THE HONORABLE RICHARD A. JONES
THE HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CITY OF SEATTLE, a municipal corporation, located in the County of King, State of Washington,

Plaintiff,

v.

MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA LLC,

Defendants.

CASE NO. 2:16-cv-00107-RAJ-MLP

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PER FEBRUARY 21, 2023 ORDER

Noted on Calendar for: March 20, 2023

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The City of Seattle impermissibly seeks to pursue its public nuisance claim against Defendants for alleged PCB-related harm to the Lower Duwamish Waterway ("LDW") after the State of Washington settled all claims against Defendants relating to PCBs in the environment within the state. Defendants may not be called upon twice to pay for the same alleged harm. Based on the State's settlement of its claims, Defendants are entitled to summary judgment, as a matter of law, for three independent reasons:

First, the State of Washington's release of its claims, by operation of law, extinguished the City's derivative sovereign claim for public nuisance. Because the City brings its public nuisance claim under sovereignty "borrowed" from the State, the State's release of all sovereign claims relating to PCB-related harm in the state leaves no sovereign claim for the City to pursue.

Second, the City constitutes an agency of the State and, therefore, a "Releasing Person" under the Washington State Settlement Agreement (the "Settlement Agreement"). Nothing adduced in discovery indicates an intent of the parties to depart from the common definition of "agencies" used by Washington courts for over a century to define municipalities acting in their sovereign capacity.

Third, the doctrine of *res judicata* bars the City's attempt to "split" the sovereign public nuisance claim for the LDW because it properly belonged to the subject matter of the Washington State lawsuit. No discovery is relevant to the application of *res judicata* because *res judicata* bars the City's claim independent of the terms of the Settlement Agreement.

ARGUMENT

I. The State's Release of Its Sovereign Claims Extinguished the City's Public Nuisance Claim by Operation of Law

Magistrate Judge Peterson properly determined that no discovery is necessary to decide whether the State's release of its sovereign claims – independent of the meaning of the term "Releasing Persons" used in the release – extinguished the City's claim by operation of law. Dkt. 572; Declaration of Lisa DeBord ("DeBord Decl."), ¶ 2, Exhibit A

(Transcript of Jan. 11, 2023 Hearing at 22-23).

In the Settlement Agreement, the State released all sovereign rights relating to PCB-related public nuisance claims without carving out any exception for the City's public nuisance claim in this lawsuit. Dkt. 322-1, ¶15 ("'Released Claims' means all claims . . . which were or could have been alleged related to the manufacture, sale, testing, disposal, release, marketing or management of PCBs by Defendant."). Indeed, Magistrate Judge Peterson recognized the breadth of the "Released Claims" in the Settlement Agreement: "How is it legally possible that the State would have kept any claims? I mean, that release language is as broad as it gets." DeBord Decl., ¶ 3, Exhibit B (Transcript of Feb. 21, 2023 Hearing at 9:13-15).

The City's derivative sovereign claim for public nuisance in the LDW falls squarely within the scope of the claims released by the State. Washington municipalities, like the City of Seattle, "are only sovereign . . . in so far as they represent the State. *They have no sovereignty of their own* . . . . [T]heir sovereignty[] is in a sense borrowed" from the State. *Kelso v. City of Tacoma*, 63 Wn.2d 913, 916-17 (1964). To avoid the statute of limitations, the City successfully argued that it brought this case in its sovereign capacity "in the name or for the benefit of the state," (Dkt. 41 at 10 (quoting RCW 4.16.160)), and represented that it is acting under sovereign authority derived from the State under RCW 35.22.280 (29),(30) to pursue its public nuisance action relating to the LDW, Dkt. 41 at 11-12.[1] The Court, accepting the City's argument, ruled, "[i]n this action to restore the purity of its waterways, Seattle acts in its sovereign capacity" for the benefit of the people of the state. Dkt. 60 at 8-9.

The City's public nuisance claim, which it brought "for the benefit of the state" under sovereignty "borrowed" from the State, was extinguished by the State in the Settlement Agreement. The Supreme Court's decision in *Kelso* negates the City's claim

[1]After successfully arguing in opposition to Defendants' motion to dismiss that it is acting in a sovereign capacity as an agent of the State, the City is judicially estopped from now arguing the contrary. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

that it retains a right to pursue sovereign interests already released by the State.

