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13 **UNITED STATES DISTRICT COURT**

14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 SAN DIEGO UNIFIED PORT
 DISTRICT, a public corporation; and
 16 CITY OF SAN DIEGO, a municipal
 corporation,

17 **PLAINTIFFS,**

18 v.

19 MONSANTO COMPANY,
 20 SOLUTIA INC., and
 PHARMACIA CORPORATION,
 21

22 **DEFENDANTS.**

CASE NO. 3:15-CV-0578-WQH-JLB

**PLAINTIFF SAN DIEGO UNIFIED
 PORT DISTRICT'S FIRST
 AMENDED COMPLAINT**

Judge: Hon. William Q. Hayes
 Filed Date: March 13, 2015

23 Plaintiff, SAN DIEGO UNIFIED PORT DISTRICT (“the Port District”),
 24 hereby alleges, upon information and belief, as follows:

25 **I. INTRODUCTION**

26 1. Polychlorinated biphenyls (or “PCBs”) are man-made chemical
 27 compounds that have become notorious as global environmental contaminants –
 28

1 found in bays, oceans, rivers, streams, soil, and air. In humans, PCB exposure is
2 associated with cancer as well as serious non-cancer health effects, including effects
3 on the immune system, reproductive system, nervous system and endocrine system,
4 among others. In the environment, PCBs have widespread deleterious effects and
5 can impair and even destroy populations of fish, birds, and other animals.

6 2. Monsanto Company was the sole manufacturer of PCBs in the United
7 States from 1935 to 1979, and trademarked the name “Aroclor” for certain PCB
8 compounds. For decades, Monsanto knew that PCBs were toxic, that they could not
9 be contained and were widely contaminating all natural resources and living
10 organisms, and that there was no safe way to dispose of PCBs. Monsanto concealed
11 these facts and continued producing PCBs until Congress enacted the Toxic
12 Substances Control Act (“TSCA”), which banned the manufacture of and most uses
13 of PCBs.

14 3. PCBs have been found in and around San Diego Bay (“the Bay”) at
15 levels that require cleanup in certain areas. At different times and locations, PCBs
16 have been detected in the Bay’s water, sediments, fish and lobsters. PCBs entered
17 the Bay through a variety of ways. PCBs regularly leach, leak, off-gas and escape
18 their intended applications into air, soil and water. PCBs also leach from landfills
19 and other disposal locations and enter the Bay with stormwater and other runoff.

20 4. As a public property owner and trustee of natural resources in and
21 surrounding the Bay, Plaintiff Port District seeks all past and future costs associated
22 with investigating and removing PCBs from in and around the Bay and preventing
23 future injuries. In its own right and in its capacity as trustee for the public, the Port
24 District also seek damages for injuries to property and the natural resources of the
25 Bay and seeks abatement of the public nuisance caused by PCBs in and around the
26 Bay.

1 **II. PARTIES**

2 **A. Plaintiffs**

3 5. Plaintiff Port District is a public entity created by the San Diego
4 Unified Port District Act (California Harbors & Navigation Code, Appendix 1, § 1
5 *et seq.*) enacted by the California Legislature in 1962 (the “Port Act”). The Port
6 District is a trustee for the people of the State of California, which holds and
7 manages the tidelands and submerged lands in and around San Diego Bay “for the
8 development, operation, maintenance, control, regulation, and management of the
9 harbor of San Diego ... and for the promotion of commerce, navigation, fisheries,
10 and recreation therein.” Harb. & Nav. Code App. 1, §§2, 4, 5, 5.5. The Port District
11 is specifically authorized to use its “powers and authority ... to protect and enhance
12 ... physical access to the bay ... natural resources of the bay, including plant and
13 animal life ... [and] quality of water in the bay.” *Id.* The Port District holds and
14 exercises land management authority over the tidelands and submerged lands in and
15 around San Diego Bay. The Port District is the successor to the powers vested in
16 the cities that make up the Unified Port District, and the powers of those cities
17 related to these properties are vested in the Port District. *Id.* at § 70.

18 6. Plaintiff Port District brings this suit pursuant to California Code of
19 Civil Procedure 731, and California Civil Code sections 3479, 3480, 3491, 3493,
20 and 3494 and any other applicable codes or sources of relief available for monetary
21 damages and abatement of the public nuisance caused by PCBs in the Bay.

22 7. Plaintiff City is a California Charter City and municipal corporation,
23 duly organized and existing by virtue of the laws of the State of California. The
24 City was the trustee of certain relevant tidelands and submerged lands in and around
25 the Bay from the early 1900s through 1963, when that property was transferred to
26 the Port District. Plaintiff City is filing, or has filed, a separate First Amended
27 Complaint.
28

1 **B. Defendants**

2 8. Defendant Monsanto Company is a Delaware corporation with its
3 principal place of business in St. Louis, Missouri.

4 9. Defendant Solutia Inc. (“Solutia”) is a Delaware corporation with its
5 headquarters and principal place of business in St. Louis, Missouri.

6 10. Defendant Pharmacia LLC (formerly known as “Pharmacia
7 Corporation” and successor to the original Monsanto Company) is a Delaware
8 limited liability company with its principal place of business in Peapack, New
9 Jersey. Pharmacia is now a wholly-owned subsidiary of Pfizer, Inc.

10 11. The original Monsanto Company (“Old Monsanto”) operated an
11 agricultural products business, a pharmaceutical and nutrition business, and a
12 chemical products business. Old Monsanto began manufacturing PCBs in the 1930s
13 and continued to manufacture commercial PCBs until the late 1970s.

14 12. Through a series of transactions beginning in approximately 1997, Old
15 Monsanto’s businesses were spun off to form three separate corporations. The
16 corporation now known as Monsanto operates Old Monsanto’s agricultural products
17 business. Old Monsanto’s chemical products business is now operated by Solutia.
18 Old Monsanto’s pharmaceuticals business is now operated by Pharmacia.

