IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

CITY OF MODESTO, *et al.*,

Plaintiffs, Appellants, and Cross-Respondents,

v.

THE DOW CHEMICAL COMPANY, *et al.*,

Defendants, Respondents, and Cross-Appellants.

_____/

Case no. A134419

San Francisco County Superior Court Case nos. CGC-98-999345 and CGC-98-999643 (consol.)

Honorable Richard A. Kramer
Honorable John E. Munter
Honorable Ernest H. Goldsmith

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS CITY OF MODESTO AND CITY ATTORNEY OF MODESTO EX REL. PEOPLE OF THE STATE OF CALIFORNIA

DUANE C. MILLER (SB # 57812)
MICHAEL D. AXLINE (SB #229840)
MILLER, AXLINE & SAWYER
1050 Fulton Avenue, Suite 100
Sacramento, CA 95825
Telephone: (916) 488-6688
Facsimile: (916) 488-4288

ELLIOT L. BIEN (SB # 90744)
JOCELYN S. SPERLING (SB # 211714)
BIEN & SUMMERS
829 Las Pavadas Avenue
San Rafael, CA 94903
Telephone: (415) 472-1500
Facsimile: (415) 472-1515

SUSAN ALCALA WOOD (SB # 156366)
City Attorney of Modesto
ROLAND R. STEVENS (SB # 87040)
Special Counsel
1010 10th Street
Modesto, CA 95354
Telephone (209) 577-5200
Facsimile (209) 544-8260

Attorneys for Plaintiffs, Appellants and Cross-Respondents,
CITY OF MODESTO, *et al.*

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PRELIMINARY STATEMENT

A.

OVERVIEW

Groundwater is the primary source of domestic water for the City of Modesto. Yet for many years the manufacturers of a dry cleaning solvent, perchloroethylene ("PCE"), instructed dry cleaners in Modesto to dispose of PCE in ways that contaminated both soil and groundwater. Because dozens of dry cleaners across the city disposed of PCE in those very ways during that same time period, Modest has a serious and long-term health problem today. The parties stipulated below that PCE "potentially causes cancer in human beings." (RT Volume 57 [hereafter "RT 57" etc.] at 5955: 5-10) As a vapor, PCE can poison insidiously by rising up into buildings or contacting workers on the ground. (*Post*, pp. 30-31) In groundwater, PCE has already forced closure of city wells and, absent costly remediation, will threaten more wells over time. (*Post*, p. 33)

Modesto commenced these consolidated cases in 1998. (Appellants' Appendix Volume 1 [hereafter "AA 1" etc.] at 1 & 50) The city sought either equitable relief compelling responsible parties to take clean-up action themselves, or monetary relief (damages or statutory awards) so the city could do the job. In addition, to deter similar catastrophes in the future the city sought punitive damages against any defendants found to have acted tortiously and with malice.

The road to final judgment was long and arduous. It took 13 years, four bifurcated trials, innumerable hearings, and many trips to this Court. It spawned over 25,000 pages of reporters' transcripts and many times that volume of other papers.

At the end of the day, however, Modesto received nowhere near the relief required to protect its residents from PCE contamination. Although many defendants settled, the resulting funds are far from sufficient for the necessary clean-up. (*Post*, p. 78) Most significantly, two of the biggest contributors to the PCE problem, The Dow Chemical Company ("Dow") and PPG Industries, Inc. ("PPG"), escaped all liability below except for the cost to filter PCE out of two city wells.

Those two respondents were among the largest suppliers of PCE to Modesto's dry cleaners for several decades. During these decades, Dow and PPG were also supplying unsafe disposal instructions that are at the heart of this case. Claiming expertise on the use and disposal of PCE, Dow and PPG affirmatively instructed dry cleaners to dispose of PCE waste casually into the environment, whether down the drain or out on the ground. (*Post*, pp. 35-44) Because the dry cleaners acted accordingly during that long time period, enough PCE built up in the soil and groundwater to create the health crisis facing Modesto today. (*Post*, pp. 31-35)

Dow and PPG avoided liability by attacking Modesto's remedies one at a time. First, in 2003, they defeated all of Modesto's nuisance causes of action on a summary adjudication ruling. The court fully embraced their contention that nuisance liability required ownership or control of local dry cleaners. (*Post*, pp. 14-15) Although this Court later squarely rejected that test in *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28 ("*Modesto I*"), Dow and PPG successfully opposed reconsideration of the summary adjudication after this Court's opinion. (*Post*, p. 16)

Before the ink was dry on the denial of reconsideration, however, Dow and PPG unveiled a startling contention. They said the very nuisance causes of action they had just defeated provided the *only* proper remedy for Modesto's PCE contamination. As a major and ultimately successful weapon in their attack on the city's claims for tort damages, Dow and PPG extolled a public nuisance injunction as the city's only fair, effective, and legally supported recourse against them. (*Post*, pp. 17-23)

Dow and PPG defeated the balance of Modesto's claims for clean-up assistance in other ways. In 2005, for example, they convinced the court presiding at the first (bellwether) jury trial to exclude any evidence of Modesto's costs to remove PCE from city soil and groundwater. (*Post*, pp. 80-81) That ruling cost Modesto some $40 million in claims for clean-up damages — hardly an endorsement for traditional product liability claims over nuisance claims in this field.

The next section of the brief summarizes the foregoing and other key rulings allowing Dow and PPG to walk away from any clean-up obligation in this case. Reversible errors in these rulings warrant a remand for a new jury and/or court trial.

After so many years of litigation, however, Modesto is reluctant to delay the clean-up even longer by pursuing every possible claim and remedy again. New trials could take years, and the resulting judgment would guarantee another round of appeals before Modesto could hope to obtain the assistance it needs. The record below establishes that federal and state agencies cannot be counted on to fill the gap. (*Post*, pp. 70-71) Accordingly, Modesto has decided to focus this appeal on

two issues that support prompt and effective remedies against Dow and PPG with the least possible burden on the courts.

First, Modesto challenges the summary adjudication of its nuisance claims against Dow and PPG in 2003. As noted previously, this Court's decision in *Modesto I* squarely rejected the local site-control test on which the summary adjudication relied. Instead, *Modesto I* held that nuisance liability could properly be grounded on Dow or PPG's affirmative conduct assisting in creating a nuisance — specifically citing improper disposal instructions as an example. (*Post*, pp. 47-50) *Modesto I* thus directly compels a reversal of the summary adjudication.

If the Court agrees, Modesto requests a specific disposition on this issue. Either on judicial estoppel grounds or the merits, based on undisputed facts, the Court should remand with directions to enter a public nuisance injunction against Dow and PPG as "the proper judgment" on this issue. (Code Civ. Proc. § 906) A public nuisance injunction would get the clean-up done. It would minimize the need for judicial resources in further merits adjudications and appeals. It could be implemented with great efficiency if the Court were to direct, or at least strongly recommend, that a special master be selected post-remand to facilitate any fact-finding required. And it could be framed to ensure fairness to Dow and PPG, who protested constantly below that remedies sought against them were unnecessary or unquantifiable. In the form proposed here (*post*, p. 68), the injunction would compel clean-up action on the part of Dow and PPG only where *actually* necessary — where the demands at particular sites exceed any applicable settlement funds or another party's clean-up efforts.

If the Court adopts that disposition, Modesto will forgo any other clean-up remedy against Dow and PPG. That would also moot a number of issues raised in this brief, as will be explained in the summary that follows.

Modesto's second main concern on appeal is punitive damages. Modesto asks the Court to restore the full punishment that the jury imposed against Dow at the first trial. Compelling evidence supports that jury's finding that Dow *knowingly* endangered a major urban population for many years, and that $75 million was an appropriate punishment and deterrent given the company's $16 billion net worth. (*Post*, pp. 92 *et seq.*) Nothing in due process case law, or California's post-trial rules, justifies the trial court's reduction of Dow's punishment to a $5.4 million slap on the wrist. On this Court's *de novo* review of the dispositive rulings, it should reverse the entire reduction order and remand with directions to reinstate the jury's award. The Court is under no compulsion to require a new trial or any other proceedings on this issue. (*Post*, pp. 124-126)

It is time for this case to turn from protracted adjudications to remediation and deterrence. This Court can and should accomplish that now, on this appeal, by ensuring Modesto receives an effective clean-up injunction and Dow receives an effective punishment.

B.

SUMMARY OF THE MAIN RULINGS BELOW ON CLEAN-UP REMEDIES

The 2003 Summary Adjudication Barring Nuisance Claims

As noted above, the 2003 summary adjudication of Modesto's nuisance claims against Dow and PPG is irreconcilable with this Court's 2004 decision in *Modesto I.* This Court expressly rejected the site-control test adopted by the trial court. Instead, *Modesto I* held it was sufficient that a manufacturer's affirmative conduct assisted in creating a nuisance. Although the ultimate holding of *Modesto I* addressed the Polanco Redevelopment Act (Health & Saf. Code, § 33459 *et seq.*) ("Polanco Act"), the holding on nuisance law was critical to the Polanco Act holding.

The 2005 Rejection of Clean-Up Damages at the First Jury Trial

In 2005, the Honorable John E. Munter ruled on a motion in limine (known as "MIL 40") that damages for the cost of removing PCE from city soil and groundwater were preempted by federal and state clean-up statutes. (Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* ["CERCLA"] and Carpenter–Presley–Tanner Hazardous Substance Account Act, Cal. Health & Saf. Code, § 25300, *et seq.* ["HSAA"]). (AA 40: 10117 *et seq.*)

Only one of the four relevant sites, however, was subject to clean-up efforts under CERCLA or HSAA, and both statutes expressly preserve

claims like Modesto's in any event. (42 U.S.C. §§ 9614(a), 9652(d) & 9659(h); Health & Saf. Code § 25366, subd. (c)) At a minimum, though, the ruling swept too broadly by including sites not formally designated for a clean-up under those statutes.

An alternative holding in the MIL 40 ruling was that the city's clean-up damages were too speculative, mainly because other public or private entities might complete the job themselves, or do so partially but to an unpredictable extent. This holding is indefensible for two reasons. First, because the fact of existing contamination was undisputed, Modesto was entitled to reasonably foreseeable future damages to redress that injury at least at the sites not subject to regulatory cleanup orders. Second, if the court was correct that clean-up costs were too speculative to be awarded as damages, that ruling would establish error in the denial of equitable relief below for these sites The MIL 40 ruling would establish a fundamental ground for injunctive relief: "[w]here it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." (Code Civ. Proc. § 526, subd. (a)(5))

Accordingly, unless the Court remands for a public nuisance injunction including these sites, it should reverse and remand for a new trial on damages. At least one remedy must be afforded for the wrongs committed by Dow and PPG. (See Civil Code § 3523)

The 2009 Ruling Barring Clean-Up Damages at the Second Jury Trial

In contrast to a public nuisance injunction — a police power remedy not limited to city property — Modesto's remaining claims were subject to that limitation. Modesto sought as damages the cost of removing PCE from the city's soil, its street and sewer easements, and the groundwater its residents depend on. But the court then presiding, the Honorable Ernest H. Goldsmith, granted nonsuits or directed verdicts against most of those claims at the second jury trial.

One such ruling stands out for its plain error and sweeping result, costing Modesto up to $42 million in claims. (*Post*, pp. 82-84) The court held PCE contamination is not actionable unless and until it reaches a city well at levels that exceed, or will "imminently" exceed, the "maximum contaminant level" (MCL) established by the State: 5 parts per billion. Case law rejects that rigid approach. Contamination of public drinking water sources is itself actionable injury, and cities need not wait until they are forced to shut wells down before seeking a remedy for such contamination. The ruling below would let PCE continue to fester and spread across the city, and force Modesto to file new actions (and face res judicata defenses) every time another well succumbs. Case law sensibly supports full legal or equitable relief in one action whenever possible. (E.g., *Renz v. 33rd District Agricultural Ass'n.* (1995) 39 Cal. App.4th 61, 68 [review den.])

Accordingly, unless this appeal results in a public nuisance injunction covering these sites, the Court should reverse and remand for a new and proper damages trial.

The Rejection of an $18 Million Award Against Dow and PPG on Limitations Grounds

On one of the few sites the second jury was allowed to consider, know as Elwood's, the jury found Dow and PPG liable for clean-up and related damages in the amount of $18.3 million. A few months later, though, the court erroneously directed a verdict for Dow and PPG on that site on statute of limitations grounds. While that ruling focused on the "discovery" exception to the accrual test, the exception was moot because Dow and PPG failed to meet their burden of proof on the underlying accrual test.

By special verdict, the jury found that Modesto's relevant injury had occurred by December 3, 1995, which was more than three years before Modesto filed suit. But Modesto was entitled to a judgment notwithstanding that verdict, for which it timely moved. A lay jury had to determine whether enough PCE from Elwood's had migrated to the relevant well by December 3, 1995, that the concentration exceeded, or would "imminently" exceed, the official MCL (5 parts per billion). That question, a highly technical one, required an expert calculation and Dow and PPG failed to adduce any.

Accordingly, if the Court does not remand for an injunction covering this site, it should remand with directions to include the jury's $18.3 million award in the new judgment.

The Denial of Relief for Redevelopment Sites in 2010 and 2011

Finally, after proceedings without a jury in 2010 and 2011, Judge Goldsmith denied Modesto any relief for PCE contamination at several redevelopment sites — including sites where Judge Munter had awarded relief in the 2007 statement of decision.

In denying relief in 2010, Judge Goldsmith imposed a causation test bearing no resemblance to California's prevailing "substantial factor" standard, let alone CERCLA's relaxed burden-shifting rule that the Polanco Act incorporates for redevelopment sites. (Health & Saf. Code § 33459.4, subd. (c)) On the contrary, the court required exacting proof beyond any required in garden variety tort cases. (*Post,* pp. 87-90) Indeed, the best way to illustrate that error is to compare the causation analysis in Judge Munter's 2007 statement of decision. (*Post*, pp. 65-66) That court concluded that the same body of evidence satisfied both the substantial factor and CERCLA/Polanco Act tests.

The second notable ruling, in 2011, was the denial of equitable relief on grounds irreconcilable with equity. The court found there was only a small chance Modesto would need any clean-up assistance in excess of the city's settlement funds or other parties' clean-up efforts. But it is patently inequitable to impose even a small risk of that nature on the victim of contamination, rather than the perpetrators. If the court's prediction proves accurate, equitable relief will cost Dow and PPG little or nothing. But such relief, carefully tailored as suggested in this brief, is critical to ensure Modesto does not bear the risk of costs

exceeding settlements, and receives as much assistance from Dow and PPG as Modesto may actually require.

The public nuisance injunction Modesto requests would cover the redevelopment sites along with the others in the city. Absent that disposition, however, the Court should remand for appropriate legal or equitable relief on the redevelopment sites.

THE RELEVANT PROCEEDINGS

This section summarizes proceedings relevant to Modesto's primary contentions, involving a public nuisance injunction and punitive damages. Later sections summarize other proceedings as needed.

A.

THE PARTIES

The City of Modesto ("Modesto" or "city") is the principal plaintiff and appellant. It is also the successor plaintiff and appellant with respect to an action brought by the City of Modesto Redevelopment Agency ("RDA") (case no. 999345). The RDA sought similar relief for several redevelopment sites. On February 1, 2012, however, the RDA ceased to exist by operation of law. (See Health & Saf. Code § 34172) Modesto become its "successor agency" (*Id.,* § 34173), and no formal substitution was required because "[a]ll litigation involving a redevelopment agency shall *automatically* be transferred to the successor agency." (*Id.*, subd.

(g), italics added) Thus, Modesto has been citing both of its capacities on this appeal since February 1, 2012.[1]

Also joining in this brief is the City Attorney of Modesto representing the People of the State of California. (AA 3: 594, ¶ 4; 3: 628, ¶ 3) In that capacity (see Civil Code § 731), the city attorney joined only in the public nuisance causes of action below, sought only injunctive relief, and joins this brief only as to the City's public nuisance claim and request for injunctive relief. (Another related party, Modesto Sewer District No. 1, is pursuing its appeal only in its capacity as a cross-defendant and by separate counsel.)

The complaints below named 28 defendants as manufacturers or distributors of PCE or dry cleaning equipment, or retailers using those products. (AA 3: 592-593, 626-627) But settlements (*post*, p. 79) have left only five respondents on Modesto's appeal. In addition to Dow and PPG they are R.R. Street & Co., Inc., an equipment manufacturer and PCE distributor, and two retail dry cleaners named Modesto Steam Laundry and Cleaners, Inc., and Estate of Shantilal Jamnadas, dba Halford's Cleaners.

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[1] No respondent has objected, but if necessary we respectfully request judicial notice of the City Council minutes accepting the role of successor agency. They can be found at http://www.modestogov.com/sirepub/mtgviewer.aspx? meetid=419& doctype=MINUTES. (See Evid. Code §§ 452 subd. (c) & 459, subd. (a))

B.

MODESTO'S CLAIMS UNDER NUISANCE LAW

The original complaints in this matter were filed on November 18, 1998, by the RDA (AA 1: 1) and on December 3, 1998, by the city. (AA 1: 50) Each included a cause of action for "continuing nuisance" (AA 1: 19:13-20:1 [RDA] & AA 1: 69:1-17 [city]) that incorporated all prior allegations by reference. (AA 1: 19-20, ¶ 50 & AA 1: 69, ¶ 57)

The original complaints sought only damages on nuisance grounds. (AA 1: 19, ¶ 53 & AA 1: 69, ¶ 60) However, following a series of amendments the operative pleadings for purposes of this appeal also sought injunctive relief on public nuisance grounds.

The operative pleadings, both filed on January 4, 2002, were a third amended complaint by the city and the city attorney (AA 3: 592) and a fourth amended complaint by the RDA and the city attorney. (AA 3: 626) In relevant part, both pleadings included a separate cause of action for public nuisance against all defendants (AA 3: 614 [city], *id.* at 648 [RDA]), and both sought injunctive relief on that basis. (*Id.* at 616:11-15 [city], *id.* at 649:28 [RDA, sought by city attorney only])

On the merits, finally, the public nuisance causes of action carried forward every prior allegation explaining the nuisance (AA 3: 648, ¶ 72 [RDA] & AA 3: 614, ¶ 75 [city]), but added further details about how Dow and PPG's affirmative conduct were a substantial factor in PCE disposal practices in Modesto.

C.

THE SUMMARY ADJUDICATION OF THE NUISANCE CLAIMS AGAINST DOW AND PPG IN 2003

Dow and PPG moved for summary adjudication of all nuisance claims against them on December 3, 2002 (AA 3: 718), relying heavily on *City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal. App.4th 575. (AA 4: 1065-1068) They said only actual disposal of PCE on their part (e.g., *id.* at 1064:14-16), whether directly or through local site-control, could support any nuisance claims against them. And their only factual showing was a denial of any such direct or indirect disposal. They did not otherwise dispute Modesto's allegations supporting nuisance liability.

Modesto opposed the motion on January 17, 2003 (AA 21: 5206), relying in part on *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1991) 221 Cal.App.3d 1601. (AA 21: 5211-5215, 5220-5221) Modesto contended there was no need to prove Dow or PPG had "personally poured the bucket of hazardous waste down the drain, or owned or 'controlled' the dry cleaning plant at the time of disposal." (*Id.* at 5210:10-12) Modesto agreed Dow and PPG did not "own or operate" local retailers using PCE. (*Id.* at 5266, ¶ 2; *id.* at 5231, ¶ 5) But Modesto disputed Dow and PPG's denials of "authority or control" in several ways. Modesto cited, for example, Dow and PPG's authoritative communications as the product manufacturers on how to dispose of PCE. (AA 21: 5269-5270, 5273-5274, ¶ 7 [Dow] & AA 21: 5232-5234, ¶ 7 [PPG]).

More broadly, though, Modesto adduced extensive evidence of Dow and PPG's significant contribution to the nuisance in ways that

have nothing to do with "actual disposal." (AA 21: 5302 - AA 31: 7781) Separate statements outlined this body of evidence as to Dow (AA 21: 5265 *et seq.*) and PPG. (AA 21: 5230 *et seq.*) Dow and PPG elected to leave Modesto's entire body of evidence undisputed for summary adjudication purposes. Instead, they lodged a sweeping objection that Modesto's opposition evidence was "not relevant or material." (AA 31: 7821:3-12) They said it "relate[s] primarily to [Dow and PPG's] purported knowledge of hazards of [PCE] and the[ir] . . . dissemination of that information. These alleged facts are not relevant or material to Plaintiffs' nuisance . . . claims." (*Id.*)

The matter came on for hearing before the Honorable Richard A. Kramer on February 24, 2003. (RT 219: 512, et seq.) The court had already signaled its views on May 24, 2002, overruling a demurrer to the nuisance claims but emphasizing an allegation of "negligent[] dispos[al]." (AA 3: 693:14, 693:20) That view now prevailed. The court held that *City of San Diego* and *Selma Pressure* required "more direct evidence [of] actually going out there and doing the bad stuff." (RT 219: 514:27-28) Finding no triable issue of direct or indirect "actual disposal," the court entered its summary adjudication order on April 22, 2003. (AA 32: 7946)

D.

THE DENIAL OF RECONSIDERATION IN 2004 DESPITE THIS COURT'S CONTRARY HOLDING ON NUISANCE LIABILITY

Modesto I came down on June 28, 2004, and review was denied on September 15, 2004. Three weeks later, on October 4, 2004, Modesto moved for reconsideration of the summary adjudication on nuisance liability based on *Modesto I* as "new law." (Code Civ. Proc. § 1008(c)) (AA 32: 8168) Dow and PPG opposed the motion (AA 33: 8368), but only by asking the court to reaffirm its original ruling on causation grounds instead. (*Id.* at 8371:8-12)

The court denied reconsideration without reaching the merits. At the hearing on December 10, 2004, it held *Modesto I* did not constitute "new law" on nuisance liability because this Court had summarily denied Modesto's writ petition challenging the original summary adjudication order. (Case no. A102694; petn. denied June 5, 2003) Although a summary denial "is not a denial on the merits and does not become law of the case" (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1097), the court held it effectively affirmed the 2003 ruling. (RT 219: 767 *et seq.*)

The ensuing order of December 27, 2004 (AA 35: 8935) marked the final demise of Dow and PPG's exposure to nuisance liability below, and they moved quickly to exploit that situation.

E.

DOW AND PPG START EXTOLLING THE PUBLIC NUISANCE INJUNCTION TO ATTACK MODESTO'S DAMAGES CLAIMS

No longer at risk of a public nuisance injunction, Dow and PPG began praising that remedy as the proper substitute for Modesto's tort damages claims. We fully document this strategy because of its surprising success in limiting the city's tort damage recovery, the judicial estoppel that arose as a result, and the importance of a public nuisance injunction for Modesto today.

