examine the results. That is, Shell had no opportunity to show that the records were *un*trustworthy or *un*reliable. Shell's "chemical fingerprinting" expert testified that, from the F&B Lab report summaries alone, it was *impossible* to verify the methods of preparation, the sources of information and the overall trustworthiness of the results. *See* CT 4168-69, 4175-76. Watson's own expert admitted that the way the F&B Lab reported their results was different from other labs, and was, at a minimum, "confusing." CT 4182-83.

Indeed, were the self-serving Bruya Declaration deemed sufficient, it is hard to imagine a declaration (or even a company resume) that would not suffice. Yet despite the lack of any evidence regarding what F&B Lab's employees actually did and specifically how they did it, the trial court ruled that the reports constituted admissible business records under the hearsay rule. That decision was an abuse of the court's discretion.

2. The Laboratory Reports Did Not Constitute Business Records Within the Meaning of Evidence Code § 1271

Even if Watson had laid the proper foundation, the laboratory reports contained conclusions and thus did not qualify as admissible business records because they did not constitute a "record of an act, condition or event" as required by § 1271. *See People v. Reyes*, 12 Cal.3d 486, 503 (1974). Rather, as Dagdigian conceded, the reports were cited specifically for the analysis and conclusions they contained. *See* RT 1546. Beresky was even more blunt in explaining why the reports lacked the original gas chromatographs of the samples: "[Y]ou know, *we're paying them for their expertise to interpret those*, and then they give us the data – the actual *interpreted* data from the gas chromatographs." CT 4181 (emphasis added).

This plainly is not the type of evidence intended for admission under the business records exception to the hearsay rule. In *Reyes*, the Supreme Court

upheld an identical refusal by a trial court to admit a medical report under the business records exception precisely because it was not a record of an "act, condition or event." *Id.* The Court reasoned:

> In order for a record to be competent evidence under [section 1271] it must be a record of an act, condition or event; a conclusion is neither an act, condition or event; it may or may not be based upon conditions, acts or events observed by the person drawing the conclusion; it may or may not be founded upon sound reason; the person who has formed the conclusion recorded may or may not be qualified to form it and testify to it. Whether the conclusion is based upon observation of an act, condition or event or upon sound reason or whether the person forming it is qualified to form it and testify to it can only be established by the examination of that party under oath.

Reyes, 12 Cal.3d at 503; *see also Taggart*, 33 Cal.App.4th at 1708 (approving trial court's refusal to admit evidence under business records exception where disputed record offered an "opinion rather than 'a record of an act, condition or event'").

Under this plain, controlling authority, the laboratory reports did not constitute admissible business records.

C. Without Evidence in the Record to Support Dagdigian's Conclusion That DIPE or Other Shell Gasoline Components Were Found on the WICS, His Testimony Should Have Been Excluded

"'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" *People v. Gardeley*, 14 Cal.4th 605, 618 (1997) (quoting *Kennemur v. California*, 133 Cal.App.3d 907, 923 (1982)). "If [an] opinion is not based upon facts otherwise proved or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence." *Sears, Roebuck & Co. v. Walls*, 178 Cal.App.2d 284, 289 (1960) (citation omitted). Accordingly, the opinion of an expert who "bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or

upon factors which are speculative, remote or conjectural . . . has no evidentiary value." *Pacific Gas & Elec. Co. v. Zuckerman*, 189 Cal.App.3d 1113, 1135 (1987) (citations omitted).

While the trial court plainly erred in ruling that the laboratory reports constituted admissible business records, that error was grossly compounded by its denial of Shell's motion in limine to preclude Dagdigian from testifying to their contents. It is hornbook law that an expert cannot testify to the contents of documents on which he relied as independent proof of those facts. *Korsak v. Atlas Hotels, Inc.*, 2 Cal.App.4th 1516, 1525-26 (1992); *see also Gardeley*, 14 Cal.4th at 619 ("a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact.") (citing *Korsak*); *People v. Williams*, 187 Cal.App.2d 355, 365 (1960) (otherwise inadmissible evidence that may be relied upon in support of an expert's opinion may not be offered "as substantive proof of the facts so stated"). Were that not the rule, a party could *always* convert inadmissible hearsay into admissible evidence by simply calling an expert to utter it to the jury. *See Taggart, supra*, 33 Cal.App.4th at 1708. *See generally* 1 Jefferson, *California Evidence Benchbook*, § 29.42 (3d ed. 2001).

It is equally clear that the improper admission of this testimony requires the reversal of the entire judgment against Shell. *See, e.g., People v. Carpenter*, 15 Cal.4th 312, 403 (1997) ("[Although] the expert may explain the reasons for his opinions, including the matters he considered in forming them . . . prejudice may arise if, under the guise of reasons, the expert's detailed explanation brings before the jury incompetent hearsay evidence.") (citations and internal quotation marks omitted); *Young v. Bates Valve Bag Corp.*, 52 Cal.App.2d 86, 96 (1942) ("[W]here an expert witness bases his opinion entirely upon incompetent matter, or where it is shown that such incompetent matter is the chief element upon which the opinion

is predicated, such opinion should be rejected altogether."). Here, the very plume maps drawn by Dagdigian and Beresky were based solely upon the inadmissible evidence contained in those hearsay laboratory reports. *See* App. (Exhs. 1500, 1501, 1512, 1513). Accordingly, the trial court erred by permitting Dagdigian to testify that DIPE and other compounds had been detected on the WICS and that those compounds unmistakably linked Shell to the contamination.

D. Watson Offered No Other Evidence Sufficient to Support a Finding that a Shell Pipeline Contaminated the WICS

Once the F&B Lab reports are removed from the case,[12] Watson's claim that Shell caused any contamination on the site is just a bare assertion. Watson presented no other evidence—let alone sufficient evidence—to support the conclusion that Shell, rather than some other oil company, caused the contamination. Further, Watson provided no percipient witnesses to testify to their own personal knowledge of the presence of a leak. In contrast, Shell's witnesses proffered substantial testimony that supported the contrary conclusion: Either Shell's pipelines did not contaminate the WICS or it is at least as likely that another source did. Either way, Watson failed in its burden of proof.

1. Absent the Inadmissible Laboratory Reports, Watson Failed to Link Shell to the Contamination Found in Either Plume

As described, Dagdigian was forced to concede that soil borings in the area of the B2 Plume did not show any contamination above laboratory detection limits, RT 1704, and that Watson's multi-year investigation around the Shell

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[12] Shell has focused its argument on the F&B Lab reports because of Watson's reliance on the DIPE finding to establish causation. Shell also objected to the admission of other laboratory results as business records. *See* RT 1457. Shell's arguments for the F&B Lab reports apply equally to the reports from Watson's other laboratories that Dagdigian relied upon in his testimony. None of these reports may be relied upon as evidence that Shell's gasoline was found at the site.

pipelines in the area surrounding the B2 Plume had come up with "essentially nothing," RT 2978-79, 2966.

Watson's experts also admitted that they had no soil data to support a conclusion that Shell caused the A Plume contamination. The only *soil* data collected in the A Plume area showed contamination by degraded and undegraded diesel fuel and refinery slops—not leaded gasoline. *See* RT 2081-82. Most strikingly, Dagdigian admitted he did not have *any* soil data that would allow him to identify where, *if at all*, there was a leak from the Shell pipelines in the area of the A Plume. *See* RT 2832-33, 2890-91. Beresky admitted the same. RT 2531. She testified she decided not to collect soil lithological data during her investigation of the site, despite the fact it would have cost her only about $2.500 per boring. *See* RT 2531, 2535-36. Beresky also admitted she did not gather any groundwater flow direction information in the area of the A Plume or other information necessary to ascertain the source of the A Plume. *See* RT 2549, 2550, 2552.

The most shocking (and damning) part of those concessions, however, is the revelation that the failure to collect that soil data was purely a tactical decision. *See* RT 2969. In fact, Dagdigian admitted that he had requested Watson to take soil and soil gas samples from the Utility Way Corridor, but that Watson had never followed up on his request. *See* RT 2965. He also admitted that he was aware previous sampling in that area had turned up nothing. *See* RT 2966, 2978-79. Dagdigian conceded that had there been a pipeline leak in the A Plume area, a soil gas reading would have likely discovered it. *See* RT 2978.

Thus, the only admissible evidence elicited at trial was the problematic testimony of Charles Schmidt. Schmidt, who used a fairly common procedure to detect volatile gases in the soil in an entirely unorthodox way, asserted that he could interpret these results to determine their source. RT 1020-21, 1895-96. But

even if this claim were valid, he only obtained one significant downhole flux reading for benzene (*i.e.*, > 55 parts per billion) for the A Plume (WSB-27), and only one within the boundaries of the B2 Plume as drawn by Dagdigian (MW-4). App. (Exhs. 1500, 1512). Thus, those isolated readings standing alone (which did not differentiate between particular gasoline products) were insufficient to attribute any contamination to Shell, including the A Plume. Accordingly, without the F&B Lab and other test results that Dagdigian was allowed to cite in his testimony, causation goes unproven and the judgment must be reversed in its entirety.

2. Watson Failed to Prove that Shell's Pipelines Had Been Negligently Maintained

Independently of its failure to establish a scientific basis for attributing the WICS contamination to Shell, Watson also failed to establish that a Shell pipeline ever leaked onto the WICS. In fact, Paul Karlozian was the only witness called by Watson to challenge Shell's pipeline maintenance practices and reports. Karlozian testified that of the hundreds of hydrotest results he had reviewed, 39 were in his estimation "failures" that could be read to indicate a possible leak. RT 1032. While Karlozian admitted that he could not conclusively determine that any particular hydrotest result indicated a leaking pipeline, and that there were ample reasons apart from leaks that could lead to a "failing" result, RT 1122-23, he speculated that Shell's decision to replace certain pipelines in 1973 was not justified and opined that Shell's pipelines had leaked. RT 1010.

But Shell's cross-examination of Karlozian proved that all of the so-called "failed" hydrotests on pipelines in the Utility Way Corridor (the only corridor near the A and B2 Plumes) had been followed by *compliant* tests, indicating that the earlier "failed" result had been caused by something other than a leak. RT 1125-29, 1131-33. This is vitally significant precisely because Watson claimed at all

times that the pipelines that caused the A and B2 Plumes were in the *Utility Way* Corridor. RT 1455, 1491, 1497. Karlozian relied heavily on the fact that Utility Way pipelines built in 1965 had been idled in 1973, before the end of their projected useful life. RT 1010. But the inference that these pipelines were already actively leaking is eviscerated by the indisputable fact that Karlozian could not identify a single dispositive hydrotest failure from that set of supposedly failing pipelines.

Indeed, Shell maintenance supervisor Roger Underwood provided a telling reason for the early replacement of those pipelines. As he testified, Shell undertook a campaign in the early 1970's to upgrade pipelines throughout its Southern California system to take advantage of technological advances in pipeline construction. RT 3209, 3272-77. During this comprehensive replacement effort, Shell laid new pipelines in both the DWP and Utility Way Corridors. RT 3272; Exh. 10.

Watson's failure to produce any convincing evidence that Shell's pipelines had leaked is entirely consistent with the undisputed testimony of Shell's witnesses. Underwood testified that in 35 years monitoring Shell's pipelines on the Watson property for leaks, he had never discovered a gasoline leak and that he would have known had there been such a leak because such leaks invariably rise to the surface. *See* RT 3217, 3270, 3224-25. Underwood explained that even an excavation of the pipelines in 1993, which is long after Shell ceased using leaded gasoline at that site, yielded no evidence of any leaks that could have caused the alleged contamination in the Utility Way Corridor. *See* RT 3313, 5352-53. Similarly, Shell employee Russell Guidry stated that he did not smell any hydrocarbon leaks during the 1993 pipeline excavation. RT 5352-53.

