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CITY OF SAN BUENAVENTURA

EXEMPT FROM FILING FEES PURSUANT TO GOVERNMENT CODE SECTION 6103

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SANTA BARBARA CHANNELKEEPER, a California non-profit corporation,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, et al,

Respondents.

CITY OF SAN BUENAVENTURA, et al.,

Cross-Complainant,

v.

DUNCAN ABBOTT, an individual, et al.,

Cross-Defendants.

Case No. 19STCP01176

Judge: Hon. William F. Highberger

**CITY OF SAN BUENAVENTURA'S OPPOSITION TO EAST OJAI GROUP'S EX PARTE APPLICATION TO CONTINUE TRIAL**

[*Filed concurrently with Declaration of Christopher M. Pisano; Declaration of Sarah Christopher Foley*]

Date: January 18, 2022
Time: 1:30 p.m.
Dept.: 10

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

Defendant and Cross-Complainant the City of San Buenaventura (Ventura) submits this opposition to the East Ojai Group's (EOG) ex parte application to continue trial.

## I. INTRODUCTION

EOG's ex parte application is a classic illustration of someone trying to "move the goal-posts" during the game. There is no good cause to grant a trial continuance, and EOG's stated excuse for trying to delay the trial is belied by their counsel's prior representations. Indeed, EOG's counsel previously stated (in writing no less) that they needed Ventura's expert's model for two, or at most three weeks, in order to analyze it for the depositions. By the time this application will be heard, EOG will have had Ventura's expert's model for exactly three weeks and one day, and there is still a month before the start of trial. EOG's strategy of blaming a supposed "delay" in the production of the model is disingenuous. It is not good cause.

The dispute regarding Ventura's expert's surface water-groundwater model is well-known to the Court, and does not warrant repeating. What is important to note however, is that while the parties were trying to resolve this dispute over the model (which they ultimately did through a Stipulation and Protective Order), EOG's counsel stated that they needed the model at least ten (10) business days (i.e., two weeks) before Ventura's expert's deposition. (See Declaration of Greg Patterson (Patterson Decl.), Ex. D.) At the time in December, Ventura's expert, Dr. Claire Archer, was scheduled to be deposed on January 6, 2022. In negotiating the Stipulation and Protective Order, the parties all agreed that the model would be produced by December 27, 2021, which was ten days before the scheduled deposition. While this was not the ten business days that EOG's counsel requested initially, everyone agreed to the timeline, and nobody objected.

Ventura complied with the Stipulation and Protective Order. EOG and their experts have had the model since December 27th. Yet thereafter the "goal-posts" seemingly moved. On December 29, 2021, after EOG had had Dr. Archer's model for two days, EOG's counsel requested to continue the Archer deposition from January 6th to a date in late January or in early February. (Declaration of Christopher M. Pisano (Pisano Decl.), Ex. C.) There were two stated reasons for the continuance; (1) EOG's experts needed ***three weeks*** to analyze Dr. Archer's model, and (2) EOG's testifying expert, Mr. Brown, was ill at the time. In that email, EOG's

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counsel insisted that while they needed more time to review Dr. Archer's model, they were still prepared to go forward with the depositions of the State's experts, Dr. Preston and Dr. Schnaar, as noticed for January 10th and January 11th, and there was no indication of any need for a trial continuance. (*Id.*) Counsel for Ventura agreed to continue Dr. Archer's deposition and was agreeable to depositions taking place following the expert discovery cut-off date. Out of a deference for the health of EOG's expert, Anthony Brown, counsel for Ventura even agreed to the concept of a *short* trial continuance. (Pisano Decl., ¶ 4.)

By this application, EOG is trying to move the "goal-posts" yet again. They are now inexplicably saying that they need ***eight weeks*** to analyze the model. What happened to two weeks, or at most three weeks? Those extensions, which seem at least to have been reasonable requests at the time, have been cast aside, and EOG is now asking for a substantial continuance that will delay this trial for months. The EOG parties (and the Garrison and Whitman parties) claim that they do not even belong in this case, but as expert discovery has revealed, they cannot prove this on February 14, 2022 and thus seek to delay this case and waste everyone's resources. This lawsuit was filed in 2014, and the time is long overdue for the parties to start Phase 1 of trial. Ventura will indeed be prejudiced by a continuance, and EOG's and others' efforts to stall this case should not be condoned. Ventura requests that the Court deny EOG's application. Alternatively, Ventura would be agreeable to a short continuance of between one week and ten days. There is no reason the parties should not be able to try the Phase 1 issues before the Court leaves for its scheduled vacation in mid-March.