1.

Motion in Limine in 2004-2005

The strategy began on December 10, 2004, the same day the court orally denied reconsideration of the nuisance claims. Dow moved in limine (MIL 40) to bar any clean-up damages at the first jury trial. (AA 35: 8891) Dow's first argument was that "[t]he City is suing in *tort* as an allegedly injured property owner" (*id.* at 8899:24; original italics), and the claimed clean-up damages were barred because they did not constitute "present appreciable harm to city property." (*Id.* at 8900:3, 8900:14-16) But with Modesto's nuisance claims still under review at the time, Dow stated in a footnote that nuisance law provides an "abatement" remedy in lieu of "future" or "prospective" damages. (*Id.* at 8895, fn. 2)

Similarly, PPG filed a joinder in Dow's motion on preemption grounds, citing clean-up work under CERCLA and HSAA. (AA 35: 8920) But PPG stated that public nuisance remedies were *not* preempted:

"Modesto's public nuisance . . . claims are fully consistent with CERCLA and HSAA because the principal remedy for each would be an order of abatement, a decree requiring liable defendants to undertake remediation. . . ." (AA 35: 8928, fn. 2) PPG even praised that remedy: "[a]batement mandates prompt remediation, but the defendants control the process and can protect themselves from excess costs, and the possibility of a windfall to the plaintiff is eliminated." (*Id.*)

Dow and PPG began amplifying that point soon after the formal order denying reconsideration of the nuisance claims. On February 17, 2005, fifty-two days after the order formally denying reconsideration of the nuisance claims, Dow and PPG dramatically increased their praise of the public nuisance injunction. In a joint supplemental brief on MIL 40, they again disputed Modesto's right to pursue anticipated remediation costs as tort damages. (AA 38: 9553) But this time, in the text of their brief, they argued that "the City" — Modesto in particular — "has the right to bring a public nuisance action to require responsible parties to clean up groundwater contamination." (*Id.* at 9569:19-20) And they added that, "in contrast to negligence and product liability actions . . . . the primary remedy for public nuisance actions is an order of abatement . . . ." (*Id.* at 9571:21-9572:3)

To say Modesto "has" the right to pursue a public nuisance injunction (*id.* at 9569:19) implied that the City could have, should have, and still could pursue that remedy. Nor was this a one-time implication. They repeated it in 2007 to this Court and the Supreme Court.

2.

Petitions to this Court and the Supreme Court in 2007

On July 13, 2007, with the second jury trial approaching, Dow and PPG again moved to bar any damages claims for future clean-up costs. (AA 57: 14772) When this motion was denied (AA 61: 15879), Dow and PPG petitioned this Court to intervene and bar such claims.[2] They were not content, however, to challenge those claims on the merits. Instead, they repeated the same misleading assertion about an injunction on nuisance grounds.

Dow and PPG told this Court Modesto was "*unsatisfied* with the . . . abatement remedies prescribed by the law of private and public nuisance. . . ." (MJN Ex. 1, p. 21; italics added) Once again, the plain implication was that Modesto could have, should have, and still could pursue that remedy. And a few weeks later, after this Court summarily denied their petition, they repeated the same comment to the Supreme Court. In a reply supporting their petition for review, they again berated Modesto as "[d]issatisfied" with its nuisance-based remedies because it preferred "money damages." (MJN, Ex. 2, p. 1)

3.

Pretrial Brief in 2008

As the second jury trial approached, Dow and PPG significantly expanded their praise of the nuisance injunction to attack Modesto's

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[2] Please see Modesto's accompanying motion for judicial notice ("MJN"). The mandate petition is copied there as Exhibit 1.

damage claims. In a joint pretrial brief filed on April 15, 2008 (AA 61: 15988), Dow and PPG again contended that tort damages were limited to "present" property injury. And they summoned up their familiar foil — "[a] public nuisance action [which] seeks abatement, not damages . . . ." (*id.* at 15997:12) This brief also ushered in new and more aggressive phase of this tactic:

> a plaintiff in such an action may obtain relief before the hazard causes any physical injury or physical damage to property. . . . Nor can negligence or product liability be used by a public entity to act on behalf of a community that has been subjected to a widespread public health hazard. . . . (*Id.* at 15997:12-21, cits., internal quots., and italics omitted)

From this point forward, Dow and PPG made a full-throated argument that a nuisance injunction was, and remained, Modesto's only remedy for the unfortunate "public health hazard" on its hands.

4.

Motions in Limine in 2008

Dow and PPG's injunction strategy took center stage at a multi-day hearing on motions in limine in September 2008. (RT 82 *et seq.*) Lead defense counsel fulsomely praised the nuisance injunction — for many reasons cited here too — and even claimed it was still available to Modesto:

- "The city is not without its remedies, and there are at least two different remedies that could be pursued: One would be a nuisance claim. . . ." (RT 82: 115:18-20)

- "[I]f the city believes that there is contamination that needs to be addressed, it has a remedy to follow, and that is to seek an abatement of that contamination through the law of nuisance." (RT 82: 116:17-20)
- "[I]in a situation where you have environmental contamination, a City can use certain methods such as a nuisance claim . . . but cannot use the law of product liability to do that." (RT 83: 171:28-172:4)
- Modesto's expert, Anthony Brown, "is going to say . . . there is a risk of future contamination of wells. And . . . . if what you're talking about is a risk, the law of nuisance is what you use to deal with that." (RT 83: 182:10-16)
- "The law of nuisance supports a future looking injunction. That is, if there's a nuisance out there, the law of nuisance supports an action to abate that nuisance. Wherein Your Honor says defendants, you go out and abate the nuisance, and there are a lot of public policy reasons behind that, one of which is the defendants then are not just spending money on some speculative thing that might happen in the future. . . . [¶] A nuisance claim would require you to say to the defendants clean it up, that would be an injunctive relief." (RT 83: 209:2-18)
- "[T]hose [municipal] efforts to respond to a widespread public health hazard . . . are properly brought in a nuisance action or a statutory action such as the Polanco Act." (RT 86: 481:28-482:5)
- Modesto "can file an action to abate a public nuisance. That's what the law of nuisance was created to respond to. That's exactly what you do in an abatement action. [¶] And when you recover in an abatement action, you don't get dollars for harm that might never occur. You don't get dollars for what we claim, and I think the evidence will be clear, is five, ten times what it[']s really going to cost. What you get is an injunction that makes the defendants clean it up at the actual cost. These are the considerations that went into the development of these

laws over hundreds of years of development of the common law." (RT 86: 499:18-28)

● "[T]here are police powers which . . . give the City the right to abate the public nuisance, and whether that public nuisance is a brothel or a rendering house or air pollution or groundwater pollution, there is a well-established, indeed, I think in nuisance, there's an ancient series of cases that say what the City can do. [¶] So we are not suggesting that the City is powerless." (RT 86: 500:25-501:3)

5.

Motion for Directed Verdict in 2009

Finally, after the close of evidence at the second jury trial, Dow and PPG moved on April 1, 2009, for a sweeping directed verdict. (AA 64: 16795) While grudgingly admitting "[t]he presence of PCE in the soil and groundwater is undesirable" (*id.* at 16809:18), they renewed their mantra that a public nuisance injunction was the only proper remedy:

> Public entities, such as . . . the City of Modesto, are given police powers and special causes of action peculiar to public entities (e.g. representative public nuisance, statutory claims) to vindicate the public interest. But a products liability suit is not an exercise of a public entity's police powers and does not provide an avenue for seeking compensation for alleged injuries to the public welfare. . . . [It] does not provide an avenue to prevent future harm from a hazardous condition, and it cannot allow a public entity to act on behalf of a community that has been subjected to a widespread public health hazard. (*Id.* at 16805, fn. 6; cit. and internal quots. omitted)

Lead defense counsel succinctly repeated the point at the hearing the next day, referring to the "alleged contamination in and around sewers and streets. . . ." (RT 166: 10174:9-10) He reminded the court that "we're talking here about a product liability action. We're not talking about an action to abate a public nuisance." (*Id.* at 10174:16-18)

F.

DOW AND PPG'S INJUNCTION STRATEGY ACHIEVES RESOUNDING SUCCESS

Dow and PPG achieved remarkable success with their injunction strategy. The record proves it played a significant role in winning a directed verdict against many millions of dollars in damages claims.

At a hearing on April 6, 2009 (RT 168: 10362 *et seq.*), the court announced its conclusion that the proper way to secure remediation in Modesto was a nuisance injunction, not damages. The court cited testimony by Modesto's expert, Anthony Brown, making an "analogy about future harm, I take it, where a tree is on one's neighbor's property, and if it is in danger of then harming your property, you ought to take some action to do something about it." (*Id.* at 10362:13-17) The court explained that the "future harm" analogy led it to conclude that Modesto's case "looks like a classic nuisance case. That's the only way I could see one would get relief, because I don't see how you could sue in tort." (*Id.* at 10362:17-19) Reiterating later: "[w]e're talking about future harm. Appears that that comes under nuisance" or perhaps a statutory action. (*Id.* at 10377:14-16)

The record also proves Dow and PPG convinced the court that a nuisance injunction was still available to Modesto, despite the fact that they had been awarded summary adjudication on that issue. The city's lead counsel protested that the threatened ruling on damages would "allow[] dangerous conditions to exist until people are injured." (RT 168: 10379:1-2) The court replied: "[w]ell, you know, you have injunctive relief available." (*Id.* at 10379:3-4)

By way of epilogue, though, this "available" alternative never materialized. Although the court continued to preside through and beyond the entry of final judgment on November 15, 2011 (AA 76: 20129), it refused to award any injunctive relief. It even reversed its predecessor's 2007 decision to grant such relief for several redevelopment sites. (*Id.* at 20146 *et seq.*; see also AA 55: 14283 [2007 decision])

G.

DOW AVOIDS 93% OF THE PUNITIVE DAMAGES ASSESSED BY A JURY

The last proceeding summarized here involves Modesto's punitive damages claims against Dow at the first jury trial. The trial court found sufficient evidence to present a special verdict form on punitive damages, and the jury unanimously found against Dow on June 9, 2006. (AA 42: 10525; RT 78: 8005:9-19 [jury poll])[3] A short trial took place four days later, on June 13, 2006. (RT 79: 8026 *et seq.*) Following

[3] The jury also so found against respondent R.R. Street and a defendant later settling, Vulcan Materials Company. (AA 42: 10525)

undisputed instructions, the jury assessed $75 million in punitive damages against Dow by a vote of 10 to 2. (RT 79: 8117:14-8118:2; AA 42: 10527)[4]

Dow moved for a new trial or judgment notwithstanding the verdict on June 22, 2006. (AA 42: 10621 & 10598) Street moved only for JNOV. (*Id.* at 10651) After briefing and argument (RT 226: 8 *et seq.*), the court upheld the award against Street but rejected 93% of the award against Dow. (AA 52: 13221) The court praised the jury for a "refined and discerning analysis" of the issues after "four months" of trial with "[e]ighty-five witnesses . . . and 483 documents . . . ." (*Id.* at 13222:8-11) But after upholding the jury's decisions on liability, causation, actual damages and malice (*id.* at 13224-13227), the court determined the jury was way off base in fixing the award against Dow. (*Id.* at 13227-13248) It held the maximum award was only $5,441,221, whether reviewed under the "independent judgment" standard (Code Civ. Proc. § 662.5(a)(2)) or constitutional law. (*Id.* at 13245:16-13246:18)

The court noted, however, "the possibility that a higher court might overrule this Court's determination that a ratio of more than four to one exceeds the constitutional maximum." (AA 52: 13248:5-7) Accordingly, the court entered a "conditional reduction" of Dow's award "only if there is [a] reversal of this Court's constitutional

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[4] Its award against Street was $75,000. (RT 79: 8118:3-6) The award against Vulcan was $100 million. (*Id.* at 8118:20-23) As the trial court explained, the jury had reason to find Vulcan's culpability greater than Dow's though Vulcan's net worth was less. (AA 52: 13233:10-25)

determination that the four to one ratio cannot be exceeded." (*Id.* at 13248:8-10) In other words, no other appellate ruling would trigger the "conditional reduction" — only a rejection of the trial court's ratio decision itself. And if that occurred, the court granted Dow a new trial if Modesto did not accept a remittitur of the jury's $75 million award to $5,441,221. (*Id.* at. 13248:11-25)

STATEMENT OF APPELLATE JURISDICTION

A.

THE CITY OF MODESTO'S APPEALS

This Court has jurisdiction of Modesto's appeals both as the city and the RDA's successor agency. A final judgment entered on November 15, 2011 (AA 76: 20129 *et seq.*) adjudicated all relevant substantive claims. Both the city and RDA timely appealed from that judgment on January 4, 2012. (AA 78: 20588) They also amended their notice of appeal on January 17, 2012 (timely given the preceding weekend and court holiday) "to also specify, as a precaution, the opinion and order of August 1, 2006, insofar as it grants defendants' motions for new trial, and the order of September 1, 2009, denying plaintiffs' motion for judgment notwithstanding the verdict." (*Id.* at 20607) The former order reduced Dow's punitive damages award. The latter rejected Modesto's attack on a special jury verdict on a statute of limitations issue. (*Post*, pp. 84-97)

Despite the pending appeal, the superior court entered an order on February 14, 2002, purporting to "correct" several substantive rulings in the judgment on prevailing-party issues. (AA 80: 21277 *et seq.*) A

purported amended judgment followed on May 23, 2012. (AA 81: 21406) Both acts exceeded the court's power. (*Ehret v. Congoleum Corp*. (1999) 73 Cal.App.4th 1308, 1317- 1318; *Copley v. Copley* (1981) 126 Cal.App. 3d 248, 298 ["[d]uring the pendency of an appeal, the trial court is without power to hear a motion to vacate judgment from which an appeal has been taken"]) As a precaution, though, Modesto filed notices of appeal from the "correcting" order and the amended judgment on April 13 and July 9, 2012, respectively. (AA 81: 21400 & AA 82: 21680)

Finally, an order resolving all claims for costs was entered on September 28, 2012. (AA 82: 21691) Modesto timely appealed on October 10, 2012. (*Id*. at 21714) Modesto's only contention here, however, is that a reversal or favorable modification of the judgment would compel the reversal of the costs awarded against Modesto or the RDA on prevailing-party grounds.

B.

THE CITY ATTORNEY'S APPEALS

If the Court finds Modesto is entitled to a public nuisance injunction as requested in this brief, there is no need to address the city attorney's appeals seeking the same right and remedy. As a precaution, though, we address a jurisdictional question regarding the city attorney's appeals.

As noted previously, the city attorney's only claims in this case sounded in nuisance. (*Ante*, p. 13) Thus, when all such claims against Dow and PPG were summarily adjudicated in 2003, the practical effect

was to terminate the city attorney's entire action against Dow and PPG. The order was not appealable, however, because it simply granted Dow and PPG's motion (AA 32: 7950:3-7); it did not dismiss the city attorney's action or deny relief thereon. As this Division held in *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 6, summary judgment orders are not appealable without an "express declaration of the ultimate rights of the parties, such as that 'plaintiffs shall take nothing,' or 'the action is dismissed.'"

Swain, however, also supports the preservation of the city attorney's appeals. There, mainly citing judicial economy, the Court perfected its jurisdiction by amending relevant orders to supply the necessary disposition. Here too, the Court should add the required disposition to the final judgment below and the amended version if necessary, for the same reasons cited in *Swain.*[5] It should then treat the city attorney's existing notices of appeal as premature, but valid and timely given the ruling "intended" or "rendered" in 2003. (Cal. R. Ct., Rule 8.104(d))

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[5] *Davis v. Superior Court* (2011) 196 Cal.App.4th 669 explains why the required amendment should not be made to the 2003 order. That would be futile, and contrary to the policy favoring appeals, because it would be too late to notice an appeal from the perfected order. *Davis* added that *Swain* had "*vindicated* the right to appeal. . . . Here, in contrast, construing the trial court's language as its judgment . . . *extinguishes* the right to appeal." (*Id.* at 674; italics added)

SUMMARY OF UNDISPUTED FACTS SUPPORTING A PUBLIC NUISANCE INJUNCTION ON THE MERITS

The following undisputed facts support a remand for a public nuisance injunction on the merits. Elsewhere, Modesto contends that Dow and PPG should be judicially estopped from opposing that disposition, in light of their vigorous and successful contention below that a public nuisance injunction is Modesto's proper remedy in this case. (*Post*, pp. --)

A.

BACKGROUND: HOW DRY CLEANING GENERATES PCE WASTE

It is undisputed that PCE-based dry cleaning[6] has long generated PCE waste in several ways. Aside from general leaks and spills, "still bottom residue" or "muck" results from the distillation of PCE, using steam to remove oils and greases because filters during the washing cycle do not. (RT 5: 514:16-24, 542:7-543:9, 544:3-9) The resulting residue, which is removed from the machine, still contains PCE. (*Id.* at 514:24-26, 544:26-545:9) Indeed, PCE formed up to 50% of the residue from machines used in the 1950's through the 1970's. (*Id.* at 511:10-11, 545:16-20)

PCE waste also emerges from "water separation," a process designed to reclaim PCE for reuse. (RT 5: 535:3-11, 558:10-20) PCE is heated into a vapor, the combined PCE-water vapor is cooled down to

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[6] PCE is a liquid, so "dry cleaning" simply means no water is used. (RT 5: 508:28-509:2)

recapture it in liquid form, it goes to the water separator, and the resulting "water" is directed off for disposal. (*Id.* at 542:16-20, 543: 10-24, 559:11-13) The "water" being disposed, however, still contains PCE. (*Id.* at 558:21-22; RT 4: 407:18-21 [Dow's opening statement])

Finally, used "filter cartridges" could contain up to 1.5 gallons of PCE even after being drained for 24 hours. (RT 5: 550:18-24)

B.

PCE IS A SERIOUS HEALTH HAZARD

As noted at the outset, the parties formally stipulated below that PCE "potentially causes cancer in human beings," and for that reason "[t]he California Department of Health Services promulgated a maximum contaminant level for [PCE] in drinking water of five parts-per-billion. . . ." (RT 57: 5955:5-10) Other hazards from PCE were also undisputed.

The parties also stipulated that "the migration of [PCE] vapors to the surface" can present "genuine public health risks." (RT 57: 5955:11-16) Defense expert George Linkletter, Ph.D., testified that PCE vapors in soil could reach sewer workers: "[i]f you're digging into soil that contains PCE vapors, then there would be a release of PCE into the air and the trench . . . ." (RT 160: 9354:25-27)

Similarly, defense expert Thomas Johnson testified that "the possible effects of PCE on indoor air" were "a very important concern today" (RT 197: 938:26-939:2), and one shared by the state's Department of Toxic Substance Control ("DTSC"). (*Id.*) A DTSC witness explained how PCE can volatilize up from soil through cracks in a floor.

(RT 10: 1105:11-1106:12) Another described "a number of sites" where buildings located above contaminated groundwater contained PCE vapors. (RT 191: 127:24-27) In one instance, indoor air levels caused by PCE vapors migrating upwards from soils were so high DTSC notified tenants and the county public health department. (*Id.* at 110:16-24)

C.

PCE IS "LONG LIVED" UNDERGROUND AND CAN TAKE 100 YEARS OR MORE TO EXTRACT

PCE is not only toxic, but extraordinarily persistent underground. Dow's counsel and experts agreed PCE is a "dense non-aqueous phase liquid" or "DNAPL." (E.g., RT 106: 2248:2) As one expert explained, a DNAPL "is basically an oil that sinks. It doesn't mix with water." (RT 148: 7895:18-19) Counsel added that "these kinds of chemicals are dense so they can go down into the water. They go down through the soil in a . . . non-dissolved phase, and can be a liquid that gets down to the groundwater." (RT 106: 2248:3-6)

PCE is also "very persistent" compared to some other chemicals (RT 148: 7907:23-25), and "long lived" compared to other groundwater contaminants. (*Id.* at 7908:3-7) The expert was aware of estimates that "to clean up PCE in groundwater, particularly if it's DNAPL, may exceed 100 years. . . ." (*Id.* at 7907:27-7908:2)

Finally, Dow's counsel admitted PCE is a serious contamination threat even "in real small amounts," as in separator water from dry cleaning. (RT 106: 2233: 13-23) Earlier, counsel explained that

separator water "contains up to 150 parts-per-*million* of [PCE] that might get into a city sewer. . . ." (RT 4: 407:18-21; italics added) As noted above, only 5 parts per *billion* (*i.e.*, 0.005 parts per million) in water means the water cannot be delivered to the public.

D.

MODESTO HAS NUMEROUS CONTAMINATED SITES

Another fact undisputed below is the large number of sites in Modesto with PCE contamination. The appropriate response to this contamination was disputed, but not the sheer number of contamination sites.

At the first jury trial below, where Modesto sought damages against Dow and PPG at four bellwether dry cleaning sites,[7] Dow and PPG admitted there was soil and groundwater contamination at every one. A brief filed on February 17, 2005 reported that contractors at Ideal Cleaners "had removed 435 pounds of [PCE] from the soil" (AA 38: 9563:22-23) and "approximately 29 pounds of dissolved [PCE] from the groundwater." (*Id.* at 9564:21-23) Contractors at Halford's "had removed approximately 3,608 pounds of PCE from soil vapor and groundwater" (*id.* at 9565:27-28), and at Modesto Steam had removed "19.7 lbs. of PCE" from groundwater in one month (*id.* at 9566:24-25) plus "23.3 lbs. . . . from the soil." (*Id.* at 9567:2-3) The brief cited no figures at the fourth site, Coffee Plaza, but defense expert George

[7] One site known as Jerry's Drapery Service, not a dry cleaner, is not included in this appeal.