19 13. Solutia was organized by Old Monsanto to own and operate its
20 chemical manufacturing business. Solutia assumed the operations, assets, and
21 liabilities of Old Monsanto’s chemicals business.¹

22 14. Although Solutia assumed and agreed to indemnify Pharmacia (then
23

24 ¹ See MONSANTO COMPANY’S ANSWER TO THE COMPLAINT AND JURY DEMAND,
25 *Town of Lexington v. Pharmacia Corp., Solutia, Inc., and Monsanto Company*, C.A.
26 No. 12-CV-11645, D. Mass. (October 8, 2013); see also Relationships Among
27 Monsanto Company, Pharmacia Corporation, Pfizer Inc., and Solutia Inc.,
<http://www.monsanto.com/whoware/pages/monsanto-relationships-pfizer-solutia.aspx> (last accessed July 29, 2015).

1 known as Monsanto Company) for certain liabilities related to the chemicals
2 business, Defendants have entered into agreements to share or apportion liabilities,
3 and/or to indemnify one or more entity, for claims arising from Old Monsanto's
4 chemical business – including the manufacture and sale of PCBs.²

5 15. In 2003, Solutia filed a voluntary petition for reorganization under
6 Chapter 11 of the U.S. Bankruptcy Code. Solutia's reorganization was completed in
7 2008. In connection with Solutia's Plan of Reorganization, Solutia, Pharmacia and
8 New Monsanto entered into several agreements under which Monsanto Company
9 continues to manage and assumed financial responsibility for certain tort litigation
10 and environmental remediation related to the Chemicals Business.³

11 16. Monsanto Company, Solutia, and Pharmacia are collectively referred
12 to in this Complaint as "Defendants" or "Monsanto."

13 **III. JURISDICTION AND VENUE**

14 17. This Court has jurisdiction pursuant to 28 U.S.C. §1332 because
15 complete diversity exists between Plaintiffs and Defendants. Each Plaintiff is
16 located in California, but no Defendant is a citizen of California. Monsanto
17 Company is a Delaware corporation with its principal place of business in St. Louis,
18 Missouri. Solutia is a Delaware corporation with its principal place of business in
19 St. Louis, Missouri. Pharmacia is a Delaware limited liability company with its
20 principal place of business in Peapack, New Jersey.

21 18. Venue is appropriate in this judicial district pursuant to 28 U.S.C. §
22 1391(a) because a substantial part of the property that is the subject of the action is
23 situated in this judicial district.

24
25 ² *See id.*

26 ³ *See* Monsanto's Form 8-K (March 24, 2008), and Form 10-Q (June 27, 2008),
27 available at <http://www.monsanto.com/investors/pages/sec-filings.aspx> (last
28 accessed July 29, 2015).

1 **IV. FACTUAL ALLEGATIONS**

2 **A. PCBs are Toxic Chemicals that Cannot Be Contained and**
3 **that Cause Environmental Contamination.**

4 19. Polychlorinated biphenyl, or “PCB,” is a molecule comprised of
5 chlorine atoms attached to a double carbon-hydrogen ring (a “biphenyl” ring). A
6 “PCB congener” is any single, unique chemical compound in the PCB category.
7 Over two hundred congeners have been identified.⁴

8 20. PCBs were generally manufactured as mixtures of congeners. From
9 approximately 1935 to 1979, Monsanto Company was the only manufacturer in the
10 United States that intentionally produced PCBs for commercial use.⁵ The most
11 common trade name for PCBs in the United States was “Aroclor,” which was
12 trademarked by Old Monsanto.

13 21. Monsanto’s commercially-produced PCBs were used in a wide range
14 of industrial applications in the United States, including electrical equipment such as
15 transformers, motor start capacitors and lighting ballasts. In addition, PCBs were
16 incorporated into a variety of products such as caulks, paints and sealants.

17 22. As used in this Complaint, the terms “PCB,” “PCBs,” “PCB-containing
18 products,” and “PCB products” refer to products containing polychlorinated
19 biphenyl congener(s) manufactured for placement into trade or commerce, including
20 any product that forms a component part of, or that is subsequently incorporated
21 into, another product.

22 23. PCBs easily migrate or leach out of their original source material or

23 _____
24 ⁴ Table of PCB Congeners, available at <http://www.epa.gov/epawaste/hazard/tsd/pubs/pubs/congeners.htm> (last accessed July 29, 2015).

25 ⁵ See 116 Cong. Record 11695, 91st Congress, (April 14, 1970) (“Insofar as the
26 Monsanto Co., the sole manufacturer of PCB’s is concerned”); 121 Cong.
27 Record 33879, 94th Congress, (October 23, 1975) (“The sole U.S. producer,
Monsanto Co.”). See also MONS 058730-058753 at 058733 (identifying other
producers as “all ex-USA.”), attached as Exhibit A.

1 enclosure and contaminate nearby surfaces, air, water, soil and other materials. For
2 example, PCB compounds volatilize out of building materials (such as caulk) into
3 surrounding materials such as masonry, wood, drywall and soil, thereby causing
4 damage to those surrounding materials. PCBs can also escape from totally-enclosed
5 materials (such as light ballasts) and similarly contaminate and damage surrounding
6 materials and escape into the environment.

7 24. PCBs present serious risks to the health of humans, wildlife and the
8 environment.

9 25. Humans may be exposed to PCBs through ingestion, inhalation and
10 dermal contact. Individuals may inhale PCBs that are emitted into the air. They
11 may also ingest PCBs that are emitted into air and settle onto surfaces that come into
12 contact with food or drinks. And humans may absorb PCBs from physical contact
13 with PCBs or PCB-containing materials.

14 26. EPA has determined that Monsanto's PCBs are probable human
15 carcinogens. In 1996, EPA reassessed PCB carcinogenicity, based on data related to
16 Aroclors 1016, 1242, 1254 and 1260.⁶ EPA's cancer reassessment was peer
17 reviewed by 15 experts on PCBs, including scientists from government, academia
18 and industry, all of whom agreed that PCBs are probable human carcinogens.

