WICS Property Environmental Cleanup Fund Administrator, including the trust agreement and related written instructions applicable to such replacement administrator. Although the WICS Property Environmental Cleanup Fund shall be distributed to Watson and to ARCO as provided in Section 18 and the money so distributed thereafter owned by the Party receiving it, the funds held by the WICS Property Environmental Cleanup Fund shall be owned by that fund and any interest and income earned by that fund shall be reported on the income tax return of that fund. The WICS Property Environmental Cleanup Fund shall continue in existence and be maintained for the period provided in Paragraph 17.1. Fees and charges for administering the WICS Property Environmental Cleanup Fund made by the WICS Property Environmental Cleanup Fund Administrator shall be paid as provided in Paragraph 17.2.

17.1 Term And Termination Of The WICS Property Environmental Cleanup Fund. The WICS Property Environmental Cleanup Fund shall continue in existence and be maintained for a period of at least ten (10) years from and after the date upon which Court retaining jurisdiction over the WICS Property Environmental Cleanup Fund signs an order either appointing or approving the initial or first WICS Property Environmental Cleanup Fund Administrator, or until all of the funds in the WICS Property Environmental Cleanup Fund have been distributed in accordance with Section 18, whichever shall first occur. The WICS Property Environmental Cleanup Fund shall automatically terminate upon the distribution of the last of the funds remaining in the account in

accordance with Paragraph 18.1 and Paragraph 18.2 and the filing of a final tax return and final report on the fund delivered by the WICS Property Environmental Cleanup Fund Administrator to Watson, ARCO and the Court retaining jurisdiction over the WICS Property Environmental Cleanup Fund. Except as provided in the immediately preceding sentence with respect to automatic termination, the WICS Property Environmental Cleanup Fund shall not be terminated unless and until the Court retaining jurisdiction over said fund issues an order authorizing its termination. If any funds remain in the WICS Property Environmental Cleanup Fund upon the expiration of said 10-year period, Watson and ARCO shall attempt to agree upon whether to continue the maintenance of the fund for a longer period of time, or to apply to the Court for an order to terminate the fund and distribute the amount then remaining in the WICS Property Environmental Cleanup Fund in accordance with Paragraph 18.3. If either or both of Watson and ARCO wish to seek an order terminating the WICS Property Environmental Cleanup Fund, then either or both of them shall make an application to the Court retaining jurisdiction over said fund, by noticed motion, for such an order. The decision of whether the WICS Property Environmental Cleanup Fund shall be continued and maintained beyond the initial 10-year term shall be made based upon the following considerations: (1) the environmental conditions existing on the WICS Property at that time; (2) the likelihood that additional remediation of Environmental Contamination will thereafter be required respecting the WICS Property for which the cost would be reimbursed in whole or in part by the WICS Property

18.2 Reimbursement To ARCO For Environmental Activities And Environmental Facilities And Performance Of Certain Indemnity Obligations Respecting The WICS Property. Following the initial distribution to Watson as provided in Paragraph 18.1, the remaining balance, if any, of the WICS Property Environmental Cleanup Fund shall be used as necessary as follows: (1) for as long as said fund remains in existence, to reimburse ARCO for some or all of the costs incurred by ARCO, limited as to the portion to be reimbursed as provided below in this Paragraph 18.2, from and after the Effective Date in cleaning up, remediating and/or removing from the WICS Property in accordance with Prudent Environmental Engineering Practices any and all Environmental Contamination that exists on the WICS Property as of the Effective Date, all as required and allowed by this Agreement; and (2) for a period of seven (7) years commencing on the date of the order of the Court retaining jurisdiction over the WICS Property Environmental Cleanup Fund appointing or approving the first WICS Property Environmental Cleanup Fund Administrator under the provisions of Section 17 and ending on the seventh (7^{th}) anniversary of that date, to reimburse ARCO for some or all of any other costs actually incurred by ARCO during that 7-year period, limited as to both the portion to be reimbursed and the types of costs qualifying for reimbursement as provided below in this Paragraph 18.2, in satisfying any indemnity obligations of ARCO under Section 22 that are in addition to the costs incurred to clean up, remediate and remove any Environmental Contamination existing on or within the WICS Property as of the Effective Date. For purposes of

determining the portion of such costs and expenses of ARCO that are to be reimbursed to ARCO from the WICS Property Environmental Cleanup Fund, Watson and ARCO have divided the WICS Property into three separate areas denominated as Area A, Area B, and Area C. The specific geographic locations of each of Area A, Area B and Area C of the WICS Property are depicted on the Map of the Three WICS Property Environmental Cleanup Areas attached to this Agreement as Exhibit 8. As long as the WICS Property Environmental Cleanup Fund continues in existence (i.e., prior to its termination under Paragraph 17.1 and any subsequent final distribution to Watson and ARCO as provided in Paragraph 18.3), distributions shall be made from the WICS Property Environmental Cleanup Fund to reimburse ARCO for the costs and expenses ARCO incurs to undertake Environmental Activities performed in accordance with Prudent Environmental Engineering Practices, including the installation, operation and removal of Environmental Facilities, and/or the costs and expenses of ARCO to perform certain indemnity obligations of ARCO under Section 22 actually incurred during the applicable 7-year period on or with respect to each of the three referenced areas of the WICS Property (i.e., depending upon the area on the WICS Property that the Environmental Activities in question are designed to clean up and remediate or the area on the WICS Property with respect to which ARCO's indemnity obligations under Section 22 that qualify for reimbursement have arisen) as required and allowed by this Agreement as follows: (1) ARCO shall be reimbursed from the WICS Property Environmental Cleanup Fund for one hundred

percent (100%) of such costs and expenses that solely relate to Area A of the WICS Property; (2) ARCO shall be reimbursed from the WICS Property Environmental Cleanup Fund for ninety percent (90%) of such costs and expenses that solely relate to Area B of the WICS Property; (3) ARCO shall be reimbursed from the WICS Property Environmental Cleanup Fund for five percent (5%) of such costs and expenses that solely relate to Area C of the WICS Property; and (4) when the costs and expenses can be attributed to a specific geographic area but such geographic area involves portions of more than one of Area A, Area B or Area C, any WICS Lot included in whole or in part in that specific geographic area shall be counted utilizing its applicable percentage for reimbursement depending on whether that WICS Lot is located in Area A, Area B or Area C, and ARCO shall be reimbursed from the WICS Property Environmental Cleanup Fund for that percentage of such costs and expenses incurred by ARCO respecting such specific geographic area that is equal to the arithmetic average of the allowed recovery percentage attributed to each such WICS Lot, rounded to the nearest whole percentage (ex., if all or portions of nine WICS Lots were involved, four of which were in Area A, two of which were in Area B and three of which were in Area C, ARCO would be entitled to reimbursement based on an average percentage calculated as four lots multiplied by 100%, plus two lots multiplied by 90%, plus three lots multiplied by 5%, divided by the nine total lots, the result of which is 66.11% that would be rounded to 66%). For purposes of this Section 18, costs and expenses that "solely relate" to any of Area A, Area B or Area C shall mean those costs and expenses incurred to undertake

Environmental Activities or in the performance of certain indemnity obligations under Section 22 which can be attributed to any one or more WICS Lot(s) located within the same such Area (i.e., costs and expenses that are incurred to remediate Environmental Contamination existing as of the Effective Date within Area A shall be deemed to "solely relate" to Area A, even if such remediation requires the installation of pipelines which extend through Area B or Area C). The specific types of costs and expenses incurred by ARCO that are to be reimbursed from the WICS Property Environmental Cleanup Fund, assuming such costs otherwise qualify for reimbursement under the provisions of this Section 18, are described in Subparagraph 18.2.1. The procedures for making disbursements of such costs and expenses that qualify for reimbursement from the WICS Property Environmental Cleanup Fund to ARCO to reimburse ARCO for such qualifying costs and expenses are described in Subparagraph 18.2.2.

18.2.1 The Specific Types Of Expenses That Can Or Cannot Be Reimbursed From The WICS Property Environmental Cleanup Fund. The costs and expenses to be reimbursed to ARCO as described above in this Paragraph 18.2 are as follows: (1) those costs and expenses actually incurred by ARCO for Third Person charges respecting the WICS Property relating to Environmental Contamination existing on the WICS Property as of the Effective Date, including professional environmental engineering or other consulting charges, laboratory fees, equipment purchases or rentals, surveying charges, piping, safety devices, excavation, hauling costs, disposal costs, and any other Third Person cost or

distribution from the WICS Property Environmental Cleanup Fund shall result in a conclusive presumption that such requested distribution by ARCO was proper under this Paragraph 18.2 and should timely be paid from the WICS Property Environmental Cleanup Fund to the extent said fund is sufficient in amount to pay the same.

18.3 Distributions To Watson And ARCO Upon Termination Of The WICS Property Environmental Cleanup Fund. Upon the termination of the WICS Property Environmental Cleanup Fund pursuant to Paragraph 17.1, the amount then remaining in the WICS Property Environmental Cleanup Fund, if any, after deducting all fees and charges for administering the same made by the WICS Property Environmental Cleanup Fund Administrator, shall be distributed fifty percent (50%) to Watson and fifty (50%) to either BP, or to Atlantic Richfield, or such other Person as ARCO may designate in a writing signed by each of BP and Atlantic Richfield and delivered to the WICS Property Environmental Cleanup Fund Administrator at least five (5) Business Days prior to the date scheduled for such final distribution; ARCO shall promptly furnish a copy of such written notice to Watson.

///

21.2 Preparation Of LNAPL Workplan. ARCO shall undertake a reasonable environmental engineering study of the LNAPL accumulations on the groundwater beneath the WICS Property, and within one (1) year from and after the Effective Date shall accomplish the following based on such study: (1) review the results of that study with Watson and its representatives; (2) prepare and submit to Watson a detailed workplan for removing and/or remediating the LNAPL accumulations on the groundwater beneath the WICS Property to the maximum extent such removal and/or remediation is reasonably, technically and economically efficient in light of applicable regulations and Prudent Environmental Engineering Practices; and (3) commence with actual implementation of Environmental Activities, including the installation and operation of Environmental Facilities, in accordance with the workplan. For purposes of part (3) in the immediately preceding sentence, ARCO shall not be in breach of its obligation to commence the actual implementation of Environmental Activities within said one-year period if ARCO shall have submitted a workplan for such Environmental Activities to the Los Angeles Regional Water Quality Control Board, or any other governmental agency then having primary jurisdiction over such Environmental Activities, and is diligently pursuing the approval of the ARCO-submitted workplan by the applicable regulatory agency in order to commence such Environmental Activities. Once commenced, ARCO shall thereafter diligently pursue such Environmental Activities through completion in accordance with the workplan. The costs of such Environmental Activities, exclusive of any costs relating to the barrier system as

described in Paragraph 21.1, may be charged to the WICS Property Environmental Cleanup Fund pursuant to and to the extent provided by Paragraph 18.2.

