Case No. 15-56062

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

CITY OF POMONA,
Plaintiff-Appellant

v.

SQM NORTH AMERICA CORPORATION,
Defendant-Appellee

On Appeal from the United States District Court
for the Central District of California

Honorable R. Gary Klausner

U.S.D.C. No. 2:11-cv-00167-RGK-VBK
(Los Angeles - Roybal)

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# PLAINTIFF-APPELLANT CITY OF POMONA'S OPENING BRIEF

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## INTRODUCTION

The City of Pomona operates a public drinking water system that draws groundwater from the Chino Basin aquifer. Pomona discovered that many of its wells are contaminated with perchlorate, a toxic chemical that disrupts hormones necessary for normal growth and development. It has spent millions of dollars to remedy the perchlorate contamination and comply with California water quality standards. Pomona filed this case to hold SQM North America Corporation ("SQMNA") accountable under state tort law. Pomona contends the contamination was caused by SQMNA's perchlorate-laden fertilizer, which was used extensively in fields in and around Pomona.

The resolution of this case hinged on the District Court's erroneous handling of testimony from two expert witnesses. The first is Pomona's expert Dr. Neil Sturchio, a renowned geochemist who determined that the isotopic fingerprint of the perchlorate contaminating Pomona's wells matches the perchlorate in SQMNA's fertilizer and is clearly distinguishable from the synthetic perchlorate used in industry since the 1940s. The second is SQMNA's expert Dr. Richard Laton who—without disputing the accuracy of the isotopic fingerprint—speculated that a multitude of industrial sites might be responsible for the contamination even though there is no evidence that any perchlorate used at those sites had the same

chemical fingerprint as that found in Pomona's wells or that any of it was spilled in sufficient quantities to cause the level of contamination in Pomona's groundwater.

Four years ago, the District Court granted SQMNA's pretrial *Daubert* motion to exclude Dr. Sturchio's testimony. Due to the critical importance of Dr. Sturchio's opinions, Pomona dismissed its case and appealed. This Court found multiple errors in the District Court's decision to exclude. *See City of Pomona v. SQM N. Am. Corp*., 750 F.3d 1036 (9th Cir.) ("*Pomona I*"), *cert. denied*, 135 S. Ct. 870 (2014). Concluding that Dr. Sturchio's opinions meet expert evidentiary standards, this Court unanimously reversed and remanded for trial.

On remand, however, the District Court committed errors at least as serious as those that led to the first reversal.

*First*, the District Court forbade Dr. Sturchio from testifying about scientific information developed during the more than three years since his October 2011 expert report. During that time, perchlorate isotopic fingerprint science had been advanced, validated, and affirmed by the scientific community, including in ways directly responsive to SQMNA's criticisms and the District Court's findings that led to exclusion. The court's prohibition had no justification in any statute, rule, case law, or any legitimate case management concern. By barring this testimony, the court enabled SQMNA to make entirely false statements about what is indisputably the most important causation evidence in Pomona's case; indeed,

SQMNA's counsel trumpeted to the jury that Dr. Sturchio's opinion lacked specific kinds of verification that Pomona had actually proffered. The District Court's ruling prevented the jury from hearing reliable scientific evidence going to the core dispute in the case.

*Second*, even as the District Court unduly restricted Pomona's expert, it rejected—without any explanation or analysis—Pomona's *Daubert* motion to exclude the testimony of SQMNA's expert Dr. Laton, who proffered unreliable litigation-driven theories about alternative sources of the contamination. The District Court ignored this Court's clear commands that *Daubert* decisions be explained on the record, spurning Pomona's motion with an unelaborated, "DENY." Dr. Laton was thus allowed to influence the jury with impressive-seeming but utterly unsupported and speculative "expert" opinions that would not have withstood scrutiny of even a minimally vigilant "gatekeeper."

Far from enabling the jury to hear a "battle of the experts" from which the truth would emerge, the District Court handcuffed Pomona's expert while allowing SQMNA's expert to swing recklessly. These prejudicial errors resulted in a jury verdict that Pomona had not proven that SQMNA's product was a substantial factor in causing the contamination—a conclusion irreconcilable with the scientific evidence. This Court should reverse and remand again. And as noted below, if this

Court does remand, it should correct two additional errors that significantly prejudiced Pomona.

## JURISDICTIONAL STATEMENT

Pomona filed this case in California Superior Court. SQMNA removed the case to the United States District Court for the Central District of California, asserting federal jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332. The District Court entered Judgment in this case on June 10, 2015. ER-1. Pomona filed its Notice of Appeal on July 8, 2015. ER-10-13. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## ISSUES PRESENTED

1. Did the District Court abuse its discretion by precluding Pomona's expert testimony regarding information that arose during the three years this case was pending on appeal, including evidence that directly addressed SQMNA's attacks on the weight and reliability of the expert testimony?

2. Did the District Court abuse its discretion by failing to conduct any analysis under Federal Rule of Evidence 702 and *Daubert* and by permitting testimony from SQMNA's expert that: (a) lacked a factual foundation and a scientific methodology, (b) was irrelevant to the issues, and (c) was disclosed after the close of discovery and in contradiction to SQMNA's earlier discovery

responses, thereby depriving Pomona of the opportunity to depose the expert and rebut his opinions?

3. Did the District Court contravene controlling California law in precluding Pomona's use of the consumer expectations test, and requiring Pomona to proceed under the risk-benefit test, for proving that SQMNA's fertilizer was defectively designed?

4. Did the District Court abuse its discretion in precluding Pomona from presenting expert testimony about the feasibility of an alternative design of SQMNA's fertilizer to rebut and impeach the testimony of defense witnesses?

## STATEMENT OF THE CASE

### A. Pomona's Drinking Water Is Contaminated with Perchlorate, a Toxic Chemical Particularly Harmful to Children

Pomona owns and operates a water system that provides drinking water to over 145,000 residents. ER-310, 312-315. The system is comprised of groundwater wells, distribution lines, and treatment facilities. ER-310, 312-315, 324-326. Much of Pomona's groundwater comes from the Chino Basin, a vast aquifer spanning multiple counties and cities in Southern California. ER-313-314, 327.

The State of California regulates the quality of drinking water. ER-316-318. Since October 18, 2007, the State has imposed a Maximum Contaminant Level ("MCL") for perchlorate, a toxic chemical that interferes with the production of hormones necessary for normal growth and development, particularly brain

development in fetuses and young children. ER-41, 278, 319-321, 459. Pomona must comply with this MCL. ER-323. *See also* Cal. Health & Safety Code § 116625(a). Because fourteen of Pomona's wells are contaminated with perchlorate in concentrations above the MCL, Pomona has spent millions of dollars to remove the perchlorate. ER-203-235, 315-316, 324, 329-354, 442-446, 458. Pomona seeks past and future damages exceeding $32 million. ER-230-231, 442.

### B. The Perchlorate in Pomona's Groundwater Has a Distinctive Isotopic Fingerprint That Matches SQMNA's Fertilizer

Perchlorate can be manufactured and can also occur naturally. ER-272-273. Synthetic perchlorate, which is the primary type of perchlorate used by industry, was invented in around 1940. ER-108, 100-111. It has been used for specialized applications, such as rockets, fireworks, air bags, and road flares. ER-273. Natural perchlorate rarely exceeds trace levels except in arid environments. ER-273-274, 724, 770. Naturally occurring perchlorate is found in the Mojave Desert and other desert areas of the Southwest United States. ER-151-152, 243. The largest known deposit of natural perchlorate is the Atacama Desert in Chile, from which sodium nitrate fertilizer has been mined.[1] ER-273-275. SQMNA began importing Atacama fertilizer into the United States in 1927 and became the sole importer in 1931. ER-

[1] The record sometimes refers to this fertilizer as "Chilean nitrate fertilizer" or "nitrate of soda." ER-166, 170, 173, 197.

40, 42, 43, 131, 903. Although it provided no benefit to plants or farmers, perchlorate was an ingredient of SQMNA's sodium nitrate fertilizer. ER-198, 904.

Geochemistry is the study of the chemical composition of geological materials such as rocks, minerals, water, soil, and air. ER-267. Since the development of the mass spectrometer in 1947, geochemists have been conducting stable isotope analysis. ER-276.[2] "Stable isotope analysis is based on the proposition that stable isotopes of a given chemical element (*e.g.*, perchlorate) can have distinct isotopic compositions that may indicate the origin or source of a molecule containing that element." *Pomona I*, 750 F.3d at 1042 n.1. Stable isotope analysis has been used for determining "adulteration of food, doping of athletes, [and] diagnosing disease." ER-276. "[T]he stable isotope study of chlorine and oxygen in perchlorate found in groundwater has been tested, analyzed, and subjected to peer review for at least ten years." *Pomona I*, 750 F.3d at 1046.

Dr. Neil Sturchio, a geochemistry researcher and professor, has been studying perchlorate isotopes since the late 1990s and is a pioneer in the field. *Pomona I*, 750 F.3d at 1041-43; ER-267-269, 277. He is currently the Chair of the Department of Geological Sciences at the University of Delaware. ER-267.

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[2] "An isotope is a form of a chemical element that has the same number of protons in the nucleus (*i.e.*, the same atomic number) as that element but a different number of neutrons in the nucleus (*i.e.*, a different atomic weight)." *Pomona I*, 750 F.3d at 1042 n.1. "Isotopes that are not subject to nuclear decay are known as 'stable isotopes[.]'" *Id*.

Previously, he was the Head of the Department of Earth and Environmental Sciences at the University of Illinois at Chicago. ER-268.

Dr. Sturchio and scientists at the Oak Ridge National Laboratory and the Reston Stable Isotope Laboratory of the U.S. Geological Survey developed a peer-reviewed and published methodology for collecting and analyzing perchlorate isotopes from groundwater. *Pomona I*, 750 F.3d at 1042, 1045; ER-299-300. This methodology was developed outside of litigation with research funding from the federal government. *Id*. Isotope analysis using this methodology reveals that perchlorate from the Atacama Desert has an isotopic fingerprint that is distinct both from the isotopic fingerprint of synthetic perchlorate and from naturally occurring perchlorate from other areas of the world. ER-279-289, 453.

