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I. INTRODUCTION

A. The Trial Court's Erroneous Evidentiary Rulings

In its Respondent's Brief, Watson Land Company ("Watson") tries to create the illusion that a "mountain" of evidence supports the jury's $18-million verdict against Shell Oil Company ("Shell"). The problem, of course, is that the "mountain" of evidence consists almost exclusively of the inadmissible and unadmitted evidence that Shell challenges in this appeal. Thus, Watson sets up a straw man by misconstruing Shell's appeal as a substantial evidence appeal, then spends the first thirty-three pages of its brief trying to knock that straw man down by citing the very evidence that Shell challenges: the inadmissible and unadmitted laboratory reports, the testimony of its experts to the contents of those reports, the illustrations of those reports in the form of plume maps and cross-sections, and the "junk science" of Watson's expert, Dr. Charles Schmidt.

When this erroneously admitted and unadmitted evidence is stripped away, Watson's case is reduced to no more than a parade of experts reciting bald conclusions that Shell caused the contamination on the Watson Industrial Center South ("Watson Center").[1] Watson's experts had no admissible data to give the jury and no personal knowledge of any of the laboratory reports that allegedly tied Shell to that contamination. Watson failed to authenticate the records properly, failed to provide any foundation to allow them to come into evidence and, with only a few irrelevant exceptions, failed even to move them into evidence.

The trial court, however, erroneously permitted Watson's experts to testify to the *contents* of these records and to put before the jury specific data taken from the inadmissible and unadmitted reports. The trial court also erred in allowing Watson's experts to present visual depictions of that data to the jury in the form of "plume maps" and geological cross-sections which were based entirely upon, and

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[1] Watson did not present a single percipient witness with testimony indicating Shell's pipelines were the source of the contamination at issue.

specifically referenced, the inadmissible data. The trial court's erroneous rulings to allow this inadmissible testimony and evidence were unquestionably extremely prejudicial to Shell.

Watson spends a mere seven pages of its 72-page Respondent's Brief on these issues. Watson first tries to excuse the foundational and authentication problems with the laboratory and consultant reports by arguing, in essence, "no harm-no foul," because Shell was forced to move some of these reports into evidence for rebuttal purposes. But under well-established California law, the fact that Shell was forced to refer to evidence to which it had unsuccessfully objected to mitigate the harm from the trial court's erroneous rulings does not waive Shell's objections to this evidence, nor does it convert the reports into admissible evidence in support of the verdict.

In an effort to bring the laboratory and consultant reports within the business records exception to the hearsay rule, Watson tries to characterize them as simple recordings of "routine tasks." However, even the most cursory review of the raw data generated by the gas chromatographs makes clear that expert interpretation and analysis is required to generate the conclusions that were reached in this case. Watson's own experts acknowledged that they relied on the expertise and interpretation of laboratory personnel in conducting the tests, in complying with complex chain of custody and analytical procedures, and in analyzing the data. Thus, these reports could not properly be qualified as business records. Without a proper foundation, the reports constituted inadmissible hearsay.

Nor is the fact that Watson failed to move any of the laboratory reports into evidence a "red herring," as Watson contends. The unadmitted laboratory reports were the only evidence of the threshold foundational fact that any specific chemicals were found on the Watson Center property, the nature and concentrations of those compounds, or their location. With no admissible evidence in the record in this regard, the testimony, plume maps and cross-sections

of Watson's experts Jeffrey Dagdigian and Nancy Beresky never should have been admitted.

B. The Trial Court's Erroneous Construction of Section 3334 and Improper Admission of Watson's WACC Analysis

Compounding the prejudice to Shell, the trial court also erroneously interpreted and applied Civil Code section 3334, which allowed Watson to reap a windfall award of so-called "benefit damages." The trial court then erroneously allowed the 20-percent weighted average cost of capital ("WACC") analysis of Watson's expert, Alan Suderman, to multiply the improper "benefit damages" award over four-fold.

Watson contends the trial court properly allowed Watson to claim "benefit damages" under Section 3334, even though the 1992 amendment that Watson claims authorizes such damages was passed at least twenty years after even Watson contends the trespass occurred. Because the 1992 amendment dramatically increased Shell's potential liability for an event that occurred long before its passage, its retroactive application in this case is barred by California law.

Even aside from the improper retroactive application of the 1992 amendment to Section 3334, there is no support for Watson's novel assertion that, under the amendment, even inadvertent trespassers can be tagged with huge "benefit damages" for merely negligent conduct. The best Watson can offer is one citation to the legislative history stating that the 1992 amendment was intended to apply to cases involving the intentional dumping of hazardous waste on desert lands, "*among others.*" In fact, the entire legislative history, as well as common sense and related statutory provisions, support the conclusion that the 1992 amendment was intended to apply solely to those who intentionally dump hazardous wastes or pollute another's land in an effort to avoid the costs of proper disposal.

Nor can Watson justify the grossly inflated calculation of its "benefit damages" by citing to the principle that the jury has "flexibility" in calculating damages. As Shell made clear in its Opening Brief, California law imposes a "reasonableness" limitation on all damage awards. Where, as here, the award far exceeds the injury to the plaintiff, the value of the property, and the culpability of the defendant, the verdict simply cannot stand.

C. The Trial Court's Erroneous Rulings Regarding the ARCO Settlement

Finally, the trial court erroneously held that Defendant Atlantic Richfield Company ("ARCO") was not a necessary or indispensable party to the litigation. The trial court made this ruling in spite of the fact that, under the terms of ARCO's settlement with Watson, Watson would never have to pay a penny for remediation (if any remediation in fact ever takes place), ARCO was obligated to pay half of Watson's past and future legal fees, an attorney-client relationship was formed between ARCO and Watson's counsel, and ARCO fully indemnified Watson for any conceivable economic harm arising from the contamination. The settlement also gave ARCO a direct stake in the verdict by providing not only that ARCO's remediation costs were to be reimbursed from any judgment against Shell, but also giving ARCO a 50% stake in Watson's windfall verdict above and beyond any remediation costs ARCO might incur for the Watson Center property. The trial court compounded this error by allowing Watson to claim before the jury that it suffered damages because it would have to pay to clean up the contamination, despite the fact that there was no chance it would ever have to do so.

D. The Trial Court's Legal Rulings Constitute Reversible Error

Significantly, Watson makes no effort to argue that any of the legal errors committed by the trial court were harmless; nor could it credibly make such an argument. It is obvious that the erroneous admission of Watson's expert testimony and plume maps, which constituted the heart of Watson's case both on

liability and remediation damages, was necessarily prejudicial given the highly technical nature of the evidence and the jury's natural deference to expert testimony on these issues. (See, e.g., *Kotla v. Regents of Univ. of Cal.* (2004) 115 Cal.App.4th 283, 294-295 [finding plaintiff's expert's testimony likely played a decisive role in the jury's verdict and reversing the judgment because it was reasonably probable the jury would have reached a verdict more favorable to the defendant had proper limits been placed on the expert testimony].) It is equally obvious that without the erroneous application of Section 3334, which permitted Watson to argue for "benefit damages" before the jury, and without the improper "WACC" analysis that compounded these so-called damages more than four-fold, the verdict against Shell would have been far different. And Watson's misleading argument giving the jury the misimpression that Watson would pay all remediation expenses—when the truth was that it would never pay a penny of those costs—no doubt affected the outcome of the trial.

These prejudicial legal errors by the trial court irrevocably affected the course of the trial and now mandate reversal of the judgment against Shell. Simply put, in light of these prejudicial errors, the judgment against Shell lacks any basis. Watson tries to create the illusion of a foundation, but, carefully considered, the "mountain" of evidence to which Watson points is nothing more than a mirage.

Watson had a full and fair opportunity to put its best case before the jury. It was Watson's own tactical decision to rely almost entirely upon inadmissible and improper expert testimony rather than establishing a proper evidentiary foundation for the data that constituted the heart of its case. Because there is no support for the verdict without the inadmissible evidence, the judgment should not only be reversed, but the trial court should be instructed to enter judgment for Shell. (See *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661 [when the plaintiff has had a full and fair opportunity to present its case, and the evidence is insufficient as a matter of law, judgment for defendant is required].)