22. ARCO PERPETUAL INDEMNITY OF THE WICS PROPERTY, WATSON AND ITS SUCCESSORS AND ASSIGNS. To the greatest extent permitted by Law, ARCO shall fully and completely indemnify and hold Watson and each of the other Persons described in Paragraph 22.2 completely free and harmless from certain matters and occurrences as provided in this Section 22 and shall perform all of the indemnity obligations created by this Section 22 promptly to alleviate the detriment to the Person entitled to indemnification as soon as reasonably possible under the circumstances and in a manner which reduces to the maximum extent reasonably possible the likelihood that such Person will incur any out-of-pocket expense. Nothing in this Section 22 shall be construed to (i) require any Person identified in Paragraph 22.2 to expend any funds as a prerequisite in order to assert any of his, her or its rights under this Section 22, (ii) prohibit ARCO from asserting any defense to any claim for indemnification under this Section 22 or from asserting any affirmative claim against the Persons identified in Paragraph 22.2 for breach of this Agreement in any arbitration conducted pursuant to Section 25, even if such defense or claim could result in a monetary award against such Person in excess of that Person's claim for indemnity under this Section 22, or (iii) prohibit ARCO from asserting any defense, including laches or any statute of limitations, or any right to set-off, contribution, indemnity or any

other claim against any Third Person asserting any claim against any Person identified in Paragraph 22.2.

22.1 Indemnity. Subject only to ARCO's specific rights to obtain reimbursement of certain specific costs and expenses from the WICS Property Environmental Cleanup Fund pursuant to Paragraph 18.2 and thereafter from Watson pursuant to Section 19, from and after the Effective Date ARCO and its respective successors and assigns, jointly and severally, shall forever fully indemnify, save, defend and hold each of Watson and the Persons described in Paragraph 22.2 completely free and harmless from and against the full and actual amount of any and all liabilities, obligations, losses, costs, damages, demands, notices, penalties, fines, claims, actions, suits, judgments, settlements, orders, directives, or other expenses of any kind or nature whatsoever (including attorney's fees, expert fees and costs and expenses associated with Environmental Activities, including Environmental Facilities), resulting from, caused by or otherwise a consequence of the Environmental Contamination described in the immediately following sentence, except to the limited extent, and then only to the extent, caused by or attributable to the active negligence or intentional wrongful conduct occurring subsequent to the Effective Date of the Person asserting a right to indemnity under this Section 22 or such Person's consultants, contractors, sub-contractors, agents, tenants, or invitees to the WICS Property who are not employed by, retained by, acting for or otherwise under the control or direction of ARCO or its respective successors and assigns (any claim for indemnity asserted by or on behalf of any

Person entitled to be indemnified by ARCO under this Section 22, including Watson, is referred to in this Agreement as a "Claim"). The Environmental Contamination that is the subject of the indemnity set forth in this Section 22 shall consist of, and be limited to, all and only the following: (1) any and all Environmental Contamination that exists on, under and/or within the soil and/or groundwater on and within the WICS Property as of the Effective Date; (2) Environmental Contamination that was at any time prior to the Effective Date on, under and within the soil and/or groundwater on and within the WICS Property and which exists at the time of any claim for indemnification under this Section 22 within one thousand (1000) feet from the exterior boundary of the WICS Property; and (3) any and all Environmental Contamination that first occurs or comes to exist on, under and/or within the WICS Property subsequent to the Effective Date, whether released or migrating onto, under or through the WICS Property, and whether in soil or groundwater, that results from any one or more of the following events; (i) the action(s) or inaction(s) of ARCO, its respective predecessors, successors or assigns, or any of its respective consultants, contractors or agents, (ii) operations or activities on the Atlantic Richfield Refinery Property, regardless of the nature of such operations or activities, or the identity of the Person conducting such operations or activities, (iii) migration from beneath the Atlantic Richfield Refinery Property, regardless of the ultimate source or cause of that migrating Environmental Contamination, (iv) releases from or attributable to equipment, pipelines, tanks or any other facilities (whether permanent, temporary,

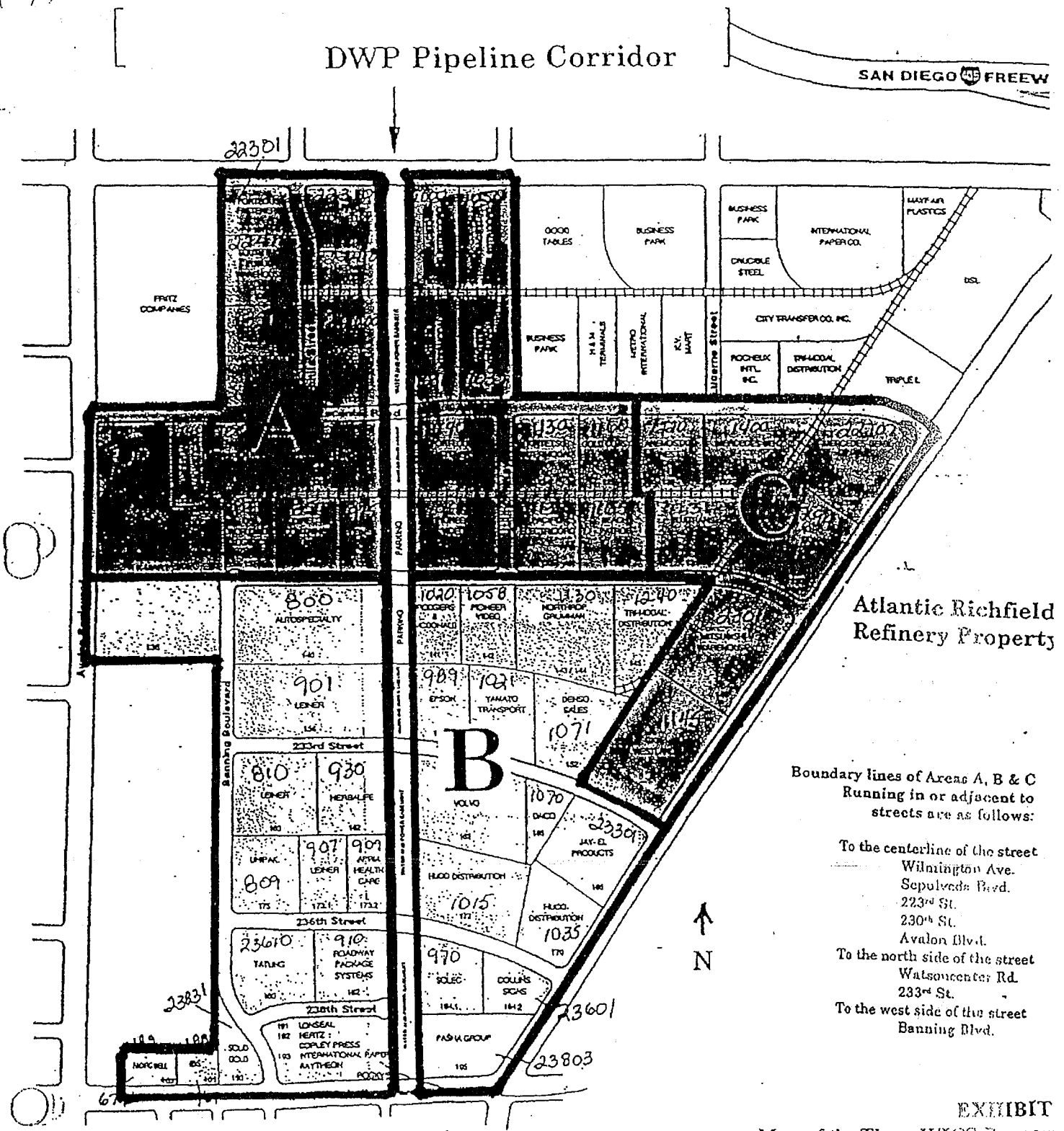
mobile or stationary) owned by ARCO or its respective successors or assigns, regardless of the location of those various facilities, or (v) migration of Environmental Contamination existing as of the Effective Date on, under or within the DWP Pipeline Corridor to the WICS Property. Without limiting the generality of the foregoing indemnity, said indemnity respecting the Environmental Contamination described in the immediately preceding sentence shall include the obligations set forth in each of Subparagraph 22.1.1, Subparagraph 22.1.2, Subparagraph 22.1.3, Subparagraph 22.1.4, Subparagraph 22.1.5, Subparagraph 22.1.6, Subparagraph 22.1.7, Subparagraph 22.1.8, Subparagraph 22.1.9 and Subparagraph 22.1.10. Nothing in this Section 22 shall be construed to require that ARCO contain or otherwise prevent the migration of any of the Environmental Contamination existing on the DWP Pipeline Corridor as of the Effective Date, but ARCO shall be obligated to indemnify the Persons described in Paragraph 22.2, as provided in this Section 22, for any Environmental Contamination existing on, under or within the DWP Pipeline Corridor as of the Effective Date that migrates onto or under all or any part of the WICS Property. Nothing in this Paragraph 22.1 shall be construed to require ARCO to reimburse Watson for compensation and salaries of Watson employees, or for any administrative fees or overhead fees of Watson.

22.1.1 Cleanup And Remediation Of Environmental Contamination. 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 which is both the subject of the indemnity set forth in this Section 22 and which is directed, required or ordered by any governmental agency under any Law affecting the WICS Property, in connection with the construction, development, redevelopment or occupancy of any facility or structure on any WICS Lot(s), including any change in the use of the WICS Property or any WICS Lot(s) and/or required of Watson and/or its successors and assigns in order to satisfy any indemnity obligations actually due from Watson and/or its successors and assigns to any Third Person who now is or becomes a tenant of any WICS Lot or who now is or becomes a lender with a security interest of any kind in any WICS Lot, in each case with respect to the Environmental Contamination that is the subject of the indemnity set forth in this Section 22, including such various directions, requirements or orders that are imposed as a result of or result from any one or more of the following: (1) protection of the public health and safety; (2) protection of the groundwater of the State; (3) compliance with any Law; (4) compliance with existing or future zoning or other land use regulations; (5) any conditions required in any permits or other governmental approvals associated with any proposed or actual construction on the WICS Property or any requirements established as a condition precedent to the issuance of any such permits or other governmental approvals; (6) any conditions required in any permits or other governmental approvals resulting from any use or proposed change in the use of the WICS Property or any requirements established as a condition precedent to the issuance

of any such permits or other governmental approvals; or (7) satisfaction of any indemnification obligations due from Watson or its successors or assigns to any of their respective tenants, purchasers or lenders. ARCO shall be deemed to be "promptly" performing any obligations with respect to Environmental Activities, including Environmental Facilities, as long as ARCO is in compliance with any deadlines imposed by any governmental agencies asserting jurisdiction over such activities. However, the Parties acknowledge that from time to time such governmental agencies may impose time deadlines in connection with Environmental Activities, including Environmental Facilities, with respect to which compliance is technically or commercially unreasonable. Accordingly, ARCO shall not be considered to be in breach of its obligation to conduct such activities "promptly" solely by reason of failing to comply with any time deadlines that may be set by any such governmental agencies; provided that ARCO promptly notifies Watson and such governmental agencies in writing of the inability of ARCO to meet such time deadline(s), that ARCO thereafter diligently pursues through completion such Environmental Activities, including Environmental Facilities, and that ARCO fully indemnify Watson, its successors and assigns, and the Persons described in Paragraph 22.2 under the provisions of this Section 22 from any consequences associated with the failure of ARCO to comply with such time deadlines.

