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May 7, 2021

Via e-mail (tbass@anaheim.net) and U.S. Mail

Theresa Bass
City Clerk
City of Anaheim
200 S. Anaheim Blvd.
2nd Floor, Room 217
Anaheim, CA 92805

Re: Demand for Arbitration

Dear Ms. Bass:

This firm represents the Santiago Geologic Hazard Abatement District (“SGHAD”). On or about June 10, 1999, the City and SGHAD entered into an *Agreement Between the City of Anaheim and the Santiago Geologic Hazard Abatement District* (“Agreement”). Paragraph 7 of the Agreement requires that any disputes concerning the Agreement be resolved through binding arbitration utilizing a mutually agreed-upon arbitrator. A dispute has arisen which SGHAD wishes to submit to arbitration. Transmitted herewith is a draft of the Complaint for Declaratory Relief which reflects SGHAD’s allegations and claims. Because paragraph 7 of the Agreement is silent with respect to the arbitration forum, we propose that the parties utilize JAMS and its Expedited Procedures.

Please respond no later than May 17, 2021 as to your position on utilizing JAMS and its Expedited Procedures. We are happy to discuss the selection of the forum with you further.

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Theresa Bass
City of Anaheim
May 7, 2021
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Thank you for your anticipated cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric J. Benink". The signature is fluid and cursive, with a large initial "E" and "B".

Eric J. Benink

cc: City Attorney's Office via e-mail (cityattorneysoffice@anaheim.net) and U.S. Mail

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DRAFT

5 Attorneys for Claimant

6 **ARBITRATION**
7 **BEFORE JAMS**
8

9 **SANTIAGO GEOLOGIC HAZARD**
10 **ABATEMENT DISTRICT**, a political
subdivision of the state of California,

11 Claimant,

12 v.

13 **CITY OF ANAHEIM**, a California
14 charter city,

15 Respondent.

) **Case No.**

) **COMPLAINT FOR DECLARATORY**
RELIEF

16
17 Claimant Santiago Geologic Hazard Abatement District (“SGHAD”) brings this complaint for
18 declaratory relief and alleges as follows:

19 **INTRODUCTION**

20 1. This complaint involves duties and obligations arising from an “Agreement Between
21 the City of Anaheim and the Santiago Geologic Hazard Abatement District” executed on or about
22 June 10, 1999 (“Agreement”). The City of Anaheim (“Anaheim”) and SGHAD entered the
23 Agreement in conjunction with the settlement of dozens of lawsuits residential property owners had
24 brought against Anaheim over damages suffered as a result of a 1993 landslide (the “Santiago
25 Landslide”). SGHAD is a political subdivision of the state that Anaheim formed in furtherance of the
26 settlements.

27 2. Prior to the Agreement, Anaheim had constructed and was operating dewatering
28 facilities designed to lower elevated groundwater levels, stabilize the earth movement, and monitor

1 groundwater levels and movement. The Agreement required Anaheim to transfer the dewatering
2 facilities to SGHAD and contribute \$3.5 million for its operation. In turn, SGHAD agreed to use the
3 funds to maintain and operate the dewatering facilities.

4 3. SGHAD has successfully maintained and operated the dewatering facilities since 1999.
5 But the \$3.5 million fund is being depleted each year. SGHAD has available to it, a single mechanism
6 to generate revenue to fund operations: a special assessment imposed on property owners. But special
7 assessments require majority approval of the property owners. In 2019, SGHAD proposed a special
8 assessment and conducted an election as required by our state Constitution, but property owners
9 overwhelmingly rejected it.

10 4. The costs of operating the dewatering facilities is approximately \$265,000 per year and
11 that does not even count the costs of replacing aging-out infrastructure or major repairs. SGHAD
12 estimates that its fund balance will be \$864,449 on June 30, 2021. Thus, its ability to operate and
13 maintain the dewatering facilities will cease at some point over the next few years.

14 5. By this complaint, SGHAD seeks a declaratory judgment that upon depletion of its
15 funds, it is excused from any contractual obligation to maintain, operate, and repair the dewatering
16 facilities under the doctrines of impossibility, impracticability, and/or frustration of purpose.
17 Alternatively, it seeks a declaratory judgment that it has no such obligation upon depletion of the
18 funds. Hundreds of residential properties and public property owned by Anaheim are at risk. Without
19 active operation and management of the dewatering facilities, catastrophic consequences will follow.
20 A declaratory judgment will put all interested parties on notice that they cannot rely on SGHAD to
21 provide these services going forward.