II. DUE TO THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULINGS, THE JURY'S VERDICT:WAS BASED ON IMPROPERLY ADMITTED EVIDENCE AND MUST BE REVERSED

Watson argues that "[a]ppeal is not the forum to reweigh the evidence" and that Shell "must overcome a strong presumption supporting the verdict." (Respondent's Brief ("RB"):2.) These assertions demonstrate that, by accident or by design, Watson has misconstrued the primary basis for Shell's appeal. Shell does not ask this court merely to review whether the verdict was supported by "substantial evidence." Rather, Shell contends the trial court committed a host of prejudicial legal errors and allowed inadmissible evidence to be placed before the jury under the guise of expert opinion.

The cornerstone of Watson's causation evidence was the testimony of its experts, who testified that the existence of certain chemicals found on the Watson Center established that Shell's pipelines were the cause of the A and B-2 Plumes. (Appellant's Opening Brief ("AOB"):20-21.) The problem, however, was that there was insufficient admissible evidence in the record to establish the predicate foundational fact that these compounds had, in fact, been identified on the Watson Center. Moreover, these same inadmissible and unadmitted reports were also the basis for the petroleum fingerprinting, concentration maps and geological cross-sections that Watson's experts relied upon at trial to try to link the contamination to Shell's pipelines. (AOB:22-27.) Watson chose not to designate any expert to authenticate the lab reports on which its experts relied, failed to provide a sufficient foundation for those records, and failed even to move the relevant records into evidence. (AOB:20-27.) The testimony of Watson's experts therefore served only as a conduit for Watson to place inadmissible hearsay and unadmitted foundational facts before the jury. The trial court's ruling allowing such testimony constitutes reversible error.

By focusing its Respondent's Brief almost exclusively on the testimony of Dagdigian and Beresky and the laboratory and consultant reports on which they

relied, Watson effectively concedes that its causation evidence turns on the admissibility of that evidence. Unable to justify its evidentiary failures, however, Watson is reduced to arguing that these omissions are excused because *Shell* was forced to introduce some of the underlying laboratory reports into evidence for rebuttal purposes. (RB:37-38.) Watson also implies (RB:35) that the two custodians who did testify at trial could somehow provide an adequate foundation for the numerous reports from other laboratories at which they never worked. However, those two witnesses had no personal knowledge regarding the analytical and chain of custody procedures employed by the laboratories that generated the bulk of the data upon which Watson's experts relied, and thus could not authenticate or provide any foundation for that data. Finally, Watson argues that the laboratory and environmental reports, which required complex analysis and data interpretation, were no more than simple recordings of "routine tasks." (RB:36.) As discussed below, none of Watson's arguments have any merit.

Without the improperly admitted evidence, it is—at a minimum—*reasonably probable* that the jury would have reached a result more favorable to Shell. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802.) "[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*" (*Id.* at p. 800) (emphasis in original).) The judgment, therefore, must be reversed.

A. Shell Did Not Waive Its Objections by Using Some of the Inadmissible Laboratory Reports for Purposes of Impeachment and Rebuttal

Watson first attempts to excuse the foundational problems with the underlying laboratory data by suggesting that Shell waived such problems by moving some of the reports into evidence for purposes of rebuttal and impeachment. (RB:38.) According to Watson, "Shell should not be allowed to argue that Watson's data is improperly authenticated when Watson refers to it, but is perfectly trustworthy and reliable when Shell wants to refer to it." (RB:38.)

Indeed, Watson goes so far as to argue, "Shell's own conduct and arguments are admissions that the laboratory data has proper foundation." (RB:38.)

The law in California, however, is clear that a party does not waive an unsuccessful objection to evidence by thereafter using or referring to that evidence. (See, e.g., *People v. Venegas* (1998) 18 Cal.4th 47, 94; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213; *Warner Constr. Corp. v. Los Angeles* (1970) 2 Cal.3d 285, 300, fn.17.) Thus, the fact that Shell was forced to refer to this evidence at trial, or to admit portions of it into evidence for rebuttal or impeachment purposes, does not cure the evidentiary defects to which Shell objected; nor does it constitute a waiver of Shell's ongoing objections to that evidence.

In *Warner Constr.*, the defendant objected to certain exhibits being admitted into evidence. (2 Cal.3d at 300, fn.17.) After those objections were overruled, the defendant sought to utilize or explain the exhibits to which it had objected. (*Id.*) On appeal, the plaintiff contended that the defendant had waived its objections to the admission of the exhibits. (*Id.*) The California Supreme Court disagreed, holding that

> "[t]he error was committed at the instance of the opposite party, and appellant did all it could to prevent the error. After the court had held, over the appellant's objection, that the evidence was competent, appellant, in seeking to overcome the case made by the appellee, could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving his right to question the court's action."

(*Id.*, quoting *Fernandez v. Western Fuse Co.* (1917) 34 Cal.App. 420, 424.)

Similarly, the mere fact that Shell proceeded to put forth a vigorous defense under the rulings made by the trial court does not in any way preclude a challenge to those rulings based on Shell's timely objections. Were it otherwise, a party in Shell's position would be faced with the untenable choice of either abandoning its legitimate objections to improperly admitted evidence in order to challenge the

evidence at trial, or forgoing any effort to challenge the substance of that evidence during trial in order to preserve its objections on appeal. The California Supreme Court has clearly rejected such a rule. Shell's admission of certain exhibits to pursue its defense in the face of the rules set by the trial court cannot be construed as a waiver. (See also *Mary M.*, 54 Cal.3d at 212 ("An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.") (citations omitted).)

There is no question that Shell preserved its objections to Watson's inadmissible evidence. At trial, Shell consistently objected to the admissibility of the lab reports, to Dagdigian's and Beresky's testimony relying on the substance of those reports, and to their visual depiction of the inadmissible data in the form of plume maps and geological cross-sections. For example, Shell filed an *in limine* motion to exclude Dagdigian's testimony that the presence of diisopropyl ether ("DIPE") on the Watson Center established that Shell had caused the contamination. (CT:3680.) Shell also objected to the boxes of lab reports and declarations Watson subpoenaed on the eve of trial to try to overcome its failure to properly designate witnesses who could testify to the laboratory results. (RT:593-594.) And Shell objected to the custodian declarations that purported to authenticate and provide a foundation for the records. (RT:854.)

Shell also consistently objected that the business records exception to the hearsay rule did not apply to complex interpretive analytical data and reports of the type Watson's experts relied upon at trial. (See, e.g., RT:601.) For example, Shell placed a continuing objection on the record to Dagdigian's testimony on the grounds that it presumed the existence of facts contained in the lab reports and relied upon lab reports that were inadmissible hearsay, lacked foundation, and went far beyond the business records exception. (RT:1457.) Indeed, even when Shell was forced to move some of the F&B lab reports into evidence for rebuttal

purposes, Shell repeated its objection and stated, *on the record,* that it did not intend to waive its objections to those records. (RT:5382-5383.)

Shell also objected to the admission of individual exhibits on the same grounds. (See, e.g., RT:930 (Exh. 951, 1475 [Kaplan]); RT:3647 (Exh. 190 [Global Geochemistry]); RT:4390 (Exh. 886 [attenuation of DIPE]); RT:5458 (Exh. 1588 [excerpt of lab data from F&B].) And, as noted in Shell's Opening Brief (See, e.g., AOB:11, 10 fn.3, 27, 27 fn.12), Shell specifically objected to the admission of Watson's demonstrative exhibits, including the plume maps and geological cross-sections drawn by Dagdigian and Beresky from the inadmissible data, and the downhole flux graphs drawn by Schmidt based on his junk science method of analysis.[2] (RT:3005-3007). Shell not only sought a Kelly hearing to preclude Schmidt from testifying (CT:4600-4610), but also moved to strike the trial testimony of Schmidt (RT:2194) and renewed its objections to Schmidt's testimony in its post-trial motions. (CT:5896, fn.7.)

Since Shell made timely objections that the trial court erroneously overruled, Watson's argument that Shell has somehow waived those objections on appeal by challenging the evidence at trial is specious.