As Dagdigian later conceded, Underwood's testimony was corroborated by historical records concerning the site. *See* RT 1723, 1724. Going a step further,

Dagdigian admitted he knew of no physical evidence of a leak from the Utility Way Corridor. RT 1724. Watson thus failed to provide any evidence that a leak had occurred in a Shell pipeline in the Utility Way Corridor. In contrast, Shell provided significant testimony that there never was any such leak.

In sum, the admissible evidence adduced by Watson at trial was by no means sufficient to establish that Shell caused the contamination found on the WICS. The judgment therefore should be reversed with directions to enter judgment for Shell. *E.g.*, *McCoy v. Hearst Corp.*, 227 Cal.App.3d 1657, 1661 (1991) (when the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law, a judgment for defendant is required).

II. AS A MATTER OF LAW, THE 1992 AMENDMENT TO CIVIL CODE § 3334 MAY NOT BE APPLIED TO SHELL'S CONDUCT IN THIS CASE; AS A RESULT, THE AWARD OF DAMAGES UNDER THAT SECTION MUST BE VACATED

For more than a century, courts have awarded compensatory damages for torts, including trespass, based on one overriding principle: Make the plaintiff whole—but don't make him rich off his injury. *See, e.g.*, Civ. Code § 3333 ("measure of damages . . . is the amount which will compensate for all the detriment proximately caused"); *Basin Oil Co. v. Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 605 (1954) ("It is a fundamental principle of the law of damages, however, that the compensation received shall be commensurate with the injury, and no more"). For trespass, the "amount of [plaintiff's] loss" has been the unswerving touchstone of various flexible remedies. *Givens v. Markall*, 51 Cal.App.2d 374, 379 (1942); *see* Civ. Code § 3334 (formerly permitting recovery of damages solely for injury to property or loss of use). If that principle had been

followed here, the jury would have awarded Watson, at most, just under four million dollars for the projected remediation costs of the A Plume.

But, in 1992, § 3334 was amended to allow plaintiffs to recover the "benefit obtained" by the trespassing party, in hopes of deterring polluters who did not want to pay the true costs associated with disposal of their waste. Based on its opportunistic resort to this amendment, Watson was permitted to reap more than $14 million in additional damages—an amount that all parties will concede is unrelated to any loss that Watson incurred due to Shell's alleged trespass. And, as discussed below, the award here *far exceeds any benefits Shell could have possibly received from its alleged trespass*. Failure to correct this judgment will invite a result the legislature never foresaw or intended — a flood of windfall damage awards in run-of-the-mill negligence cases.

For several reasons, the trial court erred in applying the 1992 amendment to Shell. First, the statute was amended dozens of years after the alleged leak from Shell's pipeline, and there was no basis to apply it retroactively in this case. Second, § 3334's benefit damages provision should have no application to the alleged conduct in this case. Third, Shell did not obtain a benefit of any kind from the accidental release of its product (if any), much less one within the meaning of this amendment.

A. The Trial Court Erred in Giving Retrospective Operation to the 1992 Amendment, Thereby Permitting the Award of Millions of Dollars in Unanticipated and Unlawful Damages

Section 3334 has long permitted an award of damages that includes the "value of the use of the property for the time of [the] wrongful occupation." Civ. Code § 3334. Before 1992, such value-of-use damages were most often awarded based on the reasonable rental value of the property for the time of the trespass. *See, e.g., Bourdieu v. Seabord Oil Corp.*, 63 Cal.App.2d 201, 207 (1944).

Damages based on the disgorgement of a defendant's benefits derived from the trespass were ordinarily rejected in favor of more traditional loss-based remedies. *See id.* (rejecting trespass damages award because jury "based its verdict upon the amount of 'benefit to the defendant'" rather than on fair rental value of the property).

Under former § 3334, only one decision had ever approved an award of damages based on the defendant's avoidance of environmental costs, and, even today, it stands alone. *See Cassinos v. Union Oil Co.*, 14 Cal.App.4th 1770, 1787 (1993). There, based on its evaluation of the equities between the parties, the Court permitted the plaintiff to recover the cost of proper disposal of wastewater that the defendant had avoided by *intentionally*, and without permission or regulatory approval, injecting its wastewater under the plaintiff's land. But because Shell was, at most, negligent and because Watson has suffered no uncompensated harm from the trespass, neither the former law nor any equitable analysis utilized in *Cassinos* can be read to support the $14.3 million in disgorgement damages awarded here.

However, Watson argued that the 1992 amendment allowed it to seek the kind of large disgorgement remedy—unconnected to Watson's actual losses—that had been rejected by courts under the former law. Based entirely on this new statute, the trial court permitted evidence on the so-called benefits accruing to Shell by reason of its trespass on the WICS and instructed the jury to award damages to Watson measured by such benefits. *See* CT 5826.

Application of the amendment to Shell's conduct here was improperly retroactive. In *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1218 (1988), the Supreme Court reaffirmed "the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a

retroactive application." 44 Cal.4th at 1208-09. *See also* C.C.P. § 3 ("No part of [this Code] is retroactive, unless expressly so declared").

"A retroactive law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." *Aetna Cas. & Surety Co. v. Indus. Accident Comm'n*, 30 Cal.2d 388, 391 (1947) (citations omitted). In *Aetna Casualty*, the Supreme Court considered whether the application of a new disability compensation statute to a worker whose *injury* occurred prior to the change in the law, but whose *disability* manifested itself only after the change in the law, was retroactive. Reasoning that the prior industrial injury was "the basis of the right to be compensated for such disability," the court held that "the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery," not at the time of the manifestation of disability. *Aetna Casualty*, 30 Cal.2d at 392.

Here, neither the text of the amendment nor its legislative history evidences any intent that it be applied retroactively.[13] Like the worker's injuries in *Aetna Casualty*, the original unwitting leak from Shell's pipelines, if any, is the past event that provided Watson with the right to compensation. Though no one knows for sure when any such leak occurred, the latest date possible is at least ten years before the 1992 amendment to § 3334 and, more likely, twenty or more years. RT 1583. Just as in *Aetna Casualty*, the date of the predicate event upon which recovery is based—the alleged leak of product onto Watson's property—determines the law to be applied, not the date of any consequent developments. By applying the 1992 amendment here, the trial court altered the legal effects of the undetected leak, just as the trial court in *Aetna Casualty* altered the legal

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[13] The legislative history of the 1992 amendment is already contained in the record. *See* CT 2036-2279, 3857-3939. Shell has filed with this brief a separate request that the Court take judicial notice of this history under Evidence Code § 459(a).

ramifications of the workers' injuries. The trial court therefore improperly applied the statute retroactively.

Moreover, the legal consequences of the leak for which Shell was found liable are vastly different under the new law than under the old, at least as the trial court construed it, to the tune of more than $14 million dollars in so-called benefit damages that would not have been available under the former law. No cases under the former law support a disgorgement remedy of this magnitude for mere negligence, especially where plaintiff's actual damages are otherwise fully compensated. This Court should therefore vacate the benefit damages award in its entirety.[14]

The public policy behind the general rule against retroactive application of laws strongly supports such a result. As the Supreme Court has observed:

> Every day it is necessary in the conduct of the affairs of individuals and of businesses to make a closely calculated estimate of the responsibility or lack thereof resulting from an accident or from other unforeseen and unplanned circumstances and to act in reliance on such estimate. We believe there is merit in the prior view of this court, as demonstrated by its decisions, that, in the absence of an indication to the contrary, legislative acts should not be construed in a manner which changes legal rights and responsibilities arising out of transactions which occur prior to the passage of such acts.

Evangelatos, 44 Cal.3d at 1214 (quoting *Joseph v. Lowery*, 495 P.2d 273, 276 (Or. 1972)).

Applied to this case, the Supreme Court's pronouncement could not be clearer: conferring a responsibility upon Shell and a right upon Watson years after the operative events, resulting in an award of $14.3 million in windfall damages

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[14] Watson submitted absolutely no evidence establishing that it had suffered any lost rent or consequential economic damages as a result of contamination under the site. *See supra* at 4-5. Consequently, it is eligible only for an award based on remediation costs.

unconnected to any actual harm suffered, would be fundamentally unfair and should not be countenanced.

B. The Legislative History Shows that the 1992 Amendment to § 3334 Was Not Intended to Apply to Accidental, Undetected Contamination

In construing statutory provisions, "the intent of the enacting body is the paramount consideration." *In Re Harris*, 5 Cal.4th 813, 844 (1993) (citations omitted). The legislative history of this amendment demonstrates that the legislature never intended its new disgorgement remedy to apply to *accidental* trespasses such as the one at bar. Thus, even if § 3334 were applied retroactively to Shell's conduct, benefit damages would be improper where Shell has been found liable only for an unknowing, negligent, and undiscovered trespass.[15]

The State Bar of California sponsored AB 2663, which ultimately became the 1992 amendment to § 3334. The State Bar was clearly taking aim at so-called "midnight dumpers" and explained the need for the legislation as follows:

> When the cost of properly disposing of toxic waste and other pollutants is more than the "rental value of the land," § 3334 provides an economic incentive to pollute . . . If enacted, AB 2663 will provide a definition for the "value of the use" and *eliminate § 3334's economic incentive to dump*. Therefore, the "value of the use" would be defined as "the greater of the reasonable rental value or the benefits obtained by the occupier by reason of the trespass." The measure of damages would take into account the benefits obtained by the trespass – *the cost saved by not properly disposing of the pollutants*.

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[15] This brief does not address the application of the 1992 amendment to situations involving knowing encroachment or trespass on adjacent property. Shell recognizes, however, that there may be situations where even intentional actions should not give rise to benefit damages under § 3334 because the original trespass was either permitted by regulatory authorities or consented to by the adjacent property owner.

CT 2059 (Letter from Amelia V. Stewart, Legislative Representative of the State Bar of California, to John Lovell of 3/18/1992) (emphasis added).

The Assembly Judiciary Committee analysis of the bill confirms that the new disgorgement remedy was not intended to apply outside of cases of wrongful, intentional trespass. The Committee wrote: "Of particular concern to the Conference are trespassers who dump toxic wastes in the desert. The rental value of the desert land is often minimal. . . . In such cases, a trespasser has a definite economic incentive to *continue the dumping*. Therefore, Conference states, the law should be clear that the damages recoverable *in such cases* is the economic benefits to the trespasser." CT 2038, 2065 (Assembly Committee on Judiciary Report, Reg. Sess. (1992)) (emphasis added); *see also* CT 2080 (Assembly Third Reading, Reg. Sess. (1992)) (incorporating same language); CT 2079 (Assembly Concurrence in Senate Amendments, Reg. Sess. (1992)) (same).

