

1 Superior Court of California
2 County of San Bernardino
3 247 W. Third Street, Dept. S23
4 San Bernardino, CA 92415-0210

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
MAY 28 2021
BY Monica Real-Ramos
MONICA REAL-RAMOS, DEPUTY

7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT
9

10 CITY OF FRESNO,

Plaintiff,

Case No.: JCPSS 4435

11
12 v

13 SHELL OIL COMPANY, et al,

Defendants

RULING ON DEFENDANT
OCCIDENTAL'S MOTION FOR
SUMMARY JUDGMENT

14
15
16
17
18
19 This matter came before the court for a hearing on a Motion for Summary
20 Adjudication by Defendant Occidental Chemical Corporation (also sued as "Occidental
21 Chemical Company") and Occidental Petroleum Corporation, seeking adjudication of
22 Plaintiff's Nuisance, Trespass and Punitive Damages Claims. The court has reviewed
23 and considered the briefs of the parties as well as the arguments of counsel and issues
24 its ruling as follows:

25 **Background**

26 In the continuing nuisance cause of action, the City alleges Occidental "created or
27 assisted in the creation of the nuisance through affirmative acts including," inter alia
28 "participating in the application of products containing TCP in the relevant areas."
(Compl. ¶ 57.)

1 In the continuing trespass causes of action, the City alleges Occidental and the
2 other Defendants, "intentionally, recklessly, and/or negligently caused TCP to enter and
3 contaminate plaintiff's property, wells and water supplies." This was done through
4 affirmative acts that included "spilling (directly or indirectly) products containing TCP on
5 the ground, from where they would inevitably contaminate groundwater and endanger
6 the public health." (Compl. ¶ 67.)

7 It is undisputed Occidental did not manufacture or formulate 1,3-D products
8 containing TCP. During the period before 1983, when Occidental was in the agricultural
9 products business in California, Occidental purchased 1,3-D products from Shell and Dow,
10 rather than manufacturing or formulating such products itself. (UF 1.) Occidental resold
11 Shell and Dow 1,3-D products in California under Shell's or Dow's label or under an
12 Occidental label that simply copied the contents of the Shell or Dow label. (UF 2.)

13 Occidental contends it was a distributor that resold 1,3-D products in accordance
14 with the manufacturers' label instructions. It relies on this court's prior rulings in the
15 *Redlands, Oceanside, and Clovis* cases on similarly asserted nuisance and trespass causes
16 of action. It also relies on this court's prior decision in the *Atwater* case to assert punitive
17 damages are without merit.

18 But as will be discussed, this case is distinguishable because the City here is
19 asserting contamination to its water well as a result of spills and releases of TCP-
20 containing 1,3-D products at the OxyChem Fresno facility at 6385 East North Avenue in
21 Fresno. The City contends releases of 1,3-D products into the soil occurred as a result
22 of bulk deliveries of products to a bulk-transfer tank at the OxyChem Fresno facility and
23 when the bulk-transfer tank was steamed out.

24 **City's Evidentiary Objections**

25 Objection No. 1 – Sustain.

26 Objection Nos. 2, 3 – Overrule.

27 Objection Nos. 4-8 – Sustain. The City objects to various reports from the 1980s
28 attached to the declaration of Occidental's counsel. Occidental seeks to have the reports
admitted as ancient documents under Evidence Code section 1331. Section 1331

1 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the
2 statement is contained in a writing more than 30 years old and the statement has been
3 since generally acted upon as true by persons having an interest in the matter."

4 "[A]n ancient documents is admitted in evidence as proof of the facts recited
5 therein, provided the writer would have been competent to testify as to such facts.
6 [Citation.]" (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 142
7 (*ConAgra Grocery*)). In *ConAgra Grocery*, at issue was whether the trial court erred in
8 allowing experts to testify about specific statements in the documents. The Court
9 concluded that because the authors of the documents would likely have been competent
10 to testify about the contents of the writings, they were not inadmissible hearsay. (*Ibid.*)

11 But counsel for Occidental does not provide sufficient foundation to authenticate
12 the documents for the purposes for which they are submitted. He does not provide
13 sufficient testimony from which to conclude the various investigative reports have been
14 "generally acted upon as true by those with an interest in the matter." Counsel also does
15 not provide sufficient foundation to testify about testing and testing results to
16 authenticate the documents in support of the stated conclusions. (See, e.g. Gilhuly Decl.
17 ¶ 18 and Exh. 16 [providing no foundation of where on the property the soil samples
18 were taken].)