## II. LEGAL ARGUMENT

### A. Continuances are Rare and Require a Showing of Good Cause.

Pursuant to California Rules of Court, rule 3.1332, subdivision (c), "continuances of trial are disfavored" and the Court "may grant a continuance only on an affirmative showing of good cause requiring the continuance." The Rules of Court similarly provide that, "[t]o ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." (Cal. Rules of Court, rule 3.1332, subd. (a); *Reales Investment, LLC v. Johnson* (2020) 55 Cal.App.5th 463, 468.)

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In deciding a motion for continuance, the court must look beyond the limited facts which cause a litigant to request a last-minute continuance, and consider the degree of diligence in his or her efforts to bring the case to trial. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1396, (*citing Link v. Cater* (1998) 60 Cal.App.4th 1315, 1324-1325).) Continuances should not be used as a dilatory tactic, and good cause for granting them must be demonstrated. (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17; *see also Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1127 [trial court acted within its discretion in denying a continuance of trial where case had been pending for over five years and employee's counsel could have moved for class certification earlier]; *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716 [requiring showing of good cause to support a request for continuance of a hearing]; *Jurado v. Toys 'R' Us, Inc.*, (1993) 12 Cal.App.4th 1615, 1618 [motion for continuance made before trial should not be granted absent affirmative showing of good cause]; *Foster v. Civil Service Com'n of Los Angeles County* (1983) 142 Cal.App.3d 444, 448 [granting of continuances is not favored, and party seeking continuance must make proper showing of good cause].)

**B. <u>There is no Good Cause Because EOG has had Ventura's Expert's Model for Three Weeks, Which is the Amount of Time EOG Claimed that they Needed to Review the Model in Advance of the Depositions.</u>**

There is no good cause to continue the trial because EOG's experts have now had the model of Ventura's expert, Dr. Archer, for over three weeks, which is the amount of time EOG's counsel claimed was necessary when this issue first arose. EOG's experts have had the model of the State's experts since September, which should have been more than enough time.

In late November and December 2021, when the parties were discussing the production of Dr. Archer's model, counsel for EOG stated that his experts needed the model two weeks before her deposition. In a December 1, 2021 email, counsel for EOG confirmed that he wanted his experts to have access to the model for ten business days (i.e., two weeks) before the deposition. (Patterson Decl., Ex. D, p. 2 ["In order to provide sufficient time to allow experts to review the

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model and advise their clients, we propose that the modeling information requested in the notice be mutually produced ***10 business days*** prior to the expert deposition…."], emphasis added.)[1]

During the first part of December, certain parties who had retained experts, Ventura, City of Ojai, EOG, and Casitas Municipal Water District, negotiated a Stipulation and Protective Order, which Ventura presented to the Court on December 23rd. The Stipulation and Protective Order was carefully negotiated by and among these parties, and it provided that Dr. Archer's model would be produced on or before December 27, 2021. (Pisano Decl. ¶ 3.) At the time of the negotiations, Dr. Archer's deposition was scheduled for January 6, 2022, and at no time during these negotiations did EOG or any other party complain that December 27th was too late for the production and that Dr. Archer's deposition should be kicked out. (*Id*.)

