APPEAL 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, Los Angeles
The Honorable R. Gary Klausner
U.S.D.C. No. 2:11-CV-00167-RGK-VBK

ANSWERING BRIEF OF DEFENDANT/APPELLEE SQM NORTH AMERICA CORPORATION

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CORPORATE DISCLOSURE STATEMENT
(Fed. R. App. P. 26.1)

Defendant and Appellee SQM North America Corporation submits the following disclosure pursuant to Federal Rule of Appellate Procedure 26.1.

Parents	51% - SQM Industrial S.A. 40% - Sociedad Quimica y Minera de Chile, S.A. 9% - Soquimich European Holdings B.V.

DATED: April 18, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Michael K. Johnson*
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Defendant and Appellee,
SQM NORTH AMERICA CORPORATION

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Defendant/Appellee SQM North America Corporation ("SQMNA"), submits its brief in answer to Plaintiff/Appellant City of Pomona's ("Pomona") opening brief ("AOB").

I. INTRODUCTION

Pomona seeks to impose on SQMNA the cost of a perchlorate treatment plant it built more than fifty years after farmers last allegedly used Chilean sodium nitrate on citrus orchards in Pomona.

This case was just four days before trial in 2012 when the district court struck Pomona's main expert, Dr. Neil Sturchio, under *Daubert.* On appeal, this Court reversed and remanded for trial. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1050 (9th Cir. 2014) ("*Pomona I*").

As directed in *Pomona I,* Sturchio gave his isotope identification opinions at the jury trial in June 2015. He opined that sodium nitrate from Chile caused perchlorate contamination in Pomona. Sturchio told the jury he is even more confident about his results now than he was in his 2011 report because, in the four years before trial, he had received hundreds more perchlorate samples from all over the world. This post-2011 data, according to Sturchio's trial testimony, shows any prior questions about the sufficiency of comparison values are "no longer true today as we sit here." [SER-101.]

On the other hand, the jury also heard evidence that the use of sodium nitrate as fertilizer had dramatically declined before SQMNA began doing business in California in 1931. Jurors heard that there were commercial and industrial uses of sodium nitrate in Pomona's industrial corridor that had nothing to do with fertilizer related activities, and that tons of perchlorate were delivered in water imported from the Colorado River.

After deliberating for sixty-seven minutes, the jury decided that SQMNA's fertilizer did not cause the contamination in Pomona. Pomona makes no direct attack on the sufficiency of the evidence. Pomona's claims of various evidentiary and procedural errors do not withstand analysis. Pomona has shown no abuse of discretion by the district court, has failed to preserve errors it now raises, and has shown no prejudice from either the admission or exclusion of any evidence.

The judgment should be affirmed.

II. JURISDICTIONAL STATEMENT

SQMNA concurs with Pomona's jurisdictional statement.

III. ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in: (a) denying Pomona's motion to modify the scheduling order to allow it to amend its expert reports, or (b) excluding some trial testimony of its experts, and if so, was such ruling harmless error?

2. Did the court abuse its discretion in allowing the testimony of SQMNA's expert, Laton, despite the absence of objections from Pomona at trial?

3. Did the court abuse its discretion in granting a motion in limine precluding Pomona's use of the consumer expectations test in a case involving complex technical and scientific evidence, and if so, does the jury's verdict on causation render it harmless error?

4. Did the court abuse its discretion in denying Pomona's motion to add a new, unnamed "rebuttal" expert on alternative design after the expert cut-off, and if so, does the jury's verdict on causation render any such error harmless?

5. Did Pomona waive its claims of error by failing to make offers of proof and seek rulings at trial, failing to appeal from final rulings in *Pomona I*, and failing in its AOB to provide supporting record citations and clear arguments?

IV. STATEMENT OF THE CASE

A. Proceedings Before *Pomona I*.

The district court issued an Order for Jury Trial ("scheduling order") setting an October 21, 2011 discovery cut-off date. [5-ER-1028; CR-16.][1] The scheduling order required expert witnesses disclosures in compliance with Federal Rule of Civil Procedure ("FRCP") 26. [SER-74.]

[1] "ER" refers to Appellant's Excerpts of Record, "SER" refers to Appellee's Supplemental Excerpts of Record, and "CR" refers to the district court's docket entries.

The parties disclosed experts and exchanged reports on October 12, 2011, ninety days before trial, and exchanged expert rebuttal reports thirty days thereafter. [5-ER-1001.] Pomona did not disclose an expert on alternative fertilizer design in its initial disclosure or in rebuttal.

The parties reported ready for trial at the pre-trial conference on January 3, 2012. [4-ER-663-664.] The district court announced tentative rulings on the parties' eighteen motions in limine. [4-ER-640, 663-664.] The court cautioned both sides that the rulings were "tentative and subject to change as we go through trial." [4-ER-640, 658.]

Among the tentatively denied motions was Pomona's motion to exclude what it characterized as the "alternative source" opinions of SQMNA's experts Laton, Einarson and Aravena. [5-ER-943-961.] Laton's "alternative source" opinions are found in section 3.1.2 of his report. [4-ER-850-867.] Pomona did not move to exclude his other opinions. Pomona argued these so-called alternative source opinions constitute improper rebuttal and were unreliable under Federal Rules of Evidence ("FRE") 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The cursory two-page *Daubert* argument cites no evidence besides portions of Laton's report. [5-ER-958-960.] SQMNA opposed the motion, showing that Laton used existing data to demonstrate holes in the methods of Pomona's experts in failing to assess alternative explanations for the

contamination, and in failing to follow the contaminant source analysis guidelines provided by the California Department of Toxic Substances Control ("DTSC"). [SER-57-59.] Pomona's reply devoted a single paragraph to the *Daubert* issue. [SER-49.]

After the court announced its tentative ruling, Pomona did not request a *Daubert* hearing. [4-ER-634-661.] Pomona's counsel addressed only whether Laton's report was proper rebuttal, and did not mention *Daubert*. [4-ER-657-658.] Even after remand, Pomona did not ask for a *Daubert* hearing regarding Laton, and Pomona did not object at trial to Laton's opinions regarding the inadequacy of Pomona's alternative causation investigation.

B. The Prior Dismissal and Appeal.

Following the 2012 pre-trial conference, the court held a *Daubert* hearing regarding the admissibility of Sturchio's isotope opinions, and excluded Sturchio's opinions. [4-ER-632; CR-211.] Thereafter, the parties stipulated to dismiss the action with prejudice to allow Pomona to seek immediate review. [SER-45-48.]

Pomona appealed only from the order excluding Sturchio's testimony. [SER-44.] In *Pomona I*, this Court reversed the exclusion of Sturchio's testimony, and remanded "for trial."

C. Re-setting the Trial Date After Remand.

After remand, the court scheduled a trial setting conference for January 12, 2015. [4-ER-625.] At that conference, Pomona's counsel raised the issue of reopening discovery and updating expert reports. [4-ER-627.] After pointing out that trial had been just four days away when the case was dismissed in 2012, the court asked Pomona to make its request by written motion. [4-ER-626-629.] With agreement of counsel, the court set a June 2, 2015 trial date. [4-ER-627-629.]

Pomona represents it asked the district court "to wait to set a trial date" so it could update its expert reports. [AOB-14-15.] Not so. Pomona made no request to delay setting the trial date. [4-ER-626-629.] To the contrary, Pomona's counsel agreed to the June 2, 2015 trial date. [4-ER-628.]

D. Pomona's Omnibus Motion to Revamp the Prior Scheduling Order.

Pomona waited almost a month, until February 9, 2015, to file an omnibus motion that sought four material changes to the scheduling order:

- To reopen expert discovery, including new reports for experts Sturchio and Wheatcraft.
- To reopen fact discovery (Pomona does not appeal this ruling).
- To reopen expert disclosures so Pomona could designate an unnamed expert regarding the feasibility of an alternative fertilizer design.

- To reopen discovery for deposition of SQMNA's lobbyist (Pomona does not appeal this ruling).

[4-ER-610-624.]

Pomona argued there was good cause to modify the scheduling order under the multi-factor test in *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th Cir. 1995). [4-ER-617-623.] Pomona's motion for leave to "update" expert reports was cursory (just over a page of discussion) and cited no case law or rule authority. [4-ER-620-621.]

Pomona did not attach the proposed reports to its motion or indicate when they would be ready. Pomona offered no reasons why it failed to do so. [3-ER-604-606; 4-ER-607-609, 617-623.] Pomona's motion did not mention SQMNA's counsel's prior request for the underlying data. [4-ER-611.] The supporting declarations from Sturchio [4-ER-607-609] and Wheatcraft [3-ER-604-606] did not claim the "updated" information constituted a material change or was crucial to their opinions. Rather, the declarations merely suggested that they would "further justify" and "further substantiate" the conclusions already reached. [4-ER-608-609.]

Pomona's motion also sought leave to add a new rebuttal expert on the feasibility of an alternative design of the fertilizer. [4-ER-620-621.] George Intille

is not mentioned by name in the moving papers; Pomona gave no specifics about its new expert. [4-ER-611, 620-621.]

SQMNA opposed Pomona's motion on the ground that Pomona failed to show good cause. [SER-37.1-37.8; 3-ER-590-591, 594-598.] On March 26, 2015, sixty-eight days before trial, the court ruled on Pomona's motion. [1-ER-4-8.]

Applying the *Schumer* factors as Pomona asked, the court found that Pomona failed to establish good cause to modify the scheduling order (except as to the damages experts as to which there was no disagreement). [1-ER-6.] Pomona's request to allow Sturchio and Wheatcraft to file new reports was denied because Pomona "fail[ed] to put forth adequate information to indicate that this information would not create back-and-forth discovery, which could delay trial. Additionally, [Pomona] has failed to demonstrate that the information is material, as the new information appears to merely bolster these experts' reports." [*Id*.]

Pomona mischaracterizes the district court's ruling when it says that the district court found "there was inadequate time for 'back and forth discovery.'" The ruling did not say that, instead the court faulted Pomona's showing. The court ruled that *Pomona* failed to present "adequate information" to demonstrate there would not be ensuing discovery necessitating a trial continuance. With no "updated" reports to consider, and with the underlying data still not turned over to

SQMNA, the court had every reason to conclude the trial date might be in jeopardy if it granted Pomona's motion.

Pomona also misstates that the district court found the new information was not material. [AOB-17-18.] Instead, the court again faulted Pomona's showing, finding Pomona "had failed to demonstrate" that the new information was material. [1-ER-7.]

The district court also denied Pomona's request to add an unidentified expert on the subject of alternative design, finding that Pomona failed to act diligently and had "adequate time to designate an alternate design expert but chose not to." The court concluded Pomona made a "tactical decision" to move to exclude SQMNA's design experts rather than retain its "own expert on the topic of alternate design." Under these circumstances, the court declared it "will not use its discretion to reopen discovery to fix [Pomona's] tactical decision." [1-ER-7.]

Although Pomona equates the court's ruling with a refusal "to allow Pomona's experts to testify [at trial] to post-2011 facts" [AOB-17], that issue was not raised in Pomona's motion and was not discussed in the ruling.

E. Final Pre-trial Proceedings.

Another pre-trial conference was held on May 18, 2015, fifteen days before trial. [3-ER-557-577.] Pomona advised the court that Sturchio and Wheatcraft had updated their reports and sought to proffer them to the court and defense counsel.

[3-ER-567.] The court directed Pomona to make the request in writing, and set an expedited briefing schedule. [3-ER-567-568.] Pomona did not serve SQMNA with these new expert reports until May 22, 2015, eleven days before trial.

The first trial witness, SQMNA's sampling expert Francis Pitard, was examined on May 21, 2015, in a trial preservation deposition. Because Pomona's supplemental reports had not yet been produced, Pitard was unable to rebut Sturchio's "additional data" for the reference database. Pitard opined about the inadequacies of the isotope database from which Sturchio had drawn conclusions about the uniqueness of perchlorate from Chile. [SER-36, 93, 148-150.] Pomona's decision not to serve Sturchio's updated report before Pitard's deposition ensured Pitard would have no opportunity to respond to that report.

The day after Pitard's deposition, Pomona filed a two-page brief supporting the filing of amended expert reports from Sturchio and Wheatcraft, which were attached as exhibits. [3-ER-507-509.] Sturchio's new report, dated **May 15, 2015** (a full week before Pitard's trial testimony), contained forty pages of text and a 545-page appendix; at least eighty-two pages of the appendix had never been produced before. [CR-293-5, pp. 29-110.] Pomona also produced Wheatcraft's new report, dated **May 18, 2015**, consisting of nineteen pages of text and a fifty-three-page appendix. [CR-293-5.] That same day, Pomona proffered Intille's so-

called "impeachment" report on the feasibility of an alternative design in the 1930s. [SER-19-21; CR-292; 3-ER-513-556.]