22.1.2 Defense Of Third Person Claims. ARCO shall promptly undertake and diligently and competently complete, at the sole cost and expense of ARCO, the defense of the Persons covered by the indemnity set forth in



EXHIBIT

Map of the Three WICS Properi
Environmental Cleanup Are

3204-244

Settlement Agreement and Release of Certain Claims
and Between Watson Land Company, BP America, I
and Atlantic Richfield Company Effective November 1, 20

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WATSON LAND COMPANY, Plaintiff, vs. SHELL OIL COMPANY, Defendants.	)	BC150161 307 - CCW JUDGMENT ON GENERAL VERDICT WITH SPECIAL FINDINGS

This action came on regularly for trial on May 21, 2001, in Department 307 of the Superior Court, the Honorable WENDELL MORTIMER JR., Judge presiding; the plaintiffs appearing by attorneys BRIGHT & BROWN, by MAUREEN J. BRIGHT, JAMES S. BRIGHT, and BRIAN L. BECKER, and the defendant appearing by attorneys DAVID JEFFREY EARLE, and CALDWELL & LESLIE, by MICHAEL R. LESLIE and ANDREW A. ESBENSHADE.

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the

answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

"TITLE OF COURT AND CAUSE"

"WE, THE JURY IN THE ABOVE-ENTITLED ACTION, FIND AS FOLLOWS:

"1. DID WATSON PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHELL CAUSED A CONTINUING NUISANCE ON THE WATSON CENTER? ANSWER:___NO___

"2. DID WATSON PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHELL CAUSED A CONTINUING TRESPASS ON THE WATSON CENTER? ANSWER:__YES___

"3. WHAT IS THE AMOUNT OF DAMAGES THAT WATSON SHOULD RECEIVE IN ORDER TO RESTORE THE CONDITION OF THE WATSON CENTER? $___3,915,851.00___

"4. DID SHELL PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE PETROLEUM CONTAMINATION ON THE WATSON CENTER RESULTED FROM A MISTAKE OF FACT BY SHELL? ANSWER:___NO___

"5. WHAT IS THE VALUE OF THE BENEFITS OBTAINED BY SHELL AS A RESULT OF THE PETROLEUM HYDROCARBON CONTAMINATION THAT IT CAUSED ON THE WATSON CENTER FROM JUNE 1, 1993 TO JUNE 30, 2001? $__14,275,237.00____

"DATED:__JULY 23, 2001__ BY:____ANGELA BRUNSON____

JURY FOREPERSON."

It appearing by reason of said special verdict that: Plaintiff WATSON LAND COMPANY is entitled to judgment against Defendant SHELL OIL COMPANY in the amount of $18,191,088.00; NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That Plaintiff WATSON LAND COMPANY have judgment against defendant SHELL OIL COMPANY in the sum of $18,191,088.00.

That plaintiff WATSON LAND COMPANY recover from Defendant SHELL OIL COMPANY costs and disbursements in the sum of $87,183.22.

DATED: JULY 23, 2001

WENDELL MORTIMER, JR.
JUDGE, SUPERIOR COURT

005849

130 Cal.App.4th 69, 29 Cal.Rptr.3d 343, 35 Envtl. L. Rep. 20,114, 05 Cal. Daily Op. Serv. 4986, 2005 Daily Journal D.A.R. 6797

(Cite as: 130 Cal.App.4th 69, 29 Cal.Rptr.3d 343)

H

Court of Appeal, Second District, Division 2, California.

WATSON LAND COMPANY, Plaintiff and Appellant,

v.

SHELL OIL COMPANY, Defendant and Appellant.

No. B155019.

June 9, 2005.

Certified for Partial Publication.[FN*]

FN* Pursuant to California Rules of Court, rules 976(d) and 976.1, this opinion is certified for partial publication. The portions directed to be published are the Introduction, Facts, part 4 of Shell's Appeal, and the Disposition.

Review Denied Sept. 28, 2005.[FN**]

FN** Baxter, J., did not participate therein.

Background: Landowner that found groundwater and soil contamination under its land brought suit for, inter alia, trespass against oil company that had pipelines running under land. The Superior Court, Los Angeles County, No. BC150161,Wendell J. Mortimer, Jr., J., entered judgment on jury verdict awarding landowner $3,915,851 for cost of clean up and $14,275,237 for benefit oil company derived from its failure to clean up contamination. Oil company appealed, and landowner cross-appealed.

Holding: The Court of Appeal, Ashmann-Gerst, J., held that oil company's avoidance of remediation costs of leak in pipeline was not "benefit" that entitled landowner to those damages.

Affirmed as modified.

West Headnotes

[1] Trespass 386 ⚿50

386 Trespass
386II Actions
386II(D) Damages
386k50 k. Entry on and Injuries to Real Property. Most Cited Cases

Oil company's avoidance of remediation costs of leaking gasoline pipeline under landowner's property was not "benefit" to oil company that entitled landowner to recover benefit damages under statute allowing recovery of benefits obtained by person wrongfully occupying property by reason of that wrongful occupation; oil company derived no financial advantage from leakage and resulting contamination of land. West's Ann.Cal.Civ.Code § 3334(b)(1).

See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1460; 12 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 34:105; Cal. Jur. 3d, Ejectment and Related Remedies, § 54; Cal. Jur. 3d, Trespass to Realty, § 12.

[2] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ⚿184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

When interpreting a statute, courts must ascertain the intent of the Legislature so as to effectuate the purpose of the law.

EXHIBIT E

[3] Statutes 361 ⇐188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ⇐206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
When interpreting a statute, courts must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase, and sentence in pursuance of the legislative purpose.

[4] Statutes 361 ⇐206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
A statutory construction making some words surplusage is to be avoided.

[5] Statutes 361 ⇐208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases

Statutes 361 ⇐223.2(.5)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General
361k223.2(.5) k. In General. Most Cited Cases
When construing a statute, the words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.

[6] Statutes 361 ⇐181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases
Where uncertainty exists as to the meaning of a statute, consideration should be given to the consequences that will flow from a particular interpretation.

[7] Statutes 361 ⇐217.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.1 k. History of Act in General. Most Cited Cases

Statutes 361 ⇐217.2

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.2 k. Legislative History of

Act. Most Cited Cases
Both the legislative history of a statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.

[8] Statutes 361 ⇐184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
The objective sought to be achieved by a statute, as well as the evil to be prevented, is of prime consideration in its interpretation.

[9] Trespass 386 ⇐50

386 Trespass
386II Actions
386II(D) Damages
386k50 k. Entry on and Injuries to Real Property. Most Cited Cases
Under statute allowing recovery of benefits obtained by person wrongfully occupying property by reason of that wrongful occupation, benefits are not obtained by reason of a wrongful occupation unless the trespass itself provided the trespasser with a financial or business advantage. West's Ann.Cal.Civ.Code § 3334(b)(1).

[10] Trespass 386 ⇐50

386 Trespass
386II Actions
386II(D) Damages
386k50 k. Entry on and Injuries to Real Property. Most Cited Cases
By amending trespass damages statute to allow recovery of benefits obtained by person wrongfully occupying property by reason of that wrongful occupation, the Legislature intended to eliminate financial incentives for trespass by eradicating the benefit associated with the wrongful use of another's land. West's Ann.Cal.Civ.Code § 3334(b)(1).

**345 Caldwell, Leslie, Newcombe & Pettit, Michael R. Leslie, Mary Newcombe, Cara A. Horowitz, Los Angeles, Andrew Esbenshade, Sandra L. Tholen; Greines, Martin, Stein & Richland, and Feris M. Greenberger, Los Angeles, for Plaintiff and Appellant.

Bright and Brown, James S. Bright, Maureen J. Bright and Brian L. Becker, Glendale, for Defendant and Appellant.

Mayer, Brown, Rowe & Maw and Gregory R. McClintock, Los Angeles, for Western States Petroleum Association as amicus curiae on behalf of Defendant and Appellant.

ASHMANN-GERST, J.

*71 INTRODUCTION

When respondent Watson Land Company (Watson) discovered groundwater and soil contamination under its land (the Watson Center), it claimed that appellant Shell Oil Company (Shell), among others, was responsible. A jury awarded Watson $3,915,851 for the cost of cleanup of contamination caused by the leakage of leaded gasoline from pipelines Shell was operating under *72 the Watson Center. Additionally, the jury found that Shell derived a $14,275,237 benefit when it failed to clean up the contamination and awarded that amount to Watson pursuant to Civil Code section 3334. Shell appeals and urges reversal on the following grounds: (1) Because Atlantic Richfield Company (ARCO) settled with Watson and agreed to pay for the entire clean up of the Watson Center, ARCO was the real party in interest and Watson lacked standing to sue; (2) at a minimum, ARCO should have been joined as a coplaintiff at trial as an indispensable party; (3) Watson's evidence of causation was based on inadmissible evidence; and (4) the 1992 amendment to Civil Code section 3334 allowing a plaintiff to recover the benefits obtained by a trespasser should not have been applied because Shell was not benefited when its pipelines leaked.

Therefore, even if there was causation, the judgment must be reduced by $14,275,237.

Watson challenges two orders on cross-appeal. According to Watson: (1) the trial court improperly denied a motion for sanctions against Shell for bad faith conduct under Code of Civil Procedure section 128.7,[FN1] and (2) the trial court erroneously gave Shell a credit for the litigation costs ARCO agreed to pay Watson through settlement and then reduced Watson's recoverable costs by half.

FN1. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

In part 4 of Shell's appeal, we hold that for the purposes of **346Civil Code section 3334, Shell did not obtain any benefits when its pipelines leaked onto the Watson Center. As a consequence, the judgment in favor of Watson must be reduced by $14,275,237. In the unpublished portion of this opinion, we explain that Watson's cross-appeal, and the rest of Shell's appeal lack merit. As modified, the judgment is affirmed in all other respects.