Linkletter testified that "the dry cleaner at Coffee Plaza contributed to the PCE in soil and groundwater." (RT 21: 2249:22-23)

The second jury trial was much broader, but again the fact of contamination was undisputed. For example, PPG's counsel stated on the record that Modesto's "aquifer" was contaminated, and confirmed he meant the groundwater serving "the entire City. . . ." (RT 166: 10187:4-8) In addition, defense expert Thomas Johnson testified that contamination at many specific sites warranted a response, because they were "sources of PCE that have caused contamination in the Modesto area and that would continue to cause contamination in the Modesto area if they're not removed or addressed. . . ." (RT 162: 9522:14-20)

The defense experts even cited specific contamination figures at most of those sites. At one known as Elwood's, for example, Mr. Johnson testified that there were "high concentrations . . . in the groundwater near the source area of 1800 parts per billion . . . . The soil gas concentration was [also] very high. . . ." (RT 162: 9605:1-6) He and another defense expert confirmed there were at least 18 other contaminated sites.[8]

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[8] Acme: 3.3 parts per billion ("ppb") in groundwater. (RT 162: 9604: 6-7) Blue Rose/Lakewood: 120 pbb in groundwater. (*Id.* at 9593: 2) Bonded: up to 15 pbb in groundwater. (*Id.* at 9594: 22-23) Century One Hour Martinizing: up to 160 ppb in groundwater. (*Id.* at 9597:10-11) Crossroad's: 10 pbb in groundwater plus "low concentrations" in soil gas. (*Id.* at 9582:23-28) Del Rio: 100 pbb in groundwater plus "relatively low" findings in soil gas. (*Id.* at 9620:4-8) Deluxe: up to .77 pbb in groundwater and .92 micrograms in soil gas. (*Id.* at 9580: 3-7) Fashion: 2.5 pbb in groundwater. (*Id.* at 9581:18-

(continued...)

E.

THE HEALTH RISK AFFECTS SOME 200,000 PEOPLE

Even if PCE contamination were limited to the foregoing sites, it would threaten numerous people. But the health risk is undisputedly wider than that. As noted previously, it is undisputed that the "aquifer" beneath Modesto is contaminated with PCE — and that means the city's primary water supply (RT 49: 5202:7-11, 5203:7-14; RT 58: 6062:11-12) is contaminated. Some 200,000 residents[9] are therefore exposed today to the health risk posed by PCE in Modesto's groundwater.

Modesto cannot simply shut down particular wells when they become contaminated. For one thing, "[i]f we walked away from every well that had a problem, we wouldn't have enough water." (RT 58:

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[8](...continued)
20) Hi-Grade: 540 pbb in groundwater (RT 160: 9355:12-15) plus "noteworthy" soil gas concentrations (RT 162: 9615:4-5) Holiday: unspecified concentrations warrant "at least some investigation." (*Id.* at 9595:26) Ideal: 46 pbb in a monitoring well plus 190 micrograms in soil gas. (*Id.* at 9586:5-6 & 10-11) One Hour Martinizing: up to 33 pbb in groundwater plus "lower" concentration in soil gas. (*Id.* at 9587:21-23) Pelandale: 340 pbb in groundwater plus soil gas concentrations that "aren't particularly high. . . ." (*Id.* at 9588:25-26) Service: 31,000 pbb in "grab sample." (*Id.* at 9617:17-21) Stewart's: groundwater concentrations "in the 30s" pbb plus soil gas "very close to the facility." (*Id.* at 9589:6-10) Sunshine: 1,300 pbb in groundwater plus "relatively elevated soil gas concentrations." (*Id.* at 9601:6-7 & 22-24) Superior: 16 pbb in groundwater plus "very low" concentrations in soil gas. (*Id.* at 9590:4-7) Vogue: 1.2 pbb in one sample plus 24 micrograms in soil gas. (*Id.* at 9580:21-22 & 9581:5-6)

[9] The Census Bureau's 2012 estimate of Modesto's population was 203,547. (http://quickfacts.census.gov/qfd/states/06/0648354.html)

6062:12-14) Shutting down even one contaminated well can cause contamination of others.

The city's 90 operating wells (RT 49: 5203:18-20) are connected to a grid of water mains running throughout the city. (RT 34: 3402:25-3403:1) Although each well is designed to serve a localized area (RT 52: 5529:18-5530:1), if taken off line a reduction in pressure would result. (*Id.* at 5531:18-5532:3) And that would cause contaminants to migrate toward other wells, putting even more residents at risk. (*Id.* at 5532:4-12)

F.

DOW AND PPG AFFIRMATIVELY INSTRUCTED MODESTO'S DRY CLEANERS FOR MANY YEARS TO DISPOSE OF PCE WASTE CASUALLY INTO THE ENVIRONMENT

1.

Introduction

It was undisputed below that Dow and PPG, for many years, promulgated literature of various kinds instructing dry cleaners to dispose of PCE waste into the environment as casually as dishwater. The specific instructions may have varied, to flush it down the drain or dump it outside. But the crux of the advice was always the same: "Dispose Without Care."

Modesto adduced its evidence in support of its nuisance claims in 2003 (AA vols. 21-31) and, as previously shown in this brief, Dow and PPG left the evidence uncontroverted. (*Ante*, p. 15) It remained uncontroverted for the duration of the case. While Dow and PPG

vigorously disputed the *effect* of their instructions, factually and legally, they did not dispute its existence or content. For the sake of efficiency, then, we summarize this evidence only once and provide citations to both the 2003 summary adjudication papers and the trials that followed.

2.

Dow's Instructions to Customers

Dow promulgated literature about PCE in documents called Material Safety Data Sheets, commonly known as "MSDSs," and in newsletters called "Spot News." While Dow provided this literature to distributors, not directly to dry cleaners, it was intended for the dry cleaners and Dow had a "policy to audit distributors to make sure that they got the literature out . . . ." (RT 175: 11311:5-8, 11311:12-14 [closing argument]) Thus, Modesto's 2003 opposition included Dow testimony that "Spot News" was designed "to communicate to dry cleaners" (AA 21: 5269:20-22; AA 29: 7217:15-17), and the MSDSs were intended to "provide[] disposal guidance and recommendations" to dry cleaners. (AA 21: 5273:15-18; AA 29: 7367:21-7368:6) This testimony was also introduced at both trials. (Phase 1 Trial Ex. 117 [4/16/02 Dombrowski Depo] at 86:21-87:6 & Ex. 123 [9/18/02 Hickman Depo] at 10:15-17; Phase 3 Trial Exs. 815 & 817 [same]) Similarly, Dow's first opening statement below said its MSDSs were intended "to provide advice for the safe use of the chemical in the workplace." (RT 4: 402:5-6).

The "safe use" Dow was instructing included:

1958 "Spot News." "If the separator is to function properly, a free unimpeded water flow to the drain is also necessary." (AA 21: 5278, ¶ 22; AA 29: 7289:14-17; AA 29: 7306; AA 82: 21767 [Trial Ex. 13, ¶ 3 under "Recovery Tumbler"])

1971 MSDS. In the event of "small spills" — "Mop up, wipe up or soak up with absorbent material using proper protective equipment. ***Bury***." (AA 21: 5280, ¶ 37; AA 29: 7366:6-9; AA 29: 7378; AA 83: 21879 [Trial Ex. 54, § 7; emphasis added])

1973, 1975, 1976, & 1977 MSDSs. (1) "In some cases it [PCE] can be transported to an area where it can be placed on the ground . . . ." **(2)** "Small leaks: Mop up, wipe up or soak up immediately. Remove to out of doors." (AA 21: 5280, ¶ 38; AA 29: 7369:15-18; AA 29: 7370:1-13; AA 29: 7379; AA 83: 21880 [Trial Ex. 55, § 6]; AA 82: 21770 [Trial Ex. 16, § 6]; AA 82: 21772 [Trial Ex. 17, § 4]; AA 82: 21774 [Trial Ex. 18, § 4]; AA 82: 21777 [Trial Ex. 19, § 4])

1979 MSDS. (1) "In some cases, small amounts" of PCE "may be transported to an area where it can be placed on the ground . . . ." **(2)** "Small leaks: Mop up, wipe up or soak up immediately. Remove to out of doors." (AA 21: 5284, ¶ 62; AA 29: 7371:6-9; AA 29: 7381; AA 83: 21882 [Trial Ex. 57, § 4])

1980, 1985, 1986, 1988, 1989, & 1991 MSDSs. "Small leaks — mop up, wipe up, or soak up immediately. Remove to out of doors." (AA 82: 21780 [Trial Ex. 20, § 4]; AA 83: 21930 [Trial Ex. 137, § 4]; AA 83: 21935 (Trial Ex. 138, § 5]; AA 83: 21940 [Trial Ex. 139, § 5]; AA 83: 21886 [Trial Ex. 58, § 5]; AA 83: 21915 [Trial Ex. 131, § 5]; AA 83: 21964, § 5 [Trial Ex. 397])

Dow openly acknowledged these and similar communications to both juries. Its first opening statement, for example, conceded that its 1970s MSDSs recommended burial of PCE. (RT 4: 400:3-4, 400:16,

401:16-17) Dow also read MSDSs to the first jury instructing that "small amounts" of PCE "can be placed on the ground . . . ." and "small" spills "[r]emove[d] to out of doors." (*Id.* at 403:22-405:18) And in closing argument to the second jury, Dow stated that "[i]ts MSDS from the very beginning said, 'Small leaks, mop up, wipe up or soak up immediately, remove to out of doors . . . .'" (RT 175: 11305:16-18)

Finally, Dow admitted below it instructed dry cleaners to follow the equipment manufacturers' manuals. (RT 175: 11308:9-12 [closing argument]) Dow thus endorsed consistent instructions to pipe PCE "separator water" either directly down the drain or to a bucket first. (E.g., Phase 1 Trial Ex. 213 [Opsahl Depo] at 74:12-22, 76:5-12; Phase 3 Trial Ex. 809 [same]; AA 83: 21866 [Trial Ex. 48, under "Water Separator Water-Drip Connection]; Phase 1 Trial Ex. 141 [9/11/02 Landon Depo] at 148:12-21)

3.

PPG's Instructions to Customers

PPG provided similar documents to distributors to be passed along to the dry cleaners. Thus, Modesto's 2003 opposition included PPG testimony that its MSDSs were "intended for the ultimate consumer . . . ." (AA 21: 5240, ¶ 48; AA 23: 5711:11-13; Phase 1 Trial Ex. 489 [11/14/02 R. Kenneth Lee Depo] at 40:11-13; Phase 3 Trial Ex. 861 [same]) PPG also promulgated what a witness called "bulletins that supported the trade," including "Solvent News," "Per Check Bulletin" and later "Cleaner Cleaner Bulletin." (RT 25: 2486:10-17; RT 142: 7038:26-7039:7; Phase 1 Trial Ex. 491 [Keller Depo] at 78:17-19;

Phase 3 Trial Ex. 843 [same]) PPG instructed distributors to use these materials as "a handout to his individual customers and give them information, technically, anything we needed to pass on to them . . . ." (RT 25: 2522:22-2523:4; RT 142: 7049:14-27)

1969 MSDSs. Promulgated in or about 1969, PPG instructed dry cleaners to dispose of unspecified "small quantities" of PCE-laced sludge by "forced ventilation or evaporation." (AA 21: 5240, ¶ 54; AA 21: 5241, ¶ 56; AA 23: 5710:17-21; AA 23: 5737:10-15; AA 23: 5757; AA 83: 21975 [Trial Ex. 412, § VII]; AA 83: 21977 [Trial Ex. 418])

That simply meant depositing the sludge out "[i]n the sun." (AA 21: 5238, ¶ 40; AA 23: 5718:18-22; Phase 1 Trial Ex. 489 [11/14/02 R. Kenneth Lee Depo] at 48:18-22; Phase 3 Trial Ex. 861 [same])

1970 "Solvent News." Addressing the "water separator" feature of dry cleaning machines, PPG instructed: "[f]or optimum efficiency, the water in the separator ought to have easy access to a drain." (AA 21: 5232:26-5233:6; AA 26: 6434:1-11; AA 26: 6579; AA 82: 21840 [Trial Ex. 26, center column])

1972 "Per Check Bulletin." PPG directed disposal of spills or waste in one of two ways. One was "in a covered container for disposal." (AA 21: 5233:26-5234:1; AA 23: 5705:9-24; AA 23: 5743; AA 83: 21962 [Trial Ex. 364, center column under "Precautions"]) A PPG witness explained that "could be" an ordinary garbage can. (Phase 1 Trial Ex. 489 [11/14/02 R. Kenneth Lee Depo] at 50:23-25, 52:1-3; Phase 3 Trial Ex. 861 [same]) The second way was mopping, and if so then the MSDS instructed that the mop "should be taken outside to dry." (AA 83: 21962) But the edition also stated — without endorsement or explanation — that "[p]ollution regulations in many areas prohibit dumping solvent into sewage systems. Make certain that you comply with all local regulations." (*Id.*; emphasis omitted)

1974 "Per Check Bulletin" and 1976 "Cleaner Cleaner Bulletin." Both editions advised against "pip[ing] the water discharge line directly to the sewer," but only because "[d]ischarge lines are easily plugged" with "sediment." Instead, PPG instructed dry cleaners to use a disposal technique with an even higher likelihood of causing contamination – that the waste water "can be collected in a container with a removable top which then overflows to the sewer." (AA 21: 5233:23-5234:1; AA 23: 5708:11-18; AA 23: 5755; AA 83: 21971 [Trial Ex. 404, under "Water Separator"]; AA 83: 21973 [Trial Ex. 407])

A PPG witness agreed this meant simply to "put it in a bucket, [and] allow the bucket to overflow onto a sewer." (RT 153: 8307:28-8308:3)

1976 "Cleaner Cleaner Bulletin." PPG directed dry cleaners to keep the water separator "clean and its drain lines free of any obstructions" (AA 82: 21843 [Trial Ex. 28, under "Still Maintenance"]) and provided a picture with a drain under the water separator. (*Id.* at 21842; see AA 71: 18535:17 for date) A PPG witness testified the company was aware that dry cleaners could discharge waste water into sewers, but this bulletin did not instruct them not to do so. (Phase 1 Trial Ex. 491 [Keller Depo] at 159:1-10; Phase 3 Trial Ex. 843 [same])

1977 MSDS. PPG instructed dry cleaners, after collecting and sweeping up any spills, to "flush area with plenty of water and maintain ventilation until vapors are eliminated." (AA 21: 5241, ¶ 55; AA 23: 5719:14-23; AA 23: 5761; AA 82: 21837 [Trial Ex. 25, § VII])

A PPG witness explained that PCE subject to such flushing "possibly could" go down the drain. (Phase 1 Trial Ex. 491 [Keller Depo] at 166:19-24) No alternative destination for the PCE contamination was ever identified.

Finally, PPG admitted in closing argument below that there was no "difference between the labels and the warnings that PPG gave at one site as compared to another site. They were the same." (RT 68: 6848:26-28) No evidence suggested Dow varied its instructions by customer or location either.

4.

Frequency and Longevity of the Instructions

PPG admitted in closing argument that PCE "was never sold in just labelless blank containers. . . . It came with MSDSs. . . . [¶] . . . And this wasn't unique to PPG. . . . [I]t was true of all the distributors and all the manufacturers that their distributors would hand out MSDSs when they delivered the product. MSDSs would be attached to the invoices. . . . *Cleaner Cleaner* bulletins would be handed out. . . . [¶] The product in this case, ladies and gentlemen, is the [PCE] with those accompanying instructions. . . ." (RT 68: 6846:18-6847:4)

A witness confirmed that Dow's MSDS came "with every shipment" of PCE. (Phase 1 Trial Ex. 143 [Laurence Lee Depo] at 133:6-7; Phase 3 Trial Ex. 830 [same]) And that meant at least once a year. (Phase 1 Trial Ex. 123 [9/18/02 Hickman Depo] at 11:10-14; Phase 3 Trial Ex. 815 [same]) PPG likewise supplied its MSDSs every year, "[w]ith the first shipment to the customer in the year." (Phase 1 Trial Ex. 450B [3/6/02 R. Kenneth Lee Depo] at 369:12-16, 369:18-19; Phase 3 Trial Ex. 860 [same]) Moreover, Dow's *Spot News* was "[g]enerally"

distributed to customers "for many years." (Phase 1 Trial Ex 123 [9/18/02 Hickman Depo] at 93:20-23; Phase 3 Trial Ex. 815 [same]).

Dow's instructions for disposing of PCE lasted for decades. As noted previously, as early as 1958 the company's *Spot News* instructed dry cleaners to dump separator water down the drain, and Dow instructed dry cleaners to follow equipment manufacturers' manuals which provided the same directions. It was not until after the 1991 MSDS, three decades later, that Dow finally warned against dumping separator water down the drain. (AA 83: 21900, ¶ 16 [Trial Ex. 59 (1994 MSDS)]; compare AA 83: 21963-21969 [Trial Ex. 397 (1991 MSDS without warning)])

Further, more than a decade after it undisputedly knew of PCE's threat to groundwater, Dow was still instructing that "[s]mall" spills be cleaned up and "[r]emove[d] to out of doors." (AA 83: 21964, § 5 [Trial Ex. 397 (1991 MSDS)]) It was not until after 1991 that Dow removed that instruction from its MSDSs. (*Id.* at 21894, § 6 [Trial Ex. 59 (1994)])

Like Dow, PPG's unsafe instructions for disposing of PCE lasted for decades. PPG's 1970 instruction, to discharge separator water to the drain, was never corrected. Even its 2002 MSDS, the latest admitted at trial, still failed to instruct about separator water. (AA 83: 22007-22013 [Trial Ex. 1872]) Salesman Bob Olson confirmed PPG never explained that its directions on that subject were improper. (RT 153: 8307:28-8308:7)

Similarly, it was not until 1980, a decade after telling dry cleaners they could dispose of PCE to the ground in 1969 (e.g., AA 83: 21975, § VII), that PPG first began warning that PCE could contaminate

groundwater. During that decade, PPG continued to direct polluting practices. (E.g., AA 82: 21837 [Trial Ex. 25, § VII]; AA 83: 21962 [Trial Ex. 364, center column])

G.

DOW AND PPG PROMULGATED THEIR INSTRUCTIONS TO NON-CUSTOMERS AS WELL

Dow and PPG did not confine their instructions on PCE disposal to their respective customers. Admissions and undisputed evidence below establish that both companies "g[o]t the word out" on that subject more broadly, in the oft-repeated expression of Dow's lead counsel.

In addition to the MSDSs and newsletters cited above, "Dow took it upon itself to get the word out to the ultimate user . . . . [and] used a whole bunch of vehicles to accomplish this." (RT 106: 2236:19-22 [opening statement]) Dow "participated in both regional and national trade shows where we would have the material available for cleaners attending." (RT 152: 8169:2-4) "When we did seminars, we handed out tables full of literature . . . ." (*Id.* at 8169:6-7) "In some cases we did presentations at the shows." (*Id.* at 8169:21) There were regular "cleaning shows" as well as national and regional shows. (*Id.* at 8170:9-13) "I . . . attended pretty much every dry cleaning trade show that Dow went to in [my] tenure. I was in there talking to individual cleaners . . . ." (*Id.* at 8182:23-26) "Our phone numbers . . . were very widely disseminated." (*Id.* at 8182:22-23) "[O]n some occasions" Dow also sent literature directly "to a mailing list of dry cleaners . . . ." (RT 4: 390:21-26 [opening statement])

Dow's technical people also "quite often" fielded calls "from dry cleaners who weren't actually purchasers of" Dow's brand of PCE, known as "DOWPER." (RT 152: 8183:4-15) "[I]t felt like we were doing something good for the industry to get the information out." (*Id.*)

Similarly, a PPG witness testified that the "Cleaner Cleaner Bulletin" was not just product literature for customers. It "was a marketing campaign. . . . [I]t was the promotion that we chose to market our [PCE] to the dry cleaning trade." (Phase 1 Trial Ex. 521 [Finocchio Depo] at 40:1-6; Phase 3 Trial Ex. 838 [same]) "[W]e were constantly vying for increased sales position with a given distributor. . . . The extent to which we were successful in increasing our sales to the distributor somewhat depended upon how well we were able to help that distributor increase their sales." (*Id.* at 51:10-16) In other words, PPG used the "Cleaner Cleaner Bulletin" to *expand* its customer base, not just educate existing customers.

Finally, PPG sent at least one MSDS to a major trade group, the California Fabric Care Institute of Dry Cleaners and Launderers. (RT 153:8288:19-8289:24) The purpose, according to the PPG witness, "was to spread this document as widely as possible." (*Id.* at 8290:12-16)

H.

MODESTO'S DRY CLEANERS UNIFORMLY ACTED IN CONFORMANCE WITH DOW AND PPG'S INSTRUCTIONS

Finally, it was undisputed below that, during the many years that Dow and PPG were promulgating instructions on the disposal of PCE, it was the uniform practice of Modesto's dry cleaners to act in

conformance with those instructions. To begin with, PPG's counsel told the trial court below that "all of the dry cleaners" in Modesto — "100 percent" of them — "were discharging separator water to the sewer on a regular basis" until the late 1980's or early 1990's. (RT 165: 10094:9-19) One owner called it one of the "general practices that had been in existence for years . . . ." (RT 16: 1696:27-1697:1) And Modesto's opposition in 2003 included Dow testimony that this was "a common practice . . . ." (AA 29: 7228:23-7229:16)

There was also uncontradicted testimony that "[e]verybody" disposed of PCE "muck" from cleaned filters into the garbage, the way a dry cleaner did himself. (RT 121: 3992:3-12) A Dow product steward admitted that "at one time it was common practice to take cartridges that had been used to filter [PCE] and throw them in the trash." (Phase 1 Trial Ex. 143 [Laurence Lee Depo] at 117:19-22; Phase 3 Trial Ex. 830 [same]) And a witness from R.R. Street was one of many who testified that, until the early 1980's, used cartridges with PCE were likewise "disposed of typically in dumpsters, or whatever containers the plant had for waste." (Phase 1 Trial Ex. 213 [Opsahl Depo] at 86:17-87:7, 110:10-15; Phase 3 Trial Ex. 809 [same])

While the convergence of disposal instructions and practices speaks for itself, two lines of evidence corroborate the linkage. First, during the periods of disposal instructions documented above, Modesto's dry cleaners believed that the disposal methods advocated by Dow and PPG were proper and acted accordingly. (RT 124: 4393:1-13; RT 9: 986:12-15) As one owner explained, had he known about the contamination risks he "sure wouldn't have" disposed of PCE-laced

muck in the garbage. (RT 121: 3992:3-18) But once the cleaners learned of the hazards, or were instructed to stop their longstanding disposal methods, they did so "[i]mmediately." (Phase 1 Trial Ex. 108 [5/11/99 Simidian Depo] at 88:6-16; see also RT 29: 2840:20-2841:4; RT 9: 979:16-23)

Second, Dow and PPG released their disposal instructions into a social network, not just to its immediate recipients. There was a "dry cleaning community" in Modesto (RT 125: 4695:16-18) in the sense that the cleaners were in regular contact with each other, regularly exposed to each other's practices and views on PCE disposal. Dow's counsel likewise told the jury of a "dry cleaning public" (RT 4: 409:27 [opening statement]), sharing a "common wisdom on how you deal with chemicals" like PCE (*id.* at 397:8-9), a "common knowledge and wisdom" on that subject. (*Id.* at 400:20-21) The record explains how Modesto's cleaners in particular shared such beliefs.