22 PARTIES

23 6. Claimant Santiago Geologic Hazard Abatement District was formed pursuant to Public
24 Resources Code section 26558, et seq. It is a political subdivision of the state. (Pub. Resources Code
25 § 26570.) It is governed by a five-person Board of Directors (“Board”). It may sue and be sued.
26 (Pub. Resources Code § 26574, subd. (a).)

27 7. Respondent City of Anaheim is a charter city located in Orange County.

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GENERAL ALLEGATIONS

The Landslide

8. In January 1993, a landslide activated in an area of Anaheim Hills (part of the City of Anaheim) forcing dozens of residential property owners to evacuate their homes. Many never returned and others allowed banks to foreclose rather than make mortgage payments on their damaged homes. The landslide was the subject of local, state, and federal disaster declarations.

9. In response to the landslide, Anaheim and its consultants installed dewatering facilities, including but not limited to horizontal wells, vertical wells, pumps, and associated equipment on public and private properties in the vicinity of the earth movement. The intent was to lower groundwater levels and stabilize the earth movement. Anaheim also repaired damage to public improvements, such as roadways, water delivery systems, sidewalks, and sewers.

10. In 1996, Anaheim's geological consultants, Eberhart & Stone, Inc. issued a 98-page report that documented the conditions and incidents associated with the "Santiago Landslide," a roughly 25 acre area. The report made recommendations as to mitigate the landslide. It also recommended "[t]he implementation of a Geologic Hazard Abatement District (GHAD) [as] a means of raising the necessary funds for maintaining, monitoring, and managing the dewatering system for the benefit of all properties threatened by renewed landslide movement."

The Lawsuits and Delmonico Settlement

11. Following the Santiago Landslide, dozens of property owners filed lawsuits against Anaheim for inverse condemnation, negligence, nuisance, dangerous condition of property, failure to discharge mandatory duty, strict products liability, and fraudulent concealment. In 1995, the City filed a cross-claim against the property owners for their own acts that allegedly contributed to the landslide and for express indemnity arising from agreements that property developers had allegedly executed. The cross-claim also named as ROE Defendants, unidentified insurers of the property owners. The cases were consolidated as *Delmonico v. City of Anaheim* ("Delmonico Lawsuit").

12. The Delmonico Lawsuit was pending for years. The court appointed a neutral geologist to opine on the area of the earth movement. In 1995, the City settled with insurers in the amount of \$3 million "for use towards the resolution of the claims asserted by the [Delmonico]

1 plaintiffs.” The settlement provided that the funds could not be released until a global resolution of
2 the Delmonico Lawsuit.

3 13. In early 1999, a global settlement of the Delmonico Lawsuit was proposed under which
4 Anaheim would form a geologic hazard abatement district to which it would transfer responsibility of
5 the operation and maintenance of the dewatering facilities. Anaheim would also fund the district with
6 \$3.5 million.

7 14. On February 23, 1999, in anticipation of the proposed global settlement, Anaheim’s
8 City Council passed Resolution No. 99R-31 which initiated proceedings to form a geologic hazard
9 abatement district pursuant to Public Resources Code section 26500, et seq. Resolution No. 99R-31
10 stated that City Council had been presented with and had reviewed a plan of control, as required by
11 Public Resources Code section 26558. The plan it had reviewed is titled “Plan of Control Prepared for
12 Proposed Santiago Geologic Hazard Abatement District” (“Plan of Control”).

13 15. On March 16, 1999, the City Council, after finding that it had not received written
14 objections from property owners representing greater than 50 percent of the assessed valuation, passed
15 Resolution No. 99R-50 approving the formation of the SGHAD and appointing an initial board of
16 directors.

17 16. On March 2, 1999 (between the adoption of the two above-referenced resolutions), the
18 City and the *Delmonico* plaintiffs entered into a global settlement agreement (“Delmonico
19 Agreement”). The Delmonico Agreement required the City to pay \$15.5 million, which included a
20 \$5.5 million contribution from other parties, inclusive of the \$3 million payment from insurers.

21 Paragraph I.D of the Delmonico Agreement states:

22 *This Agreement shall be further conditioned on the following:*

23 *1. The GHAD [geologic hazard abatement district] and its board are approved not*
24 *later than March 23, 1999.*

25 *2. The GHAD enters into a contract with the City, no later than April 30, 1999,*
26 *accepting ownership, maintenance and operation responsibilities for the Dewatering*
System.