19 27. In addition, EPA concluded that PCBs are associated with serious
20 non-cancer health effects. From extensive studies of animals and primates using
21 environmentally relevant doses, EPA has found evidence that PCBs exert significant
22 toxic effects, including effects on the immune system, the reproductive system, the
23 nervous system and the endocrine system.

24
25 ⁶ EPA, PCBs: Cancer Dose-Response Assessment and Application to
26 Environmental Mixtures, EPA/600/P-96/001F (September 1996), available at
27 <http://www.epa.gov/epawaste/hazard/tsd/pcbs/pubs/pcb.pdf> (last accessed July 29,
2015).

1 28. PCBs are known to be toxic to a number of aquatic species and wildlife
2 including fish, marine mammals, reptiles, amphibians and birds. The presence of
3 PCBs can cause changes in community and ecosystem structure and function.⁷

4 **B. Monsanto Has Long Known of PCBs' Toxicity.**

5 29. Monsanto was well aware of scientific literature published in the 1930s
6 that established that inhalation in industrial settings resulted in toxic systemic
7 effects.⁸

8 30. An October 11, 1937, Monsanto memorandum advised that
9 "Experimental work in animals shows that prolonged exposure to Aroclor vapors
10 evolved at high temperatures or by repeated oral ingestion will lead to systemic toxic
11 effects. Repeated bodily contact with the liquid Aroclors may lead to an acne-form
12 skin eruption."⁹

13 31. A September 20, 1955, memo from Emmet Kelly set out Monsanto's
14 position with respect to PCB toxicity: "We know Aroclors are toxic but the actual
15 limit has not been precisely defined. It does not make too much difference, it seems
16 to me, because our main worry is what will happen if an individual develops [*sic*]
17 any type of liver disease and gives a history of Aroclor exposure. I am sure the juries
18 would not pay a great deal of attention to [maximum allowable concentrates]."¹⁰

19 32. On November 14, 1955, Monsanto's Medical Department provided an
20 opinion that workers should not be allowed to eat lunch in the Aroclor department:

21 It has long been the opinion of the Medical Department that eating in
22 process departments is a potentially hazardous procedure that could
23 lead to serious difficulties. While the Aroclors are not particularly

24 ⁷ See EPA, Understanding PCB Risks, available at <http://www.epa.gov/housatonic/understandingpcbriks.html#WildlifeEcologicalRiskAssessment> (last accessed July
25 29, 2015).

26 ⁸ See Exhibits B, C and F.

27 ⁹ MONS 061332, attached as Exhibit B.

28 ¹⁰ MONS 095196-7, attached as Exhibit C.

1 hazardous from our own experience, this is a difficult problem to define
2 because early literature work claimed that chlorinated biphenyls were
quite toxic materials by ingestion or inhalation.¹¹

3 33. On January 21, 1957, Kelly reported that after conducting its own tests,
4 the U.S. Navy decided against using Monsanto's Aroclors: "No matter how we
5 discussed the situation, it was impossible to change their thinking that Pydraul 150
6 [which contained PCBs] is just too toxic for use in a submarine."¹²

7 34. In 1966, Kelly reviewed a presentation by Swedish researcher Soren
8 Jensen, who stated that PCBs "appeared to be the most injurious chlorinated
9 compounds of all tested."¹³ Jensen refers to a 1939 study associating PCBs with the
10 deaths of three young workers and concluding that "pregnant women and persons
11 who have at any time had any liver disease are particularly susceptible."¹⁴ Kelly
12 does not dispute any of Jensen's remarks, noting only, "As far as the section on
13 toxicology is concerned, it is true that chloracne and liver trouble can result from
14 large doses."¹⁵

15 35. At the same time, Monsanto was promoting the use and sale of Aroclor
16 and other PCB compounds. In a 1960 brochure, Monsanto promoted the use of
17 Aroclors in transformers and capacitors, utility transmission lines, home appliances,
18 electric motors, fluorescent light ballasts, wire or cable coatings, impregnants for
19 insulation, dielectric sealants, chemical processing vessels, food cookers, potato
20 chip fryers, drying ovens, thermostats, furnaces and vacuum diffusion pumps.
21 Aroclors could also be used, the brochure advertised, as a component of automotive
22 transmission oil; insecticides; natural waxes used in dental casting, aircraft parts,
23

24 ¹¹ Monsanto Chemical Company, Memorandum to H.B. Patrick, November 14,
25 1955 (no Bates number), attached as Exhibit D.

¹² MONS 095640, attached as Exhibit E.

¹³ See JDGFOX00000037-63, attached as Exhibit F.

¹⁴ *Id.* at JDGFOX00000039.

¹⁵ *Id.* at JDGFOX00000037.

1 and jewelry; abrasives; specialized lubricants; industrial cutting oils; adhesives;
2 moisture-proof coatings; printing inks; papers; mastics; sealant; caulking
3 compounds; tack coatings; plasticizers; resin; asphalt; paints, varnishes, and
4 lacquers; masonry coatings for swimming pools, stucco homes, and highway paints;
5 protective and decorative coatings for steel structures, railway tank and gondola
6 cars; wood and metal maritime equipment; and coatings for chemical plants, boats,
7 and highway marking.¹⁶

8 36. A 1961 brochure explained that Monsanto's Aroclors were being used
9 in "lacquers for women's shoes," as "a wax for the flame proofing of Christmas
10 trees," as "floor wax," as an adhesive for bookbinding, leather, and shoes, and as
11 invisible marking ink used to make chenille rugs and spreads.¹⁷

12 37. Thus, by February 1961, at the latest, Monsanto knew that its Aroclors
13 were being used in a variety of industrial, commercial, household and consumer
14 goods. Moreover, Monsanto affirmatively encouraged these uses by encouraging
15 salesmen to market products for these and other applications.

