LATHAM & WATKINS LLP
Robert M. Howard (Bar No. 145870)
Kelly E. Richardson (Bar No. 210511)
Jennifer Casler-Goncalves (Bar No. 259438)
12670 High Bluff Drive
San Diego, California 92130
Telephone: 858.523.5400
Facsimile: 858.523.5450
Email: robert.howard@lw.com
Email: kelly.richardson@lw.com
Email: jennifer.casler@lw.com

Andrea M. Hogan (Bar No. 238209)
505 Montgomery Street, Suite 2000
San Francisco, California 94111
Telephone: 415.391.0600
Facsimile: 415.395.8095
Email: andrea.hogan@lw.com

Attorneys for Defendants Monsanto Company, Solutia Inc., and Pharmacia LLC

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

CITY OF SAN JOSE, a municipal corporation,

Plaintiff

v.

MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA CORPORATION, and DOES 1 through 100,

Defendants.

CASE NO. 15-cv-03178-NC

**DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

**[FRCP 12(b)(6)]**

*[FILED CONCURRENTLY WITH REQUEST FOR JUDICIAL NOTICE AND PROPOSED ORDER]*

Hearing Date: October 7, 2015
Time: 1:00 p.m.
Ctrm: Courtroom D, 15th Floor
Phillip Burton Federal Building & United States Courthouse
(San Francisco)
Judge Nathanael M. Cousins

File Date: July 8, 2015
Trial Date: N/A

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## NOTICE OF MOTION AND MOTION

**PLEASE TAKE NOTICE** that on October 7, 2015, at 1:00 p.m., or as soon thereafter as the matter is heard before the Honorable Nathanael M. Cousins, in Courtroom D, 15th Floor, Phillip Burton Federal Building & United States Courthouse (San Francisco), Defendants Monsanto Company ("Monsanto"), Solutia Inc., and Pharmacia LLC (collectively "Defendants") will and hereby do move the Court for an order dismissing the Complaint of Plaintiff City of San Jose (the "City" or "Plaintiff"). This Motion is made pursuant to Federal Rule of Civil Procedure ("F.R.C.P") 12(b)(6) on the grounds that the Complaint's First and Second Causes of Action, and the Second and Third Prayers for Relief, fail as a matter of law to state any basis for relief and/or fail to comply with the proper pleading standards under F.R.C.P. 8(a), 9(f), and 12(b)(6).

This Motion is based on this Notice, the Memorandum of Points and Authorities in Support of this Motion, the pleadings and records on file in the case, matters of which this Court may take judicial notice (including the accompanying Request for Judicial Notice In Support of Defendants' Motion, and exhibits thereto), Plaintiff's Complaint, other documents specifically referenced in or integral to the Complaint, and such arguments as may be presented to the Court.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2008, the San Francisco Bay Regional Water Quality Control Board ("Regional Board") established limits on polychlorinated biphenyl ("PCB") discharges to San Francisco Bay. The City of San Jose ("City")—as an operator of a municipal separate storm sewer system[1] that discharges urban runoff to the San Francisco Bay—is subject to these PCB discharge limitations through the City's Clean Water Act permit.[2] The City alleges in its Complaint that it

[1] The municipal separate storm sewer system is also referred to as the "MS4."

[2] The City's Clean Water Act permit contains state-imposed "Total Maximum Daily Loads" ("TMDL") for PCBs and other chemical constituents. A "TMDL" is a regulatory term referring to a calculation of the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and a source-by-source allocation of that pollutant. The waste load allocations developed under the TMDL are then incorporated into the dischargers' permit limits, to ensure that the overall pollution "budget" for the water body is not exceeded. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY ("EPA"), *What Is A TMDL?*,

has "spent money" to reduce its PCB discharges and that due to "stricter standards" in its new permit, it will need to spend "additional money in order to improve procedures, methods, and facilities, in order to reduce PCB discharge to new and future [] levels." Compl., at ¶¶ 16-19. Instead of absorbing these permit compliance costs rightly attributable to the City's *own* operation of its storm sewer system, the City is now seeking to pass the costs along to a third-party.

In this action, the City has sued Monsanto [3] for recovery of these very permit compliance costs, utilizing novel (and unprecedented) applications of public nuisance and equitable indemnity theories. But Monsanto simply has no liability for the City's permit compliance costs. Monsanto manufactured PCBs—a useful and valuable product—four decades ago outside California. ***And the City does not even allege that Monsanto ever discharged a PCB molecule into San Francisco Bay or that the City's own compliance costs are attributable in any way to Monsanto's past production of a useful product four decades ago.*** The City's extraordinary lawsuit, which stretches public nuisance and equitable indemnity beyond recognition, must fail for the ***eight*** independent reasons set forth herein.

The City's First Cause of Action for public nuisance is deficient for numerous independent reasons. ***First,*** there are simply no facts alleged—nor could there be—that Monsanto caused or created a public nuisance in San Francisco Bay. Indeed, the Complaint fails to identify *any* causal connection between Monsanto's former manufacture of a *useful product* four decades ago outside California, and the presence of PCB-*wastes* in the City's storm sewer system or in San Francisco Bay today. Monsanto has never had a manufacturing presence in the San Francisco Bay area; has never owned or operated a plant in the San Francisco Bay area; and, in contrast to the City, has never discharged a single molecule of PCB or industrial waste into San Francisco Bay. The Complaint does not contend otherwise. It is completely silent regarding

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http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/overviewoftmdl.cfm (last updated September 11, 2013).

[3] For ease of reference, "Monsanto" is referred to collectively on behalf of all three affiliated Defendants (*i.e.*, Monsanto Company, Solutia, Inc., and Pharmacia Corporation), as the relevant PCB product manufacturer for purposes of this Motion.

crucial issues of proximate causation, such as who actually disposed of PCBs into the City's storm sewer system and the bay, and when and how those discharges occurred.[4] This failure to allege facts of causation is fatal to Plaintiffs' public nuisance claim. Indeed, at least two federal courts have already found in favor of Monsanto at the pleading stage in PCB-related actions brought under public nuisance theories by municipal entities.

***Second,*** the public nuisance allegations hinge upon the discredited theory that a manufacturer of a legal product should be held liable under public nuisance for the actions decades ago of its customers (and in turn, their customers). California law, however, forbids this result. Placing a useful product in the steam of commerce does not trigger California's public nuisance law.

