NOS. A115399, A115445, A115474, A116164 & A116901

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

CARLA M. CLARK, et al., **Plaintiffs and Appellants,** **vs.** **STATE OF CALIFORNIA,** **Defendant and Respondent.**	Sonoma County Superior Court No. SCV 227896 Hon. Allan D. Hardcastle, Judge
CARLA M. CLARK, et al., **Plaintiffs and Appellants,** **vs.** **OPTICAL COATING LABORATORY, INC.,** **Defendant and Respondent.**	
And Consolidated Appeals	

Appeals from Judgments and Orders Imposing Sanctions and Awarding Fees & Costs

RESPONDENT OPTICAL COATING LABORATORY, INC.'S BRIEF RE APPEAL FROM ORDER OF DISMISSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

I.

INTRODUCTION

After five years of discovery during which plaintiffs and appellants saw fit to depose only two employees of respondent Optical Coating Laboratory, Inc. ("OCLI"), plaintiffs now stand before the court claiming that the trial judge's dismissal of OCLI after plaintiffs' attorneys' misconduct caused a mistrial was improper because (a) plaintiffs were improperly denied discovery and (b) because all of the trial judge's orders excluding facially inadmissible evidence were erroneous. Plaintiffs' opening brief suffers from the same problem their case did below, however, in that it is all rhetoric and no evidence. Plaintiffs had no admissible evidence against OCLI after five years of litigation. When confronted with the defects in their evidence at trial, plaintiffs either failed to file opposition briefs or put forward arguments which failed to address the evidentiary objections raised by OCLI.

Although plaintiffs argue that the trial judge abused his discretion in ruling on *in limine* motions, the fact of the matter is that plaintiffs failed to preserve their right to appeal those rulings by either filing no response in the trial court or by filing deficient responses. Any attempt by plaintiffs now to bring new arguments or theories to bear in support of their position is futile, as any arguments not raised below have been waived. And since the entirety of plaintiffs' case rested on evidence that was properly excluded by the trial court, plaintiffs' argument that the dismissal was flawed must be disregarded as well, as the trial judge was well

within his rights to dismiss the case against OCLI in the absence of any admissible evidence against it.

II.

PROCEDURAL AND FACTUAL BACKGROUND

A. Plaintiffs Initially Blame the Drycleaners Right Next Door for Contaminating their Wells

Plaintiffs in this matter are 30 individuals (a group of families) who live near the intersection of West College Avenue and Clover Drive in Santa Rosa, California. All of the plaintiffs claim to have ingested, or been exposed to, well water on their properties containing elevated levels of perchlorethylene (known as "PCE")[1] or its breakdown product trichloroethylene (known as "TCE"), which plaintiffs claim caused a diverse host of physical ailments, ranging from headaches and heart disease to fibromyalgia and depression. In their initial complaint filed in 2001, plaintiffs claimed that some 27 defendants were responsible for this contamination. (AA 1-19) In addition to the current and former drycleaning establishments located directly adjacent to and across the street from plaintiffs' homes – four of whom are subject to a cleanup and abatement order issued by the North Coast Regional Water Quality Control Board ("Water Board") identifying them as responsible for the discharge of PCE into the groundwater behind and across the street from plaintiffs' homes – plaintiffs named three other nearby

[1] PCE is an industrial solvent used in cleaning and degreasing, and is commonly used in the drycleaning industry as a cleaning solvent (AA 84, AA 253, AA 1014).

drycleaners as defendants, along with their current and former owners. (AA 1-19, AA 84, AA 91, AA 94, AA 251, AA 761) Plaintiffs failed to serve the vast majority of the drycleaner defendants, however, after it became clear that most of them were insolvent, and by 2004 plaintiffs had dismissed all of them from the case. (AA 1013-1014).[2]

B. Plaintiffs Opt Not to Sue the Junkyards Responsible for Contaminating 99 Frances Street and 1143 Briggs Avenue

In addition to their claim that the neighborhood drycleaners were responsible for contaminating their well water, plaintiffs also made the unsupported allegation that contamination from 99 Frances Street – a property owned by Union Pacific Railroad Corporation ("Union Pacific") located over half a mile away from plaintiffs' homes – somehow migrated through the groundwater and ended up in plaintiffs' wells. (AA 8)

Historically, 99 Frances Street was an icing station for the railroad, but since 1967 the property had been leased to a succession of scrap metal recyclers and auto wreckers. From 1967 through 1987 the lessees included West Coast Welders Supply, West Coast Scrap Producers, and West Coast Metals. (AA 1518) The property was abandoned in 1987, and in 1988 the Water Board discovered that the site was contaminated with leaking 55 gallon drums, old batteries, large quantities of various shredded metal and above-ground and underground storage tanks, and issued a cleanup and abatement order directing Union Pacific to remediate the contamination. (AA 7698) After further investigation, in 1992 the Water Board issued a revised cleanup and abatement order adding West Coast

[2] Plaintiffs maintained the case against the Kelly Trust, which owned the land upon which one of the drycleaners was located, until shortly before trial, when the Trust settled for a *de minimus* amount.

Welders Supply and West Coast Metals as responsible parties. (AA 7742)

During this same period, the Water Board also investigated contamination of the property directly adjacent to 99 Frances Street. This property, known as 1143 Briggs Avenue, was also used as a site for scrap metal salvage, automobile salvage, and automobile wrecking at various times by West Coast Scrap Producers, Pacific Junk Company, and West Coast Metals (some of whom had also operated at 99 Frances Street) (AA 7737) These companies and their various owners – Donald Kessler, Irving Kessler, Richard Bradley, William Whitman and Jack Gardner – were named as responsible parties by the Water Board in cleanup and abatement orders first issued in 1988 and amended in 1992. (AA 7737)

Despite plaintiffs' theory that contamination migrated from these two sites and found its way to plaintiffs' properties – a theory, significantly, that the Water Board does not ascribe to[3] – plaintiffs neglected to bring suit against any of the salvage companies who had operated on these sites or their owners, and made a strategic decision not to depose them[4] or subpoena them for testimony at trial. Instead, plaintiffs decided to sue Union Pacific alone as the owner of 99 Frances Street and then sue OCLI as well – even though OCLI is not named in any of the cleanup and abatement orders affecting 99 Frances or 1143 Briggs – based on the unsupported allegation that OCLI engaged in illegal dumping at 99 Frances Street.

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[3] The former head of the Water Board testified that contamination from 99 Frances Street has not reached the West College area where plaintiffs' live and that two drycleaners are responsible for that contaminant plume. (AA 1551, RT 2457-2458).

[4] Richard Bradley, who owns both 1143 Briggs Avenue, West Coast Welders Supply and West Coast Scrap Producers, was subpoenaed for deposition in this case by the City of Santa Rosa and examined at that deposition by plaintiffs' counsel. Bradley testified at deposition that he knew nothing about the sources of contamination at 1143 Briggs and had no knowledge concerning OCLI. (RT 112)

C. The Water Board Investigation Absolves OCLI of Wrongdoing

Plaintiffs' claim in their complaint that at some unknown time in the past OCLI illegally disposed of 300 55-gallon drums of contamination containing PCE and TCE at 99 Frances Street and that this contamination migrated onto plaintiffs' property and into their wells. (AA 9)

Lacking any witnesses to this supposed event, and faced with OCLI's denial that it ever occurred, plaintiffs based their entire case on two internal memoranda from the Water Board, both dated January 24, 1990, which memorialize an anonymous call and subsequent meeting with a man who claimed to have picked up 50 drums of some unidentified substance from OCLI sometime between 1973 and 1975 and disposed of them at either Frances Street or Briggs Avenue at a scrap metal disposal facility. (AA 89-90, AA 769-770, AA 820, AA 822, AA 3537) This individual refused to identify himself at the time and remains unknown to this day. (AA 89-90, AA 769-770, AA 820, AA 822, AA 866, AA 3537) Nonetheless, the anonymously-supplied information led to an investigation into OCLI's offsite waste disposal practices by the Water Board. (AA 89-90, AA 860-869) During the course of this investigation, OCLI produced all available evidence concerning its waste disposal practices and its compliance with the relevant laws regulating off-site disposal of hazardous waste, answered questions posed to it by the Water Board regarding these practices and produced current and former employees for administrative depositions before the Water Board. (AA 89, AA 769-770, AA 860-869, AA 3537-3538) According to Susan Warner, the former head of the Water Board who participated in the investigation, the Water Board found that OCLI disposed of "scrap metal" and "not containers of liquid" at 99 Frances Avenue.[5] (AA 769-770, AA 860-869, AA 3538) Moreover, OCLI's

[5] OCLI's own contemporaneous internal investigation found that OCLI had only sold empty drums or drums containing scrap metal to West Coast Metals in

off-site disposal of chemical waste was found to be "appropriate" and "not improper." (AA 769-770, AA 861-869, AA 3538) In short, the Water Board determined that the anonymous caller was not credible, that there was no evidence that OCLI had ever disposed of any chemicals at 99 Frances Street and terminated its investigation.[6] (AA 89-90, AA 861-869).

D. OCLI Disposes of Its Chemical Waste Properly

OCLI is a technology company that was established in 1948 and has maintained a facility at 2789 Northpoint Parkway in Santa Rosa, California since the 1950s. Historically, OCLI has developed thin film coating processes for government and industry, and created products that incorporate high performance optical thin films used to manage light. OCLI's products control and enhance light by managing its optical properties to achieve specific effects such as reflection, refraction, transmission, absorption, abrasion resistance, anti-glare and electrical conductivity. Among OCLI's products are many types of high precision thin film filters that have uses in applications such as telecommunications, fiber optics and laser products, satellite and space products, and color shifting pigments. By way of example, OCLI's products include such things as solar cell covers on satellites, protective coverings on the International Space Station, windows for the space shuttle, camera lenses, cathode ray tubes, mirrors used in copiers and scanners,

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the 1960s and 1970s. (AA 838-839).