B. Watson Failed to Provide an Adequate Foundation for the Laboratory Reports to Be Admissible as Business Records

Watson attempted to link Shell to the contamination on the Watson Center by showing that there were specific chemical components in the contamination itself that Watson claimed unmistakably belonged to Shell. (See RT:1445-1446.) Watson failed, however, to designate any expert to testify to the presence of DIPE on the property (see CT:3697-3707), and had only laboratory and consultant reports to support the existence, location and concentrations of DIPE and the other compounds Watson claimed were found on the Watson Center. (CT:3680-3687; RT:A74-75). Moreover, Watson's experts also testified improperly to

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[2] These exhibits included Exhibits 1494-1521, 1523, 1525-1528, 1531, 1532, 1534-1537, 1541-1550, and 1554-1559.

unauthenticated hearsay drawn from reports done by Watson's previous environmental consultants, which not only contained additional data such as well logs and soil lithologies, but also the expert conclusions of those consultants as to the nature, distribution, and sources of those contaminants. (See, e.g., Exhs. 1437, 1438.) Watson's expert witnesses improperly placed both the data and conclusions from these consultant reports before the jury through their trial testimony, plume maps and geological cross-sections.

There is no question that these reports were hearsay. (See Evid. Code, § 1200; *Daniels v. Dept. of Motor Vehicles* (1983) 33 Cal.3d 532, 537 [an out of court report offered for the truth of the matter asserted was hearsay].) Instead of designating and calling the appropriate witnesses to authenticate these records and explain the complex scientific analyses they contained, Watson chose to use Dagdigian and Beresky as its mouthpieces to place before the jury the inadmissible data from the laboratory and consultant reports as to the type of petroleum products that allegedly caused the contamination ("petroleum fingerprinting"); the concentrations of benzene, DIPE, EDB, EDC and other compounds Watson claimed were indicative of contamination from the Shell pipelines; the locations at which these compounds were found; and the soil lithology of the subsurface where the samples were collected.

Watson argued that the laboratory and consultant reports were admissible as business records and that Watson's experts could not only rely on them in forming their opinions, but could also testify *to their contents*. (CT:3942-3955; RT:A-78-81.) The trial court agreed, concluding that the reports qualified as business records. (RT:A-103-04; 601-602; CT:4513-4514.) Shell objected strenuously to the admission of these reports, and the record reflects Shell's continuing objections. (See, e.g., RT:1457.)

Otherwise inadmissible hearsay contained in a business record may be admitted, but only if, among other things, some "qualified witness testifies to [the document's] identity and the mode of its preparation; and [t]he sources of

information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271; see also Evid. Code, § 1561, subd. (a).) In this case, Watson offered only counsel's assurances that the reports were reliable (see RT:A-78-81), and written declarations drafted by Watson itself that offered no specifics about how the specific samples were collected, how the analyses were conducted, how the results were interpreted, or how the reports were prepared.[3] (See, e.g., Exhs. 1456-1493.) Thus, the record was devoid of admissible evidence that would allow the court to make a meaningful determination as to the trustworthiness of the reports, as required by Evidence Code section 1561, subdivision (a). Moreover, although Watson was able to obtain signatures on the declarations it drafted for these witnesses, it never called the key laboratory witnesses to testify at trial. Shell was therefore deprived of the opportunity to cross-examine those witnesses on these threshold foundational issues.

Watson contends that the showing required for trustworthiness is a "minimal" one (RB:34), and suggests that the requisite "indicia of reliability" was satisfied by Stephen Jones and Isaac Kaplan, the two records custodians that Watson bothered to call at trial. (RB:35.) However, Jones testified generally about procedures at Jones Environmental Laboratories and Teratech Laboratories.[4] (RT:744-757.) Kaplan testified generally about procedures at Global Geochemistry. (RT:907-909, 916-919.) But neither Jones nor Kaplan was competent to testify to the mode of preparation, sources of information, or trustworthiness of records from other laboratories (including F&B). Neither Jones nor Kaplan was the custodian of records for the laboratory reports that contained the key data to which Dagdigian and Beresky testified at trial, upon which they relied in forming their opinions, or that they used in drawing their plume maps and

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[3] The declarations themselves were never admitted into evidence.

[4] In fact, Jones admitted that he left Teratech in 1991, and had no information as to how records were maintained after he left. (RT:757-758.)

cross-sections. (See RT:744-779, 907-929; Exhs. 951, 1475, 1476, 1477.) They had no personal knowledge or relevant information as to those laboratories or the collection and analysis of the samples discussed in those reports. (See Evid. Code, § 1561, subd. (a).) In fact, *not a single one of the Jones and Kaplan laboratory reports that were admitted into evidence by Watson related to any data point in the A Plume*—the only plume for which the jury found Shell liable. (See Exhs. 951, 1475, 1476, 1477.) And between them, only *a single data point* (well 543) fell within the boundaries of the B-2 Plume as mapped by Dagdigian and Beresky (see Exhs. 1475, 1477), *and the jury found that Shell was not liable for that plume.* (See discussion at Section III B, *infra*.) Thus, the testimony of Jones and Kaplan did not, and could not, provide any foundation for the testimony of Dagdigian or Beresky, the plume maps that purported to illustrate the location, size, and configuration of the so-called A and B-2 Plumes, or the cross-sections that purported to illustrate the soil lithology and contamination.

The Jones and Kaplan testimony did, however, make clear that Watson easily *could have* provided the foundation and authentication required by Evidence Code section 1271 had it wanted to do so. The testimony of Jones and Kaplan was not protracted. Each testified to how their labs conducted certain analyses and how their records were made and kept. (See RT:744-779, 907-929.) They were available for cross-examination. (See Evid. Code, § 1271; *Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697, 1708 [where proponent invokes business records exception, opponent should be able to "test the applicability of the exception by cross-examining the custodian of records."].) But Jones and Kaplan simply did not have the information that went to the critical and threshold issue in the case: the alleged identification, concentration and location of DIPE and other chemicals in the samples taken from the area of the A and B-2 Plumes by the entirely separate laboratories and environmental consultants upon which Watson's experts relied. And, for tactical reasons, Watson never called any other witnesses at trial from the laboratories and environmental consultants that drilled the

borings, sampled the wells, or collected and analyzed the data used by Dagdigian and Beresky in their testimony and plume maps.

For example, Watson never called James E. Bruya, whose lab *had* conducted most of the critical tests. (See, e.g., Exhs. 1437-1438.) Nor did Watson even attempt to move Bruya's declaration as custodian of records of the F&B Labs into evidence. (See Exh. 1472.) In fact, Watson made no effort to call *anyone* who could testify to the chain of custody procedures at the labs that conducted the relevant tests, explain the testing protocols at those labs, or describe how the laboratory analyzed, interpreted and recorded the test results. Nor did Watson move to admit the vast majority of the lab reports into evidence. (See, e.g., Exhs. 472, 582, 583, 1431, 1436-1440, 1450-1452, 1472.[5]) Yet, the trial court permitted Watson's experts to testify to the contents of those reports, present the data taken from the reports to the jury in visual form through their plume maps and cross-sections, and testify to their conclusions based on those reports.

This error by the trial court deprived Shell of any meaningful opportunity to test the applicability of the business records exception in this case. Shell was improperly denied the opportunity to cross-examine the key records custodians, determine how the reports were prepared and the data analyzed, or otherwise demonstrate that the relevant reports were untrustworthy or unreliable.[6] (See *Taggart, supra*, 33 Cal.App.4th at p. 1708.) Indeed, from the report summaries that were provided to Shell, it was impossible for Shell's petroleum fingerprinting expert to verify the methods of preparation, the sources of information, the validity

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[5] Exhs. 1437 and 1438 were admitted by Shell for rebuttal purposes. (See RT:3827-3828.)

[6] Watson dismisses Shell's claim that it should have had the opportunity to cross-examine the chemists who conducted the tests on which Dagdigian and Beresky relied because "Shell asked no specific questions [of Jones or Kaplan] on any of the data results." (RB:33, fn.15.) Of course, neither Jones nor Kaplan had any personal information regarding the relevant data results because their labs had not done the critical testing. (See Exhs. 951, 1475, 1476, 1477.) Thus, it should come as no surprise to Watson that Shell asked no such questions.

of the results, or to determine the overall trustworthiness of the reports. (CT:4168-4169, 4175-4176; RT:3935-3940.)