***Third***, the Complaint improperly asks this Court to depart from the well-established legal boundaries on public nuisance law and, for the first time in the history of legal jurisprudence, shift permit compliance costs incurred by a regulated municipality (and an undisputed PCB discharger) to a non-discharging manufacturer that is not a party to any San Francisco Bay discharge permit. ***Fourth***, not a single court in California, or elsewhere, has sanctioned the recovery of permit compliance costs as "damages" under public nuisance. Such costs are simply too remote to be recoverable.

***Fifth,*** the City has no property interest or jurisdictional authority over San Francisco Bay and therefore lacks standing to assert these public nuisance damage or abatement claims outside its jurisdiction. ***Sixth***, and lastly, California routinely rejects attempts, like that here, to recast a products liability claim into a public nuisance.

Plaintiff's Second Cause of Action for equitable indemnity is defective for at least two independent reasons. ***First***, there is no legal basis for joint and several liability between the City and Monsanto, a necessary prerequisite to establish entitlement to equitable indemnity as a matter of law. ***Second***, even if the City could successfully state an equitable indemnity claim

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[4] Moreover, though styled as a claim for abatement of a public nuisance, the Complaint does not allege that the City performed any San Francisco Bay cleanup. Instead, without alleging any plausible basis for recovery, the City seeks only to compel Monsanto to pay for the City to bring the City's own stormwater system into compliance with applicable laws.

(which Monsanto vigorously disputes), it is barred by the applicable statute of limitations. In addition, two of Plaintiff's five prayers for relief are improper and must be dismissed.

For all of these independent reasons, set forth in more detail below, the City's Complaint fails to state a claim and should be dismissed in its entirety with prejudice as a matter of law.

## II. STATEMENT OF THE FACTS

Plaintiff's Complaint belatedly points an accusatory finger at Monsanto as an alleged "creat[or] of a public nuisance." *See* Compl., at ¶ 91. Yet Monsanto did nothing more than manufacture a useful product four decades ago. Indeed, PCBs have been valued by many industries and municipalities, and used as a component in many products, because of their characteristics of nonflammability, chemical stability, electrical insulating properties, and safety.[5] Moreover, PCBs continue to be used lawfully to this day in certain applications for increased operational safety, such as transformers, capacitors, and other electrical equipment, and remain legally authorized for such uses through 2025.[6]

The City's Complaint not only ignores the societal benefits and historical context of PCBs, it fails to acknowledge its own prominent role in the pollution of the bay. In fact, PCBs in the San Francisco Bay—and the source of those PCBs—have been the subject of extensive regulatory inquiry for at least the past decade, and Monsanto has not once been identified as a discharger of PCBs to the bay.[7]

In establishing the TMDL for PCBs that is specific to San Francisco Bay, the Regional Board determined that the top three sources of PCBs in the bay are: (1) urban and non-urban

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[5] U.S. ENVIRONMENTAL PROTECTION AGENCY, *Polychlorinated Biphenyls (PCBs): Basic Information*, http://www.epa.gov/epawaste/hazard/tsd/pcbs/about.htm (last updated April 8, 2013).

[6] *See, e.g.*, Authorizations, 40 C.F.R. § 761.30 (2002) (allowing use of PCBs in certain applications); *Stockholm Convention on Persistent Organic Pollutants (POPs)*, as amended in 2009, at 36 (allowing use of PCBs in certain applications until 2025), *available at* http://chm.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232.

[7] The history of industrial discharges to San Francisco Bay is included to highlight the broader factual context underlying Plaintiff's Complaint. Dismissal of Plaintiff's claims remains proper exclusively on the legal grounds set forth herein, regardless of whether the Court ultimately takes judicial notice of some, or all, of these facts in the agency, court and municipal records.

stormwater runoff; (2) the Central Valley watershed; and (3) municipal wastewater dischargers.[8] In contrast to the City, Monsanto has not discharged PCBs to the San Francisco Bay through these three sources (or any others). In short, while the City complains loudly about bay conditions and attributes increased permit compliance costs to a third party who is not even subject to permitting, the law does not recognize the novel result the City seeks to achieve here.

(a) The City's Urban Runoff: The City's discharges of various wastes, including PCBs, are ongoing today; in contrast, Monsanto is alleged to have stopped PCB manufacturing by 1979 (36 years ago). Compl., at ¶ 32. For much of the twentieth century and continuing to this day, the City has built, owned and operated a vast stormwater conveyance system encompassing "31,000 storm drain inlets, 1,100 miles of storm drain lines, and 1,500 outfalls throughout its urban service area," through which chemical-containing urban runoff is discharged into San Francisco Bay.[9] It is the City's operation of its own stormwater system, which has *nothing* to do with Monsanto, that is the subject of the Regional Board permit and the resultant compliance costs that the City improperly seeks to recover.

(b) The City's Sewage Discharges into San Francisco Bay: The City co-owns and operates the San Jose/Santa Clara Water Pollution Control Plant (the "Plant"), which discharges wastewater into San Francisco Bay, including from domestic, industrial and commercial sources in the City of San Jose.[10] The Plant has been the subject of compliance orders and violations, with EPA finding that "San Jose's Pretreatment Program had significant deficiencies, many of which result in inadequate or compromised treatment at the [industrial users] … and … the identified pass-through of cyanide through the Water Pollution Control Plant into the South Bay," and that "San Jose's inadequate control over these facilities jeopardizes the sewer system

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[8] *See* CAL. REG'L WATER QUALITY CONTROL BD., RES. R2-2008-0012, AMENDING THE WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY REGION TO ESTABLISH A TOTAL MAXIMUM DAILY LOAD AND IMPLEMENTATION PLAN FOR PCBS IN THE SAN FRANCISCO BAY, at A-2 (Feb. 13, 2008), RJN,. 1.

[9] *See* CITY OF SAN JOSE, STORM SEWER SYSTEM ANNUAL REPORT FY 2012-2013, at 3 (Dec. 2013), RJN, Ex. 2; Letter from Kerrie Romanow, Dir., Envtl. Serv. of City of San Jose, to Bruce Wolfe, Exec. Officer, Cal. Reg'l Water Quality Control Bd. at 1 (July 10, 2015), RJN, Ex. 3.

