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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

COUNTY OF SAN MATEO, TOWN OF ATHERTON, CITY OF BRISBANE, TOWN OF COLMA, CITY OF EAST PALO ALTO, CITY OF FOSTER CITY, TOWN OF HILLSBOROUGH, CITY OF MENLO PARK, CITY OF PACIFICA, TOWN OF PORTOLA VALLEY, CITY OF REDWOOD CITY, CITY OF SAN BRUNO, CITY OF SAN CARLOS, CITY OF SAN MATEO, and TOWN OF WOODSIDE, both individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

MONSANTO COMPANY, SOLUTIA, INC., PHARMACIA, LLC, and DOES 1-100,

Defendants.

No. 4:22-cv-03257-JST

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REMAND TO STATE COURT

ORAL ARGUMENT REQUESTED

Judge: Hon. Jon S. Tigar

Hearing Date: December 1, 2022
Hearing Time: 2:00 p.m.
Department: Oakland Courthouse, Courtroom 6 (remote hearing)

Complaint Filed: April 21, 2022
CMC Date: November 22, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The People of the State of California (the "People," or the "State"), San Mateo County (the "County"), and cities and towns in the County (the "Municipalities") sued Monsanto in state court because it contaminated San Francisco Bay, an immensely important state water. *See generally* First Amended Complaint ("FAC"), ECF No. 20-1, Ex. 1. Although this suit concerns state property, public resources, and widespread health and economic harms, Monsanto removed this action on the theory that the People are not a real party in interest. *See* Opposition ("Opp."), ECF No. 22. Principally, Monsanto believes that because the People are represented by the County and Municipalities' officials instead of the California Attorney General, the People are not a real party in interest. But the record conclusively demonstrates that the State has compelling interests in this litigation regardless of who represents it. *See* Motion ("Mot."), ECF No. 20. So, the People are a real party in interest, there is no complete diversity, and this action must be remanded.

Monsanto must overcome two presumptions: the presumption against removal in diversity cases, and the presumption against removal when a state or one of its subdivisions is a party. And Monsanto fails to carry its weighty burden. Initially, Monsanto fundamentally errs by over-emphasizing the County and Municipalities' non-representative claims in the real-party-in-interest analysis. The Ninth Circuit's decisions in *Lucent* and *Nevada*, as well as first principles relating to real parties in interest and permissive joinder, show that this Court's real-party-in-interest inquiry must focus on the People's claim. Of course, consistent with *Nevada*, this Court must consider the "entire record." But that does not—as Monsanto suggests—mean the County and Municipalities' claims should take center stage.

The People's representative public nuisance claim serves quintessentially state interests, namely its interests in state property, public trust resources, and preventing widespread harm to public health and the economy. Monsanto's counterarguments lack force: Monsanto ignores that localized PCB abatement measures serve state interests, misunderstands the term "general governmental interests," tries to pull California public nuisance law from its historical roots, and draws the wrong conclusions from the fact that California law recognizes multiple avenues for

public nuisance claims. If anything, the County and Municipalities' non-representative claims only confirm that the People are a real party in interest. These state subdivisions' non-representative claims have a public character, serve state interests, and arise out of the broader public nuisance.

Monsanto clings to a misreading of the Supreme Court's decision in *Missouri Railway* and argues that for the People to be a real party in interest, the relief must "enure to it alone." *Mo., Ky. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 59 (1901). Monsanto is not the first litigant to press this unsound theory. Several district courts have carefully considered and rejected any "enure alone" requirement because it is unsupported by *Missouri Railway* and Ninth Circuit precedent. Mot. at 20–22 & n.16. Monsanto gives no reason for this Court to deviate from these courts' holdings.

Monsanto fails to explain how the People could possibly lack an interest in a suit brought in its name that addresses large-scale contamination of a major state water. Indeed, Monsanto chooses to ignore the Central District of California's recent decision in *Los Angeles*, where the court easily rejected Monsanto's arguments that the People were not a real party in interest to a suit involving large-scale PCB contamination of land and state waters. *See People ex rel. L.A. City Attorney v. Monsanto Co.* (*Los Angeles*), No. 2:22-cv-02399-ODW-SKx, 2022 WL 2355195 (C.D. Cal. June 30, 2022). Like *Los Angeles*, this action belongs in state court.