Pomona retained Dr. Sturchio to investigate the sources of the perchlorate contamination in its groundwater. *Pomona I*, 750 F.3d at 1040-43. By analyzing the chlorine and oxygen isotopes in perchlorate taken from Pomona's wells, Dr. Sturchio determined that sodium nitrate fertilizer from the Atacama Desert was the "dominant source" of the perchlorate found in Pomona's groundwater. *Id*. at 1041-42. Indeed, Dr. Sturchio's analysis showed that nearly 90% of the perchlorate in Pomona's groundwater matched the isotopic fingerprint of Atacama perchlorate, and only about 10% was either synthetic or from some other naturally-occurring source. ER-280-297, 452. This was consistent with prior, non-litigation analysis

that Dr. Sturchio conducted for the Chino Basin Watermaster, which also found that most of the perchlorate in the Chino Basin matched Atacama perchlorate. ER-287. Dr. Sturchio also determined in this case that, but for the Atacama perchlorate, the perchlorate in Pomona's groundwater would not exceed the MCL. ER-295-298, 451, 745.

Pomona presented evidence that corroborated Dr. Sturchio's opinions regarding the origin of the perchlorate in Pomona's wells. For example, between the 1930s and 1950s, SQMNA imported hundreds of thousands of tons of Atacama fertilizer into California. ER-47-51, 131, 134, 173-175, 427, 432, 435, 436, 450. During World War II alone, more than a quarter million tons of SQMNA's fertilizer were used by West Coast farmers, almost all in California. ER-174-175, 450. SQMNA's fertilizer was advertised for use on California citrus crops. ER-448-450. The popularity of this fertilizer for citrus is reflected in a 1968 treatise on citrus nutrition, which states that "perchlorate injury . . . was widely observed in California and elsewhere during the World War II years, when Chilean sodium nitrate was exclusively used." ER-441. During that same period, the area in and around Pomona had thousands of acres of citrus fields. ER-180-185, 246-248, 455, 457, 460.

Using computer models of groundwater flow developed outside of litigation, Pomona's hydrogeology expert Dr. Stephen Wheatcraft testified "the perchlorate

in these wells comes from the agricultural fields." ER-253. He also testified that the expected time for perchlorate applied to the citrus fields to reach Pomona's wells matches the observed time span between when the fertilizer was most heavily used and the detection of perchlorate in Pomona's wells. ER-251, 254-260, 174-175, 450.

### C. Procedural Background Leading to the First Appeal

#### 1. Pomona Filed a Complaint Against SQMNA and Its Chilean Parent

Pomona filed a complaint against SQMNA and its Chilean parent company alleging a strict product liability claim for defective design under California law. Pomona's claim was based on the Chilean defendant's manufacture, and SQMNA's importation and distribution, of sodium nitrate fertilizer containing perchlorate. ER-997-998.[3]

#### 2. The District Court Issued Its Scheduling Order in March 2011, Allowing Seven Months for All Discovery and Setting a Trial Date in January 2012

The District Court conducted a scheduling conference on March 21, 2011. ER-1016. In a Joint Scheduling Conference Statement, the parties had described the type of discovery needed and sought a schedule that provided at least 12

[3] Pomona eventually dismissed the foreign defendant because it could not complete service of process—which required issuance of letters rogatory, translation, and transmission through diplomatic channels—within the pretrial schedule adopted by the District Court. ER-820, 1004.

months for completion of fact discovery; the exchange of expert reports after the completion of fact discovery; more than a month for expert discovery commencing after the exchange of rebuttal reports; and a trial "last[ing] between four and six weeks." ER-1021-1023.

Instead of adopting these joint requests, the District Court issued a pretrial schedule that allowed seven months for all discovery. Even though the parties had advised of the importance of expert evidence, the schedule did not address expert discovery. ER-1016, 1018, 1020-1022. The schedule provided only seven business days for depositions and other discovery after initial expert disclosures and allowed for *no depositions or other discovery* after rebuttal disclosures. ER-1016. The District Court set a 10-day jury trial to start on January 10, 2012. *Id.*

### 3. The Parties Exchanged Expert Reports in October 2011 and Rebuttal Reports 30 Days Later

Each side disclosed seven experts on the initial expert disclosure deadline. ER-1001. On the rebuttal disclosure deadline, Pomona submitted three rebuttal reports from experts disclosed previously. In contrast, SQMNA disclosed six *new* experts on the rebuttal disclosure date. ER-951. These new experts included Dr. Laton, whose report addressed "potential" alternative sources of the perchlorate in Pomona's groundwater. ER-949, 951. Earlier, in response to Pomona's written discovery, SQMNA had identified only water imported from the Colorado River as a potential source. ER-957-958. In Dr. Laton's post-discovery "rebuttal" report,

however, SQMNA identified for the first time numerous additional "potential" sources. ER-951-952.

#### 4. The District Court Denied the Parties' Joint Request for an Extension of Time to Conduct Expert Discovery

On November 4, 2011, the parties jointly filed a motion to reopen discovery for four weeks to take expert depositions and to continue the trial date by a corresponding period. ER-1000-1001. The motion was set for hearing on December 5, 2011, but before it occurred, the District Court denied the motion without explanation. ER-989-990. This scientifically and historically complex case thus proceeded toward trial without any expert depositions having taken place.

#### 5. The Parties Filed Multiple Motions in Limine, Including Motions to Strike Experts

On November 23, 2011, each party filed multiple motions in limine, including motions to preclude the testimony of expert witnesses. ER-1035-1037 (Docket Entries 95-115). Pomona filed a motion to exclude Dr. Laton's alternative source opinions on the grounds that the disclosure was deliberately timed to evade discovery and the opinions did not satisfy *Daubert*. ER-943-960. SQMNA's motions included a *Daubert* challenge directed at Dr. Sturchio. ER-1036 (Docket Entry 102). All motions in limine were noticed for hearing at the pretrial conference set for January 3, 2012.

At that pretrial conference, the District Court announced that, contrary to his earlier setting of a 10-day trial, each side would only get 10 hours per side. ER-639. The District Court explained that, in his view, this was a "pretty simple case," and drew upon the example of a PBS documentary that recounted the entire Civil War in 16 hours. ER-638-639. The District Court also issued an explicitly "tentative" ruling that Pomona's motion to exclude Dr. Laton "is denied." ER-640-642. The District Court issued tentative rulings on all other motions in limine except SQMNA's motion to exclude Dr. Sturchio. *Id*. The District Court held an evidentiary hearing only for SQMNA's challenge to Dr. Sturchio. ER-641, 633. After the hearing, the District Court issued a half-page decision excluding Dr. Sturchio's testimony. ER-632.

### D. Pomona's First Appeal Successfully Challenged the District Court's Exclusion of Dr. Sturchio's Expert Testimony

Because the isotope analysis linking SQMNA's product to the contaminated wells is central to this case, Pomona dismissed the case to allow an appeal of the ruling excluding Dr. Sturchio's testimony. ER-1047 (Docket Entries 213, 215). This Court reversed the exclusion of Dr. Sturchio and identified multiple errors in the District Court's ruling. *See Pomona I*, 750 F.3d at 1043.

In particular, this Court ruled that the District Court had erred in concluding that "Dr. Sturchio's procedures are not reliable because they are not generally accepted in the scientific community," reasoning among other things that Dr.

Sturchio's underlying methodology was based upon "12 peer-reviewed publications on stable isotope analysis of perchlorate," and "interlaboratory collaboration that began before the initiation of this litigation." *Id.* at 1044-45. Additionally, the "district court erroneously ruled that Dr. Sturchio's methodologies have not been and cannot be tested." *Id.* at 1048. Finally, the District Court had erred in accepting SQMNA's argument—"based on disclosures and quotations from old and outdated publications"—that "'not all the potential perchlorate sources have been characterized'" and that the size of the reference database used by Dr. Sturchio was too small. *Id.* at 1048-49.

Accordingly, this Court reversed the exclusion of Dr. Sturchio's opinions. SQMNA's petitions for panel rehearing, rehearing en banc, and for writ of certiorari to the Supreme Court were all denied, and the case was remanded on December 15, 2014. ER-1050 (Docket Entries 251, 253).

### E. District Court Proceedings Continued in January 2015

#### 1. Upon Remand, Pomona Sought to Update Its Experts' Reports to Include Factual Developments Made During the Appeal

After Pomona's successful appeal, the District Court conducted a trial-setting conference on January 12, 2015. ER-1050 (Docket Entry 254). By then, more than three years had passed since Pomona's experts had submitted their reports. At that conference, Pomona asked the District Court to wait to set a trial

date, advising that it wished to update certain of its expert reports to address developments and data acquired while the case was on appeal, and to conduct limited additional discovery. ER-627. Notwithstanding Pomona's request, the District Court set trial to begin on June 2, 2015 and directed Pomona to file a motion concerning its request to update the expert reports. ER-627, 629.

### 2. Factual Developments During the Three-Year Appeal Period Were Critically Important to the Testimony of Pomona's Experts

Pomona sought to update its October 2011 expert reports to reflect several significant developments that occurred while this case was on appeal. ER-615-621.

*First*, Dr. Sturchio's stable isotope analysis of perchlorate was corroborated by further studies and data, published articles, and peer review. These developments substantiated Dr. Sturchio's opinions regarding the source of the perchlorate in Pomona's groundwater. ER-508, 608-609. They also directly addressed SQMNA's and the District Court's criticisms. *See Pomona I*, 750 F.3d at 1041-49. For example, SQMNA had persuaded the District Court in 2011 that the reference database of perchlorate isotopic fingerprints was "too small." *Id.* at 1043. By 2015, the database was nearly four times larger. ER-508. In addition, SQMNA had argued—before the District Court, this Court, and in its certiorari petition—that Dr. Sturchio's methods could not be tested. During the appeal, however, additional laboratories engaged in perchlorate isotopic analysis, and additional

interlaboratory comparisons verified Dr. Sturchio's methods and results. ER-470, 608-609. Additionally, Dr. Sturchio had written an article about his work in this case, and the article was peer-reviewed and published in a leading scientific journal. ER-470.