19 In responses to Objection Nos. 4-8, Occidental argues that the documents come
20 from the same file of the Regional Water Quality Control Board that the City and its
21 experts rely on in opposition. It contends the documents qualify as ancient documents
22 because they are more than 30-years old and have been relied on as true by Plaintiff,
23 Occidental, and the Water Board.

24 But again, the fact a document is more than 30 years old does not alone allow its
25 admission as an ancient documents. As for argument it has been relied on as true by
26 Plaintiff, Occidental, and the Water Board, the issue is that Occidental's counsel's
27 declaration does not provide sufficient foundation. The fact the City's experts may refer
28 to the same documents does not provide sufficient foundation, because Occidental is
seeking to rely on the documents as establishing facts, not in support of expert opinion.

1 Objection Nos. 9, 10, 11 – Overrule.¹

2 Objection Nos. 12-17 – Overrule.

3 **Occidental’s Evidentiary Objections**

4 Occidental objects to statements made in the declarations of the City’s experts
5 Stephen Carlton and Robert Greenwald.

6 Objection Nos. 1-5 – Overrule.

7 **Nuisance & Trespass Causes of Action**

8 The City is correct that Occidental has not met its burden of production on the
9 motion for summary adjudication of the nuisance and trespass causes of action. Unlike
10 prior motions, the City contends releases of product at the OxyChem Fresno site is the
11 source of contamination, not Occidental’s involvement in sales and application of TCP
12 containing pesticides.

13 Occidental’s burden of production on its motion for summary adjudication is as
14 follows: “Summary judgment law in this state ... continues to require a defendant moving
15 for summary judgment to present evidence, and not simply point out that plaintiff does
16 not possess, and cannot reasonably obtain, needed evidence.” (*Aguilar v. Atlantic*
17 *Richfield Co.* (2001) 25 Cal.4th 826, 854, footnote omitted.) In *Andrews v. Foster*
18 *Wheeler LLC* (2006) 138 Cal.App.4th 96, 103, the Court stated: “As *Aguilar, supra*, 25
19 Cal.4th 826, and *Saelzler v. Advanced Group 400* [(2001)] 25 Cal.4th 763, later made
20 clear, a defendant cannot simply ‘argue’ that a plaintiff lacks sufficient evidence to
21 establish causation; the defendant must make an affirmative ‘showing’ that the plaintiff
22 cannot do so.” (Italics in original.) On summary judgment, the burden does not shift
23 without stringent review of the direct, circumstantial, and inferential evidence. (*Scheidung*
24 *v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83.)

25 Courts recognize the importance of the separate statement. “The separate
26 statement is not merely a technical requirement, it is an indispensable part of the
27

28 ¹ The evidence at issue in these objections, Gilhuly Declaration ¶¶ 20 (Exh. 18), 23 (Exh. 21), and 25 (Exh. 23) is not even in the separate statement and only referenced in Occidental’s Memorandum of Points & Authorities.

1 summary judgment or adjudication process.” (*Whitehead v. Habig* (2008) 163
2 Cal.App.4th 896, 902.)

3 “Where a remedy as drastic as summary judgment is involved, due process
4 requires a party be fully advised of the issues to be addressed and be given adequate
5 notice of what facts it must rebut in order to prevail.” (*San Diego Watercrafts, Inc. v.*
6 *Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) “Whether to consider evidence not
7 referenced in the moving party's separate statement rests with the sound discretion of
8 the trial court....” (*Ibid.*)

9 The separate statement not only affords “due process to opposing parties” it
10 permits “trial courts to expeditiously review complex motions for ... summary judgment
11 to determine quickly and efficiently whether material facts are disputed.” (*United*
12 *Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335, superseded by statute on
13 other grounds.)