The Senate Judiciary Committee report reveals the same intent. The report states that the bill is needed because "in some cases, trespassers find it to their advantage to *intentionally* use another's land, reap large benefits for that act, and then pay a relatively small amount of damages for the trespass. . . . In that situation, polluters may find it cheaper to dump the waste on someone else's desert land and pay relatively minor damages for that trespass, than to pay the fees for the proper disposal of the waste." CT 2040 (Senate Committee on Judiciary Report, Reg. Sess. (1992)) (emphasis added). Thus, the Committee wrote, "the purpose of this bill is to eliminate the economic incentive to commit trespass when the benefits to the trespasser would outweigh his liability for damages." *Id.*

All of these examples, together with the simple fact that there are *no* counter-examples anywhere in the history of the amendment illustrating its

application to cases of mere negligence,[16] show that the legislature never intended the "benefits obtained" language to apply to cases of merely negligent and undiscovered trespass. Such a limitation makes sense, because only intentional trespassers may be presumed to act based on cost-benefit analyses and in order to reap some anticipated benefit. Their actions can therefore be deterred by an amendment intended to eliminate the "economic incentive to continue the dumping." CT 2038, 2065 (Assembly Committee on Judiciary Report, Reg. Sess. (1992)).

In contrast, there is no authority for the trial court's expansion of the scope of the amendment to cover accidental spills of product unknown to the defendant, and as to which the defendant makes no decision to gain a financial benefit by avoiding a cleanup. As discussed, Shell was found to have been, at most, negligent in permitting its product to leak onto Watson's property—and absolutely no finding was made that Shell should have discovered any resulting contamination earlier than Watson did in 2001. Indeed, the trial court struck Watson's claim for punitive damages before the case was ever submitted to the jury, stating there was no evidence that Shell acted intentionally or ever knew about the contamination. RT 3040-41.

C. Shell Did Not Obtain a "Benefit" Within the Meaning of the Statute

Even if this Court concludes that the 1992 amendment applies retroactively in cases of negligent trespass, the trial court erred by permitting Watson to assert that Shell had *benefitted* by avoiding remediation costs in 1993, long before *anyone* was aware that any contamination existed.

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[16] The amendment does contain one narrow "safe harbor" that permits a defendant to avoid an award of benefit damages by showing that the trespass resulted from a "mistake of fact." Civ. Code § 3334(b)(2).

Although the statute does not define the term "benefit obtained . . . by reason of" the wrongful occupation, its plain meaning suggests that the provision acts as a disgorgement remedy forcing trespassers to give up wrongly obtained profits that accrue to the trespasser *as a direct result* of his or her wrongful *trespass*, not any so-called benefits deriving from an innocent failure to discover past contamination. For instance, in *Cassinos*, where the defendant had wrongfully injected waste onto plaintiff's land in order to avoid the costs of legitimate disposal, the amendment could have legitimately been applied because the "benefits obtained" by the defendant were the forgone costs of proper disposal. *See Cassinos, supra,* 14 Cal.App.4th 1770.

This is a very different case. Shell was found liable only for negligently leaking product from an underground pipeline. Any such spillage was *contrary* to Shell's interests, as it represented a loss of product available to sell and a concomitant liability for an adverse impact on the environment. Undisputed testimony established that Shell exceeded all regulatory maintenance requirements for its pipelines and spends substantial sums confirming the integrity of the pipelines. Shell's safety practices support the common-sense inference that Shell sought to avoid such leaks in the belief that they would produce only detriments, not benefits, to Shell's operation. *See supra* at 29-31. Taking as true Watson's assertions that Shell spilled product under the WICS, such spills would represent losses, completely at odds with the "benefits obtained" language of the statute. Thus, there are simply no wrongfully obtained profits for Shell to disgorge.

Importantly, if the trial court's reading of § 3334(b)(1) were correct, it would apply to every single case of negligent contamination the responsible party did not instantaneously detect and remediate. As soon as any contamination crossed a property line, the clock would begin ticking out an exponential increase of costs to the defendant over and above the costs of remediation. Yet this change

would have no ameliorative effect on remediation practices, because it would apply even where, as here, the defendant, despite its reasonable diligence, was *unaware of any contamination.* Such a result simply does not comport with the statutory language or common sense.

Accordingly, the trial court erred in applying the statute to Shell's conduct, and the award of benefit damages should be reversed.

III. THE COURT ERRED BY APPLYING A MEASURE OF THE BENEFIT DAMAGES THAT HAS NO SUPPORT UNDER CALIFORNIA LAW, THUS RESULTING IN AN IRRATIONAL AWARD THAT WILL WORK MISCHIEF IN FUTURE TRESPASS CASES

The measure of damages here is unprecedented under California law. Watson's financial expert, Allen Suderman, calculated an adjusted pre-tax, weighted average cost of capital, or WACC, for Shell that he claimed represented the annual growth rate of a Shell dollar since 1993—a dollar that Watson contends should have been used to remediate its property (had Shell then known about the contamination). Suderman concluded that Shell's pre-tax WACC in June 1993 was approximately 20%, which he then compounded annually to arrive at a multiplier of 4.27 for today's value for a 1993 Shell dollar. RT 2169-70. Using that figure, Dagdigian estimated that the supposed benefit to Shell resulting from Shell's failure in 1993 to remediate the A Plume contamination was $14,275,237. *See* RT 2830. This despite the fact that Watson spent only $121,959 in investigating the A Plume prior to this litigation and will never pay a penny to remediate it under the terms of the ARCO settlement. Exhs. 1521, 3204.

This award was wrong as a matter of law and should be vacated. *See, e.g., Fran-Well Heater Co. v. Robinson*, 182 Cal.App.2d 125, 132 (1960) (holding

"erroneous as a matter of law" the trial court's misapplication of the measure of damages).

A. The Use of WACC to Calculate Shell's Benefit is Impermissible Under California Law

Watson's assertion of a right to recover all of the purported "benefits" received by Shell led Watson to manufacture a contrived measure of those benefits premised on an admittedly artificial estimate of Shell's purported "cost of capital" beginning in 1993. The measure urged here by Watson has nothing to do with actual financial costs that Shell might have incurred in order to pay for remediation of the site in 1993. Instead, Watson's accounting expert, Alan Suderman, used a financial model that yields a theoretical figure known as the "weighted average cost of capital," or WACC. Calculation of the WACC using a formula known as the "Capital Asset Pricing Model" allows financial analysts to compare the relative performance among various companies and industries over time for purposes of investment planning. In addition, the WACC is a tool that can be used as a "hurdle rate" for internal decision-making about a company's contemplated business investments. But, as Shell economist Roy Levitch testified and Suderman conceded, it is not a tool that has ever been used by Shell or any other company to determine whether or not it will remediate contamination caused by a leaking pipeline. RT 2212, 2314.

In fact, no California court has ever approved use of a WACC-based calculation to measure tort damages. Courts that have considered the use of WACC for calculation of damages have rejected it on the ground that it would "result in obvious discrimination between [one litigant] and other just-compensation claimants." See, e.g., *Standard Mfg. Co. v. United States*, 42 Fed. Cl. 748, 778 (1999) (quoting *Hughes Aircraft Co. v. United States*, 31 Fed. Cl. 481, 492, n.12 (1994)); *Brunswick Corp. v. United States*, 36 Fed. Cl. 204, 218-219 (1996)

("[c]ourts are loathe to use subjective indicia of the appropriate interest rate"). The absence of authority to justify a WACC-based calculation of damages raises a glaring red flag to any court that such inflated damage estimates should be viewed with extreme caution, if not repugnance.

Indeed, Watson used WACC precisely because WACC is highly susceptible to manipulation and does not provide a reliable estimate of any benefits Shell may have received, even under the theory urged by Watson here. As acknowledged by the Supreme Court in its review of Proposition 103, "[i]t is really rather obvious from the record herein that all models [including the Capital Asset Pricing Model] can be manipulated/applied to produce *a great range of rates of return.*" *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 304 (1994) (quoting district court findings) (emphasis added). Watson did exactly that here.

If Watson had wanted a realistic estimate of what Shell saved by not remediating the A Plume in 1993, it could have looked to information relating specifically to Shell's actual cost of capital in 1993; *i.e.*, what a bank or other entity would have charged Shell for a loan of the monies needed for remediation of the property. While interest rates have fluctuated, historical information relating to such rates is easily available—indeed, information as to the *actual* rates paid by Shell in 1993 (and subsequent years) would have yielded far more relevant figures than did Suderman's estimated model. In fact, Suderman admitted that he would expect Shell to have had no trouble borrowing the necessary funds at a rate of approximately 6%. *See* RT 2332. Yet he told the jury that a 20% figure was appropriate.[17] RT 2184.

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[17] Suderman's 20% WACC calculation is not only fundamentally incompatible with California's constitutional limitations on prejudgment interest, *see* Cal. Const., Art. XV, § 1, but a simple comparison with the Consumer Price Index betrays the distortion yielded by his calculation. While he told the jury that a *Shell* dollar in 1993 was worth $4.27 at the time of trial, the CPI, which measures the buying power of a dollar spent by one of those jurors, has increased by only a few percentage points each year. Indeed, inflation over the past ten

So why was Watson's WACC so inflated? Two principal reasons: (1) Suderman utilized a risk premium figure artificially designed to maximize Shell's rate of return; and (2) even though the WACC formula yields by definition a *post-tax* figure, the trial court permitted Mr. Suderman to add back in a hefty percentage designed to yield a *pre-tax* calculation. Thus, over uncontroverted testimony that Shell's true WACC hovers around 10.5%, Suderman testified that Shell's WACC was instead a whopping 20%. App. (Exh. 1531).

1. Suderman's Risk Premium Figure Was Incorrect

Suderman testified that Shell's cost of capital *doubled* between 1993 and 1998 because his calculations use a very short-term estimate of the equity risk premium. Exhibit 1531, which is duplicated in the Appendix, shows the figures Suderman chose to derive a WACC of 20%. Suderman used the equity risk premium for any one year as the average equity risk premium (where equity risk premium is return on the stock market minus the return on a 20-year Treasury bond) of the subject year and the three prior years. RT 2238. Because the 1990s saw unprecedented returns to the stock market, Suderman's calculated equity risk premium is unusually high, and thus his cost of capital is wildly exaggerated.[18]

This was plainly wrong. Ibbotson Associates, the independent source Suderman used for his equity risk premium, strongly advocates using an average of the equity risk premium calculated over the full time series, 1926–199X, not the

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years has been largely contained. As of trial, one of those June 1993 *juror* dollars was worth about $1.23, a total increase of only 23% of that original dollar over *eight* years. See http://www.bls.gov/cpi/home.htm (click on "Inflation Calculator").

[18] For instance, Ibbotson's equity risk premium for the year 1998, using the long data series, is 8.4%, while Suderman's artificially manipulated equity risk premium is 24.6%. *See* App. (Exh. 3224 (Column P)). Even allowing for his speculative calculation of what he called a pre-tax WACC, *see infra*, Suderman's use of the excessively short data series, as opposed to the long data series recommended by Ibbotson, almost doubled his pre-tax WACC. *See id.* (compare Columns M(1) and M(3)).

shortened time series selected by Suderman. As Professor Ibbotson states in his treatise:

> A proper estimate of the equity risk premium requires a data series long enough to give a reliable average without being unduly influenced by very good and very poor short term returns. When calculated using a long data series, the historical equity risk premium is relatively stable. Furthermore, because an average of the realized equity risk premium is quite volatile when calculated using a short history, *using a long series makes it less likely that the analyst can justify any number he or she wants.*

Ibbotson Associates, *Stocks, Bonds, Bills and Inflation: Valuation Edition 1999 Yearbook* 49 (footnote omitted; emphasis added), *quoted at* RT 2239-41.

Thus, economists do not use short term estimates of the equity risk premium precisely because short term estimates of the equity risk premium are inevitably highly variable because the return on the stock market from year to year is highly variable. Conversely, a firm's cost of capital is generally *not* highly variable. A company like Shell's cost of capital is certainly not highly variable because Shell stays in the same business year after year, and Shell's risk stays generally constant year after year.[19] *See* RT 2236-45. In other words, Suderman deliberately skewed his formula to jack up his calculation of Shell's WACC.