The model was produced on December 27th. Two days later, on December 29th, counsel for EOG sent an email to Ventura's counsel requesting that the parties move the deposition of Dr. Archer to late January or early February. In this email, EOG's counsel wrote, "I am told by Aquilogic [EOG's expert] that ***it will take about three weeks to review the model***, so I would like to discuss setting Archer/Klug on 1/24-28 or 1/31 or 2/2." (Pisano Decl., Ex. C, emphasis added.) EOG's counsel also indicated that they thought they would be ready for the State's experts (Preston and Schnaar) on the dates they were originally noticed. EOG's counsel also noted that for the purpose of finishing the deposition of EOG's expert Mr. Brown (the President of Aquilogic), Mr. Brown had fallen ill, and EOG's counsel targeted the week of January 24th to finish that deposition. (*Id*.) Ventura's counsel agreed to continue the depositions and take depositions after the cut-off date, and also, out of respect for Mr. Brown's medical condition, agreed to a short trial continuance. (Pisano Decl. . ¶¶ 4-5.)

[1] In its application, EOG argues that Ventura was required to produce its expert's model when it produced her report pursuant to Code of Civil Procedure Section 843. (App., p. 4.) While this argument is not relevant to the issue at hand, EOG is wrong. The model is a computer program that Dr. Archer built using various input files. Dr. Archer produced concurrently with her August 31, 2021 expert report an extensive, stand-alone report on the development of her model. (Pisano Decl., Ex. B.) In this model report Dr. Archer discussed the input files that went into the model, how the model was put developed, and how it was used. This report provided the "facts and data" regarding the model development and use, and thus it complied with Section 843.

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As of the hearing date for this ex parte application, EOG's experts will have had the model for three weeks and one day. This is more than EOG's time estimate for a review of the model, even after they had the model for two full days. This is all the time that should be needed, and all the time that should be granted. Of course, any extra time that was needed to review the model can, and should be ameliorated by a reduction in the expert discovery cut-off date. At this point, there is still a month before trial, which should be enough time for the parties to complete expert discovery. At a minimum, the Court should only continue the trial by one week to ten (10) days. If the trial were moved to the last full week of February, that should be more than enough time for the parties to finish discovery and otherwise prepare for trial.[2]

**C. <u>There is no Good Cause to Continue the Trial Because the Model is not a Critical Analysis for Dr. Archer's Opinion; EOG's Counsel Overstates the Importance of the Models to his Case.</u>**

In their ex parte application, EOG's counsel (Mr. Patterson) and expert (Mr. Brown) do their best to emphasize the importance of the models for this phase of trial. (See Patterson Decl., ¶ 2 ["In preparing the report, Archer and, perhaps Klug, did their own 3D groundwater model and Ms. [Dr.] Archer's opinions are based heavily on the model."]; Brown Decl., ¶ 4 ["My review and analysis of these models is critical to enable me to provide competent and relevant testimony in this case and respond to testimony offered by experts for the City and SWRCB that relies upon these models."]) Ventura does not speak for the State experts' model. However, for Ventura's case, the model, while relevant, is hardly the critical linchpin EOG tries to portray. As EOG is clearly aware, Dr. Archer performed numerous analyses in arriving at her opinions of an interconnection between ground and surface water in the Ventura River Watershed. A copy of Dr. Archer's August 31, 2021 report is attached as Exhibit A. As the report indicates, Dr. Archer performed six separate analyses for the Ojai Basin alone in reaching her opinion of an interconnection between surface and groundwater in this basin. (Pisano Decl., Ex. A, pp. 18-27.)

[2] Ventura notes here that EOG also claims to need to more time to review the State's model, and also a model of Ojai Basin Groundwater Management Agency (OBGMA). Ventura has no control over those models or the production of those models, but points out here that the State's model has been available to EOG since September. EOG offers no explanation as to why they suddenly need more time with the State's model, particularly after counsel for EOG stated in late December that the depositions of the State's experts (Preston and Schnaar) did not need to move.

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The model is one of the six analyses Dr. Archer performed, and thus while the model is relevant, its importance is overstated in EOG's application.

Also, Mr. Brown did not build a model of his own for purposes of offering an opinion in this case. As Mr. Brown testified in his deposition, he opted not to build his own model not due to any monetary or time constraint, or lack of ability, rather he did not build his own model because he felt that a model was unnecessary for the presentation of his opinions. (Pisano Ex. D, [Brown Depo., pp. 219:16-220:23].) While Brown may want Ventura's and the State's model to critique and rebut Ventura's and the State's experts' work (which models he now has), he is not using any models as support of his own opinions, because he does not believe he needs to use any models. Like EOG's counsel, Mr. Brown is overstating this issue.