There was undisputed testimony by one cleaner that "[w]e used to meet with other dry cleaners," presumably referring to his membership in "the California Dry Cleaners Association" (RT 16: 1705:22-28), which was known as the California Fabric Care Institute. (RT 116: 3542:24-26) It was also undisputed that the organization sponsored "regular seminars" (*id.* at 3542:25-26), and PCE contamination was one subject "talked about on local levels between dry cleaners." (*Id.* at 3543:3) And another cleaner testified there were "monthly meetings" which "included everyone." (RT 117: 3618:6-13) There was also a Central California Martinizing Plant Owners Association "representing maybe 45, 50 stores, Martin stores, and we'd get together

three times a year, and a lot of information was passed there." (RT 16: 1722:5-13)

Finally, there was "a major [trade] show available every year" where the cleaner testifying would "spend a couple days" (RT 125: 4687:7-14) and presumably others did too. And even the California Air Resources Board helped maintain the community. It sponsored trainings and "[t]here was always a couple of the [Modesto] dry cleaners there . . . ." (*Id.* at 4695:23-27)

ARGUMENT

I.

THE TRIAL COURT'S 2003 SUMMARY ADJUDICATION RULING ON NUISANCE LIABILITY IS DIRECTLY CONTRARY TO THIS COURT'S 2004 OPINION IN THIS CASE

A.

THE STANDARD OF REVIEW IS *DE NOVO*

"An order granting summary judgment, of course, is reviewed independently." (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal. 4th 826, 860) That standard also applies because the controlling question is the proper "reading of decisional law" (*id.* at 860), including this Court's own 2004 decision. The evidence and inferences on a summary adjudication motion must be viewed "in the light most favorable to the opposing party." (*Id.* at 843)

B.

THIS COURT'S 2004 HOLDING APPLIES AS LAW OF THE CASE AND PRECEDENT

Modesto I, *supra*, 119 Cal.App.4th 28, expressly rejected the test for nuisance liability on which Dow and PPG prevailed below: that they had to own or control a local dry cleaner. *Modesto I* held that such liability "does *not* hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." (*Id.* at 38; italics added)

Modesto I then specified that the "created or assisted" test supported liability based on unsafe instructions for the disposal of PCE. "[T]hose who . . . instruct users to dispose of wastes improperly, can be liable under the law of nuisance." (119 Cal.App.4th 28, 40-41) Indeed, the opinion applied that holding to the Modesto RDA's specific claims against Dow and PPG: that "with knowledge of the hazards involved, some of the defendants . . . gave dry cleaners instructions to dispose of spilled PERC on or in the ground. *We conclude that these kinds of affirmative acts or instructions could support a finding that those defendants assisted in creating a nuisance.*" (*Id.* at 41; italics added)

The foregoing conclusions are binding as precedent, and law of the case as well, because they were necessary to the outcome. Although the ultimate question presented was liability under the Polanco Act (Health & Saf. Code, § 33459 *et seq.*), *Modesto I* explained in detail why public nuisance law controlled that question. (*Id.* at 37-38) Indeed, that portion of the opinion expressly confirms its conclusions on

nuisance liability were necessary to the outcome and therefore binding.[10]

Other courts view *Modesto I* that way too. It was cited on nuisance law (not the Polanco Act) in both *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 306, and *Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542.

C.

THE ERROR IS REVERSIBLE

The erroneous summary adjudication is reversible because it prevented Modesto from pursuing any nuisance claims or remedies against Dow and PPG at a trial on the merits. As the Third District held in *Hawkins v. Wilton* (2006) 144 Cal.App.4th 936: "the erroneous granting of a summary judgment motion [on the merits] lies outside . . . the harmless error provision of the California Constitution because such an error denies a party of its right to a jury trial." (*Id.* at 947-948) Similarly, this Division held in *Deeter v. Angus* (1986) 179 Cal.App.3d 241 that the erroneous sustaining of demurrer was "obviously prejudicial," or "reversible error per se," because it deprived the plaintiff "of the opportunity to prove his cause of action." (*Id.* at 251)[11]

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[10] Even assuming *arguendo* that *Modesto I's* conclusions on nuisance liability were not binding as holdings, they would still qualify as law of the case because they "were intended to guide the trial court on remand, when the issue . . . was almost certain to arise." (*Lucky United Properties Investments, Inc. v. Lee* (2013) 213 Cal.App.4th 635, 651)

[11] Nothing in *Soule v. General Motors Corp.* (1994) 8 Cal.4th

(continued...)

Even if prejudice were required, though, its existence is beyond doubt. The nuisance remedies Modesto lost in 2003 were unique. For example, even if the city obtained all the tort damages it requested, these damages would still be limited to city property. A public nuisance injunction is not so limited.

Moreover, there is at least a "reasonable chance" (*Kinsman v. Unocal Corporation* (2005) 37 Cal.4th 659, 682) the court presiding in 2007 would have granted a full public nuisance injunction against Dow and PPG had that remedy still been available. That court found Dow and PPG had, in fact, assisted in creating a nuisance under the *Modesto I* test (AA 55: 14298-14303, ¶¶ 11-13), and went on to grant an injunction against them under the Polanco Act. (*Id.* at 14311:1-4) It is almost certain, then, that the court would also have granted a broader injunction on nuisance grounds.

Accordingly, this Court should not hesitate to reverse the 2003 summary adjudication and proceed to consider the proper disposition.

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[11](...continued)
548 or its progeny suggests an ordinary showing of prejudice is required on this issue under Cal. Const. Art. 6, § 13. Neither *Hawkins* nor *Deeter* has ever been criticized as inconsistent with *Soule* or like cases.

II.

IF THE COURT REVERSES THE RULING ON NUISANCE LIABILITY, IT SHOULD REMAND WITH DIRECTIONS TO ENTER A PUBLIC NUISANCE INJUNCTION

A.

THE COURT ENJOYS BROAD EQUITABLE POWER IN FASHIONING DISPOSITIONS

Ever since 1880, the Legislature has conferred broad discretion on California's appellate courts to fashion dispositions. Those courts "may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." (Code Civ. Proc. § 43; former Code Civ. Proc. § 53 [Code Am.1880, c. 35, p. 25, § 1], amended by Stats.1933, c. 743, p. 1807, § 6, to add the Courts of Appeal; see also Code Civ. Proc. § 906)

Terms like "may direct" and "proper judgment" unambiguously confer the broad discretion associated with equitable power. This is hardly surprising, because the state constitution protects the *inherent* equitable powers of appellate courts. The Supreme Court has "often recognized the inherent powers of the court . . . to insure the orderly administration of justice. . . . Although some of these powers are set out by statute . . . it is established that the inherent powers of the courts are derived from the Constitution (art. VI, § 1 [reserving judicial power to courts]. . . ." (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267)

Both by statute and constitution, therefore, this Court enjoys broad equitable power in fashioning the disposition if it reverses the 2003 summary adjudication ruling below. And other reviewing courts

have not hesitated to remand with directions to enter an injunction when appropriate. The Supreme Court, for example, did so in *Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Center, Inc.* (1994) 7 Cal.4th 478, 491.

B.

DOW AND PPG ARE JUDICIALLY ESTOPPED TO CONTEST A PUBLIC NUISANCE INJUNCTION

After successfully extolling the benefits and availability of a public nuisance injunction for Modesto, Dow and PPG are judicially estopped to contest that remedy now. This equitable doctrine (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1468, review den.) applies here despite respondents' usual latitude in defending judgments. Thus, *Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295 (review den.) barred a contention presented for the first time in a respondent's brief, with judicial estoppel invoked for the first time in the appellant's reply brief. (*Id.* at 1314-1315 & fn. 11) The Sixth District nonetheless entertained and applied the doctrine after soliciting a supplemental brief from the respondent. (*Id.*) Here, however, Modesto invokes judicial estoppel now to permit the normal course of briefing.

Ajaxo and *Levin* applied the same five-prong test for judicial estoppel: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are completely inconsistent; and (5) the first position was not

taken as a result of ignorance, fraud, or mistake." (*Ajaxo, supra,* 187 Cal.App.4th 1295, 1314; *Levin, supra,* 140 Cal.App.4th 1456, 1469)

Dow and PPG are not likely to contest three of those tests. Suffice it to say that (1) they took a position below that a public nuisance injunction was the appropriate remedy ; (2) the position was taken at a judicial proceeding; and (3) their position below was fully informed.

Dow and PPG are more likely to dispute test number 3, the requirement of success. But the court's own comments on the record prove Dow and PPG successfully maintained that a public nuisance injunction was Modesto's proper remedy and was actually available. Nor must that position be the sole cause of the resulting damages ruling. *Levin* deemed a position successful enough for estoppel purposes because it "was a basis or important to" the relevant outcome, a settlement. (140 Cal.App.4th 1456, 1477) Similarly, *Ajaxo* held E*Trade estopped even though its success "was due, at least in part, to Ajaxo's decision not to oppose it." (187 Cal.App.4th 1295, 1314) *Ajaxo* found it sufficient that "E*Trade went to some trouble to convince the trial court." (*Id.*) Here too, it is sufficient that Dow and PPG "went to some trouble" to advocate their position (*Ajaxo*) and it was "a basis or important to" the outcome. (*Levin*)

That leaves test element number 4, which Dow and PPG may emphasize. They may insist it is not "completely inconsistent" with their prior position to contest a public nuisance injunction now. Thus, for example, they may deny specifically telling any court that a public nuisance injunction was available against *them*. All they meant, we may hear, is that the remedy was available against some other party whom

they never identified. Similarly, they may deny specifically telling a court that Modesto had failed to pursue a nuisance injunction in this case or could still do so, as if no prior adjudication might stand in the way.

But the doctrine of judicial estoppel does not countenance evasions of that kind. The inconsistency test looks to the intent and purpose of the prior statements. The respondents in *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509 likewise resisted judicial estoppel with "fine distinctions" about their prior statements. (*Id.* at 558) They had assured several courts that the appellant had asserted "the same cause of action," or words to that effect, in another pending case. (*Id.*) And *Ferraro* rejected "fine distinctions" because of "the clear intention of these representations" — which was "to satisfy the judges to whom they were made that a proper vehicle for presenting appellant's claims either remained pending or would have remained pending had she not forfeited it." (*Id.*) That "clear intention" controlled the test of inconsistency.

So here. The intent and purpose of Dow and PPG's statements make them "completely inconsistent" with opposition to a public nuisance injunction now. Every statement was opposing tort damages *against them* by touting a nuisance injunction. Their central theme, for example, was that a nuisance injunction "says *defendants*, you go out and abate the nuisance, and . . . *the defendants* then are not just spending money on some speculative thing. . . ." (RT 83: 209:7-8; italics added) The "defendants" in question were always them. And the same is true of their statements to this Court and the Supreme Court that

Modesto was pursuing damages *against them* because it was not "satisfied" with its nuisance remedies against them. (*Ante*, p. 19) Finally, every statement quoted in this brief had the same overriding purpose: to persuade a court to reject any damage award against them because a nuisance remedy was available instead.

Nor does the "completely inconsistent" test mean every detail must be identical. It simply requires the two positions to be logically or equitably incompatible. The five-part test was first articulated in *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, using the phrase "totally inconsistent." *Jackson* explained that phrase by quoting *Coleman v. Southern Pacific Co*. (1956) 141 Cal.App.2d 121, 128: that the two positions "must be clearly inconsistent so that one necessarily excludes the other." (Quoted by *Jackson* at p. 182) That rationale clearly applies to praises and promises on one day followed by opposition the next.

Ferraro, for example, rejected "fine distinctions" because of the overriding purpose of judicial estoppel.[12] Other courts have likewise identified its purpose as "maintain[ing] the integrity of the judicial system. . . . prevent[ing] litigants from playing fast and loose with the courts, . . . when a party's *inconsistent behavior* will otherwise result in a miscarriage of justice." (*Levin, supra,* 140 Cal.App.4th 1468; italics

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[12] "[L]itigation is not a war game unmoored from conceptions of ethics, truth, and justice. . . . [An advocate may not] deceive courts, argue out of both sides of his mouth, . . .or seek affirmatively to obscure the relevant issues and considerations behind a smokescreen of self-contradictions and opportunistic flip-flops." (61 Cal.App.4th 509, 558)

added, cits. and internal quots. omitted) Here, the overriding purpose of the judicial estoppel doctrine compels its application to Dow and PPG's ardent and misleading advocacy of a public nuisance injunction.

Finally, the same principles bar any contention by Dow and PPG that the injunction should target other parties instead, or even in addition. Dow and PPG may point the finger at some local dry cleaners, for example, who were never made parties below. But it is too late for such a tactic now. Had they made this point while touting a public nuisance injunction, Modesto could have insisted they file appropriate cross-complaints against such dry cleaners or stop blaming them in pretrial arguments. Either way, the point would have undercut Dow and PPG's strategy of intimating that an injunction against *them* was Modesto's proper alternative to tort damages. Having succeeded on that strategy below, Dow and PPG may not change their tune now.

Moreover, the proper response on this issue is language Modesto proposes for the injunction. (*Post*, p. 68, ¶ 5) It would require Dow and PPG to comply promptly and fully with their obligations under the injunction notwithstanding any right they may have, or claim to have, to seek contribution, indemnity, or similar remedies from any other party.

For all the foregoing reasons, Dow and PPG should be judicially estopped from opposing a remand of this case with directions to enter a public nuisance injunction against them.

C.

UNDISPUTED FACTS SUPPORT THE SAME DISPOSITION ON THE MERITS

1.

Introduction

Undisputed facts below support a public nuisance injunction against Dow and PPG even in the absence of judicial estoppel. Indeed, the Court could properly rely on both grounds, either in whole or in part.

Preliminarily, though, we clarify that no appellate fact-finding is required to rely on the merits as set forth in the following sections. The Court need only determine, as it frequently does, whether the record shows the relevant points are undisputed. An apt example is the familiar rule permitting parties to raise issues for the first time on appeal if the relevant facts are undisputed. The reviewing court's assessment of that prerequisite is the same as the assessment Modesto is requesting here. Indeed, the analogy is complete because this appeal is Modesto's first opportunity to ask *any* court for a public nuisance injunction against Dow and PPG. Accordingly, though the context is unusual because this case is unusual, Modesto is asking the Court to exercise its familiar power to make decisions for the first time on appeal where the relevant facts are undisputed.

2.

The City of Modesto Has Ample Power To Pursue this Remedy

People ex rel. Clancy v. Superior Court (1986) 39 Cal.3d 740, held that "cities have long maintained public nuisance actions. . . . In [Code Civ. Proc.] section 731 the Legislature meant to allow cities, as well as the state, to continue to bring such actions." (*Id.* at 750, fn. 5; see also *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 357 ("[u]nder state law governing public nuisance, a city is authorized to . . . file a civil action for damages and abatement for the pollution of its groundwater"] and *City of Turlock v. Bristow* (1930) 103 Cal.App. 750, 755 (hearing den.) ["[t]he city of Turlock was clearly authorized to maintain this action to abate the public nuisance"].)

But this remedy has much deeper roots in the police power. In 1850, the United States Supreme Court declared that "[t]he suppression of nuisances injurious to public health or morality is among the most important duties of government." (*Phalen v. Commonwealth of Virginia* (1850) 49 U.S. 163, 168) Indeed, water pollution is the earliest known target of that power in Anglo-American history. "The first known statute dealing with public nuisances — enacted in the 12th year of Richard II's reign — had as its subject the pollution of waters and ditches lying near settlements. . . ." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103)

California follows suit, as explained in *City of Lodi, supra,* 118 Cal. App.4th 337, 352: "[u]nder article XI, section 7 of the California Constitution, a municipality's police power to protect the health, safety

and comfort of its inhabitants is plenary. As long as that power is exercised within the municipality's territorial limits and does not conflict with state law, it is coextensive with that of the Legislature."

3.

"No Lapse of Time Can Legalize a Public Nuisance"

Civil Code § 3490 provides that "[n]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." As explained in *Mangini v. Aerojet-General Corporation* (1991) 230 Cal. App.3d 1125 (review den.): "Section 3490 has been construed to mean that the statute of limitations is no defense to an action brought by a public entity *to abate a public nuisance*." (*Id.* at 1142, italics added, citing *Cloverdale v. Smith* (1900) 128 Cal. 230, 235 and *City of Turlock v. Bristow* (1930) 103 Cal.App. 750, 756; see also *Zack's v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1191 [no time bar even for private citizen's action for public nuisance]) (*Mangini* and other cases do apply limitations rules to damage claims on nuisance grounds.)

Further, a government's abatement action on public safety grounds is not even subject to the equitable time bar of laches. In *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, the city, county, and city attorney complained that fire-sprinkler violations in a high-rise constituted a public nuisance, and all "request[ed] an injunction . . . [and] a receiver to . . . abate the violations." (*Id.* at 391) Division Two held that "fire safety is clearly a public policy concern and laches cannot bar city's claims that the partial sprinkler system in the

zbuilding violated the fire prevention regulations for high-rise structures and thus constituted a public nuisance." (*Id.* at 395; see also *City of Turlock, supra*, 103 Cal.App. 756 ["[n]or may the maintenance of a public nuisance be defended on the ground of laches"])

4.

PCE Is "Injurious to Health"

As shown previously (*ante*, pp. 30-31), PCE is undisputedly "injurious to health," even in tiny concentrations, as required to establish any nuisance. (Civil Code § 3479) But this Court should also consider federal and state authorities on this subject. Generically, PCE has long been declared a hazardous product. (E.g., Cal. Code Regs, tit. 17 §§ 93000 & 93001 [toxic air contaminant]; *id.*, tit. 22 CCR, Appendix X [hazardous waste]; *id.*, tit. 40, § 302.4 [hazardous substance]) More recently, though, the California Air Resources Board deemed PCE-based dry cleaning machines so hazardous to "public health" (*id.*, titl 17 § 93109, subd. (a)) that it prohibited any new sale or lease for use in California after January 1, 2008. (*Id.*, subd. (e)) The Board also barred certain practices with existing PCE machines, and barred *any* use of such machines in California after January 1, 2023. (*Id.*, subd. (h)) In sum, the hazard of PCE is free from doubt.

5.

"A Considerable Number of Persons" Are at Risk

The PCE contamination across Modesto constitutes a *public* nuisance because it "affects at the same time an entire community . . .

or a[] considerable number of persons." (Civil Code § 3480) *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540 (review den.) deemed the "number of persons" requirement satisfied by allegations about secondhand smoke outside a single apartment complex. (*Id.* at 1548) Those numbers are dwarfed by the number of people at risk from the groundwater and soil contamination in Modesto.

Indeed, courts have recognized that water contamination is *inherently* a widespread problem. *City of Lodi*, *supra*, 118 Cal.App.4th 337, for example, flatly stated that that "[t]he pollution of water constitutes a public nuisance under common law, which has long been codified by state law. . . ." (*Id.* at 357)

Nor must the problem affect everyone the same way or as badly. The statute defining a public nuisance provides that "the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civil Code § 3480) Thus, *Mangini, supra,* 230 Cal.App.3d 1125, held the nuisance at issue in *Baker v. Burbank–Glendale– Pasadena Airport Authority* (1985) 39 Cal.3d 862 was "indisputably . . . public" (*id.* at 1144), and *Baker* involved "homeowners who live adjacent to [the] . . . Airport . . . . [complaining of] noise, smoke, and vibrations from flights over their homes." (39 Cal.3d 867-838) Effects of that nature vary considerably more than the effects of PCE contamination.

6.

The Risk Justifies Injunctive Relief

The risk of significant harm from PCE in Modesto justifies a public nuisance injunction. Although the harm from PCE in Modesto is real

and immediate, that is not a requirement for a public nuisance. Thus, *County of San Diego v. Carlstrom* (1961) 196 Cal.App.2d 485 upheld a nuisance abatement injunction based on the significant danger to a neighborhood if fire broke out at a deserted building. There was no need to wait for combustion to start or become imminent. Responsible officials could act to protect a number of people from the potential harm.

Similarly, the applicable Restatement provides that "either a public or a private nuisance may be enjoined because harm is threatened *that would be significant if it occurred*. . . ." (Rest.2nd Torts, § 821F, comment b, italics added) Again, there is no need to prove harm is actual or imminent. Moreover, the "Supreme Court has relied extensively on [the Restatement's] . . . formulation of the public nuisance doctrine and its various elements found in sections 821A through 821F." (*Birke, supra,* 169 Cal.App.4th 155, fn. 5), citing *People ex rel. Gallo, supra,* 14 Cal.4th 1090, 1104-1105, and *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938)

It is instructive, finally, that Congress adopted a similar test for injunctive relief under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972. A private citizen may obtain such relief where "solid or hazardous waste . . . *may* present an imminent and substantial endangerment to health or the environment." (42 U.S.C. § 6972(a)(1)(B), italics added) The leading case of *Dague v City of Burlington* (2nd Cir. 1991) 935 F.2d 1343, r*ev'd in part on other grounds* (1992) 505 U.S. 557, held that the "expansive language" Congress used was intended to authorize "affirmative equitable relief to

the extent necessary to eliminate *any risk* posed by toxic wastes." (*Id.* at 1355, cit. and internal quots. omitted, italics added by *Dague* court)

Surely, Modesto's police power to abate public nuisances is no less effective than a private citizen's right under the RCRA.

7.

The Contamination Is "Substantial and Unreasonable"

Case law requires a "substantial and unreasonable" cause for a nuisance injunction. (E.g., *County of Santa Clara, supra,* 137 Cal.App. 4th 292, 305) *County of Santa Clara* explained that interference with a protected interest "is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted." (*Id.*)

As shown above, PCE undisputedly causes substantial harm. On the "social utility" question, though, Dow and PPG might be tempted to praise PCE as a wondrous solvent. That would miss the point. The subject of the utility/harm appraisal is not naked PCE, but PCE coupled with instructions to improperly dispose of PCE. As PPG told the jury below, "[t]he product in this case, ladies and gentlemen, is the [PCE] with those accompanying instructions. . . . It's just like a car. A car comes with brakes and the warnings were just part of this product. . . ." (RT 68: 6847:3-9) Dow and PPG never had the temerity to suggest PCE coupled with improper disposal instructions had any utility whatsoever, let alone sufficient to outweigh the grave harm it caused.