[6] One of the many problems with the anonymous caller's credibility, as was pointed out to plaintiffs below, was that it is a physical impossibility for the caller to have singlehandedly loaded 50 55-gallon drums of TCE or PCE on a flatbed truck and then disposed of it by himself, as he claimed ("No one would help him load the barrels, he said" (AA 3547)). Each 55-gallon drum, if filled with TCE, would weigh in excess of 700 lbs., and in the aggregate the caller would have loaded 35,000 lbs. or approximately 17 tons on single flatbed truck, which would have been far in excess of its carrying capacity and would in any event have violated the load limits for virtually ever road in Sonoma County. (AA 3542-3543)

and the optically variable ink found on all United States currency and most of the currency in the world. (RT 1794, RT 2750-2753)

In the process of creating certain of its products, OCLI has at different times employed a variety of industrial solvents, including acetone, PCE, TCE, trichlorethane ("TCA"), and Freon 113, among others. (RT 2752-2753) These solvents primarily have been used to clean material prior to applying optical thin films or to clean the machines in which the coating process occurs. (RT 709, RT 2753-2754) Prior to the enactment of the federal environmental laws regulating the disposal of hazardous chemicals in the early 1980s,[7] OCLI contracted with two local companies, Oscar Erickson and Romic Chemical, respectively, for pick up and disposal of its chemical wastes. (RT 2730) In the 1970s, before the implementation of EPA laws requiring the use of hazardous waste manifests, OCLI maintained information regarding pick up and disposal of chemical wastes on 3x5 cards which were filled in by hand by the telephone switchboard operator. (RT 2732) OCLI has recovered extant records regarding offsite waste disposal dating back to 1973, but has no records showing any pickups for a 30-month period between 1975 and 1978. (RT 2730-2736) OCLI cannot say with any certainty whether those records formerly existed but have been lost, whether they were destroyed pursuant to its records retention policy, whether the telephone operators stopped maintaining 3x5 cards during this period, or whether any pickups were made during this time. (RT 2730-2736)

E. The Trial Judge Excludes Inadmissible Hearsay Evidence

On March 20, 2006 OCLI filed two motions in limine to exclude hearsay evidence. (AA 3522 – 3576) One of the motions concerned the Water Board

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[7] For example, the Resource Conservation and Recovery Act ("RCRA") which promulgated its first regulation on May 16, 1980.

memoranda commemorating conversations with the discredited anonymous caller (discussed above in Section C). (AA 3536-3576) The other motion concerned an interview note in the Water Board files of a conversation with Donald Kessler, the deceased former owner of Pacific Junk Company, one of the scrap metal businesses at 1143 Briggs Avenue. In the note, Kessler is reported to have said the following:

> He said that drums were either picked up or delivered to the site from OCLI. He said the drums were supposed to be empty because they were used for storage of metal waste onsite. He said chances are there was liquid at times in the drums. He said he had employees that weren't always paying attention to the matter.

(AA 3533)

OCLI moved to exclude the Kessler note and the anonymous caller memoranda on the grounds that they contained multiple layers of hearsay subject to no exception, as neither the business records exception nor the exception for declaration against interest applied. (AA 3522 – 3576) In response, on March 24, 2006 plaintiffs filed a one-sentence opposition which falsely claimed that "[t]hese documents have been admitted by Court pursuant to order filed on October 8, 2004." (AA 3887-3888) Plaintiffs then attached every document they had contended constituted evidence at the hearing on OCLI's motion for summary judgment, along with the court's order at that time. (AA 3887-3924) Far from admitting the documents into evidence, the judge ruling at summary judgment merely took judicial notice of the *existence* of these documents and passed on their

admissibility. (AA 3890)

Perhaps realizing that their initial opposition was insufficient as a matter of law, eleven days later (after OCLI had filed a reply brief) plaintiffs took another stab at an opposition, arguing in a summary fashion (without addressing any of the caselaw raised by OCLI) that the Kessler note and the anonymous caller memoranda were admissible as business records. (AA 4731-4735) Plaintiffs' brief failed to address OCLI's argument that these documents were inadmissible under the declaration against interest exception, (AA 473 –4735) nor at the hearing on this matter did plaintiffs' counsel argue that the anonymous caller memoranda were statements against interest but merely addressed the entire topic of statements against interest in a single sentence in which he asserted only that "[s]pecifically concerning Mr. Kessler, we do have a statement against interest." (RT 425) Plaintiffs' counsel then went on to argue only that the business records exception applied, and when the court expressed some polite skepticism, abruptly fell back on the claim that the documents should be admitted for notice purposes rather than for the truth of the matter asserted. (RT 420 – 436)

At the conclusion of the hearing, the trial judge stated on the record that he was not persuaded as to plaintiffs' notice argument, and that plaintiffs had failed to demonstrate how either Kessler or the anonymous caller had a duty to make the statements to the Water Board, and likewise failed to convince the court that their statements were trustworthy. The trial judge took the matter under submission, and several days thereafter issued two orders which excluded the anonymous caller

memoranda and Kessler note, prohibiting any reference to their existence or contents. (AA 4779-4787)

F. The Trial Judge Excludes Evidence of Groundwater Contamination at OCLI's Main Facility as Irrelevant

Approximately nineteen years ago, in 1988, OCLI discovered the presence of certain industrial solvents (or their degraded byproducts) in the groundwater beneath its main facility at 2789 Northpoint Parkway in Santa Rosa, California. (AA 762) Pursuant to a cleanup and abatement order issued by the Water Board, OCLI instituted a remedial investigation in 1988 to characterize the distribution of chemicals beneath its site. (AA 763) Sampling of the water supply wells at OCLI in early 1988 showed detectable concentrations of TCE, TCA, dichloroethylene ("DCE") and dichloroethane ("DCA"). (AA 763) Beginning in January 1988 and continuing through today, OCLI installed 84 monitoring and 22 extraction wells in and around its facility. Over 19 years of data from these wells show that the contaminant plume under OCLI is stable.[8] (AA 763)

Although plaintiffs' original complaint in this matter contended that groundwater contamination at OCLI's main facility had migrated into plaintiffs'

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[8] The discovery of contamination beneath OCLI's main facility triggered a claim by OCLI against its insurers for remediation costs and a subsequent bad faith action by OCLI against its insurers. The central issue of the litigation was whether the "sudden and accidental" exception to the environmental exclusion clause applied given OCLI's claim that the contamination beneath its site was caused by accidental spills and conduct of which it was not aware and did not approve. This litigation generated 139 volumes of deposition testimony regarding OCLI's waste disposal practices, all of which were produced to plaintiffs in the present case. The 640 exhibits to those depositions, comprising over 7000 pages, were made available to plaintiffs for review and copying, though plaintiffs ultimately only chose to copy a small subset of those exhibits. (RT 719-729) Plaintiffs chose only to depose one of OCLI's fact witnesses from the prior case, Kenneth Pietrelli, and failed to call any other current or former OCLI employee as a witness at trial.

wells, plaintiffs withdrew that claim in the face of OCLI's summary judgment motion, which established that such migration was a physical impossibility since OCLI's facility was some two miles away from plaintiffs' homes and was, moreover, downhill, downgradient and separated by surface streams from plaintiffs' properties. (AA 763, AA 841-842, AA 1168-1172).

Before trial, OCLI moved to exclude evidence of the groundwater contamination at OCLI's main facility on the grounds that, since plaintiffs had withdrawn their claim that the contamination beneath OCLI had migrated into plaintiffs' water, the issue of whether there was groundwater contamination beneath OCLI was irrelevant to any issue in the case, and any mention of it could only serve to prejudice OCLI in the eyes of the jury. (AA 5321) OCLI therefore moved under Evidence Code Section 352 to bar any mention of groundwater contamination as tending to create a danger of undue prejudice, confusion, or of misleading the jury, and further argued that plaintiffs' counsel should not be permitted to argue that the presence of contamination beneath OCLI's main facility indicated that OCLI had a propensity to disregard its duties or improperly dispose of chemicals. (AA 5320-5322)

Plaintiffs failed to file any written opposition to OCLI's motion and at the hearing on the motion conceded that plaintiffs were not claiming that any chemicals underneath OCLI's facility had reached plaintiffs' wells. (RT 1699) Plaintiffs' counsel then went on to argue that, although it was only a "minor part" of their case, plaintiffs should be allowed to go into the groundwater contamination at OCLI because "this is how OCLI took care of chemicals. They let them go in the ground and from the ground to the groundwater." (RT 1698-1700) Plaintiffs made no other substantial argument, and the trial judge stated that counsel's argument "didn't pass the 350[sic] test" and granted OCLI's motion to exclude. (RT 1700, AA 5460).

