IV. CALIFORNIA CIVIL CODE SECTION 3334 DOES NOT SUPPORT THE AWARD OF BENEFIT DAMAGES IN THIS CASE

As amended in 1992, Civil Code section 3334 provides that the measure of damages for a trespass is the reasonable cost of remediation and the value of the use of the property, measured as 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." (Civ. Code, § 3334, subds. (a), (b)(1).) Based on the trial court's misapplication of this provision—which was clearly intended to deter those who intentionally dump hazardous wastes to avoid proper disposal costs—Watson was permitted to reap an additional award of almost $14.3 million that bears no relationship to any damages suffered by Watson, the value of the property, or Shell's culpability.

A. Retroactive Application of the 1992 Amendment to Section 3334 Is Improper

Watson does not dispute that neither the text nor the legislative history of the 1992 amendment to Section 3334 evidences any intent that the amendments be applied retroactively.[14] (See RB:51-52.) Nor does Watson dispute that a law that affects rights or obligations that were performed or existed prior to its passage is impermissibly retroactive. (See *Aetna Cas. & Surety Co. v. Industrial Accident Com.* (1947) 30 Cal.2d 388, 391.)

Instead, Watson argues, in essence, that rules governing retroactivity have no application in continuing nuisance and continuing trespass cases because, under *Mangini v. Aerojet* and its progeny, "Shell committed a new tort each day that it failed to clean up the contamination." (RB:51 [citing *Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 676; *Mangini v. Aerojet-General Corp.* (1991)

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[14] That the amendments were intended to have prospective effect only is evidenced by the use of the present tense: "the value of the use of the property shall be . . . ." (Civ. Code, § 3334.) "The language 'shall be' has been construed to give an act a prospective effect only." (*Helm v. Bollman*, (1959) 176 Cal.App.2d 838, 843 [citation omitted].)

230 Cal.App3d 1125, 1143].) The *Mangini* line of cases, however, does not touch on the issue of retroactivity. Thus, it offers no support for the proposition that continuing trespass cases constitute an exception to the rule that a statute is impermissibly retroactive if it substantially changes "the legal effect of past events" (*Aetna*, 30 Cal.2d at p. 394), or "impos[es] new or different liabilities based upon such conduct" (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 291; *accord Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1225-1226.) A statute that changes the measure or method of computing compensation for an injury is impermissibly retrospective when it is applied to an injury sustained before the date of the statute. (*Aetna*, 30 Cal.2d at pp. 392-393; see *Helm v. Bollman* (1959) 176 Cal.App.2d 838, 843 [where amended statute provides for double damages for trespass where former statute allowed only actual detriment, statute was improperly retroactive].)

In this case, it is the risk of new and substantially different penalties that makes the amendments to Section 3334 impermissibly retroactive as applied by Watson and as allowed by the trial judge. Applying the 1992 amendment to allow "benefit damages" based on an alleged leak that Watson claims occurred anywhere from twenty to thirty years prior to the amendment (RT:5891) would dramatically and impermissibly change the legal effect of the trespass, exposing Shell to damages that were inconceivable at the time of the alleged negligence.

The continuing trespass doctrine does not change this result. Even if it allows a plaintiff to bring successive actions for relief so long as a trespass remains unabated, it does not, and cannot, be used to change the legal effect of conduct that was complete before the statute was enacted. (See *Aetna*, 30 Cal.2d at pp. 394-395.)

In conclusory fashion, Watson contends that *Aetna* is "clearly distinguishable" because it involved a single injury that occurred before the law changed. (RB:51.) As Shell has explained (AOB:34-35), however, that is precisely the issue in this case. Although there is no admissible evidence that any

of Shell's pipelines ever leaked, according to Watson's own experts any such leak must have occurred at least nineteen years before the legislature amended Section 3334 in 1992, as Watson contended the leak was of old leaded gasoline from pipelines that had been taken out of service in 1973—and thus the leak had to have been terminated before that time. (RT:1583, 5891.) As in *Aetna*, it was that alleged leak that constituted the predicate event upon which Watson's right to recovery is based and it is that date that determines the law to be applied. (See *Aetna*, 30 Cal.2d at pp. 392-393 [holding that industrial injury was "the basis of the right to be compensated" rather than the later discovery of the resulting disability].) Because the alleged leak occurred twenty years or more before the 1992 amendment was passed, that amendment cannot be applied retroactively to change the legal effect of that alleged leak.

Watson also argues that the 1992 amendment was not intended to change the law, but simply to clarify the definition of "value of the use." (RB:51-52 (citing *Western Sec. Bank, N.A. v. Superior Court* (1997) 15 Cal.4th 232, 243).)[15] This argument is particularly astounding given the wholesale change in the measure of damages Watson contends was authorized by the 1992 amendment. Watson contends that the 1992 amendment authorizes an award of damages that far exceeds the value of the property, the injury to Watson, the culpability of Shell,

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[15] Watson's reliance on *Western Security Bank, N.A. v. Superior Court* (1997) 15 Cal.4th 232, 243 is misplaced. In *Western Security*, the issue was whether legislation stating that a letter of credit was not a form of suretyship obligation for purposes of anti-deficiency laws, was a change in the law or a clarification of the existing law. In finding that it was a clarification, the Supreme Court looked to the bill itself, which specifically stated that it was the intent of the legislature to abrogate a lower court's ruling on the issue and confirm the expectations of the parties. (*Id.* at p. 245.) The Court noted that the legislature had acted promptly to "protect those parties' [who had entered prior transactions] expectations and restore certainty and stability to those transactions." Thus, the *legislative intent that the provisions apply to all existing loan transactions was evident.* (*Id.* at p. 246.) In this case, there is no evidence that the legislature was responding to a perceived problem with the judicial construction of a statute. Nor did the legislature indicate its intent that the amendments be applied retroactively. The reasoning of *Western Security* is simply inapplicable here.

or any bounds of reasonableness. To now argue that these changes do not work a substantial change in the law and constitute a mere "clarification" of the existing law strains credulity.

Watson cannot have it both ways. If the 1992 amendment is a "mere clarification" of the existing law, it cannot authorize the kind of patently excessive "benefit damages" proposed by Watson. If that amendment was, however, intended to operate as Watson argues, then to apply it to this case would be impermissibly retroactive.

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

In discussing the legislative history of the 1992 amendment to Section 3334, it is worth keeping in mind the central tenet of statutory construction:

> "It is a well-settled maxim of statutory construction that 'a statute is to be construed in such a way as to render it reasonable, fair and harmonious with (its) *manifest* (legislative) purposes. . . ." (citations), and the literal meaning of its words must give way to avoid harsh results and mischievous or absurd consequences.'"

(*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 357 (quoting *County of San Diego v. Muniz* (1978) 22 Cal.3d 29, 36 (alterations in original) (inner quotations omitted) (emphasis added).)

No appellate court has yet construed Civil Code section 3334 as amended. The legislative history, however, makes clear that the legislature's manifest purpose in amending Civil Code section 3334 was to remove the economic incentive that was driving so-called "midnight dumpers," who reaped substantial profits by consciously deciding to dispose of or dump hazardous wastes improperly. (See, e.g., CT:2059 [under amendments to Section 3334, "[t]he measure of damages would take into account the benefits obtained by the trespass—the cost saved by not properly disposing of the pollutants."].)

Nothing in the legislative history indicates that the legislature intended this new remedy permitting disgorgement of a midnight dumper's avoided disposal costs to apply outside of cases of wrongful and conscious decisions to trespass, and Watson offers no evidence that it did. Indeed, the passages cited by Watson confirm, rather than contradict, this manifest legislative purpose. (See, e.g., RB:46 [Watson citing sponsor of the amendment explaining that amendment is aimed at revenues to trespasser "from using the law *to dispose of toxic wastes*." (emphasis added)]; RB:47 [Watson citing references to trespasser "dumping toxic wastes" and the "economic incentive to continue dumping"].) Each of Watson's references to the statements of the bill's authors and sponsors discusses a conscious decision to dispose of wastes improperly on another's property.

Watson nonetheless contends that the amendments should be read expansively to include any benefit, of any kind, obtained through even the most inadvertent trespass. (See RB:44-45.) Straining to support this interpretation, Watson seizes on just two words in the legislative history: "The bill is intended to address the concerns, *among others*, of landowners who have found intentional dumping of hazardous wastes onto their desert land." (RB:45, quoting CT:2048.) Although this passage corresponds exactly with both the plain meaning of the statute and the interpretation Shell attributes to the 1992 amendment, Watson argues that the words "among others" give the statute broad applicability in any case, regardless of the nature of the trespasser's conduct or intent. (RB:45.) The fact remains, however, that "midnight dumping" is *the only* example given and a limitation to intentionally illegal dumping is completely consistent with every other statement in the legislative history. (See CT:2048.)