Finally, the Restatement cited above provides that conduct is "unreasonable" for nuisance purposes if it is intentional rather than accidental. (Rest.2nd Torts, *supra*, § 821B, com. (e)) Here, it is undisputed that Dow and PPG intentionally promulgated their disposal instructions.

8.

"Affirmative Acts or Instructions" Support Dow and PPG's Liability

Dow and PPG's undisputed promulgation of instructions about PCE disposal easily satisfies this Court's requirement of "affirmative acts or instructions" for the imposition of nuisance liability. (*Modesto I* at 119 Cal.App.4th 28, 41) And a subsequent decision, *County of Santa Clara, supra*, 137 Cal.App.4th 292, applied *Modesto I* to the specific subject of public nuisance injunctions.

County of Santa Clara first addressed a "representative . . . public nuisance action" (*id.* at 309) which sought only "to abate a public nuisance." (*Id.* at 305) This portion of the opinion followed *City of San Diego* and *Modesto I* in part because "[h]ere, . . . Santa Clara, SF, and Oakland are not seeking damages. . . ." (*Id.* at 309) Later, when addressing those parties' class action for damages (*id.* at 311 *et seq.*), *County of Santa Clara* held that, "[i]n light of *San Diego* and *Modesto,* we are reluctant to extend liability for *damages* under a public nuisance theory to an arena that is otherwise fully encompassed by products liability law." (*Id.* at 313; italics added)

Nor, finally, do Dow and PPG qualify for a failure-to-warn exemption in *Modesto I.* There, this Court declined to impose nuisance liability on "certain defendants" because their "involvement . . . was limited to manufacturing or selling solvents to dry cleaners . . . without alerting the dry cleaners to proper methods of disposal" (119 Cal.App. 4th 28, 42). Defendants "who merely placed solvents in the stream of commerce without warning adequately. . ." were also not subject to nuisance. (*Id.* at 43) Undisputed facts now exclude Dow and PPG from the simple "failure to warn" category. Their contribution to the public nuisance in Modesto involved affirmative instructions for improper disposal and extensive distribution of literature on the proper use and handling of PCE that touted their expertise.

The 2007 statement of decision on this issue deserves particular attention:

> The evidence included numerous examples of manufacturer instructions, advice, and guidance to customers to discharge separator water, which the manufacturers knew to contain PCE, into sewers, as well as to release waste PCE onto the ground. These kinds of recommendations were repeatedly made and reinforced by the manufacturers over the course of many years and led to the recommended PCE waste handling and disposal practices being generally followed by the customers. The effect of the manufacturers' recommendations, considered both individually and in combination, was that risky waste handling and disposal practices became the norm among the customers.

> With knowledge of the customers' improper waste handling and disposal practices, the manufacturers nevertheless failed for too long to include in their written and oral communications to their customers the message that those PCE waste handling and disposal practices, whose origins were found in the recommendations of the manufacturers themselves, should be stopped. By the time that message was effectively delivered, the contamination here at issue had already occurred. The manufacturers did too little too late to undo the harm that they had earlier caused. In short, the essential transgressions were affirmative acts, *viz.*, the delivery of improper messages not timely withdrawn or corrected. (AA 55: 14301:10-28)

9.

No Showing of *Scienter* Is Required

Finally, nothing in California's nuisance statutes suggests Dow and PPG's conduct had to be tortious or otherwise intrinsically wrongful. Indeed, case law holds otherwise. *Lussier v. San Lorenzo Valley Water Dist.* (1989) 206 Cal.App.3d 92 (review den.) held in pertinent part that liability attaches to any conduct that "directly and unreasonably . . . creates a [nuisance] condition. . . . 'The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability.'" (*Id.* at 100, quoting Rest.2d, *supra,* § 822, com. a, p. 109)

Lussier was addressing private nuisances, but its support for liability without *scienter* applies even more strongly to public nuisances. One who obstructs a public highway, for example, "is charged in law as

an insurer against accident to a person properly traveling the highway. . . ." (*Curtis v. Kastner* (1934) 220 Cal. 185, 188; internal quots. omitted) Similarly, Dow and PPG are subject to public nuisance liability under *Modesto I* because their affirmative instructions assisted in creating danger to a large population.[13]

III.

IF THE COURT ADOPTS THIS DISPOSITION, ITS DIRECTIONS FOR THE INJUNCTION TO BE ENTERED SHOULD BE AS SPECIFIC AS POSSIBLE

A.

MODESTO'S PROPOSED FORM OF INJUNCTION

If the Court agrees to this disposition in principle, Modesto respectfully suggests that the Court direct entry of an injunction with at least the following provisions to ensure its efficiency, effectiveness, and fairness. Moreover, specifying as many details as possible will minimize post-remand disputes over the framing of the injunction, which could easily frustrate the judicial economy and expeditious clean-up that Modesto is hoping to achieve.

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[13] *Modesto I* referred to manufacturers' knowledge only when summarizing the city's allegations (119 Cal.App.4th 41) Immediately thereafter, and elsewhere, the Court stated its holding on nuisance liability without any reference to a knowledge requirement.

For the reasons that follow, Modesto respectfully suggests that the injunction should:

(1) compel Dow and PPG to comply with any and all PCE remediation or investigation orders issued by appropriate officials of the City of Modesto, except to the extent Dow and PPG can overcome the strong deference due to Modesto's exercise of its police power to combat a public health nuisance;

(2) limit Dow and PPG's obligations under such orders to remediation or investigation steps not already in progress, and that are not subject to any applicable settlement funds Modesto received in this litigation;

(3) authorize such orders in connection with any dry cleaning sites in Modesto;

(4) provide that Dow and PPG's obligations under such orders shall be joint and several at all sites unless the superior court determines otherwise on a proper showing;

(5) specify that Dow and PPG shall comply promptly and fully with such orders notwithstanding any right they may have, or claim to have, to seek contribution, indemnity, or similar remedies from any other party; and

(6) provide that any and all factual disputes arising in connection with the injunction shall be referred in the first instance to a special master or referee to be appointed by the superior court, either by consent or pursuant to Code Civ. Proc. § 639, subd. (a)(3) ("question of fact").

B.

THE INJUNCTION SHOULD COMPEL COMPLIANCE WITH REMEDIATION ORDERS ISSUED BY APPROPRIATE CITY OFFICIALS

As this brief previously demonstrated (*ante*, pp. 58-59), Modesto has full statutory and constitutional police power to combat public

nuisances. It can order their abatement administratively, for example, not only through civil or criminal actions. (Civil Code § 3491) The city has agencies and officers charged and experienced with such duties, and they can engage outside experts as needed. The city, therefore, is the proper party to direct the clean-up efforts to be enforced by the injunction.

If for any reason the Court concludes the city itself lacks a necessary power, the Court should designate Modesto's city attorney to that extent. The City Attorney's authority is indisputable. Code of Civil Procedure section 731 expressly provides that "[a] civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in Section 3480 of the Civil Code, by the . . . by the city attorney of any town or city in which the nuisance exists."

Dow and PPG, however, may prefer to confer this role on the Regional Board or some other outside agency, or require such an agency's prior approval of any remediation plans Modesto adopts. But neither arrangement is required by law, and to impose either one would jeopardize the clean-up in Modesto as a practical matter.

As for the law, it is settled that, "[w]hile a Regional Control Board *may* act in cases where there is a pollution of waters . . . , if contamination and public nuisance endangering the health of the inhabitants of any city or county exists, the statutes [Civil Code § 3479 & 3480] clearly place the power to control in other public agencies including . . . municipalities." (*People ex rel. City of Manhattan Beach et al. v. City of Los Angeles* (1958) 160 Cal.App.2d 494, 504, (hearing

den., italics added) In other words, Modesto has plenary power to combat the public nuisance Dow and PPG helped create.

Indeed, we previously quoted PPG's argument below that a public nuisance injunction is not subject to preemption under either CERCLA or HSAA. (*Ante*, pp. 17-18) Dow impliedly adopted that view as well, by never disputing its co-movant's point. Accordingly, Dow and PPG cannot be heard to contend otherwise now.

As a practical matter, though, it would nullify Modesto's police power to insist on prior approval of its clean-up plans by outside agencies, let alone require such agencies to develop or implement the plans themselves. Their resources are simply not up to the task. Philip G. Wyels, Esq., a senior official with the State Water Resources Control Board, submitted a declaration below in August 2007 explaining that his agency was overtaxed:

> The Regional Water Boards do not have sufficient resources to issue Cleanup and Abatement Orders . . . or seek judicial injunctions . . . to compel all dischargers to undertake investigative and remedial actions at all polluted sites for which they are responsible. (AA 60: 15471, ¶ 4)

Such was certainly the case with the Central Valley Regional Board that serves Modesto. (RT 144: 7400: 12-18) On February 18, 2009, a senior official there testified that "seven of my 20 staff" had received notices of anticipated lay-offs that very morning. (RT 144: 7421: 12-18) And even "[b]efore that . . . we had insufficient resources. . . . ." (*Id.*, lns. 20-21) "There's many, many more dry cleaners [causing PCE contamination] than we can handle." (*Id.* at 7420: 27)

The court then presiding went further, concluding that *no* outside agency could be counted on for help at the many sites to be tried to the second jury. (AA 61: 15881-15885) No such agency had an "ongoing remediation," a "remedial plan," a "proposed remediation," or even a prospect of remediation "on the reasonably foreseeable horizon at the majority of Phase 3 sites, and possibly not at any of them." (AA 61: 15885: 1-6)

Not surprisingly, then, Mr. Wyels went on to declare that the "Regional Water Boards have a substantial interest in the continued ability of . . . public . . . entities[] to . . . compel dischargers to undertake investigative and remedial actions at polluted sites. . . . (AA 60: 15472, ¶ 7) Simply stated, the Regional Boards *need* public entities like Modesto to take the lead as proposed in this brief.

C.

ANY FACT-FINDING REQUIRED TO IMPLEMENT THE INJUNCTION SHOULD BE REFERRED TO A SPECIAL MASTER IN THE FIRST INSTANCE

The injunction Modesto seeks may require fact-finding to resolve disputes over implementation issues, such as the proper remediation at a particular site. But there is no need to postpone entry of the injunction itself pending a trial, and inevitable appeals, over such matters. The injunction can and should contain guidelines and procedures for resolving such disputes efficiently. It also bears repeating that the more details this Court specifies for the injunction, the less room there will be for resistance and delay.

One detail should be the appointment of a qualified special master to assist the superior court:

> By statute, a court may direct a special reference on a question of fact. (Code Civ. Proc., § 639.) A reference by the trial court involves the sending of a pending action or proceeding, or some issue raised therein, to a referee for hearing, determination and report back to the court. . . . The trial court may order a special reference without the parties' consent. . . . In such cases, the authority of the referee or special master is limited to resolving specific questions of fact. . . . The referee's factual findings are advisory recommendations only; they are not binding unless the trial court adopts them. Nevertheless, the referee's recommendations are entitled to great weight.

(*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 175; cits. and internal quots. omitted)

A special master would also lend valuable continuity on the complex issues presented. Changes of judicial assignment are inevitable over the likely course of implementing this injunction.

D.

THE INJUNCTION SHOULD APPLY CITYWIDE NOTWITHSTANDING ANTICIPATED "CAUSATION" OBJECTIONS BY DOW AND PPG

Modesto's proposed injunction applies citywide, despite a wail of protest anticipated from Dow and PPG on "causation" grounds. At the outset, therefore, we emphasize that the precise question presented is how the Court, in exercising its equitable discretion over dispositions, should define the scope of the injunction and the process for

implementing it. The Court may consider any relevant factor in making that determination.

One such factor is Dow and PPG's ardent praise of a public nuisance injunction below, and one element of that praise has a particular bearing on the scope of the injunction. Dow and PPG expressly argued that a public nuisance injunction could operate throughout Modesto, not just at a handful of sites. On two occasions previously quoted in this brief, Dow and PPG attacked Modesto's tort damages claims as follows: "[n]or can negligence or product liability be used by a public entity *to act on behalf of a community that has been subjected to a widespread public health hazard*. . . ." (*Ante*, pp. 20 & 22, italics added) Accordingly, this Court should ensure that the injunction Dow and PPG invited below *does* benefit the entire community in Modesto. Paragraph 3 of the proposed injunction accomplishes that purpose.

At the same time, Dow and PPG's actual clean-up obligations would be significantly restricted. Under ¶ 2 of Modesto's proposal, Dow and PPG would bear only excess liability — a duty to act only to the extent Modesto's settlement funds, or ongoing clean-up by other parties, are insufficient. Moreover, this excess liability would be extremely modest according to Dow and PPG's mantra below that Modesto did not *need* any monetary or equitable relief from them. They repeatedly and successfully urged that the clean-up in Modesto would be accomplished fully out of the city's settlement funds or the clean-up efforts of other public or private parties. Accordingly, Dow and PPG cannot object now that a citywide injunction would impose an

inequitable burden on them. If anything, it would be inequitable to *deny* Modesto a citywide injunction.

In an abundance of caution, though, especially if the Court were to rely solely on the merits rather than estoppel, Modesto suggests an alternative disposition addressing three categories of sites:

"Phase 3" Sites with Direct Sales. The injunction should apply unconditionally to nine sites where, at the second jury trial below, Dow and PPG implicitly conceded direct sales of their PCE. Accordingly, their unsafe disposal instructions would have accompanied those sales. These sites are Elwood's 6 (Dow & PPG), Elwood's 30 (Dow), Sunshine/Coit (both), Crossroad's (both), Century (Dow), One Hour Martinizing/ Yosemite (Dow), Vogue (PPG), Acme (PPG), and Superior (PPG).[14]

Like any other issue, "causation . . . . can be decided as a matter of law where the facts of a case can permit only one reasonable conclusion." (*Milligan v. Golden Gate Bridge Hwy. & Transp. Dist.* (2004) 120 Cal.App.4th 1, 9) As applied to Dow and PPG's unsafe instructions, the question presented is whether "a reasonable person would consider [them] to have contributed to the harm. . . . [as] more than a remote or trivial factor. It does not have to be the only cause of the harm." (CACI No. 430; see also CACI No. 2020 [public nuisance

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[14] Dow and PPG moved for nonsuits or directed verdicts at many other sites to be tried to the second jury, claiming there were no direct sales or "product identification" there. (E.g., AA 63: 16481 et seq.) But they raised no such challenge at the sites listed in the text, implicitly conceding sales at those sites.

instruction incorporating the substantial factor test])

At the nine sites with direct sales, "only one reasonable conclusion" (*Milligan*) can be drawn from the many undisputed years of unsafe disposal instructions and corresponding disposal practices. No reasonable person would dispute that the instructions "contributed to the harm" at these sites as "more than a remote or trivial factor." (CACI No. 430) *Modesto I* held that those who merely "assisted" in creating a nuisance are subject to liability (119 Cal.App.4th 38), and explained that "even a relatively minor contribution to discharge may support a finding of responsibility." (*Id.* at 41 [citing a State Water Board decision]) But as the 2007 statement of decision below well explained, Dow and PPG's unsafe instructions over many years contributed to the PCE contamination in Modesto to much more than a "minor" extent. (*Id.*)

"Phase 1" Sites with Direct Sales. For the same and additional reasons, the injunction should apply unconditionally to three of the bellwether sites tried to the first jury: Ideal Cleaners (Dow and PPG), Modesto Steam (both), and Coffee Plaza (Dow only). By holding Dow or PPG liable at those sites, the jury necessarily found sales of their PCE at those sites accompanied by their unsafe instructions. Accordingly, the same facts cited above satisfy the substantial factor test at these sites as well.

In addition, these sites were the subject of the 2005 in limine ruling (MIL 40) barring any clean-up damages because they were too "speculative." As explained previously, if that ruling were correct Modesto is entitled to an injunction as a substitute remedy. (See Code Civ. Proc. § 526, subd. (a)(5) ["extremely difficult to ascertain the

amount of [proper] compensation"] and Civil Code § 3523 ["for every wrong there is a remedy"])

All Remaining Sites. Finally, the injunction should apply to all remaining sites, irrespective of any direct sales, but with a rebuttable presumption that Dow and PPG's unsafe disposal instructions satisfied the substantial factor test. As this brief has documented, Dow and PPG promulgated their instructions to both customers and non-customers, and the consistent message of all these instructions was broadly disseminated to dry cleaners throughout the city. (*Ante*, pp. 43-47)

Two lines of authority support Dow and PPG's liability at the remaining sites irrespective of any direct PCE sales. First, there is ample precedent for imposing presumptive and even strict liability on parties supplying hazardous products that contaminate the environment. (E.g., *United States v. Alcan Aluminum Corp*. (2d Cir. 1993) 990 F.2d 711, 721 ("*Alcan II*") ["CERCLA does away with a causation requirement"]; *United States v. Monsanto* (4th Cir. 1988) 858 F.2d 160, 170) For similar reasons, the more modest approach of a rebuttable presumption is well warranted as to Dow and PPG's unsafe instructions. Undisputed facts establish at least a prima facie case that the relevant instructions migrated throughout Modesto's dry cleaning industry and influenced the uniform practices previously documented.

Second, case law supports liability for similar conduct without any privity of contract. *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89 (review den.) affirmed liability for negligent communications about a drug even though the defendant had never sold it to the plaintiff. The harm was caused by a generic version. Wyeth, however, had broadly

disseminated unsafe communications about the drug, and *Conte's* holding therefore applies squarely here:

> a defendant that authors and disseminates information about a product manufactured and sold by another may be liable for negligent misrepresentation where the defendant should reasonably expect others to rely on that information and the product causes injury, even though the defendant would not be liable in strict products liability because it did not manufacture or sell the product. (*Id.* at 102)

Similarly, *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51 upheld liability based on the unsafe "overpromotion" of a drug (*id.* at 68) by "an extensive advertising and promotional campaign . . . , employing both direct and subliminal advertising, to allay the fears of the medical profession which were raised by knowledge of the drug's dangers." (*Id.* at 69) Even though the prescribing physician in *Stevens* was aware of those dangers, the manufacturer's broad communications to the medical profession made it "reasonably foreseeable that physicians, despite awareness of the dangers of [the drug], would be consciously or unconsciously influenced to prescribe it. . . ." (*Id.*)

Accordingly, absent a citywide injunction for the reasons stated at the outset, the injunction should still apply to all remaining sites unless Dow or PPG can overcome a presumption that their unsafe instructions satisfied the substantial factor test.

E.

THE INJUNCTION SHOULD REQUIRE CITY OFFICIALS TO FIRST APPLY ANY APPLICABLE SETTLEMENT FUNDS

The injunction should also specify how Modesto's settlement proceeds should be applied, and the language proposed here reflects Modesto's disagreement with the ruling below on this point. (AA 76: 20109:-20112, 20114) The court awarded Dow and PPG a total credit of approximately $37 million — all the settlement proceeds Modesto received (*id.* at 20109:8-9) — irrespective of any site allocations in the relevant settlement agreements. The court reasoned that Dow and PPG were *alleged* to be joint tortfeasors with every settling defendant at every site, so Dow and PPG had "*potential* liability for the torts of all settling parties." (*Id.* at 20114:9-12, italics added)

That approach contravenes case law expressly tying settlement allocations to settlement credits. As this Division explained in *L. C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal. App.4th 742, 750: "[w]here there are multiple defendants, each having potential liability for different areas of damage, an allocation of the settlement amount *must* be made. Failure to do so may preclude a 'good faith' determination *because there is no way to determine the appropriate setoff pursuant to [Code Civ. Proc.] section 877 against the nonsettling defendant.*" (Italics added, see also Flahaven et al., Cal. Practice Guide: Personal Injury ¶ 4:185.8)

The contrary approach below also contravenes two fundamental purposes of the applicable statute: first, to maximize plaintiffs' recovery. (*Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 101) As

applied to the current judgment, for example, the defendants received $25 million more in credits than they deserved under the relevant settlement agreements. Their own calculations pointed to some $12 million in credits, not $37 million. (AA 76: 20063:17-26 [citing $8,175,000 in unallocated settlements]; *id.* at 20066:14-18 [citing $4,093,757 in allocated settlements] at sites where Dow and PPG were found liable) Second, it contravenes the statutory purpose of promoting settlements (*Garcia*, *supra, id.*) to ignore allocations that were duly negotiated and approved for good faith. Without reliable allocations, it would be too risky for many plaintiffs to settle in the first place.

Finally, the ruling below improperly ignores the final judgment against a nonsettling defendant. A leading treatise explains that a credit under Code of Civil Procedure section 877 "can be given only with respect to the settlement of claims for which the subsequent judgment awarded damages." (Flahavan *et al.*, *California Practice Guide: Personal Injury* (The Rutter Group 2000) ¶ 4.185.12m.) Thus, for example, *Wilson v. John Crane, Inc.* (2000) 81 Cal.App. 4th 847, 860 (review den.) rejected any settlement credit applied to a wrongful death claim where the nonsettling defendant was not actually held liable on that claim.

For all the foregoing reasons, Dow and PPG are not entitled to a credit at a particular site unless an approved settlement agreement either allocated its proceeds to that site or failed to allocate at all. Moreover, Modesto respectfully asks the Court to so hold no matter how else it decides this appeal. Even if it affirms the current judgment in full, for

example, it should not let Dow and PPG walk away with a $25 million windfall.

IV.

ABSENT A REMAND WITH DIRECTIONS FOR A PUBLIC NUISANCE INJUNCTION, THE COURT SHOULD REVERSE AND REMAND FOR PROPER PROCEEDINGS ON OTHER REMEDIES

As stated at the outset of this brief, Modesto believes its best clean-up remedy under present circumstances is a public nuisance injunction along the lines proposed here. Accordingly, Modesto will forgo any other clean-up remedy against Dow or PPG if the Court agrees to that disposition, and if so the Court need not reach any of the following contentions to the extent they relate solely to the other remedies.

A.

THE COURT ERRONEOUSLY BARRED ANY CLEAN-UP DAMAGES AT THE FIRST JURY TRIAL

The 2005 in limine ruling, to the extent it relied on preemption grounds, erred at a minimum by overbreadth. Only one of the four sites in question, known as Halford's, was even potentially subject to federal preemption because of clean-up efforts under CERCLA. Only there, accordingly, could Dow and PPG point to cases like *Fort Ord Toxics Project, Inc. v. Cal. E.P.A.* (9th Cir. 1999) 189 F.3d 828, 832, and attack Modesto's claims as a "challenge" to the CERCLA clean-up. Even as to Halford's, however, neither the defendants nor the trial court had an

answer to the express savings clauses in CERCLA cited previously. (*Ante*, pp. 6-7) And *Stanton Road Assocs. v. Lohrey Enters.* (9th Cir.1993) 984 F.2d 1015, supports Modesto's reading of those clauses.