II. ARGUMENT

A. Monsanto must overcome two presumptions against removal.

Monsanto must show complete diversity. *See NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 613–14 (9th Cir. 2016). Two presumptions elevate Monsanto's burden. First, this Court must apply a strong presumption against removal based on diversity jurisdiction. *See* Mot. at 6–7 (collecting cases). Monsanto does not dispute this presumption. *See generally* Opp.

Second, this Court must "resolve doubts against the exercise of federal jurisdiction" where, as here, "an action has been brought by a state *or one of its . . . subdivisions*" in state court. *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, 354 F. Supp. 3d 1122, 1124 (N.D. Cal. 2019) (citing *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 21 n.22 (1983)) (emphasis added). Monsanto tries to downplay as dicta the Supreme

Court's analysis in *Franchise Tax Board* that first recognized this presumption. Opp. at 3 n.2. But the Court's explanation that that "considerations of comity . . . make us reluctant to snatch cases [from state court]" was integral to its discussion of dispositive federalism issues. *See Franchise Tax Bd.*, 463 U.S. at 20–22 & n.22. Accordingly, the Ninth Circuit and other circuits have followed this reasoning. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012).[1] Monsanto alternatively suggests that the *Franchise Tax Board* presumption is limited to federal-question cases or suits by state agencies seeking a declaration that a regulation is valid. Opp. at 3 n.2. But *Franchise Tax Board* neither stated nor implied such limitations, and the Court was moved by federalism concerns that were independent of the suit's substance and the precise grounds for removal. *See* 463 U.S. at 21 n.22. Consonantly, the Ninth Circuit has applied the presumption in a diversity case that was not a declaratory relief action. *Nevada*, 672 F.3d at 676.

So, Monsanto must overcome not just one, but two presumptions against removal, which it has not done here.

B. The real-party-in-interest inquiry should focus on the People's representative public nuisance claim.

The Parties agree that this Court must determine whether the People are a real party in interest by "examin[ing] the essential nature and effect of the proceeding as it appears from the entire record." *See Nevada*, 672 F.3d at 670 (quotations omitted). However, the Parties disagree about how this Court should examine "the entire record." The Plaintiffs believe this Court should focus on the People's representative public nuisance claim and treat the County and Municipalities' non-representative claims as relevant but secondary to the analysis. By contrast, Monsanto heavily emphasizes the non-representative claims. A careful analysis demonstrates why Monsanto is wrong.

1. *Lucent*, *Nevada*, and first principles demonstrate that this Court should focus on the People's representative public nuisance claim.

Lucent, *Nevada*, and first principles pertaining to real parties in interest and permissive

[1] *Accord Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 220 (2d Cir. 2013); *Hood ex rel. Miss. v. JP Morgan Chase & Co.*, 737 F.3d 78, 89 (5th Cir. 2013); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011).

joinder show that this Court should focus on the People's representative public nuisance claim—the only claim for which the Plaintiffs assert the People are a real party in interest. The County and Municipalities' other claims are secondary to this analysis.

Plaintiffs' remand motion identified "first principles" that help explain why Monsanto's focus on the County and Municipalities' claims is misplaced. Mot. at 13. Namely, a real party in interest is *any* person "entitled to enforce [a] right" under "the governing substantive law." 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1543 & n.1 (3d ed., Apr. 2022 update). "There may [even] be multiple real parties in interest for a given claim." *HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1196 (3d Cir. 1996). When a defendant engages in large-scale misconduct, they can violate a wide range of rights that belong to many different persons. And under permissive joinder rules, a wide range of plaintiffs with diverse interests may choose to sue together. Because of these principles, one plaintiff's claims do not necessarily shed light on whether another plaintiff is a real party in interest to their claims. *See Int'l Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 411 F. Supp. 2d 458, 463 (S.D.N.Y. 2006) ("[W]here different claims are joined in the same complaint, it is entirely possible that a given plaintiff may be *a* or *the* real party in interest with respect to one claim but that another plaintiff, or a non-party, may be *a* or *the* real party in interest with respect to another." (emphasis added)). Accordingly, the natural starting point for determining whether the People are a real party in interest is the People's claim and request for relief. *See id.*