Watson's effort to argue that the phrase "among others" expands the scope of the statute to situations not contemplated anywhere in the legislative history, or in the class of conduct specifically discussed in that history, is contrary to accepted rules of statutory construction. (See *California Coastal Com. v. Quanta Inv. Corp.* (1980) 113 Cal.App.3d 579, 606 [noting that "where words of more general

import are used in connection with words enumerating a more specific class of activities, the general words should be construed as referring only to activities of the same type as those enumerated."] (citations omitted).) In light of this well-settled rule and the rest of the legislative history, the phrase "among others" merely means that the legislature did not want to limit the example to intentionally illegal dumping of hazardous wastes onto desert land, but to note that the amendment would also apply to intentionally wrongful trespasses against other types of landowners, such as owners of a coastal marsh, mountain meadow, or vacant urban lot, or to those who might be victimized by other similar conduct, such as the dumping of tires or construction debris instead of hazardous waste. Watson's argument that the words "among others" somehow broadly override the plain meaning of the rest of the legislative history of the 1992 amendment is baseless.

Ironically, Watson accuses Shell of relying on legislative "silence" to construe the statute (RB:45), even though it is Shell's construction that is overwhelmingly supported by the legislative history and Watson's view that finds no such support. The legislative history consistently articulates the concern that was driving the legislature in passing the 1992 amendment: the financial benefit that accrues to those who consciously choose to wrongfully dump hazardous waste on property to avoid incurring proper disposal costs. Nothing in the legislative history, and nothing in the history cited by Watson, supports the application of the 1992 amendment to an accidental, inadvertent and undiscovered spill of product that provided absolutely no benefit to the alleged trespasser.

C. Even if Watson Had Proven a Pipeline Leak through Admissible Evidence, There Is No Evidence that Shell's Conduct Was Anything Other than Inadvertent

Watson contends that Shell cannot avoid liability for "benefit damages" because there is no evidence that Shell's conduct was "accidental" or merely

"negligent." (RB:42.) However, as the trial court specifically held in granting Shell's non-suit on Watson's punitive damages claim:

> "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:3040-3041 (emphasis added).)

Watson dismisses the suggestion that the trial court's ruling establishes that the trespass was unintentional because of the higher burden of proof required for punitive damages. (RB:43, fn. 21.) The trial court's ruling, however, is quite clear: the court found "nothing in the evidence" to indicate willful or conscious conduct, concluded that there was "no evidence that any employee knew of this contamination and refused to do anything about it," and imposed no limitation as to the burden of proof on these findings. (RT:3040-3041.) Nor is there any admissible evidence in the record that Shell knew of the alleged leak, made any decision to wrongfully avoid disposal costs or remediate the contamination, or intended to trespass upon Watson's property in any way. Watson's effort to avoid the clear import of the trial judge's ruling is unavailing.

Watson makes a similarly baseless argument that the jury's rejection of the mistake of fact defense demonstrates Shell intentionally trespassed on Watson's property. As an initial matter, Watson's speculation as to the jury's subjective reasoning in rejecting the narrow mistake-of-fact safe harbor is not supported by any evidence whatsoever. Nor would juror declarations or further evidentiary inquiry in this regard be proper under Evidence Code section 1150.[16] Moreover,

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[16] The juror declarations submitted by Shell and discussed in Section III B, *supra*, merely confirmed the objective fact that the jury found in favor of Shell on the B-2 Plume—an overt act that was not only objectively ascertainable, but was also apparent from the face of the verdict itself. This is in contrast to Watson's unsupported speculation as to the reason *why* the jury wrote "No" on the verdict

the trial court expressly rejected Shell's special verdict form that would have asked the jury to specifically determine whether the unauthorized entry onto Watson's property was intentional or the result of recklessness or negligence. (CT:5519; RT:5452-5453.)

More importantly, other than the unsupported speculation of its pipeline expert, Watson offered absolutely no admissible, competent evidence to support the conclusion that Shell knew that the pipelines were leaking or failed to clean up the property in order to wrongfully avoid remediation costs. The trial court recognized this fact in its ruling granting Shell's nonsuit motion on Watson's punitive damages claim. Even if the jury's finding on mistake of fact were stretched to mean what Watson says it does, it still could not stand without any evidence supporting it, especially in light of Watson's prejudicial and inadmissible expert testimony and improper comments by Watson's experts and counsel at trial. Indeed, since the entire verdict must be reversed as a result of the trial court's highly prejudicial errors discussed above in Sections II and III, the jury's finding on the mistake-of-fact defense carries no weight.

The evidence of Shell's conduct here is in sharp contrast to the case of a midnight dumper who, by illegally disposing of hazardous waste on another's property, clearly obtains a benefit "by reason of" the trespass. In such cases, the dumper makes a conscious decision to avoid proper disposal costs and clearly enjoys a monetary benefit as a result. This view is consistent with the legislative history of the 1992 Amendment and gives effect to the actual language of the statute. (See also *Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1777 [allowing plaintiff to recover benefit obtained by defendant, measured by the amount the defendant would have paid to properly dispose of wastewater that the

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form in response to the question regarding the mistake-of-fact defense. Such speculation as to the jury's subjective reasoning would be improper even if Watson had provided any evidentiary support for its speculation in this regard. (See *Tramell, supra*, 163 Cal.App.3d at pp. 172-173.)

defendant intentionally injected into plaintiff's property without plaintiff's consent].)

Nor are there any public policy reasons to conclude that Shell received a benefit when it failed to discover the purported leak here. Whereas cases of a conscious, intentional decision to trespass will often involve "benefits obtained" by the defendant because intentional acts are presumably undertaken as a result of some cost-benefit analysis, cases of unknowing, accidental trespasses are likely *not* to result in any benefit to the defendant—because such inadvertent, undiscovered leaks are not, by definition, consciously undertaken in pursuit of perceived benefits. Thus, the language of Section 3334, as well as the legislative history, supports the conclusion that the "benefit damages" award against Shell in this case was improper.

V. THE COURT ERRED BY ALLOWING WATSON'S EXPERT TO APPLY A MEASURE OF DAMAGES THAT HAS NO SUPPORT UNDER CALIFORNIA LAW AND VASTLY OVERSTATES ANY CLAIMED BENEFIT TO SHELL

The trial court also erred by allowing Watson to use the weighted average cost of capital ("WACC") as a measure of Watson's so-called "benefit damages." (AOB:40-50.) Shell's Opening Brief cited case law expressly rejecting the inherent subjectivity of such a measure and pointed out that it was this very lack of objectivity that made it possible for Watson's expert, Allen Suderman, to artificially inflate Watson's damages before the jury. (AOB:42-44.) The trial court further compounded that error by allowing Suderman to speculate about the possible tax consequences of the award and adjust the claimed amount upward to account for such taxes. (See AOB:44-46.)

In response, Watson cites no published California authority employing the WACC as a measure of damages, concedes that the WACC provides a highly subjective measure of damages, and acknowledges that California law precludes considering the tax consequences of a judgment. (RB:52-60.) Watson

nonetheless contends that use of the WACC as a measure of its damages under Section 3334 was appropriate. Watson is wrong.

A. Watson Effectively Concedes that the WACC Is a Subjective Measurement and that Its Use as a Measure of Damages Is Unprecedented in California Law

No California court has ever endorsed the use of a WACC-based calculation as a measure of tort damages, in part because it results in obvious discrimination between litigants, and in part because it is highly susceptible to manipulation.[17] (See AOB:41-42.) Watson does not dispute either of these assertions. Nor does Watson cite any California case that has endorsed the use of the WACC to calculate damages.

Instead, Watson argues that some courts, in *rejecting* use of the WACC, have noted that it may yield a number that reflects the actual cost of capital for a particular entity over time. Watson suggests that such an observation provides adequate support for its use of the WACC in this case. (RB:56.) But these same courts that have recognized that WACC may accurately measure a company's cost of capital, have gone on to reject the use of WACC as a measure of damages. (See *Standard Mfg. Co. v. United States* (1999) 42 Fed. Cl. 748, 778; *Brunswick Corp. v. United States* (1996) 36 Fed. Cl. 204, 218-219.)

Standard Manufacturing and *Brunswick* were patent infringement cases in which the defendant had consciously and successfully exploited the plaintiffs' patents to their own benefit, obtaining sums that should rightly have gone to the plaintiffs. Even in these cases, however, the courts rejected use of the WACC as too subjective a measure of damages, noting the strong judicial policy in favor of

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[17] Shell objected to Suderman's use of WACC as a measure of damages by two motions in limine. (CT:1782-1787, 3610-3617.) The trial court denied both requests. (CT:2875-2877, 4513-4514.) Shell renewed its objections at trial. (RT:2193.) Shell also sought specific jury instructions regarding the proper measure of damages, which were rejected by the court. (See CT:5770-5774.)

uniformity and the "obvious discrimination" that would result between one litigant and another. (*Standard*, 42 Fed.Cl. at p. 778; *Brunswick*, 36 Fed. Cl. at p. 219.)