[10] *See* CAL. REG'L WATER QUALITY CONTROL BD., ORDER NO. R2 2009-0038, NPDES PERMIT CA0037842, at 4−5 (Apr. 2009), RJN, Ex. 4.

and has led to increases in discharges of toxic pollutants to San Francisco Bay." [11]

(c) The City's Bayside Public Nuisance—the Newby Island Sanitary Landfill: The City authorizes a bayside disposal facility known as the Newby Island Sanitary Landfill (the "Landfill") to locate and accept industrial and municipal wastes at the shores of the bay. Operated since the 1930s, the Landfill was an open-burning dump from 1931 to 1956.[12] The City acknowledges that the "specific make-up of all the buried waste on the landfill is unknown."[13] Stormwater from the Landfill flows in part to the bay (through drainage swales, ditches and a creek) and in part to leachate storage tanks, with at least one reported leachate seep in the past decade.[14] The operation of the Landfill and the City's role therein have come under increasing criticism from an adjoining municipality (City of Milpitas), which has declared the Landfill to be a "public nuisance" because it threatens "an adverse and negative effect on the Milpitas community," while San Jose "turn[s] a blind eye to improper storage of putresibles [sic], and other nuisance-causing violations."[15]

Against this judicially noticeable history of the City's own unclean hands and the countless sources of actual and intense industrial utilization of San Francisco Bay over a century, Monsanto *never* owned or operated a single manufacturing facility in the San Francisco Bay area. Not even the Complaint purports to allege Monsanto ever discharged PCBs into the bay.[16]

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[11] *See* Letter from Alexis Strauss, Dir., EPA Water Div., to Carl Mosher, Dir., Envtl. Serv. Dep't of City of San Jose at 1 (Mar. 17, 2005), RJN, Ex. 5; Press Release, EPA, U.S. EPA orders San Jose, Calif. to correct violations of federal Clean Water Act (Mar. 17, 2015), RJN, Ex. 6.

[12] *See* CITY OF SAN JOSE, NO. PDC07-071, SCH# 2007122011, DRAFT ENVTL. IMPACT REPORT: NEWBY ISLAND SANITARY LANDFILL AND THE RECYCLING REZONING, at §§ 3.9.1 (Sep. 2009) ("Landfill DEIR"), RJN, Ex. 7.

[13] *See id.*

[14] *See* Landfill DEIR at §§ 3.8.1.2, 3.8.1.3, RJN, Ex. 7.

[15] *See* CITY COUNCIL OF MILPITAS, RESOLUTION NO. 8463, A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILPITAS FINDING THE NEWBY ISLAND RESOURCE AND RECOVERY PARK AND ITS OPERATIONAL ACTIVITIES CONSTITUTE A PUBLIC NUISANCE (Apr. 21, 2015) ("Milpitas Resolution"), RJN, Ex. 8; *City of Milpitas v. City of San Jose, et al.*, Case No. 1-15-CV-279041, Pet. for Writ of Mandate at ¶ 2, RJN, Ex. 9.

[16] A plaintiff "who comes into equity must come with clean hands." *Aguayo v. Amaro*, 213 Cal. App. 4th 1102, 1110 (2013). While the City points an accusatory finger at Monsanto and seeks equity, it suffers from unclean hands for its documented and judicially recognizable history of PCB and other contaminant discharges to the bay through its stormwater conveyance system, its wastewater treatment plant and its authorized bayside landfill.

Causation is all but ignored. Instead, the Complaint alleges only that Monsanto manufactured "PCBs" for "commercial use" from the 1930s to 1979 (*see* Compl., at ¶ 32), that unspecified *third-parties* used PCBs in a wide range of industrial applications and incorporated them into a variety of products, and that "PCBs regularly leach, leak, off-gas and escape their intended applications." *Id*. at ¶¶ 5, 33. Noticeably absent are any facts connecting Monsanto and its manufacturing operations outside California decades ago to today's alleged San Francisco Bay conditions that have been caused, according to the State of California, by Central Valley stormwater, and municipal waste sources.

## III. ARGUMENT

### A. Standard of Review

A court may dismiss a complaint as a matter of law under F.R.C.P. 12(b)(6) for failure to state a claim where there is (1) a lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (as amended), *overruled in part on other grounds*. A claim may also be dismissed if a plaintiff's own allegations indicate the existence of an affirmative defense. *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). Similarly, a court may dismiss prayers for relief under F.R.C.P. 12(b)(6) where the complaint lacks sufficient factual support for the relief sought or where the relief is otherwise unavailable as a matter of law. *See Whittlestone, Inc. v. Handi-Craft, Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (holding F.R.C.P. 12(b)(6) motions to be the proper vehicle for dismissing claims for damages that are unavailable as a matter of law); *Coppola v. Smith*, 1:11-CV-1257 AWI BAM, 2015 U.S. Dist. LEXIS 59440, at *12 (E.D. Cal. May 6, 2015) (F.R.C.P. 12(b)(6) motion is the proper procedural mechanism for dismissing damage claims with insufficient factual support).

To survive dismissal, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); F.R.C.P. 8(a), 9(f). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[C]onclusory allegations of

law and unwarranted inferences will not defeat a motion to dismiss for failure to state a claim." *Miranda v. Clark Cnty.*, 279 F.3d 1102, 1106 (9th Cir. 2002), *aff'd in part, rev'd in part* 319 F.3d 465 (9th Cir. 2003).

Although legal conclusions may provide the framework of a complaint, a plaintiff must support the conclusions with factual allegations. *Iqbal*, 556 U.S. at 679. A complaint must include something more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). Rather, a plaintiff must plead enough factual allegations "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

In ruling on a motion to dismiss, the court generally may not consider matters outside the pleadings, but the court *may* consider information incorporated by reference into the complaint, documents that are "integral" to a plaintiff's claims, matters of public record, and facts susceptible to judicial notice such as those provided here. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).[17] Further, although courts generally accept the facts alleged in a complaint as true, courts need not accept as true a plaintiff's (1) conclusory allegations, (2) legal conclusions, (3) allegations that contradict matters properly subject to judicial notice, or (4) allegations that contradict documents attached to or incorporated by reference into the complaint. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988−89 (9th Cir. 2001).

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[17] As explained further in the Request for Judicial Notice filed concurrently herewith, a "court is not [strictly] limited to the four corners of the complaint"; rather, a court may consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned . . . without converting the motion into one for summary judgment," on the ground that such materials "are deemed to be []part of every complaint by implication." *In re Death Row Records, Inc.* 2014 Bankr. LEXIS 2546, at *5-6 (C.D. Cal. May 9, 2014).