14 Here, it is not clear the exact facts and evidence on which defendant intends to
15 rely in support of its motion. Occidental’s Memorandum of Points and Authorities cites
16 and discusses evidence beyond that cited in the separate statement. The court should
17 not have to cull through additional facts and evidence cited in the Memorandum to find
18 evidence in support of the motion. Therefore, only evidence cited in the separate
19 statement was considered.

20 In support of the motion, Occidental asserts that during the period before 1983,
21 there is no evidence Occidental was ever involved with or aware of any spills or releases
22 of 1,3-D products in the Fresno Area. (UF 5.) There is no evidence Occidental did
23 anything improper, unlawful, or contrary to 1,3-D product label instructions with regard
24 to 1,3-D products in the Fresno area. (UF 6). It also contends TCP, 1,2-D, and 1,3-D
25 have never been detected in soil or groundwater at the OxyChem Fresno facility, and
26 there is no evidence that the facility is a source of TCP contamination. (UF 8.)

27 But in light of the objections to the evidence cited in support of UF 8 being
28 sustained, Occidental has not met its burden on the motion. Its evidence in support of
UFs 5 and 6 involves Occidental personnel generally testifying that they are unaware of

1 application of 1,3-D soil fumigant inconsistent with label instructions or unaware of any
2 accidental spills, leaks, or releases of 1,3-D soil fumigant into the ground. But this cited
3 testimony fails to specifically discuss the City's responses to Occidental's Supplemental
4 Special Interrogatory, Set Two, in which the City asserted that Occidental contributed to
5 Fresno's TCP-contamination problem by releasing Telone or Telone II directly to soil when
6 it steamed out its bulk-transfer tank on its wash pad at the OxyChem Fresno Site. (Gilhuly
7 Decl. Exh. 32, p. 26:12-20.) It refers to evidence regarding the steam cleaning of the
8 transfer tank and allowing rinse water from the wash pad at the OxyChem Fresno site to
9 run off on the soil. (*Id.* at pp. 28:3-12; 29:13-30:16.)

10 On reply Occidental argues that in these discovery responses, the City was not
11 claiming that TCP detected in Well 341 was impacted by TCP from the OxyChem Fresno
12 site and it only is with its opposition does the City for the first time shift its position and
13 contend TCP from the facility is the source of contamination to Well 341. It argues that
14 in the discovery responses, the City's claim was that such contamination was from
15 agricultural applications, not from the OxyChem Fresno site. But the City's response is
16 broad enough to be read to assert that contamination included that from the OxyChem
17 Fresno facility. (*Id.* at p. 26:3-20.)

18 The City's opposition also cites to the deposition testimony Oscar Kasparian,
19 manager at the OxyChem Fresno site during the relevant period. (City's Exh. 5 –
20 Kasparian Depo pp. 11:17-12:16.) He discusses a memorandum he wrote regarding an
21 inspection by the California Regional Water Quality Control Board, Central Valley Region,
22 in which he discussed steaming the Telone transfer tank. (*Id.* at pp. 13:13-14:21, 15:10-
23 16:11, 16:19-25; 17:21-18:13, and Kasparian Depo Exh. 3.) The general testimony of
24 Occidental personnel cited by Occidental in support of the motion does not specifically
25 address the issue of steam cleaning the bulk-transfer tank. It also does not address the
26 contention that Occidental allowed rinse water from the wash pad to run off onto the soil.