Lucent supports this view. In *Lucent*, a California agency brought a disability discrimination suit "on behalf of a single aggrieved employee." *Nevada*, 672 F.3d at 670 (citing *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 735 (9th Cir. 2011)). The agency asserted "four causes of action under the [California] Fair Employment and Housing Act ('FEHA')." *See Lucent*, 2008 WL 5157710, at *1 (N.D. Cal. Dec. 8, 2008). Later, the court allowed the employee to permissively intervene. *See Lucent*, 642 F.3d at 736. The employee then filed a complaint-in-intervention with five causes of action. The first three causes of action duplicated the agency's FEHA claims. *Lucent*, 2008 WL 5157710, at *1. The other two causes of action were for

common-law wrongful termination and unfair business practices under the California Unfair Competition Law ("UCL"). *Id.*

The Ninth Circuit described the question presented as whether the agency was "*a* real party," recognizing that both the agency and the employee might be real parties in interest. *See* 642 F.3d at 738–40 (emphasis added). And the court's inquiry started with and focused on the agency's FEHA claims. *Lucent*, 642 F.3d at 736–40. When "consider[ing] what interest California ha[d] in th[e] litigation pursuant to its laws," the court looked solely to the FEHA's statutory purposes. *Id.* at 738–39. When evaluating the requested relief, the court examined only the remedies requested under the FEHA. *Id.* at 739. Although the court compared the agency's and employee's requests for equitable relief under the FEHA, it did so to demonstrate that the agency's requested relief did not substantially advance state interests. *Id.* The court never considered the employee's common-law wrongful termination claim, his UCL claim, or the remedies uniquely associated with those claims. *Id.* at 736–40.[2] *Lucent* thus signals that if there are multiple plaintiffs, the court should focus on the plaintiff that is the real-party-in-interest inquiry's subject.

In *Nevada*, the State of Nevada, as the sole plaintiff, sued under a *parens patriae* theory. 672 F.3d at 664. So, the Ninth Circuit asked whether Nevada was "*the* real party in interest." 672 F.3d at 669–72 (repeatedly using this phrasing except when describing *Lucent*). The court focused on a parenthetical in *Lucent* that quoted the following statement from *Geeslin v. Merriman*, 527 F.2d 452, 455 (6th Cir. 1975): "[t]he question as to whether or not the state is the real party in interest must be determined by the essential nature and effect of the proceeding as it appears from the entire record." *See Nevada*, 672 F.3d at 670 (citing *Lucent*, 642 F.3d at 740). The *Nevada* court proceeded to consider all the claims and requests for relief to determine whether the state was suing on its own behalf or on behalf of injured Nevadans. *See id.* at 670–72. Nowhere did the *Nevada* court suggest that if there were other plaintiffs, their claims would have mattered.

Taken together, these authorities demonstrate that this Court's real-party-in-interest inquiry

[2] For example, the employee sought restitution under the UCL. *See* Complaint in Intervention at 10 (ECF No. 42), *Lucent*, No. 4:07-cv-03747-PJH (N.D. Cal. Feb. 20, 2008). The Ninth Circuit did not consider that request for relief in its real-party-in-interest analysis. *Lucent*, 642 F.3d at 736–40.

in this multi-plaintiff case should begin with the People's representative public nuisance claim. As in *Lucent*, this Court should consider the County and Municipalities' non-representative claims only if they help clarify whether the People are a real party in interest to their claim and associated request for relief. As in *Nevada*, this Court should examine the entire record. But this Court need not treat every aspect of the record as equally important. After all, nobody is arguing here that the People are a real party in interest to the County and Municipalities' non-representative claims.