FACTS

The Watson Center is a fully developed commercial and industrial park with over 50 lots, most of which have been improved with buildings. Watson leases those buildings to various tenants. ARCO owns a refinery (the ARCO Refinery) across the street from the Watson Center and uses it for processing, storing and transporting crude oil, gas and petroleum products. There are two major pipeline corridors that run under the Watson Center. The first is commonly referred to as the "Utility Way Pipeline Corridor,"[FN2] and the second *73 is commonly referred to as the "DWP Pipeline Corridor."[FN3] At times relevant to this appeal, Shell operated pipelines in both of those corridors.

FN2. The Utility Way Pipeline Corridor is a portion of the Watson Center that is subject to a pipeline easement held by Shell.

FN3. The DWP Pipeline Corridor is property owned by the Los Angeles Department of Water and Power. The corridor cuts through the Watson Center.

In 1996, Watson sued, inter alia, Shell and ARCO pursuant to 11 causes of action, including trespass and nuisance. The first amended complaint alleged: Since some time prior to 1977, the operations of ARCO contaminated the groundwater beneath the ARCO Refinery. ARCO has been actively recovering free-floating petroleum product and removing contamination from the groundwater beneath the ARCO Refinery. In 1985, ARCO began conducting its remediation efforts under order of the Los Angeles Regional Water Quality Control Board (RWQCB). The RWQCB directed ARCO to create a subsurface barrier to prevent the migration of groundwater contamination to the Watson Center. Based on ARCO's remediation efforts and its representations, Watson believed that the contamination had not migrated to the Watson Center. However, in 1995, a prospective tenant at the Watson Center conducted an environmental site investigation and discovered contamination. In 1996, Watson engaged an independent environmental consulting firm to investigate the contamination and its sources. The ARCO Refinery and three other offsite properties were found to be likely contributors to the groundwater contamination. As well, Watson learned that the Shell pipelines running beneath the Watson Center may also be contributors.

Watson and ARCO entered in a settlement agreement (the settlement agreement) with an effective date of November 1, 2000. The settlement agreement provided that Watson would continue to diligently pursue its claims against the other defendants in the case and deposit the proceeds into a cleanup fund (the cleanup fund). ARCO agreed to be responsible for the remediation of the Watson Center, subject to a specified right of reimbursement from the cleanup fund. The parties divided the Watson Center into three areas: Area A, Area B and Area C. Pursuant to the parties' agreement, ARCO

was entitled to 100 percent reimbursement of cleanup expenses related to Area A, 90 percent related to Area B, and 5 percent related to Area C.

The trial court granted ARCO's motion for determination of good faith settlement with Watson. The order specified that **347 none of the nonsettling defendants was entitled to any set-off or credit as a result of the settlement between ARCO and Watson, that Watson would seek to "recover from the remaining defendants only their proportionate shares of liability for contamination of [the Center]," and the trial court would retain jurisdiction over the cleanup fund.

*74 Prior to trial, Shell moved to exclude evidence of remediation costs on the theory that they would be paid by ARCO and ARCO was the real party in interest. In the alternative, Shell argued that ARCO had to be joined as an indispensable party. Shell's motion was denied.

At trial, Watson expert Jeffrey Dagdigian (Dagdigian) explained that when enough gasoline contaminates soil, the gasoline will float on top of the groundwater and become a source of contamination. The gasoline slowly dissolves into the groundwater, becomes a plume, and moves in the direction of the groundwater flow. The contamination is most concentrated at the source. Then, following the second law of thermodynamics, the contamination moves from a concentrated state to a random, dissolved state.

Watson produced maps displaying three plumes of gasoline contamination: Plume A (a medium sized plume at the northern end of the Watson Center over the Utility Way Pipeline Corridor), Plume B1 (a small plume in the southern half of the Watson Center over the DWP Pipeline Corridor at 233rd Street), and Plume B2 (a large plume in the southern half of the Watson Center over the Utility Way Pipeline Corridor at 233rd Street).[FN4] Dagdigian testified that he was able to verify the accuracy of the plume maps by checking and rechecking facts and figures derived from unidentified "laboratory reports." He explained that overlapping concentrations of chemicals indicate a common source and then analyzed the plumes in terms of overlapping concentrations of benzene, diisipropyl ether (DIPE), methyl tertiary butyl ether (MTBE), and lead scavengers known as ethylene dichloride (EDC) and ethylene dibromibe (EDB).

> FN4. In their briefs, the parties concentrate on Plume A and Plume B2. GATX Terminals Corporation, one of the defendants below, settled with Watson and agreed to remove jet fuel from the same area as Plume B1.

According to the maps, Plume A contained concentrations of benzene, DIPE and EDC, Plume B2 contained concentrations of benzene, DIPE, EDC, and EDB, and Plume B1 contained concentrations of benzene, DIPE and MTBE. The absence of MTBE in Plume A and Plume B2 suggested to Dagdigian that the contamination in those plumes was a leaded gasoline. Further, the presence of DIPE suggested to Dagdigian, based on his research of Shell facilities, "that this gasoline came from one of those facilities."[FN5] He testified that Shell's pipelines carried the type of gasoline found in those plumes.

> FN5. A Shell chemist, Ileana Rhodes, testified that Shell manufactured DIPE at one of Shell's nearby refineries. Shell's quarterly reports to the Environmental Protection Agency in 1979 listed DIPE as an additive in Shell's gasoline. Rhodes acknowledged these reports. Dagdigian testified that DIPE was found at Shell facilities to the north and south of the Watson Center, and also at Morman Island, where Shell stored gasoline.

*75 Dagdigian went on to explain that the gasoline in Plume B2 contained a mixed alkyl lead package comprised of: tetraethyl lead, methyltriethyl lead, dimethyldiethyl lead, trimethylethyl lead, and tetramethyl lead. In contrast, the only lead compound that was discovered under the ARCO Refinery was

tetraethyl lead. When asked what that meant, he stated: **348 "It means that the gasoline that was released underneath the ARCO Refinery is different than the gasoline that was released underneath the Watson Center."

Nancy Beresky (Beresky), another Watson expert, opined that the Plume B2 was caused when a Shell pipeline leaked leaded gasoline. She based her opinion on four lines of evidence. Shell transported leaded gasoline through the Utility Way Pipeline Corridor. There was no evidence that there were any other pipelines in that corridor that were used to carry the same type of material. The hot spot of the plume was centered immediately underneath the Utility Way Pipeline Corridor. Additionally, the plume was comprised of leaded gasoline that contained DIPE. The same material was found underneath the Shell refinery to the north and the one to the south. Those two refineries are interconnected via the Utility Way Pipeline Corridor.

According to Beresky, there was evidence that Plume B2 was not caused by contamination migrating from the ARCO Refinery. Points between Plume B2 and the ARCO Refinery revealed no detection of the chemicals found in Plume B2. Based on the second law of thermodynamics, it would be impossible to have high concentrations at Plume B2 and lesser concentrations between Plume B2 and the ARCO Refinery if the refinery was the source. Beresky explained that the hydrology of the area supported her position. She thought that if there was migration, "we would see some smearing in this area. We don't see that."

Continuing on to Plume A, Beresky stated that it was also caused by a leaded gasoline leak from a Shell pipeline in the Utility Way Pipeline Corridor. She based her opinion on several facts. The plume was elongated in a north and south direction and the hot spot was near the corridor. The contamination contained DIPE which, again, was the same material found at the local Shell facilities. According to Beresky, the contamination did not come from the ARCO Refinery because it was too far to migrate, and the material differed.

Charles Schmidt (Schmidt), a third Watson expert, testified regarding the results he obtained using "downhole flux" testing.[FN6] He testified that "the source of the B2 Plume is [the] Shell pipeline in [the] Utility Way [Pipeline] *76 Corridor." He reached this conclusion because his tests showed a "top-down source" for the contamination that was above the groundwater. Further, he stated that he was able to exclude the ARCO Refinery as a source. Based on other data he collected, Schmidt opined that Plume A was created by a leak from Shell's pipeline. Subsequently, Dagdigian was asked about Schmidt's downhole flux data. Dagdigian noted that soil gas was first detected at 15 feet. He agreed, when asked by counsel, that this was evidence of a "top-down pipeline leak coming from the Utility Way Pipeline Corridor."

> FN6. Downhole flux is measured by lowering a chamber into the ground and taking samples of the molecules of contaminants.

The jury found that Watson failed to prove a continuing nuisance, but that it did prove a continuing trespass. According to the jury, the amount Watson should receive for remediation was $3,915,851, and the value of the benefits obtained by Shell as a result of the gasoline contamination it caused at the Watson Center from June 1, 1993, to June 30, 2001, was $14,275,237.

The trial court entered judgment in favor of Watson in the amount of $18,191,088 and awarded $87,183.22 in costs. After **349 the denial of various posttrial motions, these appeals followed.

Upon application, we allowed Western States Petroleum Association to file an amicus curiae brief regarding the proper interpretation of the "benefits obtained" measure of damages in Civil Code section 3334.

SHELL'S APPEAL

1.-3.[FN**]

FN** See footnote *, *ante.*

4. The $14,275,237 in "benefits" damages must be reversed.

[1] The question presented is whether a gasoline leak from a pipeline constitutes "benefits" to Shell, as contemplated by Civil Code section 3334.

[2][3][4][5][6][7][8] When interpreting a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386, 241 Cal.Rptr. 67, 743 P.2d 1323.) We must "look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in *77 mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]" (*Id.* at pp. 1386-1387, 241 Cal.Rptr. 67, 743 P.2d 1323.) A close cousin of the foregoing quote is the rule " 'that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation.' [Citations.]" (*Wotton v. Bush* (1953) 41 Cal.2d 460, 467, 261 P.2d 256.)

Civil Code section 3334 reads: "(a) The detriment caused by the wrongful occupation of real property ... is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession. [¶] (b)(1) Except as provided in paragraph (2), for purposes of subdivision (a), the value of the use of the property shall be the greater of the reasonable rental value of that property or the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation. [¶] (2) If a wrongful occupation of real property subject to this section is the result of a mistake of fact of the wrongful occupier, the value of the use of the property, for purposes of subdivision (a), shall be the reasonable rental value of the property."

[9] Shell's position is that though "benefits obtained" is not defined, "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.* " In counterpoint, Watson contends that a benefit is obtained by any polluter who keeps money that it should have spent remediating**350 the trespass. In our view, Shell is correct. "Benefits" are not "obtained" by reason of a wrongful occupation unless the trespass itself provided the trespasser with a financial or business advantage.

We start with the plain meaning of the statute. The word "benefits" connotes something that is advantageous, and the benefits contemplated by the statute must be obtained by reason of the wrongful occupation. In other words, a trespass must result in something advantageous for the trespasser or it does not qualify as a benefit for purposes of the statute. Here, the question is whether Shell's pipeline leakage and the resulting contamination of Watson's land can be considered something advantageous for Shell. We think *78 not. Not only did the gasoline leakage result in a loss of product for Shell, but it meant that pipelines either had to be repaired or abandoned and replaced by different

pipelines at substantial cost.