16 38. Years later, in 1970, Monsanto tried to distance itself from the variety
17 of applications of Aroclors that it proudly espoused a few years before. In a press
18 release, the company claimed: "What should be emphasized ... is that PCB was
19 developed over 40 years ago primarily for use as a coolant in electrical transformers
20 and capacitors. It is also used in commercial heating and cooling systems. It is not a
21 'household' item."¹⁸

25 ¹⁶ The Aroclor Compounds (hand-dated May 1960), 0509822-66, attached as
Exhibit S.

26 ¹⁷ Plasticizer Patter (February 1961), 0627503-21, attached as Exhibit T.

27 ¹⁸ See Press release (July 16, 1970), MCL000647-50, attached as Exhibit V, at
MCL000648.

1 39. In 1975, William Papageorge, then Monsanto's manager of product
2 acceptability, admitted that PCBs had been used in all types of products.
3 Papageorge testified at a public hearing before the Wisconsin Department of Natural
4 Resources that "[t]he past uses [of PCB's] ... were many and varied. ... They go on
5 and on. Virtually anything you can imagine, at one time or another, someone tried
6 PCB's in them."¹⁹

7 **C. Monsanto Has Long Known that PCBs Were "Global
8 Contaminants" Causing Harm to Animals and Fish.**

9 40. Monsanto also knew that PCBs were causing widespread
10 contamination of the environment, far beyond the areas of its use.²⁰

11 41. Monsanto's Medical Director reviewed an article by Swedish
12 researcher Soren Jensen, who reported the detection of PCBs in the tissues of fish
13 and wildlife in Sweden.²¹ The report noted that PCBs were also detected in the air
14 over London and Hamburg and found in seals caught off the coast of Scotland.
15 Jensen concluded that PCBs can "be presumed to be widespread throughout the
16 world."²²

17 42. A December 1968 article by Richard Risebrough identified chlorinated
18 hydrocarbons (which include PCBs) as "the most abundant synthetic pollutants
19 present in the global environment."²³ The article reported finding significant
20 concentrations of PCBs in the bodies and eggs of peregrine falcons and 34 other bird
21
22

23 ¹⁹ See Declaration of Kathleen L. Roach, Exhibit 43 (Document 681-43) at p. 27,
24 *Appleton Papers, Inc. and NCR Corp. v. George A. Whiting Paper Co.*, Case
2:08-cv-00016- WCG (E.D.Wis.), attached as Exhibit W.

25 ²⁰ See Exhibits G, H and L.

26 ²¹ New Scientist (Dec. 15, 1966), MONSFOX00003427, attached as Exhibit G.

27 ²² *Id.*

28 ²³ R.W. Risebrough, Polychlorinated Biphenyls in the Global Ecosystem, *Nature*,
Vol. 220 (December 14, 1968), attached as Exhibit H.

1 species. The report linked PCBs to the rapid decline in peregrine falcon populations
2 in the United States.

3 43. Despite growing evidence of PCBs' infiltration of every level of the
4 global ecology, Monsanto remained steadfast in its production of Aroclors and other
5 PCBs.

6 44. On March 6, 1969, Monsanto Research Center employee W.R. Richard
7 wrote a memorandum discussing Risebrough's article that criticized PCBs as a
8 "toxic substance," "widely spread by air-water; therefore, an uncontrollable
9 pollutant ... causing extinction of peregrine falcon ... [and] endangering man
10 himself."²⁴ Richard explained that Monsanto could take steps to reduce PCB
11 releases from its own plants but cautioned, "It will be still more difficult to control
12 other end uses such as cutting oils, adhesives, plastics, and NCR paper. In these
13 applications exposure to consumers is greater and the disposal problem becomes
14 complex."²⁵

15 45. On September 9, 1969, W.R. Richard, by then a member of the
16 newly-formed Aroclor "Ad Hoc" Committee, wrote an interoffice memo titled
17 "Defense of Aroclor."²⁶ He acknowledged the role of Aroclor in water pollution:
18 "Aroclor product is refractive, will settle out on solids – sewerage sludge – river
19 bottoms, and apparently has a long life." He noted that Aroclors 1254 and 1260 had
20 been found along the Gulf Coast of Florida causing a problem with shrimp; in San
21 Francisco Bay, where it was reported to thin egg shells in birds; and in the Great
22 Lakes. Richard advised that the company could not defend itself against all
23 criticism: "We can't defend vs. everything. Some animals or fish or insects will be
24

25
26 ²⁴ MONS 096509-096511, attached as Exhibit I.

27 ²⁵ *Id.*

28 ²⁶ DSW 014256-014263, attached as Exhibit J.

1 harmed. Aroclor degradation rate will be slow. Tough to defend against. Higher
2 chlorination compounds will be worse [than] lower chlorine compounds. Therefore
3 we will have to restrict uses and clean-up as much as we can, starting
4 immediately.”²⁷

5 46. On January 29, 1970, Elmer Wheeler of Monsanto’s Medical
6 Department and Chairman of the Aroclor “Ad Hoc” Committee circulated
7 laboratory reports discussing results of animal studies. He noted: “Our
8 interpretation is that the PCB’s are exhibiting a greater degree of toxicity in this
9 chronic study than we had anticipated. Secondly, although there are variations
10 depending on species of animals, the PCB’s are about the same as DDT in
11 mammals.”²⁸

12 47. In a PCB Presentation to Corporate Development Committee,
13 Monsanto expressed a desire to keep profiting from PCBs despite the environmental
14 havoc. The report suggests possible reactions to the contamination issue. It
15 considered that doing nothing was “unacceptable from a legal, moral, and customer
16 public relations and company policy viewpoint.” But the option of going out of the
17 Aroclor business was also considered unacceptable: “there is too much
18 customer/market need and selfishly too much Monsanto profit to go out.”²⁹

19 48. Monsanto formed an “Aroclor ‘Ad Hoc’ Committee” to investigate the
20 pollution caused by PCBs. The Aroclor “Ad Hoc” Committee held its first meeting
21 on September 5, 1969. The committee’s objectives were to continue sales and
22 profits of Aroclors in light of the fact that PCB “may be a global contaminant.”³⁰
23 The meeting minutes acknowledge that PCB has been found in fish, oysters, shrimp,
24

25 ²⁷ *Id.* at 014256.