In *Kelso*, the Supreme Court of Washington rejected the City of Tacoma's contention that a statute waiving sovereign immunity for "the state of Washington" did not likewise waive the immunity enjoyed by municipalities. *Kelso*, 63 Wn.2d at 916. The Court explained, "the common-law right of sovereign immunity is not in the municipality but in the sovereign from which the immunity is derived." *Id.* In other words, "[t]heir immunity, like their sovereignty, is in a sense borrowed" from the State. *Id*. at 917. The Court held, therefore, that, because the State's immunity is waived, there is no basis to find a municipality is still immune. *Id.* at 918. In other words, when the State waived its immunity, the immunity of its municipalities also vanished. *Id.* The Court noted that, "[i]f [the State] desired to preserve the doctrine of governmental immunity for these political subdivisions, it should have so stated" in the statute, but did not. *Id*. at 917.

In bringing its public nuisance claim relating to the LDW, the City of Seattle is acting pursuant to sovereignty derived or "borrowed" from the State. *Kelso*, 63 Wn.2d at 916-17. Because the State's waiver of its sovereign immunity brings the municipality's borrowed sovereign immunity to an end, *id*. at 918, the State's release of its sovereign claims likewise brings the City's "borrowed" sovereign claim for public nuisance in the LDW to an end. In other words, because the State released all sovereign PCB-related claims with respect to waterbodies within the state without exception, there is no sovereign claim left for the City to pursue. *See id.* at 916-17.

The City's contention today that the State nonetheless intended to preserve the City's claim, contrary to the four corners of the release, violates the Washington rules of contract construction. *See Hadley v. Cowan*, 60 Wn. App. 433, 438 (1991). By its own terms, the Settlement Agreement is fully integrated and represents the entire agreement of the parties. Dkt. 332-1, ¶34. In the Settlement Agreement, the State solely carved out an exception for State regulatory actions under CERCLA and MTCA from the scope of the released claims. Dkt. 332-1, ¶15. The language of the Settlement Agreement manifests a full settlement of the State's sovereign rights. Nothing from the face of the release

manifests any intent to exclude the City's public nuisance claim relating to the LDW. The State could have carved out additional exceptions from the scope of the release, like its regulatory CERCLA action, but did not.

In *Hadley*, based on "the language of the agreement, not expressions absent from the agreement," the Court of Appeals refused to accept the plaintiff-beneficiaries' post-settlement contention that they reserved tort claims for fraud notwithstanding a full and final settlement of a will contest that did not carve out any reserved claims. *Hadley*, 60 Wn. App. at 438. The Court rejected the argument that the plaintiff-beneficiaries expressed their intent to preserve their tort claims by changing prior drafts of the settlement agreement to omit language precluding fraud claims. *Id*. The Court concluded: "If the Children consciously intended to preserve causes of action challenging the distribution provided by their mother's will, they could have done so in the settlement agreement itself." *Id*. at 439.

In addition, the Washington Supreme Court has recognized that a full and final settlement of "all matters and differences" between the parties, like the Washington State Settlement Agreement, releases all known claims notwithstanding the prior severance of any part of the cause of action from a party's pleadings:

> We think, notwithstanding the amended complaint, which abandoned for the time a part of the controversy between the parties, that controversy was known to exist, and the language of the stipulation is broad enough to cover all known rights, claims, and demands whether then in suit or not. The very language of the stipulation indicates that something more than what was then involved in the pending action was being settled . . . .

McClure v. Calispell Duck Club, 157 Wn. 136, 139-40 (1930).