Watson concedes that the WACC is a measure of damages that is unique to a particular defendant and that it yields a damage calculation that is highly subjective and can vary widely from defendant to defendant. (RB:53-54.) But Watson argues that this kind of subjective calculation is justified by the "benefits obtained" remedy of Section 3334, because "Section 3334 dictates 'tailor-made' consequences specific to the polluting trespasser to ensure that the conduct will not be economically profitable to that trespasser." (RB:53.) Watson cites no authority for this proposition,[18] nor does Watson explain why no court awarding damages under other statutes providing for disgorgement remedies has ever approved the use of WACC to calculate lost profits or benefit damages.

In fact, the only published California decision that has recognized equitable relief similar to "benefit damages" in a trespass case never mentions WACC and refuses to award prejudgment interest for the time between the defendant's intentional disposal of wastewater on plaintiff's property and the date the plaintiff filed suit. (*Cassinos*, *supra*, 14 Cal.App.4th 1770, 1790.) Although *Cassinos* was decided under the former version of Section 3334, the issue before the court was how to measure the "benefit" a defendant obtained by intentionally injecting excess wastewater into the plaintiff's property without his consent in order to avoid disposal costs. (*Id.* at p. 1777.) The court concluded under equitable principles that the proper measure of the plaintiff's damages was the cost that the defendant would have paid to properly dispose of the wastewater. (*Id.* at pp. 1788-1789.) Notably, the appellate court reversed the trial court's award of even

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[18] Watson also argues that "Shell's Catch-22 assertion that a particular calculation method is unacceptable unless there is a prior reported opinion is flatly wrong." (RB:54, fn. 23.) Shell made no such assertion. What Shell argued, and what Watson cannot dispute, is that "no California court has ever approved use of a WACC-based calculation to measure tort damages." (See AOB:41.)

prejudgment interest at seven percent for the period between the wrongful disposal of wastewater and the date the plaintiff filed suit. (*Id.* at p. 1790.)

Watson dismisses *Cassinos* out of hand, contending that it did not purport to provide a set of guidelines for calculating the value of the benefit, but simply addressed the particular damages calculation in a particular set of circumstances. (RB:54.) Watson even goes so far as to argue that *Cassinos* "supports the use of the WACC because the case makes clear the broad flexibility an injured party is allowed in calculating damages with respect to the wrongful occupation of real property." (RB:54.) In fact, however, *Cassinos* deals specifically with the question of how to measure the "benefit" to a defendant for its conscious decision to wrongfully occupy another's property. (*Id.* at p. 1777.) And it allows only limited prejudgment interest at the legal rate of seven percent, not the outrageous 20-percent interest rate that Watson's improper WACC analysis imposed on Shell.[19] (*Id.* at p. 1790.) Thus the only authority on point is inconsistent with the measure of damages endorsed by Watson and erroneously allowed by the trial court. The general principle of "flexibility" in fashioning remedies does not justify an award of damages that is unrelated to the actual injury to the plaintiff or the culpability of the defendant. Nor does it provide grounds for ignoring the only case authority that discusses this issue.

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[19] In fact, no prejudgment interest would be appropriate here because the damages were unliquidated and were not of a sum certain at the time Watson filed its complaint (See *Cassinos*, 14 Cal.App.4th at p. 1789.) In contrast to the situation in *Cassinos*, where the defendant knew exactly how much wastewater it was consciously and wrongfully injecting into the plaintiff's property and what the costs of proper disposal were (*id.* at pp. 1789-1790), here there was no evidence that Shell was aware of the contamination when Watson filed its Complaint, knew the contamination came from its pipelines (which Shell still denies), or knew what the costs of remediation would be (as Watson did not even gather all of the data that Dagdigian used to draw the A or B-2 Plumes until Dagdigian and Beresky were hired to be expert witnesses a few months before trial). Thus *any* prejudgment interest would be inappropriate here, let alone the 20-percent interest permitted by the trial court.

B. Watson Acknowledges that California Law Precludes Consideration of the Tax Consequences of Economic Damages

The trial court also erred by allowing Suderman to apply a 34% multiplier to his already inflated WACC to yield an impermissible "pre-tax" calculation.[20] (AOB:43; see CT:5168; RT:2192-2193.) Watson acknowledges that, under longstanding California law, the income tax consequences of economic damage awards are irrelevant and cannot be considered in the calculation of the plaintiff's damages. (RB:57-58; see *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 664-668 [income tax consequences of award of lost future income irrelevant in personal injury action]; *DePalma v. Westland Software House* (1990) 225 Cal.App.3d 1534, 1544-1545 [declining to allow jury to consider post-judgment tax consequences of compensatory damage award]; *Danzig v. Jack Grynberg & Assocs.* (1984) 161 Cal.App.3d 1128, 1140 ["tax benefits, if any, enjoyed by plaintiff class members as a result of their partnership investments are irrelevant to the restitution award of damages"].)

Watson also admits that its expert adjusted the WACC (which necessarily yields an after-tax number (RT:2181-2183)) to a pre-tax number. (RB:58.) Inexplicably, however, Watson denies that Suderman made the after-tax to pre-tax adjustment because of the tax consequences of any payment from Shell to Watson. (RB:58.) Watson needs to reread the record.

In fact, Suderman *expressly acknowledged* that he was converting Shell's WACC to a pre-tax calculation—using the maximum corporate tax rate of 34%—precisely *because* such a payment would be deductible:

> "Well, the rationale [for converting to pre-tax dollars] would be the same rationale that you would use in any commercial damage analysis, and that is that if Shell Oil Company must make a payment to Watson Land Company, that payment will

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[20] Shell filed written objections to Suderman's adjustment of the WACC to account for the tax consequences of a judgment, (CT:5160-5163), and reiterated its objections to this testimony at trial (RT:2064-2069, 2193.) The trial court nonetheless permitted the testimony. (RT:2157, 2192-2193, 2284.)

> be deductible by Shell Oil Company, and it will be taxable to Watson Land."

(CT:5168-5169; see RT:2223.)

In other words, Suderman boosted his WACC calculation to account for and offset taxes he believed Shell would save and Watson would later have to pay on a jury award. Under the very law recognized by Watson, Suderman's speculation about the possible tax consequences of an award was improper and prejudicial. (See *Danzig*, 161 Cal.App.3d at p. 1140.) Thus, the trial court erred in allowing Suderman to speculate about the possible tax consequences of any award and to inflate his damage estimate based on that speculation.

C. The Jury's Award of "Benefit Damages" under Section 3334 Was Unreasonable as a Matter of Law

Civil Code section 3359 requires that damages must be reasonable in all cases. By using the grossly inflated WACC and then manipulating it for tax purposes to produce an even more bloated measure of damages, Watson received a windfall that violates Section 3359 because it bears no relationship to the actual harm suffered by Watson, the value of the property at issue, or Shell's culpability. Where an award of damages is excessive, or so grossly disproportionate as to raise a presumption that the jury based its results on passion or prejudice, it cannot be allowed to stand. (*Las Palmas Assocs. v. Las Palmas Ctr.* (1991) 235 Cal.App.3d 1220, 1252.) This limitation also applies to statutory damages. (*Guerin v. Kirst* (1949) 33 Cal.2d 402, 415.)

In fact, Watson fanned the flames in its closing argument, making an improper appeal to the jury to use Section 3334 benefit damages for purposes of punishing and deterring Shell and other alleged polluters:

> "Money is a tremendous driving, powerful force. And there's reason to say you should comply with law. And when you're talking environmental cleanup, you're talking huge dollars. And if one dollar is a motivator, tens of millions of dollars are stronger motivators."

(RT:5546.)

Such an argument is especially inappropriate where the trial court previously granted a nonsuit on Watson's claim for punitive damages. (RT:3040-3041.) Shell specifically objected to such comments after the closing argument and moved for a mistrial, which was denied. (RT:5626-5627.) These types of comments further illustrate why the award of $14.3 million in benefit damages is unreasonable and should be vacated.

Watson contends that "[o]nce a party establishes that it is entitled to damages, damages may be calculated using any *reasonable* basis, even if the result reached is an approximation." (RB:52 (emphasis added).) The critical element of any damages calculation, however, is that such calculations must be "reasonable" in amount. (Civ. Code, § 3359.) An award that bears no relationship to the injury actually suffered by the plaintiff, the value of the property itself, or the defendant's culpability is, under California law, not reasonable. Accordingly, the award in this case is excessive and precluded by Civil Code section 3359.

Watson pays lip service to Section 3359, but suggests that imposing such a reasonableness requirement in this case would "gut the legislature's express decision to eliminate any economic incentive to trespass."[21] (RB:58.) Watson argues that the "reasonableness" limitation proposed by Shell would "effectively eliminate the key purpose of the disgorgement remedy," and "contradicts a fundamental rule of statutory construction that related statutory provisions must be read together and that effect must be given to every section." (RB:58.) However, Watson ignores the fact that the amended text of Section 3334 itself reinforces and repeats that a proper award includes only the "*reasonable* cost of repair or restoration" and the "*reasonable* rental value of [the] property or the benefits obtained." (Civ. Code, §§ 3334, subds. (a) & (b)(1) (emphasis added).)