26 ²⁸ MONS 098480, attached as Exhibit K.

27 ²⁹ Ex. A at MONS 058737.

28 ³⁰ Ex. L at MONS 030483.

1 birds, along coastlines of industrialized areas such as Great Britain, Sweden, Rhine
 2 River, low countries, Lake Michigan, Pensacola Bay, and in Western wildlife.
 3 Moreover, the committee implicated the normal use of PCB-containing products as
 4 the cause of the problem: “In one application alone (highway paints), one million
 5 lbs/year [of PCBs] are used. Through abrasion and leaching we can assume that
 6 nearly all of this Aroclor winds up in the environment.”³¹

7 49. A month later, on October 2, 1969, the Committee reported extensive
 8 environmental contamination. The Committee advised that Monsanto could not
 9 protect the environment from Aroclors as “global” contaminants but could protect
 10 the continued manufacture and sale of Aroclors:

11 The committee believes that there is little probability that any action
 12 that can be taken will prevent the growing incrimination of specific
 13 polychlorinated biphenyls (the higher chlorinated -- e.g. Aroclors
 14 1254 and 1260) as nearly global environmental contaminants leading
 15 to contamination of human food (particularly fish), the killing of some
 16 marine species (shrimp), and the possible extinction of several species
 17 of fish eating birds.

18 Secondly, the committee believes that there is no practical course of
 19 action that can so effectively police the uses of these products as to
 20 prevent completely some environmental contamination.

21 There are, however, a number of actions which must be undertaken to
 22 prolong the manufacture, sale and use of these particular Aroclors as
 23 well as to protect the continued use of other members of the Aroclor
 24 series.³²

25 50. Monsanto’s desire to protect its profits from Aroclor sales rather than
 26 the environment is reflected in the Committee’s stated objectives:

- 27 1. Protect continued sales and profits of Aroclors;
- 28 2. Permit continued development of new uses and sales, and

31 *Id.* at 030485.

32 DSW 014612-014624, at 014615, attached as Exhibit M (emphasis added).

- 1 3. Protect the image of the Organic Division and the Corporation as
2 members of the business community recognizing their responsibilities
3 to prevent and/or control contamination of the global ecosystem.³³

4 51. An interoffice memorandum circulated on February 16, 1970, provided
5 talking points for discussions with customers in response to Monsanto's decision to
6 eliminate Aroclors 1254 and 1260: "We (your customer and Monsanto) are not
7 interested in using a product which may present a problem to our environment."
8 Nevertheless, the memo acknowledges that Monsanto "can't afford to lose one
9 dollar of business." To that end, it says, "We want to avoid any situation where a
10 customer wants to return fluid. ... We would prefer that the customer use up his
11 current inventory and purchase [new products] when available. He will then top off
12 with the new fluid and eventually all Aroclor 1254 and Aroclor 1260 will be out of
13 his system. We don't want to take fluid back."³⁴ Instead of having customers return
14 the old formula fluids, Monsanto instructed its customers to dispose of PCB
15 containing wastes in local landfills, knowing that landfills were not suitable for PCB
16 contaminated waste. Monsanto had determined that the only effective method of
17 disposing of PCBs was high temperature incineration, which was not commercially
18 available to it or its customers, and it had constructed an incinerator for the disposal
19 of its own *liquid* PCB contaminants. Monsanto made its incinerator available to its
20 customers, for a fee, for the disposal of their *liquid* PCB wastes. However, as
21 William Papageorge explained in his 1975 testimony before the Wisconsin
22 Department of Natural Resources, Monsanto instructed its customers to dispose of
23 *solid* PCB contaminated wastes in landfills: "lacking that resource [a commercial
24 incinerator], we have to reluctantly suggest, because we don't have a better answer,

25
26 ³³ *Id.* at 014614.

27 ³⁴ MONS 100123-100124, attached as Exhibit N.

1 that they find a well operated, properly operated landfill and dispose of the material
2 in that fashion.”³⁵

3 52. In 1970, the year after Monsanto formed the “ad hoc” committee, and
4 despite Monsanto’s knowledge of the global reach of PCB contamination, PCB
5 production in the United States peaked at 85 million pounds.³⁶

6 53. Growing awareness of the ubiquitous nature of PCBs led the United
7 States to conduct an investigation of health and environmental effects and
8 contamination of food and other products. An interdepartmental task force
9 concluded that PCBs were highly persistent, could bioaccumulate to relatively high
10 levels, and could have serious adverse health effects on human health.³⁷

11 54. After that report, environmental sampling and studies indicated that
12 PCBs were a “more serious and continuing environmental and health threat than had
13 been originally realized.”³⁸ To address these concerns, EPA undertook a study to
14 assess PCB levels in the environment on a national basis. That study revealed
15 widespread occurrence of PCBs in bottom sediments in several states, including
16 California.³⁹

17 55. EPA’s study noted the particular burden on California. “PCBs have
18 become a significant component of the marine food webs of southern California,”
19 were found in sediments in the Santa Barbara Basin, and found in high levels in the
20 San Francisco Bay.⁴⁰

23 ³⁵ See Exhibit W at 29.

24 ³⁶ *Id.* at 27.

25 ³⁷ EPA, Review of PCB Levels in the Environment, EPA-560/7-76-001 (January
1976), available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockkey=2000I3HT.txt>
(last accessed July 29, 2015).

26 ³⁸ *Id.* at 1.

27 ³⁹ *Id.*, *passim*.

28 ⁴⁰ *Id.* at 78-9.