Monsanto believes *Nevada*'s admonition to examine the "entire record" means this Court must place equal weight on each claim when determining whether the People are a real party in interest. That position, which is unsupported by *Lucent* and *Nevada*, has absurd implications. Suppose the California Attorney General brings a public nuisance claim in the State's name to abate a harmful condition that unquestionably implicates state interests. Further suppose that the Attorney General decides to sue alongside fifteen individual plaintiffs who bring negligence claims for damages because of personal injuries caused by that condition. It would be absurd for the court to play a simplistic counting game and worry that the State is not a real party in interest just because the State brings only 6.25% of the total claims. *Cf.* Opp. at 9 (arguing that "this case involves a public nuisance claim on behalf of the People 'tacked on' to the fifteen [local governments'] claims"). Similarly, here, this Court should focus on determining whether the People are a real party in interest to its claim and associated request for relief.

2. Plaintiffs do not rely on the "claim-by-claim approach" that the Ninth Circuit rejected in *Nevada*.

Monsanto contends that by focusing on the People's public nuisance claim, the Plaintiffs violate *Nevada*'s holding that courts should avoid a "claim-by-claim approach" to the real-party-in-interest inquiry. Opp. at 5, 6.[3] That argument misunderstands the concept of a "claim-by-claim approach," which is irrelevant here.

As *Nevada* and its citations demonstrate, the "claim-by-claim approach" arose in suits brought by state attorneys general in their states' courts and exclusively in their states' names. In

[3] Monsanto's Opposition contains a citation suggesting that *Lucent* addressed the propriety of a "claim-by-claim approach." *See* Opp. at 6:20. But *Lucent* never discussed the concept.

such suits, defendants removed under the Class Action Fairness Act ("CAFA"), arguing that the statute's minimal diversity requirement was met because the state's citizens were unnamed real parties in interest to one or more of the claims.[4] These removals eventually gave rise to a circuit split. Some courts—like the Fifth Circuit in *Caldwell*—adopted a "claim-by-claim approach": removing defendants could show minimal diversity by demonstrating that the state's citizens were real parties in interest to just one of the claims or requests for relief. 536 F.3d at 429 (finding minimal diversity because "as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest"). Other courts—like the Seventh Circuit in *Madigan*—rejected the "claim-by-claim approach" and required removing defendants to show that the state was not a real party in interest to the suit as a whole. 665 F.3d at 774. The *Madigan* approach was designed to vindicate principles of jurisdictional "[r]estraint," follow "the Supreme Court's directive that removal statutes should be strictly construed," and make it *more difficult* to remove cases. *Madigan*, 665 F.3d at 774 (quotations omitted). In *Nevada*, the Ninth Circuit rejected *Caldwell*'s "claim-by-claim approach" and followed *Madigan*'s anti-removal approach. 672 F.3d at 670.

Nevada's holding that rejected the "claim-by-claim approach" is irrelevant here, where there are multiple named plaintiffs, only one of several claims is brought in the State's name, and Monsanto removes under the general diversity jurisdiction statute.[5] Indeed, it is fundamentally incoherent for Monsanto to rely on this anti-removal holding to argue *for* removal.

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[4] *Nevada*, 672 F.3d at 664–65 (suit by state attorney general, removed by Defendants under CAFA based on an argument that minimal diversity was met); *LG Display Co. v. Madigan*, 665 F.3d 768, 770–71 (7th Cir. 2011) (same); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 416, 421–23 (5th Cir. 2008) (same); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 444 (E.D. Pa. 2010) (same); *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942, 943 (E.D. Mo. 2010) (same); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 4:07-cv-01827-SI, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011) (consolidated suits by California's *and* Washington's attorneys general, which were removed by defendants under CAFA's minimal-diversity requirement).

[5] In fact, *Nevada*'s holding rejecting the claim-by-claim approach is no longer good law because of *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 174–76 (2014), which categorically prohibited CAFA removals based on the minimally diverse citizenship of "unnamed real parties in interest."

* * * *

Plaintiffs' remand motion appropriately focuses on the People's representative public nuisance claim to show that the People are a real party in interest to this action. Monsanto's contrary arguments about a "claim-by-claim approach" turn Ninth Circuit precedent upside down.