27 In light of sustaining evidentiary objections directed to evidence cited in support
28 of UF 8 regarding soil and a water well testing, Occidental also has no evidence in support
of its statement that TCP, 1,2-D, and 1, 3-D have not been detected in the soil or

1 groundwater at the OxyChem Fresno facility and that there is no evidence it is the source
2 of TCP contamination. Occidental has not presented any evidence to address the City's
3 contentions in its response to Occidental's Form Interrogatory No. 17.1, addressing
4 Request for Admission Nos. 20-23, 26-29. In these responses, the City recounts the
5 discharge of pesticides containing TCP from wash water at the wash pad and the bulk
6 Telone II tank, and the testimony of former Regional Water Board inspector Gail Battles
7 who testified that based on her experience, Occidental should have tested soil by the
8 wash pad. The City also asserted that during his deposition, Occidental's Environmental
9 Control Engineer, Paul Sundberg testified that in the early 1980s, Occidental had
10 identified OxyChem Fresno as a priority site for additional environmental testing, but
11 could not explain whether OxyChem tested the soil at the stain spot. (Gilhuly Decl. Exh.
12 31, pp. 7:20-8:15.)

13 "The migration of pollutants from one property to another may constitute a
14 trespass, a nuisance, or both. [Citations.]" (*Martin Marietta Corp. v. Insurance Co. of*
15 *North America* (1995) 40 Cal.App.4th 1113, 1132.) Occidental has failed to cite sufficient
16 evidence to demonstrate the OxyChem Fresno site is not a source of TCP contamination
17 in the City's wells. Therefore, the burden does not shift to the City to demonstrate triable
18 issues of material fact exist.

19 **Punitive Damages Claim**

20 The City's allegations related to punitive damages are that Shell, Dow Defendants,
21 and Occidental knew their products containing TCP would inevitably contaminate
22 groundwater, water supplies, and aquifers used by the public, and knew that TCP is
23 carcinogenic and causes other serious health problems. Defendants continued to
24 manufacture, formulate, design, distribute, and sell these products. They decided not to
25 conduct thorough scientific testing of TCP, and did not test it as thoroughly as they could
26 and should have to avoid discovering TCP's harmful effects on the environment and
27 human health. (Compl. ¶ 42.) These allegations are incorporated in all causes of action,
28 wherein the City alleges defendants acted with malice, fraud, and oppression.

1 Occidental argues that its only knowledge of the contents of 1,3-D products was
2 what was stated on the Shell and Dow labels that did not identify TCP as an ingredient.
3 (UF 3.) It did not know that when it sold 1,3-D products, it contained TCP. Occidental
4 was never warned before 1983 that application of 1,3-D products in accordance with label
5 instructions could cause groundwater contamination. (UF 10.)

6 In support of disputing UF 3, the City asserts that a Shell Manager of Product
7 Safety testified that Shell knew of the presence of TCP from the 1940s and it was known
8 to an "adequately trained" chemist. It contends Occidental employed adequately trained
9 chemist at its Lathrop facility. One chemical engineer working in Lathrop, Robert Edson,
10 was aware of groundwater contamination issues at the Lathrop plant. But such evidence
11 is not sufficient to demonstrate Occidental was aware of TCP in the product at that time
12 of the Edson documents cited. With respect to UF 10, it also contends that Edson warned
13 that dumping wastewater containing pesticides from washing down equipment could
14 percolate through the soil to groundwater and contaminate neighboring drinking wells.
15 Again, the evidence cited does not establish Occidental's knowledge of TCP in the product
16 at that time of the Edson documents cited.

17 But this case is different from the *Atwater* case in that the City in discovery
18 responses asserted that cleaning of the Telone bulk-transfer tank resulted in spills and
19 releases of Telone and Telone II. Given this court sustained evidentiary objections to soil
20 and water testing documents, Occidental fails to meet its burden with respect to its
21 assertion that TCP, 1,2-D and 1,3-D have not been detected in soil or groundwater at the
22 OxyChem Fresno facility and there is no evidence it is the source of TCP contamination.
23 (UF 8.)

