



1 EARLY SULLIVAN WRIGHT
 GIZER & McRAE LLP
 2 BRYAN M. SULLIVAN (BAR NO. 209743)
 6420 Wilshire Boulevard, 17th Floor
 3 Los Angeles, California 90048
 Telephone: (323) 301-4660
 4 Facsimile: (323) 301-4676
 E-Mail: bsullivan@earlysullivan.com

5 ALLEN MATKINS LECK GAMBLE
 MALLORY & NATSIS LLP
 6 DAVID L. OSIAS (BAR NO. 091287)
 One America Plaza
 7 600 West Broadway, 27th Floor
 8 San Diego, California 92101-0903
 Telephone: (619) 233-1155
 9 Facsimile: (619) 233-1158
 E-Mail: dosias@allenmatkins.com

10 Attorneys for Cross-Defendant
 11 JEFFREY S. BACON, AS TRUSTEE OF THE VILLA
 NERO TRUST

12
 13 **SUPERIOR COURT OF CALIFORNIA**

14 **COUNTY OF LOS ANGELES - CENTRAL DISTRICT**

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

16 Petitioner,

17 v.

18 STATE WATER RESOURCES
 19 CONTROL BOARD, a California State
 Agency;
 20 CITY OF SAN BUENAVENTURA, a
 California municipal corporation,
 21 incorrectly named as CITY OF
 BUENAVENTURA,

22 Respondents.

23
 24 AND RELATED CROSS-ACTION.
 25

Case No. 19STCP01176

BY FAX

ASSIGNED FOR ALL PURPOSES TO
 Judge William F. Highberger
 Department 10

**CROSS-DEFENDANT JEFFREY S.
 BACON, AS TRUSTEE OF THE VILLA
 NERO TRUST, RESPONSE TO JULY 6,
 2021, STATUS CONFERENCE REPORT
 OF CITY OF SAN BUENAVENTURA**

Date: July 6, 2021
 Time: 2 p.m.
 Dept: 10

Complaint Filed: September 19, 2014
 Trial Date: February 14, 2022

1 Cross-Defendant Jeffrey S. Bacon, as Trustee of the Villa Nero Trust ("VNT") submits this
2 response to the July 6, 2021, Status Conference Report filed by Cross-Complainant, the City of
3 San Buenaventura ("City") with respect to two issues before the Court: (i) should the Court be
4 given a copy of the current [Proposed] Stipulated Physical Solution and Judgment ("Physical
5 Solution"); and (ii) what should the schedule be for discovery, exchange of expert reports, and
6 motion practice in connection with the Phase 1 Trial currently scheduled to commence on
7 February 14, 2022.

8 **I. INTRODUCTION**

9 VNT owns an 8-acre residential parcel with an existing well and some olive trees located
10 north and east of the town of Ojai, in Senior Canyon, which may partly, or may not overlie the
11 Ojai Ground Water Basin and which may or may not overlie the subsurface flows of the Senior
12 Canyon and/or Ladera Creeks. Recent historic consumptive use by VNT has been in a nominal
13 volume, although more distant past irrigation use may have been higher, but still in a volume less
14 than the 10 acre-feet per year ("afy") defined by Water Codes §§ 2102 and 2503 as "minor
15 quantities of water" in connection with water rights matters, less than the proposed Physical
16 Solution *de minimis* definition of 5 afy, and probably less than the Sustainable Groundwater
17 Management Act ("SGMA") definition in Water Code § 10721 of "*de minimis* extractor" of 2 afy.

18 VNT has plans to build a new single family home on the parcel and to efficiently irrigate
19 olive trees and other appropriate landscaping. The property has overlying and possibly riparian
20 rights that run with the land, do not require continuous water use, and are not forfeited or deemed
21 abandoned by intermittent water use, nominal water use or even water non-use. VNT's
22 participation in this lawsuit is for the sole purpose of protecting its water rights and its ability to
23 use its property as planned. VNT filed a form answer on February 16, 2021, and Allen Matkins
24 joined as water co-counsel on April 5, 2021. VNT, as a rather recent and small participant in this
25 litigation, albeit at significant expense, believes that its parcel, well and water use may be factually
26 and legally irrelevant to the purpose of this litigation.