C. The public nuisance claims demonstrate that the People are a real party in interest.

Monsanto believes that although the California Legislature expressly empowered the County and Municipalities' local officials to represent the People in public nuisance abatement claims, the People are not a real party in interest to this public nuisance suit involving contamination of an important state water. Monsanto's argument is both counterintuitive and wrong. The People's representative public nuisance claim is imbued with state interests. Monsanto's counterarguments misunderstand California public nuisance law, especially the relationship between the Plaintiffs' two public nuisance claims.

1. The People's representative public nuisance abatement claim advances state interests.

The People's public nuisance abatement claim advances time-honored state interests. *See* Mot. at 7–12. As the California Supreme Court explained in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1104–05 (1997), a public nuisance has a "community aspect" or "a distinctly public quality": it is a "substantial and unreasonable" interference with "the quality of organized social life." So, public nuisance abatement suits like this one advance the State's "right" and "obligation" to "maintain a decent society." *Id.* at 1102 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)). So, "[t]here can be no question" that a Cal. Civ. Proc. Code § 731 representative public nuisance claim "is . . . prosecuted on behalf of the public." *Cnty. of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 55 (2010).[6]

[6] Monsanto argues this Court cannot conclude based on the substantive law of public nuisance alone that the People are a real party in interest, but its citations do not support that argument. Opp. at 7 (citing *Nevada*, 672 F.3d at 670; *Lucent*, 642 F.3d at 740). In any event, Monsanto's argument is unimportant because the record confirms that the People are a real party in interest.

Plaintiffs' allegations further demonstrate that the People's public nuisance abatement claim (like the other Plaintiffs' claims) serves state interests. Although Monsanto's Opposition strenuously avoids any references to the San Francisco Bay, Monsanto cannot escape that the FAC centers on the Bay, a state water with submerged sovereign bottomlands and other state public trust resources—such as fish and birds—that are tainted by Monsanto's PCBs. *See* Mot. at 10–11 (collecting allegations). Monsanto also cannot ignore that this contamination has caused widespread public health risks that have required state agencies to adopt stringent regulations. *Id.* On-land PCB contamination is inextricably linked with the Bay's contamination. *Id.* The County and Municipalities must remediate PCB contamination on land because state laws require them to protect the Bay from harmful PCB discharges. FAC ¶¶ 12–14, 105–10. Abating PCB discharges from the County and Municipalities would protect the Bay as a whole, as PCBs and the animals affected by them are mobile. *See id.* ¶¶ 34–35 (PCBs are mobile and cycle between land, air, and water). As the court found in *Los Angeles*, the State has a strong interest in such a claim:

> California desires to clean its waters of PCBs, keep its fish and wildlife healthy, . . . and prevent deadly diseases . . . . Further, California's substantial benefit from the remedy of abatement directly relates to its concrete interests. California asserts that an abatement would help clean its waters, improve the health and well-being of its wildlife, and help its citizens avoid serious diseases.

2022 WL 2355195, at *4.

Monsanto's counterarguments are unpersuasive. First, Monsanto argues the State is not a real party in interest because the Plaintiffs' claims—including the People's public nuisance claim—serve only the State's "general governmental interests in the welfare of its citizenry and enforcement of its laws." Opp. at 5, 9–10, 12. While it is true that the State must have more than "general governmental interests" to be a real party in interest, Monsanto misunderstands that phrase. The phrase refers to a state's interest "in the welfare of all its citizens" and "in securing compliance with all its laws." *Mo., Ky. & Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 60 (1901). For a state to have a more than a general interest in litigation, "[t]he interest must be one in the state as an artificial person." *Id.* For example, states have non-general interests in state property, *Reagan*

v. Farmers' Loan & Tr. Co., 154 U.S. 362, 390 (1894), and in preventing "widespread" injuries to their residents and economy, *Nevada*, 672 F.3d at 670–71.