*Second*, the groundwater computer models on which Dr. Wheatcraft's hydrogeology opinions were based had been updated with additional data. ER-616. Dr. Wheatcraft sought to testify how the updated models confirmed the predictions in his October 2011 report regarding the movement of perchlorate particles from the historic citrus fields to Pomona's contaminated wells. ER-605-606. Pomona also had three years of additional water quality testing and production data from Pomona's wells. *Id.* This data showed consistent or increased levels of perchlorate contamination, which supported Dr. Wheatcraft's opinion in October 2011 that the contamination would persist for at least 30 years.

*Third*, during the time the case was on appeal, Pomona had completed the construction of a treatment plant to remove perchlorate from the contaminated groundwater and had actual data regarding operating costs. Whereas the October 2011 report of Pomona's damages expert contained only projections, after the appeal, Pomona had actual data for the period between 2012 and 2015. ER-619-620.

### 3. Pomona Filed a Motion to Reopen Discovery and Update Its Expert Reports

Pomona filed its motion to reopen discovery for specific, limited purposes. ER-610-624. In addition to updating its experts' reports with the information described above, Pomona sought to update its December 2011 witness list to include its current Water Manager and Public Works Director. The 2011 witness list identified their predecessors, but they left the City's employment during the appeal. ER-618-619. Neither of the current managers was employed by the City as of the original trial date. *Id*. Pomona also sought to call Dr. George Intille, a chemical manufacturing engineer, as a rebuttal expert to refute SQMNA's assertion that there was no alternative, safer design for its fertilizers during the period relevant to this case.[4] ER-620-621.

### 4. With One Exception, the District Court Refused to Allow Pomona's Experts to Testify to Post-2011 Facts

Pomona filed its motion on February 9, 2015, and noticed it for hearing on March 9, 2015. The District Court took the hearing off calendar and issued a decision on March 26, 2015, refusing to allow Drs. Sturchio and Wheatcraft to update their reports. ER-4-8. The District Court explained that with trial starting on June 2, there was inadequate time for the "back-and-forth discovery" that updated expert reports might generate. ER-6. The District Court further opined that the new

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[4] *See* Statement § E.6 below for relevance of alternative design opinions.

information was not "material" because it "appears to merely bolster these experts' reports." *Id.*

The District Court also refused to allow Pomona to introduce testimony from Dr. Intille on the alternative design issue. ER-7. Moreover, the District Court refused the request to add Pomona's current Water Manager and Public Works Director to the witness list. This meant that Pomona was limited to proving its case through witnesses disclosed in December 2011. ER-1039 (Docket Entry 134).

The only updating the District Court permitted was for Pomona's damages expert, who was permitted to introduce post-2011 information about the cost to operate Pomona's perchlorate treatment plant. ER-6.

### 5. The District Court Conducted a Final Pretrial Conference in May 2015 and Then Issued New Rulings on the Motions in Limine on the Eve of Trial

The District Court conducted a final pretrial conference on May 18, 2015 at which time the District Court announced that the parties would be allowed 12 hours per side for the trial. ER-561.[5] The District Court, however, declined to rule on the parties' legal dispute about what statute of limitations period applies. ER-564. SQMNA contended that a two-year statute applies, whereas Pomona argued that this Court's decision in *Pomona I* had established as law of the case that a

[5] While slightly more than the 10 hours per side ordered at the 2012 pretrial conference (ER-632), this was still much less time than the four to six-week trial requested by the parties at the outset of the case (ER-1002) and even the 10-day trial originally set by the District Court (ER-1016).

three-year statute applies. ER-579-584; *see Pomona I*, 750 F3d at 1051 ("the statute of limitations for injury to real property is three years.") Even though this issue had been fully briefed in the parties' respective filings, the District Court directed the parties to "[p]ut it in writing" (again). ER-564. They did so on May 22, 2015. ER-1053-1054 (Docket Entries 295, 301).

On the afternoon of May 29, 2015, the Friday before the trial began, the District Court issued sua sponte a minute order setting forth new rulings on the parties' motions in limine filed in 2011. ER-2-3. The District Court reversed several of its 2012 rulings without explanation or analysis, and all but one of the changed rulings was to Pomona's detriment. *Cf*. ER-2-3 & ER-663-664.[6] The final ruling on Pomona's motion to exclude Dr. Laton remained unexplained yet unequivocal: "DENY." ER-2-3. Notably, the May 29 rulings did not address the statute of limitations issue.[7]

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[6] SQMNA's motion to exclude the testimony of Pomona's agricultural historian, Dr. Sundstrom, was "denied" after having been "granted" more than three years earlier. ER-3, 664. While this change ostensibly favored Pomona, it left Pomona little time to reorganize its trial plan and arrange for this witness's appearance.

[7] On the first day of trial, the District Court finally addressed the issue stating, "if the facts support a two-year statute of limitations, that's fine, or a three-year statute of limitations. The appellate court did not foreclose the fact that you can go into facts that might support a two-year statute of limitations." ER-358. No further explanation was provided.

### 6. The District Court Overruled Pomona's Election to Prove Its Design Defect Claim Using the Consumer Expectations Test and Required Use of the Risk-Benefit Test, and Then Precluded Pomona from Presenting Evidence Relevant to the Risk-Benefit Test

California product liability law provides two alternative tests for deciding a design defect claim.[8] The motions in limine filed in late 2011 included cross-motions about which of these tests should apply in this case. ER-1035 (Docket Entry 97), ER-1036 (Docket Entries 99, 100). Pomona sought to rely on the consumer expectations test, which considers whether a product failed to perform as safely as the ordinary users of the product would have expected. ER-836-842. Relevant to this test, Pomona showed that advertisements touted SQMNA's fertilizer as "safe." ER-175, 447. Pomona also proffered percipient witness testimony from Ted Batkin, a fourth-generation California citrus farmer, that he and other farmers would not use a fertilizer they knew would contaminate their groundwater. ER-833, 900. Pomona also proffered expert testimony that farmers using SQMNA's fertilizer in the 1920s through the 1950s would not have expected the fertilizer to contaminate groundwater. ER-711, 833. Finally, Pomona proffered an admission from SQMNA that "the ordinary farmer appreciated that one should not foul one's own water[.]" ER-833.

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[8] *See* Argument § III(A) below for discussion of the two alternative tests.

SQMNA, however, opposed the application of the consumer expectations test. It argued for the sole use of the risk-benefit test, which considers the feasibility and cost of a safer alternative design, among other things. SQMNA claimed that an alternative safer design was not feasible at the relevant times, relying on the "expert" testimony of several of its corporate representatives that before the early 2000s, "practical technology" to reduce perchlorate in fertilizer was lacking. ER-911, 918-920. However, these purported expert opinions contradicted testimony given by *these same individuals* in fact depositions conducted just weeks earlier. ER-970-975, 978, 979.[9] Pomona filed a separate motion in limine to exclude these opinions on the grounds they failed to meet *Daubert* standards, were untimely, and contradicted prior discovery responses and deposition testimony. ER-962-988.

On January 3, 2012, the District Court tentatively denied Pomona's motions to allow use of the consumer expectations test and to exclude the "expert" alternative design testimony proffered by SQMNA. ER-642, 663. The District Court issued final rulings to this effect on May 29, 2015. ER-2.

[9] One of these employees was asked at deposition, "do you consider yourself to be an expert regarding the history of nitrate production in Chile?" to which he answered, "No." ER-938.

### F. The District Court's Evidentiary Rulings Resulted in a Skewed Presentation of Centrally Relevant Evidence

#### 1. In the 2015 Trial, the District Court Precluded Testimony From Pomona's Scientific Experts About Post-2011 Facts

During the June 2015 trial, Drs. Sturchio and Wheatcraft were limited to testifying about facts that existed as of their October 2011 expert reports. ER-239-240, 282-283, 298-299. The District Court ruled that experts could testify only about matters in the report "at the time his report was done." ER-253. This prevented the jury from learning of intervening scientific data validating their testimony. *See* Statement § E.2 above.

Because the District Court had precluded Dr. Sturchio from testifying about the last three and a half years of perchlorate isotope research, SQMNA's geochemist Dr. Ramon Aravena was able to testify at length about his "two main criticism[s]" of Dr. Sturchio's research (as it stood in 2011): (1) that it had not been reproduced by other laboratories; and (2) that the reference database was too small. ER-143-146. Furthermore, the District Court limited Pomona's cross-examination of Dr. Aravena to facts in the 2011 expert disclosures; as a result, Pomona was not allowed to challenge Dr. Aravena's testimony regarding Dr. Sturchio's analysis that was, by the time of trial, contrary to fact. ER-159-162.

By prohibiting Dr. Sturchio from testifying about post-2011 information and facts, the District Court allowed misleading testimony and enabled SQMNA's attorney to tell the jury in closing that:

> It is so important to have a complete comparison database, and that's where Sturchio has dragged his feet. He says there's only 16 samples from Chile . . . [and] four samples from all of California.
>
> * * *
>
> [Dr. Sturchio] also admitted his is the one and the only laboratory to do his technique... I didn't make that up, folks. That comes from Dr. Sturchio.
>
> * * *
>
> Because Pomona is presenting weaker evidence when they had it in their power to present stronger evidence, you should disregard Dr. Sturchio.

ER-24, 27, 28, 143-149, 155-156. In fact, at the time of counsel's summation, Dr. Sturchio and other scientists had amassed 50 samples from the Atacama Desert in Chile, 55 samples of naturally occurring perchlorate from other locations, and 79 samples of synthetic perchlorate. ER-465-466, 608-609.