Pomona did not explain why these reports had not been produced sooner. No red-line copy of either report was provided so that the district court and SQMNA might easily identify what was new or changed. Pomona did not offer to continue the trial so that SQMNA could review and respond to the new reports. On May 26, 2015, SQMNA objected to Pomona's proffers on the grounds of prejudice and delay. [SER-1-8; CR-299.]

On May 29, 2015, the court issued a minute order revisiting some of the rulings on the November 2011 motions in limine, in particular reversing the prior exclusion of Pomona's expert Sundstrom and SQMNA's expert Trussell. [1-ER-2-3.]

On the first day of trial, June 2, 2015, the district court held a hearing before jury selection. The court tentatively denied Pomona's request to add Intille as a new impeachment expert, commenting, "I'm not too sure what the motion is one way or the other." [3-ER-359.] The district court emphasized the tentative nature of that (and other) evidentiary rulings, admonishing that "[a]ny ruling on a motion in limine may or may not be revisited as the evidence comes. . . .So all I'm telling you is, is that they're quasi tentative, depending on how the evidence comes in." [3-ER-360.]

The expert reports proffered by Pomona on May 22, 2015, were not mentioned by Pomona again during the trial. Pomona did not call Intille (or any other expert) in its rebuttal case.

F. The Evidence at Trial.

1. The Historical Use of Sodium Nitrate in Pomona.

Pomona was incorporated in 1888, and was a major center of citrus growing. [SER-76-77.] This lawsuit concerns perchlorate in fourteen of Pomona's groundwater wells that feed the City's Anion Exchange Plant ("AEP Wells"). [SER-78-79, 272-273.] Those AEP Wells are located in the town's industrial corridor, an area where the groundwater is plagued by other industrial contaminants such as nitrates, TCE and PCE. [SER-82-83.]

SQMNA, created in New York in 1927 [2-ER-40], was first licensed to sell fertilizer in California in 1931. [SER-169-173, 279-280.] Long before SQMNA existed, numerous companies in Chile produced sodium nitrate fertilizer, and in turn, the fertilizer was brokered and distributed by many other businesses. [SER-155-156.]

From about 1880 until 1910, sodium nitrate derived from natural deposits in the Atacama Desert in Chile was the dominant commercial nitrogen fertilizer in the world and in California. [*See* SER-130; SER-136, 154-156.] The use of sodium nitrate waned considerably after World War I due to the invention and production

of cheaper synthetic fertilizers. [SER-161-162.] After 1920, there were no dealers of sodium nitrate in Pomona. [SER-144.] The market share of sodium nitrate decreased through the 1930s. [SER-157-159, 277.] By 1935, ten times more ammonium sulfate was sold in California than sodium nitrate. [SER-160, 277.]

SQMNA's expert Batkin testified that "very, very little" sodium nitrate was used during the 1930s because "during the depression, the growers would use the least expensive fertilizers that they could get." [SER-141.] Pomona's expert agreed that by 1930, synthetic ammonium sulfate fertilizer was "much cheaper" than sodium nitrate. [SER-138.]

During the early years of World War II, the United States Government requisitioned the entire Chilean output as part of the war effort. [SER-163, 141-143.] During World War II, the predominate fertilizer in Pomona was cow manure. [SER-142-143.] By 1950, the use of sodium nitrate as fertilizer in California had dropped to almost zero. [SER-163-165, 278.]

Before 1940, sodium nitrate was also used for industrial purposes, including railroad flares, explosives, glass manufacturing, matches, fireworks, and heat treating of metals. [SER-156, 167, 197-198, 203-206, 236, 242-243; 2-ER-108.] Sodium nitrate was also the main ingredient for gunpowder and other munitions. [SER-129, 137, 141.]

2. Expert Testimony Regarding Causation.

(a) Pomona's Case-in-Chief.

Sturchio opined, based on sampling done in 2011 [3-ER-483], that his isotope analysis showed a unique fingerprint identifying SQMNA's fertilizer as the source of contamination to Pomona's groundwater. No objection was made or sustained to matters covered in Sturchio's expert report. [CR-352-358.] Sturchio described why he believes his isotopic method of analysis is able to distinguish between perchlorate that occurs naturally in the Atacama Desert from other naturally occurring deposits, as well as from synthetic perchlorate. [2-ER-270-274, 281.]

Sturchio said a circle could be drawn around the three different groupings of measured isotope values to show the distinctiveness of perchlorate coming from each source. He opined "we can rule out any other source [besides Atacama] of perchlorate" for Pomona's groundwater. [2-ER-281-282.]

Sturchio stated that when he prepared his 2011 report, he had fifty comparison samples, which he called a "big number." [SER-106.] Sturchio also told the jury about comparison samples obtained *after* 2011, claiming he "now" has "hundreds of samples from all over the world" that corroborate "the same general distinctions" shown in his 2011 report. [2-ER-283.] Sturchio testified that

any questions as to the adequacy of the reference database are "no longer true today as we sit here." [SER-101.]

That testimony is the "post-2011" evidence Pomona claims on appeal that it was prevented from introducing. [2-ER-288.] Pomona did not even offer the chart from Sturchio's May 22, 2015 report showing updated reference database points. [3-ER-466.] Notably, that chart was not listed in the Joint Exhibit List or identified in Pomona's FRCP 26(a)(3)(B) pretrial disclosures that were required to be made "at least 30 days before trial." [CR-276, 322.]

Sturchio testified that his method was described in a March 2011 draft of a Guidance Manual that lists him as a co-author. Sturchio asserted that "other laboratories use the methods that are explained in the Guidance Manual." [2-ER-299-301.] Sturchio was permitted to testify that "hundreds" of laboratories now use this analysis. Sturchio repeatedly referred to the March Guidance Manual to describe the methods he used in 2011 to analyze the perchlorate samples from Pomona. [*Id.*] No showing was made as to any material difference between the March and December 2011 Guidance Manuals.

Sturchio testified that when he performed his work for Pomona, his lab was the only one "that did the entire method from start to finish." [SER-95-96.] Furthermore, he conceded that no other laboratory checked his results. [SER-90.] When he did his work for Pomona, Sturchio admitted it was impossible to send

split samples for independent testing because his was the only laboratory doing such testing. [SER-97.]

Sturchio conceded his method is unable to distinguish whether the perchlorate came from fertilizer sold by SQMNA, or whether any fertilizer containing perchlorate was applied in Pomona after 1931 or during any other particular year. [SER-107-108.][2] Sturchio's isotope analysis is not capable of "age-dating" the perchlorate's release or manufacturing date. [*Id.*] Sturchio did not perform any of the non-isotopic age-dating techniques that the Guidance Manual recommended be used in conjunction with isotopic analysis. [*Id.*] His explanation for failing to use those additional age-dating techniques was that "I wasn't hired to do that." [SER-108.]

Sturchio also testified his method does not distinguish between "whether the sodium nitrate was used as fertilizer versus used in an industrial application." [SER-107.] Sturchio agreed that perchlorate had "a lot of uses, industrial uses." [SER-84.] Other witnesses testified about the common industrial uses of sodium nitrate. [SER-137, 167.]

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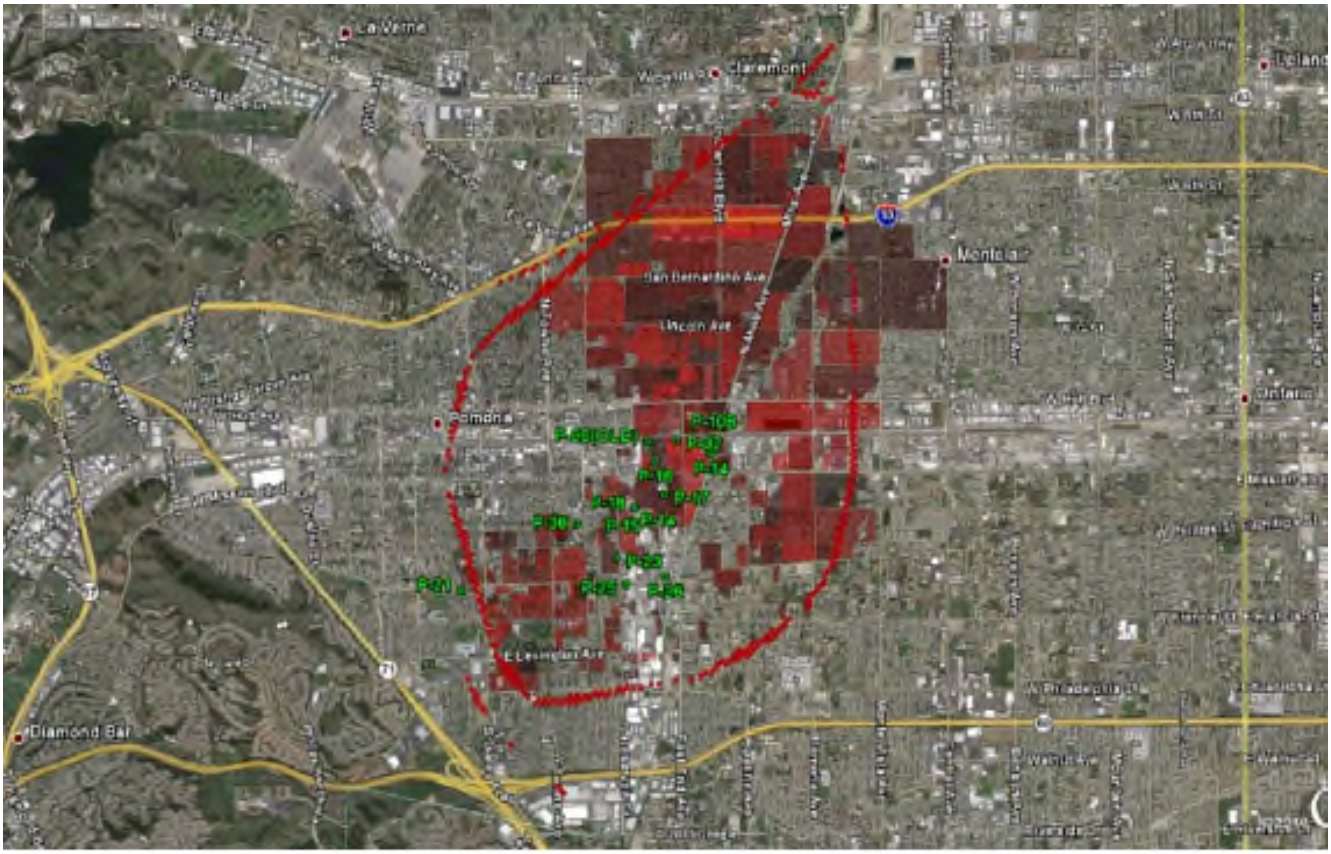
[2] In his amicus brief, Saltzburg incorrectly assumes that "naturally-occurring Atacama perchlorate" was "exclusively sold by SQMNA." [Saltzburg Br. 18-19.] Not true. Many other companies distributed sodium nitrate fertilizer in California before SQMNA entered the market. [SER-155-156.]

On cross-examination, Sturchio testified that isotopic synthetic perchlorate can be substantially altered in the manufacturing process, and can be adjusted in an infinite number of values in the production process. [SER-105.] Sturchio admitted that in 2007, the database was deficient because of the insufficient number of synthetic as well as natural perchlorate samples. [SER-93.] Sturchio did not testify at trial as to the number of synthetic samples he considered, as to the provenance of the information he was relying on for synthetic isotope values, or the uniqueness of synthetic perchlorate isotope values.

Pomona's expert Wheatcraft testified he used a groundwater particle tracking computer model to understand the "capture zone" of the AEP wells. [SER-114.] He used this model to predict the areas from which the AEP wells drew water, and the travel time for the water to reach the AEP wells. [SER-112-114.] He predicted a total travel time of fifteen to 100 years, and up to 120 years in some instances, depending on the distance between the field and the well—the further away from the well, the longer it takes to get there. [SER-116-117, 125-126.] Wheatcraft acknowledged it is likely that most perchlorate moved more slowly than the average times he predicted. [SER-118.] Wheatcraft agreed his travel time estimates were valid before and after 1930. [SER-127-128.] He testified that Chilean nitrate fertilizer was used for citrus crops in the "early 20th Century." [SER-124.]

Wheatcraft's tear-drop shaped depiction of the AEP well capture zone shows the former orchards in red. [SER-274.] The boundaries depict the areas that potentially flow into the AEP wells:



Wheatcraft's teardrop shows that no AEP wells (in green) draw groundwater from the area where orchards were formerly located north of well P-10B, which is in the center of the teardrop. Wheatcraft did not do any sampling himself, and did not ask for the perchlorate sampling data for the area north of P-10B. [SER-123-124.] Wheatcraft had no idea Pomona had collected sampling data showing the absence of perchlorate in groundwater north of the AEP. [SER-120-123.] After Laton later testified that considerable data showed no perchlorate in groundwater

north of the AEP wells [SER-213-214], Pomona made no attempt to rebut that testimony.

(b) SQMNA's Defense Case.