The case for preemption under the state HSAA is even weaker. While a regional board was involved at Halford's the HSAA "preempts local regulation of response actions on sites *listed* pursuant to [Health & Safety Code] section 25356 because it vests the state with sole jurisdiction over removal and remedial actions of all listed sites." (*City of Lodi, supra*, 118 Cal.App.4th 337, 349, italics added) Here, only Halford's was listed under the HSAA. Further, as explained in *City of Lodi*, the HSAA (Health & Saf. Code § 25366, subd. (c)) "preserve[s] the substantive law imposing liability and obligations upon parties responsible for hazardous waste contamination" (*Id.*, at 356)

Finally, the court's alternative ground, speculative damages, fares no better. With the fact of contamination injury undisputed, the city's expert used standard practices to project reasonably foreseeable clean-up costs. "Where the fact of damages is certain, . . . [t]he law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398, original italics) As stated in *Garcia*, *supra*, 156 Cal.App.4th 92, 98: "[t]he fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery."

Even if defensible on its own terms, however, this sweeping exclusion of damages makes it reversible error to deny Modesto injunctive relief for these sites in the final judgment. (See Code Civ.

Proc. § 526, subd. (a)(5) ["it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief"]) There must be *some* remedy for this wrong. (Civil Code § 3523)

B.

THE COURT ERRONEOUSLY BARRED A HOST OF DAMAGES CLAIMS AT THE SECOND JURY TRIAL BY HOLDING THEY ENTAILED "FUTURE INJURY"

At the second jury trial, Dow and PPG prevailed against millions of dollars in damages claims, as a matter of law, on the ground that those damages entailed "future injury" uncompensable by tort law. The directed verdict ruling to that effect was erroneous, and cost Modesto up to $42 million in claims. (AA 65: 16915:1-13 [list of affected sites] & AA 83:21979 [estimated costs])

With respect to groundwater, Modesto's relevant interest is "appropriative," the right of access to this resource to supply residents and others dependent on it through city wells. By statute, it is "the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses . . . ." (Water Code § 106.5)

Not surprisingly, courts have protected "appropriative" rights far earlier, and better, than the ruling below permits. *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, for example, held that "appropriators are entitled to the protection of the courts against *any substantial infringement* of their rights in water which they reasonably and beneficially need." (*Id.* at 926, italics added, see also *Town of*

Antioch v. Williams Irrigation Dist. (1922) 188 Cal 451,457-458 [appropriator entitled to have water "preserved in its natural state of purity, so far as may be necessary for the purposes to which he is devoting it"] and *Wright v. Best* (1942) 19 Cal.2d 368, 378 ["any material deterioration of the quality of the stream by . . . others without superior rights entitles appropriator to both injunctive and legal relief"].)

That line of cases cannot be squared with the ruling below rejecting any damages claim unless and until so much PCE accumulates at a city well that it exceeds the MCL (5 parts per billion) or will imminently do so. (AA 65: 16914:21-26) As the Second Circuit recently observed in *In Re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation* (July 26, 2013) _ F.3d _ [2013 WL 3863890 *26]: "[i]t strikes us as illogical to conclude that a water provider suffers no injury-in-fact – and therefore cannot bring suit – until pollution becomes so severe that it would be illegal to serve it to the public." (Cits. omitted)

Recent case law refutes Dow and PPG's theory another way. *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807 held squarely, as a necessary predicate to the outcome on insurance law, that "release of hazardous waste into groundwater and surface water constitutes actual harm to property." (*Id.* at 829, see also *id.* at 842 [contamination of the environment satisfies the requirement of property damage]; *accord*, *Aerojet-General Corp. v. Superior Court* (1989) 211 Cal.App.3d 216, 229 ["[p]ollution of the ground and river waters is damage to public property"].) In the insurance context of both cases, the holdings meant water contamination itself is compensable harm to property — not just

its most extreme consequences. (An amount sufficient to constitute accrual for limitations purposes presents a separate question.)

Similar principles apply to contamination of soil and sewer pipes. For example, *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 524, rejected a defense contention that "the evidence did not show the presence of PCB's caused any harm to SoCalGas's property [because] the pipes still piped, the pumps still pumped and the meters still metered just as well as they had before." Instead, the court held contamination itself constituted property damage, and the remediation costs required were recoverable on a theory of strict liability.

C.

THE COURT ERRED AGAIN AT THE SECOND TRIAL BY ANNULLING AN $18 MILLION AWARD AGAINST DOW AND PPG ON STATUTE OF LIMITATIONS GROUNDS

The trial court erred by annulling the jury's $18.3 million award against Dow and PPG at the Elwood's site (AA 69: 17978 et seq.) and failing to enter judgment on that award in Modesto's favor. Both sides filed motions addressing the statute of limitations issue. Modesto challenged the sufficiency of the jury's special verdict finding that Modesto's claim had accrued outside the statute. (AA 67: 17499 et seq.) Dow and PPG contended Modesto had no right to the "delayed discovery" exception as a matter of law. (AA 69: 17981:3-16) The court should have granted Modesto's motion, and denied Dow and PPG's as moot because the delayed discovery issue only arises if accrual would

otherwise bar the action.

This brief, accordingly, challenges only the denial of Modesto's motion for judgment notwithstanding the special verdict on accrual. While the usual standard of review on such motions is substantial evidence (*Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 289), the question presented here turns on an undisputed aspect of the record: the dearth of expert testimony on the accrual issue. As this Division has explained, "a complex scientific issue such as the migration of chemicals through land calls for expert evaluation." (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583) This requirement was not disputed below, nor the fact that Dow and PPG bore the burden of proof on this affirmative defense. Dow and PPG, however, presented no expert testimony of its own on the accrual issue.

Accordingly, the question boils down to Dow and PPG's contention that Modesto's *own* expert testimony satisfied the *Bowman* requirement. (AA 68: 17835:14-17) The precise question presented, however, was whether by December 3, 1995, "groundwater to be used by City residents exceed[ed] or [was] imminently threaten[ing] to exceed a PCE concentration of five parts per billion. . . ." (RT 174: 11130:10-21) Nothing in Modesto's expert testimony met the *Bowman* test on that question.

Dow and PPG relied on Mr. Anthony Brown's testimony that the contamination at Elwood's posed a threat to the relevant well. (AA 68: 17835:20-25; RT 139: 6612:4-6613:12 [Brown's testimony]) But Mr. Brown's opinion was based on data from 2000 to 2003, long after the accrual date of 1995. (RT 140: 6755:6-14, 6757:19-24) And Mr.

Brown gave no opinion whether or when PCE first reached levels meeting the trial court's accrual test.

He did testify that the "plume" of PCE from Elwood's moved at the rate of 90-100 feet per year (RT 140: 6766:3-8), and the relevant well was 2000 foot away. (RT 137: 6287:18-19) The absence of testimony when movement began precluded the required calculation.

Dow and PPG also cited Modesto's expert James Mercer. Mr. Mercer, however, gave only general testimony about PCE migration from the surface and resulting contamination of soil and groundwater. (AA 68: 1835:18-21; RT 109: 2612:11-2613:24, 2619:16-2620:1)

Finally, Dow and PPG cited two documents preceding the 1995 accrual date: the 1989 "Radian Report" and a 1992 California Regional Water Quality Control Board Report. (AA 68: 17836:P16-21) Neither report, however, focused on groundwater contamination. (AA 83: 22014 et seq.; *id.* at 22080 et seq. [Phase 3 Trial Exs. 3019, 3033]; RT 153: 8420: 17-25) If anything, the Radian Report cut against Dow's position on the accrual issue. While it showed some PCE in the relevant well (No. 2) the levels reported were far below the 5pbb accrual test — only 0.98 and 1.0 ppb. (AA 83: 22054, 22068) Moreover, the Report concluded that all "results were less than DHS action levels" (*id* at 22060, § 4.2.1), which is 4 pbb (*id.* at 22059) — even lower than the standard MCL of 5 pbb level. Indeed, Dow conceded that the PCE in the relevant well was "not at high levels yet" before 1995. (RT 189: 12051:22-24)

In sum, Modesto's experts did not rescue Dow and PPG from their failure to satisfy *Bowman* with its own experts. Because Dow and

PPG failed to meet their burden of proof on the accrual issue, Modesto is entitled to a judgment in its favor on the $18.3 million jury award.

D.

THE COURT'S SUBSEQUENT DENIAL OF RELIEF FOR REDEVELOPMENT SITES RESTS ON PREJUDICIAL ERROR

1.

The Erroneous Causation Rulings in 2010

This Court independently reviews whether a trial court applied the correct causation standard. (*Redevelopment Agency of City of San Diego v. San Diego Gas & Electric Co*. (2003) 111 Cal.App.4th 912, 916) Here, the trial court's exoneration of Dow and PPG for five redevelopment sites[15] in 2010 rested almost entirely on an erroneous causation standard. The error was prejudicial and reversible for that reason.

At the second Polanco Act trial below, the court imposed stringent causation requirements that cannot be squared with relevant authority. The court described them as "premises follow[ing] from" *Modesto I* (AA 71: 18526:18:19-18527:5), but that proposition does not survive scrutiny. In one instance, for example, the trial court cited authority that *Modesto I* expressly rejected. We address each of the four requirements in turn.

Requirement No. 1: The dry cleaner must have received the

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[15] The court identified these sites as Elwood's (site 30), Elwood's (site 6), Sunshine (site 67), Sunshine (site 85), and Vogue (site 69). The first three were at the same location.

instructions. (AA 71: 18526:21-22) While that simple formulation appears reasonable on its face, it was short-hand for an impermissibly stringent causation test. What the court actually required was specific evidence about which manufacturers' PCE and instructions were delivered to a particular dry cleaner at a particular time. (*Id.* at 18542:26 -18548:6) Yet the court acknowledged that distributors consistently sold *both* companies' product to particular dry cleaners over long periods of time. (*Id.* at 18543:2-14) Nonetheless, it assigned no causal significance to the inference that dry cleaners received both companies' product during at least some of those times. It required specificity of proof flatly at odds with the applicable substantial factor test.

Requirement No. 2: The dry cleaner must have disposed of PCE in the exact same way as the contemporaneous instruction. (AA 71: 18526:21-22) This, too, requires too much. As shown previously, all the instructions in question conveyed the same message notwithstanding any different specifics: to dispose of PCE waste casually into the environment. By limiting its causation test to specifics, the court erroneously ruled out influences over time.

Requirement No. 3: The contamination must have been caused by the exact same release mechanism contained in the instructions and used by the dry cleaner. (AA 71: 18526:22-18527:2) There are two problems with this heightened requirement. First, it again ignores the overriding and consistent instructions to dispose of PCE waste casually into the environment.

Second, the court's requirement of expert testimony about the

exact release mechanism at each site conflicts with the Polanco Act's causation standard requiring the defendant to bear the burden of proof. (Health & Safety Code § 33459.4(c) [the Polanco Act incorporates CERCLA's "scope and standard of liability"]; *Alcan II, supra,* 990 F.2d 711, 722 [under CERCLA, the defendant bears the burden as to "what caused the release of hazardous waste and triggered response costs"]) Modesto was required to show only that Dow's and PPG's PCE was at the sites and that there were releases which caused it to incur response costs. (*Alcan II, supra,* 990 F.2d 711, 721; *United States v. Alcan Aluminum Corp.* (3d Cir. 1992) 964 F.2d 252, 266 (*"Alcan I"*) It was not required to prove any causal link between Dow's and PPG's waste and the release or response costs. (*Alcan II, supra*, 990 F.2d 711, 721; *Monsanto, supra,* 858 F.2d 160, 170) Imposing a high burden on the plaintiff, as the trial court did, would not only conflict with the Polanco Act's minimal causation standard, but also ensure that polluters avoid liability.

In rejecting CERCLA's causation standard, the trial court relied on language in *Redevelopment Agency v. Salvation Army* (2002) 103 Cal.App.4th 755, 765-766. (AA 71: 18257:24-18258:12) But that case does not involve causation. Moreover, the language was dictum, and this Court expressly disagreed with it. (*Modesto I, supra*, 119 Cal.App.4th 28, 35 fn. 5) Further, to the extent there is any doubt that the Polanco Act adopts CERCLA's causation standard, it should be resolved in favor of the "remedial purpose of the [Polanco] Act." (*San Diego Gas & Electric Co.*, *supra*, 111 Cal.App.4th 912, 920)

Requirement No. 4: The dry cleaner must have purchased the

defendant's solvent. (AA 71: 18527:2-5) The court predicated this requirement on the assumption that PCE manufacturers provided advice only to their customers. (*Id.* at 18527:2-8) But the testimony cited simply stated that the manufacturers' materials were intended for and provided to customers; the witnesses never contradicted other affirmative evidence that the materials were also provided to non-customers. (Phase 3 Trial Ex. 830[16] [July 11, 2003 Depo of Laurence Lee] at 101:15-25, 133:2-6; Phase 3 Trial Ex. 817 [April 16, 2002 Depo of Stanley Dombrowski] at 24:24-25:10; Phase 3 Trial Ex. 838 [May 14, 2003 Depo of Raymond Finocchio] at 40:23-41:2)

As this brief previously documented (*ante*, pp. 43-47), it was undisputed below that Dow and PPG promulgated their unsafe disposal instructions to non-customers as well, and that the instructions migrated from all direct recipients into the communication network linking Modesto's dry cleaners. For present purposes, though, suffice it to say that a causation test excluding that entire body of evidence cannot be squared with applicable authority.

2.

The Causation Errors Were Prejudicial

While each of the foregoing requirements was separately prejudicial, the Court need only look at their cumulative effect to find a "reasonable chance" of a different outcome had the proper causation

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[16] The court referred to Exhibit 143, but that was the exhibit number for this deposition in Phase 1.

standard been applied. (*Veronese v. Lucasfilm Ltd*. (2012) 212 Cal.App. 4th 1, 32, review den. [combination of "multiple errors" established prejudice], see also *Kinsman, supra*, 37 Cal.4th 659, 682 [a "reasonable chance" is all that is needed to show a "reasonable probability" that the outcome was affected, italics, cit. and internal quots. omitted]) Moreover, the court presiding in 2007 reached the opposite conclusion under the proper causation test based on many of the same facts.

3.

The Denial of Equitable Relief in 2011 Places an Unconscionable Risk on the Victim of Contamination Rather than Those Who Caused It

On November 14, 2011, the trial court issued a "Statement of Decision re: Judgment" (AA 76: 20073) based on evidentiary and other proceedings without a jury. Among other things, the court denied any equitable relief for two sites known as Halford's and Modesto Steam. (*Id*. at 20073:3 & 20106:6) While the court's lengthy recitation of facts is subject to deferential review for substantial evidence, the court's ultimate conclusion about equitable relief is different. It rests on a premise that is independently reviewable as such, and this Court should declare that

premise too unconscionable to be affirmed as an exercise of equitable discretion.

The trial court's test for equitable relief was whether Modesto faced a *sufficient* risk of future clean-up costs to warrant equitable protection from that risk. But the court acknowledged Modesto faces

some risk of that nature, and it is unconscionable to deny Modesto equitable protection from that risk no matter how small it may be. The effect of that ruling is to place the risk of clean-up expenses on the victim rather than the perpetrators. This Court should therefore reject the dispositive ruling below, and if necessary (absent a public nuisance injunction) remand this issue for a new determination limited to the Halford's and Modesto Steam sites.

V.

THE COURT SHOULD REVERSE THE 93% REDUCTION OF THE JURY'S PUNITIVE DAMAGES AWARD AGAINST DOW AND REMAND WITH APPROPRIATE DIRECTIONS

A.

THE STANDARDS OF REVIEW

This Court conducts a *de novo* review of the trial court's punitive damages analysis under the federal due process clause. (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 418; *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1172; *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 85 (review den.) Specifically, the Court independently assesses three familiar "guideposts": "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and

the civil penalties authorized or imposed in comparable cases."[17] (*Bankhead, supra*, 205 Cal.App.4th 68, 84-85; cits. omitted)

In conducting this analysis, this Court "review[s] the express or implied factual findings of the trier of fact under the deferential substantial evidence test." (*Id.* at 85; see also *Simon*, *supra*, 35 Cal.4th 1159, 1172) Under that familiar test, the evidence must be viewed in the light most favorable to Modesto, with all reasonable inferences drawn and conflicts resolved in Modesto's favor. *(McMahon v. Albany Unified School District* (2003) 104 Cal.App.4th 1275, 1282 (review den.)

Simon emphasized the required deference to juries on the issue presented here, the permissible amount:

> While we must . . . assess independently the wrongfulness of a defendant's conduct, our determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability. In enforcing federal due process limits, an appellate court does not sit as a replacement for the jury but only as a check on arbitrary awards. (35 Cal.4th 1159, 1188)

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[17] The U.S. Supreme Court has stated that, for the first guidepost, trial courts "have a somewhat superior vantage over" appellate courts, but that advantage is limited: it "exists primarily with respect to issues turning on witness credibility and demeanor." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440 & fn. 14) Here, the trial court did not make any findings contrary to those of the jury. It concluded that the amount of the punitive damages award was not supported based only on its legal analysis and characterization of undisputed facts, not based on issues turning on witness credibility and demeanor.

(See also *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 559, review den. [same; affirming punitive damages award of $13.8 million in case where compensatory damages were $850,000])

B.

THE JURY'S FACTUAL FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

1.

Dow Knew PCE Threatened Groundwater When It Promulgated the Instructions Previously Documented Here

Dow admitted in opening statement that no "responsible person" would still instruct someone to dump PCE outdoors. (RT 4: 399:11-17) There was substantial evidence, though — including undisputed evidence — that Dow did exactly that. It issued instructions to dump PCE outdoors with full knowledge that such practices would eventually contaminate public water supplies.

Dow admitted it knew of PCE's threat to groundwater as early as 1978. (AA 47: 12041:9 ["Dow first became aware of the groundwater contamination issue in 1978."]); see also AA 47: 12019:11-12) It is undisputed that a Dow study in 1978 turned up PCE in wells in Michigan, including school wells. (AA 82: 21722 [Trial Ex. 2]; see also AA 82: 21721 [Trial Ex. 1])

But long before 1978 Dow had learned of PCE's risks through studies at its own manufacturing facility in Midland, Michigan. In 1965 and 1975, for example, Dow conducted environmental testing on PCE at its own sewage treatment plant. Dow wrote an internal report

labeling PCE a "red flag" compound with "severe pollutional characteristics" that "deserves close watching." (AA 82: 21783, 21784, 21786 [Trial Ex. 22 (1965 report)]; AA 82: 21787 [Trial Ex. 23 (1975 update of the 1965 report, marked "CONFIDENTIAL")]) The reports advised Dow employees at the sewage treatment plant that PCE must be treated differently from other chemicals. (Phase 1 Trial Ex. 114 [Alexander Depo] at 19:20-22, 21:23-22:2, 23:9-11) The reports — particularly the 1975 report — were distributed widely throughout Dow, including internationally. (*Id.* at 14:3-19, 24:11-20; AA 21783, 21788)

In addition to its own 1965, 1975 and 1978 studies, Dow learned of PCE's threat to groundwater through a variety of channels. As early as 1952, Dow boasted it had 37,000 volumes at only one of its libraries. (AA 83: 21948 [Trial Ex. 146]; see also 13 RT 1317:11-1318:3) In 1970, Dow's president said the company "has as much knowledge of environmental problems and how to contain them as anyone in the world." (AA 83: 21951 [Trial Ex. 148]) Dow thus knew long before the 1970's that trichloroethylene, a breakdown product of PCE (RT 47: 5050:16-28), was reported to contaminate groundwater and wells. (RT 14: 1473:6-1474:18; AA 82: 21850 [Trial Ex. 39]; AA 83: 21955 [Trial Ex. 188]) One of the 1949 and 1950 articles so reporting was published in "one of the largest and most widely read journals for chemists in the United States." (RT 14: 1472:7-20)

Most importantly, though, PCE's threat to groundwater was known to the "product stewards" at Dow — the very officials charged with "read[ing], understand[ing], and pay[ing] attention to [the] research," and involved in formulating and promulgating the company's

instructions about PCE disposal. (Phase 1 Trial Ex. 117 [4/16/02 Dombrowski Depo] at 22:14-23:3) As one Dow employee testified, "[a] product steward had to basically know everything there was to know about a particular chemical and make sure that it was used properly." (RT 27: 2682:10-13) Undisputedly, therefore, Dow's product stewards knew of the company's own discovery of PCE's threat to groundwater by at least the 1970's, and of the earlier reports of that threat in well-known journals in Dow's library. And the product stewards also knew of the EPA's national study of PCE contamination resulting in a 1982 report. (AA 82: 21761 [Trial Ex. 12]) No later than 1982, therefore, Dow's product stewards knew PCE was reported as contaminating more than 7 percent of the nation's wells. (*Id.*)

In sum, as the trial court explained, "substantial evidence supported the conclusion that as of the late 1970's . . . Dow knew that PCE was a hazardous substance, indeed a potential human carcinogen, that had contaminated, and posed a threat to further contaminate, public drinking water supplies." (AA 52: 13232:11-15)

2.

Dow's Warnings Were Inadequate and Improper Even After Citing the Danger of Groundwater Contamination in a 1978 Newsletter

In a 1978 *Spot News* edition sent to dry cleaners, Dow reported that "[d]ry cleaners have been sued for contamination of groundwater used for drinking purposes. Contamination occurred over the years as a result of *previously* acceptable practices of solvent disposal, loosely

called 'dumping' or 'back lot burial.'" (AA 82: 21756 [Trial Ex. 3], emphasis added) Despite this acknowledgment — and despite holding itself out as a PCE expert (AA 52: 13232:7-9) — Dow provided only minimal warnings to reduce the amount of PCE waste, and did not even instruct dry cleaners to stop dumping or how to dispose of the waste:

> Be assured your solvent chillers and water separators are functioning properly. Before disposing cartridge filters, drain them overnight or dry them in a cabinet vented to your "sniffer." Maintain efficient operation of your distillation equipment so that you minimize the amount of residual solvent that can be potentially lost in filter muck and still bottom waste. (AA 82: 21756 [Trial Ex. 3])

In short, those instructions still instructed PCE disposal by any method, including down the sink and in the trash. Indeed, Dow continued to direct dry cleaners to engage in polluting practices. (E.g., AA 83: 21964 [Trial Ex. 397, § 5 (1991 MSDS instructing disposal of "small" amounts of PCE outdoors)])

The main subject of Dow's 1978 *Spot News* edition was not teaching safe PCE disposal but the opposite: attacking any regulation of PCE dry cleaning. For example, Dow deplored the "growing maze" of "burdensome" and "unnecessar[y]" and "irresponsible charges" against PCE. (AA 82: 21753, 21754, 21757 [Trial Ex. 3]) Dow asserted that regulations "designed to restrict" PCE threatened dry cleaners' profitability. (AA 82: 21756 ["Every business operator should be aware of . . . regulations which may affect his profitability — indeed his very ability to stay in business!"])