**B. Plaintiff's First Cause of Action Fails to State a Claim for Public Nuisance**

1. The City Has Not Articulated Facts that Monsanto Caused or Created a Public Nuisance in San Francisco Bay

The City has not shown—and *cannot* show—that Monsanto caused the alleged public nuisance in the bay. Plaintiff must assert facts to show that Monsanto was in a position to cause the alleged nuisance—liability cannot attach based on Monsanto's mere manufacture of PCBs. *See City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 38 (2004); *Coppola v. Smith*, 935 F. Supp. 2d 993, 1018 (E.D. Cal. 2013) ("For liability based on creating or assisting in the creation of a nuisance, a defendant must engage in active, affirmative, or knowing conduct, merely being a 'but-for' cause of the nuisance will not suffice.").

Instead of alleging facts showing Monsanto caused the alleged public nuisance in San Francisco Bay, the City relies on bare conclusions that "Monsanto's conduct was a substantial factor in causing the harm to the Plaintiff" (*i.e.*, increased permit costs) because it "manufactured, distributed, marketed, and promoted PCBs in a manner that created or participated in creating a public nuisance." Compl., at ¶¶ 89, 78. In fact, the City's claim is identical to those brought against Monsanto by the Town of Westport, Massachusetts (utilizing the same counsel in this case) and City of Bloomington, Indiana, in which the District Court of Massachusetts and the Seventh Circuit, respectively, found a lack of causation. *See Town of Westport v. Monsanto Co.*, No. 14-12041-DJC, 2015 U.S. Dist. LEXIS 36846 (D. Mass. March 24, 2015); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989). This case does not warrant a different result.

In *Town of Westport*, a Massachusetts town sought damages from Monsanto as the sole manufacturer of PCBs for commercial use in the U.S. from the 1930s to 1979. 2015 U.S. Dist. LEXIS 36846, at *3−*4. The town argued that the use of PCB-containing building materials by Monsanto's customers in town buildings created a public nuisance. *Id.* at *3−*4. As here, the town could not allege any facts that Monsanto had the ability or authority to control or abate PCB-containing materials after the point of sale, and instead the town relied upon Monsanto's manufacture and lawful sale of PCB-containing materials to support its public nuisance claim.

*Id*. at *10. The court held such allegations are insufficient to support a claim for public nuisance and dismissed the complaint. *Id.* Monsanto could not be held liable for the actions of its customers after the point of sale: "Westport was in control of the instrumentality, the PCB-containing products, following purchase and the Court thus agrees with Defendants that because they 'did not have the power or authority to maintain or abate these PCB-containing building materials, they cannot be liable for a public nuisance.'" *Id*.

Similarly, the Seventh Circuit rejected a municipality's public nuisance theory and upheld the dismissal of a complaint seeking damages from Monsanto for the cleanup of PCB wastes that had been deposited into a city landfill and the municipal sewer system by one of Monsanto's *customers*. *City of Bloomington*, 891 F.2d at 614. The court emphasized that Monsanto could not be held liable for public nuisance based on the actions of its customers after the point of sale: "The allegations do not support the proposition that Monsanto participated in carrying on the nuisance. Without such participation, Monsanto cannot be liable…." *Id*. Rather, the customer is "solely responsible for the nuisance it created by not safely disposing of the product" because *the customer*—not Monsanto—controlled the PCB-containing materials after the point of sale. *Id*. ("Since the pleadings do not set forth facts from which it could be concluded that Monsanto retained the right to control the PCBs beyond the point of sale to Westinghouse, we agree with the district court that Monsanto cannot be held liable on a nuisance theory.").

Here, the City does not allege any additional facts that would distinguish its public nuisance claim from those unsuccessfully advanced by the Town of Westport and City of Bloomington, and therefore its public nuisance claim too must be dismissed.

2. Placing a Useful Product in the Stream of Commerce Does Not Trigger Public Nuisance Liability Under California Law

The Complaint fails to plead adequate facts demonstrating how Monsanto purportedly caused or assisted in the creation of a public nuisance, aside from placing a useful product into the stream of commerce. The City alleges only that "Monsanto manufactured, distributed, marketed, and promoted PCBs in a manner that created or participated in creating a public

nuisance," "Monsanto's conduct was a substantial factor in causing the harm," and Monsanto knew or should have known that "the manufacture and sale of PCBs was causing the type of contamination now found in the Bay." Compl., ¶¶ 78, 89, and 90.

But placing a product (even an allegedly dangerous product) into the stream of commerce is insufficient for liability to attach under California law. *See City of Modesto Redevelopment Agency*, 119 Cal. App. 4th at 43 (defendants who placed chemical solvents into the stream of commerce without adequately warning of the dangers of improper disposal, without more, did not cause a public nuisance); *In re Firearm Cases*, 126 Cal. App. 4th 959, 988 (2005) (gun manufacturers did not create a public nuisance by simply engaging in the "risky practice" of manufacturing potentially dangerous products, without a causal link to the threatened harm).

Knowledge of a product's dangers or the promotion of a "dangerous" product, alone, is insufficient to create or assist in creating a public nuisance. More is required. *See County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 309 (2006) (imposing liability on lead paint manufacturers for public nuisance because of their zealous promotion of lead paint for interior home and office use, combined with knowledge of the hazard it would create, made it "distinct from and far more egregious than simply producing a defective product or failing to warn of a defective product"). In *County of Santa Clara*, the manufacturers marketed lead-based paints directly to consumers for use inside residential homes and in children's toys, despite knowing of the significant exposure risks posed. *Id*. By contrast, Monsanto never intended, or specifically marketed, PCBs for disposal into San Francisco Bay via the San Jose stormwater system or otherwise. Nor could Monsanto have predicted or controlled how its customers (or customers of customers, and so on) would handle or dispose of its products.

Unlike the defendants in *County of Santa Clara* who concealed the dangers of lead inside homes, mounted a campaign against lead regulation, and promoted lead paint usage in homes even though they knew of its dangers to human beings for nearly a century, courts have held that the "uncontested record shows that when alerted to the risks associated with PCBs, [federal courts have found that] Monsanto made every effort to have [its customers] dispose of the chemicals safely." *See City of Bloomington*, 891 F.2d at 614; *see also City of Phila. v. Beretta*

*U.S.A., Corp.*, 126 F. Supp. 2d 882, 911 (E.D. Pa. 2000), *aff'd* 277 F.3d 415 (3d Cir. 2002) ("Monsanto certainly took a number of laudable steps to prevent the potential entry of its chemicals into the environment.").