G. OCLI's Motion to Dismiss For Lack of Evidence Is Reluctantly Denied by the Trial Judge

After the trial judge granted OCLI's motions *in limine* excluding evidence, OCLI moved to dismiss the case prior to opening statement under the authority of *Clemens v. American Warranty Corporation* (1987) 193 Cal.App.3d 444 on the grounds that the net effect of the *in limine* rulings was to exclude all evidence against OCLI. (AA 4925-4940) Plaintiffs countered by claiming that they had other circumstantial evidence which would permit them to prove their case against OCLI, which consisted in its entirety of the following: (1) plaintiff's expert Dr. Everett's opinion that the chemicals used by OCLI were "consistent" with those found at the 99 Frances and 1143 Briggs sites; (2) a hearsay declaration by plaintiff Loraine Dickey that it was "common knowledge in the neighborhood" that OCLI disposed of chemicals at 99 Francis or 1143 Briggs[9]; (3) a declaration by a former OCLI officer, Ken Pietrelli, that OCLI had in the 1960s and 1970s sold empty drums or drums containing scrap metal to one of the scrap metal recyclers at 99 Frances or 1143 Briggs; and (4) a Water Board memorandum dated May 1988 which noted that the presence of leaking drums of unknown origin at 99 Frances Street. (AA 5112-5123) In response, OCLI contended that the evidence proffered by plaintiff was inadmissible and incompetent, and even when taken in the light most favorable to plaintiffs amounted to nothing more than mere speculation as to causation, which was insufficient as a matter of law to support any verdict against OCLI. (AA 5231-5262)

At the conclusion of the hearing on OCLI's motion to dismiss (RT 776-795), the trial judge stated as follows:

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[9] This declaration was contradicted, as plaintiffs' counsel was well aware, by Ms. Dickey's deposition testimony, in which she disclaimed any personal knowledge of disposal of chemicals by OCLI. (AA 5235-5236, AA 5259-5262)

> First of all, in regard to OCLI's motion to dismiss, reluctantly – I say reluctantly at this point, but, you know, I'll explain it a little bit further – reluctantly, I'm going to deny the motion to dismiss. And I guess my reluctance is because I feel, based on more gut instinct than anything else, that at some point – maybe it will be after listening carefully to plaintiffs' closing argument and hearing a motion for nonsuit at that time, as the code allows, or hearing it at the conclusion of plaintiffs' case, that a motion in OCLI's favor may be granted. I don't know.
>
> And that's really why I'm not granting the motion, because I don't know. I don't know what the evidence may be. I think Mr. Robinson's argument that he gets a shot at trying to put some sort of admissible evidence in front of the jury – he's made a record at this point that should allow him to do that. Whether he can do it or not remains to be seen, and I have some feeling that he may not be able to do that. But I'll have to wait and see what the evidence is before being asked to do that.
>
> So at this point, the OCLI motion to dismiss is denied, certainly without prejudice to raise it again at the appropriate time or by way of motion for nonsuit.

(RT 822-823)

H. Plaintiffs' Attorneys' Misconduct Results in Two Contempt Citations and a Mistrial

The trial of this matter was plagued from day one by continual missteps on the part of plaintiffs' counsel. The record is replete with constant, flagrant violations of *in limine* orders by plaintiffs' counsel and resulting cautions and admonitions by the court, which ultimately resulted in the trial judge declaring a

mistrial and citing two of plaintiffs' attorneys for contempt of court.[10] When the mistrial was declared on May 24, 2006 some eight weeks after trial had begun, the trial judge stated:

> Before we conclude our record, I am going to state for the record that this was the second motion for mistrial. It was after numerous warnings to counsel a mistrial would be declared. I have never seen a case where the court's orders were so blatantly disobeyed. And as I indicated the last time we went round this issue, it was I was not going to be inclined to accept the "Oops, I didn't mean to" excuse. I did not. Mistrial has been declared.

(RT 2764)[11]

I. The Trial Judge *Sua Sponte* Reconsiders and Grants OCLI's Motion to Dismiss

After declaring a mistrial, Judge Hardcastle announced that he was going to reconsider his earlier ruling on OCLI's motion to dismiss "as the Court is seriously concerned about its prior rulings and believes that those rulings could have been erroneous." (RT 2772) He thereafter invited the parties to further brief the issue. (*Id.*) In response, OCLI filed a three paragraph pleading stating that it stood on its prior memoranda and supporting declarations, and reiterated that plaintiffs' case was based entirely on incompetent and inadmissible evidence. (AA 5732)

Plaintiffs then filed an opposition which argued that the court should deny

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[10] The contempt citations were reversed in separate proceedings by the appellate court on procedural grounds.

[11] To avoid redundancy, OCLI incorporates by reference the recitation of plaintiffs' counsels' misconduct in OCLI's companion brief regarding the imposition of CCP § 128.7 sanctions, as well as the similar discussion contained in the briefs of Union Pacific Railroad and the State of California regarding imposition of attorney's fees against plaintiffs' counsel for misconduct at trial.

the motion to dismiss for two reasons. First, plaintiffs argued that the answer[12] filed by West Coast Welders Supply in a federal court CERCLA action between Union Pacific Railroad, OCLI, West Coast Welders Supply, and the other scrap metal recyclers who operated at 99 Frances Street and 1143 Briggs Avenue somehow constituted evidence against OCLI. (AA 6267-6281) Although this argument had previously been rejected by the trial court, plaintiffs nonetheless renewed their argument that West Coast Welders Supply's answer, in which the company and its owner purported to "admit" that OCLI sent chemicals to be disposed of by the owners of a different scrap metal recycling facility, was admissible as against OCLI, and that plaintiffs should be allowed to take additional discovery of the company's owner, Richard Bradley – who had already been deposed in this case and testified that he had no information regarding disposal of chemicals by OCLI. (AA 6280, RT 112, RT 2505) Second, plaintiffs argued that they should be permitted to allow their hydrogeology expert, Dr. Everett, to provide additional testimony on areas that the trial court had already ruled were outside the scope of his expert designation, his previous deposition testimony and his field of expertise. (AA 5313-19, RT 1708-1709, RT 777-78, 1711-12, AA 6280-6281).

In its reply brief, OCLI pointed out that plaintiffs failed to address any of OCLI's objections to the competency of the evidence plaintiffs purported to offer against OCLI, and that plaintiffs argument after five years of discovery merely consisted of the nebulous promise that they proposed to gain additional evidence by "deposing parties not previously deposed" and by offering up their expert

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[12] In an attempt to buttress their argument, plaintiffs falsely claim twice (at pp. 24and 25) in their opening brief that this answer was "verified" when it was not and in fact could not have been, as our federal courts do not recognize the concept of "verified" answers.

witness to retroactively sanctify opinions that had already been stricken by the trial court as inadmissible. (AA 6868-6870)

At the hearing on this matter, plaintiffs' counsel made no argument, but was content to submit the issue on briefs alone. (RT 2803). Prior to making his tentative ruling dismissing OCLI from the case, the trial judge commented that:

> I have never seen counsel determined, almost as a strategy, to cause a mistrial. And in reviewing plaintiffs' papers, perhaps it was a strategy to reopen discovery in the hope of finding evidence against a party . . . . A lawyer can and should argue facts and reasonable inferences from the facts that are properly admitted into evidence. A lawyer has no right to make up facts or exceed the rules of evidence simply because he or she believes in the righteousness of their cause. A lawyer cannot run roughshod over the truth in a desire to, as we heard many times, "connect the dots."

(RT 2813-2814) Some ten days thereafter, Judge Hardcastle issued a written order granting OCLI's Motion to Dismiss for Lack of Evidence in which he found that:

> Plaintiffs continually pinned their case against OCLI to speculation, gossip and innuendo and the court ruled that "evidence" was inadmissible. Plaintiffs have failed to convince this court that it was wrong or that it possesses or can possess legal and competent evidence against Defendant OCLI.

(AA 6897)[13] Plaintiffs thereafter timely filed their notice of appeal.

[13] The Amended Order issued by Judge Hardcastle on September 25, 2006, which plaintiffs also appeal from, includes identical language. (AA 6940-6941)

III.

ARGUMENT

A. The Trial Court's Dismissal OCLI Was Proper

1. The Trial Court Had the Inherent Authority to Reconsider OCLI's Motion to Dismiss on its Own Motion

"All courts have inherent powers that enable them to carry out their duties and ensure the orderly administration of justice. The inherent powers of courts are derived from California Constitution, article VI, section 1, and are not dependent on statute." *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1101-1102. Consistent with these powers, the trial court may, on its own motion, reconsider its interim orders after providing the parties with notice and the opportunity to be heard. *Id.* at pp. 1104-1108; *see also Clark v. First Union Securities Inc.* (2007) 153 Cal.App.4th 1595, 1608 (same); *Farber v. Bayview Terrace Homeowner's Assn.* (2006) 141 Cal.App.4th 1007, 1015 (same).[14] As the California Supreme Court stated:

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[14] *See also, e.g., Darling, Hall & Rae* (1999) 75 Cal.App.4th 1148 (court held section 1008 does not govern the trial court's ability, on its own motion, to reevaluate its own interim rulings); *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172 (court held section 1008 restricts only litigants' motions, not court's sua sponte reconsideration of its own orders); *Bernstein v. Consolidated American Ins. Co.* (1995) 37 Cal.App.4th 763, 774 , disapproved on another ground in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 841, fn. 13 (court held that, upon request for clarification, correction of prior ruling denying summary adjudication permissible on court's own motion); *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368 (court held section 1008 was jurisdictional and controlling only when a party has renewed a motion or requested reconsideration, not when the trial court reconsiders its ruling sua sponte); *Abassi v. Welke* (2004) 118 Cal.App.4th 1353 (court held the trial court may sua sponte invite a second summary judgment motion following its denial of a previous summary judgment motion notwithstanding section 1008).

> We agree that it should not matter whether the "judge has an unprovoked flash of understanding in the middle of the night" or acts in response to a party's suggestions. If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief. . . . To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion – something we think will happen rather rarely – it should inform the parties of this concern, solicit briefing, and hold a hearing.

Le Francois, supra, at p. 1108.