27
28

1 **II. PHYSICAL SOLUTION**

2 VNT did not file a response to the City's request that the Physical Solution be shared with
3 the Court prior to the last Status Conference on June 21, 2021, and appreciates that the Court
4 continued a decision on the matter to the July 6 Further Status Conference, and allowed additional
5 responses to be filed by July 2, 2021. VNT informed the City of its position on the Physical
6 Solution in writing on June 30, and had not received a response of agreement or opposition by the
7 time it prepared this Response. In general, VNT does not oppose the Court receipt and review of
8 the Physical Solution, subject to two minor modifications.

9 VNT's first request is that the Physical Solution document be clearly and prominently
10 labeled as "DRAFT." Although the City advised the Court that it was prepared to go to trial in
11 Phase 2 on the Physical Solution in its present form, it also advised the Court that it had not
12 foreclosed possible modifications to the Physical Solution and would continue to engage with
13 parties about possible modifications. In order to properly inform the Court and all present and
14 future litigants that the current form of proposed Physical Solution is not locked in cement, and to
15 encourage possible settlement or further stipulations based on possible modifications, it is prudent
16 and fair to prominently label the document "DRAFT."

17 Second, VNT requests that Section 8 of the Physical Solution, entitled "FINDINGS" be
18 redacted. VNT recognizes that if the Physical Solution were to be adopted by the Court as-is, and
19 made a Judgment as proposed, there will be necessary findings and conclusions of law. But, the
20 current document has three and one-half pages of the equivalent of trial-brief argument, including
21 caselaw and statutory citations, that seems unfair for the Court to review at this time. VNT
22 understands that prior to its participation, parties were allowed to file general briefs on the nature
23 of physical solutions. But, Section 8 of the current Physical Solution states why the Court is
24 approving this one as proposed. It is premature for the Court to review such argument; the
25 argument is unnecessary for the Court to gain understanding of the physical activity proposed by
26 the Physical Solution to help solve the endangered steelhead issue at the heart of this litigation;
27 and it is unfair for the Court to review this section without receiving opposing argument for
28

1 review at the same time. The simplest solution is to redact Section 8 before delivery to the Court,
2 even if such redaction is only temporary until Phase 2 filings are permitted and appropriate.

3 **III. PHASE 1 DISCOVERY AND MOTION SCHEDULE**

4 The City has been very gracious and accommodating in discussing with all willing
5 participants a schedule for the necessary discovery and motion process leading up to the Phase 1
6 Trial. The City also graciously acknowledged the inherent unfairness to new and small litigation
7 participants that would arise from forcing them to exchange expert reports at the same time as the
8 City, and thus proposes a later date for such exchange. But, VNT remains very concerned with the
9 schedule for expert report exchanges and motion practice.

10 As a single parcel owner with a minor water use history and future, and as a recent addition
11 to the litigation, VNT has not retained a testifying expert for the matter, nor even had access to a
12 consulting expert to review the 33 expert reports listed by the City in its recently filed "Initial List
13 of Documents Supporting Interconnectivity Submitted At The Request of the Court." VNT is
14 hopeful that expert reports or testimony will demonstrate the irrelevance of VNT's property and
15 well, along with the minor past and future water use, to any physical solution or judgment focused
16 on saving the endangered steelhead. However, VNT is realistic that the City or others may not
17 agree. Thus, VNT and other geographically remote, small volume users, perhaps in concert with
18 each other to share the formidable expense, may have to prove their irrelevance by finding their
19 own expert to demonstrate that their inclusion in the Physical Solution is unnecessary. Or
20 perhaps, the City's expert report will persuade VNT that the Physical Solution, as is, is necessary
21 and fair and should be accepted by stipulation.