*County of Santa Clara* is a clear and unique outlier. Cases advancing similar public nuisance theories against manufacturers in the lead-based paint, asbestos, and chemical contexts have been consistently rejected in at least ten different jurisdictions, including New Jersey, Missouri, Illinois, Rhode Island, California, New Hampshire, Tennessee, Michigan, Massachusetts, Indiana, and North Dakota.[18] Even if *County of Santa Clara* were correctly decided (which Monsanto does not concede), its holding is limited to the unique and particularly egregious factual circumstances surrounding the specific marketing of lead-based paints inside homes, which do not apply here. Further, *County of Santa Clara* does not purport to alter the black letter principle that a defendant must have somehow created or assisted in creating a public nuisance to be liable. *See id*. at 309. The failure to present facts of causation is fatal to the First Cause of Action (Compl., ¶¶ 47-62).

3. Permit-Related Compliance Costs Are Not Recoverable Under a Public Nuisance Theory

The City has failed to plead a cognizable claim because Clean Water Act permit compliance costs incurred to implement a TMDL are not recoverable under public nuisance. No federal or state court has ever awarded Clean Water Act permit compliance costs as a form of

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[18] *See, e.g., In re: Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007) (dismissed); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005) (dismissed); *Cofield v. Lead Indus. Ass'n*, 2000 U.S. Dist. LEXIS 23405 (D. Md. Aug. 17, 2000) (dismissed); *City of Manchester v. Nat'l Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986) (dismissed); *Town of Hooksett School Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126 (D.N.H. 1984) (dismissed); *Cnty. of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984) (dismissed); *Town of Westport v. Monsanto Co.*, No. 14-12041-DJC, 2015 U.S. Dist. LEXIS 36846 (D. Mass. March 24, 2015) (dismissed); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989) (dismissed); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992) (summary judgment); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (summary judgment); *Tioga Pub. School Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993) (jury verdict); *City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575 (Cal. 1994) (affirmed summary judgment in favor of defendants).

"damages" in any public nuisance action.[19] The City's unprecedented attempt to recover such costs from a non-permittee under a broad interpretation of public nuisance has no basis in law. The purpose of TMDLs (and the associated permit limits) is to regulate the amount of *lawful discharges* of pollutants. *See, e.g.*, Total maximum daily loads (TMDL) and individual water quality-based effluent limitations, 40 C.F.R. § 130.7(a) (2001) (describing process of implementing TMDL through water quality management plans and discharge permits).

Monsanto has not discharged any PCBs to San Francisco Bay or to the City's vast stormwater conveyance system. Over at least the past decade, the State has extensively studied PCBs in the bay, yet the State has never named Monsanto as a discharger under the San Francisco Bay TMDL, nor has any investigative or cleanup order for the bay. Because Monsanto has never discharged any PCBs to the San Francisco Bay watershed, Monsanto cannot be regulated under the TMDL directly, or held responsible for the costs to the City of implementing TMDL requirements under a theory of public nuisance.[20] Shifting a

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[19] The few cases that discuss TMDL compliance costs arise out of challenges to the TMDL in the first instance. *See, e.g.*, *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). In none of these cases does a court permit TMDL costs as a form of damages, and the plaintiffs do not even seek such damages. Here, the City has chosen not to challenge the validity of the TMDL, but rather it seeks to pass off the costs to an unregulated, product manufacturer. *See* Compl., at ¶¶ 19, 87. This is an improper form of "back door" regulation of a party the State concluded is not subject to a discharge permit.

The few cases permitting recovery of permit compliance costs were in far different contexts involving issues of products liability and misrepresentation. *See, e.g.*, *Wyle v. Lees*, 2010 N.H. Super. LEXIS 159 (N.H. Super. Ct. Aug. 18, 2010), *aff'd* 162 N.H. 406 (N.H. 2011) (holding plaintiff entitled to costs of compliance with municipal code and required permits regarding his recently purchased apartment building because defendants negligently misrepresented that the modifications defendants previously made met code requirements); *Learjet Corp. v. Spenlinhauer*, 901 F.2d 198, 203 (1st Cir. 1990) (holding that if aircraft owner could establish allegations of fraudulent misrepresentation at trial, he would be entitled to recover costs of complying with an FAA directive that would have been avoided had Learjet's representations been accurate). To allow recovery of Clean Water Act permit compliance costs as damages for an alleged *public nuisance* would be an unwarranted expansion of state nuisance liability, particularly where, as here, there is no causal link between the manufacturer and the "nuisance," and the manufacturer is not alleged to have made any misrepresentations to the City regarding the product.

[20] Not only are permit costs not recoverable under public nuisance, but the specific "damages" at issue here purport to amount to costs associated with operating a municipal stormwater system. For example, by the City's own description, the City's new permit is expected to include proposed control measures such as "additional street sweeping, inlet cleaning, suspect business referral to the Water Board, and ordinances to control the release of PCBs from demolition and renovation activities." *See* Letter from Kerrie Romanow to Bruce

municipality's cost of implementing pollution controls from dischargers to product manufacturers is nonsensical, runs contrary to existing statutory and common law frameworks, and would require an extraordinary expansion of public nuisance law.[21] Further, if the Court were to impose permit compliance costs onto a private entity which the state has chosen not to regulate under its federally delegated TMDL program, as the City suggests the Court should do here, it risks delving into uncharted and complicated preemption issues. In a PCB-disposal nuisance case, a North Carolina federal court dismissed the state nuisance claim "because courts will not enjoin as a nuisance an action authorized by valid legislative authority." *Twitty v. State of North Carolina*, 527 F. Supp. 778, 781 (E.D.N.C. 1981).

Public nuisance law aims to redress interferences with property or public rights, not to reimburse a city for its costs in complying with a permit that "requires the Plaintiff to reduce their [sic] discharge of PCBs into the Bay." Compl., at ¶82. "If 'nuisance' is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied the term to matters not connected either with land or any public right, as mere aberration." W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 618 (W. Page Keeton ed., 5th ed. 1984). Advancing an issue of first impression, the City should not be permitted to redefine nuisance law to shift the costs of restricting its ***own*** PCB discharges to a manufacturer with no causal connection to the alleged public nuisance, in contravention of the detailed regulatory scheme set forth under the Clean Water Act and California's implementing regulations.

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Wolfe, *supra* note 9, RJN, Ex. 3 at 7. No existing case law authorizes a municipality to seek from third parties the costs of performing these types of municipal functions under a public nuisance theory of liability.