In the case at bar, there can be no question that the trial court complied with the procedure laid out by the court in *Le Francois*. Immediately upon declaring a mistrial, Judge Hardcastle informed the parties that the court was "also, upon its own motion, going to reconsider its ruling on the State's motion for summary judgment and Optical Coating Laboratory's motion to dismiss, as the Court is seriously concerned about its prior rulings and believes that those rulings could have been erroneous." (RT 2722). He then invited the parties to submit additional briefs and set the matter for hearing. (*Id.*) The parties then filed additional briefs on the matter (AA 5731-5735; AA 6277-6397; AA 6868-6872), a hearing was held (RT 2802-2803), and the trial court issued a written order dismissing OCLI in which it found that plaintiffs based their case against OCLI on nothing more than inadmissible "speculation, gossip and innuendo." (AA 6895-6897; 6940-6941)

2. Plaintiffs Were Not Deprived of the Right to Discovery

Plaintiffs pointedly ignore *Le Francois'* instruction that "[f]orcing the

parties to proceed where there is recognized error in the case would result in an enormous waste of the court's and the parties' resources," *Le Francois, supra*, at p. 1107, and offer up as their chief argument the disingenuous claim that the trial judge's decision to reconsider OCLI's motion to dismiss after declaring a mistrial deprived them of the right to conduct additional discovery. (App. Br., pp. 38-42) Plaintiffs' reliance on *Beverly Hospital*[15] and *Fairmont Insurance*[16] is misplaced and misleading, however, as the issue of whether discovery was reopened after the mistrial was never in dispute, and thus never decided by the trial judge. Plaintiffs simply did not attempt to take additional depositions or obtain additional discovery from any defendant or third party from the date the mistrial was declared on May 24, 2006 to the time OCLI's renewed motion to dismiss was heard – some three months later – on August 18, 2006. No subpoenas were issued, no declarations or affidavits were obtained, and no documents were requested. Rather than clamoring for discovery, as plaintiffs imply, plaintiffs did absolutely nothing during this period to advance their case against OCLI.

Despite the fact that nothing impeded plaintiffs from proceeding with discovery, plaintiffs argued in their opposition papers in the trial court that at some unspecified time in the future plaintiffs should be permitted to take the depositions of unidentified "parties not previously deposed" (AA 6278), take additional discovery from the previously-deposed owner of West Coast Welders Supply, and

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[15] Beverly Hospital v. Superior Court (1993 19 Cal.App.4th 1289

[16] Fairmont Ins. Co. v. Superior Court (2000) 22 Cal.4th 245

proposed to make their expert Dr. Everett available for deposition regarding a declaration that had already been stricken by the trial court as improper. (AA 6280, AA 5313-5319, AA 5326-5352, AA 1707-1715, 1733)[17] In their opening brief before this court, plaintiffs add that they "might also have been able to introduce the testimony of OCLI's former controller," whom plaintiffs never even bothered to contact.[18] (App.Br., p. 42). This purported "showing" by plaintiffs of additional evidence to be brought to bear against OCLI is facially unpersuasive, consisting of nothing more than vague claims about what plaintiffs hoped might be uncovered in further discovery. Plaintiffs' claims that they "possibly" would have designated another expert witness, "would likely" have been able to subpoena a witness associated with West Coast Welders Supply,[19] and "might also" have been able to introduce the testimony of OCLI's former controller (App.Br., pp. 41-42) are all aspirations which plaintiffs had the ability and time to pursue and failed to

[17] Although plaintiffs complain at length about the exclusion of portions of Dr. Everett's testimony in their recitation of facts, nowhere in this appeal do plaintiffs challenge the trial judge's *in limine* ruling limiting the scope of Dr. Everett's testimony.

[18] During the course of the trial, plaintiffs stated that they intended to call OCLI's former controller, Bill Pietro, although he was not included on plaintiffs' list of trial witnesses. In response, OCLI's former President, Joseph C. Zils, spoke to Mr. Pietro, who indicated that he had never been contacted by plaintiffs' counsel. (AA 5690)

[19] As noted previously, plaintiffs' counsel had ample opportunity to explore the knowledge of West Coast Welders Supply, as one of their attorneys attended the deposition of Richard Bradley, the owner of West Coast Welders Supply, on October 5, 2004 and asked him questions at that deposition about OCLI. (AA 5448-5459; RT 2505) Plaintiffs thereafter failed to subpoena any other employee of West Coast Welders Supply for deposition and took no further discovery regarding the federal action. (RT 2505, lns. 14-21)

follow up on. Moreover, plaintiffs did not even purport to explain to the trial court what these "possible" witnesses would testify to should plaintiffs' counsel ever get around to taking their testimony.

At its most basic level, plaintiffs' argument fails to recognize that the right to discovery is not unlimited and that motions to dismiss and motions for summary judgment are routinely granted while discovery is still open. Plaintiffs fail to point out how the trial judge's decision to reconsider OCLI's motion to dismiss is any different than a decision rendered on any other motion while discovery remains open, where the trial court has broad discretion to decide whether there is any merit to opposing counsel's request to continue the hearing in order to seek additional discovery. *See, e.g., Andrews v. Mobile Aire Estates* (2005) 125 Cal. App. 4th 578, 596 (trial judge's denial of continuance to seek additional discovery is reviewed for abuse of discretion). Significantly, plaintiffs' argument glosses over the context in which the trial court made its decision – where plaintiffs had *five full years* to investigate OCLI and to conduct discovery and were unable to come up with any competent evidence of liability. When faced with an utter lack of evidence against OCLI and plaintiffs' half-hearted assertions of the discovery plaintiffs proposed to conduct in the future (but had not seen fit to even get started on), it is entirely unremarkable that the trial judge concluded in his order that "[p]laintiffs have failed to convince this court that it . . . possesses or can possess legal and competent evidence against Defendant OCLI." (AA 6897; AA 6941) After eight weeks of trial in which plaintiffs presented a case based entirely on

"speculation, gossip and innuendo" (AA 6897) it was not an abuse of discretion for the trial court to conclude that there was no merit to plaintiffs' nebulous claims about what further discovery "might" "possibly" uncover. *See Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 (holding discretion is abused only when the trial court "exceeds the bounds of reason, all of the circumstances before it being considered.")

3. The Trial Court's *In Limine* Rulings Were Correct

Although plaintiffs' voluminous statement of facts criticizes a number of the trial court's rulings on *in limine* motions, plaintiffs have only challenged a subset of those rulings on appeal: (1) the order excluding the anonymous caller memoranda; (2) the order excluding the Kessler note; and (3) the order excluding evidence of groundwater contamination at OCLI's main facility. The trial court's rulings on the admissibility of evidence are reviewed for abuse of discretion. *Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900; *see also Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456 (*in limine* rulings reviewed for abuse of discretion). The burden is on the party complaining to establish an abuse of discretion, and "unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." *Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348-349. Plaintiffs have not and cannot show that the trial court abused its discretion, much less carried their burden of showing the exclusion of these discrete items of evidence resulted in a miscarriage of justice.

a. The Anonymous Caller Memoranda Was Properly Excluded

i. Plaintiffs Failed to Raise, and Therefore Waived, the Argument that the Anonymous Caller Memoranda Met the Declaration Against Interest Exception to the Hearsay Rule

At the inception of the trial, OCLI moved to exclude two internal memoranda from the Water Board on the grounds that they were hearsay subject to no exception. (AA 3536-3576). The two memoranda, both dated January 24, 1990, memorialize an anonymous call and subsequent meeting with a man who claimed to have picked up 50 drums of some unidentified substance from OCLI sometime between 1973 and 1975 and disposed of them at either Frances Street or Briggs Avenue, at a scrap metal disposal facility. (AA 3547, AA 3548) Plaintiffs initially filed a one-sentence response in which they incorrectly claimed that the documents had already been admitted pursuant to order of court (AA 3888), when in fact the order plaintiffs attached merely took judicial notice of the "existence" of the memoranda. (AA 3890) Plaintiffs thereafter filed another opposition with the trial court in which they argued that the memoranda were admissible as business records under Evidence Code § 1271. (AA 4732-4735) *This was the only ground on which plaintiff ever argued to the trial court that the memoranda were admissible for the truth of the matter asserted.* (RT 420-436) The trial court was not persuaded by plaintiffs' argument, and stated on the record that the memoranda:

> are much like an accident report or something, the person that's – well everyone that's involved has to have some sort of duty to make a statement. And certainly . . . the anonymous caller didn't have a duty to make the statement. There may be some other exception to the hearsay rule that allows it in, but frankly, one's not coming to me. And finally, there's got to be a showing under 1280 that the sources of the information are trustworthy. I don't see that as well.

(RT 436) Several days later, the trial court issued an order excluding the memoranda. (AA 4783)

In their opening brief, appellants do not revisit their losing argument that the memoranda should be admitted under the business records exception, but for the first time argue that they are admissible as declarations against interest. Although OCLI briefed this issue for the trial court in its motion *in limine* in anticipation of plaintiffs making this argument, *plaintiffs never submitted any brief nor made any argument to the trial court that the documents were admissible under the declaration against interest exception to the hearsay rule.* Plaintiffs are barred from raising this argument for the first time on appeal, as it is well-settled that "points not raised in the trial court will not be considered on appeal." *Hepner v. Franchise Tax Board* (1997) 52 Cal.App.4th 1475, 1486; *see also American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal. App. 3d 1271, 1281 ("possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal"); *Manco Contracting Co. v. Bedzikan* (2007) 151 Cal.App.4th 749, 753 ("Theories not raised in the trial court are usually deemed waived and cannot be asserted for the first time on appeal");

Dimick v. Dimick (1962) 58 Cal.2d 417, 422 ("It is settled that points not raised in the trial court will not be considered on appeal"); *Apra v. Aureguv* (1961) 55 Cal.2d 827, 831 (same); *Everly Enterprises, Inc. v. Altman* (1960) 54 Cal.2d 761, 765 (same). Plaintiffs neglected to inform the court in their opening brief that they did not raise this argument below and have simply ignored the rule that "a party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." *Ernst v. Searle* (1933) 218 Cal. 233, 240–241.

ii. The Anonymous Caller Memoranda Are Inadmissible Multiple Hearsay

Another analytical flaw in plaintiffs' contention that the trial court erred in disallowing the anonymous caller memoranda is their failure to recognize and address the fact that the records were *multiple* hearsay. That is, the memoranda were offered to prove two points. The first is that a call was placed to the Water Board and a subsequent meeting took place. The second is that certain acts were committed as reflected in the statements made to the Water Board by the anonymous caller. "When multiple hearsay is offered, an exception for *each* level of hearsay must be found in order for the evidence to be admissible." *Alvarez, supra,* 100 Cal.App.4th 1190, 1205; *People v. Ayers* (2005) 125 Cal.App.4th 988, 995 (same); *People v. Arias* (1996) 13 Cal.4th 92, 149 (same); *People v. Roldan* (2005) 35 Cal. 4th 646, 714 (same); Evid. Code § 1201.