The testimony of SQMNA's experts on the historical use of sodium nitrate is summarized in Section IV.F.1, *supra*. On the technical side, Laton provided a hydrogeological review of the reasonableness of Pomona's environmental investigation. Laton is a tenured professor of hydrogeology and an active professional who has worked on hundreds of contamination projects. [2-ER-53-54; 4-ER-848-849.] His qualifications were unchallenged during trial.

Laton followed professional standards for developing a Site Conceptual Model ("SCM") to identify potential sources of perchlorate contamination in Pomona's groundwater, including DTSC's "*Guidelines for Hydrogeologic Characterization at Hazardous Substances Release Sites, Vol. 1: Field Investigation Manual*." [4-ER-850-851.] Using the SCM method, Laton looked at "all the aspects that may impact or produce that [contamination]," including "all the potential sources of perchlorate that could be in the area that you've identified as being of concern." [SER-178-179, 197.] Laton was fundamentally critical of Pomona's experts because "they only looked at one thing rather than looking at the whole complete picture." [2-ER-58-59; 4-ER-850.]

Laton followed standard practice by consulting the Environmental Data Resources ("EDR") database for the Pomona well field area. [4-ER-852.] EDR's data are compiled from public records filed with federal, state and county agencies. [2-ER-70.] Laton further relied on documents from the EPA, Department of Defense and other publicly available sources to identify industries "that would have more likely than not utilized sodium nitrate." [2-ER-110.]

Laton's investigation identified numerous and widespread pre-1931 consumer, industrial and military uses of Chilean sodium nitrate, and also other natural fertilizers that contained natural perchlorate. [2-ER-74, 80.] His investigation also identified pre-1940 businesses that would have likely used sodium nitrate from the Atacama Desert for industrial purposes, because synthetic sodium nitrate was not yet available. [2-ER-108-112.] He described the railroad as a significant potential pathway for perchlorate contamination through the use of sodium nitrate flares for signal calling, and through spillage of sodium nitrate in shipping and off-loading. [2-ER-78-79.] Laton calculated, using measured perchlorate concentrations and import records, that over one-and-a-half tons of perchlorate were imported into Pomona by the use of Colorado River water. [2-ER-74-78.] These calculations were not challenged on cross-examination, or in Pomona's rebuttal case. Laton testified in cross-examination that Sturchio had never sampled Colorado River water, and had only a *single* sample from a tributary

called the Las Vegas Wash. [2-ER-92-94.] Aravena also observed that Sturchio never sampled Colorado River water. [SER-152.1-152.2.] Sturchio did not rebut this testimony.

Laton testified that an environmental investigation should examine the water quality data at both the upgradient and downgradient wells. [SER-181.] Laton reasoned that if the perchlorate had come from applications of fertilizer in the historic orchard areas in the northern part of Wheatcraft's well capture zone, then one would expect to see residual contamination there. But unsafe levels of perchlorate have not been found in that area. [SER-215-219, 237.] In fact, these areas tested mostly as "non-detect." [SER-213-219.] Based on this interpretation of the data, Laton opined that the contamination at the AEP wells probably does not come from the use of fertilizer in the former citrus fields north of the AEP wells. [*Id.*] Instead, Laton's opinion was that this data indicates that the point source lies within the industrial corridor of downtown Pomona, which is where the AEP wellfield is located. [SER-83, 208-214.]

The non-detection of perchlorate in the northern area of the teardrop prompted Laton to investigate other potential mechanisms to explain the AEP contamination. [SER-213, 215-216, 218.] Laton found that Pomona's records showed very high concentrations of perchlorate in the effluent from Pomona's AEP water treatment plant. [SER-221.] Laton learned that in backwashing the

treatment resins, large concentrations of perchlorate collected from the treatment process were discarded using Los Angeles County's "brine line." [*Id.*] The volume of effluent from the AEP plant ranged from 60,000 gallons per day in 1992 to 100,000 gallons per day after 2011. [SER-78, 222.] Laton found Pomona records showing municipal sewers connect the AEP plant to the brine line. [2-ER-87-94.] Laton explained how sewer lines are generally known to leak, as they are not threaded or caulked, particularly older vitrified clay pipes such as those used by Pomona. [SER-225-226.] Laton's description of the AEP plant perchlorate effluent as a continuing source that Pomona should have investigated ("it certainly warrants doing an investigation") was logical and fits the known data. [2-ER-95.]

Pomona does not question the admissibility of SQMNA's other experts' testimony—Aravena on isotopes and Pitard on sampling—who disputed the reliability of Sturchio's method for perchlorate stable isotope identification.

Pitard criticized the reference database described in Sturchio's 2011 report as inadequate to prove "uniqueness" because each sample location showed wide variability and dispersion. [SER-148.] In Pitard's opinion, the collection of additional samples is likely to show whether the various perchlorate sources have overlapping isotope values. This is crucial—if there is overlap, the database is no longer useful as a forensic tool, because the different sources are no longer unique.

[SER-93, 149-150 (Sturchio admits "if . . . you don't have enough fingerprints to know if they are unique, that's an inadequate database").]

Because Pitard's trial preservation testimony was taken before Sturchio's supplemental report was produced, and before Sturchio's trial testimony about "hundreds" of new samples within the last four years, Pitard could not address whether those additional data support or undermine Sturchio's identification opinions. The jury was entitled to decide which experts were more convincing.

G. The Jury's Verdict.

The jury was instructed it was Pomona's burden to prove that the design of SQMNA's fertilizer was "a substantial factor" in causing harm to Pomona. [SER-270-271.] The jury was also instructed that as to expert testimony, it "may accept it or reject it or give to it as much weight as you think it deserves." [SER-269.]

After sixty-seven minutes of deliberations [2-ER-19, 30-31], the jury reached a unanimous verdict on no causation. [2-ER-14-15.] The court entered judgment in favor of SQMNA. [1-ER-1.]

V. SUMMARY OF ARGUMENT

Pomona seeks to overturn a verdict the jury needed only minutes to reach. The jury reached its verdict on causation after having heard all the stable isotope opinions of Sturchio that *Pomona I* ruled were admissible. The jury was given the

instruction, "You do not have to accept an expert's opinion." The jury did not agree that Sturchio's opinions proved causation.

Even if the jury had agreed with Sturchio's isotope analysis, it still could find that the perchlorate did not come from fertilizer distributed by SQMNA. Sturchio's method was unable to age-date perchlorate or distinguish between fertilizer and non-fertilizer uses of sodium nitrate. The evidence showed that sodium nitrate was widely used in both fertilizer and industrial products long before SQMNA was created. Once the pre-eminent chemical fertilizer (and main ingredient in munitions, among other non-fertilizer applications) in the 1800s and early 1900s, by the mid-1920s the use of sodium nitrate was greatly reduced in California in favor of cheaper synthetic fertilizers before SQMNA came into the California market in 1931. The jury's finding of no causation was logical.

Despite arguing that sodium nitrate was used as a fertilizer in Pomona even into the 1950s, Pomona did not call any eye-witness (such as a former farmer or field hand) to testify about the use of sodium nitrate fertilizer. Pomona's 2007 public water report stated that the use of sodium nitrate fertilizer transpired "during the agricultural era here in the Pomona Valley over 75 years ago." [SER-276.]

The water quality data under the former orchards in Pomona upgradient from the AEP wells shows no perchlorate—just the opposite of what one would expect if sodium nitrate had been used there as fertilizer. In fact, the persistent

perchlorate and industrial solvent plumes in the industrial center of Pomona suggests an industrial origin.

The errors claimed by Pomona are not errors at all. The district court acted well within its discretion in refusing Pomona's request to disclose new expert reports. Pomona's motion seeking such leave lacked sufficient support, came too late, and jeopardized the trial date. Pomona did not actually serve the new reports until eleven days before trial, which is far too close to trial under either the scheduling order or under FRCP 26. Pomona's conduct in not producing the new reports, or the underlying data, until eleven days before trial suggests it was seeking to maximize tactical surprise. The delay was inexcusable and prejudicial.

Making matters worse, Pomona's new expert reports and data were served *after* the trial preservation deposition of SQMNA's sampling expert. This meant SQMNA had no rebuttal at trial for Sturchio's new sampling data. At trial, Sturchio testified fully as to his stable isotope analysis of samples that were collected in Pomona in 2006 and in 2011. Sturchio even testified about "four additional years" of data since then from over 100 additional samples. Wheatcraft testified fully as to his opinions as to the "capture zone" of Pomona's wells, and the flow of water within the capture zone.

Nor was it error to allow testimony by SQMNA's hydrogeology expert, Laton. Pomona's counsel did not object at trial to Laton's qualifications or opinions under *Daubert*. The failure to object waived any claim of error. Had there been a proper objection, SQMNA would have had the opportunity to lay any necessary additional foundation. Laton's opinions were based on mainstream environmental investigation procedures. Laton pointed to the weaknesses in Pomona's investigation in failing to rule out sources of perchlorate other than SQMNA, such as pre-1931 distributors of fertilizer. Pomona's reliance on the 2012 tentative ruling denying its *Daubert* motion as to Laton is wholly insufficient to preserve its claim of error.

The third alleged error as to the consumer expectations test, raised only contingently, is mooted by the jury's finding of no causation, and was waived. The district court's ruling was correct as a matter of law. The safety of sodium nitrate fertilizer in the 1930s or 1940s was not a matter of the "everyday experience" of an ordinary consumer.

Finally, the court did not err in denying leave to add an unnamed new expert on alternative design. Pomona had intentionally forgone the opportunity to name a design expert as required by the court's scheduling order before the first trial, despite knowing that SQMNA designated two design experts. Pomona did not call

him in its rebuttal case despite the district court's twice-repeated admonition that all rulings in limine were tentative and subject to change.

VI. STANDARD OF REVIEW

Denial of a motion to amend a FRCP 16 pretrial scheduling order is reviewed for "a clear abuse of discretion." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). The district court's evidentiary rulings are also reviewed for abuse of discretion. *Pomona I*, 750 F.3d at 1043.

Review for abuse of discretion involves a two-step process under *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). First, this court must first consider whether the district court "identified the correct legal standard for decision." Second, the court must determine whether the district court's findings of fact and its application of those findings to the correct legal standard were "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Id.*

An erroneous evidentiary ruling is reversible only if the error was prejudicial, and the verdict was "more probably than not affected as a result." *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1060 (9th Cir. 2014) (en banc) (quoting *McCollough v. Johnson, Rodenburg & Lauinger*, LLC, 637 F.3d 939, 953 (9th Cir. 2011)).

An erroneous evidentiary ruling does not, as Pomona contends, carry a presumption of prejudice. Pomona relies on broad statements in *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464-65 (9th Cir. 2014), that conflict with pre-existing authority. In *Shinseki v. Sanders*, 556 U.S. 396 (2009), the Supreme Court "warned against courts determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." *Id.* at 407-08. *Shinseki* endorsed the federal "harmless-error" statute, 28 U.S.C. § 2111, "as expressing a congressional preference for determining 'harmless error' without the use of presumptions insofar as those presumptions may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not." *Id.* at 408.

Accordingly, this Court should not presume prejudice. *See Molina v. Astrue*, 674 F.3d 1104, 1117-21 (9th Cir. 2012) (discussing *Shinseki* and concluding that the Supreme Court made it "quite clear that no presumptions operate," so the court must analyze harmlessness "in light of the circumstances of the case").

VII. ARGUMENT

A. Pomona Did Not Show Good Cause to Amend or Supplement Expert Reports.

1. The *Schumer* Factors Governing the "Good Cause" Standard Under FRCP 16(b)(4).

After *Pomona I*, Pomona brought its omnibus motion to modify the scheduling order expressly under FRCP 16(b)(4), implicitly recognizing that district court approval was needed to re-set or reopen the expert and discovery deadlines that had already expired before *Pomona I.* Pomona also explicitly asked the district court to apply the factors for evaluating whether "good cause" exists under FRCP 16(b)(4) as set forth in *Schumer*, 63 F.3d at 1526-27, *vacated on other grounds*, 520 U.S. 939. [AOB-31-33.]

Case authority supports application of FRCP 16(b)(4)'s "good cause" standard as interpreted by *Schumer* in the context of a motion to reopen expert discovery. *See, e.g.*, *Zone Sports Ctr., LLC v. Rodriguez*, No. 1:11-cv-00622-SKO, 2016 U.S. Dist. LEXIS 6186, at *30 (E.D. Cal. Jan. 19, 2016); *Fid. Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co.*, 308 F.R.D. 649, 652 (S.D. Cal. 2015); *Bleek v. Supervalu, Inc.*, 95 F. Supp. 2d 1118, 1120-21 (D. Mont. 2000).