We reject the notion that "benefits" include the avoidance of remediation costs. "The value of the use"i s a separate component of damages from "the reasonable cost of repair or restoration of the property to its original condition." Remediation costs fall within the umbrella of the "reasonable cost of repair or restoration." If "benefits" included the cost of remediation (and the value of the use of the money saved, as Watson suggests), then the language permitting recovery of "the reasonable cost of repair or restoration" would be surplusage. (Civ.Code, § 3334, subd. (a).)

According to Watson, "[Civil Code] section 3334 was amended to eliminate the incentive to trespass, including as only one example defendants who dumped toxic waste on worthless desert properties to avoid the proper disposal costs. Obviously, those toxic dumpers did not generate a 'direct profit' dumping the waste-they simply avoided a cost thereby increasing their net profits. That is exactly what Shell did here. The value to Shell of the cleanup costs it never spent is many times the amount of the cleanup costs." This analogy fails. A polluter who dumps toxic waste in the desert instead of paying to properly dispose of toxic waste gains the financial advantage of getting either free disposal or cheaper disposal. No such financial advantage accrues to the owner of a leaking pipeline, at least insofar as the owner was not using the leak to effectuate disposal or to obtain some other financial gain separate from the failure to remediate the trespass.[FN16] In the absence of an advantage, there is no need to impose a special disincentive to trespass.

> FN16. Watson does not attribute any such intent to Shell.

Our interpretation is in harmony with the salutary purpose of the 1992 amendment that introduced the "benefits obtained" measure of damages to Civil Code section 3334.

The origins of the amendment can be found in resolution No. 5-9-91, which was passed by the Conference of Delegates of the State Bar of California in the summer of 1991. In writing to the legislative counsel for the State Bar, the resolution's author explained that the resolution "provides a definition for the 'value of the use' which eliminates Section 3334's economic incentive to dump" toxic waste when the rental value is cheaper than the cost of disposal. "The 'value of the use' would be 'the greater of the reasonable rental value or the benefits obtained by the trespasser by reason of the trespass.' The measure of damages would take into account the benefit obtained by the trespass-the cost saved by not properly disposing the pollutants."

**351 *79 Those connected to Assembly Bill No. 2663 (1991-1992 Reg. Sess.), the bill prompted by resolution No. 5-9-91 and sponsored by the State Bar to amend Civil Code section 3334, discussed the purpose of the bill in a variety of ways and used the following language: (1) "trespassers [have] earned significant business revenue (benefits) from using the land to dispose of toxic wastes" (Amelia V. Stewart, legis. representative of State Bar of Cal., letter of support for Assembly Bill No. 2663 to Assemblyman Phillip Isenberg, Chair of the Assembly Judiciary Com., Mar. 19, 1992); (2) "potential polluters would be required to disgorge the benefits obtained from any such wrongful occupation" (Michael D. Schwartz, letter of support for Assembly Bill No. 2663 to Amelia V. Stewart, legis. representative of State Bar of Cal., Mar. 20, 1992); (3) "the law should be clear that the damages recoverable in such cases is the economic benefit to the trespasser, if that is the greater value" (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2663 (1991-1992 Reg. Sess.); (4) "the law should encourage proper disposal of toxic wastes. [¶] By statutorily allowing recovery of 'the benefits (profits) obtained by the occupier by reason of trespass,'c ourts in trespass actions will have the discretion to assess damages comparable to the benefit to the wrongful trespasser that is dumping toxic wastes" (Assem. Com. on Judiciary, 3d reading

analysis of Assem. Bill No. 2663 (1991-1992 Reg. Sess.)); (5) "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" and that "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" (Sen. Com. on Judiciary, comment on Assem. Bill No. 2663 (1991-1992 Reg. Sess.), as amended May 27, 1992, p. 2).

[10] This history demonstrates that the legislature intended to eliminate financial incentives for trespass by eradicating the benefit associated with the wrongful use of another's land. This intent would not be furthered by applying the "benefits obtained" measure of damages to a trespass for which there was no financial or business advantage. In such a case, a plaintiff is limited to recovering under the other measures of damages contemplated by the statute, i.e., the reasonable rental value of the property and the cost of restoration and recovery. Thus, the $14,275,237 "benefits" damages awarded by the jury must be reversed.

WATSON'S CROSS-APPEAL[FN***]

FN*** See footnote *, *ante*.

*80 DISPOSITION

The damages are reduced to $3,915,851. As modified, the judgment is affirmed. The parties shall bear their costs on appeal.

We concur: DOI TODD, Acting P.J., and NOTT, J. FN†

FN† Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cal.App. 2 Dist.,2005.
Watson Land Co. v. Shell Oil Co.
130 Cal.App.4th 69, 29 Cal.Rptr.3d 343, 35 Envtl. L. Rep. 20,114, 05 Cal. Daily Op. Serv. 4986, 2005 Daily Journal D.A.R. 6797

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2d Civ. No. B155019

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v.

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Appeal from Judgment of the Superior Court
For the County of Los Angeles
(Hon. Wendell J. Mortimer, Judge)

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EXHIBIT F

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INTRODUCTION

Shell Oil Company has been hit with a judgment that includes an award of more than $14 million on the paradoxical notion that when one of Shell's underground pipelines supposedly leaked for a brief time in the 1970's, Shell derived a "benefit" from the leak it knew nothing about (and the existence of which it still disputes). Even worse, the entire judgment rests on a foundation of improperly admitted evidence, without which Plaintiff Watson Land Company's proof of causation is, in a word, nonexistent.

Watson claimed that an undetected leak decades ago in a Shell pipeline caused three separate plumes of contamination under Watson's land, although the jury found Shell liable for only the smallest of these plumes—the A Plume. The evidentiary basis for the jury's award on the A Plume stemmed from the trial court's decision to allow Watson's damages expert to testify, based on his review of unverified, uncross-examined laboratory test results that were never admitted at trial, that Shell leaded gasoline manufactured between 1960 and 1980 had been found on the Watson Industrial Center South ("WICS"). These records purported to identify chemical components in the contaminated soil that Watson claimed were markers for Shell gasoline. Watson's damages expert, who conceded he was no expert in petroleum compound fingerprinting, relied upon these unadmitted, hearsay records to justify his conclusion that Shell's pipelines were the source of contamination found on the site. But without the threshold evidentiary showing that any plume, and in particular the A Plume, contained Shell gasoline, the entire judgment of $18.1 million (plus costs) must fall. Thus, this appeal seeks a total reversal of the judgment.

The basis for the so-called "benefit" damages, which have nothing to do with any harm suffered by Watson, is a previously unconstrued 1992 amendment to Civil Code § 3334. Under that amendment—which never should have been applied to a spill that supposedly occurred some 20-40 years ago—a property owner may recover from a trespasser the value of the use of the damaged land, as measured by the land's reasonable rental value *or the benefit obtained by the trespasser*, whichever is greater. Even though Shell never knew of any leak or contamination from its pipeline, Watson claimed it was entitled to measure the "benefit" Shell supposedly obtained from the leak by multiplying the costs Shell avoided in 1993 when it failed to remediate the A Plume, by the return on those funds purportedly obtained by Shell since that date. Based on the testimony of Watson's financial expert that Shell's weighted average cost of capital averaged *20%* from June 1993 through trial, Watson claimed that every dollar Shell should have spent in remediation in 1993 was now worth *$4.27*. Watson then argued that the total value of the "benefit" received by Shell was an astonishing $14.3 million—even though the costs of remediation today are under $4 million. Shell asks this Court to hold, if the judgment is not struck down entirely, that Watson is limited to an award of its actual damages under § 3334. Alternatively, Shell seeks a ruling that Watson's calculation of Shell's "benefit" was wrong as a matter of law.

What is also particularly onerous about the judgment is that Watson received a windfall award of damages from Shell, even though it faced *no* financial exposure arising from the contamination it attributed to Shell at trial. The real entity maneuvering the outcome here was ARCO. In a settlement documented just weeks before trial was to begin, ARCO assumed responsibility for remediating the *entire* Watson property—as it should have since there was no question that ARCO's operations caused the bulk of the contamination. As part of

the settlement, Watson ceded all responsibility and control for remediation of the property to ARCO. What is more, ARCO fed Watson's trial effort with financial support and expertise to shift the burden to Shell because, under the settlement, ARCO stood, first, to be reimbursed for its remediation costs and, second, to recover half of any damages beyond those costs recovered by Watson. In light of these unique circumstances, Shell moved to have ARCO added as an indispensable party, because ARCO was no longer just a settling joint tortfeasor but instead had assumed the position of co-claimant. The trial court prejudicially erred in denying that motion. Thus, the judgment against Shell must be reversed due to Watson's failure to name ARCO as an indispensable party plaintiff.

Accordingly, Shell requests this Court to reverse the judgment below and either direct entry of judgment for Shell because of a failure of causation 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, Shell requests that the Court remand the case for further proceedings.

STATEMENT OF FACTS

A. The Watson Industrial Center South (WICS)

Among its extensive holdings, Watson Land Company owns approximately 350 acres of contiguous property in Carson that has been developed for commercial and industrial use and is known as the Watson Industrial Center South ("WICS"). The property is surrounded by a number of refineries, pipelines, and other petroleum facilities—some of them no longer active—that are or were owned by ARCO, Shell, and the other defendants who have since settled out of the action. *See* CT 214, 413.

The WICS and surrounding properties are depicted in the maps and photographs attached as an Appendix to this brief. The property contains a number of large warehouse and distribution facilities that range in size from 5,000

to 550,000 square feet. *See* RT 786-87. The value of the entire site, including facilities, is approximately $400 million. RT 824, 830. It is considered premium commercial rental property and is marketed at rates above those in the surrounding areas. RT 3131-38; Exh. 3241.

From the pristine surface of the WICS, *see* App. (Exh. 3258), one would never know that the subsurface is contaminated. Alerted to the potential for subsurface contamination by the Regional Water Quality Control Board's issuance in 1985 of a cease and desist order to the ARCO Los Angeles Refinery next door to the WICS, Watson initiated its own investigation in the early 1990's and, in 1995, began disclosing the existence of potential contamination to its lessees. RT 795-97. Although Watson has since provided all tenants located above documented subsurface contamination with indemnities for environmental exposure or remediation claims,[1] no WICS tenant has ever executed on an indemnity or claimed any damages resulting from contamination. RT 832. Moreover, there is no evidence that the fair market value of the property has been impaired by any contamination, RT 830, that rents on the property have been depressed, RT 897, or that Watson has lost a single tenant because of alleged subsurface contamination, RT 3833-34. At the time of trial, Watson had no plans to sell any portion of the WICS. RT 850.