27 17. Paragraph I.E. of the Delmonico Agreement required the City to pay \$12 million of the
28 \$15.5 million directly to the plaintiff property owners. The balance (\$3.5 million) was to “be paid to

1 the GHAD, if approved, providing the GHAD enters into the contract with the City referred to herein
2 relating to the Dewatering System by April 30, 1999. If the GHAD is not approved or if the GHAD
3 does not enter into the contract with the City by April 30, 1999, the Agreement shall have no further
4 force or effect and neither the Settlement Distribution nor the GHAD Distribution shall be made,
5 unless the City agrees to waive the GHAD conditions.”

6 ***The Anaheim-SGHAD Agreement***

7 18. As contemplated by the Delmonico Agreement, on or about June 10, 1999, Anaheim
8 and SGHAD entered in an “Agreement Between the City of Anaheim and the Santiago Geologic
9 Hazard Abatement District” (“Agreement”). Attached hereto as **Exhibit A** is a true and correct copy
10 of the Agreement.

11 19. Under the Agreement, Anaheim (a) transferred and assigned all rights and interests that
12 it held in specified Dewatering Facilities, (b) provided SGHAD access to such facilities, and (c)
13 transferred \$3.5 million to SGHAD for the purpose of construction, acquisition, operation,
14 maintenance, and repair of dewatering facilities and for the purpose of monitoring, abating and/or
15 stabilizing the Santiago Landslide, *inter alia*. (See Ex. A, ¶¶ 1, 3, 4, 5.)

16 20. SGHAD’s obligation under the Agreement was to “assume sole and total responsibility
17 for all ownership, control, operational, maintenance, and repair responsibilities relating to the
18 Dewatering Facilities.” (*Id.* at ¶ 6.) Specifically, the Agreement provides that “[t]he District shall
19 operate, maintain, and repair all or part of the Dewatering Facilities, as well as any additional new or
20 replacement facilities the District may construct or install, in a manner within its discretion which will
21 control groundwater levels to prevent reactivation and/or to abate movement of the Santiago
22 Landslide.” (*Ibid.*)

23 ***SGHAD’s Operations to Date***

24 21. The Dewatering Facilities specified in the Agreement include:

- 25 ● 36 pumped, standby, and abandoned vertical dewatering wells as identified as DW-1
26 through DW-23 and DW 25- DW-37 in the Plan of Control (active dewatering wells)
- 27 ● 87 horizontal dewatering wells (passive dewatering wells)
- 28 ● 28 open-tube stand-pipe piezometers

- 5 multi-point piezometers
- 10 inclinometer casings

(See Agreement, Ex. A.) The piezometers monitor the depth of groundwater. Inclinometers measure displacements in ground and in structures that lie below ground level (e.g. retaining walls) in relation to a baseline reading.

22. The Plan of Control states:

The objective is to achieve area groundwater elevations no higher than those recorded for October 5, 1994 each and every year at the onset (October 15) of the seasonal rain-year.

The Plan of Control provides that a minimum of three entities need to provide technical and contractual services on behalf of SGHAD: (1) a primary geologic/geotechnical consultant to conduct monitoring of water elevations, perform inclinometer surveys, compile pump discharge volumes, and report and analyze findings, (2) pump contractor to service pumps, monitor performance and report to primary consultant, and (3) review geologic/geotechnical consultant to assist SGHAD in reviewing reports and activities.

23. SGHAD has successfully operated, maintained, and repaired the Dewatering Facilities in accordance with the Plan of Control, and as required by the Agreement. It presently engages two consultants: ENGEO Incorporated (“ENGEO”) and Charles King Company (“Charles King”).

ENGEO acts as the primary geologic/geotechnical consultant and liaison to SGHAD, and acts as the day-to-day manager, retaining other consultants as needed. It monitors and maintains measurement devices, such as piezometers and inclinometers, and evaluates and reports system data to SGHAD.

Charles King maintains and repairs the dewatering wells and related equipment like pumps and electric systems, and obtains and reports water levels of, and volumes pumped from, wells.

