplemental designees) to ensure that its interests were properly defended—whether the scope of trial ultimately ordered by the court is narrow or broad. Casitas' position was argued before the Court in numerous case management conferences, in CMC statements that were provided to this Court, and is further explained in Casitas' original motion, and is based on Ventura's motion to bifurcate and the Court's order granting the same. All of these prior filings are citable as evidence before the Court since they, much like the Skahan declaration and Exhibits attached thereto, are part of the citable record in this case. (*See generally Higgins v. Superior Court* (2017) 15 Cal.App.5th 973, 982 fn. 12 , as modified (Sept. 28, 2017) [agreeing with trial court that "the court did not need to take judicial notice of a pleading in the court's file."].)

Ventura argues that Casitas did not explain how its failure to designate an expert witness was based on mistake, inadvertence, surprise or excusable neglect. (See Opposition, p. 10.) That is simply not true. (*See* Motion, pp. 7-8 ["Hence, Casitas' failure to initially designate a separate expert witness was, at worst, the result of good faith inadvertence and/or surprise on what Phase 1 of trial would actually entail. (See CCP § 2034.720(c)(1).) "].) By failing to respond to this argument, Ventura has waived its right to challenge the same.

Likewise, Ventura's claim that its showing must be made via declaration is not supported by the authority it cited, or indeed any of the case law provided by Ventura. CCP § 2034.720 does not impose a declaration requirement as a condition for granting a motion to designate a tardy expert. Likewise, the cases cited by Ventura, *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1424; *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1008, are inapposite because they both involve requests for relief from a default judgment, not a request for relief under CCP 2034.720. Ventura is playing fast and loose with the facts and the law. Of course the issue of requiring evidence in support of Casitas' motion is irrelevant since Casitas was never required to file a motion to designate witnesses out of time in the first place, and would not have had to do so absent Ventura's unwillingness to stipulate to Casitas' very reasonable request and vociferous opposition at the November 2, 2021 case management conference.

Despite Ventura's attempts to argue otherwise, Casitas has clearly explained how its need to designate expert witnesses is a result of surprise and inadvertence. Had Casitas understood that the scope of Phase 1 would potentially be so broad, as opposed to the very narrow focus identified in Ventura's motion to bifurcate, it would have designated experts prior to September 24. However, the need only materialized once it became clear through multiple CMCs, and the greatly divergent views expressed between different parties as to the proper scope of Phase 1, that the scope was likely to be broader than Casitas previously believed.

Second, Ventura will not suffer any prejudice should the Court allow Casitas to designate Mr. Kear as an expert witness, and if Casitas is otherwise allowed to designate supplemental expert witnesses because it will be in the same exact position as it is now. Ventura's Opposition betrays their true motives for objecting to the City's ability to designate Mr. Kear. In its Opposition, Ventura argues:

> 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.

This is a perfect explanation of Ventura's gamesmanship in this matter. Ventura admits that it is seeking to ensure that "Casitas cannot participate in the supplemental expert designation of December 3rd" because it is worried that Casitas has "far broader" interests in the watershed. This is true. Casitas does have broader interests in the Watershed than the City of Ojai. But that is not a showing of prejudice. Any experts designated by Casitas as supplemental, if Casitas designates any supplemental experts, can still be deposed per the existing schedule established by the Court. Moreover, had Ventura not expanded the scope of Phase 1 by designating its additional experts in unrelated areas, those broader interests that are the potential subjects of supplemental expert testimony would not have been implicated.

Having lulled Casitas into believing that the scope would be limited to issues that are of little importance to Casitas (as Casitas does not object to the fact that it is subject to this comprehensive adjudication), Ventura now claims that it should be allowed to prohibit Casitas from presenting expert testimony for essentially the entire Phase 1 trial, a remarkable assertion that would create an injustice and prejudice, not prevent it. Ventura's allegation is not the disqualifying prejudice contemplated by CCP § 2034.720. CCP § 2034.720 states that the Court may grant leave to provide a tardy expert witness disclosure, where "[t]he court has determined that any party opposing the motion will not be ***prejudiced in maintaining that party's action or defense on the merits***." (CCP § 2034.720(b); emph. added.) Allowing Casitas to put forth its expert witness testimony will in no way prejudice Ventura's ability to "maintain" its action or defense on the merits. Casitas is not seeking to introduce any new expert witness testimony that has otherwise not been provided to date. Likewise, Casitas is not seeking to introduce any evidence that cannot be adequately addressed by Ventura, because Mr. Kear's report has been available to Ventura since the original disclosure deadline. In short, Ventura will experience no prejudice as contemplated by the statute should the Court grant Casitas' motion.