#### 2. The District Court Permitted SQMNA's Experts to Present Speculative Testimony

Over Pomona's objections, the District Court allowed Dr. Aravena to speculate that "it's a possibility" that further sampling of perchlorate from the Death Valley could yield isotope measurements that "overlap with the perchlorate from Chile" and that additional sampling from the Atacama Desert could yield isotopic values of a range that is "maybe larger than we already observe." ER-156.

The District Court also allowed speculative testimony from SQMNA's expert Dr. Laton. Without distinguishing between natural and synthetic perchlorate, Dr. Laton testified that military and industrial sites, railroads, hobby rocket sellers, households using bleach, septic tanks, swimming pools, pipes that carry wastewater away from water treatment plants (*i.e.*, "brine lines"), and the Colorado River were potential alternative sources of the perchlorate in Pomona's wells. ER-71-96.

### 3. The District Court Precluded Pomona from Rebutting and Impeaching SQMNA's Claim That There Was No Safer, Alternative Design for Its Fertilizer

In response to SQMNA's assertion that an alternative, safer design for Atacama fertilizer was not feasible decades ago, Dr. Sturchio provided a timely rebuttal report. It explains that "modest reductions" of perchlorate, using a manufacturing process available by 1927, would have reduced the perchlorate in the groundwater to avoid the MCL exceedances that triggered Pomona's costly remediation responsibilities. ER-816-819. He returned to this point at trial, testifying that a 50% reduction of perchlorate in the fertilizer would have been sufficient. ER-303-304. However, the District Court ruled that Dr. Sturchio lacked the qualifications to testify that such a reduction could have been achieved in the 1930s and 1940s. ER-304-306.

Dr. Intille, on the other hand, indisputably had the qualifications to address that subject and was prepared to do so. Pomona proffered a written report from him fully supporting the position taken in Dr. Sturchio's rebuttal report. ER-1053 (Docket Entry 292). Dr. Intille's report explained that, as early as 1927, sodium nitrate fertilizer from the Atacama Desert could have been manufactured to contain an acceptably low concentration of perchlorate. ER-517. Pomona moved to call Dr. Intille to impeach SQMNA's witness, and SQMNA objected solely based on timing. ER-461-462. The District Court refused to allow the jury to hear this evidence, ruling, "I'm not too sure what the motion is one way or the other. I think it was a request that he be allowed to testify, and there was an objection to it, and he will not be allowed to testify." ER-359.

### G. The Jury Returned a Defense Verdict, Finding the Design of SQMNA's Fertilizer Was Not a Substantial Factor in Causing Pomona's Groundwater Contamination

The case was tried in 24 hours through the testimony of 19 witnesses, including 13 expert witnesses. After deliberating for less than three hours, the jury returned a defense verdict. ER-19, 30.

The verdict form consisted of a series of questions:

1. Did SQMNA distribute or sell sodium nitrate fertilizer containing perchlorate?

2. Was the property (i.e., groundwater in the City of Pomona) harmed?

3. *Was the design of SQMNA's sodium nitrate fertilizer a substantial factor in causing the harm in the City of Pomona?*[10]

4. Did the City of Pomona have usufructuary rights to the groundwater located in the City of Pomona?

5. Did the risks of the sodium nitrate fertilizer's design outweigh the benefits of the design at the time the product was used?

6. What are the City of Pomona's damages?

ER-14-16 (emphasis added). The jury answered "yes" to the first two questions. ER-14-15. However, it answered "no" to the third question, resulting in a judgment for defendant. *Id*. The jury reached this verdict even though SQMNA had presented no evidence of any other product containing Atacama perchlorate being used anywhere (let alone near Pomona) or any other source of perchlorate with the same isotopic fingerprint as Atacama perchlorate.

## SUMMARY OF ARGUMENT

The District Court made multiple erroneous and arbitrary rulings that resulted in a badly skewed fact-finding process. This appeal focuses principally on two grave errors, each of which, standing alone, mandates reversal.

*First*, the District Court prohibited Dr. Sturchio, Pomona's key causation expert, from testifying about information developed during the three years this case was on appeal. This ruling prevented Pomona from discrediting SQMNA's central

[10] The jury was instructed that "[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." ER-361.

attacks on Pomona's case, namely, the argument that stable isotope analysis of perchlorate is too novel and rests upon inadequate peer review and an insufficient number of samples.

In ruling on this critically important evidence, the District Court failed to faithfully apply the test for amending pretrial deadlines and erroneously declared the relief sought by Pomona would delay trial. These errors resulted in the presentation of egregiously misleading expert evidence and undermined the jury's ability to deliver an informed and just verdict. The District Court's exclusion of this evidence prejudiced Pomona and tainted the outcome because it enabled a jury finding that SQMNA's fertilizer was not a substantial factor in causing the contamination in Pomona's wells—a conclusion contradicted by the empirical, scientific evidence presented by Pomona.

*Second*, the District Court abdicated its *Daubert* gatekeeping responsibility in allowing without scrutiny SQMNA's hydrogeology expert to speculate about potential alternative sources of perchlorate contamination. The testimony was not only methodologically flawed and unreliable, it focused on chemically distinct *synthetic* sources of perchlorate that were beside the point given Dr. Sturchio's uncontested testimony that synthetic perchlorate accounts for less than 10% of the perchlorate in Pomona's wells. This testimony misled the jury regarding the significance of the scientific evidence presented by Pomona.

The District Court made two additional errors that should be addressed if this case is remanded. The first was a legal error in denying Pomona its choice to use the consumer expectations test to prove design defect. The District Court erred when, contrary to controlling California law, it required Pomona to proceed with the risk-benefit test and precluded reliance on, and evidence regarding, the alternative consumer expectations test. If this case is remanded, Pomona should be allowed to rely on and present evidence supporting the consumer expectations test.

Additionally, the District Court erred in refusing to allow Pomona to present testimony regarding the feasibility of an alternative design for SQMNA's fertilizer. That testimony would have directly contradicted SQMNA's claim that there was no manufacturing method available during the relevant period to reduce the level of perchlorate in SQMNA's fertilizer. If the case is remanded and tried using the risk-benefit test, Pomona should be allowed to introduce that evidence.

The District Court's management of the case—including a pretrial schedule that provided insufficient time for expert depositions and trial limits that required Pomona to prove its case in 12 hours—precluded a full and fair development of the scientific and historical evidence. These rulings greatly amplified the impact of the court's errors regarding expert testimony.

## ARGUMENT

### Standard of Review

This Court reviews evidentiary rulings for abuse of discretion and must reverse "if the exercise of discretion is both erroneous and prejudicial." *Pomona I*, 750 F.3d at 1043. "Generally, a district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts." *United States v. Rahm*, 993 F.2d 1405, 1410 (9th Cir. 1993).

This Circuit has adopted "an objective two-part test" for analyzing whether a district court abused its discretion. *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (*en banc*). First, the Court asks "whether the trial court identified the correct legal rule to apply to the relief requested." *Id.* at 1262. If the trial court failed to identify the correct legal rule, then it necessarily abused its discretion. *Id.* Second, the Court asks "whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *Id.* at 1262 (citations and footnotes omitted). This second step entails a review of the "record as a whole." *See id*. at 1262 n.21 (quoting *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001)).

An erroneous evidentiary ruling is prejudicial if it "tainted the outcome." *GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc*., 650 F.3d 1257, 1262 (9th Cir.

2011) (citation omitted). When the trial court erroneously admitted evidence, there is a "presumption of prejudice." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 465 (9th Cir.), *cert denied*, 135 S. Ct. 55 (2014) (citation omitted). The beneficiary of the error has the burden to show lack of prejudice by "showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Id*. Absent that showing, "the appropriate remedy is a new trial." *Id*. at 460.

## I. The District Court Erred in Prohibiting Dr. Sturchio from Testifying in the 2015 Trial About Centrally Relevant Information That Was Unavailable at the Time of the 2011 Expert Reports

In the earlier appeal, this Court held that "the district court abused its discretion by not allowing a jury to resolve contested but otherwise admissible expert testimony[.]" *Pomona I*, 750 F.3d at 1041. On remand, however, the District Court persisted in arbitrarily limiting the testimony of Dr. Sturchio by refusing to allow him to testify about important new information made available only after his 2011 report. The same district judge that had previously found Dr. Sturchio's analysis so novel and untested to justify its *wholesale exclusion* now barred information that directly addressed those objections. Dr. Sturchio sought to testify about post-2011 scientific developments that strongly corroborated his testimony linking SQMNA's fertilizer to the pollution in Pomona's water. The District Court's refusal to allow the jury to hear this important evidence allowed SQMNA

to affirmatively mislead the jury about the reliability of Sturchio's findings. The court's arbitrary exclusion had no justification in any rules or precedent.

### A. Pomona Satisfied the Standard for Amending a Scheduling Order to Allow Its Experts to Update Their Reports

Intent on rushing the remanded case to the finish line, the District Court refused to amend its March 22, 2011 scheduling order and reopen discovery for the limited purposes requested. Pomona easily met the "good cause" standard set forth in the Federal Rules, which "primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (citing Fed. R. Civ. P. 16). Pomona's request was also supported by the following factors that are relevant to a request to reopen discovery:

> 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.

*United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995) (citation omitted).

The good cause standard and *Schumer* factors weighed overwhelmingly in favor of granting Pomona's request: Pomona was diligent because the information did not exist during the original discovery period, and Pomona could not have foreseen during that time that a protracted delay would occur before trial; although

SQMNA opposed the request, it failed to show any prejudice; trial was not imminent; and the particular additional discovery would indisputably lead to relevant evidence. *Id*. at 1526. The District Court's decision was both "illogical" and "without 'support in inferences that may be drawn from the facts in the record.'" *Hinkson*, 585 F.3d at 1262 (citation omitted).