The City erroneously contends RCW 35.22.280(29) vested in the City the independent right to pursue its public nuisance action that the State is powerless to extinguish absent express legislation. Dkt. 521 at 9 n.11. But the City has cited only non-binding decisions involving the irrelevant issue of State legislative preemption of local ordinances under Wash. Const. art. XI, § 11. Dkt. 510 at 12-13. The City, in effect, impermissibly construes RCW 35.22.280(29) as prohibiting the State from settling its sovereign claims over municipal objections or without the explicit concurrence of every

municipality the state. *Accord City of Spokane v. J-R Distributors, Inc.*, 90 Wn.2d 722, 730 (1978) (constraining city from exercising authority to declare and abate public nuisance under RCW 35.22.280(30) in manner that invades the province of state government). The Legislature vested in the Attorney General statutory authority to prosecute the Washington State lawsuit. *See City of Seattle v. McKenna*, 172 Wn.2d 551 (2011) (discussing attorney general authority under RCW 43.10.030(1)). In matters like the Washington State lawsuit, the Attorney General has the statutory authority to sue on behalf of the State as a whole and bind municipalities over their objection. *See, e.g., id.* at 562. The City, therefore, has no basis to assert that the State lacked authority to settle all sovereign claims against Defendants and extinguish the City's lawsuit.

II. The City Falls Within the Ordinary Meaning of "Agencies of the State"

The Washington State Settlement Agreement also compromised the City's public nuisance claim for the independent reason that the City falls within the definition of a "Releasing Person" as used in the Settlement Agreement. Defendants, however, recognize that Magistrate Judge Peterson deems the term, "agencies," to be ambiguous, Dkt. 572 at 3-4.[2] Defendants stand on their arguments made in prior submissions and oral argument. Nothing in the additional discovery by the City controverts the definition of cities as "agencies" of the state established by the courts for over a century.[3] *Cornish Coll. of the*

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[2] Magistrate Judge Peterson limited discovery to the meaning of the terms "agencies" and "Releasing Persons" under the Settlement Agreement. Dkt. 572 at 3-4. Yet, the City devoted most of the depositions of Defendants' Rule 30(b)(6) witness and in-house counsel, not to the meaning of those specific terms, but generally to improperly attempt to controvert the "intent" of the parties as expressed in the Settlement Agreement. The City did so despite Magistrate Judge Peterson's clarification that surrounding circumstances and other extrinsic evidence are not to be used "to show an intention independent of the instrument or to vary, contradict or modify the written word." Dkt. 572, at 3. Regardless, the City's efforts fell flat as Defendants' Rule 30(b(6) witness, Keith Abrams, testified that "the four corners" of the Settlement Agreement sets forth "the sole statement of the intention of the parties," "the Settlement Agreement by itself integrates all of the terms of the parties that are intended to be reflected in the agreement," and the "release includes release of the City of Seattle's claims." DeBord Decl., ¶ 4, Exhibit C (Abrams Dep. (Mar. 7, 2023) at 34:11-14, 37:8-20, 119:5-12, 133:2-4.).

[3] *See, e.g., Malette v. City of Spokane*, 77 Wn. 205, 227 (1913) (identifying city as "a governmental agency of the state" in the exercise of sovereign power); *State v. Howell*, 85 Wn. 281, 289 (1915) ("[M]unicipalities in all their governmental functions are agencies of the state exercising sovereign powers of the state."); *State ex rel. Walker v. Superior Court*

Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 223 (2010) ("[L]aws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law."). Defendants are, therefore, entitled to summary judgment. *Dice v. City of Montesano*, 131 Wn. App. 675, 686 (2006) ("where only one reasonable inference can be drawn from the extrinsic evidence, interpretation of a contract is a question of law.").

Even if the Court were to disagree that the City falls within the definition of "Releasing Persons" as a matter of law, Defendants are still entitled to summary judgment on the independent bases that the State's release of its sovereign claims extinguished the City's "borrowed" sovereign public nuisance claim, discussed above, and *res judicata*, discussed below.

III. *Res Judicata* Bars the City's Lawsuit Independent of the Release

Independent of the terms of the release, the doctrine of *res judicata* bars the City's public nuisance claim as a matter of law. No discovery is necessary for the Court to grant summary judgment in Defendants' favor on the basis of *res judicata* because *res judicata* bars the City's claim independent of the language of the release. *Hadley*, 60 Wn. App. at 440-41 n.10 ("Settlement agreements are given res judicata effect as to the ***issues that were or should have been resolved in the lawsuit***.") (emphasis added); *In re Phillips' Est.*, 46