Lastly, Ventura does not otherwise argue that Casitas has not demonstrated compliance with CCP §§ 2034.720(a) or (c)(2)—(3). As such, Ventura has waived those arguments.

For the foregoing reasons, Casitas should be allowed to designate its expert witnesses and meaningfully participate in expert discovery per the Court's prior schedule.

IV. The Parties Should Designate Rebuttal Expert Witnesses After the Deposition of the Primary and Supplemental Experts Have Been Completed

As explained in Casitas' Opening Brief, rebuttal expert witness disclosures are directly contemplated and authorized under CCP § 843(d) and (e). Ventura does not seem to respond to this argument and request, and has therefore waived its right to object to the designation of rebuttal expert witness pursuant to CCP § 843. Instead, Ventura claims that Casitas motion is unnecessary because Casitas can still designate rebuttal experts under CCP § 843, but in the same breath Ventura goes on to seemingly argue that expert opinion testimony cannot be presented per 843, in direct contravention of the plain language of CCP 843. Casitas' (and all of the other parties') rights to designate rebuttal expert witnesses under CCP § 843(d) and (e) are entirely distinct from the parties' rights to designate primary and supplemental expert witnesses. Ventura attempts to distinguish between the disclosure of primary and supplemental expert opinions versus rebuttal expert opinion testimony. However, CCP § 843 includes no such distinction and/or limitation.

CCP § 843(e) is instructive in this regard, as it directly acknowledges that the Court can allow rebuttal expert witness ***opinions***. CCP § 843 (e) provides as follows:

> The court may modify the disclosure requirements of subdivisions (b) to (d), inclusive, ***for expert witnesses presented solely for purposes of impeachment or rebuttal***. In modifying the disclosure requirements, the court shall adopt disclosure requirements that expedite the court's consideration of the issues presented and shall ensure that expert testimony presented solely for purposes of impeachment or rebuttal is strictly limited to the scope of the testimony that it intends to impeach or rebut.

CCP § 843(b) and (c), in turn, both contemplate that expert witnesses subject to those provisions, including experts presented for the purposes of impeachment or rebuttal (as confirmed by CCP § 843(d)), must provide a complete statement of the "opinions of the witness"

or a "summary of the witness' opinion" if stipulated to by the parties or ordered by the Court. CCP § 843(e) authorizes the Court to ***modify*** these disclosure requirements, and in doing so, expressly acknowledges that for the modification, the parties would be mandated to comply with the requirements therein, which includes the disclosure of the rebuttal expert's opinions.

As such, CCP § 843(e) confirms that in a comprehensive adjudication such as this, all parties are entitled to designate rebuttal and impeachment experts that are required to provide opinion testimony (admittedly limited to the scope of the testimony that it intends to challenge) unless otherwise ordered by the Court (or agreed to by the parties). To the extent Ventura argues that other portions of the CCP limit CCP § 843, such an interpretation must be ignored. (See CCP § 830(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***."].)

In light of the foregoing, Casitas renews its request that the Court direct the parties to meet and confer and agree to a date on which rebuttal witnesses may be designated, but also direct the parties to select a date that is after the day on which the depositions of the primary and supplemental expert witnesses have been completed.

V. CONCLUSION

For the foregoing reasons, Casitas respectfully renews its requests that the Court issue an order: (i) authorizing Casitas to designate Mr. Kear as its primary expert witness; (ii) authorizing Casitas to submit supplemental expert witness designations, if any, by the existing December 3, 2021 deadline; and (iii) directing the parties to meet and confer on any potential rebuttal expert witnesses, and their potential deposition, prior to the currently scheduled trial date of February 14, 2022.

Dated: November 19, 2021

Respectfully submitted

By: _____

Jeremy N. Jungreis
Attorneys for Cross-Defendant
CASITAS MUNICIPAL WATER DISTRICT a California special district