Watson also could not identify any residual effects from subsurface contamination. Although Watson owns the water rights associated with the property, there are no water wells on the site, RT 864-65, and Watson has no plans to appropriate the water on its property, RT 898. Most importantly, Watson could

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[1] Such indemnities are now routine in industrial lease agreements and, except in extreme circumstances not presented here, have no impact on lease or occupancy rates. *See* RT 3130, 3142-43.

not identify any risks to human health arising from contamination on the site. RT 869.

As a result, Watson did not seek damages arising from lost rents, diminished property value, impairment to water or other subsurface rights, or for increased financing costs arising from contamination on the site. RT 897. At the time of trial, the only damages Watson had incurred were costs of environmental assessment for purposes of the litigation totaling $476,301. Exh. 1521; RT 3833. Yet, at trial, Watson claimed millions of dollars in damages for remediation costs it would never pay, as well as tens of millions of dollars in statutory damages under Civil Code § 3334.

B. ARCO's Operations Near the WICS

The ARCO Los Angeles Refinery is situated due east of the WICS across Wilmington Avenue. Throughout its history, the ARCO refinery has been responsible for massive releases of petroleum products into the subsurface, causing the Water Board to order ARCO in 1985 to investigate and remediate subsurface contamination at the refinery. RT 3591.

Stephen Testa, a geologist who supervised ARCO's environmental investigative operations from 1985-1990 and continued to consult with ARCO until 1993-94, see RT 3396-3405, testified that his team discovered extensive areas of free product composed of gasoline, diesel fuel, and other hydrocarbons, either perched in the soil at different depths or floating on the water table. *See* RT 3415-18. Those perched layers of free product, or LNAPL as it is sometimes called, measured up to 25-27 feet in thickness and extended as far as 200 acres laterally under the surface. *Id.* at 3419-21; Exh. 93. In addition, the team identified multiple plumes of dissolved phase hydrocarbons permeating the soil and groundwater under the refinery. RT 3492-93.

Testa's team concluded that the ARCO refinery was the source of the hydrocarbons encountered at the ARCO refinery site. *Id.* at 3423. No similar conclusions were reached with respect to contamination underlying the WICS, because ARCO had not yet conducted testing on the WICS. *Id.* at 3425. Thus, while maps prepared during the course of the investigation depict the contamination boundary as Wilmington Avenue, the street between the ARCO Refinery and the WICS, *see* Exh. 176, Fig. 7-5, Testa's team admittedly assumed that the pools detected under the refinery extended off-site onto the WICS. Just how far was not known. RT 3424-25.

The 1985 cease and desist order required ARCO to file regular reports with the Water Board concerning its remediation progress. According to those reports, since 1977 ARCO has removed more than nineteen million gallons of free product from the vicinity of the groundwater table underlying its refinery (of a potential volume as high as *120 million* gallons) and has treated more than 500 million gallons of groundwater. RT 3712-14, 3716; Exh. 3194 (at 7, 27). *See also* App. (Exh. 3266-A). Nonetheless, Testa acknowledged that somewhere from 50 to 70% of the free product contained in the subsurface will never be recovered. RT 3518. Thus, the nineteen million gallons of free product already removed will constitute "a small fraction" of the original contamination caused by ARCO, and it will be impossible to remove completely the existing free product or its associated dissolved phase constituents. RT 3518-19, 3721-22.

C. Shell's Operations Near the WICS

Shell's former refinery consisted of two separate facilities located to the north and south of the western portion of the WICS and linked by two corridors of underground pipelines known, respectively, as the DWP Right of Way and the Utility Way Right of Way. *See* App. (Exh. 1498). In approximately 1991, Shell sold the southern facility to Unocal and converted the northern facility into a

distribution plant. Since the sale, most of the inter-refinery lines have been converted into product lines for the distribution plant. RT 3330-31.

Through the years, Shell regularly performed preventive maintenance on the inter-refinery lines and replaced them as needed. Shell never discovered any product leaks along these lines other than a single butane leak near the surface that erupted in the Utility Way Corridor in 1983. RT 3263-72. That leak was immediately repaired, after which Shell abandoned the line and remediated the spill. RT 3263-64.

Notwithstanding this excellent record, which is supported by repeated maintenance tests and a complete lack of any documented regulatory violations, Watson included Shell in the long list of defendants it sued in 1996.

D. Watson Sues All Potentially Responsible Parties in the Area

Watson filed this action in May 1996 against ARCO and eight others, including Shell. Watson claimed that ARCO had fraudulently concealed and made fraudulent misrepresentations to Watson about the extensive contamination on the WICS. By contrast, Watson never alleged that Shell had intentionally misrepresented or concealed any information about contamination on the WICS. Instead, Shell was sued primarily for nuisance and trespass.

By the time of trial, Watson claimed it had discovered three separate plumes of contamination in the groundwater under the WICS: Plume A, located on the northernmost portion of the WICS; the B1 Plume located near the DWP Corridor; and the B2 Plume that extended laterally under the eastern half of the property. App. (Exh. 1498). Not surprisingly, based on its extensive history with ARCO, Watson consistently took the position that the bulk of contamination on its property was attributable to ARCO—that is, until Watson settled with ARCO on the eve of trial.

E. Watson Settles With ARCO

Just weeks before the then-scheduled trial date, Watson announced that it had settled with ARCO. ARCO's motion for a good faith settlement determination was granted over Shell's objection on February 26, 2001. CT 1620-22. Under the Settlement, ARCO agreed to pay $1.5 million to Watson, subject to the express requirement that the non-settling defendants, including Shell, not be entitled to any setoff for this payment. CT 1621. The Settlement also relieved Watson of all responsibility for and control over any required remediation of environmental contamination at the WICS. Instead, ARCO promised to "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 which is both the subject of [ARCO's indemnity in the Settlement] and which is directed, required, or ordered by any governmental agency [on the WICS] . . . ." CT 3198-99 [emphasis added].

ARCO also became a financial participant with Watson in any upside recovery from the lawsuit. Under the Settlement, recoveries from other defendants will be paid into a trust fund. Monies in that trust fund are earmarked initially to repay Watson its attorneys' fees and costs, and then secondly to repay ARCO an allocated percentage of its remediation expenses. CT 3168, 3173. Monies remaining in that fund at the completion of the remediation are then split between Watson and ARCO fifty-fifty. CT 3183. If the judgment against Shell is not reversed, ARCO—the primary wrongdoer in this lawsuit and the only party alleged by Watson to have committed fraud—will have turned its intentional misconduct into a tidy multi-million dollar profit center.

F. Watson Alters Its Trial Strategy

The ARCO settlement fundamentally altered Watson's trial strategy. No longer concerned with cleanup of the property, Watson refocused its case on

maximizing its monetary recovery from Shell. Towards that end, Watson sought to pin responsibility for all but the B1 plume on Shell,[2] including the B2 plume that so plainly emanated from the ARCO refinery.

But Watson's original testing of the soil around Shell's pipelines in the area of the B2 Plume had failed to establish any link between the pipelines and the groundwater contamination on the WICS. Jeffrey Dagdigian, Watson's principal environmental consultant and damages expert, was forced to concede at trial that soil borings in the area of the B2 Plume did not show any contamination 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 it had collected in these areas. RT 2964-65. He further admitted that Watson's various consultants over the course of Watson's multi-year investigation had taken both soil gas samples and soil borings all around the Shell pipelines in the area surrounding the B2 Plume looking for evidence of leaks, but had come up with "essentially nothing." RT 2978-79, 2966.

The evidence supporting Watson's case against Shell with respect to the A Plume was even weaker. Because no free product had ever been discovered in the vicinity of the A Plume, petroleum fingerprinting to establish the source of the A Plume was not an option. RT 1855, 2742, 2767. The only soil data that even suggested the existence of the A Plume had been reported in October 1997 by the Friedman & Bruya Laboratory (the "F&B Lab"), an independent laboratory retained to analyze samples collected by Watson's experts. The F&B Lab results showed light contamination from a mixture of degraded and undegraded diesel and refinery slops—not leaded gasoline, which Watson insisted was the product leaking from Shell's pipeline in the area. Exh. 3251; RT 2081-82. Only one test

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[2] In a settlement documented shortly after the ARCO settlement, Defendant GATX agreed to remediate the B1 Plume. CT 1581-84, 1609-12.

yielded a result that was consistent with a gasoline range product: Using what he called the "downhole flux method" on the ARCO side of the A Plume, Watson expert Charles Schmidt obtained readings from a single boring known as WSB-27 that he claimed reflected contamination from a pipeline in the vicinity.[3] *See* RT 1948-49, 2408.

Possibly because the standard soil test results collected by Watson (showing contamination by diesel and refinery slops) mirrored the mix of products found on the WICS just across the street from the ARCO Refinery, *see* RT 3998-99, the Watson team chose not to gather *any* additional soil or soil gas data when they finally initiated a groundwater investigation in March 2001, one month after the ARCO settlement was approved by the trial court, RT 2966, 2912, 2913, 2832, 2833, 2531, 2535-36, 2550. Dagdigian admitted this was a strategic decision made in conjunction with Watson's counsel, even though there were no restrictions on Watson's ability to collect such data. RT 2969.

Instead, Watson retained an environmental contractor, Heritage Environmental, to conduct a series of CPT, or hydropunch, tests along the Utility

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[3] Although traditional soil and soil gas tests had failed to detect such contamination, Schmidt also claimed that three downhole flux borings in the area of the B2 Plume showed "top-down" contamination from a pipeline within the Utility Way Corridor. But these borings were 50, 65 and 400 feet *away* from Shell's pipelines in the direction of the ARCO Refinery and only one source even fell within the boundaries of the B2 Plume drawn by Dagdigian (MW-4). *See* App. (Exh. 1500); RT 1853-54.

Moreover, Schmidt's downhole flux testing at that location detected no significant levels of volatile gases until he hit a depth of 40 feet, far below any pipelines in the vicinity, but smack-dab on top of the groundwater admittedly contaminated by ARCO. Exh. 1510.

Even apart from the fact that such sparse and distant data was tenuous at best, the whole downhole flux methodology is highly suspect and is not an acceptable scientific technique, at least as Schmidt tried to use it in this case. The trial court, nonetheless, denied Shell's motion to strike Schmidt's proposed conclusions under *People v. Kelly*, 17 Cal.3d 24, 130 Cal.Rptr. 144 (1976). *See* CT 5152; RT 1359-60.

Way Corridor. Groundwater samples from these hydropunch tests were then sent to the F&B Lab for chemical fingerprint analysis. *See* Exh. 3194.