[21] Eviscerating the existing limits of public nuisance in this way is likely to prompt an array of unintended consequences. For example, although the City singles out Monsanto, PCBs are just one of countless chemicals regulated by the City's Clean Water Act permit, and the City is subject to numerous TMDL requirements for other permit constituents, such as mercury and pesticides. Allowing the City's claim to proceed would open the door to a massive proliferation of public nuisance claims by municipal dischargers against any number of product manufacturers, with potentially far-reaching economic effects.

4. The City's Clean Water Permit Compliance Costs Are Too Remote And Not Causally Linked To Monsanto's Past Manufacturing Activities Outside California

Even if permit costs were recoverable by municipalities from private parties in theory, the remoteness doctrine bars recovery of such costs under the particular circumstances alleged here. "[C]ourts are not to lay aside traditional notions of remoteness, proximate cause, and duty when evaluating public nuisance claims." *Sahu v. Union Carbide Corp.*, 528 Fed. Appx. 96, 101 (2d Cir. 2013); *see also Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557, 1565 (1990) (liability for nuisance extends to damage proximately caused by the defendant's conduct, not to damage resulting from the independent intervening acts of others).

Notwithstanding the City's conclusory allegation that it suffered monetary damages "[a]s a direct and proximate result of Monsanto's creation of a public nuisance" (Compl., at ¶ 91), the City fails to allege any facts showing a causal link between Monsanto's manufacture of PCB *products* decades ago outside California and the costs the City must incur today to comply with its own lawful discharge limits of stormwater containing trace amounts of PCBs.

The "public nuisance" as alleged in the Complaint relates to PCB leaks or discharges by *unnamed third parties*, and the City cannot reach back into the chain of distribution to impose liability where Monsanto did nothing more than produce and sell a legal product incorporated into other products. *See In re Firearm Cases*, 126 Cal. App. 4th at 991 (dismissing plaintiffs' complaint for lack of causation because the "complaint attempt[ed] to reach too far back in the chain of distribution when it target[ed] the manufacturer of a legal, nondefective product that lawfully distributes its product."). Underscoring the remoteness of the municipality's claim in this case, the unspecified permit-related costs that the City seeks are the result of regulatory requirements imposed *nearly four decades after Monsanto stopped manufacturing PCBs* (Compl., at ¶¶ 19, 87), and they arise from thousands of intervening acts by third-party dischargers. Some of those intervening acts, according to the State, occurred as far away as the Central Valley over 100 miles away. The City's claim here fails for remoteness.

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5. The City Lacks Jurisdictional Standing to Assert a Public Nuisance over San Francisco Bay or its Tidelands

The City has failed to allege *any* facts that the municipality possesses an "ownership" or other property interest in San Francisco Bay—a required element of a public nuisance claim in California. Such a claim "may be brought by any person *whose property is injuriously affected*, or whose personal enjoyment is lessened by a nuisance ... in the name of the people of the State of California … by the … city attorney of any town or city *in which the nuisance exists*." C.C.P. § 731 (emphasis added). Here, the City alleges that "Monsanto manufactured, distributed, marketed, and promoted PCBs in a manner that created or participated in creating a public nuisance that is harmful to health and obstructs the free use of the Bay," but notably it never asserts that it has any property rights to the bay. *See* Compl., at ¶ 78.

In fact, federal, state and local entities other than the City have specific property rights in and regulatory jurisdiction over aspects of San Francisco Bay. As a general matter, the State of California has title to San Francisco Bay's tidal and submerged lands, held in trust for its citizens.[22] Jurisdiction over the bay's tidelands and submerged lands lies exclusively with the California State Lands Commission, unless otherwise granted by the State, and no such grants have been made within Santa Clara County, where the City of San Jose is located.[23] Cal. Pub. Res. Code § 6301. Further, the San Francisco Bay Conservation and Development Commission is charged with water and land use planning authority over San Francisco Bay. Cal. Gov. Code §§ 66604, 66610; 14 C.C.R. § 10121(a). Finally, the federal government is the landowner closest to the south San Francisco Bay, and it manages the area as a wildlife refuge. [24]

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[22] *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57, 65-66 (1873) ("Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State . . . .").

[23] *See* CAL. STATE LANDS COMM'N, GRANTEE STATUTES BY COUNTY, *available at* http://www.slc.ca.gov/Programs/Grantee_Regions.html, RJN, Ex. 10.

[24] *See* U.S. FISH & WILDLIFE SERV., FINAL COMPREHENSIVE CONSERVATION PLAN, DON EDWARDS SAN FRANCISCO BAY NATIONAL WILDLIFE REFUGE, at 1, 8−12, 35-37 (Oct. 2012), RJN, Ex. 11.

Without property or trustee rights to San Francisco Bay, where the alleged public nuisance exists, the City lacks jurisdictional standing to assert a public nuisance and cannot seek abatement or money damages. *Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving Co. of Am., Inc.*, 221 Cal. App. 3d 1601, 1615 (1990), *overruled on other grounds* (holding that the government may recover damages for public nuisance only if it has a property interest injured by the nuisance). For this independent reason, the First Cause of Action must be dismissed.

6. The City Seeks to Expand Improperly the Public Nuisance Doctrine to Circumvent Products Liability Laws

By labeling its claim as one for public nuisance, as opposed to products liability, the City seeks to circumvent the well-established limitations of California's products liability laws. But "the law of nuisance is not intended to serve as a surrogate for ordinary products liability." *See City of Modesto Redevelopment Agency*, 119 Cal. App. 4th at 39 (refusing to expand public nuisance to include claims that are better addressed under products liability law). Courts have routinely rejected plaintiffs' attempts—like those here—to circumvent products liability doctrines by recasting ordinary products liability claims as public nuisance claims. *City of Merced Redevelopment Agency v. ExxonMobil Corp.*, 2015 U.S. Dist. LEXIS 13549, at *35 (E.D. Cal. Feb. 4, 2015) (creation of a public nuisance "must amount to more than simply the manufacture or distribution of [a] defective product—rather, a defendant must take other 'affirmative acts' that contribute 'directly' to the nuisance."); *Town of Westport*, 2015 U.S. Dist. LEXIS 36846, at *8 ("Courts have largely rejected nuisance theory in the lead paint and asbestos contexts…."); *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ( "[N]uisance law does not afford a remedy against the manufacturer of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of that product in the building."); *Philadelphia*, 126 F. Supp. 2d at 910 (refusing to expand public nuisance law to the manufacturing, marketing, and distribution of products).