On the record before it, the district court acted well within its "wide latitude" of discretion to manage the progress of the case to trial. *See e.g.*, *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 863 (9th Cir. 2014) ("The late

disclosure of witnesses throws a wrench into the machinery of trial"); *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 681 (6th Cir. 2011) ("The court's discretion is particularly broad when the new information serves as a 'transparent attempt to reopen' the Daubert inquiry after the weaknesses in the expert's prior testimony have been revealed.") "Neither the retention of new counsel nor a Ninth Circuit remand decision constitutes good cause to re-open discovery under [FRCP] 16." *Porter v. Cal. Dep't of Corr.*, No. CIV-S-00-978, 2006 U.S. Dist. LEXIS 368 (E.D. Cal. Jan. 6, 2006); *see also Alvarado Orthopedic Research, L.P. v. Linvatec Corp.*, No. 11cv0246, 2012 U.S. Dist. LEXIS 176206 (S.D. Cal. Dec. 12, 2012).

2. Pomona Was Not Diligent.

The "good cause" standard primarily focuses on the "moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Johnson*, 975 F.2d at 609.

Pomona was not diligent in seeking leave to supplement its experts' reports. This case was pre-tried on January 3, 2012, and both sides appeared ready for trial. [4-ER-634-664.] *Pomona I* was decided in May 2014, and the case was remanded "for trial" and not for "further discovery and trial." Despite knowing in May 2014 that Sturchio's opinions would be admissible at trial, Pomona did not prepare a supplemental report, and did not provide defense counsel with the underlying "new" data. Pomona waited until the new trial date had been selected to

communicate its purported need to disclose new expert reports. Even then, Pomona did not provide the proposed new reports with its FRCP 16 motion, instead waiting until eleven days before trial to do so.

Pomona's tactics were calculated to delay the disclosure of the new reports as long as possible. The tactic back-fired, however, because Pomona had the burden of demonstrating good cause to reopen discovery. By withholding the reports, Pomona failed to provide the court with the information necessary to find good cause. The tactical nature of Pomona's decision-making was demonstrated at the trial preservation deposition of SQMNA's sampling expert, Pitard, who had no opportunity to rebut the impact of the "hundreds" of new samples Sturchio claims were generated between 2011 and 2015.

Pomona never explained why its new expert reports were not prepared sooner, or why the unspecified "new developments" described by its expert were not timely disclosed to SQMNA. [4-ER-608-609.] Pomona's allegation that SQMNA "already had" the data is simply not true, and is unsupported by any reference to the record. [AOB-34.] As the amended report itself states, new data came from "unpublished" sources. [3-ER-465.] The amended report does not include any of the necessary background documentation required to evaluate these new samples such as chain of custody documentation, laboratory notes, or even the identity of the samplers.

Pomona offers little to show that it acted diligently. Pomona argues only that the information it "sought to include in 2015 did not exist in October 2011." [AOB-32.] But that misses the point. There is no reason Pomona could not have submitted amended experts reports and new information promptly after *Pomona I* was decided, so that the court and SQMNA could assess its impact on the trial date. *In re Hanford Nuclear Reservation Litig. v. E. I. Dupont*, 292 F.3d 1124 (9th Cir. 2002) is distinguishable. It was not an appeal from a motion to reopen expert discovery under FRCP 16. The *Hanford* court used the wrong legal test and prematurely decided a summary judgment motion on the issue of "generic" versus "individual" causation in the midst of complex, phased discovery proceedings. *Id.* at 1128-32.

Pomona's lack of diligence in 2015 is in stark contrast to its claim now that the amendments were "critically important" and "centrally relevant" to its experts' opinions. [AOB-15, 30.] If this information was so important, it should have been provided to SQMNA in a timely fashion. Pomona's motion did not claim the new information was crucial or central to its case; that assertion first appears in the AOB.

Pomona's failure to show diligence by itself was sufficient reason to deny Pomona's FRCP 16 motion. *Johnson*, 975 F.2d at 609 ("If that party was not diligent, the inquiry should end.").

3. The Remaining *Schumer* Factors Support the Court's Exercise of Discretion.

(a) Trial Was Imminent.

Pomona's contention that trial was not imminent is untrue. [AOB-35-36.] Trial was four months away when Pomona filed its motion on regular notice, and hearing was set for just three months before trial. The district court's ruling on the motion was sixty-eight days before the start of trial.

Had Pomona's motion been granted, the trial date would likely have been jeopardized. Pomona was asking for reopening of both fact and expert discovery, substitution of new fact witnesses (who would need to be deposed), revisions to Sturchio's and Wheatcraft's reports, amendments to SQMNA's rebuttal experts, depositions of both sets of experts, a report by a new expert on alternative design, and "follow up" discovery regarding documents previously produced by SQMNA. [4-ER-610-624.] Pomona encouraged the district court to believe that the scheduled trial date could remain firm while all this work somehow got done. The district court reasonably concluded Pomona failed to support that proposition.

Pomona misstates that the proposed update of expert reports dealt only with "publicly-available information." [AOB-35.] Even Pomona's motion did not say that. [4-ER-623.] Because the revised reports were not submitted to the district court with the motion, any such assertion could not be assessed at that time. As it turned out, the new information relied upon by Sturchio in the amended report

(served eleven days before trial) included unpublished information about "hundreds" of new perchlorate samples.

While Pomona argues that the district court could have set a deadline for updated reports on "April 10, with depositions by April 20, and rebuttal reports by May 10" [AOB-36], Pomona did not advocate such a schedule, and certainly showed no ability to follow such an ersatz timetable as it did not produce the new reports until eleven days before trial.

(b) SQMNA Opposed Pomona's Request.

SQMNA opposed Pomona's motion (except insofar as it related to damage experts) on the grounds of lack of diligence, lack of good cause, and prejudice. [*See* SER-37.1-37.8.]

(c) SQMNA Would Have Been Prejudiced.

Pomona failed to establish SQMNA would not be prejudiced by the addition of a new expert and new expert reports so close to trial. Sturchio was Pomona's key witness, and much of the case involved his forensic methods, so reopening his expert report was significant.

SQMNA would have been prejudiced by having to incur the expense and delay of additional discovery after the case had already been pre-tried. *See* *Bleek*, 95 F. Supp. 2d at 1120 (there would "undoubtedly" be prejudice because of the

expenditure of time and resources incurred in having to conduct additional discovery).

Disruption of the court's case management plan is itself prejudicial. *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005) ("Disruption to the schedule of the court and other parties in that manner is not harmless.").

(d) Any Need to Update Sturchio's Report Was Foreseeable to Pomona.

When Pomona appealed, it knew that it might take two to three years before a final decision was rendered, and it could have foreseen the possibility that it might want to update expert reports. If Pomona believed it was necessary for its experts to update their reports, it should have directed them to do so promptly after *Pomona I* was decided. *See Fid. Nat'l Fin.*, 308 F.R.D. at 653 ("Diligent counsel would have recognized that substituting a new expert and reopening discovery nearly three years after the discovery deadline would be a major setback to the parties' trial preparations and the Court's pretrial case management"). Pomona has offered no good explanation for waiting so long to do this.

(e) The Proposed New Information Was Not Relevant or Material.

Pomona also failed to establish that the new information was relevant to proving a material fact in the case. To the contrary, it is now clear this was largely cumulative information, dumped on SQMNA shortly before trial. Pomona

concedes that Sturchio "was not offering new opinions or changed opinions; rather the additional research and data supported the conclusions in his earlier report." [AOB-32.] *See* *Schumer*, 63 F.3d at 1526 (affirming denial of motion to reopen discovery because it was "unclear whether additional discovery is likely to lead to relevant evidence").

Even if the new information had some marginal relevance, it was heavily outweighed by Pomona's lack of diligence, the interference with the trial date, and the prejudice to SQMNA. *See* *Bakalar v. Vavra*, 851 F. Supp. 2d 489, 493-94 (S.D.N.Y. 2011) ("the probative value of the expert evidence is far outweighed by Defendants' lack of diligence and the resulting prejudice to Plaintiff").

Pomona has failed to demonstrate an abuse of discretion under the "significantly deferential" two-step abuse of discretion test in *Hinkson*, 585 F.3d at 1262, cited by *Pomona I*. [AOB-29.] Pomona points to no error in the legal standard the district court correctly identified, as Pomona itself advocated for application of the *Schumer* test. [AOB-31.] Pomona also fails to demonstrate that the district court applied *Schumer* to the facts in an implausible or illogical manner. *Id.*

4. Even If Pomona Had Attempted to "Supplement" Sturchio's and Wheatcraft's Reports, Its Efforts Were Untimely and Improper Under FRCP 26(e).

Pomona suggests for the first time on appeal that the FRCP 26 deadlines for supplementation of expert reports are automatically re-set after a reversal and remand. [AOB-36-37.] On the contrary, the right to supplement expert reports to correct errors "until 30 days before trial" under FRCP 26(e)(2) and 26(a)(2)(B) had already expired in December 2011. Pomona's motion to reopen discovery recognized this fact because it relied on *Schumer*, not FRCP 26(e), as the basis for reopening expert reports. [4-ER-617.] This new argument may not be made for the first time on appeal. *Wyatt Tech Corp. v. Malvern Instruments, Inc.*, 526 F. App'x 761, 764 (9th Cir. 2013) (declining to consider new arguments because raising arguments for the first time on appeal deprives the court of "a fully developed factual record" and "the benefit of the district court's prior analysis").

Even had Pomona relied on FRCP 26(e) in its February 2015 motion, it would not have changed the result. Supplemental expert reports must be disclosed "at least" thirty days before trial, which was then scheduled for January 10, 2012. Thus, the time for supplementing expert reports expired by December 11, 2011. A change in trial dates does not automatically reopen expired deadlines. If even the remand magically re-set all the prior litigation deadlines, Pomona still blew the

thirty-day deadline for submitting supplemental reports because it did not submit its new expert reports until eleven days before trial.

Additionally, FRCP 26(e) only permits a party to supplement an expert disclosure "if the party learns that in some material respect the disclosure . . . is incomplete or incorrect." *Coles v. Perry*, 217 F.R.D. 1, 3 (D.D.C. 2003). Pomona never argued that Sturchio's report was either "incomplete" or "incorrect," and has not made that argument on appeal. To the contrary, Pomona has always vigorously argued that Sturchio's method was mature and reliable when he prepared his report in 2011. *See Pomona I*. FRCP 26(e) does not create a revolving door for expert reports to be supplemented to include merely corroboratory new information. *See Beller v. United States*, 221 F.R.D. 696, 701 (D.N.M. 2003) (granting motion to strike purported supplemental expert reports because plaintiff "does not contend that . . . new information was discovered which required that the original report be supplemented because the original opinion was no longer correct").

A supplemental expert report that simply "seeks to 'strengthen' or 'deepen' opinions expressed in the original expert report" is beyond the scope of proper supplementation." *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010) (quoting *Cohlmia v. Ardent Health Servs.*, LLC, 254 F.R.D. 426, 433 (N.D. Okla. 2008)).

Further, FRCP 37(c) analysis regarding exclusion of experts was not required. [AOB-37.] Pomona did not raise this argument below, and may not raise it now. Pomona failed to meet its burden of proof in any event. "Implicit in [FRCP] 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). Pomona never established its untimely disclosure of the report was substantially justified or harmless.

Even if an analysis under FRCP 37(c) had been requested, the result would be the same. If full compliance with FRCP 26(a) is not made, FRCP 37(c)(1) mandates some sanction, "the degree and severity of which are within the discretion of the trial judge." *Keener v. United States*, 181 F.R.D. 639, 641 (D. Mont. 1998). District courts are given broad discretion in supervising the pretrial phase of litigation. *Jeff D. v. Otter*, 643 F.3d 278, 289 (9th Cir. 2011). The Ninth Circuit gives "particularly wide latitude" to the district court's discretion to issue sanctions under FRCP 37(c)(1). *Ollier*, 768 F.3d at 859 (citing *Yeti*, 259 F.3d at 1106). As discussed above, Pomona's delays were not substantially justified or harmless.

5. The District Court's Evidentiary Rulings Were Neither Incorrect Nor an Abuse of Discretion.

Pomona criticizes the court's alleged "rigid adherence" to the parties' 2011 expert reports. [AOB-38-40.] The actual questioning of the experts at trial demonstrates Pomona's inflammatory characterization is untrue.

Pomona's argument is premised on the false assumption that the court's ruling on Pomona's motion to reopen discovery precluded introduction of all post-2011 evidence at trial. This is incorrect. The court's March 26, 2015 order does not mention any "2011 limitation." The order includes no direction about what evidence might or might not be admissible at trial. [1-ER-4-7.] The court never ruled that the trial factual record should be "frozen in 2011." [AOB-39.]

Pomona does not cite to any evidentiary rulings at trial, except for the December 2011 version of the Guidance Manual. [AOB-38-42.] Pomona cross-references AOB section E.2, but that section does not cite to any offers of evidence or rulings at trial either. Pomona confuses the court's March 26, 2015 order with the supposed evidentiary rulings at trial that never occurred. Pomona does not provide a record on appeal demonstrating any trial rulings or offers of evidence.[3] Pomona's generalized arguments regarding post-2011 evidence, untethered to actual offers of evidence and rulings at trial, should be disregarded. FRE 103(a)(2);

[3] *See* 1-ER, which contains no orders or transcript excerpts of court rulings as required by Circuit Rules 28-2.5 and 30-1.6.

Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929-930 (9th Cir. 2003) ("[W]e have held firm against considering arguments that are not briefed."); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 776 n.3 (9th Cir. 2010) (argument deemed waived where made "summarily" and without specificity); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim"); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Pomona's assertion that it was supposedly barred from offering "post-2011" evidence is belied by the fact that a great deal of post-2011 evidence was admitted at trial. Pomona ignores at least eight instances where Sturchio testified to facts arising after his October 2011 report:

- "We've measured hundreds of samples of perchlorate from all over the world, . . . and we see the same general distinctions being held up everywhere." [SER-85.]
- "it's very clear" by isotopic analysis if perchlorate is Atacama or synthetic, or another naturally occurring perchlorate from somewhere else —that distinction is "every time, any measurement that's been made can be categorized like that." [SER-86.]

- "Once the final document was released, it was publicly available for free to anyone." [SER-88.]
- "Now, do other laboratories use the methods that are explained in the guidance manual? Yes." [SER-89.]
- "the Guidance Manual was an interim document. The final report came out in 2013 actually." [SER-92.]
- qualifications about the reference database are "no longer true today as we sit here." [SER-101.]
- [Sturchio] "wouldn't have published the results if I didn't feel that they were completely valid." [SER-109.]
- [Sturchio's conclusion] "I think it's completely valid, and I feel even stronger about it now than I did at that time because there's a lot more evidence available, different data and so forth."). [SER-110.]

The only specific example Pomona recites regarding an actual evidentiary ruling was the court's sustaining an objection to the December 2011 version of the Guidance Manual.[4] [AOB-39-40 (citing 2-ER-239-240; 4-ER-632, 666).] The court correctly sustained SQMNA's objection because that version of the Manual

[4] Pomona misrepresents that this was the "final" Guidance Manual. [AOB-39.] It was not. Sturchio testified the final report came out in 2013. [SER-89.]

was published after Sturchio's report, and was not relied on by Sturchio since his report was completed two months before. There has to be some end to expert reports before trial. *Beller*, 221 F.R.D at 701 ("To rule otherwise would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports").

Pomona did not show that the December Guidance Manual provided any information materially different from the March Guidance Manual that Sturchio testified about at trial. [SER-95-99.] Even in this appeal, Pomona neglects to point out any relevant or material change in the December Guidance Manual. Although Pomona questioned Sturchio about the March Guidance Manual, Pomona did not offer that exhibit. [SER-105-108.] Without that baseline of comparison, Pomona cannot show how exclusion of the December Guidance Manual could possibly have affected the jury's very brief deliberations.

Pomona argues that it is somehow significant that the December Guidance Manual had been discussed more at Sturchio's January 5, 2012 *Daubert* hearing than the March Guidance Manual. [AOB-39.] The mere mention of an exhibit in a hearing does not control admissibility at trial. Under FRE 104(a), when deciding a preliminary question about admissibility of evidence, "the court is not bound by evidence rules, except those on privilege."

Pomona's failure to show any material difference between the March and December Guidance Manuals constitutes an inadequate offer of proof. FRE 103(a)(2) requires a "proper offer of proof" so the trial court may learn "what counsel expects to prove by the excluded evidence and preserves the record so that an appellate court can review the trial court's decision for reversible error." *Heyne v. Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995); *see also Pau v. Yosemite Park*, 928 F.2d 880, 887 (9th Cir. 1991) (an offer of proof must show "the purpose for which a party sought to introduce" the evidence); *Reese v. Mercury Marine Div. of Brunswick Corp.*, 793 F.2d 1416, 1421 (5th Cir. 1986) ("Busy trial courts should not be required to repeat trials, especially civil trials, because the trial judge has excluded evidence for lack of a clear understanding of the proponent's purpose in offering the evidence.").

Pomona's assertion that SQMNA's closing argument somehow took advantage of some imagined exclusion of Sturchio's evidence is unfaithful to the record. When SQMNA's counsel argued that Pomona presented "weaker evidence when they had it in their power to present stronger evidence," the stronger evidence he was referring to was the "eyewitnesses, the farmers, the people who know whether sodium nitrates was used" in Pomona. [1-ER-28.] Pomona's counsel, on the other hand, relied in his closing on post-2011 evidence, arguing that "hundreds" of laboratories now do "this type of analysis." [*See* SER-275.]

The cases cited by Pomona are not persuasive. In *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1202-03 (6th Cir. 2006), the court ruled experts may "read the report [to the jury] and not one word more," and refused to allow counsel to make an offer of proof; facts that are very different than here. *Heller v. District of Columbia*, 952 F. Supp. 2d 133, 137-39 (D.D.C. 2013), involved a motion to strike expert testimony on the ground that the disclosure did not satisfy FRCP 26(a), which is not an issue here. *Johnson v. H.K. Webster, Inc.*, 775 F.2d 1, 8 (1st Cir. 1985) was superseded by statute. *See Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998) ("pre-1993 cases . . . retain only limited authority" because "the new rule clearly contemplates stricter adherence to discovery requirements, and harsher sanctions"). Pomona never made an offer of proof and does not demonstrate how admission of the December Guidance Manual would have made a difference to justify reversal of the jury's verdict.

6. Pomona Was Not Prejudiced.

(a) Pomona Has Waived Any Error.

Pomona argues the jury was precluded from learning about "significant developments in perchlorate isotope research." [AOB-40.] Pomona does not specify where in the record Sturchio was precluded from giving such testimony. Circuit Rule 28-2.5. As shown above, Sturchio actually testified about those developments. [*See* Section VII.A.6(b).] It is uncertain what rulings Pomona is

complaining about, and for that reason the argument should be disregarded. *See* *Sullivan*, 623 F.3d at 776 n.3; *Greenwood*, 28 F.3d at 977; *Dunkel*, 927 F.2d at 956.

After introducing evidence of four more years of perchlorate isotope data, Pomona made no offer of proof at trial regarding what other data Pomona wanted to introduce, or the purpose or significance of the data. By failing to make such an offer, Pomona waived its rights to claim error regarding any exclusion of Sturchio's testimony. FRE 103(a)(2); *Heyne*, 69 F.3d at 1481; *Pau*, 928 F.2d at 887.

Moreover, Pomona's brief does not explain how the exclusion of any particular post-2011 evidence affected the outcome of the trial. Absent such a showing, the district court's rulings should be affirmed. *Harper v. City of L.A.*, 533 F.3d 1010, 1030 (9th Cir. 2008) (finding no abuse of discretion where appellant failed to "specifically explain why any of the admitted evidence was prejudicial"); *D.A.R.E. Am. v. Rolling Stone Magazine*, 270 F.3d 793, 793 (9th Cir. 2001) (refusing to review evidentiary rulings because appellants' brief "does not argue how resolving them would have affected the outcome").

(b) Sturchio Testified About the Excluded Evidence Anyway.

Pomona's argument that Sturchio should have been permitted to testify that the reference database was "much larger than it was in 2011" [AOB-15], ignores

the fact that Sturchio did testify to exactly this fact at trial. Sturchio staunchly defended the adequacy of his 2011 database ("Fifty sounds like a big number to me."). [SER-106, 275.] Sturchio went much further, testifying "*we have many more points now measured from all over the world since this diagram was made four years ago*." [SER-85 (emphasis added).] Sturchio explained that "we've measured hundreds of samples of perchlorate from all over the world" and that "we see the same general distinctions being held up everywhere." [*Id*.] The testimony was not stricken, and was considered by the jury. No offer was made by Pomona as to any further testimony by Sturchio on this subject. Pomona got what it wanted; the jury heard the testimony and was not persuaded.

Further, Pomona did not offer the graph that summarizes the 100 additional samples Sturchio testified to at trial, perhaps because that exhibit actually favors SQMNA. That graph supports the criticism of SQMNA's experts that further sampling at other locations would likely tend to show that the isotope values among locations are overlapping. [*See* AOB-23; *compare* 3-ER-453 *with* 3-ER-466; SER-149-150.] When values overlap, it becomes impossible to use the database as a forensic tool, because the different sources are no longer unique. [SER-101 (Sturchio admits "if . . . you don't have enough fingerprints to know if they are unique, that's an inadequate database").]

The new (and largely unpublished) new data shows increased dispersion of chlorine and oxygen isotope values at each tested location. [3-ER-453, 466.] Comparing the 2011 and 2015 graphs, the clouds of data points shown on the new graphs have expanded and are beginning to overlap, with two non-Atacama natural samples (depicted as green triangles) now immediately adjacent to the "Pomona" samples in the oxygen isotope chart on 3-ER-466, and two non-Atacama samples as part of the synthetic samples on the chlorine-oxygen graph on the same page.

Accordingly, Pomona was not harmed because, even if the new data points had been offered and admitted, the verdict likely would have remained the same. More data simply meant more dispersion of results, and hence less uniqueness. Furthermore, because the graph at 3-ER-466 was not listed in the parties' joint exhibit list, Pomona could not have offered it at trial as it violated the thirty-day requirement in FRCP 26(a)(3)(B).

Pomona also contends it was precluded from having Sturchio testify about his 2014 article. [AOB-16.] That 2014 article simply publishes the findings of Sturchio's 2011 expert report in this case. [SER-22-29.] The article is therefore cumulative, as well as self-serving hearsay. Articles are not admissible on direct examination of an expert at trial. *See* *Hartle v. Firstenergy Generation Corp.*, 7 F. Supp. 3d 510, 525 (W.D. Pa. 2014) (excluding opinions as cumulative where the expert merely reviewed another expert's work); *Tunis Brothers Co. v. Ford Motor*

Co., 124 F.R.D. 95, 98 (E.D. Pa. 1989) ("Merely to have partisan experts appear to vouch for previous experts violates [FRE] 403 and would needlessly present cumulative evidence, waste time, and mislead the jury.").

Moreover, Sturchio testified at length about the peer review of his research. [2-ER-268-269, 279.] SQMNA's experts freely conceded his published work was peer-reviewed. [1-ER-100; 2-ER-157.]

Pomona argues in its statement of the case (but not in its argument) that the district court "limited Pomona's cross-examination of Dr. Aravena to facts in the 2011 expert disclosures," citing the transcript pages at 2-ER-159-162. [AOB-22.] In fact, those transcript pages show no objection was sustained on that basis. Aravena testified he did not know "if there is a paper published" by Cal Tech on this subject [2-ER-162], and Pomona did not seek to impeach him with such a paper. This supposed "ruling" is not discussed in Pomona's arguments, thus any error is waived. *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259-60 (9th Cir. 1996).

Sturchio in fact testified that "hundreds" of laboratories do stable isotope analysis [2-ER-300], and that other labs including USGS and Oak Ridge National Laboratory use his methods. [2-ER-301.] The court pointed out to the jury that even in 2011, Sturchio was working with "at least three labs," and "there may have been more." [SER-91.1.] Aravena did not disagree that there are multiple scientists and laboratories working on perchlorate isotope analysis. [2-ER-159-162.] Thus,

the verdict likely would have been no different had Pomona presented additional but unspecified evidence of more labs using this method.

(c) Pomona Was Not Harmed by Any Limit on Wheatcraft's Testimony.

Pomona asserts in a single paragraph that updated information from Wheatcraft "would have been of obvious assistance to the jury" (citing to AOB-section-E.2). Yet Pomona does not explain how the updated information would have "assisted" the jury, or why it would have made any difference to the outcome of the trial. Pomona does not explain how Wheatcraft's new report is different from his prior report, or how the new report would have blunted any criticisms by SQMNA at trial.

Pomona does not point to any sustained objection to Wheatcraft's testimony at trial that would have been overcome by Wheatcraft's supplemental report. Pomona's reference to colloquy at 2-ER-82 [AOB-22], omits both the question and objection. There is no showing that the amended report cured the problem discussed in that truncated excerpt of record. There simply is no other discussion of Wheatcraft's testimony being excluded during trial in the AOB.

The lack of prejudice from the exclusion of Wheatcraft's amended report stems from the fact his new report merely included additional support for his already-formed opinions. [3-ER-605-606.] Even the AOB states the "new" data simply "supported Dr. Wheatcraft's opinion in October 2011." [AOB-16.]

However, such support was superfluous because at trial SQMNA neither challenged nor criticized the model Wheatcraft used, Wheatcraft's description of the well capture zone or his predicted travel times. [*See* 1-ER-65, 84-87; SER-126-128, 190, 209-214.] In fact, Wheatcraft's travel time opinions supported SQMNA's position that any perchlorate from sodium nitrate fertilizer emanated from use long before SQMNA existed. Pomona fails to show how the revised Wheatcraft report would have changed anything at trial.

(d) The Jury Could Have Found in Favor of SQMNA Even If They Had Accepted Sturchio's Testimony.