22 The first step needed by VNT is to receive the City's expert report to see what it proves.
23 Whether that report is shared by the City first, before any other expert reports are shared, or shared
24 concurrently with expert report exchanges by the State and other large participants, is of little
25 concern to VNT. VNT recognizes that there is a serious disagreement among the City and others
26 about concurrent or sequential exchanges. VNT's focus and position is to not let the litigation
27 concerns of those who already have expert reports influence the schedule to such a degree that it is
28 practically impossible for VNT and other recent and small participants to gain timely expert

1 assistance. VNT asserts that a time period of at least 12 weeks from receipt of the City's expert
2 report is necessary for it to review, understand, and possibly retain expert assistance. Even 12
3 weeks may be too short, but that is the request of VNT at this time. The City has graciously
4 offered to allow VNT to ask the Court for relief from the deadline, currently proposed as 7 weeks,
5 should VNT be unsuccessful in finding and completing its expert assistance needs. The ability to
6 ask the Court for expert-deadline relief is an expensive and uncertain safety net, and yet may be
7 needed if the 12 weeks ultimately proves to be inadequate. At 7 weeks, it is highly probable to be
8 needed, and thus 12 weeks should be allowed.

9 The longevity and scale of the current litigation is recognized by VNT. As such, it is
10 anticipated that the small population of knowledgeable experts is likely already picked-over and
11 hired by the large and early litigation participants. Add to the mix the reality that these experts are
12 also busy with extensive SGMA activity that is occurring in the State with respect to the
13 preparation of required Groundwater Sustainability Plans, and assisting water providers with the
14 present drought, makes it highly likely that most potential qualified non-conflicted experts will be
15 quite busy already. It is simply unfair and unrealistic to allow VNT and others similarly situated
16 only 7 weeks to review, analyze, retain, and prepare an expert report. The simplest solution to
17 creating more time for VNT and others is to move the City expert disclosure sooner, to early or
18 mid-August. VNT understands that the City is not opposed to this idea, but only if others with
19 expert reports also disclose at the same time.

20 Although VNT might start to shop for an expert now, work by any expert for VNT cannot
21 really start until receipt of the City's expert report. Furthermore, VNT might learn from its review
22 of the City's expert report that it does not need or want its own expert. Avoiding the potential
23 substantial expense of an expert is not a trivial matter. VNT is not a volunteer to this litigation, it
24 was sued, served, and made a party. VNT and other small users and property owners do not have
25 the same resources or the same ability to spread the costs of litigation among a large base of
26 customers who receive water service from the City or from other public agencies and entities.
27 VNT and others similarly situated should be allowed to see the City's expert report and what that
28 report says about the interconnectivity of the City's water supply to their individual water sources

1 before having to spend large sums to potentially counter that conclusion. Twelve weeks from
2 release of the City's expert report is not an unreasonable time period.

3 VNT is also desirous of a realistic opportunity for a possible dispositive motion allowing it
4 to be excused from the litigation and not be bound by the eventual Judgment, if the expert
5 evidence warrants such a motion. Closing off the filing deadline for dispositive motions before
6 VNT has a realistic opportunity to review and evaluate expert reports and potentially procure its
7 own expert is unfair, as is cutting off depositions and discovery before any hearing on such
8 motions in case the Court denies the motions for triable issues that, with sufficient time, could be
9 addressed at the Phase 1 Trial by supplemental expert work being done before trial.


10 **IV. CONCLUSION**

11 VNT requests that the Physical Solution be modified by inclusion of "DRAFT" in its title
12 and the redaction of Section 8 before sharing with the Court. VNT requests that the Phase 1
13 pretrial schedule include at least a 12-week period after receipt of the City's expert report so that
14 VNT can review it, analyze it, and if warranted, retain an expert and have an expert report
15 prepared for sharing. VNT also requests a schedule that would permit the possibility of
16 dispositive motions after the 12-week period, and if any such motion is unsuccessful, a reasonable
17 period of time for further discovery and supplemental expert work prior to the commencement of
18 the Phase 1 Trial.

19 Respectfully Submitted.

20
21 Dated: July 2, 2021

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

22
23 By: 
24 DAVID L. OSIAS
25 Attorneys for Cross-Defendant
26 JEFFREY S. BACON, AS TRUSTEE OF
27 THE VILLA NERO TRUST
28