In the absence of evidence as to the mode of preparation of the reports or the sources of information and methods used to produce the reports, the trial court should never have deemed the laboratory and consultant reports admissible as business records, and Watson's experts should never have been permitted to testify to their contents or to present the data from those reports to the jury visually in the form of plume maps and cross-sections. (See Evid. Code, § 1271; see also Evid. Code, § 1561, subd. (a).) Since Watson provided no foundation whatsoever for the key laboratory records, the trial court lacked discretion to admit those records. (See *Rodwin Metals, Inc. v. Western Non-Ferrous Metals, Inc.* (1970) 10 Cal.App.3d 219, 225 [where offering party lays no foundation whatsoever, no discretion exists to admit the evidence]; *Miles Labs., Inc. v. Superior Court* (1982) 133 Cal.App.3d 587, 594 [finding scientific report "patently inadmissible" where no foundation was laid].) The trial court's rulings allowing such improper testimony and evidence were prejudicial error and should be reversed.

C. The Contents of the Laboratory and Consultant Reports that Watson's Experts Presented to the Jury Were Not Simple Recordings of "Routine Tasks"

Even if Watson had laid a proper foundation, the laboratory and consultant reports still would have been inadmissible because they constituted conclusions based on expert analysis and complex interpretations of raw data and did not qualify as business records. (See *People v. Reyes* (1974) 12 Cal.3d 486, 503.) Watson again misstates Shell's argument in order to reject it, asserting that "Shell's second argument is that scientific test results can never be authenticated as business records because they do not record an act, condition or event." (RB:36.) In fact, Shell does not contend that scientific test results can *never* be authenticated as business records. (AOB:24.) What Shell maintains is that, on the facts in this case, *these* laboratory results do not qualify as business records

because they do not constitute a "record of an act, condition, or event." (AOB:24.) Rather, the laboratory results and environmental reports testified to and relied upon by Watson's experts are expert conclusions based on the interpretation and analysis of complex data, rather than records of an act, condition or event for purposes of the business records exemption:

> "In order for a record to be competent evidence under that section 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 p. 503.)

In an effort to minimize the expertise inherent in the reports, Watson contends that the "running of the test itself is an 'act or event' recorded in the results," and that "[r]ecording test results from standard EPA laboratory methods is a routine task similar to reading an electrical meter." (RB:36.) The lab results at issue here, however, were not generated by simply placing a sample in a machine, pushing a button and "recording" the results.

Indeed, both Watson's own experts and the custodians of records that Watson did call at trial acknowledged that interpretation of the data reflected in these laboratory reports was not simply a mechanical recording of a routine task. For example, Beresky admitted that "we're paying them for their *expertise to interpret* [the original gas chromatographs], and they give us the data—the actual *interpreted data* from the gas chromatographs." (CT:4181 (emphasis added).). Dagdigian acknowledged that the reports were cited specifically for the *analysis and conclusions they contained.* (See RT:1546.) And the two custodians of records Watson did call each acknowledged that a degree of expertise and

experience is necessary to analyze the raw data. (RT:761-764; 923-924.) Indeed, Kaplan specifically admitted that his reports reflect his expert conclusions based on his interpretations of the data and his expertise in the field. (RT:923-924.)

That the lab reports are not simple recordings of routine tasks is readily illustrated by reviewing samples of the gas chromatographs generated during the testing process. (See, e.g., excerpts from Exh. 1475, attached in the Appendix to this Brief.) Without expert interpretation, it is impossible to bridge the gulf between the raw data and the ultimate results. (RT:3935-3937.) Hence, the graphs themselves must be analyzed and interpreted to yield a laboratory report that describes and summarizes the data and reflects the analyst's conclusions. (RT:3935-3940.) In fact, the conclusions in the F&B reports as to the nature of the petroleum compounds found on the Watson Center make clear that they are not routine "electric meter" readings, as Watson asserts, but instead are conclusions resulting from expert analyses by witnesses Watson chose not to call at trial. (See, e.g., excerpts from Exh. 1437, attached in the Appendix.) Similarly, the reports and well logs from Watson's previous environmental consultants constitute those consultants' conclusions regarding their interpretation of the well logs and soil lithology.[7] (See, e.g., excerpts from Exh. 1437, 1438, attached in the Appendix.)

The laboratory and consultant reports plainly are *not* simple recordings of "routine task[s]" as Watson asserts. As such, they are not the kind of business records that Section 1271 was intended to authorize. (*Reyes*, *supra*, 12 Cal.3d at 503 [Where a report's conclusion is based on an analysis of the person preparing the report, it does not qualify as a business record].) The trial court's ruling that

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[7] In fact, the soil lithology well logs do not represent continuous cores of the soil column. As indicated in the well logs attached in the Appendix from Exh. 1438, actual soil samples are only taken every five feet, and the field geologist then uses his training and expertise to interpolate those results into a complete soil lithology for the boring.

Watson's laboratory and consultant reports were admissible under the business records exception to the hearsay rule was both erroneous and prejudicial.

D. With No Foundation for the Laboratory and Consultant Reports, Watson's Experts Should Not Have Been Permitted to Testify to or Present the Contents of Those Reports

With no applicable exception to the hearsay rule and no admissible evidence in the record to support the predicate fact that DIPE or any other identifying compound was found on the property, the Dagdigian and Beresky testimony should have been excluded. 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." (*People v. Carpenter* (1997) 15 Cal.4th 312, 403) (citations and internal quotations omitted); see also *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal. App. 4th 1516, 1524-1525.) Were that not the rule, a party could always convert inadmissible hearsay into admissible evidence simply by calling an expert to utter it to the jury.

That is precisely what happened in this case. The laboratory reports were not properly admissible as business records, Watson failed to properly authenticate the reports or provide any kind of foundation, and made no effort to move the records into evidence. The trial court nonetheless permitted Watson's experts to testify to the contents of these reports, allowed them to present plume maps and cross-sections that were nothing more than visual representations of that data, and permitted them to testify to their conclusions based on that data. (See, e.g., Exhs. 1497-A and 1502 (attached to Respondent's Brief).) The trial court also permitted Dagdigian to testify that DIPE (and certain lead alkyls and scavengers used by many oil companies to make leaded gasoline) had been found on the site and that the presence of DIPE conclusively established Shell as the source of the contamination on the Watson Center. (RT:1444-1446.) Dagdigian also testified extensively as to the concentration and location of benzene and other compounds

that he claimed allowed him to delineate plumes of contamination demonstrating the contamination came from Shell's pipelines instead of from the ARCO refinery or some other source. (See, e.g., RT:1468, 1471, 1472, 1475, 1479, 1481-1483; Exhs. 1498-1502.) Beresky relied on and testified to the same data in producing "cross sections" that purported to illustrate the soil lithology and contamination. (See, e.g., RT:2458, 2485, 2489-2490; Exhs. 1503, 1504, 1508, 1509.)

In the process, Dagdigian and Beresky testified to specific data points, concentrations, petroleum fingerprinting results, locations and soil lithologies that came directly from the inadmissible and unadmitted laboratory and consultant reports. For example, in describing his plume maps, Dagdigian testified:

- "You will notice that there are two areas where there's free product that's laying on top of the groundwater and then the remainder of this is dissolved benzene in groundwater." (RT:1468.)
- "The most important thing here is that we have DIPE, this blue area right here, and this blue area right here, and the DIPE and the benzene perfectly overlap one another . . . . So now we have a plume that has benzene in it, has TPH gasoline in it, and it has DIPE in it . . . . Then down here, this is, again, the B2 and this is the A plume, now in the B1 plume, we have not only DIPE, which is down here, but we have some MTBE in this area right here." (RT:1444.)
- "Well, the hot spot is basically in the same spot as before. Here we have a 14,000, and an 8,000." (RT:1451.)
- "Well, this is plume A, again, but now instead of looking at benzene, . . . we're looking at DIPE. . . . So here we have 560, 340, hot spot, 4, 100, down below, 390, and nothing sampled right there, non-detect, non-detect, non-detect, non-detect, non-detect." (RT:1483.)
- "The boring logs contain a little bit of information that tells us what's here, what's here, what's here. . . And that's how we come up with the different layers." (RT:1479.)

- "We have lead inside the free product. We have EDB and EDC, which are the lead scavengers, we don't have MTBE which is another clue and then we know from the mixed, from the lead package that that lead package was only added to gasoline between 1960 and 1982." (RT:1472.)