Here, the State's interests go far beyond merely general ones. The Bay is state property, and the Bay's submerged bottomlands—which are especially harmed by PCB contamination—are state property that is imbued with special sovereignty interests. Mot. at 10–11 (collecting cases). The State undisputedly has a sovereign interest in protecting the Bay's public trust resources such as fish, birds, habitats, and recreation opportunities. *Id.* at 10 (collecting cases); *see District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1082 (D.C. Cir. 1984) ("At the core of the public trust doctrine is the principle that navigable waters are held *by the sovereign* in trust for certain public uses." (emphasis added)). The Bay's contamination causes widespread economic harm and health risks. So, the People's claim for abatement implicates uniquely state interests.

Second, Monsanto cites case law holding that when awarding relief under Cal. Civ. Proc. Code § 731, a court may order only abatement actions that occur within the jurisdictions whose officials happen to represent the People. *See* Opp. at 7 (citing *Cnty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 305 n.5 (2006)). Based on that case law, Monsanto portrays the abatement relief available to the People as parochial and unconnected with state interests. Simultaneously, Monsanto attempts a sleight of hand by conflating *state* interests with "*statewide*" interests, suggesting there cannot be a state interest in judicial relief unless it is statewide. *See* Mot. at 1, 2, 9, 13, 14. Even assuming abatement actions will take place only within the County's borders,[7] these actions will serve the State's interest in preventing PCBs from being discharged into and dispersed within the Bay. Moreover, no court has held that the State has an interest only in *statewide* matters. Adopting such a novel rule would improperly make removable virtually any action brought by a state. After all, a lawsuit brought by a state to vindicate its interests is rarely *statewide* in a true sense. Unsurprisingly, the Central District of California in *Los Angeles* rejected Monsanto's same arguments. 2022 WL 2355195, at *5 (even if abatement "primarily take[s] place within the [City of Los Angeles's] boundaries," abatement relief would serve state interests by

[7] Plaintiffs hereby reserve their right to later argue that any decisions interpreting Cal. Civ. Proc. Code § 731 as imposing geographic limitations on abatement relief were wrong.

protecting state waters). Other courts have reached similar conclusions in analogous cases.[8]

Third, Monsanto tries to divorce public nuisance from its historical meaning. *See* Opp. at 7–8. It argues that when courts started recognizing that public nuisances are civil wrongs in addition to criminal wrongs,[9] or when the California Legislature codified public nuisance, public nuisance lost its public character and became indistinguishable from a run-of-the-mill tort. *Id.* Monsanto is wrong. California adheres to the centuries-old understanding that public nuisance claims have a "*community* aspect" and serve "to protect the quality of organized social life" by addressing "*substantial* and *unreasonable*" interferences with "collective social interests." *Acuna*, 14 Cal. 4th at 1105. Monsanto's unintelligible citations to *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010), do not show otherwise. *See* Opp. at 7–8.

Fourth, Monsanto repeatedly conflates equitable abatement relief and damages relief. *See* Mot. at 19 (explaining why Monsanto errs). An abatement order compelling Monsanto to bear the costs of PCB abatement would not award "future" "damages" to the County and Municipalities, as Monsanto insists. Opp. at 8. Rather, abatement's "sole purpose is to eliminate the hazard," not to compensate. *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 132 (2017). Relatedly, Monsanto objects that abatement would not enure to the State's benefit because it would not result in a money payment to the State. *See* Opp. at 12 ("None of the relief sought . . . by the People would actually go to the State."). That is immaterial. What matters is that abatement would protect the Bay, an important state water in which the State has many interests.

Fifth, Monsanto suggests that because California law empowers plaintiffs other than the State to seek public nuisance abatement, the State has no interest in this litigation. *See* Opp. at 9 (arguing that relief must be "available to [the state] alone"); *id.* at 12 (arguing that any relief must

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[8] *See* Mot. at 17–18 (collecting cases including *People v. Purdue Pharma L.P.*, No. 8:14-cv-01080-JLS-DFMx, 2014 WL 6065907, at *4 (C.D. Cal. Nov. 12, 2014), which found a state interest in a public nuisance claim seeking abatement in two counties of opioid-related harms, and *California v. Exide Technologies, Inc.*, No. 2:14-cv-01169-ABC-MANx, 2014 WL 12607708, at *1 (C.D. Cal. Apr. 9, 2014), which found a state interest in abating air emissions from a single facility).