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for Spokane Cty., 87 Wn. 582, 584 (1915) (identifying cites as "subordinate agencies of the state"); *Columbia Irr. Dist. v. Benton Cnty.*, 149 Wn. 234, 235 (1928) ("A 'municipal corporation,' in its strict and proper sense, is a body politic established by law partly as an agency of the state…."); *Neils v. City of Seattle*, 185 Wn. 269, 275 (1936) ("In the exercise of its sovereign power, the state may withdraw from a municipality… powers delegated to, or exercised by, them and redelegate such powers to another agency."); *Lauterbach v. City of Centralia*, 49 Wn. 550, 554 (1956) ("A municipal corporation is a body politic established by law as an agency of the state."); *Edmonds Sch. Dist. No. 15 v. City of Mountlake Terrace*, 77 Wn.2d 609, 612 (1970) ("A city and other kinds of municipal corporations, too, are agencies of the state."); *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 557 (1972) ("[T]he United States Supreme Court makes it clear that [municipal corporations are] political subdivisions of a state… created as convenient agencies for exercising such governmental powers of the state….") (citing *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907)); *Washington Pub. Power Supply Sys. v. Gen. Elec. Co.*, 113 Wn.2d 288, 295-96 (1989) (identifying the municipal corporation as "an agent of the state" with respect to the promotion of public welfare); *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1176 (E.D. Wash. 2006) (identifying city as agent of state in exercise of sovereign power).

Wn. 2d 1, 13-14 (1955) ("A compromise or settlement is *res judicata* of ***all matters relating to the subject matter of the dispute***.") (emphasis added).

In *Hadley*, for example, the Court of Appeals affirmed the grant of summary judgment against the plaintiff-beneficiaries in a tort action after the settlement and dismissal of their prior will contest on both (i) the terms of the settlement agreement, *Hadley*, 60 Wn. App. at 438-39, and (ii) *res judicata*, *id.* at 442-43. The *Hadley* Court's analysis of *res judicata* independent from the terms of the settlement agreement directly refutes the City's erroneous contention that the application of *res judicata* depends on the terms of the Settlement Agreement.

The City has inaccurately relied on *Holden-McDaniel Partners, LLC v. City of Arlington*, 2017 WL 959502 (Wash. App. Jan. 9, 2017), to blur the distinction between the effect of the release and *res judicata* when, in *Holden-McDaniel*, the Court found *res judicata* inapplicable to a settlement agreement ***because it was not followed by entry of a final judgment***. *Id.* at *6 ("It is well settled that a dismissal order entered without prejudice will not support a res judicata defense because it is not a final judgment."). In contrast to *Holden-McDaniel*, the Settlement Agreement was followed by a final order of dismissal of the State's cause of action with prejudice. Dkt. 326 at 30:5-6.

Unlike the extinguishment of the City's claim pursuant to the Settlement Agreement, which is governed by principles of contract construction, the *res judicata* bar to the City's claim is separately governed by the law regarding the enforceability of judgments. *Holden-McDaniel*, 2017 WL 959502 at *7. The Settlement Agreement followed by the dismissal order with prejudice, therefore, triggers the application of *res judicata*, but resolution of whether *res judicata* bars the City's public nuisance claim is determined by whether the City's public nuisance claim was or should have been litigated in the Washington State lawsuit. *Hadley*, 60 Wn. App. at 439 ("Res judicata applies to claims that were, or should have been, litigated in a prior proceeding between the parties, including settlement agreements.").

Where a final decree is entered on a settlement agreement, Washington courts apply

res judicata when, "***between the prior and subsequent actions***," there is identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Id.* at 441 (emphasis added). "[I]t is not necessary that all four factors favor preclusion to bar the claim." *Zweber v. State Farm Mut. Auto. Ins. Co.*, 39 F. Supp. 3d 1161, 1166 (W.D. Wash. 2014). The overarching goal of *res judicata* under Washington law is to preclude so-called "claim splitting." *Ensley v. Pitcher*, 152 Wn. App. 891, 898 (2009). "In Washington, res judicata is 'the rule, not the exception.'" *Zweber*, 39 F. Supp. 3d at 1165-66 (citation omitted).