Similarly, Beresky testified:

- "Well, we actually had to take all that data and analyze it and determine what were the significant chemicals that described exactly what was going on in regards to the contamination. So we drew plume maps and I think Dr. Dagdigian talked us through those. . . . We did that from the existing data, that is correct." (RT:2454-2455.)
- "The other chemicals, here, again, we have only met benzene here. We have maps of MTBE and DIPE. We also have another map of EDB and EDC. And those chemical concentrations in these plumes clearly mark it as the same material and also indicate that these plume shapes are very similar and they are very well defined. . . [W]e have the luxury of having a very large database for this particular project. We have DIPE concentrations that we can see that these lines are well-defined, we have EDB, EDC concentration where we see these lines well-defined." (RT:2490.)
- "Over here, underneath the Utility Way Pipeline corridor, there's a little perched zone here. WSB-27 is this point, and that well was—that hole was sampled and got a little bit of benzene, 1800 and 1900 parts per billion." (RT:2485.)
- "If you look at the concentration of the plumes, the hot spot, is centered in the area of the pipeline corridor. You can also look at, it's important to look at where data shows you the plume is, where data shows you the plume is not . . . . So we can see there are lines, there are places where in the benzene plume, we have some clear,

> lower concentrations than what we have in the hot spot here, even these, although there are high concentrations and indicate some coming over across Wilmington from the ARCO refinery of this plume, there's still not as high as the hot spot concentrations." (RT:2489-2490.)

All of this extremely prejudicial testimony was based upon the inadmissible laboratory and consultant reports that Watson never admitted into evidence. Given the highly technical nature of the evidence and the deference typically given to experts, it is extremely likely that the inadmissible testimony of Dagdigian and Beresky and the improper admission of their plume maps prejudiced the jury. (See, e.g., *Kotla, supra*, 115 Cal.App.4th at pp. 294-295; *Korsak, supra*, 2 Cal.App.4th at p. 1523 ["Unquestionably, expert witnesses can be very persuasive to lay jurors on topics unfamiliar to the layperson."].) Consequently, "the courts have the obligation . . . to require adequate foundation for the opinion." (*Korsak*, 2 Cal.App.4th at p. 1523.) Accordingly, the trial court's erroneous admission of this evidence constitutes reversible error.

E. The Fact that Watson Never Moved the Laboratory and Consultant Reports into Evidence Compounds the Trial Court's Error

In a last-ditch effort to save its verdict, Watson asserts that its failure to move the reports into evidence is simply a "red herring." Hardly.

Watson's entire case rested upon the inadmissible scientific opinion testimony and plume maps and geological cross-sections of its experts, who in turn based their analyses entirely upon the inadmissible (and in most cases unadmitted) laboratory and consultant reports, which were done by others. As discussed, these reports were *the only evidence of the threshold foundational fact that DIPE or any other chemical that supposedly tied Shell to the contamination were found on the Watson Center property.* By allowing Watson's experts to testify not just to their conclusions, but to the actual contents of the reports by the

laboratories and environmental consultants, the trial court deprived Shell of any opportunity to cross-examine the custodians of those records or the people who actually collected, analyzed and interpreted that data to determine their trustworthiness.

It was Watson's own tactical decision, over Shell's repeated objections, not to present any foundational evidence to allow the reports to be admitted into evidence, not to move them into evidence even after it obtained the trial court's erroneous ruling on the business records exception, and to present its entire case through its paid expert witnesses, instead of through percipient testimony from those who actually had personal knowledge of the facts. Having made that decision, Watson must now live with its choice.

Once the appellant establishes that evidence was erroneously admitted, a verdict will be reversed if the reviewing court concludes that it is *reasonably probable* that a result more favorable to the appealing party would have been reached in the absence of the error. (*Cassim, supra*, 33 Cal.4th at pp. 800-803.) There can be little question that without the highly prejudicial testimony, plume maps and geological cross-sections of Watson's experts, the verdict would have been far different. Even in the face of the erroneous admission of that evidence, Watson still lost entirely on its nuisance claim, as well as on its trespass claim as to the B-2 Plume. (CT:5731-5732.) The remaining verdict in favor of Watson on its trespass claim as to the A Plume was clearly based upon the expert evidence and testimony erroneously admitted by the trial court. Without that evidence, it is not only "reasonably probable," but also highly likely, that the verdict on the A Plume would have been in Shell's favor, as well. (*Cassim, supra*, 33 Cal.App.4th at 800-802.) Accordingly, the $18.2-million judgment against Shell must now be reversed.

III. THE JUDGMENT SHOULD BE REVERSED WITH AN INSTRUCTION TO ENTER JUDGMENT IN FAVOR OF SHELL BECAUSE THERE IS NO SUPPORT FOR THE VERDICT WITHOUT THE ERRONEOUSLY ADMITTED EVIDENCE

Watson contends that the verdict was supported by "multiple layers" of evidence—specifically, "Shell's historical conduct"; the "opinions" of Watson's pipeline expert, Paul Karlozian; Schmidt's downhole flux data;[8] and the opinions of Dagdigian and Beresky, "who based their opinions on much more than the existence of DIPE in the plumes." (RB:16-17.) However, stripped of the inadmissible evidence, Watson's contentions fall like a house of cards. Since the remaining admissible evidence cannot support the verdict, and since Watson had a full and fair opportunity to put its best case before the jury, the judgment should not only be reversed, but the trial court should be instructed to enter judgment for Shell. (*McCoy, supra*, 227 Cal.App.3d at p. 1661.)

A. Watson's "Scientific Evidence" Was Based Almost Exclusively on the Inadmissible Laboratory and Consultant Reports

Watson contends that its "scientific evidence" of causation is "substantial." (RB:21.) The "evidence" Watson cites, however, is predicated almost exclusively upon the inadmissible laboratory and consultant reports. (RB:21-25.) For example, as discussed in detail above, Dagdigian and Beresky's testimony regarding specific data points and the existence and concentrations of certain chemical markers (including DIPE, MTBE, lead alkyls, EDB and EDC) was improper because the laboratory reports upon which that testimony was based were not admitted and constituted inadmissible hearsay in any event. (See *Korsak*,

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[8] Surprisingly, Watson contends that Shell does not contest the admissibility of Schmidt's testimony. (RB:16-17, 32.) However, as noted in Shell's Opening Brief, Shell objected to that testimony and sought a *Kelly* hearing with respect to Schmidt's testimony because of the entirely unorthodox way in which Schmidt claimed to be able to analyze the downhole flux data to identify the source of volatile soil vapors. (See AOB:10, fn. 3, 28-29; CT:4600-4610.) For the reasons set forth in Shell's Respondent's Brief on Watson's Cross-appeal ("CRB") (*infra*, pp. 5-26), the trial court's decision to allow Schmidt's testimony was erroneous, and his testimony cannot be used to support the verdict.

supra, 2 Cal.App.4th at pp. 1524-1525.) Watson also argues that the pipelines must be the source of the A and B-2 Plumes because, according to Dagdigian and Beresky's plume maps and geological cross-sections, the plumes are located directly below the Shell pipelines. (RB:21-22, 24-27.) As discussed above, however, the plume maps were drawn based on laboratory and consultant reports that were not properly authenticated, lacked a proper foundation, were not admissible as business records, and, for the most part, were never even admitted. The little evidence that remains cannot support Dagdigian's and Beresky's conclusions as to the location or configuration of the A and B-2 Plumes, and the maps are evidence of exactly nothing.

The same is true with respect to Beresky's geological cross-sections. Beresky had no personal knowledge of the underlying data on which they were based. (RT:2531 [obtained no lithological data from CPT borings], 2468 [relied on boring logs to produce cross-sections].) Thus, as with the lab reports, Watson's cross-sections rely entirely upon lithological data and well logs from inadmissible consultant reports that were never authenticated, lacked foundation and were never admitted by Watson at trial. As such, Watson's cross-sections and plume maps were no more than illustrations of inadmissible hearsay.

Even if the cross-sections had been properly authenticated and a proper foundation laid, however, they could not support the verdict. Beresky did not collect the data from the WSB borings and had no personal knowledge with respect to this data. (RT:2531.) Beresky admitted that she had "inferred" the soil lithology of the C-series borings depicted in the cross-sections because Watson had made a tactical decision not to collect any lithological data. (RT:2531, 2541.) Thus, for example, Exhibit 1514, which purports to depict an east-west cross-section of the A plume is based entirely upon data from just two soil borings, WSB-24 and WSB-27. WSB-24, of course, is not even in the A plume as mapped by Dagdigian and Beresky, and Beresky had nothing to do with the collection of the WSB series of soil borings. (RT:2534-2535.) Nor, according to Beresky, did

either WSB-27 or WSB-24 ever hit groundwater. (Exh. 1514.) There is simply no basis for inferring, from these two lone data points, the admittedly complex soil lithology in the area of the A plume depicted on Beresky's cross-sections. (RT:2537-2544; Exh. 1514.) Thus, all of the information reflected in the cross-sections is either speculation or inadmissible, unauthenticated hearsay.