1 **D. Monsanto Concealed the Nature of PCBs from**
2 **Governmental Entities.**

3 56. While the scientific community and Monsanto knew that PCBs were
4 toxic and becoming a global contaminant, Monsanto repeatedly misrepresented
5 these facts, telling governmental entities the exact opposite – that the compounds
6 were not toxic and that the company would not expect to find PCBs in the
7 environment in a widespread manner.⁴¹

8 57. In a March 24, 1969 letter to Los Angeles County Air Pollution Control
9 District, Monsanto advised that the Aroclor compounds “are not particularly toxic
10 by oral ingestion or skin absorption.”⁴² Addressing reports of PCBs found along the
11 West Coast, Monsanto claimed ignorance as to their origin, explaining that “very
12 little [Aroclor] would normally be expected either in the air or in the liquid
13 discharges from a using industry.”⁴³ A similar letter to the San Francisco Bay
14 Regional Water Quality Control Board explained that PCB plasticizers (found in
15 surface coatings, such as paints, industrial adhesives and window sealants), in
16 normal use, present no special health problems” and that, “[i]n view of PCB’s
17 chemical inertness, we would anticipate no problems associated with the
18 environment from refuse dumps.”⁴⁴

19 58. In May 1969, Monsanto’s Manager, Environmental Health, Elmer
20 Wheeler spoke with a representative of the National Air Pollution Control
21 Administration, who promised to relay to Congress the message that Monsanto
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23

24 ⁴¹ See Exhibits O-R (letters to governmental agencies).

25 ⁴² Letter from Monsanto to Los Angeles County Air Pollution Control District
(March 24, 1969), attached as Exhibit O

26 ⁴³ *Id.*

27 ⁴⁴ Letter from Monsanto to State of California Resources Agency (March 27, 1969),
attached as Exhibit P.

1 “cannot conceive how the PCBs can be getting into the environment in a widespread
2 fashion.”⁴⁵

3 59. Monsanto delivered the same message to the New Jersey Department
4 of Conservation in July 1969, claiming first, “Based on available data,
5 manufacturing and use experience, we do not believe the PCBs to be seriously
6 toxic.”⁴⁶ The letter then reiterates Monsanto’s position regarding environmental
7 contamination: “We are unable at this time to conceive of how the PCBs can
8 become wide spread in the environment. It is certain that no applications to our
9 knowledge have been made where the PCBs would be broadcast in the same fashion
10 as the chlorinated hydrocarbon pesticides have been.”⁴⁷

11 60. At the same time that Monsanto was downplaying the toxicity of PCBs
12 and inevitable widespread contamination caused by PCBs, its Aroclor “Ad Hoc”
13 Committee acknowledged that there was nothing that could be done to prevent PCBs
14 from becoming a global contaminant leading to contamination of the food supply,
15 injuring marine life and possibly leading to the extinction of certain bird species.
16 The committee reported on the probability of success of actions Monsanto might
17 undertake to address the PCB problem and provided:

18 The committee believes there is little probability that any action that
19 can be taken will prevent the growing incrimination of specific
20 polychlorinated biphenyls ... as nearly global environmental
21 contaminants leading to the contamination of human food (particularly
fish), the killing of some marine species (shrimp), and the possible
extinction of several species of fish eating birds.⁴⁸

22 61. Moreover, the committee acknowledged that no course of action could
23 be taken to prevent products containing PCBs from contaminating the environment,

24
25 ⁴⁵ Monsanto Memorandum to W.R. Richard (May 26, 1969), attached as Exhibit Q.
26 ⁴⁶ Letter from Monsanto to Department of Conservation and Economic
Development (July 23, 1969), attached as Exhibit R.

27 ⁴⁷ *Id.*
⁴⁸ DSW 014612-014624, at 014615, attached as Exhibit M.

1 particularly waters and the marine environment. The committee explained “the
2 committee believes that there is no practical course of action that can so effectively
3 police the uses of these PCB containing products as to prevent completely some
4 environmental contamination.”⁴⁹ Further, the committee reported concern that
5 vapor losses from PCB containing products likely results in contamination of an
6 aquatic environment because based on published reports “even minute quantities of
7 [PCB] vapors are eventually transferred to the water environment and accumulated
8 therein.”⁵⁰

9 62. Exactly as Monsanto’s committee had acknowledged, PCBs have
10 become a global contaminant and have accumulated in the waters of the Bay to the
11 point where they are a public nuisance and require remediation and abatement.

12 **E. The San Diego Bay is a 303(d) Impaired Body of Water for PCBs.**

13 63. The Bay is one of the region’s most widely used natural resources, and
14 the PCB contamination affects all San Diegans, who reasonably would be disturbed
15 by the presence of a hazardous, banned substance in the sediment, water, and
16 wildlife.

17 64. PCBs (specifically, Aroclor compounds 1254 and 1260) have been
18 found in samples of sediments and water taken from the Bay at varying times and
19 locations, some requiring substantial remediation work and cost. In addition, PCBs
20 have been identified in tissues of fish and lobster in the Bay.

21 65. PCBs are identified as a Primary Chemical of Concern (“COC”) in
22 California Regional Water Quality Control Board, San Diego Region (“Regional
23 Water Board”) Cleanup and Abatement Order (“CAO”) No. R9-2012-0024, dated
24 March 14, 2012, which directed the City and the Port District to, among other things,

26 ⁴⁹ *Id.*
27 ⁵⁰ *Id.* at DWS 014618.

1 remediate PCB contaminated sediments within a discrete area known as the
2 Shipyard Sediment Site.

3 66. There are other sites and public properties within and around the Bay
4 that are currently under investigation for PCB contamination and that will be
5 investigated for PCB contamination in the future. The site and location of future
6 PCB contamination investigation areas are currently unknown; the Regional Water
7 Board, however, has indicated that it may require the investigation of dozens of sites
8 in and around the Bay and the subsequent remediation of any areas containing PCB
9 contamination that it deems appropriate.

10 67. The Regional Water Board estimated human health risks due to the
11 consumption of PCB contaminated fish tissue found in the Bay and employed
12 human fish consumption rates and bioaccumulation factors in the analysis.