#### 1. Pomona Was Diligent and Could Not Have Included in the October 2011 Expert Reports the Clearly Relevant Information Acquired During the Appeal

The key factor—Pomona's diligence—unquestionably supported reopening discovery after remand. The information Dr. Sturchio sought to include in 2015 did not exist in October 2011. He was not offering new opinions or changed opinions; rather, the additional research and data supported the conclusions in his earlier report, adding substantially to the weight of his testimony that had been attacked as too novel or insufficiently tested.

Pomona was also diligent because it "could not reasonably have anticipated" the relief sought in 2015 during the original discovery period. *See In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1134, 1139 (9th Cir. 2002) (directing trial court to permit supplementation of expert reports on remand, where "[b]ecause the district court's discovery orders were not clear, the plaintiffs could not reasonably have anticipated" the need for the type of discovery that could have prevented dismissal of their claims). The discovery period was from March 22,

2011 to October 21, 2011, and during that time, Pomona was preparing for a January 2012 trial. ER-1028 (Docket Entry 17). It was only due to the District Court's erroneous exclusion of Dr. Sturchio's testimony—*after* the close of the original discovery period—that an appeal and multi-year delay of the case occurred.

Further, there was no question that granting Pomona's motion would have led to relevant information. Pomona sought to include testimony from Dr. Sturchio about research conducted and data acquired, including by other scientists and laboratories, regarding stable isotope analysis of perchlorate. That research and data substantiated Dr. Sturchio's analysis and strengthened the conclusions he reached in October 2011 that the Atacama Desert is the dominant source of the perchlorate in Pomona's groundwater. And the excluded evidence rebutted SQMNA's central criticisms of Dr. Sturchio's testimony: that his methodology was too new and untested and that the reference database was too small. The excluded developments are precisely the type of "contested but otherwise admissible expert testimony" that the jury should have been allowed to hear. *See Pomona I*, 750 F.3d at 1041. By excluding this evidence, the District Court undermined the jury's fact-finding mission and allowed SQMNA to mislead the jury.

### 2. SQMNA Opposed Pomona's Motion but Failed to Demonstrate Any Prejudice

Dr. Sturchio should have been allowed to update his report because SQMNA would have suffered no prejudice. In opposing Pomona's motion, SQMNA merely argued in conclusory terms that it would be "expensive," "time consuming," "unproductive," and possibly require refiling of pretrial documents and generate additional in limine and *Daubert* motions. ER-602-603. None of SQMNA's conclusory, factually-barren assertions had merit. *Id.*

First of all, SQMNA was well aware of, and had access to, the updated information that Pomona sought to introduce. SQMNA followed Dr. Sturchio's independent research during the appeal and went so far as to pay a "consultant" to publicly criticize one of Dr. Sturchio's publications. ER-608. Accordingly, there was no need for "expensive" or "time consuming" discovery.

Second, the potential for additional *Daubert* motions was nonexistent. The additional research and factual developments did not change Dr. Sturchio's qualifications or the methodologies and principles upon which his opinions were based. Therefore, updating his report would not have opened him up anew to any legitimate *Daubert* challenge. *See Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 595 (1993) (focus of a Rule 702 inquiry "must be solely on principles and methodology"). Thus, contrary to SQMNA's assertions, an updated report would not have caused any unfair prejudice.

### 3. Trial Was Not So Imminent as to Justify Denial of Pomona's Motion

The District Court justified its denial of Pomona's request to update its expert reports by suggesting that "back-and-forth discovery" "could delay trial," but this reason was clearly erroneous. ER-6. As explained above, there was no need for "back-and-forth" discovery because Dr. Sturchio would have supplemented with publically-available information and would not have added any new opinions.

The error of the District Court's explanation is inescapable when contrasted against the admission of an updated expert report from Pomona's damages expert Kenneth Wilkins. The District Court allowed Mr. Wilkins to update his damages calculations based on newly acquired data, including water quality and production data. ER-6, 202-206, 210-212, 225. The updates to Mr. Wilkins' report ostensibly entailed the prospect of "back-and-forth" discovery no less than the others, but this did not prevent the District Court from allowing it. And in the end, SQMNA did not seek discovery from Mr. Wilkins.

But even if follow-up discovery were necessary, there was ample time to replicate the expert discovery schedule the District Court imposed at the outset of the case. The original pretrial schedule provided only seven business days to conduct discovery after initial expert disclosures and no time for discovery after rebuttal disclosures. When Pomona made its initial oral request on January 12,

2015 and its written request on February 9, and even when the District Court issued its ruling on March 26, the District Court could have imposed deadlines in advance of the new June 2, 2015 trial date that mirrored the original schedule. For example, the deadline for updated reports could have been set at April 10, with depositions by April 20, and rebuttal reports by May 10.

The District Court's sole rationale for denying Pomona's request was illogical, without support in the record, and reflected an erroneous factual assessment. *Hinkson*, 585 F.3d at 1262. In limiting the testimony of Pomona's experts, the District Court ignored this Court's admonition that a "factual dispute is best settled by a battle of the experts before the fact finder, not by judicial fiat." *Pomona I*, 750 F.3d at 1049.

### B. Pomona Also Satisfied the Test for Supplementation of Expert Reports

The illogic of the District Court's order prohibiting Dr. Sturchio from testifying about later acquired facts is underscored by the fact that supplementation of expert reports is expressly authorized by the Federal Rules until 30 days before trial. *See* Fed. R. Civ. P. 26(e)(2), (a)(2)(B). "By the very terms" of Rule 26, supplementation may occur "after the discovery cut-off date in most cases." *Qdoba Restaurant Corp. v. Taylors, LLC*, No. 08-cv-01179-MSK-KMT, 2009 WL 1938819, *1 (D. Colo. Jul. 2, 2009). The "Rules do not prohibit supplementation simply because the discovery deadline has passed." *Id*.; *see also Helen of Troy*,

*L.P. v. Zotos Corp*., 235 F.R.D. 634, 637 (W.D. Tex. 2006) (allowing expert affidavit containing additional factual support even though discovery had closed because Rule 26 "contemplates allowing parties to supplement their expert reports."); *In re Hanford Nuclear Reservation Litig*., 292 F.3d at 1139 (directing trial court to permit supplementation of expert reports on remand). Pomona's proposed updates were all within the scope of proper supplementation: The additional information did not exist when discovery closed in October 2011, and the new information rendered the earlier report incomplete. *See* Fed. R. Civ. P. 26(e)(2) (supplementation warranted when "in some material respect the disclosure or response is incomplete or incorrect").

Even if the proposed updates had been outside the scope of proper supplementation, exclusion would have been proper only after conducting an analysis under Rule 37(c), which the District Court failed to do. An exclusion sanction is inappropriate if the failure to disclose was either "substantially justified" *or* "harmless." Fed. R. Civ. P. 37(c)(1). Here, the omission of the updated 2011-2015 information from the 2011 reports was fully justified *and* harmless. In addition to the fact that this expert information simply did not exist until this case was on appeal, Pomona had no means to disclose additional reports during the appeal because the case was dismissed in January 2012. Pomona raised the need for updated reports at the very first hearing after remand. And even if

Pomona could have updated the reports *during* the appeal, SQMNA suffered no prejudice from Pomona's January 2015 request. *See* Argument § I.A.2 above. In all of these respects, Dr. Sturchio was identically situated to Mr. Wilkins, who was allowed to supplement his report. Accordingly, the District Court had no legitimate ground for imposing what amounted to an exclusion sanction.

### C. The District Court's Rigid Adherence to the Scope of the 2011 Expert Reports Was Contrary to the Rules and Fundamental Purpose of a Trial

The District Court's requirement that Drs. Sturchio and Wheatcraft limit their June 2015 trial testimony to the contents of their 2011 reports was contrary to the rule governing expert disclosure in another respect. Rule 26 "contemplates that the expert will supplement, elaborate upon, and explain his report in his oral testimony." *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006). In other words, an "expert report . . . is not the end of the road, but a means of providing adequate notice to the other side to enable it to challenge the expert's opinions and prepare to put on expert testimony of its own." *Heller v. District of Columbia*, 952 F. Supp. 2d 133, 139 (D.D.C. 2013); *see also Johnson v. H.K. Webster, Inc.*, 775 F.2d 1, 7-8 (1st Cir. 1985) (explaining Rule 26's goal to prevent unfair surprise). Thus, a "mechanical and formulistic" approach to expert testimony that strictly limits testimony to the contents of expert reports is an abuse

of discretion. *Thompson*, 470 F.3d at 1203-04 (court erred in limiting expert's testimony by requiring that "everything's got to be in his report").

The District Court's unfounded commitment to conducting a trial in 2015 based (with one exception) upon a factual record frozen in 2011 was even more inexplicable than the "mechanical and formulistic" approach rejected in other cases. The District Court blindly adhered to "what the [pre-appeal] Rule 26 report provided" for determining the permissible scope of expert testimony (ER-239-240), regardless of the passage of nearly four years, thereby preventing the jury from hearing reliable and important information regarding the core scientific issue in the case. This prevented Pomona from introducing competent evidence that was indisputably known to SQMNA. To take one example, the District Court refused to admit the final *Guidance Manual* because it post-dated Dr. Sturchio's October 2011 expert disclosure even though SQMNA used the *Guidance Manual* to cross-examine him at the *Daubert* hearing and *this Court's opinion* cited the final version. ER-239-240, 632, 666.[11]

The enormous significance of excluding more than three years of corroborative evidence and research on Sturchio's theory of causation was not lost

[11] Dr. Sturchio's October 2011 expert report referred to a draft of this document because the *Guidance Manual* was not officially published until December 2011. Pomona submitted a copy of the final version in advance of the January 5, 2012 evidentiary hearing, and the Ninth Circuit decision refers to the final published document. ER-665-666; *see Pomona I*, 750 F.3d at 1042.

on SQMNA. Safe in the knowledge that the jury would not learn the actual facts, SQMNA's attorney was able to tell the jury in closing that:

> It is so important to have a complete comparison database, and that's where Sturchio has dragged his feet. He says there's only 16 samples from Chile . . . [and] four samples from all of California.
>
> * * *
>
> [Dr. Sturchio] also admitted his is the one and the only laboratory to do his technique... I didn't make that up, folks. That comes from Dr. Sturchio.
>
> * * *
>
> Because Pomona is presenting weaker evidence when they had it in their power to present stronger evidence, you should disregard Dr. Sturchio.