In the case at bar, the plaintiffs urged that the memoranda should be admitted under the business records exception, and the trial court ruled against them on the grounds that, among other things, the anonymous caller had no official duty to report any information to the Water Board. *See, e.g., Alvarez, supra,* 100 Cal.App.4th at 1205 (business records exception does not apply where caller has no duty to report information); *People v. Hernandez* (1997) 55 Cal.App.4th 225, 240 (business records exception inapplicable to police reports based upon observations of victims or witnesses who have no official duty to observe and report the relevant facts). Plaintiffs have not challenged that ruling on appeal nor asserted any basis upon which *each* level of hearsay would fall under some exception. Plaintiffs' newly raised argument that the statements allegedly made by the anonymous caller and commemorated in the memoranda are declarations against interest only addresses a single layer of hearsay. Having failed to address both layers of hearsay, plaintiffs have failed to meet their burden and their argument necessarily fails.

iii. The Declaration Against Interest Exception to the Hearsay Rule Does Not Apply

Plaintiffs spend an abundance of energy construing stop-and-search cases and discussing the sufficiency of an anonymous tip for purposes of issuing a search warrant without bothering to explain to the court how these cases are remotely relevant to the question of the admission of the anonymous caller memoranda as substantive evidence against OCLI at trial. The question is not

whether the anonymous call was sufficient to prompt the Water Board to investigate OCLI's waste disposal practices, but whether plaintiffs should be permitted to offer the memoranda for the truth of the matter asserted – i.e., that drums of chemicals were picked up from OCLI and dumped at Frances Street or Briggs Avenue – when the only evidence of this is an anonymous phone call from someone whose identity still remains unknown after 17 years and whose motivations can only be guessed at. Plaintiffs' attempt to explain why the memoranda should be admitted is at best an exercise in creative writing and at worst a flagrant appeal to emotions which ignores relevant facts and fails to mention that plaintiffs' legal position is contrary to controlling California Supreme Court precedent.

In California, "evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Evid. Code § 1230. The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. *See People v. Lucas* (1995) 12 Cal.4th 415, 462.

Even where a statement tends to implicate a declarant in criminal activity, however, caselaw nonetheless reminds us that declarations against penal interest

"may contain self-serving and unreliable information." *People v. Campa* (1984) 36 Cal.3d 870, 883. Indeed, courts have commented that "a self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not," *People v. Leach* (1975) 15 Cal.3d 419, 439, and have held that a court may not "find a declarant's statement sufficiently reliable for admission solely because it incorporates an admission of criminal culpability." *People v. Lawley* (2002) 27 Cal.4th 102, 153. Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, also be exculpatory or have a net exculpatory effect. *People v. Coble* (1976) 65 Cal.App.3d 187, 191. As the United States Supreme Court reasoned in interpreting the analogous exception to the federal hearsay rule:

> The fact that a person is making a broadly self-inculpatory confession does not make more credible the confessions' non-self-inculpatory nature. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

Williamson v. United States (1994) 512 U.S. 594, 599-600.

In light of these concerns, the California Supreme Court determined long ago that "*the hearsay exception should not apply to collateral assertions within declarations against penal interest.*" *Lawley, supra*, 27 Cal.4th at 153 (emphasis added); *People v. Duarte* (2000) 24 Cal.4th 603, 612 (same); *People v. Campa, supra*, 36 Cal.3d at p. 882 (same). "In order to protect defendants from statements of unreasonable men if there is to be no opportunity for cross-examination," the

California Supreme Court has declared that section 1230's exception to the hearsay rule is "inapplicable to evidence of any statement or portion of any statement not itself specifically disserving to the interests of the declarant." *People v. Duarte, supra*, 24 Cal.4th at p. 612. Thus, "a hearsay statement which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible." *Id.*

Although the collateral statement rule was pointed out to plaintiffs in OCLI's briefs below, plaintiffs failed to address the issue below and now pointedly ignore controlling caselaw that was previously brought to their attention. In the case of *People v. Lawley, supra,* a defendant on trial for murder attempted to offer exculpating evidence that someone else had committed the crime. Defendant's offer of proof was that his proposed witness, Mullins, would testify that an inmate named Seaborn had told him that Seaborn had killed someone, that an innocent person was incarcerated for it, that the Aryan Brotherhood had directed Seaborn to commit the crime, and that he had seen a letter allegedly from the Aryan Brotherhood ordering the murder. *Lawley, supra*, 27 Cal.4th at 151-152. In ruling on admissibility, the court stated that while Seaborn's statement that he had killed a man was admissible as against penal interest assuming it related to the victim, his statement that the Aryan Brotherhood had directed him to kill the victim was inadmissible because *who* told him to do so was not against his penal interest, as "nothing about *who* hired Seaborn to kill [the victim] made Seaborn

more culpable than did the other portions of his statement." *Id.* at p. 154. Moreover, the letter purportedly stating that the Aryan Brotherhood had ordered Seaborn to kill the victim was double hearsay subject to no exception. *Id.* at 153.

In the case at bar, plaintiffs' claim that the anonymous caller memoranda should be admitted under the declaration against interest exception completely ignores the above-stated rule that collateral statements implicating other parties do not fall within the exception. Here, the anonymous caller is alleged to have stated that he picked up 50 barrels containing some unknown substance from OCLI and disposed of them at either 99 Frances Street or 1143 Briggs Avenue on the instructions of his alleged employer, Mr. Kessler. (AA 3547, AA 3548) While those portions of the memoranda in which the caller admits disposing of barrels at one of these two sites might in fact be against his interest if he could be identified, *where* the barrels allegedly came from and *who* instructed him to dispose of them are not: they are on their face collateral statements seeking to implicate other parties (i.e., OCLI and Kessler), and are thus inadmissible. *See Duarte, supra*, 24 Cal.4th at 612 (holding only those portions of declarant's statement "specifically disserving" to his penal interest were admissible under section 1230 and that the court must excise any statement or portion of a statement that was not specifically disserving). In the case at bar, plaintiffs have not even attempted to argue that any portion of the anonymous caller's statement implicating OCLI is specifically disserving to his penal interest but have merely proceeded as if this is a requirement they are free to ignore. It is not, and their failure to address this point

is fatal to their entire argument.

b. The Kessler Note Was Properly Excluded

At the inception of trial, OCLI moved to exclude a note in the Water Board files of a brief conversation between Donald Kessler (the deceased owner of Pacific Junk Company) and Water Board staff on the grounds that it was hearsay subject to no exception. In the note, Kessler is reported to have said:

> He said that drums were either picked up or delivered to the site from OCLI. He said the drums were supposed to be empty because they were used for storage of metal waste onsite. He said chances are there was liquid at times in the drums. He said he had employees that weren't always paying attention to the matter.

(AA 3533) OCLI's motion *in limine* to exclude the Kessler note argued that the note was multiple hearsay, and that neither the business records exception nor the declaration against interest exception applied. In response, plaintiffs filed an opposition in which the only argument made was that the note was a business record. Plaintiffs did not address the issue of double hearsay, nor did they argue that the note constituted a declaration against interest. At oral argument below, except for an unexplained throw-away comment by plaintiffs' counsel that "specifically concerning Mr. Kessler, we do have a statement against interest," plaintiffs argued only that the note was a business record. (RT 425) The trial court disagreed, and properly exercised its discretion in excluding the note.

i. Plaintiffs Failed to Raise, and Therefore Waived, the Argument that the Kessler Note Met the Declaration Against Interest Exception to the Hearsay Rule

Plaintiffs again fail to inform the court that the argument made on appeal – that the Kessler note should have been admitted as a declaration against interest – was not briefed or raised below. The argument is therefore waived, as "points not raised in the trial court will not be considered on appeal." *Hepner, supra,* 52 Cal.App.4th at1486; *Manco, supra,* 151 Cal.App.4th at 753 ("Theories not raised in the trial court are usually deemed waived and cannot be asserted for the first time on appeal"); *Dimick, supra,*58 Cal.2d at 422 ("It is settled that points not raised in the trial court will not be considered on appeal"); *Apra, supra,* 55 Cal.2d at 831 (same); *Everly, supra,* 54 Cal.2d at 765 (same). Plaintiffs failed to brief the issue below, failed to urge the trial court to admit the evidence on that basis and hardly can be said to have "fully developed" their argument for the trial court by making a single throw-away comment at oral argument. *See American Continental Ins. Co., supra,* 195 Cal. App. 3d at 1281 ("possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal.")

ii. The Kessler Note Is Inadmissible Multiple Hearsay

Plaintiffs fail to recognize and address the fact that the Kessler note is *multiple* hearsay. That is, the note was offered to prove two points. The first is that Kessler spoke to the Water Board. The second is that Kessler said that "chances

are" that the empty drums picked up from OCLI contained liquid in them at times, as his employees were not always paying attention. "When multiple hearsay is offered, an exception for *each* level of hearsay must be found in order for the evidence to be admissible." *Alvarez, supra,* 100 Cal.App.4th 1190, 1205; *People v. Ayers*, *supra*, 125 Cal.App.4th at 995 (same); *People v. Arias*, *supra*, 13 Cal.4th at 149 (same); *People v. Roldan*, *supra,* 35 Cal. 4th at 714 (same); Evid. Code § 1201.