13 68. The Regional Water Board also concluded that human ingestion of
14 seafood caught within certain assessment areas can significantly increase cancer
15 risk, specifically identifying PCBs as a carcinogenic chemical.

16 69. PCBs have entered the Bay through various sources. As Monsanto
17 knew they would, PCBs sluff from myriad products and uses promoted by Monsanto
18 and enter the environment in the absence of any discharge. PCBs are also found in
19 commercial and industrial waste water as a result of Monsanto's directions to its
20 customers to dispose of their PCB contaminated wastes in landfills when Monsanto
21 knew, in fact, that disposal of PCBs in landfills was not proper. PCBs also leach out
22 of paints, caulk, sealants and other applications and are transported by air and water
23 to the Bay.

24 70. As trustees of the Bay, Plaintiff Port District has spent substantial
25 amounts of money to limit the amount of PCBs in the Bay. The Port District will
26 also likely continue to incur costs to remove PCBs from the Bay and to keep PCBs
27 from entering the Bay for the foreseeable future.

1 71. PCBs were not only a substantial factor in causing the Port District to
2 incur costs and damages, but PCBs were also the primary driving force behind the
3 need to clean up and abate the Shipyard Sediment Site. Without abatement of the
4 health hazard caused by PCBs in the Bay, Plaintiff Port District will continue to
5 suffer injuries and damages. In addition, PCB contamination has resulted in the
6 impairment of navigational capabilities within the Bay. For example, previous PCB
7 driven remedial actions have resulted in the creation of permanent engineered caps
8 isolating PCB-contaminated sediments at the Campbell Shipyard and Convair
9 Lagoon sediment sites, at significant cost and interference to the Port District.
10 Navigation is prohibited above and around these caps to ensure their stability and
11 continued effectiveness. PCBs have similarly impaired and interfered with the use
12 of other properties and functions of the Port District.

13 72. Remedial proposals for contaminated sediments at other sites within
14 the Bay currently under review by the Regional Water Board include the addition of
15 sand and other material to the Bay, which has the potential to impair navigational
16 capabilities. Further, navigational maintenance costs may increase as a result of
17 PCB contamination within Bay sediments through additional environmental review
18 and disposal requirements.

19 73. Monsanto's conduct, as set forth above, was committed with malice,
20 oppression and/or fraud, as those terms are defined in Civil Code § 3294.
21 Monsanto's conduct was despicable and in conscious disregard to the rights and
22 safety of others, including Plaintiff Port District. Monsanto's despicable conduct
23 has subjected unjust hardship in conscious disregard to the public and to Plaintiff
24 Port District, who is trustee of properties in and surrounding the Bay. Defendants
25 intentionally misrepresented and concealed material facts from governmental
26 entities in the state with the intent of causing injury. In addition to Plaintiff Port
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1 District's entitlement to actual damages and request for abatement, Plaintiff is
2 entitled to recover exemplary damages.

3 **FIRST CAUSE OF ACTION**

4 **PUBLIC NUISANCE**

5 74. Plaintiff Port District realleges and reaffirms each and every allegation
6 set forth in all preceding paragraphs as if fully restated in this count.

7 75. Monsanto manufactured, distributed, marketed and promoted PCBs in
8 a manner that created or participated in creating a public nuisance that is harmful to
9 health and obstructs the free use of the Bay. Monsanto also directed its customers
10 and the public to dispose of PCB containing materials improperly, resulting in PCBs
11 leaching from landfills and entering the Bay.

12 76. The presence of PCBs interferes with the comfortable enjoyment of the
13 Bay for its customary uses for commercial and sport fishing, swimming and other
14 water activities.

15 77. The presence of PCBs interferes with the free use of the Bay for the
16 promotion of commerce, navigation and fisheries.

17 78. The presence of PCBs interferes with the free use of the Bay for
18 ecological preservation and habitat restoration.

19 79. The San Diego Bay is listed as impaired due to PCBs, pursuant to the
20 Clean Water Act and the 303(d) list.

21 80. The Regional Water Board found that the contamination at the
22 Shipyard Sediment Site has caused a nuisance. Indeed, the contamination meets all
23 three criteria for a "nuisance" as defined by California Water Code section 13050
24 (m) because it: (1) is injurious to health, or is indecent or offensive to the senses, or
25 an obstruction to the free use of property, so as to interfere with the comfortable
26 enjoyment of life or property; (2) affects at the same time an entire community or
27 neighborhood, or any considerable number of persons, although the extent of the
28

1 annoyance or damage inflicted upon individuals may be unequal; and (3) occurs
2 during, or as a result of, the treatment or disposal of wastes. The Regional Water
3 Board found that “[t]he “contaminated marine sediment has caused conditions of
4 pollution, contamination or nuisance in San Diego Bay that adversely affect aquatic
5 life, aquatic dependent wildlife, and human health San Diego Bay beneficial uses.”

6 81. The presence of PCBs causes inconvenience and annoyance to the
7 people of the State of California and to Plaintiff Port District, who has been required
8 to incur costs in order to protect plant and animal life, and their presence adversely
9 affects the quality of water in the Bay.

10 82. The condition affects a substantial number of people who use the Bay
11 for commercial and recreational purposes and interferes with the rights of the public
12 at large to clean and safe resources and environment.

13 83. An ordinary person would be reasonably annoyed or disturbed by the
14 presence of toxic PCBs that endanger the health of fish, animals and humans and
15 degrade water quality and destroy marine habitats.

16 84. The seriousness of the environmental and human health risks created
17 by Monsanto’s PCBs and Monsanto’s concealment of the dangers posed to human
18 health and the environment far outweigh any social utility of Monsanto’s conduct in
19 manufacturing PCBs.