2. The Trial Court Erred in Allowing Watson to Proffer a Pre-Tax WACC Calculation

California law has long held that the tax consequences of lost income damages awarded in a personal injury action are irrelevant and cannot be considered in the calculation of the plaintiff's damages. *See, e.g., Rodriguez v. McDonnell Douglas Corp.*, 87 Cal.App.3d 626, 664-68 (1978), *as modified on*

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[19] The low level of Shell's actual risk, and thus the stability of Shell's cost of capital is evidenced by the remarkable stability of Shell's beta (column Q) and cost of debt (column J).) App. (Exh. 3224); RT 2228.

denial of reh'g (1979) (tax consequences of award of lost future income irrelevant in personal injury action). This general rule has been extended to cases involving awards of economic damages. *See, e.g., DePalma v. Westland Software House*, 225 Cal.App.3d 1534, 1545-46 (1990) (declining to allow jury to consider post-judgment tax consequences of compensatory damage award in breach of contract action); *Danzig v. Jack Grynberg & Assoc.*, 161 Cal.App.3d 1128, 1139-40 (1984) ("tax benefits, if any, enjoyed by plaintiff class members as a result of their partnership investments are irrelevant to the restitution award of damages"), *cert. den.*, 474 U.S. 819 (1985). Courts have recognized that attempts to predict the tax consequences of damage awards are unduly speculative and inexact and have barred such predictions on the grounds that they are irrelevant and unduly prejudicial. *See DePalma*, 225 Cal.App.3d at 1544-45.

As the Court of Appeal in *DePalma* pointed out:

> "Experience teaches us it is very complicated and speculative to predict: (1) what portion of a damage award will actually be paid; (2) the year or years when a damage award will actually be received; (3) what the prevailing tax rate will be during the year(s) of receipt; and (4) how a damage award will be construed under the continuously changing Internal Revenue Code. We are concerned even the most sophisticated attempts to make a prediction about tax consequences would result in only guesswork which has little probative value."

DePalma, 225 Cal.App.3d at 1544.

The trial court erred, therefore, when it allowed Watson to present an inflated WACC based on Suderman's *speculation* about the likely tax consequences of any award of benefit damages. After applying the standard Capital Asset Pricing Model to calculate Shell's WACC, Suderman inflated his calculation based on the assumption that any payment made by Shell to Watson would be deductible. RT 2182-83. The economic theory behind this adjustment was murky: As Suderman admitted in his deposition, "[a]ll damage calculations

that I have ever made, and that I've ever been instructed to make by attorneys, have always been before federal income tax." CT 5169; RT 2223.

Clearly, the factors that contributed to Shell's cost of capital for purposes of determining new investment pursuits are radically out of step with a proper valuation of Shell's so-called benefit. By overestimating costs to Shell and then applying an inflated measure of the value of those dollars to Shell in June 1993, Watson's experts have undermined the reliability of their own model through their unjustified overreaching. Accordingly, the award of benefit damages based on these speculative and unfounded calculations should be vacated.

B. The Decision in Cassinos Conflicts With the Theory of Damages Here

Only one published decision has ever approved an award based on the benefits received by a trespassing defendant, and it did so only where the defendant had a *direct economic incentive* to trespass and, in fact, trespassed *intentionally* in order to gain that financial benefit. See *Cassinos, supra,* 14 Cal.App.4th 1770 (holding that defendant who wrongfully injected unpermitted wastewater into plaintiff's land to avoid paying cost of proper disposal should be required to disgorge the benefit obtained by its wrongful trespass, in amount that defendant would have had to pay for proper disposal).

Cassinos, though decided under the former version of § 3334, nevertheless explicitly undertook to award the plaintiff damages based on "the benefit to [defendant] from this trespass." *Id.* at 1777. Thus, *Cassinos* was answering the very question placed before this Court, *i.e.*, how does a court calculate the "benefit" received by a litigant when assessing damages under § 3334? Its answer is incompatible with the theory embraced by the trial court, and supports an interpretation of the phrase "benefits obtained" that extends only to profits obtained as a direct result of the defendant's wrongful trespass in the first

instance—not from a defendant's failure to detect and remedy damages caused by the trespass.

In *Cassinos*, the trial court determined the benefit remedy by calculating what it would have cost the defendant to dispose of a barrel of wastewater properly at the time of the trespass; multiplying this cost by the number of barrels injected into the plaintiff's land; and awarding this amount, about $3.5 million, plus prejudgment interest dating back to the time of the trespass. The Court of Appeal approved this measure of the defendant's benefit, with the caveat that the prejudgment interest component, which it emphasized was necessary only "to make [plaintiff] whole for the accrual of wealth which *could have been produced during the period of loss*," could date back only to the date the complaint was filed—not to the date of the trespass. *Id.* at 1788-90 (emphasis added). Significantly, *Cassinos* did *not* approve an award of damages such as that adopted here, where the original fair market value of the alleged benefit to the defendant is compounded by a subjective inflator unique to the defendant, back to the date of trespass, to arrive at the total "benefit" to the defendant from the date of disposal through judgment.

If *Cassinos* had espoused the interpretation of "benefits of trespass" adopted here, the defendant there would have been required to disgorge some much larger amount to account for the $3.5 million's speculative and subjective growth between 1984 (the year of trespass) and trial. Rather than awarding prejudgment interest from the date of the *complaint* (limited by the California Constitution to 7% per annum), *Cassinos* would have approved the trial court's award of interest (even had the rate violated constitutional proscriptions) from the date of *trespass* to approximate the accrual of wealth gained by the defendant as a result of his forgone costs. Because *Cassinos* declined to include such subjective inflators even when calculating defendant's benefits from an intentional trespass

that resulted in plainly unjust profits, such a harsh remedy is clearly not appropriate in Shell's case of mere negligence.

C. The Jury Award of $14.3 Million in Benefit Damages Was Excessive as a Matter of Law and Violates the Fundamental Principle that Damages Must Be Reasonable

Without question, the measure of damages unjustly penalizes Shell for an accidental spill (if any) of which Shell was totally unaware. Under this award, Watson received an astonishing windfall that massively exceeds any actual harm it suffered, any actual costs of cleanup, any "benefits" that accrued to Shell, and even the value of the land on which Shell was found to have trespassed. Under these circumstances, such a damages award is excessive, unreasonable, and unjust, and should be vacated. C.C.P. § 3359.

"Although the law commits the responsibility for determining the amount of damages suffered by a plaintiff to the jury, its decision cannot be allowed to stand where the award as a matter of law is excessive, or is so grossly disproportionate as to raise a presumption that the panel based its result on passion or prejudice." *Las Palmas Assoc. v. Las Palmas Ctr.*, 235 Cal.App.3d 1220, 1252 (1991). Even when awarding statutory damages, "'reasonableness' [is] an essential condition which enters into 'all cases' of damage recovery." *Guerin v. Kirst*, 33 Cal.2d 402, 415 (1949). In particular, damages awarded for "value of use" may be struck down as excessive when they are disproportionate to the value of the thing itself, as here. *See, e.g., id.* (holding "grossly excessive and disproportionate" damages sought for the value of defendant's use of a tractor, where the damages sought were several times greater than the value of the tractor itself).

Adhering to these principles, one court of appeal reviewed and struck down an award for defendant's wrongful detention of property, where the award

exceeded the value of the wrongfully detained property by a factor of three. *Fran-Well Heater Co. v. Robinson, supra*, 182 Cal.App.2d 125, 133. Based solely on the clear disproportion between the total value of the property and the amount of the award, this Court rejected the award as excessive as a matter of law, quoting the Supreme Court's pronouncement in *Guerin* that "[o]bviously such damage claim is grossly excessive and disproportionate when correlated with the value of the [property]." *Id.*

Here, the judgment requires Shell to pay more than $14 million for the value of its "use" of the WICS, which is an amount even more out of proportion to the value of the property at issue than was the award in *Fran-Well Heater*. Conservatively estimated, Shell was assessed well more than four times the total value of the land under which the A Plume sits—and far more times the value of the subsurface land on which Shell supposedly trespassed.[20] Shell could have bought and sold that land many times over with the money it is now being asked to pay for its indiscernible trespass of the subsurface, a trespass that the jury concluded did not even constitute a nuisance.

The award is also vastly out of proportion to Watson's actual damages. Watson received an astonishing windfall based solely on the contamination at the A Plume, where Watson's investigation costs were only $121,951 and even though Watson will never pay a penny for remediation. *See* RT 2830. Even if

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[20] Uncontroverted testimony established the value of the entire WICS, including all buildings and improvements, to be about $400 million. RT 830. The total area of the WICS is about 350 acres (or 15.246 million square feet), and the total area of the A Plume is about 120,000 square feet. Exhs. 1559, 3205. A rough—and very generous—estimate of the value of the land on which Shell trespassed can therefore be calculated by multiplying the cost per square foot for the entire WICS by the 120,000 square feet of the A plume. Doing so yields $3.15 million, which represents an approximate cost of the land over the A Plume, including a portion of the value of all the improvements on the WICS. Yet Shell was ordered to pay almost $14.3 million in damages for the value of its use of only the *subsurface* of this land—well more than four times the total worth of its *surface*.

Watson had shouldered cleanup costs, the award would still be more than four times Watson's loss. In fact, the size of the damage award can only be explained as an unauthorized attempt to punish Shell in a case where punitive damages were held to be unjustified. RT 3040-41.

It is no answer that the legislature called for an award of benefit damages in its amendment of § 3334. Any statutorily mandated award of damages is limited by a sister provision of the Civil Code, § 3359, which requires that "damages in all cases must be reasonable, and where an obligation *of any kind* appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." (Emphasis added.) In applying this limit to strike down an award based on another section of the Code, the Supreme Court specifically held that § 3359's requirement of reasonableness limits other Code provisions and "is controlling in every instance pursuant to the settled rule that all related provisions of the codes must be read and construed together, and that effect must be given to every section." *Guerin*, 33 Cal.2d at 415.

Where the trial court's misapplication of § 3334 resulted in an award that is so grossly out of proportion to the value of the trespassed land, to the actual harm to Watson, to the cost of cleanup, and even to any benefits to Shell, the award must be vacated in order to ensure that Shell is subject to "no more than reasonable damages."

IV. THE JUDGMENT MUST BE REVERSED BECAUSE CALIFORNIA LAW REQUIRES THAT AN ACTION BE PROSECUTED IN THE NAME OF THE REAL PARTY IN INTEREST

A. Under the Unique Terms of the Settlement in this Case, ARCO Was, and Continues to Be, the Real Party in Interest Here

One fundamental principle of California law is that "every action must be prosecuted in the name of the real party in interest . . . ." C.C.P. § 367. The question of a party's standing to sue goes to the existence of a cause of action and may be challenged either at trial or on appeal. 5 B.E. Witkin, *Cal. Procedure: Pleadings* § 862 at 320 (4th ed. 1997).

The purpose of § 367's requirement that every action must be prosecuted in the name of the real party in interest "is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand." *Keru Invs., Inc. v. Cube Co.*, 63 Cal.App.4th 1412, 1424 (1998) (reversing judgment in favor of owner of real property, because it lacked standing to sue for claims for damage to its structure and property; citations omitted). That purpose is plainly at stake here. In light of the very specific terms of its settlement with ARCO, Watson lacked standing to pursue its claims for remediation costs. That is because ARCO—and not Watson—is the only party that bears financial responsibility for remediation of the WICS.