ER-24, 27, 28, 143-149, 155-156. The information Pomona had sought to place before the jury left no doubt that these assertions were—as the jury sat in 2015—completely false. *See* Statement § E.2 above.

Thus, the District Court's exclusion of the post-2011 evidence was contrary to the fundamental purpose of a trial, which is to "ascertain the truth." *Estes v. Texas*, 381 U.S. 532, 540 (1965); *see also Dabney v. Montgomery Ward & Co., Inc.*, 692 F.2d 49, 52-53 (8th Cir. 1982) (reversing district court that "adhere[d] blindly to the letter of" scheduling order and precluded testimony from witness whose existence came to light after submission of witness list).

### D. Pomona Was Prejudiced by the District Court's Refusal to Permit the Jury to Hear Post-2011 Evidence

The exclusion of updated opinions from Dr. Sturchio unquestionably "tainted the outcome" of the trial. *GCB Commc'ns, Inc.*, 650 F.3d at 1262 (citation

omitted). The jury was prevented from learning about multiple significant developments in perchlorate isotope research. *See* Statement § E.2 above. At the same time, damages expert Mr. Wilkins *was* allowed to testify based on the most current information. A reasonable juror would have assumed that Dr. Sturchio, like Mr. Wilkins, had been allowed to testify to full and up-to-date information underlying his opinion. The disparity between Mr. Wilkins' and Dr. Sturchio's testimony gave undue credence to the argument by SQMNA's attorney in closing that the jury "should disregard Dr. Sturchio" because Pomona "present[ed] weaker evidence when they had it in their power to present stronger evidence[.]" ER-28. In truth, it was the District Court's arbitrary ruling that prevented Pomona from presenting stronger evidence, and not anything in Pomona's power.

This evidence is particularly vital in this case. Dr. Sturchio's analysis provides direct, empirical evidence that approximately 90% of the perchlorate in Pomona's wells is the same as the perchlorate in SQMNA's product (far more than is necessary to meet the "substantial factor" test). SQMNA's central attack on Dr. Sturchio's opinions was that his methodology was too novel and inadequately tested, and had not been sufficiently scrutinized in the scientific community. Indeed, the District Court's original ruling excluding Dr. Sturchio's testimony

rested on such novelty objections.[12] The Supreme Court's *Daubert* opinion emphasized the importance of "scrutiny of the scientific community" and "support within the community" as important measures of the strength of scientific testimony. *Daubert*, 509 U.S. at 593-94. This Court, in overturning the District Court previously, had observed that the relative novelty of Dr. Sturchio's approach should be the subject of cross-examination at trial. *Pomona I*, 750 F.4d at 1049. Information showing that independent scientific reviews validated Dr. Sturchio's analysis, and his reliance on a much broader database of samples, was crucial to Pomona's case.

The Court of Appeals should vacate the judgment, remand for a new trial, and explicitly direct the District Court to permit all of Pomona's experts to update their reports to reflect the most current research, analysis, and data. Although the District Court's exclusion of Dr. Wheatcraft's updated hydrogeology opinions lacked the ironic twist of the exclusion with respect to Dr. Sturchio, it was equally arbitrary and prejudicial to Pomona. Dr. Wheatcraft's updated opinions were based on information that was unavailable at the time of the original expert reports and

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[12] Similarly, SQMNA's petition for certiorari had attacked Dr. Sturchio as a "lone expert" whose "novel application" of stable isotope analysis relied on an "underdeveloped database" involving "only a handful of samples," and claimed his methods "had not undergone proper validation" and remained "highly provisional[.]" *See* Petition for Certiorari, No. 14-297, *SQM N. Am. Corp. v. City of Pomona*, No. 14-297, 2014 WL 4477715, *3, *7, *8, *20, *21 (Sept. 8, 2014).

would have been of obvious assistance to the jury. *See* Statement § E.2 above. And if this case is remanded, the passage of time since the October 2011 expert reports will be even greater than it was at the time of the trial.

## II. The District Court Erred in Allowing SQMNA's Untimely Disclosed Hydrogeologist to Testify About Potential Alternative Sources of Perchlorate

The prejudice to Pomona from the erroneous exclusion of Dr. Sturchio's updated testimony was compounded by the District Court's complete abdication of its *Daubert* gatekeeping function as to SQMNA's expert Dr. Laton. Dr. Laton's testimony fell well below the minimum standards for admissibility and its disclosure was timed to evade rebuttal by Pomona. The District Court's admission of Dr. Laton's testimony lent an aura of expertise to completely unfounded speculation that the contamination of Pomona's water could have been due to numerous sources other than SQMNA's fertilizer.

The District Court committed the following errors in admitting Dr. Laton's testimony, each of which independently justifies reversal of the judgment:

(1) Failing to conduct *any Daubert analysis* of Dr. Laton's alternative source theories;

(2) Admitting Dr. Laton's testimony, which was not "based on sufficient facts or data," the "product of reliable principles and methods," or relevant "to determine a fact in issue." Fed. R. Evid. 702; and

(3) Allowing SQMNA to shield Dr. Laton's testimony from the pretrial testing provided for under the Federal Rules, by (a) mischaracterizing it as rebuttal testimony and disclosing it after the close of discovery; and (b) failing to include the factual bases for the expert theories in response to Pomona's interrogatories.

### A. The District Court Failed to Conduct Any Analysis of the Reliability or Relevance of Dr. Laton's Opinions as Required by Rule 702

In stark contrast to the District Court's scrutiny of Dr. Sturchio's isotope analysis—which had an indicia of reliability by virtue of it being developed outside of litigation—the District Court failed to scrutinize Dr. Laton's litigation-driven opinions. *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ("*Daubert II*") ("Establishing that an expert's proffered testimony grows out of pre-litigation research" is one of "the two principal ways the proponent of expert testimony" can satisfy the reliability requirement of Rule 702); ER-848-849.

Both the U.S. Supreme Court and this Court have "made clear that the Federal Rules of Evidence impose a 'gatekeeping' duty on the district court requiring the court to 'screen' the proffered evidence to 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *United States v. Alatorre*, 222 F.3d 1098, 1100-01 (9th Cir. 2000), *citing Daubert*,

509 U.S. at 597, 589. District courts must therefore "scrutinize carefully the reasoning and methodology" underlying proffered expert testimony. *Claar v. Burlington N. RR. Co.*, 29 F.3d 499, 501 (9th Cir. 1994); *see also Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (overturning district court decision containing "no explanation or analysis for rejecting" expert's qualifications). Although district courts have latitude in deciding how to conduct a reliability determination, there is no latitude in the requirement that a reliability determination be made. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42 (1999). Accordingly, the admission of "expert testimony without first finding it to be relevant and reliable under *Daubert*" is by itself reversible error. *Estate of Barabin*, 740 F.3d at 464.

Here, the District Court failed to conduct *any Daubert* analysis before denying Pomona's challenge to the reliability of Dr. Laton's opinions. ER-2, 642, 663. Ignoring its responsibility as a gatekeeper, the District Court dispensed with Pomona's motion to exclude Dr. Laton with a one-word decision: "DENY." ER-2. At no time did the District Court explain—in writing or in oral remarks—why it denied Pomona's motion. Instead, the District Court "abdicated its gatekeeping role by failing to make *any* determination that Dr. [Laton's] testimony was reliable and, thus, did not fulfill its obligation as set out by *Daubert* and its progeny."

*Mukhtar v. Calif. State Univ., Hayward*, 299 F.3d 1053, 1066 (9th Cir. 2002) (emphasis in original).

SQMNA's suggestion in its briefs below that Pomona had the burden to show that Dr. Laton's opinions were unreliable and failed to meet that burden was completely wrong. *See Lust v. Merrell Dow Pharms., Inc*., 89 F.3d 594, 598 (9th Cir. 1996) ("It is the proponent of the expert who has the burden of proving admissibility"); ER-739. That Dr. Laton was a defense expert was also no excuse; *Daubert* standards of reliability and relevance apply to "*any and all* scientific testimony or evidence admitted[.]" *Daubert*, 509 U.S. at 589 (emphasis added). The District Court never conducted *any* evidentiary hearing for *any* defense expert, much less state its reasoning. This failure requires reversal.

### B. Dr. Laton's Opinions Fail to Meet the Reliability Requirement of Rule 702

A proper *Daubert* inquiry would have revealed that Dr. Laton's opinions regarding potential alternative sources of perchlorate were not reliable, relevant, or the product of a scientific methodology. *See Pomona I*, 750 F.3d at 1044 ("For scientific evidence to be admissible, the proponent must show the assertion is 'derived by [a] scientific method.'") (citation omitted).

### 1. Dr. Laton Speculated About Potential Sources of Perchlorate Without Any Evidence That Any Source Spilled Perchlorate in Quantities Sufficient to Contaminate Pomona's Wells

Dr. Laton identified no actual releases of perchlorate in any relevant area in sufficient quantities to cause the level of contamination found there. Dr. Laton attached to his report an approximately 3,000-page report from the Environmental Data Resources database—essentially a compilation of all businesses in the region that used any kind of toxic chemicals—which SQMNA's counsel touted to the jury as evidence of Dr. Laton's diligence and scholarship. ER-54. Yet the word "perchlorate" appears just once in that directory—and even there, in connection with a facility located outside the area from which Pomona's wells capture water where *no* evidence of perchlorate contamination existed. ER-104-106. The District Court allowed Dr. Laton to give explicitly speculative testimony regarding locations that "could be considered as potential perchlorate source(s) to the City's groundwater[.]" ER-852.