In the case at bar, the plaintiffs urged that the note should be admitted under the business records exception, and the trial court ruled against them on the grounds that, among other things, Kessler had no official duty to report any information to the Water Board. *See, e.g., Alvarez, supra,* 100 Cal.App.4th at 1205 (business records exception does not apply where caller has no duty to report information); *People v. Hernandez*, supra, 55 Cal.App.4th at 240 (business records exception inapplicable to police reports based upon observations of victims or witnesses who have no official duty to observe and report the relevant facts). Plaintiffs have not challenged that ruling on appeal nor asserted any basis upon which *each* level of hearsay would fall under some exception. Plaintiffs' newly raised argument that the statements allegedly made by Kessler and commemorated in the note are declarations against interest only addresses a single layer of hearsay. Having failed to address both layers of hearsay, plaintiffs have failed to meet their burden and their argument necessarily fails.

iii. The Declaration Against Interest Exception to the Hearsay Rule Does Not Apply

In the single page they devote to this issue, plaintiffs falsely claim that Kessler admitted "allowing his employees to dump on the ground unidentified liquids contained from a chemical processing facility" (App. Br., p. 52) and then compound their misrepresentation to the court by claiming that OCLI argued below that such conduct was "innocuous." (*Id.*) Neither statement is supported by the record. Kessler never admitted disposing of any chemicals, nor did OCLI ever claim anywhere that such behavior was acceptable. Plaintiffs' purported citations to the record in support of these assertions – in the few instances they cite to the record – do not bear out their assertions in any way, shape or form.

The only statement Kessler made concerning OCLI was the statement contained in the Water Board note that OCLI successfully moved to exclude on hearsay grounds. As we have already seen, the entirety of what Kessler is reported to have said is:

> He said that drums were either picked up or delivered to the site from OCLI. He said the drums were supposed to be empty because they were used for storage of metal waste onsite. He said chances are there was liquid at times in the drums. He said he had employees that weren't always paying attention to the matter.

(AA 3533)

There is no statement by Kessler that there actually *was* anything in the drums – which by his own admission "were supposed to be empty" – or that he

ever allowed employees to dump chemicals on the ground. In fact, the note does not contain the word "chemicals" or the word "dumping," and fairly read cannot be deemed to be an admission by Kessler of any wrongdoing at all. As explained above in the section addressing the anonymous caller memoranda, the California Supreme Court has declared that section 1230's exception to the hearsay rule is "inapplicable to evidence of any statement or portion of any statement not itself specifically disserving to the interests of the declarant." *People v. Duarte, supra*, 24 Cal.4th at p. 612. Here, where there is no admission by Kessler of any wrongdoing, the declaration against interest exception simply does not apply.

Moreover, even if the exception did apply, it would only apply to those portions of the note that were specifically disserving to *Kessler's interest*, not those portions which could be construed to be against *OCLI's interest.* To the extent the note can be construed to be an attempt by Kessler to attribute blame to OCLI for the contamination of 99 Frances Street or 1143 Briggs Avenue, its admission violates the collateral statement rule, which would require any reference to OCLI in the note to be excised prior to its admission. *See Duarte, supra*, 24 Cal.4th at 612 (holding only those portions of declarant's statement "specifically disserving" to his penal interest were admissible under section 1230 and that the court must excise any statement or portion of a statement that was not specifically disserving). Plaintiffs deliberately misconstrue what is required by the declaration against interest exception, as its application has always limited the admission to the inculpatory portion of a statement and excluded exculpatory portions from

admission into evidence. As the California Supreme Court has unequivocally stated: "a hearsay statement which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible." *Id.* Simply put, plaintiffs ignore the settled law that out of court statements offered to implicate *others* (i.e., persons other than the declarant) in wrongdoing do not fall within the declaration against interest exception and are nothing but pure, unadulterated, inadmissible hearsay.[20]

c. Evidence of Groundwater Contamination at OCLI's Main Facility Was Properly Excluded

i. Plaintiffs New Arguments Regarding Admissibility Are Waived

Before trial, OCLI moved to exclude evidence of the groundwater contamination at its main facility on the grounds that, since plaintiffs had withdrawn their claim that the contamination beneath OCLI had migrated into plaintiffs' water, the issue of whether there was groundwater contamination beneath OCLI was irrelevant to any issue in the case, and any mention of it could only serve to prejudice OCLI in the eyes of the jury. (AA 5320-5322) OCLI therefore moved under Evidence Code Section 352 to bar any mention of groundwater contamination as tending to create a danger of undue prejudice, confusion, or of misleading the jury, and further argued that plaintiffs' counsel

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[20] Plaintiffs also gloss over OCLI's argument that Kessler's comments were unreliable. As Kessler had already been named as a responsible party by the Water Board in a Cleanup & Abatement Order, he had every incentive to implicate others in order to lessen his share of the cost of remediating the contamination. (AA 3528)

should not be permitted to argue that the presence of contamination beneath OCLI's main facility indicated that OCLI had a propensity to disregard its duties or improperly dispose of chemicals. (AA 5320-5322)

In response, plaintiffs failed to file any opposition brief with the trial court. At the hearing on the matter plaintiffs asserted only two grounds for the admission of this evidence: first, plaintiffs argued that the evidence was relevant because it showed that the chemicals kept at OCLI "can go through the ground and get into the water" (RT 1699) – a fact that plaintiffs' hydrogeologist could presumably attest to – and then plaintiffs made their real argument, that the evidence was being offered to show that "what we're saying is this is how OCLI took care of chemicals. They let them go in the ground and from the ground to the groundwater." (RT 1699-1700). The trial judge concluded in short order that the purported reasoning for offering the evidence "doesn't pass the 350 [sic] test" and granted OCLI's motion to exclude. (RT 1700-1701)

Now plaintiffs come before this court and for the first time raise the argument that the trial court should have admitted the evidence under Evidence Code §1101 as proof of "identity" or a "common scheme," or in the alternative that he should have admitted the evidence under Evidence Code § 1105 as proof of "custom or habit." Though plaintiffs had ample opportunity to do so, neither of these arguments was raised or briefed by plaintiffs below. By long-established precedent, plaintiffs are precluded from attacking the trial court's orders on theories that were not brought to the trial court's attention, as failure to raise the theory results in a waiver on appeal. *See Hepner*, *supra,* 52 Cal.App.4th at p. 1486 ("points not raised in the trial court will not be considered on appeal"); *see also American Continental Ins. Co., supra,* 195 Cal. App. 3d at p. 1281 ("possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal"); *Manco Contracting Co., supra,* 151

Cal.App.4th at p. 753 ("Theories not raised in the trial court are usually deemed waived and cannot be asserted for the first time on appeal"); *Dimick, supra,* 58 Cal.2d at p. 422 ("It is settled that points not raised in the trial court will not be considered on appeal"); *Apra, supra,* 55 Cal.2d at p. 831 (same); *Everly Enterprises, Inc., supra,* 54 Cal.2d at p. 765 (same).

ii. The Evidence Is Not Admissible as Proof of Identity

Ordinarily, evidence of a person's character is inadmissible to demonstrate his or her conduct on a particular occasion (Evid. Code, § 1101, subd. (a)), except that evidence is admissible to establish "that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b)) "Evidence going to the issue of identity must share *distinctive* common marks with the charged crime, marks that are sufficient to support an inference that the same person was involved in both instances." *People v. Gray* (2005) 37 Cal.4th 168, 202. In fact, the greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." *People v. Britt* (2002) 104 Cal. App. 4th 500, 505.

In the case at bar, plaintiffs new argument that the evidence of contamination at OCLI's main facility should have been admitted as proof that OCLI disposed of chemicals somewhere else on its face does not meet this test.

There is no distinctive common thread between the presence of contamination underground at a manufacturing facility and plaintiffs' allegations of secret dumping some two miles away. Plaintiffs' clear intent was not to establish a distinctive similarity in behavior that would be sufficient to prove identity, but simply to introduce the evidence in order to make the *ad hominem* argument that because the groundwater at OCLI's main facility is contaminated, OCLI must be a corporate polluter; and because polluters by definition "pollute," OCLI therefore must be responsible for the contamination at plaintiffs' properties.

As plaintiffs' counsel himself admitted, "what we're saying is this is how OCLI took care of chemicals. They let them go in the ground and from the ground to the groundwater." (RT 1699-1700) Clearly, this is not an attempt to establish identity, but rather an attempt to get the jury to infer that OCLI has a propensity to act a certain way, and that OCLI acted in conformity with that propensity in this case. That argument is expressly barred by § 1101.

The two murder cases plaintiffs rely on for their argument, *Prince*[21] and *Diaz,*[22] are easily distinguishable. *Prince* involved evidence that the killer had stalked and murdered six women in nearly identical fashion – including testimony that the killer had followed other of the murder victims home to the same apartment complex in which one of the witnesses who escaped him lived, followed them up the stairs to their apartments, and that the murder victims had all

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[21] *People v. Prince* (2007) 40 Cal.4th 1179

[22] *People v. Diaz* (1992) 3 Cal.4th 495

been of similar age, race, and gender to the witness. *Prince, supra*, 40 Cal.4th at p. 1271.

Similarly, *Diaz* involved evidence that a nurse convicted of murdering twelve patients by injecting them with massive overdoses of lidocaine had also attended a patient at another hospital who died, again, from a massive overdose of lidocaine. In commenting on the admission of the uncharged other crime into evidence, the *Diaz* court stated:

> Other-crimes evidence is admissible to prove the defendant's identity as the perpetrator of another alleged offense on the basis of similarity *when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses. Here, the similarity between the charged and uncharged offenses is overwhelming*. Each took place in the ICU of a hospital. More important, each victim was killed by administration of a massive overdose of lidocaine. This shared characteristic of the death of Jones at Chino Community Hospital and the deaths at CHOV and San Gorgonio Pass Hospital is *highly distinctive*. The murder of patients in ICU's by injecting them with large quantities of lidocaine is *unprecedented*.

Diaz, supra, 3 Cal.4th at p. 562 (internal citations omitted, emphasis supplied)

In the case at bar, the court is not confronted with a *sui generis* case like *Diaz*, in which the similarity between charged and uncharged conduct was found to be "overwhelming," "highly distinctive," and "unprecedented" (*Id.*), nor with a case like *Prince*, in which the patterns of the six murders were virtually identical.