This fact is dispositive. In *Vaughn v. Dame Construction Co.*, 223 Cal.App.3d 144 (1990), the Court considered whether the *former* owner of a condominium was the real party in interest with respect to a claim against the construction contractor for shoddy construction. The defendant tried to claim that the proper plaintiff was the current owner, because the current owner had the possessory interest in the real property. The Court rejected that argument,

recognizing that the proper plaintiff was the individual with a financial stake in the outcome, which, in *Vaughn*, was the former owner who had sold the condominium at a loss. Thus, the Court explained:

> While ordinarily the owner of the real property is the party entitled to recover for injury to the property, the essential element of the cause of action is injury to one's interest in the property — ownership of the property is not. It has been recognized in many instances that one who is not the owner of the property nonetheless may be the real party in interest if that person's interests in the property are injured or damaged.

Id. at 148.

This rule applies squarely to the instant case, and explains why ARCO is the proper party plaintiff. While Watson may be the "owner" of the property, the entity whose interests are at stake here is not Watson, but ARCO, because ARCO now has the financial responsibility and complete control over remediation of the property still owned by Watson. Watson simply has no remaining stake in the outcome of the remediation damages aspect of this case.[21]

This arrangement poses a direct and unmistakable threat to Shell. ARCO, once it incurs the costs to remediate the WICS, could file a second lawsuit in its own name seeking to recover from Shell the remediation costs that ARCO has already paid. Thus, regardless of what (if anything) Shell ultimately pays to

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[21] This fact is not subject to dispute. As ARCO's lawyer stated in his sworn Declaration submitted with ARCO's Motion for Good Faith Settlement Determination, "Under the Settlement, ARCO agrees to take responsibility for contamination caused not only by ARCO but also contamination caused by the other defendants." CT 3392. Indeed, the Settlement provides that ARCO "shall promptly undertake and diligently and competently complete, *at the sole cost and expense of ARCO*, any environmental assessment, testing, sampling, monitoring, remediation or removal of any Environmental Contamination . . . affecting the WICS Property . . . ." CT 3198-99 (emphasis added). Watson's counsel concurred, "After extended negotiations, to reconcile the parties' competing concerns, ARCO agreed to extend its indemnity to the entire Watson Center, including the areas in which Watson has identified contamination caused by the other defendants." CT 3379.

Watson, ARCO could argue it is entitled to bring a claim seeking reimbursement from Shell for Shell's full share of any remediation costs that ARCO itself has incurred. While Shell would vigorously contest any such action by ARCO as "double-dipping" or even "claim-splitting" in light of the structure of ARCO's settlement with Watson, the very possibility of such a lawsuit opens the door to multiple or inconsistent judgments against Shell. Even if ARCO were willing to credit Shell with any funds paid to Watson in this lawsuit (a credit that ARCO has never conceded it is obligated to allow), ARCO could still force Shell to litigate this case a second time if it believes that Shell's proportionate share exceeds what Shell has paid.

Any way you slice it, given that Watson bargained away its responsibility to undertake any remediation, as well as any control over remediation, the real party in interest with respect to the remediation claims was ARCO, not Watson. Shell was therefore entitled to have those claims prosecuted in ARCO's name, so that Shell would not have to face the possibility of "further harassment or vexation" at ARCO's hands after this litigation is concluded.

B. At a Minimum, ARCO Should Have Been Joined as an Indispensable Party

Even if Watson had some remaining interest in remediation activities, the trial court should have required joinder of ARCO as a party at trial in order to prevent Shell from facing the possibility of duplicative liability, multiple lawsuits, and inconsistent judgments. At the time of trial, ARCO easily could have been joined as a party, and there was no conceivable prejudice to ARCO or to Watson from an order requiring ARCO's joinder.

In pertinent part, C.C.P. § 389, (entitled "Compulsory Joinder") provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

C.C.P. § 389(a).

The reasons that Shell continues to face the risk of incurring "double, multiple, or otherwise inconsistent obligations" are explained above. Under the Settlement, ARCO has assumed full responsibility for remediation activities, and there is nothing in the Settlement that prevents ARCO from seeking to recover from Shell remediation costs it incurs—regardless of the amount (if any) for which Shell is ultimately found to be liable in this action.

The resulting necessity to join ARCO as a party plaintiff is established by *Bank of the Orient v. Superior Court,* 67 Cal.App.3d 588 (1977), in which the Court issued a writ of mandate commanding the Superior Court to order the joinder of St. Paul Fire and Marine Insurance Co. in a lawsuit between two financial institutions. In that case, San Francisco Federal Savings had sued Bank of the Orient, alleging that Bank of the Orient's negligence had enabled an employee of San Francisco Federal Savings to make unauthorized withdrawals from savings accounts and steal hundreds of thousands of dollars. San Francisco Savings' insurance company, St. Paul, had reimbursed San Francisco Federal Savings for the loss. Bank of the Orient claimed that joinder of St. Paul as a party plaintiff was required because the "true dispute" in the case was between St. Paul and Bank of the Orient, St. Paul had caused the action to be brought by San Francisco Federal Savings, and "the law precludes this ruse, for [St. Paul], as the real party in interest, is required to prosecute this action in its own name and must be joined as an indispensable party plaintiff." *Id.* at 593.

Relying on the requirement in C.C.P. § 367 that every action must be prosecuted in the name of the real party in interest and the provisions of § 389 providing for the joinder of indispensable parties, the Court agreed with Bank of the Orient and issued a writ commanding the joinder of St. Paul as a party plaintiff. *Id.* at 597. The Court refused to countenance St. Paul's effort to hide its true role in the lawsuit—just as this Court should not brook ARCO's attempt to hide behind Watson. *See also Allstate Ins. Co. v. Mel Rapton, Inc.*, 77 Cal.App.4th 901, 908-909 (2000) (citing *Bank of the Orient* with approval and explaining that both insured and insurer should be joined in a single suit against a tortfeasor to avoid violation of the rule against splitting the cause of action).

Shell recognizes that, under the provisions of § 389(b), the trial court had the power, even in the absence of an indispensable party, to proceed with the case if the court determined that "reasons of equity and convenience" so require. *See Redevelopment Agency of San Marcos v. Comm'n on State Mandates*, 43 Cal.App.4th 1188, 1197 (1996). But the trial court failed even to apply this standard, because it concluded erroneously that a determination that the settlement was in good faith precluded consideration of ARCO's status as the real party in interest. *See* RT A-46. This utter misapprehension of the issues was compounded by the trial court's repeated refusal to allow Shell to inform the jury of the fact that ARCO had agreed to clean up the WICS and would financially profit from any judgment against Shell, while Watson would never incur any costs or remediation obligations—precisely the facts that placed ARCO in the position of the real party in interest. *See, e.g.*, RT A-46, 1361-62, 2901-07, 2985-91.

Here, if the court had properly considered the relevant factors, all considerations of equity and convenience compelled the joinder of ARCO. There was no conceivable inconvenience to ARCO to appear as a party plaintiff in this case, since it had participated fully in discovery in this case, already had counsel in

the action and was paying half of Watson's lawyers' fees. There was, and continues to be, a complete identity of interest between Watson and ARCO on these issues. By contrast, Shell faces the possibility that a court will allow Watson and ARCO to pursue their claims in *seriatim* lawsuits if ARCO does not like the results of this action. Most importantly, principles of equity were ill-served by allowing Watson and ARCO to present a "ruse" to the jury that the true plaintiff here was the property owner, when the only party here that had any interest in the remediation damages was ARCO.

V. CONCLUSION

For all the stated reasons, Appellant Shell Oil Company urges this Court to reverse the judgment below and either direct entry of judgment for Shell or vacate the award of benefit damages in the amount of $14,275,237. Alternatively, if the Court determines that ARCO should have been joined as a party plaintiff, Appellant requests that the Court remand the case for further proceedings.

DATED: May 22, 2003

Respectfully submitted,

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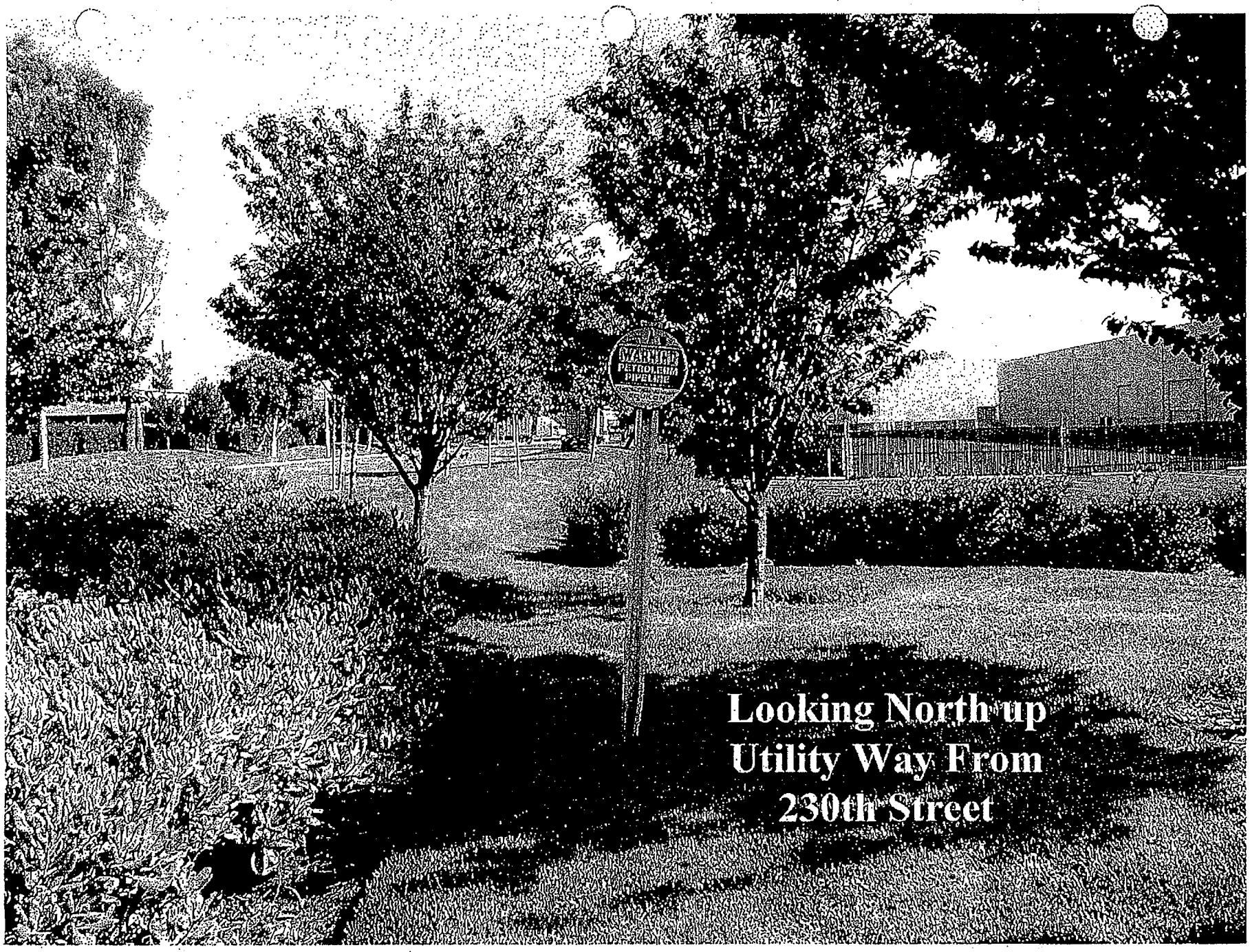
CERTIFICATE OF COMPLIANCE

PURSUANT TO CAL.R.CT. 14(c)(1)

Pursuant to California Rule of Court 14(c)(1), and in reliance upon the word count feature included in Microsoft Word, I certify that the attached Appellant's Opening Brief contains 17,890 words, excluding parts not required to be counted under Rule 14(c)(3).