Pomona's appeal appears to be premised on the idea that the jury must have rejected Sturchio's testimony. However, the qualifications Sturchio himself placed on the limits of his isotope analysis made his conclusions anything but inevitable.

First, Sturchio admitted that his method cannot "age-date" the perchlorate. [SER-108.] Therefore, even if his method could distinguish Atacama perchlorate from other perchlorate, it is impossible to know whether the perchlorate in Pomona's groundwater came from use of fertilizer before or after 1931, when SQMNA did business in California. [2-ER-131-132; SER-170-171, 279-281.] The evidence at trial showed that substantial amounts of sodium nitrate fertilizer were used in California before 1931. [SER-124 (large quantities of sodium nitrate used for citrus in the "early 20th Century"), *see also* SER-130 (mined nitrate was "used

as the primary nitrogen source" more than "a century" past), SER-155-156, 229-235.] Moreover, by 1931, the use of sodium nitrate had already sharply declined due to the availability of cheaper synthetic fertilizers. [SER-159-160, 282-284.] Thus, the jury could have believed Sturchio's method works, but still conclude that Pomona had not proved the perchlorate came from SQMNA's post-1931.

Second, Sturchio admitted that his method does not distinguish between perchlorate from sodium nitrate used as fertilizer versus sodium nitrate used for an industrial purpose. [SER-107.] The evidence was that there were important industrial uses of sodium nitrate before 1940. [2-ER-108; SER-197-198, 203-206, 236, 242-243.] These uses were ignored by Pomona's experts, and the lack of investigation leaves the possibility that these sources still exist. [1-ER-109.]

The evidence regarding pre-1931 fertilizer and industrial use of sodium nitrate is compelling because the groundwater beneath the historic orchards in the well capture zone tested non-detect for perchlorate. [SER-186, 281.1.] If the contamination had come from that area, there should be residual contamination, but there is not. [SER-215-219, 237.] This common-sense evidence surely resonated with the jury, and supports a finding of no causation, even if the jury accepted Sturchio's testimony.

Third, Sturchio testified that the isotope values for synthetically produced perchlorate can be adjusted in an infinite number of values in the production

process, which defeats a claim of uniqueness for all the samples in his database lacking an adequate authentication chain. [SER-105.] The uniqueness of synthetic perchlorate in the Colorado River was not well-established as Sturchio did not sample any water from the river, but only obtained a single sample from the Las Vegas Wash. *See infra*, IV.F.2(b).

7. Professor Faigman's Amicus Brief.

Amicus Faigman arguments that the district court should have allowed Sturchio to update his expert report do not provide citation to the record or discuss the applicable legal standard.

Faigman's argument—that the post-2011 sample data goes to the "heart" of claims made by SQMNA's experts—ignores the inconvenient fact that Sturchio did testify at trial as to the hundreds of new perchlorate samples in the past four years. Additionally, he ignores the fact that the chart showing the isotope values of the new samples was not listed in the FRCP 26 pretrial disclosures, was not served until eleven days before trial, and hence could not be used at trial. He also ignores the fact Pomona did not call Sturchio in rebuttal to respond to SQMNA's experts.

B. The District Court Properly Denied Pomona's Motion in Limine to Exclude Laton's Expert Testimony.

Pomona's arguments regarding Laton were not preserved below, ignore the holding of *Pomona I*, and lack merit because Laton's opinions are relevant and reliable, and thus admissible under *Daubert*.

1. Pomona Failed to Preserve Its Arguments for Appeal.

Pomona's challenge to Laton is limited to the district court's denial of its 2012 motion in limine. [AOB-45 (citing 1-ER-2; 4-ER-642, 663).] Pomona did not make any trial objection or obtain any ruling at trial regarding Laton's opinions. [*See* 2-ER-53-98.] In fact, Pomona's counsel stipulated to allow SQMNA to show the jury, among other items, a demonstrative exhibit identifying all of the other alternative sources of perchlorate that Laton had identified. [SER-209, 219.]

Having failed to object at trial, Pomona waived its right to challenge the admission of Laton's testimony. FRE 103(a)(1). Merely filing a motion in limine does not preserve an issue for appeal, absent a further objection and final ruling at trial. *McCollough*, 637 F.3d at 954; *Tennison v. Circus Circus Enters, Inc.*, 244 F.3d 684, 689 (9th Cir. 2001); *United States v. Archdale*, 229 F.3d 861, 864-65 (9th Cir. 2000).

Here, the district court expressly stated that its in limine rulings were tentative and subject to change, as is generally recognized. *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999). The court so admonished counsel

several times, including on the first day of trial. [3-ER-360; 4-ER-640, 658.] Despite the court's direction, Pomona elected not to object to Laton's opinions based on *Daubert* at trial. Accordingly, Pomona waived this argument. *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996) ("By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise admissibility issues on appeal.").

In any event, any such error was harmless as Pomona's objections were limited to Laton's so called "alternative source" opinions as stated in section 3.1.2 of his report [4-ER-850-867; 5-ER-943-944, 949], and did not address the main core of Laton's testimony. Laton testified that the water quality data show non-detection of perchlorate in the upgradient portion of the capture zone for the AEP wells (Wheatcraft's "teardrop"). Since that is the area where citrus orchards were maintained, the absence of perchlorate in the groundwater is inconsistent with the theory that sodium nitrate containing perchlorate was used there, or that it is a source of perchlorate in the AEP wells. [4-ER-870-871.]

Pomona's motion as to Laton also did not seek to bar his opinions regarding the significance of the inability of Sturchio's methods to age-date perchlorate. This limitation meant that any perchlorate in the AEP wells—if it came from sodium nitrate at all—was more likely to have come before 1931 than after because sodium nitrate was used more frequently as fertilizer then. [4-ER-886;

SER-107.] Laton also opined on the inability of Sturchio's method to distinguish between perchlorate from industrial uses of sodium nitrate versus fertilizer use. [2-ER-72-73, 78-81, 108; 4-ER-886; SER-242-243.]

2. If the Laton in Limine Ruling Was Final, Pomona Waived Any Error by Not Raising It in *Pomona I*.

If Pomona contends there was no need to object at trial because the court's ruling on the Laton motion in limine was "final," then the issue was waived because it was not raised in the prior appeal. This Court will "not consider a new contention that could have been but was not raised on the prior appeal." *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir. 1982); *see also Jimenez v. Franklin*, 680 F.3d 1096, 1099-1100 (9th Cir. 2012) (finding it "inefficient and uneconomical" to permit a party to raise an argument that could have been raised in the first appeal).

The decision not to challenge this ruling in the first appeal may have been tactically advantageous for Pomona, as it would have been awkward for Pomona to argue for a strict application of *Daubert* for Laton, while at the same time advocating a liberal construction for its own expert. Appellate review, however, should not be manipulated for tactical advantage. *Lowery v. Channel Comm'n, Inc. (In re Cellular 101, Inc.)*, 539 F.3d 1150, 1155 (9th Cir. 2008) (it would be a "manipulation" of the court to allow party a "second bite at the apple" in a second appeal).

3. The District Court Satisfied Its Responsibility Under *Daubert.*

The record shows the district judge fairly analyzed the reliability and relevance of Laton's opinions, and followed an appropriate procedure to reach that determination. "The law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142, 152 (1999) (emphasis in original). "District courts are not required to hold a *Daubert* hearing before ruling on the admissibility of scientific evidence." *Hanford*, 292 F.3d at 1138.

Here, the court considered Pomona's motion in limine at least twice, before the first trial and again before the second trial. [1-ER-2-3; 4-ER-642, 663-664.] The court considered Pomona's arguments [5-ER-943-961], SQMNA's response [SER-50-70], and Laton's comprehensive report. [4-ER-845-896.] The court advised counsel that its ruling was "tentative" and "may or may not be revisited as the evidence comes in." [3-ER-360.] Before Laton's alternative source opinions were admitted at trial, the foundation for the opinions was laid, including Laton's qualifications and experience, and the standards and methods he followed. [*See* 2-ER-53-72.] Pomona made tactical decisions not to voir dire Laton on any *Daubert* issue, and not to object to Laton's testimony at trial.

The district court's procedure fairly satisfied its gatekeeping function. In *United States v. Alatorre*, 222 F.3d 1098, 1105 (9th Cir. 2000), the district court rejected plaintiff's request for a *Daubert* hearing before trial. *Id.* at 1105 n.9. Instead, the court gave plaintiff the opportunity to explore the proposed opinions by voir dire at trial. The Court of Appeals found this procedure satisfied the court's gatekeeping function. "By overruling Alatorre's objections and permitting the testimony after hearing not only the government's foundational proffer but also extensive voir dire, the court fulfilled its duty to make a determination as to the reliability of the expert's testimony." *Id.* at 1105.

Similarly, in *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971 (9th Cir. 2009), this Court affirmed the district court's decision to admit expert testimony where the court considered the parties' briefs and proposed testimony prior to trial, and where the expert testified as to his credentials prior to the opinions being admitted in evidence. *Id.* at 979; *see also United States v. Gadson*, 763 F.3d 1189, 1202 (9th Cir. 2014); *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004). Error, if any, was invited by Pomona when it made a tactical decision not to voir dire Laton.

To the extent Pomona complains the court did not explain its tentative ruling in 2012, Pomona failed to preserve the issue. At the pre-trial conference in January 2012, Pomona's counsel specifically addressed this motion in order to "make my

record." [4-ER-657-658.] Counsel argued Laton's alternative source opinions should not come in because he was "late disclosed," but counsel did not present any argument regarding *Daubert*. [*Id*.] Counsel did not request a *Daubert* hearing, although the *Daubert* hearing regarding Sturchio had just been discussed. [4-ER-652-654.] Counsel made no effort to explore the basis for the ruling. [*Id*.]

As noted in *Fenton v. Freedman*, 748 F.2d 1358, 1360 (9th Cir. 1984), by remaining silent in the trial court, the appellant denies his opponent the opportunity to lay a better foundation or to present other competent evidence. The trial court is also deprived of the opportunity to explain its ruling or to correct its error. Pomona's failure to object to Laton's testimony is subject to the same criticism as in *Fenton.*

4. The District Judge Correctly Found Laton's Opinion Testimony to Be Admissible Under *Daubert.*

The district court's denial of Pomona's motion in limine regarding part of Laton's opinions was not an abuse of discretion because those opinions were both relevant and reliable. *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 815 (9th Cir. 2014) (finding the record sufficient to conclude the expert's report is relevant and reliable); *Barabin*, 740 F.3d at 467; *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007).

Expert opinion evidence is admissible if it meets the reliability standards set forth in FRE 702. "[T]he trial court must assure that the expert testimony 'both

rests on a reliable foundation and is relevant to the task at hand.'" *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) (quoting *Daubert*, 509 U.S. at 597). This determination "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592. The reliability test is "flexible" and should be applied based on the circumstances of the case. *Pyramid*, 752 F.3d at 816-17.

The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury." *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969-70 (9th Cir. 2013). The court is "supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable." *Id.* at 969. When an expert meets the threshold established by FRE 702, the expert may testify and the fact finder decides how much weight to give that testimony. *Primiano*, 598 F.3d at 564-65. Challenges that go to the weight of the evidence are for the fact finder, not the trial judge. *Pomona I*, 750 F.3d at 1043-44.

(a) Laton's Opinions Are Admissible.

Laton's qualifications as a hydrogeologist are well-established, and were not challenged by Pomona. [2-ER-53-54; 4-ER-848-849.]

The facts and data developed by Laton constitute a sufficient basis for his opinions, which go to central issues in the case. As discussed above in Section IV.F.2(b), Laton identified and explained the sources of his information, including the EDR database search [2-ER-70; 4-ER-852], documents from the EPA, Department of Defense and others that identified industries "that would have more likely than not utilized sodium nitrate" [2-ER-110], and data from Wildermuth Environmental and the State regarding perchlorate in groundwater in the well capture zone. [2-ER-61, 64; 4-ER-870.] Pomona does not argue this information is inaccurate.

Laton explained to the jury the methodology that led to his opinions, and testified that his environmental investigation followed standard practices. [2-ER-55.] Laton applied published standards, based on DTSC guidelines. [4-ER-850-851.] Laton looked at "all the aspects that may impact or produce that [contamination]," including "all the potential sources of perchlorate that could be in the area." [*See* SER-178-179, 197.]

Expert opinion testimony based on SCM methodology has been admitted in other environmental cases. *See* *N. States Power Co. v. City of Ashland*, No. 12-cv-602-bbc, 2015 U.S. Dist. LEXIS 49387, at 14-15 (W.D. Wis. Apr. 15, 2015) ("Plaintiff has not shown that Patrick used an improper method for his conceptual site model or that he lacked an adequate factual foundation for his findings. Any

other aspects of his report can be challenged through cross examination."); *Plainview Water Dist. v. Exxon Mobil Corp.*, 856 N.Y.S.2d 502 at *20, *55 (Sup. Ct. Nassau Co. 2008), *affirmed*, 888 N.Y.S.2d 521 (2009) (NYSDEC site conceptual model showed MTBE beneath defendants' properties does not pose a threat to plaintiff's wells); *Newark Group, Inc. v. Dopaco, Inc.*, No. 2:08-cv-02623-GEB-DAD, 2010 U.S. Dist. LEXIS 40150, at *16-17 (E.D. Cal. Apr. 1, 2010); *Liss v. Milford Ptnrs., Inc.*, No. HHDX07CV044025123S, 2011 Conn. Super. LEXIS 906 (Apr. 11, 2011).