24. SGHAD’s Fiscal Year (“FY”) 2020/21 Budget was \$266,646. It consisted of the following projected expenses:

Scheduled Monitoring and Analysis Activities	\$ 42,300
Maintenance and Operations	\$172,500

1 Administration and Accounting
(SGHAD Manager) \$ 27,000

2 Administration and Accounting
3 (Outside Professional Services) \$ 23,846

4
5 25. The FY 2020/21 Budget notes that “[w]hile it appears that there are significant well
6 maintenance and repair items that have been deferred, to help maintain the GHAD account balance
7 and allow response to critical failures that may occur, these items are not funded in the FY 2020/21
8 budget.” SGHAD has, in fact, deferred maintenance which creates significant financial burdens in the
9 future.

10 26. The FY 2020/21 Budget estimates a fund balance of \$864,449 on June 30, 2021. It
11 also estimates that FY 2023/24 will be the final year in which it will have sufficient funds by which to
12 operate, maintain, and repair the Dewatering Facilities. And this does not take into account
13 expenditures for critical well failures. Wells have a lifespan of 30-50 years. As most were
14 constructed in the mid-1990’s, they are approaching their end-of-life.

15 ***SGHAD’s Lack of Funding Sources***

16 27. SGHAD invests its fund balance in certificates of deposit and money market accounts
17 that generate nominal returns. These nominal returns have represented its sole source of revenue.

18 28. Public Resources Code section 26650 authorizes SGHAD to levy and collect
19 assessments to pay for the cost and expenses of maintenance and operation of improvements.
20 Pursuant to Public Resources Code section 26587, SGHAD may fund the costs of improvements via
21 the Improvement Act of 1911 (commencing with Section 5000 of the Streets and Highways Code) or
22 the Municipal Improvement Act of 1913 (commencing with Section 10000 of the Streets and
23 Highways Code) or the Improvement Bond Act of 1915 (commencing with Section 8500 of the
24 Streets and Highways Code).

25 29. In order to fund such costs or improvements as authorized by Public Resources Code
26 section 26650, or under each of the foregoing acts, SGHAD must levy special assessments against
27 property owners. Special assessments are subject to procedures set forth in our state Constitution.
28 Specifically, article XIII D, section 4, subdivision (d) requires a local agency proposing an assessment
to mail ballots to each property owner. Subdivision (e) provides each property owner the right to

1 protest the assessment according to the proportional financial obligation of the affected property. If
2 ballots submitted in opposition to the assessment exceed the ballot submitted in favor, the local agency
3 may not impose the assessment.

4 30. In 2019, SGHAD endeavored to pass an annual \$923 per parcel special assessment on
5 303 properties within its boundaries. As required by the California Constitution, SGHAD retained a
6 registered professional engineer (ENGEO) to prepare a detailed engineer's report to support the
7 assessment. The engineer's report identified the cost of major well reconditioning or replacements at
8 \$200,000 each and assumed such a replacement would occur once every 5 years. It also projected
9 that, without the assessment, SGHAD's fund balance would be \$338,849 by the end of FY 2023/24.

10 31. On January 31, 2019, the Board passed Resolution No. 2019/03: "A Resolution of
11 Intention to Order an Assessment for the Santiago Geologic Hazard Abatement District and Set a
12 Public Hearing for March 28, 2019, to Consider the Proposed Assessment and Protests Thereto."
13 Resolution No. 2019/03 directed SGHAD's manager (ENGEO) to mail a "Notice of Adoption of
14 Resolution, Proposed Assessment, and Public Hearing" to property owners. It also stated ballots
15 would be tabulated at the March 28, 2019 public hearing.

16 32. In connection with the proposed assessment, SGHAD conducted extensive outreach to
17 property owners, including workshops, mailings, flyers, face-to-face meetings and a website.

18 33. At the March 28, 2019 public hearing, the ballots were tabulated. Of the 177 ballots
19 received, 136 were against, and 41 were for the assessment. In other words, nearly 77% of property
20 owners voted against it. The costs associated with the failed assessment was approximately \$25,000.

21 34. Public Resources Code section 26593 provides that SGHAD is authorized to borrow
22 money. But without any revenue stream to repay it, it is not possible to obtain loans. Nor is SGHAD
23 aware of any available assistance from other private or public sources. (Pub. Resources Code §
24 26591.)

25 35. On March 6, 2020, representatives of SGHAD met with Anaheim City Councilmember
26 Trevor O'Neil and his aide Justin Glover. At the meeting, SGHAD raised the same issues referenced
27 herein, i.e., SGHAD will run out of funds to the detriment of public and private property and was
28 unable to obtain property owner approval to levy assessments. It asked that Anaheim contribute funds

1 in order to sustain SGHAD's operations. O'Neil and Glover suggested that SGHAD consider a bond.
2 But a bond is not possible without a repayment mechanism as discussed above. A few weeks after the
3 meeting, Glover reported that O'Neil would not recommend providing any financial assistance to
4 SGHAD.