24 Occidental contends that the City's discovery responses are devoid of any evidence
25 that could support a finding against Occidental of oppression, fraud, or malice. (UF 9.)
26 But in the City's responses to interrogatories for liability regarding nuisance and trespass
27 claims it states, "Oxy knew that 1,3-D PRODUCTS could contaminate groundwater and
28 wells when released to soil. Paul Sundberg's deposition testimony established that, by
1980 at the latest, Oxy had realized that its pesticide releases at OxyChem Fresno posed

1 special risks. Yet, Oxy continued to cause releases of 1,3-D PRODUCTS to soil a [sic]
2 many locations in and around Fresno until 1982, and Oxy still has not taken any steps to
3 investigate or remediate TCP contamination anywhere in or around Fresno. As a result,
4 TCP from Oxy's 1,3-D Products contaminate or threaten to contaminate public and private
5 wells in Fresno." (Gilhuly Decl. Exh. 33 – Plaintiff's Am. Responses to First Supplemental
6 Spec. Interrogatory Nos. 26, 29, pp. 74:2-8, 84:10-16.)


7 Plaintiff argues in opposition that in *Barrous v. BP P.L.C.* (N.D. Cal. Oct. 3, 2011)
8 2011 U.S. Dist. LEXIS 113597, *51, the federal district court discussed that in California,
9 courts have awarded punitive damages for unintentional conduct "'showing complete lack
10 of concern regarding the harmful potential-the-probability and likelihood of injury,'
11 [citation], or a 'conscious disregard of the rights and safety of others.' [Citation.]"
12 (Footnotes omitted.) The court found a reasonable jury could find BP's inaction for nearly
13 ten years regarding contamination at a gas station "exhibited clear and convincing
14 evidence of a 'complete lack of concern regarding the harmful potential' of contamination"
15 at the station, constituting malice. (*Ibid.*) The City argues that here, Occidental continues
16 to demonstrate a disregard for its discharge of Telone waste that has migrated offsite
17 and contaminated groundwater.

18 On reply, Occidental seeks to distinguish *Barrous* by relying on its contention that
19 under Water Board supervision, Occidental investigated, found no 1,3-D products in soil
20 or groundwater, conducted a soil cleanup of other chemicals, and then obtained a clean
21 closure. But such contention relies on the evidence cited in support of UF 8, and the
22 court sustained evidentiary objections to documents in support of soil and water testing.
23 In its motion, Occidental cites a Water Board report from June 1988 that issued a "clean
24 close," citing Gilhuly Decl. ¶ 20, Exh. 18. But the report is directed to closure of the
25 "impoundments," which are the east and west trenches. (Gilhuly Exh. 18, FRE-OCC-
26 01327, FRE-OCC-01329.) The City contends contamination resulted from steam cleaning
27 of the bulk-transfer tank and allowing rinse water from the wash pad to run off. (Gilhuly
28 Decl. Exh. 32, pp. 26:12-20, 28:3-12; 29:13-30:16.) Occidental does not present any
evidence of soil testing at the bulk-transfer tank/wash pad area.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Overrule Occidental's evidentiary objection Nos. 1-5.

Dated this 28 day of May, 2021



DONALD ALVAREZ
Judge of the Superior Court

TCP CASES
SERVICE LIST

BECHERER KANNETT & SCHWEITZER
1255 Powell Street
Emeryville, CA 94608-2604

SL ENVIRONMENTAL LAW GROUP
201 Filbert St., Suite 401
San Francisco, CA 94133

ROBINS BORGHEI LLP
369 Pine Street, Suite 400
San Francisco, CA 94104

MILLER & AXLINE
1050 Fulton Avenue, Suite 100
Sacramento, CA 95825-4225

FARELLA BRAUN & MARTEL LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104

LEWIS BRISBOIS BISGAARD & SMITH LLP
333 Bush Street, Suite 1100
San Francisco, CA 94104-2872

GORDON REES SCULLY MANSUKHANI, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

SNIDER DIEHL, SLOUP & RASMUSSEN, LLP
1111 W. Tokay Street
P.O. Box 560
Lodi, CA 95241

STEPTOE & JOHNSON LLP
633 West Fifth Street, Suite 1900
Los Angeles, CA 90071

BARON & BUDD, P.C.
11440 West Bernardo Court, Suite 265
San Diego, CA 92127

BARG COFFIN LEWIS & TRAPP, LLP
600 Montgomery Street, Suite 525
San Francisco, CA 94111