B. The Jury Found in Favor of Watson Only on the A Plume, for which Watson Presented Virtually No Evidence to Support Liability against Shell

The jury's damages award matched Watson's damage request for the A Plume *to the dollar*. (AOB:18.) Watson sought *precisely* $3,915,851 in remediation damages and *precisely* $14,275,237 in so-called "benefit damages" for the A Plume and the jury awarded *precisely* $3,915,851 in remediation damages and *precisely* $14,275,237 in "benefit" damages. (Exhs. 1525, 1521, 1523; RT:2830.) The amount of the jury's award makes plain that the jury found in favor of Watson solely with respect to the A Plume, and this fact was confirmed by affidavits filed by two jurors. (CT:5926-5927.) Since the jury found that the B-2 Plume was *not* caused by the Shell pipelines, all references in Watson's Respondents' Brief to the B-2 Plume are irrelevant and cannot support the jury's verdict as to the A Plume located far to the north.

In an effort to escape this inevitable result, Watson contends that the use of juror affidavits "to manufacture special findings" is precluded by Evidence Code section 1150. (RB:14.) Section 1150, however, does not preclude consideration of the juror affidavits here because they are not being offered for the purpose of challenging or questioning the validity of the verdict—the purpose precluded by Section 1150. Rather, the declarations are offered simply to *confirm* the basis of the jury's award—an objective fact that is self-evident from the verdict itself.

Section 1150 permits the consideration of juror affidavits to the extent they are received as proof of "overt acts, objectively ascertainable," rather than proof of subjective reasoning. (*Tramell v. McDonnell Douglas Corp.* (1984) 163

Cal.App.3d 157, 172-173.) In *Tramell*, the appellate court determined that juror declarations could be considered for the purpose of determining whether the jury had impermissibly calculated damages, holding that "[t]he fact that such comments were made is overt conduct, objectively ascertainable and corroborated by two other jurors." (*Id.* at 173; see also *Drust v. Drust* (1981) 113 Cal.App.3d 1, 9 [consideration of juror affidavits is appropriate to determine that damages award included inconsistent damages elements because declarations describe "overt act of awarding a particular sum for a particular element of damage"].)

So it is in this case. The juror declarations were offered for the limited purpose of establishing the basis of the jury's verdict, relate to the overt and objectively ascertainable conduct of the jury, and were independently corroborated by each other. They did not go to the issue of the jury's subjective thought processes and deliberations and were therefore properly admitted to confirm what was evident on the face of the verdict: That the jury found in favor of Shell on the B-2 Plume and in favor of Watson on the A Plume.

With respect to the A Plume, Watson and its experts, Dagdigian and Beresky, made a strategic decision not to collect the very soil data that would be most critical to tracing the source of the groundwater contamination and migration pathways in the area of the A Plume. (RT:2833-2834.) In fact, they made the tactical decision not to gather *any* soil information in and around the area of the A Plume. (RT:2966, 2531, 2535-2537, 2550, 2969.) They also made the decision not to seek access to the pipelines to inspect and test the area around the pipelines.[9] (RT:2968.) Instead, Beresky merely "inferred" data points on the exhibits relating to the A Plume. (RT:2541; Exh. 1557.)

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[9] Notwithstanding Dagdigian's testimony that it was Watson's counsel who rejected his suggestion to test amongst the pipelines (RT:2969, 2978), Watson now contends that Shell would not allow Schmidt to test in the pipeline corridor. (RB:30.) At trial, Schmidt initially claimed that he had tried to gain access to the area, but was supposedly denied access by a "Shell pipeline representative." (RT:1910.) In a big show before the jury, he produced the business cards of Allen Rosencrantz and Eva Wang, and identified them as the ones who denied him

The only actual "evidence" Watson cites to support the A Plume is the location and configuration of the plume (as drawn by Dagdigian and Beresky based on the inadmissible and unadmitted laboratory and consultant reports) (RB:21), the soil vapor results from WSB-27, and Schmidt's "downhole flux" data," which supposedly shows a "top down" source in the vicinity of the A Plume. (RB:25.) This evidence is insufficient for several reasons.

As discussed above, the size, location and configuration of the A Plume as determined by Dagdigian and Beresky are based upon the inadmissible, unauthenticated and unadmitted laboratory reports. Thus, Watson's plume maps cannot support liability against Shell because there is no admissible evidence in the record to establish the threshold predicate fact that DIPE, benzene, or any other chemical marker was actually found in the area of the A Plume.

That leaves Schmidt's "downhole flux" testing from the single sample at WSB-27. As discussed below and in Shell's Respondent's Brief to Watson's Cross-appeal ("CRB"), Schmidt's testimony should never have been admitted, as his self-serving and unprecedented analytical methodology was not generally accepted in the scientific community. (CRB:5-26.) Moreover, Watson's own analysis of soil samples from WSB-27 showed not leaded gasoline—which Watson contended was leaking from the pipelines—but a mixture of degraded and undegraded diesel fuels, kerosene and refinery slops, similar to the massive contamination under the ARCO refinery across the street. (RT:2081-2082, 3998-

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access. (RT:1910.) On cross-examination, however, Schmidt ran away from this assertion, admitting that "those representatives were always in a gaggle over by Joe [Turner] somewhere else, away from my van," and that Joe Turner actually knew what happened. (RT:2011-2012.) When Wang was called to the stand, she testified that she was only an observer, had no authority to grant or deny access to anyone and had never done so. (RT:3595-3596.) Watson chose to ask not a single question about her alleged "denial" of access. (RT:3597-3598.) Likewise, Rosencrantz testified that he had never received a request for access from Schmidt or Turner and that he too lacked authority to grant such a request. (RT:3606, 3608-3609.) Significantly, Watson never called Joe Turner to testify, apparently abandoning Schmidt's patently false claim, only to resurrect it now in its Respondent's Brief.

4000; Exh. 3251; 559.) And Schmidt found only a single "significant" downhole flux reading from a single data point in the entire area of the A Plume. (RT:1947-1948; Exhs. 1500, 1512.) This isolated reading, even if it were admissible, would clearly be insufficient to allow Dagdigian or Beresky to "map" the size, location, or configuration of the A Plume. It is quite obvious that a complex plume map cannot be drafted based upon a single data point.

Accordingly, there is insufficient admissible evidence to support liability on the A Plume, and the jury's $18-million verdict cannot stand.

C. Even if the Jury's Verdict Were Found to Somehow Include Liability on the B-2 Plume, the Admissible Evidence on the B-2 Plume Was Not Sufficient to Support the Verdict

On the face of the verdict, and as confirmed by the juror declarations, the jury found against Watson on the B-2 Plume. (See CT:5731-5733, 5926-5927.) As such, all citations in Watson's Respondent's Brief that refer to the B-2 Plume are irrelevant. Even if this were not the case, however, the B-2 Plume evidence would still be insufficient to support the jury's verdict. First, as discussed above, there is insufficient admissible evidence in the record to support Dagdigian's and Beresky's testimony, plume maps and cross-sections regarding the B-2 Plume.

Indeed, other than Schmidt's highly questionable downhole flux data, the *only* potentially admissible evidence in the record regarding the B-2 Plume is data from a single data point: Well 543. (See Exhs. 1475, 1477.) Well 543 was installed by ARCO to monitor off-site migration of the documented contamination from ARCO's property across Wilmington. (See Exh. 2155.) Well 543 showed elevated levels of benzene, a nonspecific marker for petroleum contamination, which could have come from anywhere, including the ARCO Refinery. (RT:4001.) Moreover, a single data point is insufficient to support the location, contours and configuration of the B-2 Plume as portrayed by Dagdigian and Beresky in their plume maps.

Again, that leaves Schmidt's claim that three downhole flux borings in the area of the B-2 Plume showed "top-down" contamination. (See RB:30.) As discussed in detail in Shell's Respondent's Brief to Watson's Cross-Appeal, the trial court erred by allowing Schmidt to testify to his entirely novel and scientifically unsupported use of downhole flux for the purpose of source identification. (CRB:5-26.) Any citations of Schmidt's improper testimony in Watson's Respondent's Brief are therefore of no moment.