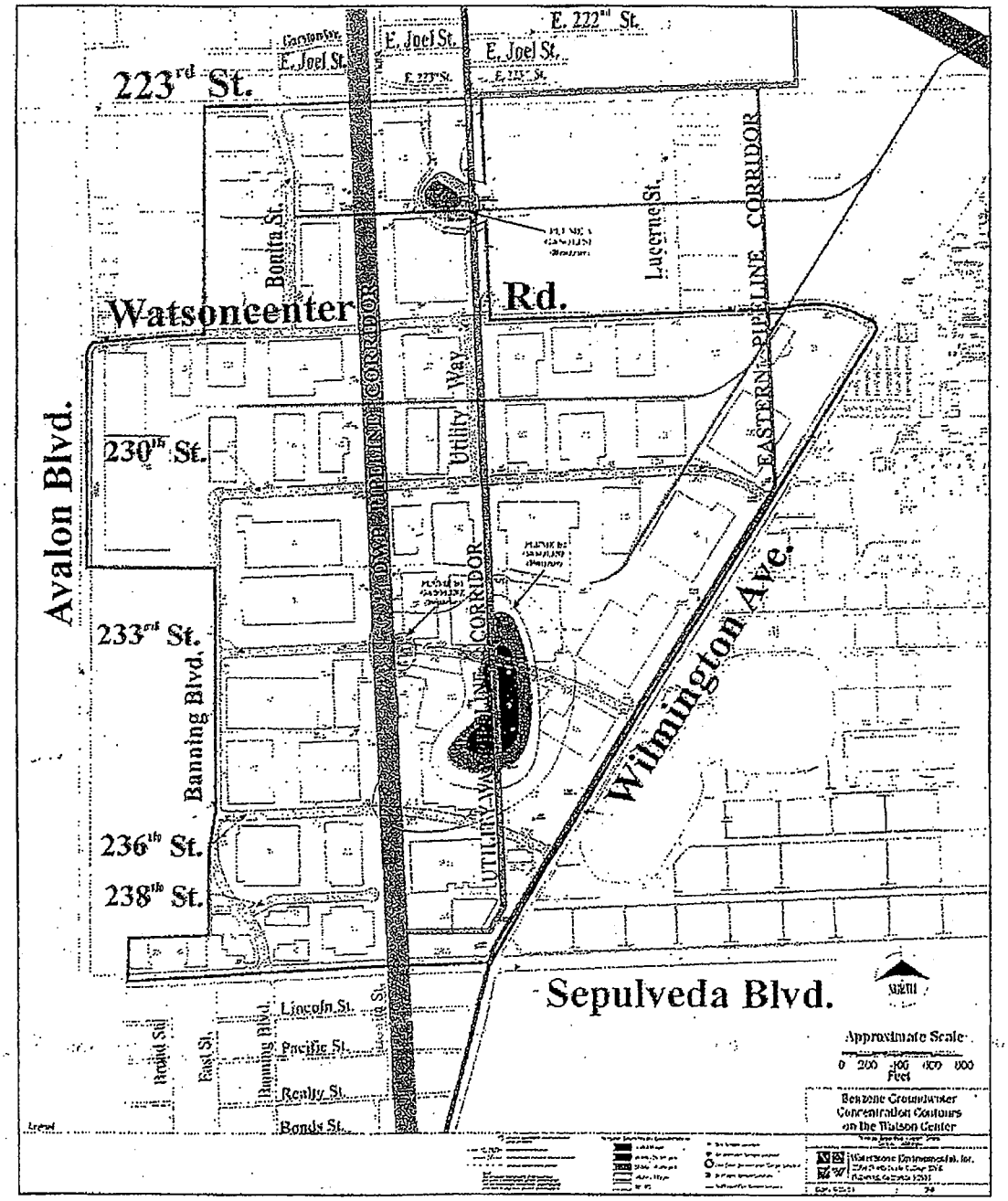
Dated: May 22, 2003

MARY NEWCOMBE



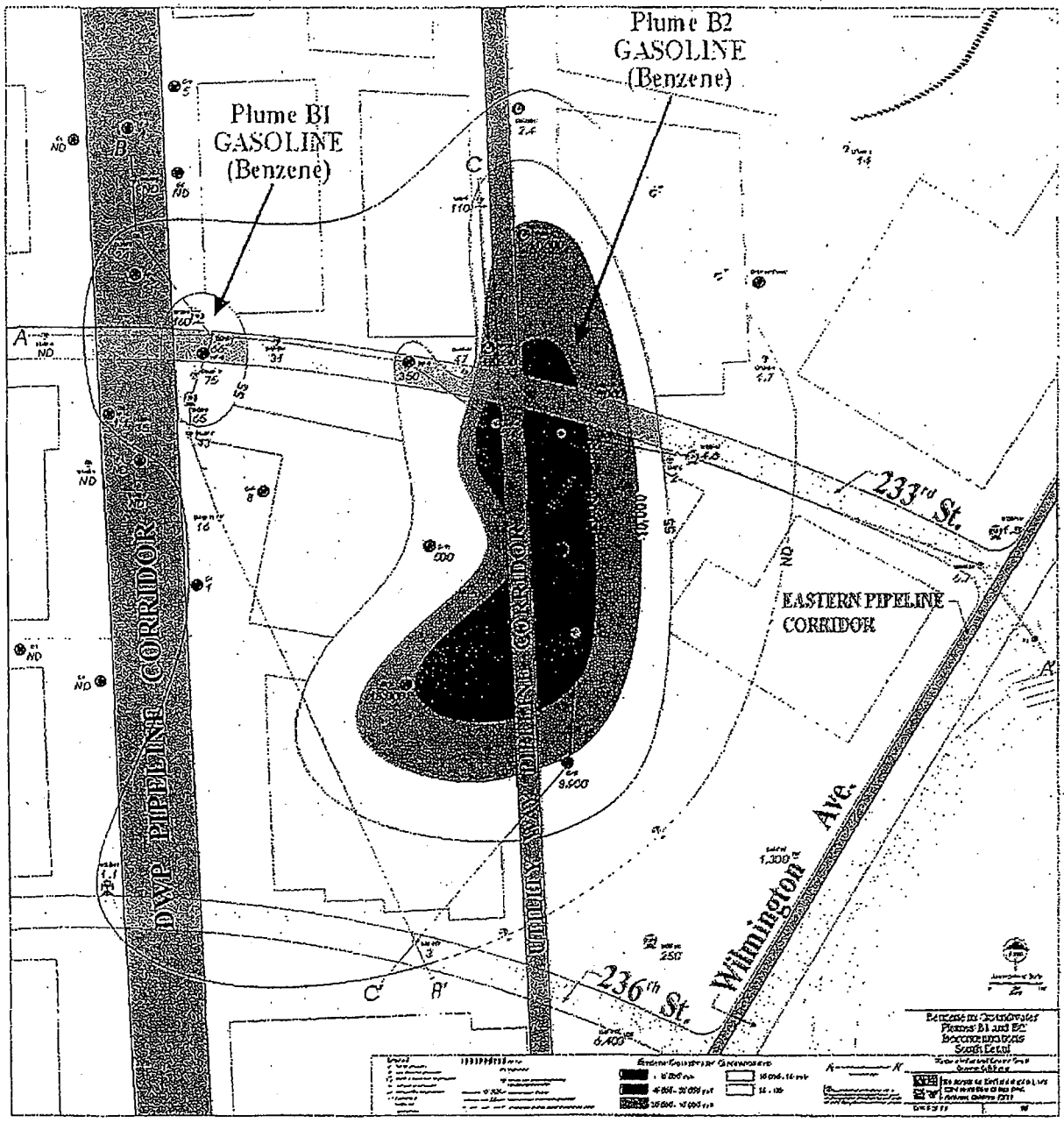
Looking North up Utility Way From 230th Street