20 85. Plaintiff Port District has suffered and will continue to suffer harm that
21 is different from the type of harm suffered by the general public, and Plaintiff Port
22 District has incurred substantial costs deriving from state-mandated PCB clean-up.
23 Further, the Port District holds and manages the tidelands and submerged lands of
24 the Bay for the benefit of the public. In addition, the Port District is obligated to pay
25 for certain remediation of the Shipyard Sediment Site pursuant to the March 14,
26 2012 CAO.

1 86. Plaintiff Port District did not consent to the conduct that resulted in the
2 contamination of the Bay.

3 87. Monsanto's conduct was a substantial factor in causing the harm to
4 Plaintiff Port District. Without an abatement of the nuisance created by Monsanto,
5 the Port District and the people of the State of California will continue to suffer
6 injuries, and the hazards caused by PCBs will continue.

7 88. Monsanto knew or, in the exercise of reasonable care, should have
8 known that the manufacture and sale of PCBs was causing the type of contamination
9 now found in the Bay. Monsanto knew that PCBs would leach out of products to
10 become waste in the environment and that there was no effective way to prevent
11 PCBs from becoming waste and accumulating in an aquatic environment like the
12 Bay. Monsanto knew that PCBs would contaminate water supplies, would degrade
13 marine habitats, would kill fish species, and would endanger birds and animals. In
14 addition, Monsanto knew that PCBs are associated with serious illnesses and
15 cancers in humans and knew that humans may be exposed to PCBs through
16 ingestion and dermal contact. As a result, it was foreseeable to Monsanto that
17 humans may be exposed to PCBs through swimming in contaminated waters or by
18 eating fish from those waters. Monsanto thus knew, or should have known, that
19 PCB contamination would seriously and unreasonably interfere with the ordinary
20 comfort, use, and enjoyment of any coastal marine area.

21 89. As a direct and proximate result of Monsanto's creation of a public
22 nuisance, Plaintiff Port District and the public have suffered, and continue to suffer,
23 actual damages and injuries to property requiring abatement and other costs to be
24 determined at trial.

1 **SECOND CAUSE OF ACTION**

2 **EQUITABLE INDEMNITY**

3 90. Plaintiff Port District realleges and reaffirms each and every allegation
4 set forth in all preceding paragraphs as if fully restated in this count.

5 91. Monsanto is responsible for creating a public nuisance by
6 manufacturing, distributing, and promoting PCBs, resulting in contamination of
7 water, soil and sediments in and around the Bay, and for directing its customers to
8 improperly dispose of PCBs. Monsanto is also responsible for creating a purpresture
9 as a result of PCBs at certain sites in and around the Bay. Monsanto is also liable to
10 the Port District for the costs to remediate PCB contamination at discrete sites
11 around the Bay.

12 92. Monsanto's creation of the public nuisance is a substantial factor in
13 causing Plaintiff Port District's injury.

14 93. Monsanto must reimburse the Port District for its injuries.

15 **THIRD CAUSE OF ACTION**

16 **PURPRESTURE**

17 94. Plaintiff Port District realleges and reaffirms each and every allegation
18 set forth in all preceding paragraphs as if fully restated in this count.

19 95. The Bay is navigable in law and in fact and is continuously used by the
20 public for commercial and recreational purposes.

21 96. The presence of PCBs in the waters and sediments of the Bay
22 constitutes an unauthorized invasion of the rights of the public to navigate the waters
23 of the Bay and constitutes a purpresture.

24 97. The presence of PCBs in the waters and sediments of the Bay impairs
25 the navigation of the Bay, related commercial uses of the Bay, and the rights of the
26 entire community to free use and enjoyment of the Bay.

1 98. As a direct and proximate result of Monsanto's creation of an
2 unauthorized invasion and obstruction of the rights of the public to navigational uses
3 of the waters of the Bay, the Port District and the people of the State of California
4 have suffered, and continue to suffer, interference with public and navigational uses
5 of the Bay and related property damage that requires investigation, remediation, and
6 monitoring costs to be determined at trial.

7 99. The Port District as trustee also has the authority to institute a
8 proceeding in equity and hereby seeks to compel an abatement of the purpresture
9 created by PCBs in the waters and sediments of the Bay.

10 **PRAYER FOR RELIEF**

11 In addition to the relief requested in each individual cause of action above,
12 Plaintiff Port District prays for judgment against Defendants, jointly and severally,
13 as follows:

- 14 1) Any and all compensatory damages according to proof including, but
15 not limited to, all past and future costs and expenses related to the
16 investigation, remediation, and removal of PCBs from in and around
17 the Bay, loss of use of portions of the Bay, and diminution in value of
18 real property in and around the Bay;
- 19 2) A judicial determination that each Defendant is liable for any and all
20 future costs related to the investigation, remediation, and removal of
21 PCBs from in and around the Bay;
- 22 3) An order that Defendants pay for establishment of a fund used by
23 Plaintiff Port District to abate the public nuisance created by the
24 presence of PCBs in and around the Bay, including investigating and
25 remediating all PCB contamination in the Shipyard Sediment Site and
26 PCB contamination at other sites in and around the Bay, discovered
27 now or in the future, where necessary.

- 1 4) An order that Defendants abate the purpresture created by the presence
- 2 of PCBs in the Bay.
- 3 5) Compensatory damages to Plaintiff Port District for the injury to and
- 4 loss of use of natural resources deriving from the presence of PCBs in
- 5 and around the Bay, including the cost of restoring those natural
- 6 resources.
- 7 6) Punitive/Exemplary damages;
- 8 7) Litigation costs and attorney's fees as provided by law;
- 9 8) Pre-judgment and post-judgment interest;
- 10 9) Any other and further relief as the Court deems just, proper, and
- 11 equitable.

12
13 **DEMAND FOR JURY TRIAL**

14 Plaintiff Port District hereby demands a jury trial as provided by Rule 38(a) of
15 the Federal Rules of Civil Procedure.

16 Respectfully submitted,

17
18 Dated: August 3, 2015

By: /s/ William J. Jackson

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By: /s/ John N. Carter

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