Laton was critical of Pomona's experts because "they only looked at one thing rather than looking at the whole complete picture." [2-ER-58-59; 4-ER-850.] Laton explained how the data he reviewed helped him identify other potential causes of the contamination in Pomona, and why the investigation conducted by Pomona's experts was inadequate to prove that SQMNA's product caused the contamination. [4-ER-845-888; SER-174-235, 239-244.] This is not a case where the expert "utterly fails . . . to offer an explanation" for a proffered alternative cause. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001).

Laton's testimony helped the jury understand the evidence and decide whether Pomona had met its burden of proof. He addressed the perchlorate contamination in Pomona in a comprehensive manner that identified several loose ends left by Pomona's experts. He discussed Pomona's industrial corridor, where

the AEP wellfield is located, and identified potential sources of perchlorate there, including fertilizer use before 1931 and industrial uses of sodium nitrate before 1940. Laton testified about the groundwater sampling results in areas upgradient of the AEP wellfield, where historic orchard farming took place. Laton pointed out that these water samples—taken by Pomona and reported to the State—showed no perchlorate. Laton explained that if sodium nitrate were used in those orchards and was the source of perchlorate in the AEP wellfield, then residual contaminants should have been found there. This suggests a point source. He explained why the brine lines should have been investigated. Pomona did not recall any expert to rebut any of this testimony.

Laton was not required to identify *which* of the several potential sources was the actual source. [2-ER-105-112.] *See* *Stanley v. Novartis Pharms. Corp.*, 11 F. Supp. 3d 987, 1001 (C.D. Cal. 2014) ("an expert need not rule out every potential cause in order to satisfy Daubert"); *Pyramid*, 752 F.3d at 816 ("Although Spiegel did not say with certainty that the humidity from the flood caused damage to Pyramid's inventory, a jury could reasonably infer causation from Spiegel's report and Pyramid's other evidence."). Rather, Laton testified to rebut Pomona's experts' assertion that they properly considered all potential sources in their analysis, and he showed that other potential sources should have been investigated. [2-ER-58-59.] It was important for the jury to understand Pomona's myopic

approach, because Sturchio's conclusions were presented in the guise of scientific certainty,[5] which Laton showed was unjustified. There was a legitimate dispute among the experts, which was correctly presented to the jury for decision.

(b) Laton's Opinions Are Not Speculation.

Pomona argues that Laton's opinions should have been excluded because he "identified no actual releases of perchlorate in any relevant area" and did not identify any companies that "actually used" or "actually spilled" perchlorate. [AOB-47-52.] Pomona further argues that Laton's opinions do not "fit" the case. [AOB-52-53.] These arguments were waived and are without merit.

Pomona cites five examples to try to show there was a lack of evidence supporting Laton's opinions. [AOB-47-48.] Pomona's counsel actually cross-examined Laton at trial on each of these items, giving the jury the opportunity to weigh the evidence, as directed in *Pomona I*, 750 F.3d at 1049.[6] Despite this cross-examination, *Pomona's counsel never objected or moved to strike Laton's opinions*. [*See* 1-ER-34-37, 99-123; SER-174-235, 239-244.] This is a clear waiver. FRE 103(a)(1); *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th

[5] For example, Sturchio testified that his method is "like having an iPhone 2 and now you can buy an iPhone 6. You can still make phone calls on the iPhone 2 and it works fine." [SER-109.]

[6] *See* (1) military facility [1-ER-106-107]; (2) metal finishing/plating operations [1-ER-111]; (3) pulp and paper facilities [1-ER-110-111]; (4) waste oil recycling facility [1-ER-105-106]; and (5) US Rockets [1-ER-109-110].

Cir. 1990) ("This rule serves to ensure that 'the nature of the error [is] called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take corrective measures.'"); *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001) ("Counsel should not 'sandbag' *Daubert* concerns. . . .").

Laton's opinions were not speculation. "Trained experts commonly extrapolate from existing data." *Pomona I*, 750 F.3d at 1049. For a qualified expert, lack of certainty is not the same thing as guesswork. *Primiano*, 598 F.3d at 565. "[A]n expert need not rule out every potential cause in order to satisfy *Daubert*," as long as the expert's testimony "address[es] obvious alternative causes and provide[s] a reasonable explanation" for responding to the opposing expert's opinions. *Stanley*, 11 F. Supp. 3d at 1001. Such concerns go to weight and credibility. *Id.*

As discussed above in Section IV.F.2(b), Laton showed that Pomona's experts did not conduct a reasonable investigation, and that the source areas did not have any residual perchlorate. Pomona's criticisms go to the weight of the evidence, not to admissibility. *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Pomona I*, 750 F.3d at 1049.

(c) Laton's Opinions Have a Reliable Basis in the Knowledge and Experience of His Discipline.

Pomona also wrongly argues that Laton's opinions are not the product of a "scientific" methodology. However, FRE 702 applies to many types of evidence, including "scientific, technical, or other specialized knowledge." *See* *Kumho*, 526 U.S. at 150 ("there are many different kinds of experts, and many different kinds of expertise"). Opinion testimony, whether "scientific" or other, is reliable "if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Pomona I*, 750 F.3d at 1044.

As discussed above, Laton's opinions are based on his knowledge and experience as a professional hydrogeologist, and on data obtained from reliable sources. His methods are published and well-accepted, and have been found reliable in other environmental cases. Pomona offered no evidence at trial to refute Laton's showing that his opinions are the product of reliable principles and methods, and never objected to his testimony on that basis.

Laton's testimony demonstrated the absence of perchlorate "upstream" from the AEP Wells, and identified alternative sources of perchlorate that Pomona's experts did not, and could not, rule out. Thus, Laton's testimony was properly admitted. *See, e.g.*, *Dep't of Toxic Substances Control v. Technichem, Inc.*, No. 12-cv-05845-VC, 2016 U.S. Dist. LEXIS 33379, at *4-5 (N.D. Cal. Mar. 15, 2016) ("Gallagher's testimony is premised on straightforward ideas: for example, that

PCE released into soil will disperse outward from the point of release, and that the absence of PCE in groundwater 'upstream' from a site suggests that groundwater did not carry PCE into the site."); *Tyco Thermal Controls LLC v. Redwood Industrials*, No. C-06-07164-JF, 2010 U.S. Dist. LEXIS 47019, at *37-38 (N.D. Cal. Apr. 15 2010) (admitting opinions over *Daubert* objection as to the source of PCB contamination, where opinions were supported by historical information, environmental data from the Site and a review of aerial images); *Walnut Creek Manor, LLC v. Mayhew Ctr., LLC*, 622 F. Supp. 2d 918, 926-27 (N.D. Cal. 2009) (admitting an expert's opinion that adjoining property was the source of PCE contamination based on a "process-of-elimination method" because the work was grounded in a defensible scientific methodology with extensive factual support).

5. SQMNA Properly Disclosed Laton As a Rebuttal Expert on Alternative Sources.

Rebuttal expert opinions are proper if they contradict or rebut the subject matter of the affirmative expert report. FRCP 26(a)(2)(D); *see Robinson v. HD Supply, Inc.*, No. 2:12-cv-604, 2013 U.S. Dist. LEXIS 101690, at *12 (E.D. Cal. July 19, 2013) (rebuttal testimony is proper "as long as it addresses the same subject matter that the initial experts address and does not introduce new arguments"); *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Haw. 2008).

Laton's alternative source opinions addressed the same subject-matter as Pomona's initial reports, and did not introduce new arguments. [4-ER-849-887.] Laton's alternative source work was in response to Wheatcraft's reliance on a single study "regarding potential sources of the perchlorate contamination in Pomona's (and other nearby) Chino Basin wells: a study commissioned by the Chino Basin Watermaster (Sturchio et al. 2008)." [4-ER-850.] Laton rebutted Wheatcraft's approach by analyzing contaminant source(s) using a Site Conceptual Model, thus demonstrating the flaws in the methods and analysis used by Pomona's experts.

SQMNA was not required to disclose its expert's work product in response to written discovery before the time for expert disclosures under FRCP 26(a)(2), and Pomona cites no authority supporting such a proposition. It is not disputed that Laton's EDR database search and related work was the product of his investigation. [2-ER-55-58, 70, 104-105.]

Pomona also was not prejudiced. Pomona did not raise this issue in *Pomona I*. [4-ER-657-658.] On remand, despite asking for other discovery, Pomona did not ask to depose Laton or to designate any additional rebuttal expert. [4-ER-610-624.] By the time of trial, Pomona had almost four years to prepare a response to Laton's rebuttal opinions, yet rather than object at trial, Pomona elected to vigorously cross-examine Laton. Yet after cross-examination, Pomona did not

move to strike any testimony. Pomona called no expert in rebuttal. This conduct waives any error as to the admission of the testimony. *See* *Robinson*, 2013 U.S. Dist. LEXIS 101690, at *14-15.

6. Response to Amici's Laton Arguments.

Arguing that the district court abused its "procedural" discretion [Saltzburg Br. 4-7] in denying a motion in limine that Pomona brought to exclude Laton, amici present no case authority that required the court to follow a different procedure. Importantly, amici do not even try to defend Pomona's failure to object to Laton's testimony at trial.

Amici cite no authority that would have required the district court to further "explain its decision." The ruling was plainly tentative, and Pomona never preserved its objections by making them again before or at trial. *Cortez v. Skol*, 776 F.3d 1046, 1050 n. 3 (9th Cir. 2015) ("[d]efendants waived these objections by failing to request a ruling on them in the district court"); *Fenton*, 748 F.2d at 1360.

The cases cited by amici are distinguishable as they involve situations where the record showed that the district court applied the wrong legal standard or abdicated its gatekeeping responsibility. *Pyramid*, 752 F.3d at 814; *Barabin*, 740 F.3d at 464; *Metabolife Int'l v. Wornick*, 264 F.3d 832, 843, 845 (9th Cir. 2001). Moreover, in each case, the objecting party properly preserved the issues for appeal.

Amici's argument regarding "fit" is unavailing. [Saltzburg Br. 14-22.] When considering relevancy, or "fit," the court should determine whether the testimony "logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (quoting *Daubert*, 509 U.S. at 597). Relevancy requires the opinions to assist the trier of fact in reaching a conclusion necessary to the case. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998).

Primarily, amici argues that Laton's testimony does not go to an issue that is in dispute, because Sturchio used another method (isotopic analysis) that was found reliable in *Pomona I*. *Pomona I* found only that Sturchio's opinion was reliable enough to be admissible, not that it was credible. Further, Laton's testimony was directed to his disagreement with the failure of Pomona's experts to conduct the most rudimentary environmental investigation. Amici disregard this Court's prior finding that there were disputes among the experts and that resolving such disputes "is the job of the fact finder." 750 F.3d at 1049.

Amici ignore that Laton's work identified alternative sources of perchlorate that fall squarely within the inherent limitations of Sturchio's method, namely pre-1931 applications of fertilizer and industrial uses of sodium nitrate. Amici's argument turns on the mistaken notion that SQMNA's fertilizer had a unique fingerprint that Sturchio's method was able to identify, which is simply not true.

Laton did not need to positively identify the actual source of the contamination, because his testimony identified for the jury other important potential sources that Sturchio's method could not rule out. *Pyramid*, 752 F.3d at 816 (expert report admissible because it "could assist a trier of fact in inferring that the flood caused sufficiently high humidity to damage Pyramid's parts and that [the opposing expert's] contrary conclusion was not reliable").

Amici's argument regarding "differential diagnosis" has no place in this appeal, as it is used in medical cases, and was never raised below. *See* *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057 (9th Cir. 2003) ("Differential diagnosis is the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings."); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1581 n.9 (9th Cir. 1986) (rejecting amicus arguments not raised below and not raised in the opening brief). Laton's approach utilized standard *environmental* investigation methods. *See* Sections IV.F.2(b), and VII, B.4(c), above.

C. Not Instructing the Jury on the Consumer Expectations Test Was Not Error.

Pomona states twice in its AOB that the consumer expectations issue need not be reached in this appeal unless this Court reverses the judgment based on the expert testimony issues regarding Sturchio and Laton. [AOB-3-4, 28.] Pomona may not raise the consumer expectations issue in this appeal because the jury's "no

causation" verdict bars any products liability claim, regardless of the liability theory.

Under California law, causation is an essential element in both the risk-benefit and consumer expectations approaches. *Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283, 1305 (2012); CACI 1203-1204. Because the jury concluded the fertilizer design was not a substantial factor, the jury never reached the risk-benefit factors. [2-ER-14-16, 361.] The jury's no causation determination equally defeats the consumer expectations test. Accordingly, any error in not instructing the jury on this alternative test was harmless.