Instead, the court is faced with a case in which the alleged conduct – illegal disposal of chemicals at a distant location – is entirely distinct from the *condition* plaintiffs seek to introduce into evidence as proof of identity (i.e., the presence of groundwater contamination at OCLI's own facility).[23] Plaintiffs' argument simply does not meet the test for admission of uncharged acts as proof of identity and should be disregarded.

iii. The Evidence Is Not Admissible as Proof of a Common Scheme or Plan

Plaintiffs' new argument that evidence of groundwater contamination at OCLI's main facility should have been introduced as proof of a common scheme or plan is contrary to law. In establishing a common design or plan, evidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (superseded on other grounds). Moreover, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts." *Id.* at p. 403. Here, the entirety of plaintiffs' argument is that many of the widely-used industrial chemicals discovered in the groundwater beneath OCLI's main facility were also discovered

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[23] What plaintiffs really seek to have admitted is a *condition* – i.e., the presence of contamination – rather than any *conduct* per se. This is a significant distinction given the fact that there is absolutely no evidence in the record that groundwater contamination at OCLI was caused by any wrongdoing or intentional conduct as opposed to accidental spills.

in the groundwater at 99 Frances Street. (App. Br., pp. 62) Plaintiffs fail to point out how this demonstrates the existence a common scheme or plan – or any plan at all – and fail to enlighten the court as to what this common plan or scheme might have been. Plaintiffs also pointedly ignore the fact that their argument requires that OCLI have "planned" to contaminate its own property, which is both contrary to the evidence and absurd. The mere fact that chemicals discovered in the groundwater at OCLI were similar to those discovered in the groundwater some two miles away at 99 Frances Street does not lead to a permissible inference that OCLI disposed of chemicals at 99 Frances Street. *See, e.g., Colony Holdings, Inc. v. Texaco Refining and Marketing, Inc.*, 2001 U.S. Dist. LEXIS 26217 (October 29, 2001) (expert testimony that chemicals used by defendant were consistent with those contaminating plaintiff's property was as a matter of law insufficient to form a factual nexus for causation purposes). Plaintiffs have failed to show any evidence of a plan, and their argument accordingly should be disregarded.

iv. The Evidence Is Not Admissible as Proof of Habit

Plaintiffs' argument that evidence of groundwater contamination at OCLI's main facility should have been introduced as a "habit" is nothing more than a thinly disguised attempt to characterize OCLI as a habitual polluter. Just as an attempt to introduce evidence that defendant has a "habit" of lying falls afoul of the general rule against character evidence (McCormick on Evidence § 195 (4th ed. 1992)), so too does plaintiffs' attempt here. A habit is a person's regular practice of responding to a particular kind of situation with a specific type of conduct.

Thus, a person may be in the habit of bounding down a certain stairway two or three steps as a time, of patronizing a certain bar after work each day, or of driving his car without using a seat belt. *Id.* In the case of corporations, generally the word "habit" is replaced with "custom," which refers to the routine practice or behavior on the part of the organization that is equivalent to the habit of an individual. *People v. Memro* (1985) 38 Cal. 3d 658, 681.

Here, plaintiffs argue – without citation to authority or the record – that the existence of contamination in OCLI's groundwater illustrated "its customary method of handling the hazardous waste it routinely generated." (App. Br., p. 58) Continuing in this vein, plaintiffs argue that:

> Specifically, evidence that the groundwater beneath OCLI's facility was contaminated with the same mixture of solvents that the company used would have permitted the jury to infer that, for some period of time, the company had followed a practice of disposing of its hazardous wastes in a way that contaminated the groundwater. And that inference, in turn, would have supported a finding that the company had followed that same practice by sending drums containing substantial amounts of residual chemicals to the Frances Street site for disposal.

(*Id.*, p. 58)

There are a multitude of problems with this argument, not the least of which is that plaintiffs do not, and cannot, point to one shred of evidence in the record that would support their claim that "for some period of time, the company had followed a practice of disposing of its hazardous wastes in a way that contaminated the groundwater." (*Id.*) There is no deposition testimony cited by

plaintiff in support of this claim, no declarations by fact or expert witnesses, and no trial testimony on this issue. Plaintiffs simply *assert* that OCLI followed such a custom as if that were sufficient to meet their burden and ignore the rule that the existence of a business custom has to be established by a knowledgeable witness's testimony that there was such a practice or by evidence of a sufficient number of specific instances to support the finding of a habit or custom. *See* McCormick on Evidence, *supra*, at § 195. The existence of contamination in OCLI's groundwater by itself says nothing about how it got there, a fact that plaintiffs studiously avoid discussing.

An equally significant problem with plaintiffs' argument is that the inferences they claim must necessarily follow from the existence of groundwater contamination at OCLI are mere contrivances created by plaintiffs without regard for either evidence or logic. The mere presence of contamination in the groundwater beneath OCLI does not logically permit one to infer that the company followed a practice of allowing solvents to contaminate its own groundwater. Nor, even if that inference could be rationally supported (and it cannot), it would not logically follow that the company also had a different practice of shipping solvents offsite for illegal disposal. Contrary to plaintiffs' claims, these are not reasonable inferences which can be drawn from the mere presence of contamination beneath OCLI, but self-serving speculation of the sort that prompted the trial court to conclude that plaintiffs had based their entire case against OCLI on inadmissible "speculation, gossip and innuendo." (AA 6897)

4. The Court Should Strike or Disregard the Numerous False and Inadmissible Statements of Fact Made By Plaintiffs

As a general rule, "documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review." *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632. "Likewise disregarded are statements in briefs based on matter improperly included in the record on appeal." *Id.*; *see also Kendall v. Allied Investigations, Inc.* (1988) 197 Cal.App.3d 619, 625 ("Statements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal.")

In the case at bar, plaintiffs not only admit that their statement of facts refers to evidence that was never offered at trial (App. Br., p. 6, fn. 1), but throughout their brief they attempt to buttress their case by referring to excluded evidence whose exclusion is not challenged on appeal, and to purported "facts" which are demonstrably false. All of this is improper. As a matter of law, factual assertions which are inadmissible or not in the record are improper and must be disregarded by the court. *See Slovensky v. Friedman*, 142 Cal. App. 4th 1518, 1526 fn. 7 ("We disregard any factual assertions in plaintiff's opening brief that depend on inadmissible evidence"); *see also Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481 (unsupported statement of fact disregarded); *C.J.A. Corp. v. Trans-Action Fin'l Corp.* (2001) 86 Cal.App.4th 664, 673 (striking portions of brief referring to evidence not in record).

The following specific statements of fact in plaintiffs' opening brief are either false or inadmissible, and should be stricken or disregarded by this court:

(1) On page 50, plaintiffs claim without citation to the record that "An OCLI employee would later admit that the company sent scrap metal to the Frances Street and Briggs Avenue sites *in drums that had previously contained solvents*." Plaintiffs' failure to cite to the record here is telling, as nothing in the appellate record supports this statement. The only evidence adduced on this point is the declaration of a former officer of OCLI, Ken Pietrelli, who stated that interviews with OCLI employees "indicated that only empty scrap drums and drums containing scrap metal were sold to West Coast Metals," and that OCLI's historical documents "do not indicate that OCLI ever sent or disposed of any drums containing chemicals of any sort to 99 Frances Avenue in Santa Rosa." (AA 839, ¶¶ 4, 5) Contrary to plaintiffs' claim, there is absolutely no evidence in the record that these drums previously contained solvents.

(2) On page 51, plaintiffs claim without citation to the record that "Mr. Kessler's successor in interest would later admit that OCLI had 'contracted, agreed, or otherwise arranged with the Keslers for the transport, sale or disposal of barrels or drums owned by OCLI containing residual, unused chemicals.'" Given its internal quotations, this statement necessarily refers to the answer filed by West Coast Welders Supply and its owner, Richard Bradley, in the federal court CERCLA case discussed previously. (AA 6394)

Plaintiffs' inclusion of this statement is improper for two reasons: First, plaintiffs sought to introduce the answer into evidence against OCLI at trial, and the trial court ruled that it was inadmissible. (RT 2749) Plaintiffs have not challenged this ruling on appeal and thus are barred from relying on this document or its contents in their opening brief for any purpose. *Slovensky, supra,* 142 Cal. App. 4th at p. 1526 fn. 7. Second, plaintiffs' casual assertion that West Coast Welders Supply and Richard Bradley are Kessler's successor-in-interest is not supported by any evidence in the record.

(3) On page 51, plaintiffs claim without citation to the record that "OCLI's controller would later admit that the company disposed of hazardous waste illegally." Again, this is not borne out by the record. Plaintiffs presumably are referring to the hearsay statement made by a prospective juror named Benjamin during jury *voir dire* in which Benjamin claimed in an attempt to get off the jury panel that he had recently hired one of OCLI's former controllers who told him that OCLI had "dumped chemicals and only stopped after they were caught." (RT 1445) The former controller, Bill Pietro, was never called by plaintiffs as a witness at trial. Moreover, when contacted by OCLI, the former controller stated he had no personal knowledge of OCLI's involvement in any groundwater contamination. (AA 5690).

(4) On page 51, plaintiffs claim without citation to the record that "That particular mix of chemicals was rare; and somewhat unique to the industrial

activity that occurred at OCLI's Santa Rosa facility." This statement refers to a portion of the opinion of plaintiffs' expert hydrogeologist, Dr. Lorne Everett, that was excluded pursuant to order of court. (RT 1733) Plaintiffs have not challenged this ruling on appeal, and thus are barred from relying on this statement in their opening brief for any purpose. *Slovensky, supra,* 142 Cal. App. 4th at p. 1526 fn. 7.