Moreover, even if Schmidt's evidence were admitted, it could not support the verdict. As discussed in Shell's Opening Brief, the three borings Schmidt used for his downhole flux readings were 50, 65 and 400 feet away from Shell's pipelines. (AOB:10, fn.3.) Even Dagdigian had to admit that a downhole flux reading 400 feet from the pipelines was insufficient to identify the pipelines as the source of the alleged contamination. (RT:1849-50.) Moreover, only one of these borings (MW-4) fell soundly within the boundaries of the B2 Plume as mapped by Dagdigian. The second was just barely within the B-2 plume. (See Exh. 1500: RT:1853-1854.) These two data points are simply insufficient to allow Dagdigian or Beresky to "map" the size, location or configuration of the B-2 plume.

Indeed, Dagdigian conceded that soil borings taken by Watson in the area of the B-2 Plume found no contaminants above laboratory detection limits. (RT:1704.) Dagdigian also conceded that Watson had not detected any significant hits in the soil matrix or soil gas sampling that it collected. (RT:2964-2965.) He admitted that Watson's various consultants over the course of Watson's multi-year investigation had taken both soil and gas samples and soil borings all around the Shell pipelines in the area surrounding the B-2 Plume, but came up with "essentially nothing." (RT:2978-2979, 2966.) And he acknowledged that he was unaware of any evidence in any of Shell's records showing hydrocarbon contamination around the pipelines at issue. (RT:1723-1724.)

Because the jury's verdict makes plain that it found Shell not liable for the B-2 Plume, none of Watson's purported evidence as to this plume can support the

verdict. However, the configuration of the B-2 Plume is unsupported by admissible evidence in any event. Thus, Watson's key argument that the Shell Pipelines must have been the source of the contamination (RB:21-22, 25) simply evaporates upon scrutiny.

D. Watson's Reliance on "Inference" Is Insufficient to Support the Verdict

Lacking admissible evidence to support the verdict, Watson turns to bare inference, arguing that the only "rational conclusion" to be drawn from Shell's allegedly "premature" replacement of some—but not all—of its pipelines is that the pipelines must have been leaking and Shell must have known about it. (RB:17-18.)

An inference is not evidence, however. (1 Jefferson, Cal. Evidence Benchbook (3d ed. 2001), § 19.2; Evid. Code, § 600, subd. (b).) Where a plaintiff seeks to prove an essential element of its claim by circumstantial evidence, it cannot recover merely by showing that the inferences drawn from those circumstances are *consistent* with that theory. (*Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 483.) Instead, the plaintiff must show that the favorable inferences are *more reasonable or more probable* than those against it. (*Id.*) If the facts from which the inference is drawn are equally consistent with some other theory, they do not support the inference the plaintiff seeks to draw. (*Id.*, citing *San Joaquin Grocery Co. v. Trewhitt* (1926) 80 Cal.App. 371, 375-376.) Where the evidence gives rise to conflicting inferences, there is no proof, only guesses and conjecture.[10] (*Id.*, citing *In re Moore's Estate* (1923) 65 Cal.App. 29, 33.)

Watson contends that the pipelines in the Utility Way Corridor must have been leaking because Shell replaced some of those pipelines before the expiration

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[10] The trial court refused Shell's proposed jury instruction on the plaintiff's burden when it seeks to prove an essential element of its claim by inference. (CT:5754.)

of their normal life expectancy. (RB:17-20.) The evidence on which Watson relies to support this theory is a single notation that one of the pipelines in the Utility Way Corridor was in "poor condition" in 1983; Karlozian's equivocal testimony regarding hydrotests conducted on other pipelines; and the speculative inferences Watson seeks to draw from this supposed evidence. (RB:17-20.)

As explained below, Watson's "evidence" is insufficient to support the inferences it asks the Court to draw. To the extent such an inference is even consistent with Watson's theory, it is directly contradicted by the percipient testimony of Roger Underwood, Russell Guidry and the historical documentary evidence.

1. The Designation of a Single Pipeline in 1983 as Being in "Poor" Condition Does Not Support the Inference that All of Shell's Pipelines Were Defective Prior to 1973

Watson points to a notation on one of Shell's Y-Maps, indicating that in 1983 one of Shell's lines was in "poor" condition and that "all of the lines built in 1965 were constructed with the identical specifications." (RB:18.) From these tidbits, Watson baldly asserts that "[t]here is only one rational conclusion from this evidence—Shell abandoned the pipelines because *Shell knew* they were in poor condition." (RB:18 (emphasis in original).)

However, to get from a "poor" notation on a single pipeline in 1983 to the conclusion that *all* of the pipelines in the Utility Way Corridor were defective prior to their abandonment in 1973 requires a series of inferences that amount to nothing more than a leap of faith. First, the fact that a single pipeline was in "poor condition" in 1983 does not support the conclusion that it or any other pipelines were leaking prior to 1973. Second, the fact that a group of pipelines were built according to the same specifications does not mean they all will fail simultaneously. Finally, the fact that Shell would replace some, but not all, of the pipelines does not support the conclusion that Shell knew the pipelines were defective.

In fact, Roger Underwood, who worked for Shell for 35 years, testified that the notation on the Y-Map referred to by Watson pertains only to a single pipeline—line 9—that was idled *in 1983* as a result of a documented *isobutane* leak, which vaporized and formed an ice block on the surface and which could not have caused the hydrocarbon contamination at issue. (RT:3263-3267, 3298, 3308; see Exh. 12.) Thus, the notation relied upon by Watson did *not* apply to all of the pipelines in the Utility Way Corridor, *nor did it refer to any of the lines that were idled in 1973.* (RT:3298.) The notation was made simply as a safety precaution to ensure that line 9 was not put back into service until it had been repaired. (RT:3266.) As it turns out, line 9 was, in fact, later replaced, *with one of the lines that was idled in 1973 after that line passed a hydrotest.* (RT:3267-3268, 3270; Exh. 12.) If the lines in the Utility Way Corridor were all in "poor" condition, as Watson argues, and Shell knew they were defective, why would Shell use one of the very same pipes to repair line 9, and how would such a line pass a hydrotest? Tellingly, Watson chose not to ask Underwood *a single question* regarding the "poor condition" notation, and Watson's string of inferences was shredded by Underwood's unchallenged testimony. (See RT:3318-3373.)

2. Karlozian's Claim that Different Pipelines "Failed" Hydrotests Years Later Does Not Support the Inference that the Pipelines at Issue in the Utility Way Corridor Were Leaking

In a similar vein, Watson suggests that Karlozian's opinion that some pipelines in later years "failed" periodic hydrotesting required by the California Pipeline Safety Act supports the inference that other pipelines were replaced in 1973 because they were leaking. (RB:19.) As Watson expressly acknowledges, however, none of the allegedly failed hydrotests *were conducted on the pipelines at issue*, nor were they conducted during the time period at issue.[11] (See RB:20.)

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[11] As Underwood explained, the fact that Shell no longer had documents relating to hydrotests on the 1965 pipelines is not surprising because, as Watson notes, the California Pipeline Safety Act was not even passed until the early 1980s

Thus, like the evidence relating to the "poor" notation on the Y-map, these alleged hydrotest failures do not support the inference that the pipelines in the Utility Way Corridor were leaking in 1973, that Shell knew they were leaking, or that Shell installed new pipelines in the DWP Corridor for that reason.

In fact, even if the testing on these other lines were somehow relevant to the issues, *each of the allegedly failed tests was subsequently followed by a passing test.* (RT:1123-1133). As Karlozian acknowledged, buried pipelines do not fix themselves. As such, it is clear that the alleged "failures" were caused by one of the numerous factors—other than a leak—that Karlozian admitted can cause a failed hydrotest. (See RT:1121-1122 [including misplacement of the temperature probe, a heat source near the pipeline, or an air pocket in the water being run through the pipeline].) Watson's only response is that "Shell never submitted evidence to prove that the lines were not repaired in between the failed tests and the passing tests." (RB:20.) But the burden on each element of Watson's claims rests with Watson, not Shell, and Watson presented absolutely no evidence that any such repairs had occurred, or were necessary. (See *Beck Dev. Co. v. Southern Pacific* (1996) 44 Cal.App.4th 1160, 1205.) Watson cannot rely on a *lack* of evidence in the record to support an inference that finds no cognizable evidentiary support.