BENZENE GROUNDWATER CONCENTRATION CONTOURS ON THE WATSON CENTER



Ex.1498

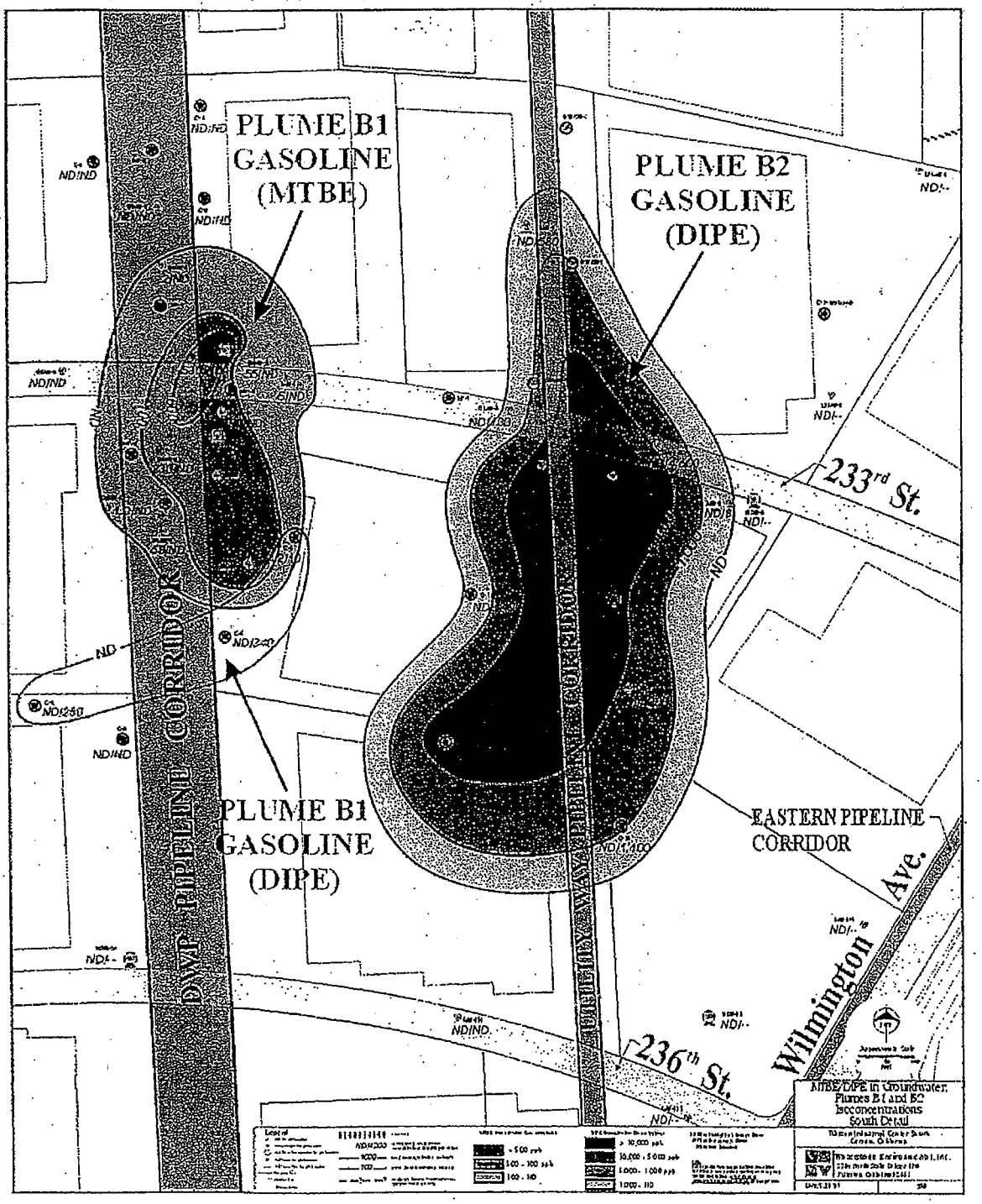
PLUMES B1 AND B2 - GASOLINE:
MAP OF BENZENE GROUNDWATER CONCENTRATIONS



Ex.1500

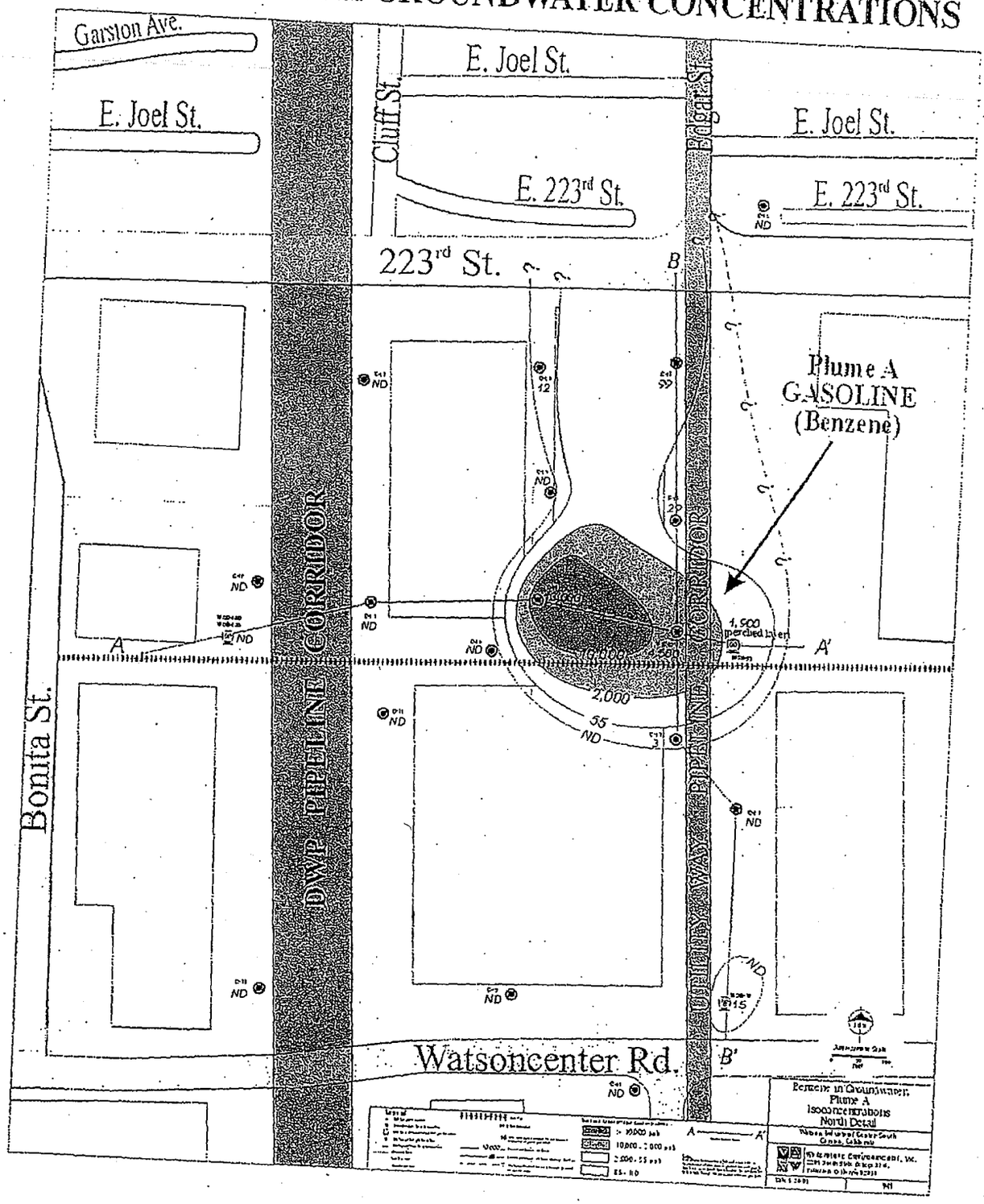
PLUME B1 AND B2 - GASOLINE:

MAP OF MTBE/DIPE GROUNDWATER CONCENTRATIONS



Ex.1501

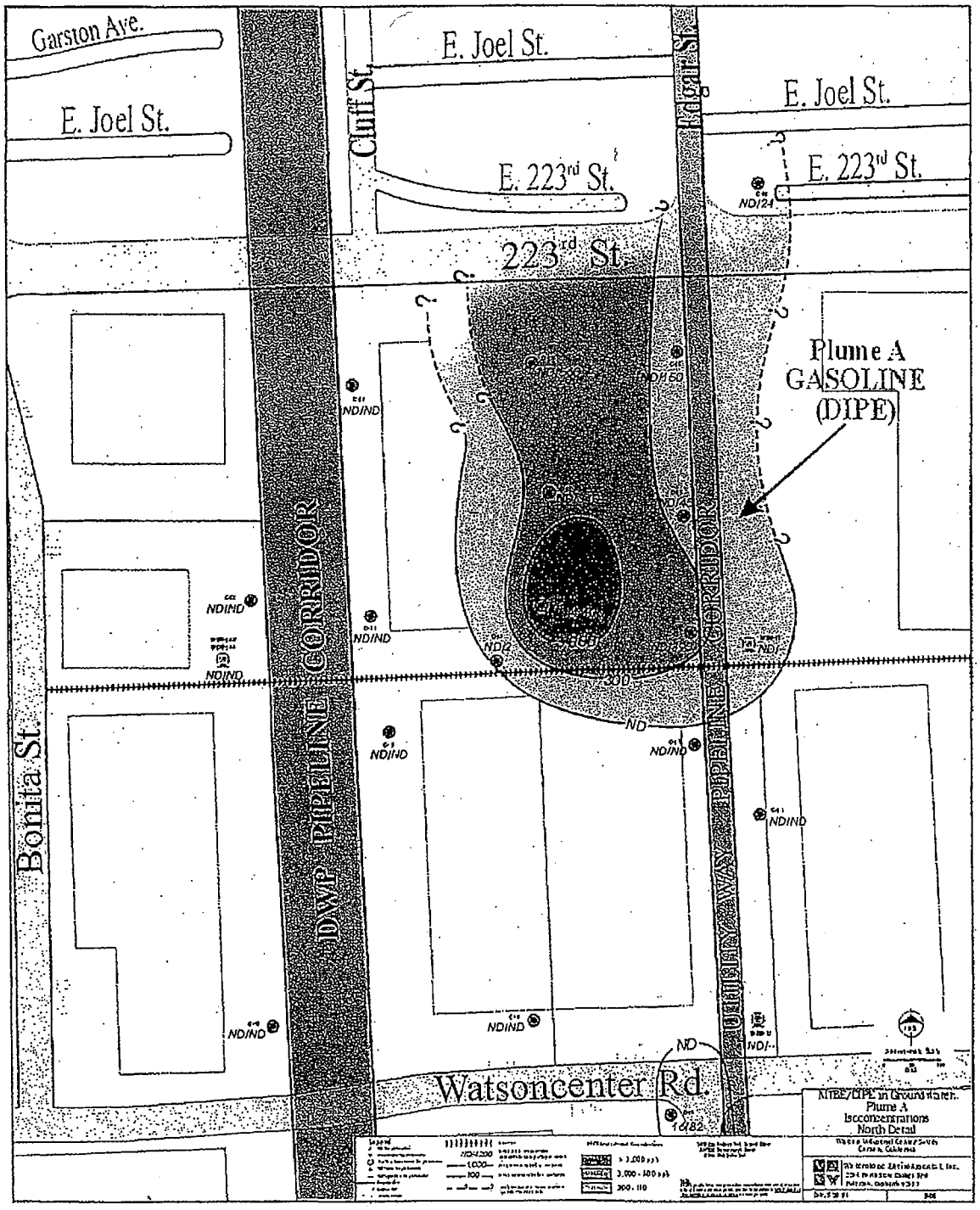
PLUME A - GASOLINE:
MAP OF BENZENE GROUNDWATER CONCENTRATIONS



Ex.1512

PLUME A - GASOLINE:

MAP OF DIPE GROUNDWATER CONCENTRATIONS



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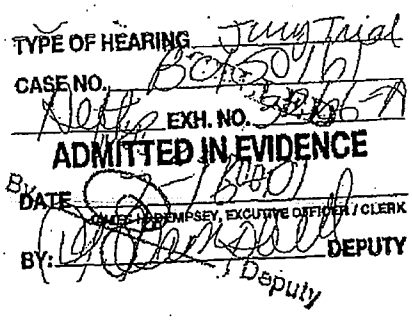
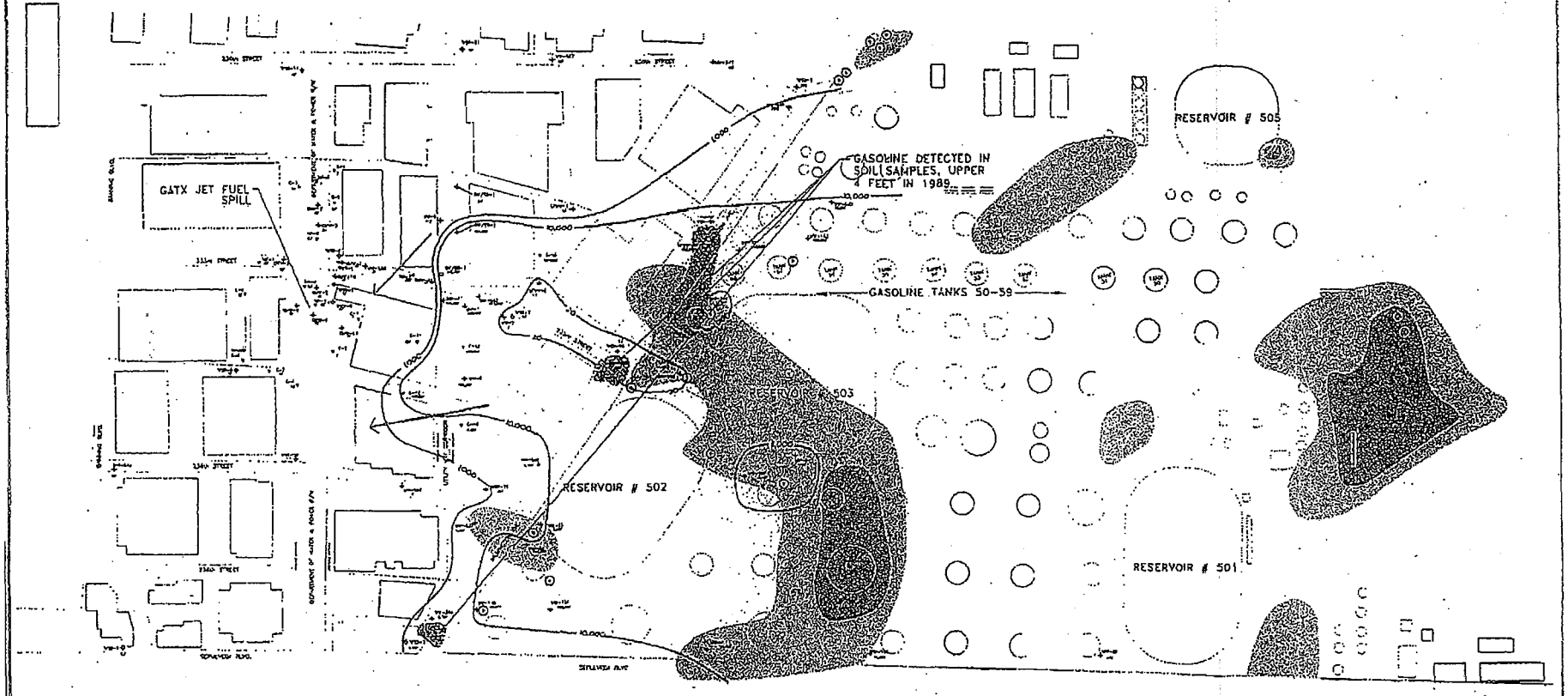