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[21] Of course, as discussed above, there can be no "economic incentive" to avoid unintentional conduct or undiscovered contamination, and Watson's argument only reinforces the fact that Section 3334 can only be applied to knowing and intentionally wrongful trespasses.

In addition, the "reasonableness" of any damages award is a touchstone of California jurisprudence that is clearly codified in Section 3359. Thus, all provisions of the Code, including Civil Code sections 3334 and 3359, "must be read and construed together and [] effect must be given to every section." (*Guerin, supra,* 33 Cal.2d at p. 415 [rejecting claim for damages of $9,900 where value of property detained was only $6,000]; see *Kinney, supra,* 27 Cal.3d at p. 357 [holding statute must be construed to be consistent with its legislative history and the meaning of its words, and to avoid harsh or absurd consequences]; *Guerin,* 33 Cal.2d at p. 415.) ["The mere recital of plaintiffs' exorbitant demand demonstrates their position to be one wholly irreconcilable with the question of 'reasonableness' as an essential condition which enters into 'all cases' of damage recovery . . ."].)

Watson actually acknowledges these principles, citing *Tower Acton Holdings v. Los Angeles County Waterworks Dist. No. 37* (2002) 105 Cal.App.4th 590, for the proposition that "[C]ourts do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (RB:58.) Having stated the law, however, Watson fails to apply it: Sections 3334 and 3359 cannot be reasonably harmonized in this case if Section 3334 is given the statutory construction proposed by Watson.

Watson dismisses the cases cited by Shell that imposed a relationship between the value of the property and the value of the loss of use, arguing that they "involve claim and delivery actions for personal chattel, have nothing to do with Section 3334 and were decided prior to the 1992 amendment to Section 3334." (RB:59.)

But what the cases establish, and what Watson ignores, is that the requirement of reasonableness in Section 3359 is consistently recognized as a limit on *all* damage awards. In *Mutch v. Long Beach Improvement Co.* (1920) 47 Cal.App. 267, the Court of Appeal reviewed a case in which the damages to

plaintiff for the loss of her car were determined by the "value of the use" of the car during that period. In reversing an award of three times the total value of the car, the court relied on Civil Code section 3359, holding:

> "It must be apparent at once that there is something wrong with a scale of damages that allows three times as much for the detention of an article from the possession of the owner for a period of two years as could have been recovered if the trespasser had completely smashed it up and destroyed it in the first instance . . . . [I]t would be against conscience to permit a recovery so out of proportion to the value of the thing involved as appears here . . . . In determining the value of the use under the above rule, care should be taken not to permit the fixing of an amount out of all proportion to the value of the thing itself; otherwise the result is not compensation for use but punishment for a wrong in a case where exemplary damages as such would not be allowed."

(*Mutch*, 47 Cal.App. at pp. 268-269.)

Here, the contamination in the area of the A Plume has had no effect on Watson's business (RT:830 [no impact on fair market rental values], RT:846 [no lost tenants]); will cause Watson no damages—as ARCO is required to pay for any remediation that may take place (CT:3198-3199, 3392); has not caused Watson to pay a nickel in indemnities (RT:827); and resulted in no cognizable benefit to Shell. Yet, Watson sought and received an award of $14.3 million based on Watson's fictional "benefit" analysis—a figure that amounts to more than four times the value of the land above the A Plume[22]—*even though the use and value of that land has not been affected in any way.*

In *Avery v. Fredericksen and Westbrook* (1944) 67 Cal.App.2d 334, 336, the court held that an award above the total value of the land was excessive and unreasonable, because "one who has been injured by the breach of a contract or the commission of a tort is entitled to a just and adequate compensation for such

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[22] See AOB:49, fn.20, demonstrating the value of the land above the A Plume is approximately $3 million.

injury, *and no more*." (*Id.* (emphasis in original).) "[I]n no case should he be placed in a better position than he would be in had the wrong not been done or the contract not been broken." (*Id.*) After considering other cases, *Avery* noted that "if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value then the value of the property is the proper measure." (*Id.* at p. 339, citation and internal quotation omitted.)

Here, Watson was awarded far more than just and adequate compensation. The jury's $14.3-million award of "benefit damages" has no connection whatsoever to Watson's damages (which totaled approximately $120,000 in investigation costs as to the A Plume). Moreover, it comes *in addition to* an award of $3.9 million, which Watson claimed would be the costs to fully remediate the A Plume. If the judgment is not reversed in its entirety for the reasons discussed, the jury's verdict must be remitted to avoid an excessive and unauthorized penalty. (See *Safeco Ins. Co. v. J & D Painting* (1993) 17 Cal.App.4th 1199, 1202.)

None of the cases cited by Watson are to the contrary. Rather, they stand for the unremarkable proposition that damages may be awarded even where their amount is difficult to quantify, and that the proper measure of damages must be determined on the basis of particular facts. (See, e.g., *GHK Assocs. v. Mayer* (1990) 224 Cal.App.3d 856, 873-874 [allowing share of net profits from condominium sales where wrongful conduct of defendants caused difficulty in calculation]; *Clemente v. State of California* (1985) 40 Cal.3d 202, 219-220 [allowing pedestrian to recover from negligent highway patrolman without showing that judgment against motorcyclist that caused injury would be collectible]; *Fishbaugh v. Fishbaugh* (1940) 15 Cal.2d 445 [holding difficulty of valuing plaintiff's interest in community property did not preclude award of damages]; *Monroe v. Owens* (1946) 76 Cal.App.2d 23, 30-31 [allowing damages for depreciation of value of cattle even though actual amount is difficult to

calculate].) None of these cases stands for the proposition that a party may collect an award that is many times the value of the property at issue, and that has no reasonable connection to the damages suffered by the plaintiff or the culpability of the defendant.

Here, Watson has suffered no loss other than relatively small investigation costs and the cost of a cleanup that may not ever take place. Moreover, the jury awarded Watson an additional $3.9 million for those costs, despite the fact that, in reality, Watson will never pay a penny of those costs due to the ARCO Settlement. The additional $14.3 million in "benefit" damages awarded by the jury is entirely divorced from any injury to Watson. Moreover, the $14.3-million damage award, which includes a WACC of 20 percent that was then adjusted upward by the highest tax bracket, does not approximate the reasonable "benefit" allegedly obtained by Shell arising from the loss of its valuable product. Such damages are unreasonable as a matter of law.

VI. UNDER THE UNIQUE TERMS OF WATSON'S SETTLEMENT AGREEMENT WITH ARCO, ARCO WAS THE REAL PARTY IN INTEREST

A. ARCO Was the Real Party in Interest with Respect to Remediation Damages

Shell's Opening Brief made clear that the terms of the Watson-ARCO settlement agreement gave ARCO sole liability for any and all remediation that might be ordered on the Watson Center property. (AOB:51; CT:3198-3199, 3392). Accordingly, ARCO was the real party in interest under Code of Civil Procedure section 367 with respect to the remediation damages Watson sought in this case, and Watson no longer has any stake in the outcome of that aspect of the case.

Watson concedes that, "[w]hile the owner of the property is typically the real party in interest for an action for injury to real property, 'the essential element of the cause of action is injury to one's interests in the property—ownership of the property is not.'" (RB:64, quoting *Vaughn v. Dame Constr. Co.* (1990) 223

Cal.App.3d 144, 148.) Without explanation or citation to authority, Watson goes on to assert that, because Watson was the real party in interest when the claims arose and failed to assign the claims, it remained the real party in interest at the time of trial. (RB:64.)

Shell agrees that Watson was the real party in interest when the claims arose. However, when Watson and ARCO contractually agreed that ARCO would assume sole responsibility for all remediation costs, ARCO became the real party in interest with respect to those damages, and Watson held no remaining interest in the outcome of the litigation with respect to remediation. (See *Vaughn*, 223 Cal.App.3d at 148 [holding the party whose interest is injured owns the cause of action].) As such, ARCO was the real party in interest with respect to the remediation damage.

Watson tries to argue that it is still the real party in interest by citing to cases holding only that a party may remain the real party in interest after it has received a payoff from a collateral source, such as an insurance company. (RB:66 [citing *Greene v. M & S Lumber Co.* (1951) 108 Cal.App.2d 6; RB:66; *Lebet v. Cappobiachno* (1946) 38 Cal.App.2d Supp. 771, 772; *Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347].) These cases, however, are inapposite because Shell and ARCO can be characterized as joint or co-tortfeasors, and the collateral source rule does not apply between joint tortfeasors. (*Pacific Gas & Elec. Co. v. Superior Court* (1994) 28 Cal.App.4th 174, 180.)