3. Watson's Proposed Inference Is Rebutted by the Clear, Uncontroverted Evidence in the Record

Under California law, even if the admissible evidence in the case were consistent with Watson's proposed inference—which it decidedly is not—mere consistency is still not sufficient. (See *Leslie G., supra*, 43 Cal.App.4th at 483 [plaintiff must show that favorable inferences are more reasonable or more probable than those against him].) Moreover, even permissible inferences may be

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and it requires only that records be kept for five years. (RT:3245.) In addition, given Shell's repeated office moves, it is not surprising that records relating to optional hydrotests conducted thirty years earlier were not maintained. (See RT:3245.)

dispelled, *as a matter of law,* where contrary evidence is "clear, positive, uncontradicted, and of such a nature that it cannot be rationally disbelieved." (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 50.)

Watson's pipeline expert—who had no personal knowledge pertaining to Shell's pipelines (see RT:999-1001)—made the entirely speculative inference that Shell must have replaced its pipelines in 1973 because they were leaking. The supposed justification for Karlozian's speculation was his opinion that the 1973 pipeline replacement was unjustified because it would result in no more than a 20% increase in pipeline capacity. (RT:1010.) In fact, however, lines totaling 11,670 GPM had been taken out of service *prior* to the 1973 replacement; thus, the new pipelines produced an increase in capacity of 100%, rather than the 20% Karlozian calculated. (RT:3293, 3297.) Karlozian admitted that these calculations would be correct if, in fact, the lines had been taken out of service prior to the 1973 replacement. (RT:1169-1170.) This significant error illustrates the problem with Watson's reliance upon the speculative inferences of its paid expert witnesses, in lieu of competent percipient testimony.

Karlozian's speculation that the pipelines were replaced because they must have been leaking also was soundly rebutted by the percipient testimony of Shell's witnesses, Roger Underwood and Russell Guidry. (RT:3217, 3270, 3224-3225, 5352-5353.) For example, Underwood testified that the 1973 pipeline replacement was part of a region-wide pipeline upgrade program that included not only the pipelines in the Utility Way Corridor, but the Ventura Product Line, the Mormon Island Line, and the Brea Crude Line. (RT:3209, 3272, 3273 (listing numerous pipeline replacement projects taking place during the early 1970s); Exh. 10.) The new pipelines were outfitted with stronger pipe and more resistant coatings than those laid in 1965. (RT:3275-3277, 3281-3282 (discussing different reasons for replacing pipelines before reaching their maximum lifespan).) And the new pipelines increased Shell's capacity and gave Shell the option to increase operating pressures. (RT:3283, 3335.)

Given the variety of products carried through the inter-refinery pipelines at different time periods (see RT:991), laying new pipelines while the area was already being excavated made sense in terms of capacity, product-carrying capability and flexibility. (RT:3282-3283.) Because Shell was already digging a trench to replace the five lines idled prior to 1971, it was prudent and cost-effective to lay additional pipelines at the same time, since the major cost and time factor in laying pipelines is obtaining the necessary permits and excavating the trench. (RT:3282.)

Watson contends that Underwood's testimony "did not hold up under cross-examination," because the "lower grade" pipe installed in 1965 could easily handle the operating pressure at which Shell ran the pipelines and "Shell operated the new lines installed in 1973 at the same pressure as the ones installed in 1965."[12] (RB:19.) Watson also argues that the improved coating was valuable only with respect to heated lines, and "[p]ipelines carrying gasoline, diesel, jet fuel and similar compounds are not heated." (RB:18-19.)

In fact, however, Shell's inter-refinery pipelines have carried a wide variety of products at various times (RT:991-992), including residual oil and crude oil, which *are transported in heated lines*. (RT:3336-3337.) Moreover, Underwood testified that the value of the improved coating was not limited to lines that carried heated product, because the radiant heat from a heated line can affect the coating of an unheated line. (RT:3337.) Thus, the improved coating not only increased Shell's flexibility with respect to the products it could carry through the lines, but provided additional protection for adjacent lines. (RT:3283, 3337.) Likewise, the greater operating pressure of the new pipelines gave Shell the *capacity* to increase

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[12] Watson also attempts to impeach Underwood's testimony on the grounds that he lacked personal knowledge. (RB:19.) However, Underwood testified that he frequently consulted with people in the engineering group that worked in other locations during this period. (RT:3209.) More importantly, his testimony was corroborated by documentary evidence. (See RT:1723-1724.) Finally, *Watson did not call a single opposing witness who had any personal knowledge about the pipelines at issue.*

the operating pressure, whether or not such pressure was required at the time of the replacement. (RT:3335.) As Underwood testified, it simply made sense to install pipelines that were technologically advanced and could satisfy Shell's potential future needs. (See RT:3282.)

Underwood also testified at length about Shell's maintenance and operating procedures (RT, 3226; 3262), Shell's testing procedures (RT, 3301, 3229-3231), and Shell's policies if a pipeline leak was discovered (RT:3217, 3271, 3224, 3249). He also testified that he was unaware of any leak in the Utility Way Corridor (other than the irrelevant isobutane leak in 1983 from pipeline 9, discussed above), and that he would have known about such a leak if there were one. (RT:3225, 3270-3271.) He testified that a hydrocarbon leak has a peculiar odor (RT:3217-3218, 3224), and that there was no such evidence during any excavation between 1973 and his retirement in 2001. (RT:3271.) This testimony was reinforced by Russell Guidry, who was present when the pipelines in the Utility Way Corridor were excavated in 1993, and who testified he saw no evidence of a leak. (RT:5352-5353.)

Even Dagdigian had to admit that the historical records revealed no physical evidence of hydrocarbons in the soil around the pipelines. (RT:1723.) He also testified that he was unaware of any evidence that hydrocarbon contamination was discovered during the 1993 excavation in the Utility Way Corridor—the pipelines Watson contended were the source of both the A and B-2 Plumes. (RT:1724.)

Watson's only response to this uncontradicted testimony is that "Shell's employee was not a bloodhound," and "the trenching [in 1993] was a long way from the leaking pipelines." (RB:21.) Ironically, Watson has no difficulty asserting that contaminants can migrate 600 to 700 feet (RB:13), but rejects the contention that the allegedly large hydrocarbon contamination from Shell's pipelines would be detectable less than 50 feet from the alleged source of the

contamination.[13] Indeed, Dagdigian testified that when there is a leak from a pipeline near the surface, drilling around the pipeline in the appropriate place should show a trace of contamination down through the soil column to the groundwater. (RT:1731-1732.) Yet he admitted Watson found no such trace. (RT:1735.)

In conclusion, Watson's inference that Shell must have replaced the pipelines in the Utility Way Corridor because Shell knew they were leaking is based on pure conjecture, is contradicted by substantial and unchallenged evidence in the record, and cannot support the verdict as a matter of law.

When the record is stripped of the inadmissible evidence and testimony erroneously admitted by the trial court, and Watson's unsupported speculation and unjustified inferences are disregarded, there simply is no substantial evidence remaining to support the judgment. (See, e.g., *Roddenberry v. Roddenberry* (1996) 44 Cal. App. 4th 634, 651 [substantial evidence is "evidence that is reasonable, credible and of solid value."].) Since Watson had a full and fair opportunity to put its best case before the jury, the judgment should not only be reversed, but the trial court should be instructed to enter judgment for Shell. (*McCoy*, *supra*, 227 Cal.App.3d at 1661.)

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[13] The Court should summarily disregard Watson's improper and unsubstantiated allegations in footnote 2 of its Respondent's Brief. Accusing Shell of "violat[ing] a fundamental rule by trying to raise matters not in the trial record," Watson conclusorily alleges supposed facts that were not part of the record and are actually alleged to have occurred *after judgment was entered.* (RB:11, fn.2.) In contrast, Shell's statement on which Watson relies to justify its conduct—that Watson refused to quantify its damages until expert discovery (RB:10-11)—can be readily supported by reference to the record. (See RT:A-17 (Shell has been waiting almost five years for cash demand from Watson), 1785 (damages theory disclosed for first time March 5 and 6, 2001).) Watson's allegation in footnote 2 violates fundamental rules of appellate briefing and is of no weight or import. (Cal. Rules of Court, rule 14(a)(2)(c) (appellate brief limited to facts in the record); see *C.J.A. Corp. v. Trans-Action Fin. Corp.* (2001) 86 Cal.App.4th 664, 672-673.)