[9] Monsanto wrongly states that "[p]ublic nuisance is [no longer] criminal in nature." Opp. at 11. Maintaining or committing a public nuisance is a crime. Cal. Penal Code § 372.

be "traditionally reserved to the state"). But the Ninth Circuit has never adopted such a principle. And, as further explained in the next Section, the California Legislature's decision to empower persons other than the Attorney General to bring public nuisance abatement claims only demonstrates the strength of the state interest in abating public nuisances.

The People's representative public nuisance claim seeks abatement that would protect a state water of immense public importance. The State obviously has an interest in such relief.

2. Monsanto draws the wrong conclusions from the fact that the two public nuisance claims are similar.

Monsanto theorizes that because the People's representative public nuisance claim and the County and Municipalities' non-representative public nuisance claim are similar, the People cannot be a real party in interest. Opp. at 2, 6, 7, 11. Monsanto also emphasizes that the County and Municipalities can obtain compensatory damages through their public nuisance claim that are unavailable to the People. *Id.* at 2, 8–9. Monsanto's argument is a *non sequitur*. The State's interests in abating Monsanto's public nuisance do not dissipate merely because the County and Municipalities also have a viable non-representative public nuisance claim.

Monsanto's argument betrays a misunderstanding of why courts and legislatures have authorized different types of plaintiffs to bring public nuisance claims. Initially, the power to prosecute public nuisance claims was held exclusively by the sovereign. William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 998–1002 (1966). Over the centuries, courts and legislatures expanded the set of plaintiffs that may assert public nuisance claims and thereby protect public rights. Specially injured private plaintiffs were authorized to bring public nuisance claims, *id.* at 1004–07, and some legislatures authorized persons "to sue on behalf of the public," *id.* at 1005, as the County and Municipalities' officials do here.

Here, the County and Municipalities have been given two tools to address Monsanto's public nuisance. Their public officials stand in the shoes of the Attorney General as duly authorized representatives of the State under Cal. Civ. Proc. Code § 731. These officials simultaneously represent the County and Municipalities, which sue as ordinary plaintiffs that

have experienced special damage. This two-track approach does not diminish the strength of the State's interest in this suit or the inescapably public character of the nuisance. Rather, the availability of multiple avenues simply underscores that the California Legislature has enlisted a wide range of persons to protect important public rights.

D. The County and Municipalities' other claims confirm that the State is a real party in interest.

The County and Municipalities' other, non-representative claims are not particularly relevant to the real-party-in-interest inquiry for the People. To the extent they are relevant, these claims only confirm that the State is a real party in interest because "each non-representative claim advances the State's interest in remedying the widespread PCB pollution problem." Mot. at 13. The private nuisance and trespass claims simply address a subset of the public nuisance—parts of the widespread PCB contamination that happen to occur on government property. *Id.* at 14. To the extent the County and Municipalities seek abatement of the private nuisance and trespass, such abatement would address subsets of the broader public nuisance. *Id.* And Monsanto does not dispute that to the extent the local governments seek damages, they seek compensation for what they have already spent to help abate the public nuisance. *See* Notice of Removal, ECF No. 1 ¶ 15. Monsanto also does not deny that the damages would have a "distinctly public character" because they would be paid into the public coffers of state subdivisions and that the State has a strong interest in having tortfeasors, not taxpayers, pay the costs of public nuisances. Mot. at 14–15 & n.12. The County and Municipalities' non-representative claims, just like the People's representative public nuisance claim, are permeated with state interests.

E. There is no requirement for the relief to enure to the State alone.

Monsanto persists in its flawed argument based on *Missouri Railway* that for the People to be a real party in interest, "the relief sought" must "[e]nure to [them] alone." Opp. at 4, 8, 10–11. As explained, numerous district courts have closely examined this "enure alone" concept and rejected it. *See* Mot. at 20–22. Monsanto does not show otherwise.