Watson tries to avoid this limitation by stating, in conclusory fashion, that defendants' "contamination could be differentiated," that "each defendant's liability was several, not joint," (RB:5), and that ARCO is an "independent source" for purposes of the collateral source rule (RB:66). There is no citation to the record for any of these assertions. Watson cannot simply declare by fiat that ARCO and Shell were not joint tortfeasors. Under California law, the term "joint tortfeasors" is a broad one that includes joint, concurrent and successive tortfeasors, regardless of whether defendants were "joined" as tortfeasors by the

plaintiff. (*GEM Developers v. Hallcraft Homes of San Diego* (1989) 213 Cal.App.3d 419, 431.)

The record is replete with evidence that (until the settlement) neither Watson nor ARCO ever contended that the contamination on the Watson property was differentiated by defendants. Watson joined both ARCO and Shell as defendants. (CT:67.) ARCO cross-complained, alleging that contamination in the groundwater had commingled to create a single indivisible harm. (CT:3470.) In late 2000, just six months before trial, Watson stated under oath that it believed contamination from ARCO had migrated to the far side of the B-2 Plume. (See RT:3844; see also RT:3837 [Watson discovery response stating that Watson believed the B-2 Plume was caused by releases from Shell and ARCO].)

Moreover, even ARCO's Motion for Good Faith Settlement repeatedly asserted that ARCO and Shell jointly contributed to the contamination at issue. (See CT:1394-1430.) With respect to contamination adjacent to the ARCO refinery along Wilmington Avenue, the Motion states, "Watson contends that most of this contamination emanates from the ARCO refinery, and a small portion of it emanates from Shell pipelines that transported refined products in this area." (CT:1402.) With respect to contamination in the Utility Way Corridor, "Watson attributes most of this gasoline contamination to Shell, and a small portion to ARCO's refinery." (CT:1403.) Indeed, in her Declaration supporting the Motion, Watson's counsel explains that ARCO is entitled to different percentage reimbursements for remediation activities in different areas on the Watson property precisely *because* the various defendants were jointly responsible for the contamination. (See CT:1420.) In fact, Watson expressly acknowledges that ARCO and Watson "negotiated *approximate* degrees of responsibility attributed to ARCO for different areas within the Watson Center." (RB:61.) Accordingly, under the law and the evidence, ARCO and Shell were joint tortfeasors and the collateral source rule does not apply.

Watson also contends that its "interest in the claims against Shell is patently obvious from the fact that Watson is entitled to approximately $1.5 Million as the first distribution from any judgment against Shell and from the fact that Watson is entitled to half of any funds left over *after remediation reimbursements* to ARCO." (RB:65 (emphasis added).) The initial $1.5-million distribution to Watson from any judgment, however, is expressly intended to reimburse Watson *for its litigation costs* in pursuing this action against Shell, not as compensation. (CT:6078-6079.) And the fact that Watson stands to recover one-half of any remaining funds *after ARCO has been fully reimbursed for remediation costs*, simply proves that Watson had no interest in the outcome of the litigation with respect to those remediation damages. ARCO, and ARCO alone, was the real party in interest with respect to remediation damages.

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

At minimum, Watson should have been required to join ARCO as an indispensable party at trial. (Code Civ. Proc., § 389.) To do so would have created no prejudice to ARCO or Watson, given that ARCO was subject to the jurisdiction of the court, was involved in the litigation and discovery in the case for years up until the eve of trial, and agreed to pay half of Watson's litigation fees through trial and appeal. (CT:3154-3156, 3158-3160.)

As Shell explained in its Opening Brief (AOB:54-55), the propriety of ARCO's joinder is established by the result in *Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588, in which the Court compelled the joinder of the plaintiff's insurer because the insurer had already reimbursed the plaintiff for the loss. The bank argued that joinder of the insurer was required because the true dispute was between the insurer and the defendant, rather than the defendant and the plaintiff. Finding that the insurer had caused the action to be brought, the court held that it was required to prosecute the action in its own name and to be joined as a party plaintiff. (*Id.* at pp. 593-594.)

Watson contends Shell's reliance on *Bank of the Orient* is misplaced because the plaintiff there had partially assigned its rights to its insurer and later executed a full release in favor of the insurer. Watson contends the court based its ruling solely on the fact that the insurer was a partial assignee. (RB:69.)

In this case, however, Watson has done far more than execute a partial assignment of its claims to ARCO. ARCO has undertaken complete responsibility "at [ARCO's] sole cost and expense" to remediate the Watson Property. (CT:3198-3199.) Watson was left with no role whatsoever in the remediation; in fact, the Settlement Agreement expressly *prohibits* Watson from even communicating directly or indirectly with government agencies about the remediation without ARCO's consent. (CT:3262-3266.) Thus, ARCO has a far greater stake in this dispute than did the partial assignee in *Bank of the Orient*. ARCO is not just a partial assignee; it is the party exclusively responsible for the remediation and the only party with an actual financial stake in the outcome of this issue. And, like the assignee in *Bank of the Orient,* ARCO received a complete release from Watson. (CT:3149-3150.)

Watson relies on *Glendale Federal Bank v. Hadden* (1999) 73 Cal.App.4th 1150, 1154 for the proposition that parties who do not have possessory rights to real property are not indispensable in an action for violation of property rights unless some or all of the claims have been formally assigned to them by the property owner. (RB:68.) *Glendale Federal Bank*, however, is entirely inapposite. The issue in *Glendale Federal Bank* was whether a bank that claimed an interest in a leasehold was an indispensable party *in an unlawful detainer action.* Noting that "possession is the fundamental issue in an unlawful detainer action," and that the bank was not arguing that it had possession or a right to possession, the court held that the bank was not an indispensable party. (*Id.* at p. 1153.) But this is not an unlawful detainer action, possession is not the fundamental issue and *Glendale Federal Bank* has no application.

Nor do the other cases cited by Watson compel a contrary result. Indeed, in at least two of the cases, the identities of the other potential plaintiffs were not even known at that stage of the proceedings. (See *Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 23-24; *Harboring Villas Homeowners v. Superior Court* (1988) 63 Cal.App.4th 426, 430.) And in *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, the court held that the identified potential plaintiffs were not indispensable because, as a matter of law, they had no possible claims against the defendant.

By contrast, ARCO's identity was known, ARCO was a party to the litigation until the eve of trial, its liability for remediation was established in the ARCO Settlement Agreement, and its claims against Shell were real and potentially actionable. Thus, the instant case is directly analogous to *Bank of the Orient*, and the trial court erred by failing to order that ARCO be joined as an indispensable party.

C. There Is a Substantial Risk of Multiple and Successive Lawsuits

One of the purposes of Code of Civil Procedure sections 367 and 389 is to prevent the risk of multiple actions at the hands of other claimants. (See Code Civ. Proc. § 389, subdiv. (a)(2)(ii) [requiring joinder where substantial risk of "double, multiple, or otherwise inconsistent obligations"]; *Keru Inv., Inc. v. Cube Co.* (1998) 63 Cal.App.4th 1412, 1424 [purpose of Code Civ. Proc. § 367 "is to save a defendant, against whom a judgment may be obtained, from further harassment, or vexation at the hands of other claimants to the same demand."].) In this case, there is a substantial risk that ARCO, as a non-party to this litigation with the sole liability for remediating the property, could bring a subsequent lawsuit seeking reimbursement from Shell for those remediation costs ARCO incurred beyond its proportionate share.

Watson contends that the risk of "multiple lawsuits is nothing more than 'mere concern' in light of the acknowledgement by ARCO that it and Shell are not joint tortfeasors." (RB:67.) In fact, as explained above, ARCO and Shell are

alleged joint tortfeasors and Watson cites no authority to support the proposition that ARCO can, or has, changed the legal effect or legal relationship of the parties by simply making the self-serving "acknowledgment" that it is not a joint tortfeasor.[23]

Watson cites *City of San Diego v. U.S. Gypsum Co.* (1994) 39 Cal.App.4th 575, 588 for the proposition that a claim for equitable indemnification requires that liability be joint and several. (RB:66.) *U.S. Gypsum* does not help Watson, however, because ARCO has assumed liability for all remediation costs on the Watson property (see CT:3198-3199, 3392) and, as discussed above, ARCO and Shell can, in fact, be considered joint tortfeasors under California law.[24]

California has expressly recognized the right of a joint tortfeasor to bring an equitable indemnity claim in a case that closely parallels this action. (See *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.* (1990) 221 Cal.App.3d 1601, 1611, 1619-1620 [allowing co-defendant to seek full or partial indemnification from joint tortfeasors alleged to have made individual contributions to groundwater contamination alleged to constitute a nuisance]. Moreover, a claim for equitable indemnification is not the sole theory on which ARCO could seek recovery from Shell for Shell's proportionate share of ARCO's remediation costs. Such claims might be asserted under an unjust enrichment

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[23] Watson does not support the statement that ARCO has "acknowledged" that ARCO and Shell are not joint tortfeasors with any citation to the record. (See RB:68.) Accordingly, it is unclear what "acknowledgement" Watson is referring to. To the extent Watson is referring to self-serving statements in the Settlement Agreement (CT:3118-3120), however, those statements are belied by both ARCO and Watson's conduct and prior representations, as set forth above.