At trial, Watson relied almost exclusively on the results of the F&B Lab's testing of the 2001 groundwater samples to link Shell to the contamination found under the WICS. Dagdigian and his associate, Nancy Beresky, a hydrogeologist, used these test results to draw maps of the A and B2 Plumes that were presented to the jury as factual over the vigorous objections of Shell. *See, e.g.*, CT 4513-14; RT 3005-07. According to Dagdigian, who conceded he was not an expert in petroleum chemical fingerprinting, RT 1544, he created these maps—with the assistance of Beresky, who was a hydrogeologist and not a chemist, RT 2630—based on his review of dozens of boxes of records, including test results. RT 1400-01. Without identifying the tests or the laboratories that conducted the tests, Dagdigian testified that the tests confirmed the presence of benzene and certain lead alkyls contained in Shell leaded gasoline manufactured prior to 1980, as well as sporadic traces of an oxygenate known as diisopropyl ether or isopropyl ether ("DIPE"), which he claimed had been used exclusively by Shell in the manufacture of leaded gasoline. RT 1445. According to Dagdigian, DIPE was a distinguishing marker for Shell leaded gasoline sold in the 1970's, and ARCO had never used DIPE.[4] RT 1483.

But Watson had never designated the experts necessary to authenticate and admit any of this laboratory data or to identify Shell gasoline as the source of the contamination. To circumvent this strategic problem, Watson subpoenaed the records of the test results from the various outside laboratories, including the F&B Lab, requesting that they produce those results at trial as business records. Shell objected to the admission of these records in a motion in limine, CT 3680-3708, but the trial court denied the motion, finding that the uncross-examined,

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[4] Shell hotly disputed both of these assertions. *See infra* at 21 n. 11.

conclusory declarations attached to those records (drafted by Watson's counsel) contained the requisite indicia of reliability to qualify the hearsay test results as business records. *See* RT A-103-04. Thus, no one from any of the laboratories (other than the laboratory that analyzed the vapor samples collected by Schmidt) ever testified about the science or methodology involved in the test procedures, the chain of custody and handling of the samples, or purported to analyze the data contained in the test results. The declarations themselves were never admitted. Most remarkably, none of the test results that purported to define the scope of contamination or to fingerprint the contamination identified in the A and B2 Plumes were ever admitted into evidence. Instead, Dagdigian himself simply asserted to the jury that the unnamed laboratory records he had reviewed conclusively established that Shell pipelines had caused both the A and B2 Plumes.[5] *See* RT 1483.

G. The Lack of Evidence that Shell's Pipelines Leaked

But the evidence that these plumes resulted from a Shell pipeline leak, as opposed to emanating from the massive contamination found under the ARCO Refinery, was sparse. At trial, Dagdigian was forced to concede that Watson had no soil data of any sort that would allow its experts to identify where, if at all, there was a leak from the Shell pipelines in the Utility Way Corridor. RT 2832-33. As he also conceded, if soil or soil gas readings from in and amongst the pipelines had been collected, those readings likely would have dispositively

[5] The F&B Lab performed the testing of the hydropunch groundwater samples identified as the C series on Exhibits 1500, 1501, 1512, and 1513, which are included in the Appendix. Those test results were subpoenaed for trial but were never admitted. *See* Exhs. 472, 1472. Dagdigian testified that the records indicated intermittent findings of DIPE and various lead alkyls and scavengers that he attributed to Shell. *See* RT 1445-46, 1450-55; App. (Exh. 1501, 1513). Only excerpts from two F&B Lab reports, which had nothing to do with DIPE and did not distinguish between types of petroleum contamination, were ever admitted into evidence. *See* Exhs. 1588, 3251 (rebuttal exhibit).

determined the existence of any leak and possibly the source. RT 2978. Watson, however, elected not to collect that data. *Id.* Watson's fate and transport expert, Nancy Beresky, also decided *not* to collect any soil lithological data around the site of the suspected A Plume, RT 2531, even though this data would have allowed Watson to trace the source of the groundwater contamination and migration pathways.[6]

The trial record, moreover, lacks *any* other credible evidence that leaded gasoline ever leaked from Shell's pipelines. Other than the concededly irrelevant butane leak that popped to the surface in 1983, nobody ever saw evidence of a pipeline leak. RT 3270-71.

As Shell's pipeline supervisor Roger Underwood explained, Shell used a combination of methods to oversee the pipelines, including hydrotesting the lines, cathodic protection, radiographic review and physically inspecting the surface above the pipelines on a regular basis, all to ensure that the pipelines "would operate in a safe way." RT 3226, 3262. Underwood also testified it was Shell's policy that, "for whatever reason if you've seen anything that would indicate a possible leak, then that would immediately be reported and investigated." RT 3217; *see also* RT 3271 (stating that if an employee failed to report evidence of hydrocarbon contamination, "the person probably would be terminated"), RT 3224

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[6] Beresky admitted she *could* have gotten continuous lithological information during her soil borings at the A Plume for a mere $2,500 per boring. RT 2531, 2535-36. Saddled with Watson's strategic decision not to collect more relevant information, she also admitted she had been forced to infer the data points for her mapping of the A Plume. RT 2541.

Shell's experts repeatedly challenged the aggressive conclusions of Watson's experts attributing the A Plume contamination to Shell. Shell's hydrogeologist, Sandra Maxfield, testified that there was no evidence the contaminants found in the A Plume came from a Shell pipeline release, as opposed to some other offsite or onsite source. RT 4846-48. Maxfield also noted that Watson had no legitimate soil information in the area of the A Plume, other than the flatly inconsistent soil sample results from WSB-7. RT 4847, 5017, 5014, 5015.

(Shell pipeline workers required to report problems with lines). Moreover, Underwood testified that in his 35 years of experience virtually all leaks from high pressure pipelines like those in the DWP and Utility Way corridors result in some surface disruption, as occurred with the GATX jet fuel leak. RT 3217.

In addition to the undisputed testimony that Shell regularly patrolled and tested its lines, the evidence also showed that, in 1993, Shell conducted excavations in the Utility Way Corridor precisely where the pipelines had supposedly leaked. Yet no leaks were ever found; nor was any telltale odor detected.[7] Even Dagdigian was forced to admit that the historical records compiled by Shell revealed no physical evidence indicating hydrocarbons in the soil around the pipelines. *See* RT 1723-24.

The only "contrary" evidence offered by Watson came from Paul Karlozian, Watson's pipeline expert who reviewed Shell's hydrotest results. Karlozian opined that some of the hundreds of hydrotests run by Shell on the pipelines did not pass state requirements, though he admitted that many factors could cause those results, only one of which is an actual leak. RT 1032, 1020-25, 1121-22. Karlozian also testified that some pipelines were replaced prematurely in his estimation, leading him to infer that the lines were leaking. RT 1010. On this whisker-thin inference, Watson hung its entire contention that Shell's pipelines had leaked and contaminated the WICS.

Tellingly, though, of the hydrotest results challenged by Karlozian, those performed on lines within the *Utility Way* Corridor that Watson identified as the source of the A and B2 Plumes were *followed by compliant tests*, indicating that

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[7] RT 3270 (Underwood testifying that in his 35 years he was unaware of any gasoline leaks in the Utility Way and, at RT 3225, he would have known had there been such a leak); *see also* RT 3261-62 (no problems with cathodic protection indicating a leak); RT 3313 (no reports of any leak during the 1993 excavation); RT 5352-53 (Russell Guidry stating he smelled no hydrocarbon leaks during the 1993 excavation).

the earlier "failing" results had been produced by factors other than actual leaks. *See* RT 1125-29. As Karlozian acknowledged, leaking underground lines don't fix themselves; nor could leaking lines from the DWP Corridor have caused the A or B2 Plumes. RT 1122, 1131-32.

Nonetheless, Dagdigian concluded, based almost exclusively on the F&B Lab reports ostensibly evidencing minuscule amounts of DIPE in the groundwater, that the Utility Way pipelines had leaked leaded gasoline into the WICS some 20-40 years earlier. *See* RT 1583.

H. Watson's Damages Calculation

Undeterred by this lack of evidence, and despite the fact that ARCO had agreed to remediate the entire site, Watson sought $12.8 million in remediation costs from Shell. This number, though, was dwarfed by the $54.8 million Watson sought as Shell's "benefit" received by not finding and remediating the contamination before 1993. Thus, the combined total Watson sought from Shell exceeded $67 million. *See* Exhs. 1521, 1523, 1525; RT 2787, 2803-05.

1. The Cost of Remediating the A Plume

Dagdigian estimated that remediating the A Plume would cost $3,915,851.00. Exh. 1521, even though he conceded that more data would have to be collected before any remediation system could be implemented or his proposal could be submitted to the appropriate government agencies for consideration. RT 2914. He also admitted that, other than his general conclusion that there was a groundwater plume underneath Shell's pipelines, there was no hard data to indicate soil levels high enough to require remediation of the soil. RT 2890-91. Instead, even though he did not know the location of the soil contamination, he asserted, "I just know it's there somewhere. We are going to spend more money to go out there and find it." RT 2766-67.

The paucity of data did not stop Dagdigian from speculating about the costs of remediating the plume he couldn't yet define. His figure of $3.9 million was based on his proposal for a massive 50 by 150 foot excavation of soil around Shell's pipelines, combined with an equally excessive soil vapor extraction system. RT 2787; Exh. 1521. Of that sum, he allocated $1,322,559.00 for remediation of the *soil* in the area of the A Plume, *see id.*, even though Watson had failed to collect any soil data whatsoever in that location.[8] Finally, Dagdigian admitted that if the $1.3 million soil remediation of the A Plume was not supported by the data, that figure should be removed from his remediation estimate for the A Plume.[9] RT 2891.

2. Watson Unveils its Benefit Damages Theory

The big ticket, however, remained the benefit damages under § 3334. Watson had some trouble deciding how to calculate these damages. Although Shell made numerous requests throughout the litigation asking Watson to articulate its damages, Watson steadfastly refused to quantify the monetary relief it sought, claiming that damages were properly the subject of expert testimony.

On the eve of trial, Dagdigian outlined Watson's damage theory for the first time. According to him, Watson was entitled to recover from Shell the value of the "benefit that Shell has received as a result of not remediating the subsurface of the WICS," which he estimated at more than $75 million since 1991. CT 1785-86.

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[8] Dagdigian admitted he had no data indicating where the soil remediation should be placed, how extensive it should be, or even that there was any need for such remediation at all. RT 2759-60.

[9] Shell's expert on remediation issues, Adam Leiter, testified that the data for the site provided no support for any link between the Shell pipelines near the A Plume and the groundwater contamination in that area. Leiter reviewed all of the soil data gathered by Watson's consultants throughout Watson's multi-year investigation, and testified there was no justification whatsoever for any soil excavation or soil vapor treatment in the area of the A Plume, let alone any data sufficient to justify soil remediation of the scope proposed by Dagdigian. RT 4214-15, 4238-39.