For example, Dr. Laton identified the following as "potential candidate[s] for source of perchlorate contamination in the Pomona area":

(1) A military facility where various irrelevant chemicals were found. ER-106, 107, 852-854. The only factual evidence regarding perchlorate at this facility is a letter from the U.S. Navy that states that

"rocket fuels containing perchlorate were *not* manufactured, stored, or tested" there. ER-854 (emphasis added).

(2) Twelve metal finishing and/or plating operations in Pomona because "some" metal plating and finishing processes use perchloric acid and because perchlorate was reportedly found at an unrelated metal plating facility in another city. ER-854-855.

(3) Two "pulp and paper related" companies located in Pomona on the basis that the pulp and paper industries sometimes used as a bleaching agent either sodium hypochlorite—which can "breakdown to chlorate, which further oxidizes to perchlorate"—or sodium chlorate—which "is known to contain perchlorate." ER-855. Dr. Laton had no information about any use of bleaching agents at these facilities in Pomona. ER-110-111, 855.

(4) A waste oil recycling facility operated from 1975 to 1982 in the City of Montclair, where the soil (but not groundwater) was determined to be contaminated by various chemicals (but not perchlorate). ER-856. Although Dr. Laton admitted there is no evidence of perchlorate contamination at the site, he nonetheless speculated that it is a "potential source of perchlorate contamination" because "aerospace related companies with a strong potential of perchlorate containing

waste generation shipped waste" there. ER-857. Dr. Laton ignored the fact that the site was outside the geographic area that could affect Pomona's contaminated wells. ER-105-106.

(5) US Rockets and Dynamic Propellant, two companies in Pomona that manufactured hobby rockets using *synthetic* perchlorate, which bears a distinctly different isotopic fingerprint from 90% of the perchlorate in Pomona's wells. ER-85, 109-110, 857-858. There was also no evidence that either company spilled perchlorate, let alone in the vast quantities necessary to cause the level of contamination in Pomona's groundwater.

Dr. Laton also speculated that perchlorate could have leaked from "brine lines" carrying wastewater primarily from industrial sites and water treatment plants. ER-859-861. According to Dr. Laton, the "most significant" of these brine lines was the one conveying "perchlorate-laden wastewater" discharged from Pomona's anion exchange plant, that is, the water treatment plant connected to the contaminated wells at issue in this case. ER-859. Although there is no evidence of leaks, he speculated that "[c]racks in the concrete or clay pipes, poor seals, and/or pipe offsets [in the brine lines] are likely sources of releases."[13] ER-861. Dr. Laton

[13] In fact, the only evidence on this subject was provided by the City's retired Public Works Director, who testified that he had no knowledge of leaks. ER-264.

provided no scientific analysis as to the quantity and duration of leaks required to cause the vast amount of perchlorate contamination found in the Chino Basin, much less an explanation of how *Atacama* perchlorate in such quantities got into the water being filtered at Pomona's water treatment plant to begin with. ER-859-863.

Testimony "based on unsubstantiated and undocumented information is the antithesis of scientifically reliable expert opinion." *Pomona I*, 750 F.3d at 1044 (internal quotation marks and citation omitted). Experts must "justify a foundational assumption or refute contrary record evidence." *Id.* at 1049 (citation omitted). Dr. Laton did neither. His assumptions about potential alternative sources had no foundation in facts relevant to this case, and he ignored the contrary evidence of Dr. Sturchio's isotopic analysis showing Atacama perchlorate predominates.

Opinions that are "'without factual basis and are based on speculation or conjecture' are inadmissible at trial[.]" *Calif. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1149 n.4 (9th Cir. 2011) (citation omitted); *see also In re TMI Litig.*, 193 F.3d 613, 697 (3d Cir. 1999) ("If the data underlying the expert's opinion are so unreliable that no reasonable expert could base an opinion on them, the opinion

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The District Court's refusal to allow updating of the 2011 witness list precluded testimony from the current managers on this subject.

resting on that data must be excluded."); *Cella v. United States*, 998 F.2d 418, 423 (7th Cir. 1993) ("expert testimony *must* be rejected if it lacks an adequate basis in fact") (citation omitted; emphasis added). The District Court abused its discretion in admitting speculative testimony from Dr. Laton.

### 2. Dr. Laton's Opinions Were Not the Product of Any Scientific Methodology

"For scientific evidence to be admissible, the proponent must show the assertion is 'derived by [a] scientific method.'" *Pomona I*, 750 F.3d at 1044 (citation omitted). "Talking off the cuff—deploying neither data nor analysis—is not an acceptable methodology." *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006) (citation omitted); *see also Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996) ("a District Court judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being . . . speculation offered by a genuine scientist").

Here, Dr. Laton employed a methodology no more reliable than opening a telephone book and selecting companies that *likely used hazardous materials*. Rather than identifying companies that *actually used perchlorate* bearing an isotopic fingerprint the same as Atacama perchlorate, and that *actually spilled perchlorate* in substantial quantities, Dr. Laton speculated that various companies *could have used perchlorate* without showing how such use could have caused the significant level of contamination in Pomona's groundwater. "Instead of reasoning

from known facts to reach a conclusion, [Dr. Laton] reasoned from an end result in order to hypothesize what needed to be known but what was not." *Sorensen by & through Dunbar v. Shaklee Corp.*, 31 F.3d 638, 649 (8th Cir. 1994). In short, Dr. Laton followed no scientific methodology whatsoever.

### C. Dr. Laton's Opinions Fail to Meet the Relevance Requirement of Rule 702

Dr. Laton's opinions should have been excluded for the additional reason that they simply do not "fit" the facts of this case and only served to confuse the issues. *See Daubert*, 509 U.S. at 591-92. This case is about perchlorate in Pomona's wells, the vast majority of which has an isotopic fingerprint matching Atacama perchlorate and is distinct from synthetic perchlorate.

SQMNA presented no evidence that the isotopic fingerprint of Atacama perchlorate could be confused with the isotopic fingerprint of synthetic perchlorate that would have been used at industrial sites. ER-107-117, 156. Nor did SQMNA refute Dr. Sturchio's conclusion that synthetic perchlorate accounted for only a small fraction—10% or less—of the perchlorate in Pomona's groundwater. ER-293-298, 451-452. Indeed, in cross-examination, Dr. Laton admitted that he had no basis for criticizing Dr. Sturchio's conclusion that on average, nearly 90% of the perchlorate in the City's wells came from the Atacama Desert. ER-104.

Under these circumstances, Dr. Laton's speculations about synthetic sources of perchlorate were *irrelevant*. Under California law, Pomona only had to prove

that SQMNA's fertilizer was "more than a slight, trivial, negligible, or theoretical factor in producing" the perchlorate contamination. *See Espinosa v. Little Co. of Mary Hosp.*, 31 Cal. App. 4th 1304, 1314 (1995) (citation omitted). Dr. Laton's testimony regarding possible sources of *synthetic* perchlorate was unhelpful where the unrebutted evidence was that no more than 10% of the perchlorate in Pomona's wells was of synthetic origin.

Even if Dr. Laton's opinions had some probative value, that value was far outweighed by their ability to confuse and mislead the jury. Fed. R. Evid. 403. His speculative and confusing opinions about potential alternative sources of perchlorate exemplify the very problem *Daubert* highlighted. His speculative testimony confused the jury into concluding that even though 90% of the perchlorate in Pomona's groundwater was Atacama perchlorate, SQMNA's fertilizer was not a substantial factor in causing Pomona's contamination problem. The District Court's failure to perform the required *Daubert* gatekeeping function enabled an "expert" to give a patina of science to conjectures and speculations divorced from facts. The "aura of reliability" of the expert blinded the jury to the fact that Dr. Laton's conclusions were factually unsupported. *See Cella*, 998 F.2d at 423 ("Due to the aura of reliability which often surrounds the testimony of an 'expert' witness, the basis of that opinion testimony must be carefully scrutinized by the trial court judge.").

### D. By Mischaracterizing Dr. Laton's Opinions as Rebuttal Opinions and Disclosing Them After the Discovery Cut-off, SQMNA Prevented Pomona from Rebutting Them

Dr. Laton's opinions should have been excluded for the additional, independent reason that SQMNA delayed disclosing them until after the close of discovery. Notwithstanding access to the 3,000 page database report that Dr. Laton would eventually rely upon, SQMNA gave incomplete discovery responses. ER-949-952, 104-105.

SQMNA identified in interrogatory responses only water from the Colorado River as a potential alternative source. ER-951. Not until *after* the discovery deadline, when SQMNA disclosed Dr. Laton's report as a "rebuttal" report, did Pomona learn the extent of SQMNA's defense theories. ER-949-952. Pomona was prejudiced by SQMNA's discovery tactics by being unable to properly rebut them. *United States v. Harvey*, 117 F.3d 1044, 1048 (7th Cir. 1997) ("The search for truth is only hampered when one party is ambushed by expert testimony, which is typically difficult to refute without prior preparation.").

SQMNA's characterization of Dr. Laton's alternative source opinions as "rebuttal" opinions was wrong insofar as he was presenting wholly new and affirmative hypotheses about the source of the perchlorate in Pomona's wells. ER-849-874; *see Baldwin Graphic Systems, Inc. v. Siebert, Inc.*, No. 03-C-7713, 2005 WL 1300763, *2 (N.D. Ill. Feb. 22, 2005) ("rebuttal expert report is no place for

presenting new argument"). As such, they should have been disclosed by the deadline for expert witness disclosures, rather than 30 days later after the close of discovery as a rebuttal to Pomona's expert.[14]

Due to SQMNA's untimely disclosure of Dr. Laton's alternative source theories, Pomona was prevented from deposing him or conducting any other discovery regarding those theories. *See* ER-957-958. Had Dr. Laton been disclosed by the initial expert disclosure deadline, Pomona could have designated an expert to investigate and rebut the industrial source and brine line theories, just as it had done with the Colorado River theory, the sole alternative source identified during discovery. ER-801. Because SQMNA lacked justification for failing to disclose them on or before the initial disclosure deadline, and the delay was not harmless, Dr. Laton's opinions should have been excluded. Fed. R. Civ. P. 37(c)(1); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp*., 259 F.3d 1101, 1106 (9th Cir. 2001).