[24] Shell is not conceding that any such claim would be successful. In fact Shell would have contested any claim by ARCO vigorously during the Watson trial based on a number of factual and legal defenses, and would do so now were ARCO to bring a lawsuit. In addition, Shell does not waive any arguments that ARCO is bound by the judgment under principles of *res judicata* or claim-splitting in view of the fact that ARCO is in privity with Watson. However, just because Shell has valid defenses does not mean that ARCO won't sue Shell. Watson's comments that this risk is small carry no weight, as the risk is that ARCO, not Watson, may harass Shell by a subsequent suit.

theory or a statutory cost recovery claim under state or federal law. (See, e.g., 42 U.S.C. § 9613(f) [authorizing contribution action for reimbursement of clean-up costs by private parties]; *State of California v. Montrose Chem. Corp.* (9th Cir. 1997) 104 F.3d 1507, 1518, fn. 9 [allowing cross-recovery actions under CERCLA].)

Thus, the risk that Shell might be subjected to multiple lawsuits arising from the very same facts and conduct is quite real and mandates that ARCO should have been included as a party in this trial and bound by its outcome.

D. Considerations of Equity and Convenience Favored ARCO's Joinder

Watson's argument that ARCO should not have been brought back into the lawsuit because it wants to avoid the "expense and uncertainty of this litigation" also fails under scrutiny. (RB:69.) ARCO was intimately involved in the litigation and was already paying one-half of Watson's attorney's fees. (CT:3154-3156, 3158-3160.) Nor was there any "uncertainty," since ARCO would not be brought back in as a defendant, but as a *plaintiff*, like the party ordered joined in *Bank of the Orient*. (See *supra*, 67 Cal.App.3d 588.) The joinder of ARCO would actually minimize uncertainty by having all of the claims between the three parties resolved finally and fully, in a single proceeding.

Indeed, Watson's witnesses and counsel made repeated references to liabilities incurred by Watson and remediation efforts that Watson would be required to undertake, leaving the jury with the false impression that, if Shell were not found liable, Watson would face these liabilities alone. (See, e.g., RT:2759 [Dagdigian talking about how estimated cost of remediation can be expected to increase when remediation plan implemented], 2789, 5512.) In reality, however, there is no possibility that Watson will ever have to spend a single penny, either in remediation costs or in liability to any third party. (CT:3198-3200.) Under the terms of the ARCO-Watson settlement, ARCO must pay for all required

remediation and indemnify Watson for any and all liability that Watson may incur. (CT:3195-3198.)

Watson also contends that bringing ARCO back into the case would have run counter to California's policy of encouraging settlements. (RB:69-70.) Although California has a policy of encouraging settlements that fairly apportion liability, there is no policy that supports allowing the primary defendant in a lawsuit to strike a deal turning its significant liability into a multimillion-dollar profit center. There is also no policy encouraging concealment of the settling defendant's true role in the action from the jury in order to preserve its likelihood of reaping a windfall.

E. Reference to the ARCO Settlement Should Have Been Permitted

Under the unique circumstances of the Watson-ARCO settlement, Watson ceded all control of, and responsibility for, remediation of the Watson property to ARCO. Watson and ARCO wholly realigned ARCO's interest from that of a joint tortfeasor to that of the real plaintiff in interest. Having structured the settlement as they did, Watson must accept the consequences of the rules applicable to standing in California courts.

Watson contends that the trial court was correct in preventing Shell from informing the jury that Watson would never incur any costs or remedial obligations. To support this assertion, Watson cites a string of cases that stand for the general proposition that evidence of a settlement agreement is inadmissible to prove liability. (RB:71.) Watson contends that "[a]llowing Shell to put the Watson/ARCO agreement before the jury would have violated this fundamental principle." (*Id.*)

But Shell did not propose to disclose the settlement agreement to establish liability; Shell proposed to disclose the settlement agreement to preclude Watson from giving the jury the false impression that, without a judgment in its favor, Watson would be required to fully fund all remediation activities on the property. For example, Dagdigian's testimony led the jury to believe that he, Watson's

expert, would have to spend Watson's money to clean up the contamination: "I will have additional expenses when we actually go out there and do this." (RT:2759.) (Emphasis added.) "I am gambling that the regional water quality control board will allow us just to treat down in here." (RT:2765.) (See also RT:2789, where Dagdigian suggested that if he were Watson, he'd budget more like $20 million for cleanup.) Watson's counsel compounded this error in closing arguments:

> "So what do we have? We have nearly $13 million, according to Dr. Dagdigian's calculations, of mess under the Watson Center that will be required by a regulatory agency to be cleaned up. . . . And whose property is it? It's the Watson Center. It's Watson's property. . . . *That's a big check to write.*"

(RT:5515 (emphasis added).)

Watson, of course, will never have to pay a penny in remediation costs, and misleading the jury to believe otherwise was improper.

VII. CONCLUSION

For the reasons set forth here and in its Opening Brief and Cross-respondent's Brief, Shell urges this Court to reverse the judgment and either direct entry of judgment for Shell or vacate the jury's award of benefit damages in the sum of $14,275,237. Alternatively, if the Court concludes that ARCO should have been joined as a party plaintiff, Appellant respectfully requests that the Court remand the case for retrial.

DATED: September 15, 2004

Respectfully submitted,

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By _____
MICHAEL R. LESLIE
Attorneys for Appellant
SHELL OIL COMPANY

STATE WATER RESOURCES CONTROL BOARD

GEOTRACKER

GATX - GX -190 PIPELINE RELEASE AREA (SL2045R1627) - (MAP)

900 BLOCK EAST 233RD STREET
CARSON, CA 90754
LOS ANGELES COUNTY
CLEANUP PROGRAM SITE

CLEANUP OVERSIGHT AGENCIES
LOS ANGELES RWQCB (REGION 4) *(LEAD)* - *CASE #: 0532A*
CASEWORKER: *LUIS CHANGKUON*

Regulatory Profile

CLEANUP STATUS
OPEN - ASSESSMENT & INTERIM REMEDIAL ACTION AS OF 9/16/2008

POTENTIAL CONTAMINANTS OF CONCERN
AVIATION, GASOLINE

POTENTIAL MEDIA AFFECTED
AQUIFER USED FOR DRINKING WATER SUPPLY, SOIL

FILE LOCATION
REGIONAL BOARD

Site History

Groundwater monitoring activities since 1998. Free product recovery activities since 2003.

Cleanup Status History

DATE	STATUS
9/16/2008	Open - Assessment & Interim Remedial Action
4/21/2006	Open - Site Assessment
1/5/2003	Open - Remediation
5/15/2000	Open - Remediation
5/15/2000	Open - Case Begin Date

Regulatory Activities

	ACTION TYPE	ACTION DATE	ACTION
[VIEW DOCS]	*ENFORCEMENT/ORDERS*	3/10/2009	Staff Letter
[VIEW DOCS]	*ENFORCEMENT/ORDERS*	12/17/2008	13267 Requirement
[VIEW DOCS]	*ENFORCEMENT/ORDERS*	9/3/2008	Staff Letter
[VIEW DOCS]	*ENFORCEMENT/ORDERS*	5/16/2008	Staff Letter
	CLEANUP ACTION	3/1/2003	Remove free product

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EXHIBIT H

California Regional Water Quality Control Board

Linda S. Adams
Cal/EPA Secretary

Los Angeles Region

Arnold Schwarzenegger
Governor

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: http://www.waterboards.ca.gov/losangeles

May 16, 2008

Ms. Kelsy K. Hardy
Specialist – EH&S Remediation
Kinder Morgan Liquid Terminals, LLC (Kinder Morgan)
1100 N. Town and Country Rd., 7th Floor
Orange, CA 92868

CONDITIONAL APPROVAL OF SHUT DOWN VAPOR EXTRACTION COMPONENT OF THE LIGHT NONAQUEOUS PHASE LIQUID RECOVERY SYSTEM – GX-190 PIPELINE RELEASE SITE, 900 BLOCK OF EAST 233RD STREET, CARSON, CALIFORNIA (SLIC NO. 532A, SITE ID NO. 2045R00)

Dear Ms. Hardy:

Los Angeles Regional Water Quality Control Board (Regional Board) staff have reviewed the March 31, 2008, *Results of Temporary Shut Down Test of Vapor Extraction of the Vacuum-Enhanced LNAPL Recovery System* (Report), prepared by CH2MHILL (CH2M), for the referenced site. The Report was required by the Regional Board in the letter dated September 27, 2007.

The Report describes the results of a temporary shut down test of the vapor extraction (VE) component of the light nonaqueous phase liquid (LNAPL) recovery system. During approximately five months of testing (3 months VE online and 2 months VE offline), a shutdown of the VE component did not result in a decrease in product recovery. Because no significant changes in LNAPL recovery rates were observed during the VE shutdown testing, along with historical decline trend in LNAPL recovery rates and low to non-detectable concentrations of volatile organic compounds in VE influent samples, CH2M recommended to permanently shutdown the VE component while continuing active LNAPL recovery using existing skimming pumps.