5 36. It is certain that SGHAD **will** run out of funds to sustain the maintenance, operation,
6 and repair of the Dewatering Facilities. The timeline will depend, in part, on the need to address
7 major repair events and well failures. Once such operations cease, it is certain that the Santiago
8 Landslide will reactivate causing a catastrophic event for property owners and Anaheim. The
9 Dewatering Facilities protect the public and private property worth hundreds of millions of dollars.
10 And landslides can injure or kill people as well. For over twenty years, SGHAD has safeguarded
11 property and protected the public through its prudent and professional management and operation of
12 the Dewatering Facilities. At the time the parties entered the Agreement, they assumed SGHAD
13 would be able to levy assessments to sustain its operations. SGHAD sought to ensure its continued
14 operation by seeking an assessment two years ago, which, despite its best efforts, failed. It has no
15 options going forward.

16 ARBITRABILITY

17 37. Section 7 of the Agreement provides:

18 *Any disputes between the City and the District concerning the interpretation or*
19 *enforcement of this Agreement shall be resolved through binding arbitration between*
20 *the parties utilizing a mutually-agreed upon arbitrator. The arbitration proceeding*
21 *may be commenced by either party by service of a notice of intent to arbitrate. The*
22 *arbitration shall be conducted on an agreed-upon date not more than three months*
23 *following service of such notice. It is specifically agreed that in addition to any other*
24 *available remedies, the arbitrator may order specific performance of this Agreement.*
25 *Judgment on the arbitration proceeding may be entered in any court of competent*
26 *jurisdiction.*

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CAUSE OF ACTION
Declaratory Relief
Code of Civil Procedure section 1060
(Against the City of Anaheim)

38. SGHAD realleges and incorporates by reference each of the foregoing allegations as though fully set forth herein.

39. SGHAD and Anaheim are parties to the Agreement. To date, SGHAD has performed each of its contractual obligations as required by the Agreement.

40. The Agreement places no explicit time restriction on SGHAD's obligation to operate, maintain, and repair the Dewatering Facilities, and thus, it could be interpreted to require such in perpetuity. SGHAD, by no fault of its own, and due to the unique powers conferred, and limitations imposed, upon it by virtue of the fact it exists merely as a political subdivision of the state pursuant to Public Resources Code section 26558, et seq., will be unable to operate, maintain, and repair the Dewatering Facilities in the future.

41. SGHAD contends that the performance of any contractual obligation to operate, maintain, or repair the Dewatering Facilities will be excused when its funds on hand have been depleted, based on the doctrines of impossibility, impracticability, and/or frustration of purpose. Alternatively, SGHAD contends that the Agreement does not impose on SGHAD any obligation to operate, maintain, or repair the Dewatering Facilities if it has no means to fund such.

42. Anaheim contends that SGHAD's performance is not excused by the doctrines of impossibility, impracticability, and/or frustration of purpose. It also contends that SGHAD's obligations continue despite the depletion of funds. Accordingly, a present and actual controversy exists between the parties with respect to SGHAD's duties under the Agreement.

43. SGHAD is entitled to a declaratory judgment, pursuant to Code of Civil Procedure section 1060.

PRAYER FOR RELIEF

WHEREFORE, SGHAD prays for the following relief against Anaheim:

1. A declaratory judgment, pursuant to Code of Civil Procedure section 1060, declaring

1 that its performance of any contractual obligation to maintain, operate, or repair the Dewatering
2 Facilities will be excused when the funds on hand have been depleted based on the doctrines of
3 impossibility, impracticability, and/or frustration of purpose. Or alternatively, a declaratory judgment
4 that declares that the Agreement does not impose on SGHAD any obligation to operate, maintain, or
5 repair the Dewatering Facilities upon depletion of its funds.

6 2. An award of costs of arbitration.

7 3. Any other relief that the Arbitrator may deem just and proper or in the interest of
8 justice.

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10
11 **DATED:** _____

BENINK & SLAVENS, LLP

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13 _____
14 Eric J. Benink
15 Attorneys for Claimant,
16 Santiago Geologic Hazard Abatement District
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