In *Hadley*, to avoid the effect of *res judicata* based on the settlement of a prior will contest, the plaintiff-beneficiaries in a subsequent fraud action argued that there was no identity of the causes of action because they intended to reserve their fraud claims for the subsequent tort action. In rejecting the plaintiffs' argument, the Court emphasized that, "[i]n determining whether there is identity of causes of action, res judicata . . . applies to what might or should have been litigated as well as what was litigated." *Hadley*, 60 Wn. App. at 442. The Court concluded with the observation that "[i]t is also obvious that the claims in the present proceedings would have constituted a convenient trial unit in the probate proceeding." *Id.* at 443. As in *Hadley*, all factors mandate the application of *res judicata* to the City's public nuisance lawsuit regarding the LDW.

There is unquestionably a concurrence of identity of subject matter between the State's cause of action and the City's public nuisance claim against Defendants regarding the LDW because both (i) arose from the identical transactional nucleus of facts, *i.e.*, Defendants' manufacture, marketing, and sale of PCBs; (ii) seek to redress the same wrongs, *i.e.*, the alleged harm caused by the presence of PCBs in the LDW and other enumerated water bodies in the state (Washington State Complaint Dkt. 344-4 at 4); and (iii) would involve the presentation of the same evidence, *e.g.*, the chemical properties of PCBs, Defendants' design, manufacture, marketing, and sale of PCBs, and the alleged harm to the waterway, natural resources, and the general public. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 713 (identifying factors determining concurrence of subject

matter), *opinion corrected by* 943 P.2d 265 (Wash. 1997).

There is also unquestionably an identity of parties because the City seeks to enforce the same sovereign interests against the same Defendants with respect to the presence of PCBs in the LDW that the State addressed in its lawsuit. The City's statutory authority to address the alleged public nuisance in the LDW, which derives wholly from the State, did not give it any enforceable right that the State did not already address in its lawsuit. Rather, the State represented the same legal interests of the people of the State as the City with respect to the settlement of its claims for the alleged public nuisance in the LDW. The City is thus in privity with the State. *Snyder v. Munro*, 106 Wn.2d 380, 383-84 (1986) ("[A] final judgment effective against the State may also be effective against its citizens because their common public rights as citizens were represented by the State in proceedings."); *People v. Sims*, 32 Cal. 3d 468, 487 (1982) ("[T]he courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government.") (citations omitted).

The very purpose of *res judicata* is to eliminate "the splitting of claims" like the City's claim from the State's claim relating to the LDW. *Kuhlman v. Thomas*, 78 Wn. App. 115, 120 (1995). *Res judicata* bars the City's claim because it "properly belonged to the subject of the [State's] litigation." *Zweber*, 39 F. Supp. 3d at 1167. The City impermissibly seeks to call upon the same Defendants to answer again the same charge based on the same facts pertaining to the same waterbody by the mere substitution of the named party. *See In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 261-62 (1998). To permit the City to relitigate the same charge based on the same facts against the same Defendants would defeat the finality of the Settlement Agreement, waste judicial resources, and subject Defendants to potential double recovery contrary to the *res judicata* doctrine. *See id.* at 262.

Because *res judicata* bars the City's claim as a matter of law, Defendants are entitled to summary judgment. *See Holden-McDaniel*, 2017 WL 959502 at *6 ("Whether res judicata bars an action is a question of law"); *see, e.g.*, *Kuhlman*, 78 Wn. App. at 120

(affirming grant of summary judgment on the basis of *res judicata*); *Hadley*, 60 Wn. App. at 442-43 (same).

CONCLUSION

Based on the foregoing and the reasons set forth in Defendants' prior submissions, incorporated by reference herein, Defendants request that the Court grant summary judgment in their favor on the City's sole remaining claim for public nuisance on any or all of the following grounds: (i) the State's settlement extinguished the City's claim by operation of law; (ii) the City falls within the definition of a Releasing Person under the terms of the Settlement Agreement; and/or (iii) *res judicata* bars the City's claim because it could and should have been litigated in the Washington state lawsuit.

DATED: March 20, 2023

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the United States, that the following is true and correct:

I hereby certify that on March 20, 2023, I electronically served the foregoing **DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PER FEBRUARY 21, 2023 ORDER** to all counsel of record:

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