Even after acknowledging in 1978 that dumping PCE caused

contamination, in the 1980's Dow did not forthrightly instruct against that practice. It only "strongly discouraged" dumping PCE into sewers or bodies of water and noted that it "may be illegal" to do so. (AA 82: 21780 [Trial Ex. 20, § 4 (1980)]; AA 83: 21931 [Trial Ex. 137, § 4 (1985)]; AA 83: 21935 [Trial Ex. 138, § 5 (1986)]) This was an invitation to dry cleaners to decide for themselves, and the invitation did not even describe the state of the law responsibly. The federal RCRA was amended during this time period to require the majority of dry cleaners to dispose of PCE as hazardous waste — that is, with licensed waste haulers. (RT 5: 617:24-618:18; *id.* at 616:7-11 [RCRA amendment in 1983, effective in 1984]) In 1979, Dow began telling dry cleaners they had to comply with the law when disposing of PCE. (E.g., AA 83: 21882-21883 [Trial Ex. 57, § 4]) But Dow knew many regulations permitted PCE disposal in the sewers (RT 6: 688:17-23 [regulations differed by jurisdiction]; RT 5: 642:14-18 [federal regulations allowed separator water to be discharged into sewers]), a practice Dow also knew would lead to groundwater contamination (*post*, pp. 99-101), so even its instructions to conform to regulations were knowingly dangerous.

Not until 1988 did Dow finally start issuing a general instruction not to dump PCE in sewers, bodies of water, or on the ground. (AA 83: 21940 [Trial Ex. 139, § 5]) Even then, Dow continued to instruct that "small" leaks be cleaned up and "[r]emove[d] to out of doors" — *i.e.*, dumped outside on the ground. (AA 82: 21780 [Trial Ex. 20, § 4 (1980)]; AA 83: 21930 [Trial Ex. 137, § 4 (1985)]; AA 83: 21935 (Trial Ex. 138, § 5 (1986)]; AA 83: 21940 [Trial Ex. 139, § 5 (1988)]; AA 83:

21886 [Trial Ex. 58, § 5 (1989)]; AA 83: 21915 [Trial Ex. 131, § 5 (1989)]; AA 83: 21964 [Trial Ex. 397, § 5 (1991)])

In addition to condoning the disposal of "small" amounts of PCE on the ground, Dow's disposal instructions in the 1980's and into the 1990's referred only to the "unused contents," giving no directions at all on how to dispose of "used" PCE. (AA 83: 21931 [Trial Ex. 137, § 4 (1985)]; AA 83: 21935 [Trial Ex. 138, § 5 (1986)]; AA 83: 21940 [Trial Ex. 139, § 5 (1988)]; AA 83: 21886 [Trial Ex. 58, § 5 (1989)]; AA 83: 21915 [Trial Ex. 131, § 5 (1989)]; AA 83: 21964 [Trial Ex. 397, § 5 (1991)]) Moreover, well after the 1984 RCRA amendments requiring most dry cleaners to use licensed waste haulers, Dow's instructions for "unused contents" merely referred to the use of licensed waste haulers as a "*preferred* option." (*Id.*, italics added)

3.

Dow Deliberately Failed to Warn Against Discharging Separator Water with PCE Despite Knowing This Would Cause Groundwater Contamination

Dow knew separator water was being discharged to the sewer: Dow itself instructed to do so (AA 82: 21767 [Trial Ex. 13, ¶ 3 under "Recovery Tumbler"]), and over the years its representatives visited many dry cleaners where this "industry practice" occurred. (Phase 1 Trial Ex. 119 [10/4/02 Landon Depo] at 155:25-156:11, 157:9-20) Yet, through the early 1990's, Dow still had not corrected its instructions. Indeed, its MSDSs were silent on how to handle separator water (e.g., AA 83: 21963 [Trial Ex. 397 (1991 MSDS)]), even though Dow knew

that groundwater contamination could result from this industry practice.

Dow claimed at trial that separator water did not "bec[o]me an issue" until the early 1990's (RT 4: 407:12-23), arguing this justified its failure to warn. But the jury could have reasonably found otherwise. Substantial evidence supports Dow's knowledge by at least the early 1980's that PCE in separator water could cause contamination.

As noted previously, Dow admitted below that separator water "contains up to 150 parts-per-million of [PCE] that might get into a city sewer. . . ." (RT 4: 407:18-21) Indeed, Dow's MSDSs as early as 1973 noted PCE's solubility in water. (AA 83: 21880 [Trial Ex. 55, § 3[18]]; see also, e.g., Phase 1 Trial Ex. 611 [Wentz Depo] at 28:19-29:10 [the solubility of PCE in water is a "well-known physical fact" for "any chemist who studied this and focused on this issue"])

Concerns about PCE in separator water were widely circulated in the early 1980's. In 1982, the International Fabricare Institute ("IFI") — the largest trade organization for the industry (RT 17: 1778:5-10) — reported "concerns over [PCE] contained in water discharged to the sewer." (AA 82: 21847 [Trial Ex. 31]) These concerns were raised by state and local governments, and Florida considered a tax on dry cleaners to upgrade sewage plants due to PCE discharges to sewers. (*Id.*) The 1982 IFI publication cited the EPA's consideration of such regulations, and the agency's decision not to adopt one based on IFI data submitted in 1978. (*Id.*) In addition, the State of Washington was

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[18] The MSDS states that PCE's solubility in water is 0.015 gram/100 gram. This is equivalent to 150 parts-per-million solubility. (RT 114: 3300:8-13)

considering separator water regulation in 1983. (RT 17: 1825:1-6; AA 82: 21846 [Trial Ex. 31 (1983 letter attaching the 1982 IFI newsletter)])

Substantial evidence supports Dow's knowledge of such government concerns, in part through its membership in an organization (HSIA) formed to address regulations of PCE and similar chemicals. (Phase 1 Trial Ex. 428 [Robinson Depo] at 192:22-23, 193:3-10; *see also id.* at 48:1-20 ["If there were proposed federal . . . or state regulations which affected the . . . discharges or releases of substances into the environment, we probably addressed it [at HSIA meetings]."]) And the same witness testified that Dow representatives were present when HSIA was formed for that purpose. (*Id.* at 42:17-43:4)

Further, there were numerous additional reports in this period of separator water causing contamination. For example — a 1983 publication by industry group Neighborhood Cleaners Association (AA 83: 21901 [Trial Ex. 75]); a 1986 publication by another group, California Fabricare (AA 83: 21958 [Trial Ex. 231]; *id.* at 21957 [stating that Bates 21958 is from California Fabricare]; and an IFI report in the mid- to late 1980's that it had been sued for separator water discharges into sewers. (RT 17: 1789:10-1791:19)

Against the foregoing backdrop, the jury could have reasonably found not credible or probative the testimony of Janet Hickman, one of Dow's product stewards, that as late as 1992 she was "[v]ery . . . surprised" to hear that separator water could cause contamination. (Phase 1 Trial Ex. 123 [9/18/02 Hickman Depo] at 90:7-22) She testified in 2002 it was merely a "hypothesis" that separator water caused contamination in the City of Turlock. (*Id.* at 90:11-20; see also *id.* at

25:16-26:2, 26:4-6) The jury could find her cavalier attitude about PCE contamination damning of Dow.

4.

Dry Cleaners "Desperately Needed" the Instructions Dow Omitted

The jury heard credible testimony from Gerald Levine, who worked for a trade association, that dry cleaners "desperately needed" information about PCE's environmental hazards and how to handle PCE waste. (RT 4: 488:13-18; RT 5: 582:14-583:6, 604:4-22) Even a Dow product steward acknowledged that dry cleaners needed information on how to handle PCE properly to avoid environmental contamination. (Phase 1 Trial Ex. 143 [Laurence Lee Depo] at 101:15-19, 101:22-25, 102:1-4) A Modesto cleaner testified he disposed of separator water in the sewer because no one, including the PCE manufacturers, had told him it was a problem. (Phase 1 Trial Ex. 108 [5/11/99 Simidian Depo] at 4:6-17, 88:11-16) He immediately stopped when he learned it was a problem. (*Id.* at 88:6-10)

There was an abundance of other evidence to the same effect — from the owner of Modesto dry cleaner Ideal (RT 9: 975:6-9, 979:16-23, 985:12-986:3, 986:12-15); the manager of Modesto dry cleaner Coffee Plaza (RT 29: 2834:2-23, 2840:28-2841:4); and an employee and son of the owner of Modesto dry cleaner Halford's. (RT 31: 3128:16-19, 3154:21-23)

Ultimately, the government had to tell dry cleaners to treat PCE as hazardous waste, because Dow and other manufactures had failed to initiate appropriate safety precautions. (RT 5: 604:19-605:7, 617:24-

618:18)

5.

Despite its Relevant Knowledge, Dow Did No Relevant Testing Until It Perceived a Liability Risk

Dow touted its product stewardship program as proof of its commitment to public health and the environment. (AA 83: 21919, 21926 [Trial Exs. 132, 133]; Phase 1 Trial Ex. 124 [9/19/02 Hickman Depo] at 134:18-135:24, 136:2-5, 137:25-138:7, 138:23-139:1, 139:3-9) But while Dow tested some of its chemicals, it conducted no further testing of PCE after learning it was contaminating public water supplies. (RT 14: 1551:14-20, 1552:19-23; RT 27: 2657:21-2658:2, 2665:20-22, 2667:12-22; Phase 1 Trial Ex. 123 [9/18/02 Hickman Depo] at 26:24-27:3, 27:10-13)

In 1991, however, discovery of PCE contamination in the City of Turlock prompted the HSIA to warn manufacturers they would likely face liability in similar cases: "Because the producers have been asked to financially assist dry cleaners associations, we should monitor the issue much more closely than we have to date." (AA 82: 21849 [Trial Ex. 38, sent to Dow and other manufacturers]; Phase 1 Trial Ex. 503 [Cammer Depo] at 40:6-10, 41:3-14 [addressing Depo Ex. 7]; RT 33: 3293:17-20 [Depo Ex. 7 is Trial Ex. 38])

It was not until after the Turlock incident — when Dow and other manufacturers perceived a risk of financial consequences — that the industry finally conducted testing on PCE in groundwater. (Phase 1 Trial Ex. 548 [Rowe Depo] at 166:25-167:3, 167:7-15, 167:23-168:1)

6.

Dow Stipulated It Was a $16 Billion Company

Dow stipulated that Modesto could use its "most recent balance sheet" for the punitive damages trial, rather than "any sales amounts or records." (RT 78: 8018:12-20) The balance sheet reflected a net worth of $16 billion. (AA 83: 21978 [Phase 1 Trial Ex. 780]; RT 79: 8037:1-8) The jury received appropriate instructions about considering Dow's net worth. (RT 79: 8047:20-27)

C.

THE TRIAL COURT'S REDUCTION RULING CANNOT SURVIVE SCRUTINY

1.

Introduction

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568) California juries have wide latitude in determining the appropriate level of punitive damages. (*Id.*; *Bankhead*, *supra*, 205 Cal.App.4th 68, 78) The role of the courts is to determine the *maximum* award under the Constitution; the courts' role "is not to find the 'right' level in the court's own view." (*Simon, supra*, 35 Cal.4th 1159, 1188)

Only when an award is "'grossly excessive'" in relation to a state's interests does the award violate the federal due process clause. (*BMW, supra,* 517 U.S. 559, 568; *Bankhead*, *supra*, 205 Cal.App.4th 68, 84) Accordingly, the due process analysis starts by identifying the state's

interest that the punitive damages award is intended to serve. (*BMW, supra*, 517 U.S. 559, 568) Here, as the trial court explained, "that interest is easily identified and of great importance: it is California's long-standing interest in protecting the quality of its drinking water." (AA 52: 13228:16-18) More than half a century ago, the California Legislature declared that Californians "have a primary interest" in high quality drinking water, and it found that degradation of water quality causes "great detriment to the peace, health, safety and welfare" of Californians. (Water Code §§ 12922, 12922.1 [adopted in 1961])[19] Even Modesto's motto, posted a century ago, emphasizes the importance of water: "Water, Wealth, Contentment, Health." (RT 34: 3399:15-21)

2.

The Guideposts

Turning to the three guideposts in the due process analysis, as discussed in *Bankhead, supra,* this Court considers: (1) the reprehensibility of Dow's misconduct; (2) the difference between the punitive damages awarded by the jury and the harm that Modesto suffered; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable

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[19] See also AA 52: 13228:19-13229:3 (citing Water Code § 12922; Water Code § 13000, adopted in 1969 ["activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable . . ."]; and Health & Saf. Code § 116270(e) ["the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable" (formerly Health & Saf. Code § 4010, adopted in 1976)]).

cases. (205 Cal.App.4th 68, 84-85) These guideposts should not be rigidly applied. As stated in *Bankhead*:

> Our own Supreme Court has characterized the constitutional test as "a three-factor weighing analysis looking to the nature and effects of the defendant's tortious conduct and the state's treatment of comparable conduct in other contexts." (*Id.* at 85, quoting *Simon, supra*, 35 Cal.4th 1159, 1171-1172)

3.

Dow's Conduct Was Highly Reprehensible

The most important guidepost in determining the reasonableness of a punitive damages award is the degree of the defendant's reprehensibility. (*Bankhead, supra,* 205 Cal.App.4th 68, 85) As the trial court explained, substantial evidence supports a finding that Dow knew PCE was hazardous and could contaminate drinking water and endanger the public if not properly handled and disposed of, and yet for years it deliberately failed to provide adequate warnings of the dangers or steps to avoid contamination. (AA 52: 13232:11-13233:8) Indeed, Dow instructed dry cleaners to take steps that Dow knew would *contaminate* public water supplies.

In addressing a defendant's reprehensibility, the Court "consider[s] whether [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of

intentional malice, trickery, or deceit, or mere accident." (*Id.* at 85; cits. and internal quots. omitted) Here, these factors weigh in favor of a high degree of reprehensibility.

a.

Dow's Conduct Caused Physical Harm as Well as Economic

The trial court acknowledged that PCE in groundwater and soil may pose serious health hazards, but ultimately characterized the nature of the harm to Modesto as "essentially economic." (AA 52: 13231:4-22) This was error.

Although Modesto did not seek damages for personal injury, the injury caused by Dow was far from "purely" or "essentially" economic. (Cf. *BMW, supra,* 517 U.S. at 576 [damage to a new car was "purely economic"]) Dow's product and conduct contributed to a serious health hazard in Modesto's drinking water supplies. As the trial court itself recognized, substantial evidence supports the finding that Dow's conduct "threatened public health and necessitated remedial action by the City to protect . . . the health and safety of its citizenry. . . ." (AA 52: 13237:15-18) The jury awarded Modesto damages for the costs of installing and maintaining well filters to remove PCE and protect against the possibility of serious health risks, including cancer. (AA 42: 10500 & 10506) Indeed, Modesto sought injunctive relief in this case to remove PCE from soil and groundwater and prevent physical harm.

Even in those cases where harm is only economic, it "does not mean that a punitive damages award should not sting." (*Bardis v. Oates*

(2004) 119 Cal.App.4th 1, 26-27 [setting 9-to-1 ratio even though there was only economic harm; review den. & cert. den.)

b.

Dow Was Indifferent to, or Recklessly Disregarded, the Health and Safety of Others

As the trial court explained, substantial evidence supports the finding that Dow knew by no later than the late 1970's that PCE was hazardous — indeed, a potential carcinogen — and that PCE had contaminated, and could further contaminate, Modesto's public drinking supplies. (AA 52: 13232:11-15)

The jury could have reasonably found, as the trial court explained, that Dow provided warnings in its "red flag" reports to protect its *own* facilities against PCE hazards while deliberately refusing to share those warnings with the dry cleaning community. (AA 52: 13233:1-5) Dow's detailed internal "red flag" warnings were in stark contrast to its instructions to dry cleaners to casually dispose of PCE, and its deliberate failure to warn about contamination or how to avoid it.

Dow itself found PCE in wells in 1978 (AA 82: 21722 [Trial Ex. 2]), had an enormous library collection with extensive information on the health and environmental effects of PCE (e.g., RT 13: 1317:11-1318:3), and had "product stewards" who "kn[e]w everything" about PCE. (RT 27: 2682:10-13) Given the overwhelming evidence, Dow conceded it knew by at least 1978 of PCE contamination in groundwater. (E.g., AA 47: 12041:9)

Substantial evidence supports the finding that Dow did not share its extensive knowledge of PCE's hazards with dry cleaners. (AA 52: 13232:21-13233:8) For example, Dow did not warn of PCE's hazards or the likelihood of groundwater contamination, even after its competitor finally did so warn. (AA 83: 21904-21905 [Trial Ex. 89, §§ 7, 9 (1980 PPG MSDS)]; see also AA 83:21906 [Trial Ex. 90 (1980 PPG letter)]) Indeed, the year that Dow found PCE in wells, its dry cleaner publication focused on how PCE regulations purportedly threatened dry cleaners' businesses, not on the risks of contamination or how to avoid it. (AA 82: 21753 [Trial Ex. 3])

Substantial evidence also supports the finding that Dow intentionally did not advise how to properly dispose of PCE to avoid contamination. Indeed, for well over a decade, Dow continued to direct dry cleaners to engage in polluting practices, including dumping PCE materials used to clean up spills. (E.g., AA 83: 21964 [Trial Ex. 397, § 5 (1991)]) And for a decade after it found PCE in wells, Dow merely "discouraged" the dumping of PCE into sewers or bodies of water. (E.g., AA 83: 21935 [Trial Ex. 138, § 5 (1986)]) Further, Dow did not provide simple solutions to avoid contamination even though its own employees testified that such practices would prevent pollution. (Phase 1 Trial Ex. 123 [9/18/02 Hickman Depo] at 104:14-24, 105:2-9)

A reasonable inference is that Dow chose not to provide adequate warnings in order to increase its sales, and that it did not care much about PCE's hazards until after the Turlock incident when it perceived a risk of financial consequences for PCE contamination. As the trial court concluded:

> In short, there was sufficient evidence to support a finding that for over a decade . . . Dow consciously failed to provide to the dry cleaner trade in Modesto information reasonably calculated to avoid the very environmental risk that materialized at the sites found by the jury to be contaminated. (AA 52: 13233:5-8)

In sum, Dow's actions "evinced an indifference to or reckless disregard of the health and safety of" Modesto residents, and thus were highly reprehensible. (*Bankhead, supra*, 205 Cal.App.4th 68, 86; see also *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 355 [evidence of harm, or a grave risk of harm, to nonparties can show that a defendant's conduct "was particularly reprehensible"]; see also *id.* at 357 ["[C]onduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few."])

c.

Modesto's Financial Vulnerability Is Irrelevant, Not Mitigating

The trial court concluded that Modesto was not financially vulnerable and thus the third factor "reflects a low level of culpability." (AA 52: 13234:21-13235:9, 13235:20-27) But even if financial vulnerability is not shown, the legal result is not low culpability. It simply makes this factor irrelevant. (*Bullock*, *supra,* 198 Cal.App.4th 543, 561-562) This predicate of the ruling below is demonstrably untenable.

Further, *Bullock* explained that financial vulnerability is not the only relevant kind. (*Id.* at 562) The U.S. Supreme Court's due process cases on this subject have only involved economic harm. But *Bullock*

explains "that, in a case involving physical harm, the physical . . . vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility . . . ." (*Id.* at 562) Here, Modesto's primary source of public drinking supplies were physically vulnerable to contamination from Dow's PCE, which posed a serious threat to human health.

d.

Dow Engaged in Intentional, Repeated Conduct

In *Bankhead*, *supra,* 205 Cal.App.4th 68, this Division considered the last two factors together, as other courts have, and as it makes sense to do here as well. (*Id.* at 86) In that case, the defendant had known about the risks of exposure to asbestos yet failed to provide warnings for two decades. (*Id.* at 73) When the defendant finally provided warnings, the warnings were still inadequate. (*Id.*) As this Division concluded:

> limiting the award . . . would undermine the purpose of punitive damages by giving undue credit to [the defendant's] belated efforts to warn users of its products about the hazards of asbestos, which the jury implicitly found were ineffective and inadequate. (*Id.* at 88)

So here. As the trial court explained, Dow knew of PCE's environmental hazards and "of the probable dangerous consequences of [its] conduct," but deliberately failed for more than a decade to provide adequate warnings to avoid those consequences. (AA 52: 13236:17-20, 13237:11-20) Worse, Dow knowingly instructed dry cleaners to dispose of PCE in such a way as to cause groundwater contamination. As in *Bankhead*, although there was no direct evidence that Dow *intended* to

cause injury, there was a "prolonged failure to take adequate measures to protect" against the harm. (205 Cal.App.4th 68, 86)

The trial court cited as a mitigating factor that Dow gave "some warnings and advice" from the late 1970's to the early 1990's, stating that there was not a "total absence of warnings or advice," and that Dow voluntarily ceased the challenged conduct in the early 1990's before being sued. (AA 52: 13233:26-13234:7, 13236:20-22) This was error. The warnings remained dangerously insufficient throughout, and failed to prevent the harm, as the trial court itself recognized. (E.g., *id.* at 13233:5-8) Further, the trial court overlooked the evidence that Dow's improved warnings in the early 1990's came after the Turlock incident when it perceived a risk of financial consequences for contamination.

As the California Supreme Court has explained, repeated conduct is more reprehensible, and thus may be punished more severely, than isolated incidents. (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1196, 1206 ("*Johnson I*"), citing *State Farm, supra*, 538 U.S. 408, 419) In considering reprehensibility, the courts should consider the "scale and profitability" of a defendant's course of conduct. (*Id.* at 1207) Here, Dow's "profitable but wrongful" conduct continued for decades, and the consequences will last for centuries. (*Id.*) "'Strong medicine'" is thus required for deterrence. (*Id.*; quoting *BMW, supra*, 517 U.S. 559, 577)

4.