1799. At trial, after the trial court ruled that Watson could reach back only to 1993,[10] Dagdigian reduced his estimate to $54.8 million, still more than four times the overall cost to clean the site. He also casually admitted that, if he changed a couple of assumptions regarding his proposed baseline remediation costs, the damages number would at least double, to as high as $108 million. RT 2953-54. Although Watson refrained from actually asking for this amount in benefit damages, it did not hesitate to dangle such astronomical sums before the jury. Over Shell's objection, Dagdigian was allowed to interlineate the figure of $108 million on its demonstrative damages chart, which the court then allowed to be admitted as Exhibit 1523 and placed in the jury room for deliberations. *See* RT 3005-06.

Watson based its calculation of the purported "benefit" received by Shell on a contrived estimate of Shell's "cost of capital" in June 1993. The measure presented by Watson had nothing to do with the actual cost of funds that Shell could have borrowed in order to pay for remediation of the site in 1993, a figure that Watson's financial expert conceded would have been approximately 6%. RT 2332. Instead, Watson relied on a financial model that yields a theoretical figure known as the "weighted average cost of capital" or "WACC."

Although the person in charge of calculating Shell's WACC for Shell's own internal use testified that Shell's WACC hovers perennially around 10.5%, RT 3676 *et seq.*, Watson's financial expert calculated an adjusted "pre-tax" WACC for Shell of 20%, a figure he used to compound a dollar Shell would have spent on remediation in 1993 had it known about the leak, to yield the sum of $4.27 for the value of that same dollar to Shell in 2001. RT 2169-70. Using that

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[10] The 1991 and 1993 dates are both legal fictions. Section 3334 allows a plaintiff to calculate the benefit beginning five years before the filing of the complaint, but the trial court ruled that the statute of limitations permitted Watson to reach back only three years to 1993. CT 4565. Watson contended the actual date of contamination was some 20-40 years earlier. *See* RT 1583.

value to multiply his estimate of 1993 remediation costs, Dagdigian estimated that the overall benefit to Shell resulting from Shell's failure in 1993 to remediate the A Plume contamination was $14,275,237. *See* RT 2830.

I. The Verdict in this Action

At the close of Watson's case-in-chief, Shell moved for a nonsuit both on the trespass cause of action and on Watson's request for benefit damages under § 3334. Although the court denied the motion, it struck Watson's demand for punitive damages, holding:

> "I saw [] nothing in the evidence that would indicate willful or cautious [sic--conscious] disregard for the rights or safety of others. Despicable conduct, there's no evidence that any employee knew of this contamination and refused to do anything about it. There's no evidence of any ratification by the Shell Oil Company. And I just don't think there's enough to go to the jury on that."

RT 3040-41.

The jury returned a special verdict on July 23, 2001, finding against Watson on its continuing nuisance claim. However, the jury found against Shell on Watson's continuing trespass claim and awarded damages under § 3334 in the amount of $3,915,851 for remediation costs and $14,275,237 as the value of the benefit received by Shell. Significantly, *these were the exact amounts proposed by Watson for the remediation and benefit damages attributable to the A Plume alone*. *See* Exhs. 1525, 1521, 1523; RT 2830.

It was obvious from the amount of the award that the jury found in favor of Watson solely with respect to the A Plume. Jurors interviewed after the verdict confirmed this fact, submitting signed declarations stating that the jury had found against Watson on the B1 and B2 Plumes, and found against Shell only with respect to the A Plume. The juror declarations also confirmed that the jury awarded Watson exactly the damages that Watson requested for restoration and

"benefit damages" for the A Plume. *See* CT 5926-27. Put simply, Watson got exactly what it asked for on its trespass theory with respect to the A Plume, but got nothing at all with respect to everything else.

Shell's post-trial motions for a limited new trial and judgment notwithstanding the verdict were denied, and the Court awarded Watson $87,183.32 in costs. CT 6848. This appeal followed.

J. Statement of Appealability

This is an appeal from a final judgment entered following a jury verdict.

ARGUMENT

I. THE JURY'S VERDICT WAS IMPROPERLY BASED ON THE TRIAL COURT'S ERRONEOUS ADMISSION OF EXPERT TESTIMONY THAT SHELL PIPELINES WERE THE SOURCE OF THE CONTAMINATION FOUND ON THE WICS

A chain is only as strong as its weakest link. Here, the weakest link in the chain of proof offered by Watson is causation—whether Shell actually *caused* the contamination for which it was found liable. Even the most cursory examination reveals there was no *admissible* evidence that a Shell pipeline—rather than some other source—contaminated the WICS.

Watson's attempt to link Shell to the contamination consisted exclusively of its experts' testimony that there were chemical components in the contamination itself that unmistakably emanated from Shell and that the contamination was located underneath the pipelines. But that opinion testimony was admitted improperly because Watson failed to proffer the requisite evidentiary foundation for the admission of essential laboratory reports, and the failure to do so rendered the experts' testimony both inadmissible and unreliable. Without that evidence, Watson has failed to offer either expert or percipient witness testimony sufficient to support a finding that Shell caused either the A or B2 Plume. Therefore, because the evidentiary chain is missing a link, the judgment must fall.

A. Watson's Evidence of Causation Depended Exclusively on Inadmissible Laboratory Reports

The cornerstone of Watson's attempt to link Shell to the contamination found on the site was Dagdigian's testimony that Shell *must* have been the source because DIPE, a chemical compound he claimed was found exclusively in Shell gasoline, was detected intermittently under the WICS and the adjacent ARCO

refinery.[11] *See* RT 1445-1446. But, astonishingly, Watson failed to designate an expert to testify to the foundational fact that DIPE had been found on the WICS. Instead, to establish this predicate fact, Watson subpoenaed the laboratory records of the F&B Lab reporting the test results on samples from the WICS, which were (absent an applicable exception) unquestionably inadmissible. *See* Evid. Code § 1200; *see also Daniels v. Dep't of Motor Vehicles*, 33 Cal.3d 532, 537 (1983) (out of court report offered for truth of matter asserted is hearsay).

In response to Shell's objection, Watson argued that the F&B Lab reports were admissible in their own right as business records and that Dagdigian could not only rely on them in forming his opinion but could also testify to their contents. The trial court agreed and held that the reports qualified as business records. *See* RT A-103-04; RT 601-02. Although Watson never moved for the admission of the F&B Lab reports or the Declaration of James E. Bruya that accompanied the records, Dagdigian was permitted to opine that DIPE (and certain lead alkyls and scavengers used by Shell to make leaded gasoline) had been found on the site, notwithstanding his lack of personal knowledge of those facts and his inability to offer an expert opinion on the presence of DIPE or any other compound. *See* RT 1444. Having used the unadmitted hearsay reports to provide the predicate fact necessary to sustain his testimony, he then testified to his theory that the presence of DIPE conclusively established Shell as the source of the contamination. *See* RT 1444-46.

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[11] Actually, Dagdigian testified that both Shell and Exxon gasoline products contain DIPE, but because Exxon has no historical activity in the area, the DIPE must belong to Shell. Dagdigian's belief regarding the exclusivity of DIPE to Shell, however, was directly contradicted by the testimony of Ileana Rhodes. She testified that DIPE is present in gasoline from many major oil companies. *See* RT 3916, 4019, 4022-23. Rhodes' testimony was directly corroborated by other evidence in this case; DIPE was also found on the adjoining ARCO property. *See* RT 4024; Exh. 557.

B. The Trial Court Erred in Ruling that the Laboratory Records Constituted Admissible Business Records

1. The Laboratory Results Lacked an Adequate Foundation for Admission Under the Business Records Exception

The trial court's ruling that the F&B Lab reports (as well as the other laboratory reports relied upon by Watson) constituted admissible business records was plain error. Under Evidence Code § 1271, otherwise inadmissible hearsay contained in a business record may be admitted 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." *See Taggart v. Super Seer Corp.*, 33 Cal.App.4th 1697, 1706 (1995). *See also* Cal. Evid. Code § 1561(a). Although trial courts are vested with discretion to determine when a business record presents sufficient indicia of trustworthiness to warrant admission, *People v. Jones*, 17 Cal.4th 307, 308 (1998), that discretion is far from absolute, *see Rodwin Metals, Inc. v. Western Non-Ferrous Metals, Inc.*, 10 Cal.App.3d 219, 225 (1970). California courts have held uniformly that where the offering party lays no foundation whatsoever, no discretion exists to admit the evidence. In *Rodwin Metals*, the appellate court reversed the trial court's decision that hearsay could be admitted under the business records exception and explicitly stated that while "the trial court has some discretion in determining just how much proof concerning the 'mode of preparation' of a chemical analysis is required. . . . [i]n the present case, . . . that was none at all." *Id.*

Similarly, in *Miles Laboratories, Inc. v. Superior Court*, 133 Cal.App.3d 587, 594 (1982), the appellate court labeled a scientific report "patently inadmissible" where there "was absolutely no foundation laid for the admissibility of the hearsay report." *Id.* The court's critique of the foundation for the report

centered on the absence of "evidence concerning the identity or qualification of the members of the group that completed the report [or] any evidence concerning the reliability of the sources of information, or of the methods by which the data was collected, recorded and analyzed." *Id.* *See also Pruett v. Burr*, 118 Cal.App.2d 188, 202 (1953) (reversing judgment where trial court improperly admitted agricultural chemical test results under business records exception); *McGowan v. City of Los Angeles*, 100 Cal.App.2d 386, 392 (1950) (upholding trial court's refusal to admit business records where "[n]o excuse, explanation or justification was given for failure to lay the necessary foundation").

Here, the record is entirely devoid of evidence regarding either the mode of preparation of the reports regarding DIPE or the sources of information used to create the reports. The trial court had only Watson's counsel's self-serving assurances that the reports were reliable, *see* RT A-78-79, A-80-81, and the Declaration of James E. Bruya, the director of the F&B Lab, which not only was drafted by Watson's counsel but also was never admitted into evidence. *See* Exh. 1472. The Bruya Declaration contains nothing more than conclusory generalities: There was a chain of custody for the samples; the lab followed EPA procedures with specific protocols; it properly used a gas chromatograph and a mass spectrometer; and it sent out the results without the underlying data. *See id.*

The absence of any verifiable indicia of reliability is fatal to the admission of complex laboratory reports under the business records exception. Normally, where the proponent of evidence invokes the business records exception, the opponent can "test the applicability of the exception by cross-examining the custodian of the records." *Taggart*, 33 Cal.App.4th at 1708. But without a specific discussion of exactly how the samples were handled and maintained, what tests were performed, by whom, how they were trained, how the tests were performed, and how the resulting data was analyzed, Shell had no opportunity to meaningfully