Initially, Monsanto does not dispute that the "enure alone" language in *Missouri Railway*

was dicta. *Compare* Mot. at 21, *with* Opp. at 10–12. Nor does Monsanto contest that *Lucent* misquoted *Missouri Railway*, where the Supreme Court referred to the "enure alone" standard as only "an example of a circumstance in which the state is a real party in interest." *In re Facebook*, 354 F. Supp. 3d at 1128; *see* Mot. at 21–22 (explaining how *Lucent* misquoted *Missouri Railway*). Monsanto insists that the Ninth Circuit in *Lucent* adopted an "enure alone" requirement through its misquotation of *Missouri Railway*. Opp. at 10. But Monsanto fails to explain why *Lucent* did not actually apply such a requirement and instead weighed the relief enuring to the agency against the relief enuring to the employee. *See* Mot. at 22 (citing *Lucent*, 642 F.3d at 739 & n.8).[10]

Even if *Lucent* were ambiguous, *Nevada* cannot be squared with Monsanto's purported "enure alone" requirement. There, the Ninth Circuit found Nevada to be the real party in interest even though it sought restitution that would be distributed to individual fraud victims. *Id.* (citing *In re Facebook*, 354 F. Supp. 3d at 1127 (*Nevada* "significantly undermines reliance on the 'enures to the state alone' phrase")). Monsanto tries but fails to reconcile *Nevada* with its "enure alone" theory. Opp. at 10–11. Ultimately, even Monsanto is forced to admit that in *Nevada*, the relief did not ensure to the state alone. *Id.* at 11 (restitution would be "distributed" to "consumers").

Finally, Monsanto tries to downplay Judge Chhabria's analysis in *In re Facebook* that rejected the "enure alone" requirement after carefully examining *Missouri Railway*, *Lucent*, and *Nevada*. Monsanto quips that Judge Chhabria merely "questioned" the requirement. Opp. at 11. To the contrary, Judge Chhabria opined, "[T]hat is not the test in the Ninth Circuit." *In re Facebook*, 354 F. Supp. 3d at 1135. In any event, Monsanto cannot overcome the other district court decisions that reject its purported "enure alone" requirement. *See* Mot. at 20–22 & n.16.[11]

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[10] Monsanto urges that the *Lucent* court must have adopted an "enure alone" requirement because it cited *Missouri Railway* "***eight times***." Opp. at 10 (emphasis in original). Because *Lucent* cited *Missouri Railway* for many reasons, the number of citations is uninformative.

[11] Monsanto cites only one contrary case: *Oregon ex rel. Nw. Pub. Commc'ns Council v. Qwest Corp.*, 877 F. Supp. 2d 1004, 1013 (D. Or. 2012). *See* Opp. at 10. That case is unpersuasive because it did not carefully examine *Missouri Railway*, *Lucent*, and *Nevada*. Although the decision was affirmed, the Ninth Circuit did not pass upon the "enure alone" concept. 563 F. App'x 547 (9th Cir. 2014) (unpublished).

F. Other case law supports that the People are a real party in interest.

Monsanto's Opposition closes by attempting to distinguish several cases cited in Plaintiffs' remand motion. Opp. at 12–15. Monsanto's arguments do not diminish the lessons that can be drawn from decisions like *County of Santa Clara v. Wang*, No. 5:20-CV-05823-EJD, 2020 WL 8614186, at *2 (N.D. Cal. Sept. 1, 2020) (California public nuisance law shows that the State has a strong interest in abating public nuisances), *California v. Exide Technologies, Inc.*, 2014 WL 12607708, at *1–2 (the State can have an interest in abating pollution even if the source is located in a single municipality), and *People v. Purdue Pharma L.P.*, 2014 WL 6065907, at *4 (the State can be a real party in interest even if public nuisance abatement activities will occur only in the jurisdictions whose officials represent the People). Monsanto also is wrong to wave away the real-party-in-interest case law arising out of civil actions to enforce consumer protection laws. Opp. at 14–15. In both consumer protection and public nuisance litigation, government plaintiffs seek judicial relief for widespread harms that harm state interests.

III. CONCLUSION

The People are a real party in interest. If this Court has any doubts, it should rely on the dual anti-removal presumptions that apply here. This action should be remanded.

Respectfully submitted,

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