TYPE OF HEARING Jury Trial
CASE NO. BC 520471
EXH. NO. 3266-A
ADMITTED IN EVIDENCE
DATE 1/8/01
JOHN A. CLARKE, EXECUTIVE OFFICER / CLERK
BY: Deputy
DEPUTY

ex. 3266-A



EXPLANATION

- GROUNDWATER WELL LOCATION
- SOIL VAPOR AND GROUNDWATER GRAB SAMPLE LOCATION
- CPT AND GROUNDWATER GRAB SAMPLE LOCATION
- BARRIER PUMPING WELL LOCATION
- CONCENTRATION OF BENZENE IN GROUNDWATER (PPB) 1997-2001
- FREE PRODUCT LIKELY IN GROUNDWATER SAMPLE, ACTUAL BENZENE CONCENTRATIONS LIKELY TO BE LOWER.
- NOT DETECTED
- GROUNDWATER (WATER TABLE) FLOW DIRECTION (ARCO 1990, 1994)
- CONTOUR OF BENZENE CONCENTRATIONS IN GROUNDWATER (ug/L) (YEARS 1997-2001)
- FREE PRODUCT THICKNESS GREATER THAN 20 FEET ON THE WATER TABLE (YEAR 1997)
- FREE PRODUCT THICKNESS BETWEEN 10 AND 20 FEET ON THE WATER TABLE (YEAR 1997)
- MIGRATION PATHWAY FOR FREE PRODUCT ON WATER TABLE AND/OR PERCHED ZONE (SPECIANED)
- GASOLINE DETECTED IN SOILS AT APPROXIMATELY 4 FEET BELOW GROUND SURFACE. VAPOR CONCENTRATIONS EXCEEDING 770 PPM (YEAR 1988)

REFERENCES

FIGURE 9, WATERSTONE ENVIRONMENTAL, MARCH 2001 (EXHIBIT/ AE1)

"MEASURED LNAPL THICKNESS MAP OCTOBER 1997", ARCO PRODUCTS, (ARSC PR 00290)

FIGURE 19, WATERSTONE ENVIRONMENTAL, MARCH 2001, (EXHIBIT #49)

"ACTUAL WATER TABLE AQUIFER POTENTIOMETRIC SURFACE MAP APRIL 1984" RETEC (PR 05016)

"CLEAN-UP PROGRESS REPORT JULY 1985" ENGINEERING ENTERPRISES (10161-10818)

MONTGOMERY WATSON

EXTENT OF FREE PRODUCT IN 1990 AND 1997 PLUS BENZENE IN SHALLOW SOILS AND GROUNDWATER IN YEARS 1997 TO 2001

SOUTHERN AREA
CARSON, CALIFORNIA

JOB No.

FILE

CALCULATION OF FINANCIAL BENEFIT SHELL OIL CO. RECEIVED
JUNE 1, 1993 TO APRIL 30, 2001

Year	Before Federal IncomeTax Cost of Debt	Before Federal Income Tax Cost of Equity	Before Federal Income Tax Weighted Average Cost of Capital	Return Earned by Royal Dutch Petroleum Shareholders	Return Earned by Shell Transport and Trading Shareholders
1993	5.90%	14.48%	12.88%	18.76%	16.12%
1994	5.13%	18.62%	16.20%	7.48%	4.76%
1995	6.92%	17.59%	15.63%	33.92%	26.17%
1996	6.28%	23.27%	20.15%	26.68%	26.76%
1997	5.59%	27.12%	22.84%	32.05%	28.49%
1998	7.91%	38.92%	29.54%	-9.63%	-12.88%
1999	5.38%	34.89%	25.38%	26.26%	30.98%
2000	5.38%	23.38%	17.58%	1.92%	3.29%
2001	5.38%	15.54%	12.27%	-3.72%	-0.54%
Return on equity before tax				23.00%	24.30%
Calculated average before tax WACC			20.24%		
Rounded to			20.00%		

Ex.1531

WACC Calculations

(a)	H	I	J	O	P		Q	R		M		
				Shell Oil Return on Equity (CAPM) (d)								
Year	Shell Oil tot. equity % of tot. capital	Shell Oil tot. debt % of tot. capital	Shell Oil Cost of Debt	Risk-free rate	Suderman Equity Risk Premium	Ibbotson Equity Risk Premium (1926 -) (c)	Beta	Suderman Cost of Equity	Cost of Equity using Ibbotson Risk Premium(d)	Suderman BFIT WACC	WACC using Cost of Equity based on Ibbotson Risk Premium (e)	BFIT WACC using Pre-tax Adjusted Cost of Equity based on Ibbotson Risk Premium (f)
1993	81.32%	18.68%	5.90%	6.460%	4.400%	7.60%	0.70	9.560%	11.800%	12.88%	10.70%	15.64%
1994	82.05%	17.95%	5.13%	8.020%	6.100%	7.40%	0.70	12.290%	13.200%	16.20%	11.75%	17.33%
1995	81.60%	18.40%	6.92%	6.010%	8.000%	7.80%	0.70	11.610%	11.470%	15.63%	10.83%	15.45%
1996	81.64%	18.36%	6.28%	6.730%	11.900%	7.90%	0.73	15.358%	12.497%	20.15%	11.36%	16.61%
1997	80.13%	19.87%	5.69%	6.020%	17.600%	8.20%	0.68	17.900%	11.595%	22.84%	10.40%	15.19%
1998	69.75%	30.25%	7.91%	5.390%	24.600%	8.40%	0.83	25.685%	12.362%	29.64%	11.02%	15.46%
1999	67.79%	32.21%	5.38%	6.830%	20.900%	8.50%	0.78	23.028%	13.460%	25.38%	10.86%	15.56%
2000	67.79%	32.21%	5.38%	5.590%	12.700%	8.20%	0.78	15.433%	11.986%	17.58%	9.86%	14.04%
2001	67.79%	32.21%	5.38%	5.660%	5.930%	8.20%	0.78	10.256%	12.056%	12.27%	9.91%	14.12%
								Weighted Average (g)		20.24%		

(a) Letters denote Suderman Columns from Suderman Schedule

(b) 34.00% Tax rate used by Suderman. After Tax Cost of Debt = Cost of Debt X (1 - tax rate)

(c) Ibbotson Equity Risk Premium from Page 13 of Ibbotson Associates Risk Premia over Time Report : 2001
2001 value Not Available. 2001 value is set equal to 2000 value.

(d) (CAPM) Cost of Equity = Risk Free Rate + Beta X Equity Risk Premium

(e) WACC = [Shell tot equity % (H) X Cost of Equity] + [Shell tot. debt % (I) X Cost of Debt]

(f) WACC = [Shell tot equity % (H) X (Cost of Equity using Ibbotson Risk Premium)/(1 - tax rate)] + [Shell tot. debt % (I) X Cost of Debt]

(g) Weighted Averages calculated using number of months in each year per Suderman. All years weighted by 12 months except 1993 (7 months) and 2001 (2 months)

TYPE OF HEARING Tariff Filing
CASE NO. PF-150161
EXH. NO. 3224
ADMITTED IN EVIDENCE
DATE 2002
JOHN A. HARRIS, EXECUTIVE OFFICER / CLERK
BY: DEPUTY

3224

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within entitled action. My business address is 1000 Wilshire Boulevard, Suite 600, Los Angeles, California 90017-2463.

On **May 22, 2003**, I served the within document(s) described below as:

APPELLANT'S OPENING BRIEF

(X) **BY MAIL:** By placing a true copy thereof in sealed envelopes and causing them to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with our firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

SEE ATTACHED SERVICE LIST

( ) **BY FAX:** By transmitting a true copy thereof via facsimile machine to the offices of the parties listed on the attached Service List. I caused the copy to be transmitted from the facsimile number of Caldwell, Leslie, Newcombe & Pettit, (213) 629-9022 or (213) 629-5584. The transmission was reported as complete and without error. A copy of the transmission report is attached to this Proof of Service.

( ) **BY OVERNIGHT MAIL (VIA OVERNITE EXPRESS):** I caused such envelope to be deposited at a station designated for collection and processing of enveloped and packages for overnight delivery service by **OVERNITE EXPRESS**. I am "readily familiar" with the firm's practice of collection and processing of documents and other papers to be sent by overnight delivery service by **OVERNITE EXPRESS**. Pursuant to that business practice, envelopes in the ordinary course of business are that same day deposited in a box or other facility regularly maintained by such overnight service carrier or delivered to an authorized courier or driver authorized by such overnight service carrier to receive documents in an envelope or package with delivery fees paid or provided for.

(X) STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge, and that I executed this document on **May 22, 2003**, at Los Angeles, California.

( ) FEDERAL: I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct of my own personal knowledge, that I am employed in an office of a member of the Bar of this Court at whose direction this service was made, and that I executed this document on **May 22, 2003** at Los Angeles, California.

Wendy M. Carpenter

WENDY M. CARPENTER

SERVICE LIST

Watson Land Company v. Atlantic Richfield Company, et al.

Court of Appeal Case No. B155019

(LASC Case No. BC 150161)

Brian Becker James S. Bright Maureen J. Bright **BRIGHT & BROWN** 550 North Brand Boulevard, Suite 2100 Glendale, CA 91203 Tel.: (818) 243-2121 Fax: (818) 243-3225	Attorneys for Plaintiff and Respondent, WATSON LAND COMPANY, a California corporation
Feris M. Greenberger, Esq. **GREINES, MARTIN, STEIN & RICHLAND LLP** 5700 Wilshire Blvd., Ste. 375 Los Angeles, CA 90036 Tel: (310) 859-7811	Attorneys for Appellant/ Cross-Respondent SHELL OIL COMPANY
Clerk of Court **LOS ANGELES COUNTY SUPERIOR COURT** Central Civil West 600 S. Commonwealth Avenue Los Angeles, CA 90005	
CALIFORNIA SUPREME COURT 350 McAllister Street San Francisco, CA 94102 **(served with 5 copies)**	

2d Civ. No. B155019

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION TWO

WATSON LAND COMPANY,
Plaintiff, Respondent and Cross-appellant,

vs.

SHELL OIL COMPANY,
Defendant, Appellant and Cross-respondent.

Appeal from Judgment of the Superior Court
For the County of Los Angeles, Case No. BC150161
(Hon. Wendell J. Mortimer, Judge)

SHELL OIL COMPANY'S COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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EXHIBIT G

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