### E. The Admission of Dr. Laton's Opinions Was Prejudicial to Pomona

In this Circuit, the erroneous admission of evidence gives rise to "a presumption" of prejudice. *Estate of Barabin*, 740 F.3d at 465 (citation omitted). SQMNA, as the "beneficiary of the error," has the "burden" to rebut this with "'a

[14] At trial, Dr. Laton used his claimed rebuttal status to justify why he did not himself conduct testing or do a more fulsome investigation. He testified that he had only a month to prepare his report. ER-62; *see also* ER-55 ("I did the best I could in the time that was allowed"), 110. This wrongly suggested to the jury that he did not and could not have begun his investigation earlier.

showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted.'" *Id*. (quoting *Jules Hordan Video, Inc. v. 144942 Canada Inc*., 617 F.3d 1146, 1159 (9th Cir. 2010)). SQMNA cannot meet this burden. Dr. Laton was the sole witness in the trial who testified about alternative sources of the perchlorate in Pomona's wells besides SQMNA's fertilizer. This "expert" testimony, coupled with unjustified limits on the testimony of Drs. Sturchio and Wheatcraft, allowed SQMNA to mischaracterize Pomona's causation evidence as unreliable, undermining the strength of that evidence. Because Pomona was prejudiced by the District Court's erroneous decisions, a new trial must be ordered. *Estate of Barabin*, 740 F.3d at 460.

## III. The District Court Also Erred in Precluding Pomona from Using the Consumer Expectations Test

Pomona should have been permitted to prove its product defect claim under the consumer expectations test. Contrary to California law, the Court precluded that test and evidence regarding consumer expectations, and instead, required Pomona to rely on the alternative risk-benefit test.

### A. California Law Permits Plaintiffs to Prove Design Defect Using the Consumer Expectations Test

California law recognizes "two alternative tests" by which a product can be found defective in design: (1) when "the product failed to perform as safely as an

ordinary consumer would expect when used in an intended or reasonably foreseeable manner"; and (2) when "the risk of danger inherent in the challenged design outweighs the benefits of such design." *Barker v. Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 429, 430 (1978). These alternative methods have become known as the "consumer expectations test" and the "risk-benefit test," respectively.

"A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks." *McCabe v. Am. Honda Motor Co., Inc.*, 100 Cal. App. 4th 1111, 1121 (2002) (citation omitted). This is because the "two tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another." *Id*. Ordinarily, a plaintiff has the option to decide whether to "proceed under either or both" tests. *Id*. at 1126.

To support a jury instruction on the consumer expectations test, the plaintiff must present facts upon which the jury can "infer[] that the product's performance did not meet the minimum safety expectations of its ordinary users[.]" *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 568 (1994). In cases where "the expectations of the product's limited group of ordinary consumers"—in this case, farmers—"are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers *do expect* may be proper." *Id*. at 567 n.4 (emphasis in original). The consumer expectations test is also compatible with cases where expert testimony is "necessary to explain the

nature of the alleged defect or the mechanism of the product's failure." *Bresnahan v. Chrysler Corp.*, 32 Cal. App. 4th 1559, 1568 (1995).

California courts have applied the consumer expectations test liberally, allowing it to reach juries in cases involving mechanically complex products, novel facts, and even esoteric scientific issues. *See, e.g.*, *Barker*, 20 Cal. 3d at 419 (involving "heavy construction equipment" that tipped when used on ground that was "sloped sharply in several directions"); *West v. Johnson & Johnson Prods., Inc*., 174 Cal. App. 3d 831 (1985) (design features of tampons that increased risk of bacterial growth and toxic shock syndrome); *Arnold v. Dow Chemical Co*., 91 Cal. App. 4th 698 (2001) (design defect in pesticide that allegedly caused fetus to suffer intrauterine stroke). The consumer expectations test has also been allowed in asbestos exposure cases, which are analogous to this case in that the products had specialized uses and caused injuries that did not manifest until decades after the use of the product. *See, e.g.*, *Sparks v. Owens-Illinois, Inc*., 32 Cal. App. 4th 461 (1995).

### B. Pomona Had the Requisite Threshold Evidence to Support Application of the Consumer Expectations Test

The consumer expectations test is especially appropriate for this case because farmers could form expectations regarding the performance of SQMNA's fertilizer based on the product's objective characteristics and the circumstances of its use. It was undisputed that: (1) SQMNA's fertilizer was advertised as

"completely natural" and "safe" (ER 446); (2) the fertilizer was intended to be applied directly to the ground at rates ranging from 625 to 1,875 pounds per acre per year (ER-189-190); (3) the fertilizer was irrigated so that the active ingredient would get dissolved into the ground (ER-177); (4) perchlorate provides "absolutely" no benefit to farmers and can even be toxic to plants (ER-198); and (5) before 1980, SQMNA never disclosed on its product labels that its fertilizer contained perchlorate (ER-134-135). These facts, combined with the excluded evidence regarding farmers' expectations (*see* Statement § E.6 above), amply supported an instruction to the jury on the consumer expectations test.

The District Court, however, rejected this test without any legal analysis. ER-640-642. Its explanation for overruling Pomona's preferred test was simply that, "[t]here is very little if any evidence as to what the farmer at that date—we certainly don't have many people from that date that are still alive as to what their expectations would be." ER-640-641. This conclusion was erroneous and unsupported by any California legal precedent. Pomona proffered both percipient *and* expert testimony, as well as an admission by SQMNA, to establish the expectations of farmers using defendant's fertilizer. *See* Statement § E.6. California law clearly permits the use of expert testimony to establish the expectations of a product's consumers. *See Soule*, 8 Cal. 4th at 567 n.4.

Accordingly, the District Court's statement that there "is very little if any evidence" of farmer expectations is contrary to the record evidence. *See Hinkson*, 585 F.3d at 1262; *Rahm*, 993 F.2d at 1410. The District Court's failure to apply the correct legal framework to the facts was erroneous.

## IV. The District Court Also Erred in Prohibiting Testimony About the Feasibility of a Safer, Alternative Design of SQMNA's Fertilizer

Exacerbating the consequences of its erroneous ruling requiring Pomona to proceed solely under the risk-benefit test, the District Court simultaneously precluded Pomona from presenting any expert evidence that would allow it to prove the existence of a product defect under that test. This preclusion was particularly unjust given that the subject of the proposed expert testimony was a matter on which SQMNA had the burden of proof, and Pomona's proposed evidence was proffered for rebuttal and impeachment purposes. Pomona's proposed expert, Dr. George Intille, is a distinguished chemical manufacturing process engineer who proffered testimony refuting SQMNA's assertion that the perchlorate content of its fertilizers could not have been reduced during the period in question. *See* Statement § F.3.

SQMNA never disputed Dr. Intille's qualifications or the reliability of his opinions. Rather, SQMNA objected based solely on timing. ER-461-462. Yet SQMNA cannot fairly claim prejudice given its own responsibility for the timing of Pomona's rebuttal and impeachment evidence. In fact depositions that took

place just a few weeks before they were disclosed as experts, the same SQMNA employee witnesses repeatedly disclaimed knowledge of historical manufacturing practices for SQMNA's fertilizer. ER-972-975, 978-979. Surprised by the designation of these same witnesses as "experts," Pomona did all that it reasonably could. It gave notice of its intention to dispute SQMNA's alternative design contention by producing a timely rebuttal report from Dr. Sturchio stating that a "modest reduction" of perchlorate, using a manufacturing process available by 1927, would have avoided the perchlorate contamination in Pomona's wells. ER-816-819.

Even if Pomona could have identified and retained a new expert who could produce a report in the 30-day period between initial and rebuttal disclosures without jeopardizing its ability to meet other pretrial deadlines,[15] Pomona was planning to prove its case under the consumer expectations test. The feasibility of an alternative design is not a factor under that test. *See Bresnahan*, 32 Cal. App. 4th at 1569. Even under the risk-benefit test, the *defendant* bears the burden of proving that an alternative design was not feasible such that a plaintiff has no obligation to address this issue except in rebuttal. *See Barker*, 20 Cal. 3d at 431-32. Thus, this entire subject would have been irrelevant had the District Court allowed

[15] For example, SQMNA filed its motion for summary judgment on October 31, 2011, and Pomona's opposition was due one week later on November 7, 2011. ER-1032, 1034 (Docket Entries 56, 73). Further, motions in limine were due on November 23, 2011. ER-1035-1037 (Docket Entries 96-115).

Pomona to rely solely on the consumer expectations test for proving product defect. But this is not what happened. The District Court tentatively ruled against the consumer expectations test on January 3, 2012—nearly two months after the rebuttal disclosure deadline—and made that ruling final on May 29, 2015. Dr. Intille's expert opinions are classic rebuttal and impeachment evidence that only became necessary when (1) the District Court required this case to proceed under the risk-benefit test; and (2) the District Court allowed SQMNA to present evidence claiming that an alternative design was not feasible. Excluding this evidence was an abuse of discretion.

## CONCLUSION

For all of foregoing reasons, this Court should reverse the judgment of the District Court and remand for a new trial.

Dated: January 14, 2016

Respectfully submitted,

By: */s/ Esther L. Klisura*

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## STATEMENT OF RELATED CASES

Plaintiff-Appellant is not aware of any related case currently pending in this Court.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman font size 14.

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## CERTIFICATE OF SERVICE

I hereby certificate that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 14, 2016.

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