Clever pleading to avoid the elements of products liability cannot alter the fact that manufacturers of ordinary consumer products that, although legal when sold, "have become

dangerous through deterioration and poor maintenance by purchasers," are not liable for public nuisance. *See In re Lead Paint Litig.*, 924 A.2d 484, 502 (N.J. 2007). Importantly, a similar municipal claim was rejected in the asbestos context when another California city unsuccessfully sued the manufacturers of asbestos-containing building materials for public nuisance.

In *City of San Diego*, the California municipality alleged that the deterioration of asbestos-containing building materials in city buildings created a nuisance, and it sought recovery from the manufacturer for cleanup costs and other damages under theories of public nuisance and equitable indemnity. *See City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 587−88 (1994). The court rejected the city's claims, holding that they amounted to "a products liability action in the guise of a nuisance action." *Id.* at 586−87 (the city also could cite no California decision allowing recovery for a defective product under a nuisance cause of action). In doing so, the court noted that "all courts that have considered this question have rejected a nuisance claim as a theory of recovery for asbestos contamination." *Id*. at 586. The court also recognized that, if it accepted the city's theory, almost every products liability action would be converted into a nuisance action, such that "nuisance 'would become a monster that would devour in one gulp the entire law of tort.'" *Id*.

Now, the City of San Jose is picking up where the City of San Diego left off by asserting the same public nuisance and equitable indemnity claims against the manufacturer of a different product for the alleged deterioration of third-party products containing a chemical component. As with the City of San Diego's attempt two decades ago, allowing the City of San Jose's claims to proceed under the far more attenuated factual circumstances alleged here would stretch the public nuisance doctrine well beyond its limits and create a dangerous precedent for circumventing California's carefully crafted products liability framework. Because the City attempts to mask a products liability claim as public nuisance, its public nuisance claim (Compl., ¶¶ 47-62) must be dismissed.

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**C. Plaintiff's Second Cause of Action Fails to State a Claim for Equitable Indemnity**

1. The City Fails to Allege Any Joint and Several Legal Obligation with Monsanto

The Complaint fails to state a cognizable claim for equitable indemnity because it is devoid of any legal showing that Monsanto is jointly and severally liable with the City to a third party for the alleged harm to the bay. Under California law, "[j]oint and several liability is a prerequisite for equitable indemnity." *Leko v. Cornerstone Bldg. Inspection Serv.*, 86 Cal. App. 4th 1109, 1115 (2001). Put another way, the equitable indemnity doctrine applies *only* among defendants who are jointly and severally liable by law to an injured third party.[25] Equitable indemnity is unavailable when an entity has no pertinent duty to the injured third party, or the entity has been found not to be responsible for the alleged injury at issue (*e.g.*, not identified as a discharger by the State in a cleanup order or TMDL). *See Jocer Enters., Inc. v. Price*, 183 Cal. App. 4th 559, 573−74 (2010).

Here, the Complaint cites no legal basis (nor could it) for the City and Monsanto to be jointly obligated to the State of California, or any other "injured" third party for permit compliance. Nor has Monsanto been investigated by the State as a discharger of PCBs or named as one in any TMDL for San Francisco Bay. In fact, the City has not alleged (*and cannot allege*) that Monsanto discharged *any* PCBs to San Francisco Bay or the City's stormwater conveyance system; rather, the City's allegations focus solely on Monsanto's manufacture and sale of PCBs over four decades ago (Compl., at ¶ 23, 78)—which constituted lawful, useful products at the time they were produced and sold. Therefore, the City's Second Cause of Action for equitable indemnity (Compl., ¶¶ 92−95) fails as a matter of law.

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[25] *See, e.g., Amerigas Propane, LP v. Landstar Ranger, Inc.*, 184 Cal. App. 4th 981, 989 (2010); *Greystone Homes, Inc. v. Midtec, Inc.*, 168 Cal. App. 4th 1194, 1218 (2008); *Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group*, 143 Cal. App. 4th 1036, 1040 (2006); *Stonegate Homeowners Ass'n. v. Staben*, 144 Cal. App. 4th 740, 751 (2006); *BFGC Architects Planners, Inc. v. Forcum/Mackey Constr., Inc.*, 119 Cal. App. 4th 848, 852 (2004).

2. The City's Equitable Indemnity Claim Is Time-Barred

The City's equitable indemnity claim is also barred by the one-year statute of limitations for equitable indemnity. A cause of action for equitable indemnity accrues at the time a plaintiff is compelled to pay damages (here, when the City incurred permit-related costs).[26] Accordingly, the one-year statute of limitations on the City's equitable indemnity claim began to run when the City first incurred costs to control PCB discharges. *Smith v. Parks Manor*, 197 Cal. App. 3d 872, 882 (1987) ("The applicable statute of limitations for actions seeking equitable indemnity is one year."); *see also Mangini v. Aerojet-General Corp*, 230 Cal. App. 3d 1125, 1154 (1991), *superseded on other grounds* (assuming one-year statute of limitations for equitable indemnity claim); *Seibels Bruce Group, Inc. v. R.J. Reynolds Tobacco Co.*, 1999 U.S. Dist. LEXIS 15320, at *32, n. 8 (N.D. Cal. Sep. 21, 1999) ("California courts . . . have found that a claim for equitable indemnity must be brought within one year of . . . accru[al].").

Based on the City's own Complaint (and the relevant permit documents, which have been incorporated by reference therein), the City had incurred costs to mitigate PCB discharges under its existing stormwater permit by September 2010 (and likely even earlier), as evidenced by the documentation of PCB-control efforts in its judicially noticeable 2010 Annual Report. The City admits in its Complaint that it "has spent money in efforts to reduce PCB discharge" to meet TMDL goals pursuant to its existing stormwater permit. Compl., at ¶¶ 14-16. Such permit limitations became effective December 1, 2009, and included directives to investigate or mitigate PCB discharges that were required to be completed by the City pursuant to the TMDL[27] prior to

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[26] *Boyajin v. Ordoubadi*, 184 Cal. App. 4th 1020, 1027 (2010) ("It is indeed true . . . that a cause of action for equitable indemnity does not exist until the underlying loss is paid. . . . [This] rule . . . is one by which the statute of limitations is tested."); *see also Mangini*, 230 Cal. App. 3d at 1154 ("It is well settled that, in the absence of a contrary statutory command, a cause of action for equitable indemnity does not come into existence until the indemnitee has suffered loss through payment.").