1. Pomona Waived the Right to Appeal Exclusion of the Consumer Expectations Test.

Pomona waived any challenge to the consumer expectations ruling. First, it did not raise this issue in its *Pomona I* appeal. As a substantive legal ruling, application of the consumer expectations test was ripe for appeal in 2012 when Pomona dismissed "all claims asserted." [SER-45-48.] The failure to appeal this issue waives Pomona's right to now challenge the ruling. *Jimenez*, 680 F.3d at 1099-1100.

After remand, Pomona treated the court's consumer expectations ruling in 2012 as final. Pomona described the ruling as final in its pre-trial memorandum. [SER-37.] Pomona did not offer a consumer expectations jury instruction for the 2015 trial. [SER-34-35.] Pomona cannot have it both ways: either the district court's ruling

was final in 2012 and should have been appealed, or it was not final and should have been raised at trial.

By remaining silent on this subject at trial and during the jury instruction conference [SER-245-265], Pomona waived the right to claim error. FRCP 51(d)(1)(A)-(B) (objection to jury instruction error must be timely made and on the record); *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152 (9th Cir. 1990); *Brown v. Avemco Inv. Co.*, 603 F.2d 1367, 1371 (9th Cir. 1979) ("Rule 51 was designed to prevent unnecessary new trials caused by errors in instructions that the district court could have corrected if they had been brought to its attention at the proper time.").

2. The Consumer Expectations Ruling Was Correct.

The district court's ruling on the consumer expectations motions in limine were correct. [*See* 5-ER-1037.]

Under California law, it is the duty of the trial court to make a foundational determination whether the product at issue is one about which "ordinary consumers" have reasonable safety expectations. *McCabe v. Am. Honda Motor Co.*, 100 Cal. App. 4th 1111, 1121, 1125 n.7 (2002) (in a jury trial, "the trial court must initially determine, as a question of foundation and in the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations"). The

relevant time frame for determining an ordinary consumer's expectations is the time of use. *Nelson v. Superior Court*, 144 Cal. App. 4th 689, 694 (2006).

An instruction based on the consumer expectations test is not appropriate "where the evidence would not support a jury verdict on that theory." *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 568 (1994). There was insufficient evidence to support a finding that an ordinary consumer would have formed safety expectations regarding sodium nitrate at the time it was used in the 1930s or 1940s. *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 126-27 (1982) ("the product must meet the safety expectations of the general public as represented by the ordinary consumer, not the industry or a government agency.").

In *Soule,* the court found the consumer expectations test inapplicable under circumstances involving the technical and scientific nature of automobile design, concluding as a matter of law that "the ordinary consumer of an automobile simply has 'no idea' how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards." *Soule*, 8 Cal. 4th at 566-67.

Likewise, the impact of commercial use of fertilizer more than fifty years ago was not part of the "everyday experience" of ordinary consumers. The risk-benefit test applies where expert testimony is required to explain the case to the jury. *Morson v. Superior Court*, 90 Cal. App. 4th 775, 791 (2001) (whether latex gloves cause allergies requires use of risk-benefit test). Numerous cases have

rejected application of the consumer expectations test where injury is caused in a way about which ordinary consumers could not form safety assumptions because of the technical and scientific nature of the product's failure. In *Pannu v. Land Rover North America, Inc.*, 191 Cal. App. 4th 1298, 1311-1312 (2011), involving a vehicle rollover, the court rejected application of the consumer expectation test and emphasized that the issue is, "not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, in the context of the facts and circumstances of its failures, is one about which the ordinary consumer can form minimum safety expectations."

In *Pruitt v. General Motors*, 72 Cal. App. 4th 1480, 1483 (1999), the court concluded minimum safety standards for deployment of air bags in a low-speed collision was not within the common knowledge of lay jurors. *See also* *Mansur v. Ford Motor Co.*, 197 Cal. App. 4th 1365, 1373-80 (2011) (a roll-over case involving complicated expert testimony about vehicle safety features); *Lunghi v. Clark Equipment Co., Inc.*, 153 Cal. App. 3d 485, 496 (1984) (use of a Bobcat where boom arms and bucket descended with fatal crushing force); *Res-Care Inc. v. Roto-Rooter Servs. Co.*, 753 F. Supp. 2d 970, 989 (N.D. Cal. 2010) (performance of hot water heater valve).

The use of fertilizers requires scientific and technical knowledge beyond the ordinary consumer's expectations. Pomona's evidentiary showing was not

sufficient to justify application of the consumer expectations test. Pomona's reliance on an advertisement about SQMNA's fertilizer, the undisclosed presence of perchlorate on the label, and SQMNA's partial interrogatory response that "the ordinary farmer appreciated that one should not foul one's own water" falls short of the foundation required to give the consumer expectations instruction. [AOB-20, 59.][7] None of this shows that the environmental consequences of sodium nitrate use was part of the "everyday experience" of ordinary consumers in the 1930s.

A farmer's safety expectations in the 1930s could not possibly have included concern over the future health impacts of perchlorate in groundwater because there was no MCL then. In fact, the existence of perchlorate in groundwater was not even measurable then. [SER-168-169.] Pomona argues for a "simple expectation of no harm" test, which has been expressly rejected. *Morson*, 90 Cal. App. 4th at 793.

Further, the alleged harm in this case was not to a consumer but to a third-party bystander—Pomona. Under California law, there is no strict liability to a bystander that did not "use" the product while the product was "on the market," and then, only when the injury was "reasonably foreseeable." *Elmore v. American*

[7] The partially quoted interrogatory answer says just the opposite; it disclaimed the ability of an ordinary farmer "to form reasonable expectations as to how the components of this fertilizer ultimately might result in cleanup costs to a municipal water supplier based on Government regulations as alleged in the City's complaint." [SER-71-73.]

Motors Corp., 70 Cal. 2d 578, 586 (1969); *Barrett v. Superior Court*, 222 Cal. App. 3d 1176, 1187 (1990); *Nelson*, 144 Cal. App. 4th at 696, 698. No California case has ever extended strict product liability to bystanders such as Pomona.

D. The Court Did Not Abuse Its Discretion in Denying Pomona's Motion for Late Designation of an Alternative Design Expert.

Pomona raises an argument regarding its alternative design expert Intille as a "contingent" issue, which need not be reached unless this Court reverses the judgment on the first two issues on appeal. [AOB-60.] Because Intille was not a causation expert, and the jury found "no causation," the verdict precludes Pomona's argument regarding Intille.

On the merits, the district court did not abuse its discretion in denying Pomona's motion to add an unnamed "rebuttal" expert on alternative design, and declining to "fix" Pomona's tactical decision not to designate a design expert before *Pomona I.* [1-ER-7.] Pomona's motion to revise the scheduling order showed a lack of good cause in this regard under the *Schumer* factors. *Schumer*, 63 F.3d at 1526-1527; *Johnson*, 975 F.2d at 609; *Fid. Nat'l Fin.*, 308 F.R.D. at 655. Pomona showed no good reason why it had failed to designate a design expert in 2011 in timely fashion.

Nonetheless, the district court told counsel that its ruling about Intille could be "revisited" and impeachment experts could be called even if not properly designated as experts. [3-ER-360; 4-ER-640, 658.] If Intille were really an

impeachment witness, he should have been called as part of Pomona's rebuttal case. Pomona had an opportunity to do so, but failed to call Intille or any other expert in rebuttal. This claim of error is therefore waived. *See* *Snake River Valley Elec. Ass'n v. Pacificorp*, 357 F.3d 1042, 1053 (9th Cir. 2004).

Pomona also mentions the court's ruling sustaining objections to alternative design questions to Sturchio. [AOB-24.] Pomona presents no argument about this issue and has waived this contention. *Martinez-Serrano*, 94 F.3d at 1259-60 (issue mentioned in statement of case, but not discussed in body of the opening brief is deemed waived). In any event, those objections were properly sustained as Sturchio's report does not address the *feasibility* of any particular design change in the 1930s. [4-ER-816-819.] Pomona was given a chance to recall Sturchio on this subject in its rebuttal case but did not do so. [2-ER-306.] Pomona waived the issue by making no effort to revisit the issue and not calling any rebuttal witness. *Snake River*, 357 F.3d at1053.

VIII. CONCLUSION

The judgment should be affirmed.

DATED: April 18, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Michael K. Johnson*
R. Gaylord Smith
Malissa Hathaway McKeith
Michael K. Johnson
Defendant and Appellee,
SQM NORTH AMERICA CORPORATION

CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a)(7)(C))

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the Appellee's Answering Brief is proportionately spaced, has a typeface of 14 points or more and contains 17,044 words.

DATED: April 18, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Michael K. Johnson*
R. Gaylord Smith
Malissa Hathaway McKeith
Michael K. Johnson
Defendant and Appellee,
SQM NORTH AMERICA CORPORATION

STATEMENT OF RELATED CASES
(Fed. R. App. P. 28-2.6)

Defendant /Appellee SQM North America Corporation is not aware of any related cases pending in this Court.

DATED: April 18, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Michael K. Johnson*
R. Gaylord Smith
Malissa Hathaway McKeith
Michael K. Johnson
Defendant and Appellee,
SQM NORTH AMERICA CORPORATION

ADDENDUM TABLE OF CONTENTS

ADDENDUM

Federal Rules of Civil Procedure 16
Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:
- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement

(b) Scheduling.
- (1) *Scheduling Order*. Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:
  - (A) after receiving the parties' report under Rule 26(f); or
  - (B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.
- (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.
- (3) *Contents of the Order.*
  - (A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.
  - (B) Permitted Contents. The scheduling order may:
    - (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
    - (ii) modify the extent of discovery;
    - (iii) provide for disclosure, discovery, or preservation of electronically stored information;
    - (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;
(vi) set dates for pretrial conferences and for trial; and
(vii) include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
(B) amending the pleadings if necessary or desirable;
(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;
(E) determining the appropriateness and timing of summary adjudication under Rule 56;
(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;
(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;
(H) referring matters to a magistrate judge or a master;
(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
(J) determining the form and content of the pretrial order;
(K) disposing of pending motions;
(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;
(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);
(O) establishing a reasonable limit on the time allowed to present evidence; and
(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.
(1) *In General*. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:
(A) fails to appear at a scheduling or other pretrial conference;
(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or
(C) fails to obey a scheduling or other pretrial order.
(2) *Imposing Fees and Costs*. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Federal Rules of Civil Procedure 26
Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;
(vii) an action by the United States to collect on a student loan guaranteed by the United States;
(viii) a proceeding ancillary to a proceeding in another court; and
(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken

stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery

or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;
(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
(E) designating the persons who may be present while the discovery is conducted;
(F) requiring that a deposition be sealed and opened only on court order;
(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery*. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Early Rule 34 Requests.*

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
(i) to that party by any other party, and
(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
(A) methods of discovery may be used in any sequence; and
(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule **16(**b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule **16(**b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Federal Rules of Civil Procedure 37
Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the

party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.*If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
(iii) striking pleadings in whole or in part;
(iv) staying further proceedings until the order is obeyed;
(v) dismissing the action or proceeding in whole or in part;
(vi) rendering a default judgment against the disobedient party; or
(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
(B) may inform the jury of the party's failure; and
(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed

to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General.*

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
    (A) presume that the lost information was unfavorable to the party;
    (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
    (C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Federal Rules of Civil Procedure 51
Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.
  (1) *Before or at the Close of the Evidence.* At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.
  (2) *After the Close of the Evidence.* After the close of the evidence, a party may:
    (A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and
    (B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:
  (1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;
  (2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and
  (3) may instruct the jury at any time before the jury is discharged.

(c) Objections.
  (1) *How to Make.* A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.
  (2) *When to Make.* An objection is timely if:
    (A) a party objects at the opportunity provided under Rule 51(b)(2); or
    (B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.
  (1) *Assigning Error.* A party may assign as error:
    (A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and--unless the court rejected the request in a definitive ruling on the record--also properly objected.

(2) *Plain Error.* A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Federal Rules of Evidence 103
Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
- (1) if the ruling admits evidence, a party, on the record:
  - (A) timely objects or moves to strike; and
  - (B) states the specific ground, unless it was apparent from the context; or
- (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Federal Rules of Evidence 104
Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:
  (1) the hearing involves the admissibility of a confession;
  (2) a defendant in a criminal case is a witness and so requests; or
  (3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Federal Rules of Evidence 702
Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

28 U.S.C. § 2111
Harmless Error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

CERTIFICATE OF SERVICE
FOR CASE NUMBER 15-56062

I hereby certify that on April 18, 2016, 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.

ANSWERING BRIEF OF DEFENDANT/APPELLEE SQM NORTH AMERICA CORPORATION;

SUPPLEMENTAL EXCERPTS OF RECORD

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Shannon Bingham
Shannon Bingham