Based on the information submitted, Regional Board staff concurs with the CH2M recommendation to shutdown the VE component of the LNAPL recovery system at this time. You are required to continue free product recovery and quarterly groundwater monitoring activities at the site. Quarterly remediation progress and groundwater monitoring reports shall be submitted according to the schedule previously established for the site.

Due to residual contaminants in vadose zone, free product in groundwater, and commercial/industrial buildings at and in the immediate vicinity of the GX-190 pipeline release area, you are required to submit a workplan to the Regional Board by **August 1, 2008,** for conducting soil gas survey and vapor intrusion evaluation at the site. The results of the vapor intrusion evaluation will be used to better understand the potential threat to the public health and environment, and to determine if the VE component can be permanently shutdown and removed from the site remediation system. To adequately define the vapor plume originating from the pipeline release area, multiple-depth soil vapor sampling shall be proposed.

If you have any questions, please contact me at (213) 576-6667.

Sincerely,

Luis Changkuon
Engineering Geologist
Site Cleanup I Unit

cc: Chris Romero, CH2M HILL
Mathew S. Covington, Steinhart & Falconer, LLP
Dat Quach, Los Angeles Department of Water & Power
Kateri Luka, BP America, Inc.

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Attorneys for Plaintiff and Cross-Defendant
WATSON LAND COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST COURTHOUSE

WATSON LAND COMPANY, a California corporation,

Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation; GEORGE PEARSON, an individual, dba G&M OIL COMPANY; G&M OIL COMPANY, INC. California corporation; TEXACO REFINING AND MARKETING, INC., a Delaware corporation; TRMI HOLDINGS, INC., a Delaware corporation; REMEDIATION CAPITAL CORPORATION, a Neva corporation; MONSANTO CHEMICAL COMPANY, Delaware corporation; STAUFFER MANAGEMENT COMPANY, a Delaware corporation; RHONE-POULENC BASIC CHEMICALS COMPANY, a Delaware corporation; SHELL OIL COMPANY, a Delaware corporation; and DOES 1 through 200, inclusive,

Defendants.

AND RELATED CROSS ACTIONS

Case No. BC 150161

JOINT MOTION OF ARCO AND WATSON LAND COMPANY FOR AN ORDER CONFIRMING ESTABLISHMENT OF THE WICS PROPERTY ENVIRONMENTAL CLEANUP FUND, APPOINTING ADMINISTRATOR, AND APPROVING TRUST AGREEMENT / DECLARATIONS OF MATTHEW S. COVINGTON AND DONNA PARISI

Action Filed: May 16, 1996
Date: August 23, 2002
Time: 9:00 a.m.
Dept: 307

EXHIBIT I

STEINHART & FALCONER LLP
333 MARKET STREET, THIRTY-SECOND FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2150

INTRODUCTION

In 1996 Watson Land Company ("Watson") filed this lawsuit against Atlantic Richfield Company ("ARCO"), Shell Oil Company ("Shell"), GATX Tank Storage Terminals Corporation ("GATX") and other defendants. Watson, ARCO, and GATX settled their disputes in 2001. Watson obtained an $18 million judgment against Shell in the summer of 2001, which currently is on appeal.

Under the Settlement Agreement between Watson and ARCO, ARCO agreed to indemnify Watson for certain contamination on Watson Industrial Center South (the "WICS"). Watson agreed that any funds obtained in a final judgment against Shell, or any settlement with Shell, would be placed in a trust account (known as the WICS Property Environmental Cleanup Fund (hereafter "Fund")) for ARCO's use in addressing the environmental contamination on the WICS. The Settlement Agreement required Court approval of a financial institution (hereafter "Trustee" or "Administrator") to administer the Fund, and approval of a written trust agreement and instructions to the Administrator (hereafter "Trust Agreement").

This Court previously entered an order approving the parties' Settlement Agreement as being made in good faith and retained jurisdiction relating to certain aspects of the Fund. ARCO and Watson have agreed upon and executed a Trust Agreement and have appointed Bank One Trust Company, National Association ("Bank One"), as Administrator for the Fund. By this motion, ARCO and Watson ask the Court to confirm and approve establishment of the Fund, and to approve the Trust Agreement and Bank One's appointment as the current Administrator.

FACTS

After more than four years of litigation and environmental assessment and three years of settlement negotiations and mediations, Watson and ARCO settled their disputes in a complex Settlement Agreement approved by the Court in February 2001. Under the Settlement Agreement, ARCO agreed to indemnify Watson for certain liabilities arising out of environmental contamination

existing on the WICS as of November 1, 2000. (Covington Decl. ¶ 2, Exh. A, pp. 88-90 (excerpts of Settlement Agreement).) Watson agreed to pursue its claims against Shell and deposit any settlement or judgment ultimately obtained against Shell ("Shell Funds") directly into the Fund for the purposes set forth in the Settlement Agreement, including the performance of certain of ARCO's indemnity obligations. (Id. at Exh. A, pp. 44-46, 52-57, 65-67.)

ARCO and Watson intend to establish the Fund to resolve claims among them that resulted from the environmental contamination and tort causes of action alleged in the lawsuit. ARCO and Watson further intend the Fund to be created as a "qualified settlement fund" under Section 468B of the Internal Revenue Code and Treasury Regulation Section 1.468B-1. (Covington Decl. Exh. A, p.1.) The Settlement Agreement requires the parties to select an Administrator for the Fund, create a Trust Agreement, and have both approved by the Court. (Id. at Exh. A, pp. 53-55.) The Court retained jurisdiction over the Fund in its February 26, 2001 Order. (Id. at ¶ 3, Exh. B and ¶ 5 thereto.)

The Settlement Agreement sets forth certain further provisions concerning the Administrator and the Trust Agreement:

- The Shell Funds shall constitute the assets of the Fund. (Covington Decl., Exh. A, p. 52.)
- The Fund must be held, maintained, used and distributed as provided in the Settlement Agreement. (Id. at 52-53.)
- The Fund will be a trust fund placed in a separate interest bearing account established at a reputable financial institution. (Id. at 53.)
- The Fund must be administered by the Administrator "pursuant to a written trust agreement and related written instructions ...." (Id. at p. 54)
- The written trust agreement and related written instructions must provide for (1) the circumstances under which the Administrator may release money from the Fund; (2) the preparation of income tax returns for the trust and the preparation of statements to be issued by the Administrator and delivered to Watson, ARCO, and the Court; and (3) such other terms and conditions as may be reasonably required in order to establish, maintain and distribute money from the Fund consistent with the Settlement Agreement. (Id. at pp. 54-55.)

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In February 2002, Watson, ARCO, and Bank One Trust Company, National Association ("Bank One") executed a Trust Agreement dated November 15, 2001 appointing Bank One as the Trustee. (Covington Decl. ¶ 4, Exh. C.) Bank One is a reputable national bank in good standing under all banking laws and regulations. (Declaration of Donna Parisi, ¶ 2.) The Trust Agreement provides, among other things:

- Watson and ARCO are the beneficiaries of the Trust ("Trust" is used interchangeably with "Fund"). (Covington Decl. Exh. C, § 1(b);
- The purpose of the Trust is to provide a source of funds to be used for the purposes set forth in the Settlement Agreement, including without limitation, the reimbursement of certain remediation costs, ARCO's indemnification obligations, and certain expenses incurred by Watson. (Id. at § 1(c).)
- The Court may reform the Trust, to the extent necessary or reasonable in order for the Trust to better serve the Trust purposes. (Id. at § 1(d).)
- All Shell Funds shall be held and distributed according to the terms of the Settlement Agreement and the Trust Agreement. (Id. at § 1(f); § 3.);
- The Trustee agrees to vest and reinvest funds in the Trust in certain "Permitted Investments." Interest and earnings will be added to the Trust and any losses or expenses will be borne by the Trust. (Id. at § 2(a).)
- The Court will retain continuing jurisdiction over the Trust including (1) approval or selection of the Administrator or replacement Administrator; (2) the receipt of annual reports from the Administrator; (3) the approval of termination of the Trust; (4) the appointment of arbitrators and the confirmation or vacation of any arbitration awards in any arbitration conducted under the Settlement Agreement; (5) any other matter specifically set forth in the Trust Agreement or the Settlement Agreement. (Id. at § 4(a).)
- The Administrator will prepare annually a detailed accounting of all receipts and disbursements to and from the Trust. (Id. at § 4(b).)
- The Trustee shall prepare and file annual tax returns applicable to the Trust. (Id. at § 6 (a)-(b).)
- ARCO and Watson may petition the Court to appoint a successor trustee at any time. (Id. at § 4(a).)
- The Trust shall continue in existence until at least February 26, 2011, or until the funds in the Trust have been distributed, whichever comes first. The Court retains jurisdiction to issue an order authorizing termination of the Trust. (Id. at § 8.)