[27] Although the PCB TMDL for San Francisco Bay did not become effective until March 2010, its provisions were incorporated into the City's December 2009 stormwater permit, since it had already been adopted by the San Francisco Regional Water Quality Control Board on February 13, 2008 and the California State Water Resources Control Board in October 20, 2009.

the submittal of its September 2010 Annual Report.[28] The City's September 2010 Annual Report, in turn, documents the City's efforts to comply with such directives through its participation in several work groups—confirming that the City necessarily incurred costs to address PCBs no later than September 2010 (and presumably even earlier).[29] Accordingly, the statute of limitations had already begun to run on the City's equitable indemnity claim no later than September 2010, and it expired, at the latest, in September 2011—almost four years before the City filed suit in July 2015.

Further, the mere increase in damages (here, permit costs) does not "re-start the clock" on the statute of limitations. The statute of limitations accrues when the plaintiff has suffered appreciable damage from a wrongful act. *Lyles v. State of California*, 153 Cal. App. 4th 281, 286 (2007). Additional damage from the same wrong does not delay the accrual of or extend the limitations period. *See id*. at 290 (the statute of limitations accrued following the "single 'activity' that occurred once," notwithstanding continuing damage to plaintiff's property due to ongoing subway construction). "[T]he infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period…. [N]either uncertainty as to amount of damages nor difficulty in proving damages tolls the period of limitations." *See Engstrom v. Kallins*, 49 Cal. App. 4th 773, 783 (1996), citing *Davies v. Krasna*, 14 Cal. 3d 502, 514 (1975). The City's claim for equitable indemnity accrued no later than September 2010, expired no later

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[28] *See* CAL. REG'L WATER QUALITY CONTROL BD., SAN FRANCISCO BAY REGION, ORDER NO. R2-2009-0074, NPDES NO. CAS612008, MUNICIPAL REGIONAL STORMWATER NPDES PERMIT, at 95 (Oct. 14, 2009) (requiring City to report results of training PCB inspectors in 2010 Annual Report); at 96 (requiring City to submit a sampling and analysis plan for evaluating PCBs at certain construction sites, and available sampling results, in 2010 Annual Report); at 96-97 (requiring City to work with other permittees to conduct pilot projects to investigate high-concentration drainage sources, and identify the areas to be investigated in their 2010 Annual Report); at 99 (requiring City to submit feasibility evaluation for reducing PCB levels through stormwater diversion in 2010 Annual Report); at 101 (requiring City to submit work plans for PCB fate/transport studies and risk reduction studies in 2010 Annual Report), RJN, Ex. 12.

[29] *See* CITY OF SAN JOSE STORMWATER MANAGEMENT ANNUAL REPORT 2009-2010 at i-8 (Sep. 2010), RJN, Ex. 13 ("The City also continued to support the San Francisco Bay Regional Monitoring Program . . . which is planning and implementing a number of projects to evaluate sources and loadings of . . . PCBs. The City is an active participant in regional efforts to understand and control stormwater inputs of . . . PCBs to the Bay.")

than September 2011, and is thus time-barred regardless of any permit-related cost increases in 2015.

**D. The City's Second Prayer for Relief (Punitive Damages) Should be Dismissed**

The City's prayer for punitive damages must be dismissed because the City has not alleged any facts showing that Monsanto acted with fraud, oppression, or malice through its historical and lawful manufacture of PCBs. A plaintiff must allege facts showing that the defendant is "guilty of oppression, fraud, or malice" to state a valid claim for punitive damages. *See* Cal. Civ. Code § 3294(a); *Coppola v. Smith*, 982 F. Supp. 2d 1133, 1145 (E.D. Cal. 2013) (dismissing a punitive damages request where the complaint failed to allege facts of defendant's oppression, fraud, or malice, and observing that a claim for nuisance "do[es] not automatically entail a right to punitive damages."). Not only are the terms "fraud," "oppression," or "malice" conspicuously absent from the Complaint, so too are the necessary facts in support.

The City also failed to specify the theory under which it seeks punitive damages. Instead, the City alleges that Monsanto manufactured and distributed an allegedly hazardous, yet legal, chemical, when it knew or should have known that PCBs could be released into the environment after leaving Monsanto's possession. Compl., at ¶¶ 78, 90. In other words, the City seeks punitive damages under a theory that Monsanto produced and sold a lawful product and that subsequent purchasers (or purchasers of purchasers) released PCBs as far away as the Central Valley in a fashion that ultimately caused them to reach the bay. Such facts do not plausibly suggest Monsanto acted from any "evil motive." *See Coppola*, 982 F. Supp. 2d at 1145 (dismissing request for punitive damages under nuisance theory where the complaint failed to allege the nature of the releases or any facts that such releases were the result of an evil motive). Therefore, the City's prayer for punitive damages should be dismissed with prejudice.

**E. The City's Third Prayer for Relief (Attorney's Fees) Should be Dismissed**

Under California law, a party is not entitled to attorney's fees from an opposing party unless a statute or contract specifically provides otherwise, and the City has not identified any statute or agreement entitling it to attorney's fees here. C.C.P. § 1021. By its plain terms, C.C.P. Section 1021.8 authorizes only the State Attorney General to recover attorney's fees when it

prosecutes a public nuisance. Further, a public entity, such as the City, is specifically precluded from recovering attorney's fees from a private defendant. C.C.P. § 1021.5 (applying to "allowances *against*, ***but not in favor of***, public entities.") (emphasis added); *see also City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal. App. 3d 229, 255 (1986) ("[A] public entity is not to receive attorney's fees under the private attorney general theory."); *Cooper v. Mitchell Brothers' Santa Ana Theater*, 165 Cal. App. 3d 378, 385−86 (1985) (refusing to award attorney's fees to a city in a public nuisance action because Section 1021.5 "expressly states that it is not applicable in favor of public entities."). Because the law prohibits that City from seeking attorney's fees from Monsanto, a private entity, the City's Third Prayer for Relief (attorney's fees) must be dismissed.

## IV. CONCLUSION

For the multiple and independent reasons set forth above, the Complaint's First and Second Causes of Action, and the Second and Third Prayers for Relief, are legally defective and the Complaint should be dismissed in its entirety with prejudice.

Dated: August 3, 2015

LATHAM & WATKINS LLP

By s/Robert M. Howard
Robert M. Howard

Attorneys for Defendants
MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA LLC