Finally, Ventura also notes here that Mr. Brown asserts in his declaration a claim that it is important for him and his team to review both Ventura's and the State's expert's model "at the same time," and he estimates that he needs to spend 150 to 200 hours to analyze these models. (Brown Decl., ¶¶ 4-5.) Mr. Brown provides no explanation as to why the models must be analyzed at the same time, nor does he explain why it will take so many hours for his modeling expert to do this work. Ventura notes here that Mr. Brown produced his expert file prior to his December 16, 2021 deposition, and in this file Mr. Brown produced email exchanges he has had with his colleagues and counsel for EOG. These emails show that Mr. Brown was given access to the State's experts' report and model on September 27, 2021, and by September 28th, Mr. Brown had already concluded that the State's expert had used a "[b]izarre model approach not approved by the Courts." (Pisano Decl., Ex. E, p. 2.) Mr. Brown likewise called the State's report, "pure techno-gobbledygook," and questioned whether the State's "modeling approach has ever passed a Daubert/Kelley-Frye test." (Pisano Decl., Ex. F, p. 1.) While Mr. Brown goes on to allude to the need to do more work rebutting and dissecting the reports, he had clearly formulated some strong opinions against the State's experts' model in only one day. Given these strong and emphatic opinions, it seems a bit far-fetched that Mr. Brown now needs eight weeks to review the models. There should be no reason that Mr. Brown would now need eight more weeks to analyze the models, and this application should be denied.

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**D. There is no Good Cause to Continue the Trial Based on Mr. Whitman Because he has not Asked for Model; Rather he Simply Wants the Ability to Get the Model, Which Ventura is Willing to do.**

EOG also points out in his application that the trial should be continued because Whitman has not yet had an opportunity to review the model. This issue was addressed in Ventura's response to Whitman's statement filed on January 13, 2022. Mr. Whitman has not even asked for model, rather he just wants the ability to get the model in the future without going to Court for approval. As Ventura stated in its response, if Whitman wants the model, he can have it; Ventura would merely like Mr. Whitman to confirm that he has the software necessary to run the model.

**E. Garrison's Charge of "Unclean Hands" is Nonsense; Garrison has Refused to Produce his Expert for Deposition, And Garrison's and Ojai's Expert Kear is Withholding Numerous Foundational Documents that Must be Produced.**

Ventura also provides a response to Garrison's separate filing, where he accuses Ventura, and more to the point, its counsel BBK, of "unclean hands." The short answer is that Garrison's claim is nonsense. BBK attorneys and paralegals have been conciliatory and cooperative in responding to Mr. Garrison's requests by researching his own clients and providing him all known information about them. (See, generally concurrently filed Declaration of Sarah Christopher Foley.) Mr. Garrison's assertion of "unclean hands" and withholding of discovery is a blatant misrepresentation to the Court and an unjustified attack on BBK. *Ibid.* It is Mr. Garrison's misrepresentation to the Court that is "arguably sanctionable," not any conduct by BBK.

It should also be noted here that it is Mr. Garrison whose hands are "unclean" and not BBK. Mr. Garrison designated Jordan Kear as an expert and produced a report from Mr. Kear on behalf of a group of owners in the Upper Ojai Basin. BBK properly noticed this deposition for January 14, 2022, which was the expert discovery cut-off. However, prior to the deposition Mr. Garrison unilaterally cancelled the deposition, and he failed to produce any foundational documents in support of Mr. Kear's work. (Pisano Decl., ¶ 7.) Ventura's counsel informed Mr. Garrison that they would be fine taking Mr. Kear's deposition after the discovery cut-off, but despite repeatedly asking Mr. Garrison for dates, he has yet to provide alternate dates for Mr. Kear's deposition. (*Id*.) If anyone's hands are unclear here, it is Garrison's.

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## III. CONCLUSION

For the reasons stated herein, Ventura respectfully requests that EOG's ex parte application be denied.

Dated: January 14, 2022

BEST BEST & KRIEGER LLP

By: _____

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