(5) On page 64, plaintiffs claim without citation to the record that "OCLI was sending West Coast Welders' Supply drums containing not only scrap metal but also significant amounts of unidentified chemicals." Presumably plaintiffs have failed to cite to the record here because there is nothing in the record whatsoever to support this statement. There is no evidence anywhere in the appellate record nor anywhere else that OCLI ever sent any drums to West Coast Welders Supply containing "significant amounts of unidentified chemicals."

(6) On page 65, plaintiffs claim without citation to the record that "Mr. Kessler . . . admitted that his company obtained from OCLI drums containing not only scrap metal but also unidentified liquids." As discussed at length above in the section dealing with the exclusion of Kessler's statement to the Water Board, Kessler did not admit any such thing, but merely stated that "chances are there was liquid at times in the drums." (AA 3533) Plaintiffs' statement blatantly mischaracterizes Kessler's excluded testimony.

(7) On page 66, plaintiffs claim without citation to authority that "OCLI

routinely sent drums to the Frances Street site." Again, this is not supported by the evidence. There is absolutely no evidence in the record regarding the frequency of OCLI's sale of scrap metal drums to any vendor. The only reference in the record is the declaration of OCLI's former officer Kenneth Pietrelli, who mentions that "during the 1960s and 1970s . . . . empty scrap drums and drums containing scrap metal were sold to West Coast Metals." (AA 839, ¶ 4). There is no evidence that these sales were routine, or frequent, or anything other than *ad hoc*.

In addition to the seven inadmissible and/or false statements above, which are embedded in plaintiffs' argument, plaintiffs include in their statement of facts much of the same inflammatory, false and inadmissible information. For example, Section L of plaintiffs' statement of facts, which runs from pages 23 to 26 of plaintiffs' opening brief, criticizes the trial court for excluding evidence relating to the federal CERCLA action between Union Pacific, OCLI, and the various scrap metal operations and their owners, and again attempts to put before this court, as an admissible fact, West Coast Welders Supply's answer, in which it purports to admit that "OCLI contracted, agreed, or otherwise arranged with the Keslers for the transport, sale or disposal of barrels or drums owned by OCLI containing residual, unused chemicals," and that "contaminants were released to the environment at or around the [Frances Street site] during the handling or disposal of OCLI's residual, unused chemicals by the Keslers or persons under their supervision." (App. Br., pp. 24-25). Putting aside the fact that West Coast Welders

Supply's answer could not be a binding admission as to any party other than itself, plaintiffs utterly ignore the fact that *the trial court denied their request for judicial notice of the existence of the federal action, ruled that the federal action could not be mentioned without prior permission of the court, and ruled that West Coast Welders Supply's answer was inadmissible.* (RT 1698, 2749; AA 5514) Since plaintiffs have not challenged those rulings in this appeal, plaintiffs are prohibited from including the aforementioned factual assertions about the federal action in their brief and may not rely on them to support their case. *Slovensky, supra*, 142 Cal. App. 4th at p. 1526 fn. 7 ("We disregard any factual assertions in plaintiff's opening brief that depend on inadmissible evidence.")

Similarly, on pages 26 and 27 of their opening brief, plaintiffs include a series of statements from the declaration of their hydrogeological expert, Dr. Lorne Everett, in which Dr. Everett claims that the particular mixture of chemicals associated with Frances Street and OCLI was "a rare mixture" that was "somewhat unique to the industrial activity that occurred at OCLI's Santa Rosa facility," and that "there is no evidence in the record that the chemicals could have come from a facility other than OCLI." (AA 5169) He then went on to state that "this highly unique mixture of organic chemicals . . . would not have originated from a different source in Santa Rosa . . . ." (AA 5171-5172) Once again, *these portions of Dr. Everett's opinion were excluded by the trial court as inadmissible*, as they were beyond the scope of his expert designation, his deposition testimony and his

expertise. ((RT 1733, 2065). Plaintiffs have not challenged the exclusion of any portion of Dr. Everett's testimony in this appeal and may not rely herein on the Dr. Everett's inadmissible statements in order to support their position. *Slovensky, supra*, 142 Cal. App. 4th at p. 1526 fn. 7.

OCLI requests that the court strike the seven specific statements called out above, and similarly strike Sections L and M of plaintiffs' statement of fact (i.e., those sections dealing with the unchallenged excluded evidence of the federal action and Dr. Everett's excluded testimony); in the alternative OCLI requests that the court disregard those statements.

5. The Absence of Admissible Evidence Against OCLI Required Its Dismissal

Although motions *in limine* are ordinarily directed at particular items of evidence, rather than at plaintiff's entire case, where the net effect of *in limine* motions is to preclude all evidence, the motions are the equivalent of an objection to all evidence, and if granted entitle a defendant to judgment as a matter of law. *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 701; *see also Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451-452)

In *Clemens, supra,* defendants brought six separate motions *in limine*, which collectively were directed at precluding the introduction of any evidence as to all issues purportedly set forth in the complaint. After the motions *in limine* were granted, defendants orally moved for dismissal on the grounds that no cause of action could be stated against them. The court granted defendants' motion to

dismiss the complaint, and plaintiff appealed on the grounds that a dismissal must be preceded by the sustaining of an objection to all evidence. In rejecting this argument, the appellate court held that, while the procedure may have been unorthodox, the dismissal itself was entirely appropriate:

> The motions in limine were, in net effect, an "objection to all evidence" on the grounds Clemens failed to state any cause of action as to respondents. Following the sustaining of such objection, a separate motion for judgment on the pleadings is not essential, and an objection to all evidence which is sustained may be followed by a judgment in favor of the objecting party.

Clemens, supra, 193 Cal.App.3d at 450-451.

The *Clemens* case is on all fours with the recent decision in *Coshow, supra*, in which the court dismissed the claims against two defendants after granting their motions *in limine*:

> Here, the motions in limine, although directed at particular items of Coshow's evidence, had the cumulative effect of an objection to all evidence on the ground Coshow failed to state any cause of action, entitling City and Department to judgment as a matter of law . . . . Once the court sustained various objections to Coshow's evidence, no viable cause of action remained. Thus, the court properly exercised its inherent powers over the proceedings by construing the motions in limine as a motion for judgment on the pleadings.

Coshow, supra, 132 Cal.App.4th at 701-702.

The principles brought to bear in *Clemens* and *Coshow* are equally applicable to the case at bar, as the court's *in limine* rulings excluding evidence of

the anonymous call and the Kessler note had the net effect of excluding all evidence against OCLI. When plaintiffs' complaint was stripped of the allegations which relied on the anonymous call, nothing remained to tie OCLI to contamination at 99 Frances Street or plaintiffs' wells. The exclusion of other improper evidence by the court – e.g., evidence of groundwater contamination at OCLI, plaintiffs' expert's improper opinions, and evidence of the existence of the federal court action – served to foreclose plaintiffs from trying a case to the jury that could only have been based on innuendo, speculation, and gossip. With the exclusion of this evidence, the only facts plaintiffs could bring to bear were that OCLI historically had used certain chemicals, and some of those chemicals were discovered in the groundwater at 99 Frances Street and 1143 Briggs Avenue. These allegations, even if proven, could not have established OCLI's liability given the complete absence of evidence that OCLI ever sent chemicals to 99 Frances Street or 1143 Briggs Avenue. Absent any causal connection, plaintiffs case falls of its own weight, as the trial court properly recognized when it *sua sponte* reconsidered OCLI's motion to dismiss after declaring a mistrial. Without any evidence against OCLI, dismissal was not only proper, it was required.

IV.

CONCLUSION

Plaintiffs brought suit against OCLI with no factual basis to support their claims, and failed to discover any factual basis upon which to proceed after five

years of litigation. Plaintiffs' hypothesis that OCLI must have disposed of chemicals at 99 Frances Street or 1143 Briggs Avenue simply because at some point in the past it used some of the same chemicals found at in the groundwater at these sites was not evidence but mere conjecture made without any supporting foundation. OCLI was entitled to a dismissal of the case against it, as all that plaintiffs put before the trial court were bare allegations of wrongdoing without any admissible supporting evidence, and they have failed to show that the trial court abused its discretion in excluding this inadmissible evidence and in dismissing OCLI from the case.

For the foregoing reasons, OCLI respectfully requests that this Honorable Court deny plaintiffs' appeal in its entirety and affirm OCLI's dismissal.

Dated: October 25, 2007 COLLETTE ERICKSON FARMER & O'NEILL LLP

By: _____
Robert Scott Lawrence

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OPTICAL COATING LABORATORY, INC.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that all text in the attached Respondent Optical Coating Laboratory, Inc.'s Brief used a 13-point proportionately spaced font and contains 13,860 words.

DATED: October 25, 2007

Respectfully submitted,

_____

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PROOF OF SERVICE

Case Name: Carla M. Clark, et al. v. Optical Coating Laboratory, Inc.
Court Case No.: 1st App. Dist. Nos. A115399, A115445, A115474, A116164 & A116901

I am employed in the City and County of San Francisco, California. I am over the age of eighteen (18) years and am not a party to the within cause; my business address is 235 Pine Street, Suite 1300, San Francisco, California 94104. On the date hereon, I served the foregoing document, described as:

RESPONDENT OPTICAL COATING LABORATORY, INC.'S BRIEF RE APPEAL FROM ORDER OF DISMISSAL

on the following:

PLEAS SEE THE ATTACHED SERVICE LIST

____ **(By Mail)** By causing a true copy of said document(s), enclosed in a sealed envelope addressed as above and with postage thereon fully prepaid, to be placed in United States mail at San Francisco, California.

_X_ **(By Federal Express)** By causing a true copy of said document(s), enclosed in appropriate packaging and addressed as above and with delivery fee thereon fully prepaid, to be delivered to a Federal Express station, where said package was routinely accepted for next-day delivery.

____ **(By Personal Service)** By causing a true copy of said document(s), enclosed in a sealed envelope and addressed as above, to be hand-delivered.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 26, 2007**, at San Francisco, California.

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