The Court's Ratio Analysis Failed to Account for Modesto's Uncompensated and Potential Harm

After addressing reprehensibility, courts consider whether punitive damages bear a "reasonable relationship" to the harm to the plaintiff. (*Bankhead*, *supra*, 205 Cal.App.4th 68*,* 88; cits. and internal quots. omitted) As a rough guide to "reasonableness," courts looks to the ratio between the relevant harm and the punitive damages awarded. (*Id.*)

In this part of the analysis, the court considers not only the actual damages awarded but also the *uncompensated* or *potential* harm to the plaintiff. (*Id.*; *BMW, supra,* 517 U.S. 559, 575, 582) Thus, a higher ratio may be justified for "extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages . . . ." (*Simon, supra,* 35 Cal.4th 1159, 1182; see also *id.* at 1173)

In other words, courts must consider that, as here, compensatory damages do not always reflect the harm caused by the defendant. (*Id.* at 1173 ["in some cases compensatory damages are not the definitive quantification of harm"]) *Mathias v. Accor Economy Lodging, Inc*. (7th Cir. 2003) 347 F.3d 672 recognized this principle, affirming a 37.2-to-1 ratio where the defendant's behavior was outrageous but the compensable harm was small and hard to quantify. (*Id.* at 676-677)

Here, the ratio between the punitive damages awarded by the jury and the compensatory damages awarded by the jury is 23 to 1. This ratio, however, does not take into account the egregiousness of Dow's conduct as compared to the small compensatory damages award, and the uncompensated and potential harm to Modesto. Modesto's

expert had estimated that it would cost $40 million for future expenses to remove PCE from the Phase I sites. The jury was barred from hearing and appraising this testimony in light of the MIL 40 ruling, and the trial court dismissed this evidence as "unrealistic" in appraising the punitive damages. (AA 52: 13240:4-7) But the court failed to recognize that a fundamentally different standard applies to admissibility of damages evidence and the proper assessment of punitive damages.

Even accepting the court's view that Modesto's future clean-up costs were too uncertain to be considered as compensatory damages, the uncompensated and potential harm should have been considered in assessing punitive damages. The court and the jury knew the contamination was so significant that federal and state authorities had become involved.

The court also had a credible estimate of $40 million as the amount *someone* would have to pay for the clean up. So the court knew at least the ballpark range of the harm Dow had caused but was barred from jury consideration. (See *TXO Production Corp. v Alliance Resources Corp.* (1993) 509 U.S. 443, 446, 462 [punitive damages award of $10 million upheld where compensatory damages were only $19,000 because of the potential harm to the plaintiff, even though the amount of potential harm was uncertain; plurality opinion])

Romo v. Ford Motor Co. (2003) 113 Cal.App.4th 738, is instructive. There, the defendant's conduct had caused fatal injuries, and California law precluded recovery of certain damages in wrongful death cases. Nonetheless, *Romo* held that uncompensable harm could still be considered in analyzing punitive damages. (*Id.* at 760-761) The

court reasoned that it would be contrary to public policy if punitive damages had to be lower because the defendant's conduct led to fatal rather than non-fatal injuries. (*Id.* at 761)

Similarly here, it would be contrary to public policy if punitive damages had to be lower because the jury was prevented from considering a large category of damages the City is actually experiencing.

5.

Ratios in Comparable Cases Support the Jury's Ratio Here

There is, of course, no mathematical precision to determining the maximum constitutional award, but case law provides context for comparison. In *Bankhead*, in upholding the jury's 2.4-to-1 ratio, this Division provided a summary of the constitutionally accepted ratios of punitive damages to compensatory damages. This Division noted a 6-to-1 ratio in *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204 (review den.), which this Division described as a sexual harassment case involving only "moderately reprehensible" conduct, where a store manager did not cause or threaten physical harm and the employer immediately transferred the manager after receiving reports of his misconduct. (*Bankhead, supra*, 205 Cal.App.4th 68, 89; *Gober, supra,* 137 Cal.App.4th 204, 219-223)

And, in *Simon*, *supra*, 35 Cal.4th 1159, the California Supreme Court held that a 10-to-1 ratio was proper in a case with low reprehensibility. There was a single act of fraud, and no physical harm, threat to health or safety, or a financially vulnerable plaintiff. The

defendant had substantial wealth, and the compensatory damages were relatively small. (*Bankhead, supra*, 205 Cal.App.4th 68, 89-90; *Simon, supra*, 35 Cal.4th 1159, 1180, 1188-1189)

A 10-to-1 ratio was also deemed proper where a car manufacturer concealed car repair histories when selling used cars, and the company's policies were designed to circumvent the state lemon law and had the "potential for great harm to the buying public." (*Johnson v. Ford Motor Co.* (2005) 135 Cal.App.4th 137, 146-147, 150 (review den. ("*Johnson II*").

A 16-to-1 ratio was approved in *Bullock, supra,* 198 Cal.App.4th 543, where a tobacco company intentionally deceived the public about the adverse health effects of smoking. The defendant's conduct was extremely reprehensible, and the compensatory damages were not substantial or punitive in nature. (*Bankhead, supra*, 205 Cal.App.4th 68, 90; *Bullock, supra,* 198 Cal.App.4th 543, 560-563, 566-567, 569 & fn. 16, 573)

Here, as in *Bullock*, Dow's conduct was extremely reprehensible, and the compensatory damages were not substantial or punitive in nature. Dow engaged in intentional, repeated, and profitable conduct over more than a decade that seriously threatened human health and safety. There was extensive uncompensated and potential harm to Modesto which supports a higher ratio. Importantly, as discussed below, Dow has substantial wealth, and the jury found that a substantial punitive damages award was necessary to punish and deter Dow's misconduct.

6.

The Trial Court Erred by Relying on a "Due Process Norm"

The trial court relied heavily, and improperly, on a purported "due process norm" of 4 to 1. The court cited *Simon, supra,* 35 Cal.4th 1159, for the proposition that ratios of 3 or 4 to 1 are, "[g]enerally speaking, . . . the due process norm." (AA 52: 13239:5-10) The trial court then relied on that "norm" to support its 4-to-1 ratio in this case. (*Id.* at 13239:11-15, 13246:15-18)

Simon repeated *State Farm's* statement that past decisions and statutory penalties approving 3-to-1 or 4-to-1 ratios were "'instructive,'" and *Simon* then added that they were instructive "as to the due process norm." (*Simon, supra*, 35 Cal.4th 1159, 1182) But as *State Farm* and *Simon* made clear, the point of discussing a "norm" was that "'[*s*]*ingle digit* multipliers are more likely to comport with due process'" rather than the *triple digit* multipliers that were awarded in *State Farm*, *BMW*, and *Simon*.[20] (*Simon, supra*, 35 Cal.4th 1159, 1183; quoting *State Farm, supra*, 538 U.S. 408, 425; italics added by *Simon*; see also *Mathias, supra,* 347 F.3d 672, 676 ["The Supreme Court did not . . . lay down a 4-to-1 or single-digit-ratio rule [—] it said merely that 'there is a

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[20] As *Simon* explained after its one reference to a "due process norm": "Reviewing the history of double, triple and quadruple damages, the court in *State Farm* warned that 'these ratios are *not binding,*' but only 'instructive.' Moreover, their instruction, what '[t]hey demonstrate,' is simply that '[*s*]*ingle digit* multipliers are more likely to comport with due process' than ratios of 500 to 1, as in *BMW,* or 145 to 1, as in *State Farm.*" (*Simon, supra*, 35 Cal.4th 1159, 1183; italics added by *Simon*; cits. omitted])

presumption against an award that has a 145-to-1 ratio' . . . ."; quoting *State Farm, supra*, 538 U.S. 408, 426)

Here, the jury's 23-to-1 award was not a "breathtaking multiplier," such as the 340-to-1 ratio in *Simon* or the 500-to-1 ratio in *BMW*. (*Simon*, *supra*, 35 Cal.4th 1159, 1181-1183; cit. and internal quots. omitted) As the cases make clear, the analysis is case specific. And there is no "norm;" there is simply the use of other cases for comparison.

The court erred not only by adopting a 4-to-1 ratio, but also by reducing the jury's punitive damages award against Dow to less than half of that: a 1.7-to-1 ratio. The court reasoned that the 4-to-1 ratio should apply to the ratio between compensatory damages and the *total* punitive damages award against both Dow and Vulcan. (AA 52: 13242:10-12, 13245:24-27) The court then split that total award (only four times compensatory damages) between the two defendants based on the "relative percentages" of punitive damages awarded against them. (AA 52: 13242:12-16, 13245:27-13246:4) Under the court's reasoning, if there had been no punitive damages award against Vulcan, the punitive damages award against Dow (as reduced by the court) would have been higher (that is, 4-to-1, not 1.7-to-1). Limiting the award against Dow solely because there was a punitive damages award against Vulcan undermines the purpose of punitive damages awards and conflicts with the constitutional analysis. The inquiry focuses on *each defendant's* conduct and its level of reprehensibility, and the award necessary to punish and deter *that particular defendant*. This inquiry is not affected by other defendants' conduct. (Cf. *Bankhead, supra*, 205 Cal.App.4th

68, 87 [rejecting the argument that a defendant's reprehensibility for punitive damages is affected by other defendants' conduct])

The trial court cited *Bardis, supra*, 119 Cal.App.4th 1, to support its allocation of punitive damages (AA 52: 13241:12-13242:2), but in *Bardis* one defendant owned and controlled the other defendant so there was "no compelling reason . . . to maintain strict culpability lines between" them. (119 Cal.App.4th 1, 21, fn. 8) Here, Dow and Vulcan are two separate, distinct and unaffiliated companies. *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists* (9th Cir. 2005) 422 F.3d 949 also cited by the trial court (AA 52: 13242:4-9), allocated the punitive damages award, but provided no explanation for doing so. (422 F.3d 949, 963-964)

7.

Comparable Civil Penalties Support the Verdict

The third factor in constitutional analysis is a comparison between the punitive damages and authorized civil penalties. This factor "is not particularly useful in a case involving only common law tort duties," as here. (*Bankhead, supra*, 205 Cal.App.4th 68, 85, fn. 10) As *Simon, supra,* explains:

> The third guidepost is less useful in a case like this one, where plaintiff prevailed only on a cause of action involving common law tort duties that do not lend themselves to a comparison with statutory penalties than in a case where the tort duty closely parallels a statutory duty for breach of which a penalty is provided. (35 Cal.4th 1159, 1183-1184; cit. and internal quots. omitted)

In *Bankhead*, this Division disregarded this factor because the case involved only common law tort duties. (*Bankhead, supra*, 205 Cal.App.4th 68, 85, fn. 10)

If the Court considers this factor in this case, the closest "comparable" civil penalties are significant, allowing more than $200 million for over a decade of violations. Statutes for environmental damage contain penalties that, as the trial court explained, "illustrate legislative judgments that impose substantial penalties . . . for conduct harmful to the environment." (AA 52: 13244:6-8) As the trial court further explained, "[e]nvironmental laws addressing unauthorized discharges of polluting substances impose significant penalties for unlawful discharges of hazardous substances." (*Id.* at 13244:9-10) The penalties generally allow for $37,500 per day of violation. (E.g., 40 C.F.R. § 19.4 [penalties increased to $37,500, except for the Safe Drinking Water Act, which was increased to $32,500];[21] Clean Water Act, 33 U.S.C. § 1319(d) [civil penalty up to $25,000 per day for each violation]; Safe Drinking Water Act, 42 U.S.C. § 300g-3(g)(3)(B) [civil penalty up to $25,000 per day of violation]; CERCLA, 42 U.S.C. § 9609(a)(1) & (b) [civil penalty up to $25,000 per violation, or per day of violation]; RCRA, 42 U.S.C. § 6928(g) [civil penalty up to $25,000 for each violation])

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[21] The EPA had the authority to, and did, increase the statutory penalties under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410 (Oct. 5, 1990) 104 Stat. 890 (reprinted in Historical and Statutory Notes following 28 U.S.C. § 2461).

The trial court concluded that other potentially comparable statutory penalties are those found in the "right to know" and "warnings" provisions of state and federal law. (Cal. Safe Drinking Water and Toxic Enforcement Act (Prop. 65), Health & Saf. Code, § 25249.7, subd. (b)(1) [civil penalty up to $2,500 per day for each violation]; 40 C.F.R. § 19.4 [federal penalties increased to $37,500]; Toxic Substances Control Act, 15 U.S.C. § 2615(a)(1) [civil penalty up to $25,000 for each violation]; Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11045(a) [civil penalty up to $25,000 for each day in which the violation occurs])

The trial court stated that these penalties are "substantial" but "do not reach the levels imposed by the jury. . . ." (AA 52: 13245:8-10) The court failed to consider, however, that at the daily rate of $37,500 for 15 years[22] (5,475 days), the penalty is more than $200 million, which is far more than the $75 million punitive damages award against Dow.

Dow argued below that the EPA rarely imposes such high penalties, even if they are authorized. (AA 47: 12052:13-12053:10) It pointed to EPA's guidelines on its civil penalty policies, which states that the daily fine should "generally" be between $1,100 and $5,500. Even using $5,500 per day rather than $37,500 per day for 15 years yields more than $30 million.[23] The punitive damages award against Dow was

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[22] Modesto sought punitive damages for Dow's conduct from the late 1970's through the early 1990's, and the trial court cited this same time period. (RT 71: 7016:12-7017:1; AA 52: 13232:15-22)

[23] Dow also stated that the penalties after 180 days are

(continued...)

only 2.5 times that amount. Courts have affirmed punitive damages awards that were more than three or four times the civil penalty. (*Johnson II, supra,* 135 Cal.App.4th 137, 140, 148, 150 [$175,000 punitive damages award where the comparable civil penalty would be $35,623.20 (the penalty was two times compensatory damages of $17,811.60)]; *Bardis, supra*, 119 Cal.App.4th 1, 5, 24 [$1.5 million punitive damages award where the comparable civil penalty would be $496,582.89 (the penalty was three times compensatory damages of $165,527.63)])

Accordingly, if the Court considers this factor, civil penalties support the $75 million award against Dow.

8.

Dow's Net Worth Supports the Verdict

Dow's wealth may be considered in the constitutional equation to ensure the punitive damages award vindicates the state's interest in deterring harmful conduct. (*Simon*, *supra*, 35 Cal.4th 1159, 1185 [a defendant's wealth is "a legitimate consideration in setting punitive damages," citing *State Farm, supra*, 538 U.S. 408, 428]; see also *Bullock, supra,* 198 Cal.App.4th 543, 558) "[T]he award must be large enough to deter similar future conduct without exceeding the amount necessary for punishment. Consideration of the defendant's net worth enables the jury to strike that balance." (*Century Surety Co. v. Polisso*

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[23](...continued)
"discretionary." (AA 47: 11928) This means that violators are on notice that the EPA may decide to impose penalties for more than 180 days.

(2006) 139 Cal.App.4th 922, 967) Although wealth alone cannot replace the guideposts and cannot justify an otherwise unconstitutional award, the guideposts do not preclude juries from imposing "awards that serve important state interests and provide a meaningful deterrent against corporate misconduct." (*Simon*, *supra*, 35 Cal.4th 1159, 1186; cit. and internal quots. omitted)

Dow's net worth is approximately $16 billion. (AA 83: 21978 [Phase 1 Trial Ex. 780]; RT 79: 8037:1-8) The punitive damages award is less than 1 percent of Dow's net worth, which is "tantamount to a slap on the wrist." (*Bardis, supra,* 119 Cal.App.4th 1, 26 [punitive damages award of less than 1 percent of the defendant's net worth was "tantamount to a slap on the wrist"]; see also *Century Surety, supra*, 139 Cal.App.4th 922, 967 [punitive damages award less than 3 percent of the defendant's net worth "would not amount to much more than a slap on the wrist"])

As in *Johnson II*, this Court too should consider that the jury found a large punitive damages award necessary to punish and deter Dow. (*Johnson II, supra*, 135 Cal.App.4th 137, 149)

D.

THIS COURT SHOULD REVERSE THE REDUCTION ORDER AND REMAND WITH DIRECTIONS TO REINSTATE THE VERDICT

This brief has already documented the broad equitable powers of reviewing courts in selecting and fashioning dispositions. (*Ante*, pp. 51-52) No authority or logic suggests those powers are more restricted in

punitive damages cases than any others. There is divided authority on one possible disposition in such cases, a remand directing the trial court to reconsider its ruling on a new trial motion.[24] But this appeal should not require a resolution of that issue. The Court's broad authority unquestionably permits the remand Modesto requests — with directions to reinstate the jury's award — and that is the proper disposition.

"The reviewing court may . . . modify a judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. (Code Civ. Proc., §§ 43, 906.)" (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499) The key word for present purposes is "may" — the court *may* remand with directions for a new trial or further proceedings. That means there is no compulsion to do so.

Judicial economy has long been accepted as a proper factor in exercising this appellate discretion. "The theory is that, where the appellate court can correct an erroneous judgment, it will do so in order to avoid the additional expense, delay, and hardship of reversal and new trial." (9 Witkin, Cal. Proc. 5th (2008) Appeal, § 855, p. 918) Indeed, more than a century ago, when judicial resources were not nearly as pressed as they are today, *Fox v. Hale & Norcross Silver Mining Co.* (1898) 122 Cal. 219 held that, when the parties' "rights can be finally determined here, this court will render its own judgment to that effect,

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[24] Compare *Delos v. Farmers Insurance Group, Inc.* (1979) 93 Cal.App.3d 642, 667-668; *Lippold v. Hart* (1969) 274 Cal.App.2d 24, 26-27; *Andersen v. Howland* (1970) 3 Cal.App.3d 380, 385; with *Barrese v. Murray* (2011) 198 Cal.App.4th 494, 503-508.

or will direct such action in the court below as in its opinion will best conserve the rights of the parties to the action, without subjecting them to further delay or expense." (*Id.* at 221-222; see also *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1170 (review den.) ["[w]henever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination"].)

For all the foregoing reasons, substantive and discretionary, this Court should not further elongate this case by requiring a new trial or any further proceedings on punitive damages. It should remand with directions to enter the jury's original award as the proper judgment on this issue.

VI.

THE COURT SHOULD VACATE THE COST AWARDS AGAINST MODESTO ON PREVAILING-PARTY GROUNDS IF ITS APPEAL RESULTS IN A FAVORABLE OUTCOME

By order of September 28, 2012 (AA 82: 21691), the court awarded costs to Dow and PPG against Modesto as the plaintiff. (*Id.* at 21696-21698) Those awards relied on a determination that Dow and PPG were prevailing parties in that regard. Accordingly, if this appeal results in a favorable outcome for Modesto against Dow or PPG, the Court should vacate the indicated cost awards and remand with appropriate instructions on this issue.

CONCLUSION

It is now 13 years and counting since Dow and PPG improperly avoided any exposure to nuisance liability below. This Court should not only reverse the 2003 summary adjudication to that effect, but also hold Dow and PPG to their oft-repeated praise of a public nuisance injunction to attack damages awards. For that reason or on the merits, the Court should remand on this issue with directions to enter a public nuisance injunction along the lines proposed in this brief. (*Ante,* p. 68) In addition, to ensure prompt and proper punishment of Dow, the Court should remand on this issue with directions to reinstate the jury's well supported punitive damages award in 2006.

DATED: September 5, 2013

Respectfully submitted,

BIEN & SUMMERS
MILLER, AXLINE & SAWYER

By: /S/
ELLIOT L. BIEN

/S/
JOCELYN S. SPERLING

Attorneys for Plaintiffs, Appellants and Cross-Respondents, CITY OF MODESTO et al.

CERTIFICATE OF LENGTH OF BRIEF

The undersigned, counsel for the appellants named above, hereby certifies pursuant to Rule 8.204(c)(1), California Rules of Court, that the foregoing brief is proportionately spaced, has a 13-point typeface, and contains 31,056 words as computed by the word processing program (WordPerfect X5) used to prepare the brief.

DATED: September 5, 2013

/S/
ELLIOT L. BIEN

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served:

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS CITY OF MODESTO AND CITY ATTORNEY OF MODESTO EX REL. PEOPLE OF THE STATE OF CALIFORNIA

by enclosing copies of same in envelopes or other packaging addressed to:

** *Service List attached* **

and placing them with the Federal Express Corporation on the date stated below for overnight delivery.

The foregoing is true and correct. Executed under penalty of perjury at San Rafael, California.

DATED: September 5, 2013

/S/

ELLIOT L. BIEN

City of Modesto, et al. v. The Dow Chemical Co., et al.
A134419

SERVICE LIST

Clerk of the Court
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

For delivery to Judges identifed on cover

Duane C. Miller, Esq.
Michael D. Axline, Esq.
Miller, Axline & Sawyer
1050 Fulton Avenue, Suite 100
Sacramento, CA 95825

Co-Counsel for Plaintiffs City of Modesto, et al.

Moris Davidovitz, Esq.
Charles Bolcom, Esq.
Davidovitz & Bennett, LLP
One Embarcadero Center, Suite 750
San Francisco, CA 94111-3514

Attorneys for Cross-Defendants City of Modesto, et al.

William D. Brown, Esq.
Brown & Winters
120 Birmingham Drive, Suite 110
Cardiff by the Sea, CA 92007

Attorneys for Cross-Defendant City of Modesto Redevelopment Agency (former)

Gennaro Filice, Esq.
Paul R. Johnson, Esq.
King & Spalding LLP
101 2nd Street, Suite 2300
San Francisco, CA 94105

Attorneys for The Dow Chemical Company

Helen E. Witt, Esq.
Thomas J. Morel, Esq.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Same

Gary J. Smith, Esq.
Lily N. Chinn, Esq.
Beveridge & Diamond PC
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251

Attorneys for PPG Industries, Inc.

Mark A. Turco, Esq. — *Same*
Beveridge & Diamond, P.C.
1350 "I" Street, N.W.
Washington, D.C. 20005

Eric Grant, Esq. — *Attorneys for R.R. Street & Co., Inc.*
Hicks Thomas LLP
8001 Folsom Boulevard, Suite 100
Sacramento, CA 95826

John B. Thomas, Esq. — *Same*
Hicks Thomas LLP
700 Louisiana St., Suite 2000
Houston, TX 77002

Noel Edlin, Esq. — *Attorneys for Modesto Steam Laundry & Cleaners, Inc.*
Antonio P. Garcia, Jr., Esq.
Bassi Edlin Huie & Blum, LLP
500 Washington Street, Suite 700
San Francisco, CA 94111

Keith D. Chidlaw, Esq. — *Attorneys for Estate of Shantilal Jamnadas dba Halford's Cleaners*
Schuering, Zimmerman, Scully & Doyle, LLP
400 University Avenue
Sacramento, CA 95825-6502