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ARGUMENT

The Settlement Agreement requires that the Administrator be a reputable financial institution and that the money in the Fund be segregated from the assets of ARCO and Watson while the Fund is in effect. The Agreement also requires that the Fund be administered pursuant to a written Trust Agreement which provides for the release of money from the Fund, the preparation of income tax returns, and the preparation of trust financial statements. Finally, the Settlement Agreement requires that the Trust Agreement contain conditions reasonably required in order to establish, maintain and distribute money from the Fund consistent with the Settlement Agreement.

The Trust Agreement and Bank One meet all of these requirements. Bank One is a national bank with a strong reputation and it is qualified to act as Administrator for the Fund. Likewise, the Trust Agreement provides for the establishment of a trust account with ARCO and Watson as beneficiaries. The Trust Agreement also contains provisions for the administration of the Fund by Bank One, or a successor trustee, for reformation of the Trust Agreement by the Court if necessary to better serve the Trust purposes, and for the Court's continuing jurisdiction over the Fund.

The Trust Agreement also meets all the requirements of the Settlement Agreement concerning administration of the Fund and preparation of accounting and tax materials. The Trust Agreement contains specific instructions to the Trustee regarding the deposit of Shell Funds directly into the Fund, and provides that money may be distributed from the Fund to reimburse certain remediation costs and other expenses as provided for in the Trust Agreement and the Settlement Agreement. Moreover, the Fund requires the Trustee to prepare annual detailed accountings of all receipts and disbursements to or from the Fund, and to prepare and file tax returns applicable to the Fund, all as required by the Settlement Agreement.

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ARCO, Watson and Bank One all have signed the Trust Agreement and have agreed that Bank One will act as Administrator. The Trust Agreement and Bank One meet all the requirements of the Settlement Agreement, and the Court should enter the order requested by this motion.

CONCLUSION

For all the foregoing reasons, the Court should confirm and approve establishment of the Fund, approve appointment of Bank One as Administrator, and approve the Trust Agreement.

DATED: June 11, 2002

STEINHART & FALCONER LLP

By: _____
Matthew S. Covington
Attorneys for Defendant and Cross-Complainant
ATLANTIC RICHFIELD COMPANY

DATED: June 14, 2002

BRIGHT AND BROWN

By: _____
Maureen J. Bright
Attorneys for Plaintiff and Cross-Defendant WATSON LAND COMPANY

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DECLARATION OF MATTHEW S. COVINGTON

I, Matthew S. Covington declare:

1. I am an attorney at law duly licensed to practice in the courts of the State of California and am a partner with the law firm of Steinhart & Falconer LLP, attorneys for defendant and cross-complainant Atlantic Richfield Company ("ARCO") in this action. I have personal knowledge of the following facts. If called upon as a witness, I could and would competently testify to them.

2. In early 2001, ARCO and plaintiff Watson Land Company ("Watson") entered into a Settlement Agreement and Release of Certain Claims effective as of November 1, 2000 ("Settlement Agreement") in this matter. True and correct copies of excerpts from the Settlement Agreement are attached hereto as Exhibit A. Under the Settlement Agreement, ARCO agreed to indemnify Watson for certain liabilities arising out of environmental contamination existing as of November 1, 2000 on Watson Industrial Center South ("WICS"). Watson agreed to pursue its remaining claims against Shell Oil Company ("Shell") and deposit any settlement or judgment ultimately obtained against Shell ("Shell Funds") into a trust account (known as the "WICS Property Environmental Cleanup Fund") for ARCO's use in addressing the environmental contamination on the WICS. The Settlement Agreement further requires ARCO and Watson to select an Administrator for the Fund (hereafter "Administrator" or "Trustee"), to execute a trust agreement and written instructions for the Administrator (hereafter "Trust Agreement"), and to have the same approved by the Court.

3. On or about February 26, 2001, the Court entered an order approving the Settlement Agreement as being made in good faith and retained jurisdiction over certain aspects of the Fund, including jurisdiction to approve the Administrator selected by ARCO and Watson. A true and correct copy of the Court's February 26, 2001 order is attached hereto as Exhibit B.

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4. In February 2002, Watson, ARCO and Bank One Trust Company, National Association ("Bank One") executed a Trust Agreement dated November 15, 2001 thereby establishing the Fund and appointing Bank One as the Trustee. A true and correct copy of the Trust Agreement is attached hereto as Exhibit C.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: June 11, 2002

Matthew S. Covington

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SUPERIOR COURT

JUN 17 2002

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WATSON LAND COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST COURTHOUSE

WATSON LAND COMPANY, a California corporation,

Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation; GEORGE PEARSON, an individual, dba G&M OIL COMPANY; G&M OIL COMPANY, INC California corporation; TEXACO REFINING AND MARKETING, INC., a Delaware corporation; TRMI HOLDINGS, INC., a Delaware corporation; REMEDIATION CAPITAL CORPORATION, a Neva corporation; MONSANTO CHEMICAL COMPANY, Delaware corporation; STAUFFER MANAGEMENT COMPANY, a Delaware corporation; RHONE-POULENC BASIC CHEMICALS COMPANY, a Delaware corporation; SHELL OIL COMPANY, a Delaware corporation; and DOES 1 through 200, inclusive,

Defendants.

AND RELATED CROSS ACTIONS.

Case No. BC 150161

ORDER GRANTING JOINT MOTION OF ARCO AND WATSON LAND COMPANY FOR AN ORDER CONFIRMING ESTABLISHMENT OF THE WICS PROPERTY ENVIRONMENTAL CLEANUP FUND, APPROVING APPOINTMENT OF ADMINISTRATOR AND APPROVING TRUST AGREEMENT

Action Filed: May 16, 1996
Date: August 23, 2002
Time: 9:00 a.m.
Dept: 307

EXHIBIT J

The joint motion of defendant and cross-complainant Atlantic Richfield Company ("ARCO") and plaintiff and cross-defendant Watson Land Company ("Watson") for an order confirming establishment the WICS Property Environmental Cleanup Fund, and approving appointment of an Administrator and a Trust Agreement came on regularly for hearing at 9:00 a.m., on August 23, 2002, in Department 307 of this Court, the Honorable Wendell Mortimer, Jr. presiding. Matthew S. Covington, Esq. appeared on behalf of ARCO and Maureen J. Bright, Esq. appeared on behalf of Watson. Based upon the papers filed in connection with the motion, and all of the records, pleadings and files in this action, and good cause appearing:

IT IS ORDERED THAT the motion be, and hereby is, granted, as follows:

1. The Court confirms and approves the establishment of the WICS Property Environmental Cleanup Fund ("Fund"). The Court finds that ARCO, Watson, and Bank One intend the Fund to be treated from its inception as a "qualified settlement fund" under Section 468B of the Internal Revenue Code and Treasury Regulation Section 1.468B-1, and as a trust under applicable California law.

2. The Fund is being established to resolve or satisfy claims that have resulted from an event, or a related series of events, that have occurred and that have given rise to claims asserting liability arising out of alleged torts in this matter.

3. The Court approves the parties' appointment of Bank One Trust Company, National Association ("Bank One") as the current Administrator of the Fund.

4. The Court approves the written trust agreement and instructions attached to the moving papers ("Trust Agreement") which applies with respect to the Fund.

5. As provided in the Settlement Agreement between the parties and the Trust Agreement, all assets of the Fund shall be deposited directly into the Fund and shall be segregated from the assets of ARCO and Watson unless and until such assets are distributed. Any and all distributions shall be made according to the terms of the Trust Agreement and the Settlement Agreement.

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6. The Fund will remain subject to the continuing jurisdiction of this Court as set forth in the Trust Agreement and the Settlement Agreement.

IT IS SO ORDERED.

WENDELL R. MORTIMER, JR.

Dated: 8/23/02

By: _____
Judge of the Superior Court

STEINHART & FALCONER LLP
333 MARKET STREET, THIRTY-SECOND FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2150

Michael Leslie

From: Michael Leslie
Sent: Wednesday, December 14, 2005 6:45 PM
To: 'Maureen J. Bright'; Matthew S. Covington (matthew.covington@dlapiper.com)
Subject: RE: Watson case: Satisfaction of judgment

Dear Maureen and Matt:

Pursuant to our prior agreement, tomorrow afternoon I will be filing the Satisfaction of Judgment I have been holding, since the judgment has now been paid.

Please let me know if you have any objections to our doing so. Thank you again for your courtesy and cooperation in working out the payment.

Michael R. Leslie

-----Original Message-----
From: Maureen J. Bright [mailto:mbright@Brightandbrown.com]
Sent: Friday, December 09, 2005 11:05 AM
To: Michael Leslie
Subject: Payment received
Importance: High

Mike:

I received confirmation that the funds ($5,702,387.94) have arrived at the bank and wanted to let you know.

Thank you again for all your help in connection with arranging payment.

Regards,

Maureen

Maureen J. Bright, Esq.
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550 N. Brand Blvd., Suite 2100
Glendale, California 91203
Telephone: (818) 243-2121
Facsimile: (818) 243-3225
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EXHIBIT K