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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINDA PARKER PENNINGTON, et al., Plaintiffs, v. **TETRA TECH, INC., et al.,** Defendants.	**Case No.: 3:18-cv-05330-JD** ***PENNINGTON* PLAINTIFFS' OPPOSITION TO DEFENDANTS TETRA TECH EC, INC., TETRA TECH, INC., ANDREW BOLT AND WILLIAM DOUGHERTY'S MOTION FOR SUMMARY JUDGMENT** Judge: Hon. James Donato Ctrm: 11, 19th Floor Date: November 6, 2025 Time: 10:00 a.m.

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I. INTRODUCTION

Defendants Tetra Tech, Inc., Tetra Tech EC, Inc., and its executives (collectively, "Tetra Tech") harmed Plaintiffs by perpetrating a wide-scale environmental cleanup fraud that falsely led Plaintiffs, homeowners at the Hunters Point Naval Shipyard ("HPNS" or "Shipyard"), to believe that the Shipyard was safe; that radioactive sources had been removed; that there would be a short timeline for community businesses to arrive; and that there would be access to public parks, schools, shops, restaurants, and public transportation. The discovery of widespread fraud perpetrated by Tetra Tech caused other people to stop development and halt investment in the area, as no one was sure to what extent the contamination still persisted.

Plaintiff homeowners suffer from living on a site infested by Tetra Tech's fraud. Plaintiffs suffered serious damage to market appreciation on their homes as a result of this stigma as well as non-economic damages resulting from the inconvenience, grief, anxiety, humiliation, emotional distress, and loss of enjoyment of life caused by Tetra Tech's fraud, including in some cases, fear of cancer. This Court's description of the case when sentencing one of Tetra Tech's employees to federal prison is an example of this stigma: **"There is a neighborhood in San Francisco that is contaminated with radioactivity. Everybody in the world of common knowledge knows that that is a bad and dangerous thing."** Ex. A (Rolfe Sentencing Tr. 19:15-17).

In this *fourth* Motion for Summary Judgment, after failing to raise the issue in three previous motions, Defendants move primarily on the newly interjected claim that the Price-Anderson Act ("PAA") preempts Plaintiffs' state-law claims. Defendants also claim that Plaintiffs' state-law claims fail for lack of evidence. Defendants are wrong and only delay resolution of this case. Defendants' PAA arguments fail because Defendants ask this Court to recharacterize the claims as arising under the PAA, despite Defendants' *own arguments* that Plaintiffs' claims do not meet the requisite pleading standards for a PAA claim. Because they are not PAA claims, Plaintiffs' claims proceed under state law. As a jury can find for Plaintiffs on Plaintiffs' remaining claims, summary judgment should be denied.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when there is "no genuine dispute as to *any* material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). All inferences "must be drawn in the light most favorable to the nonmoving party." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). "Put another way, if a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied." *Id.*

III. STATEMENT OF FACTS

A. TETRA TECH PERPETRATED WIDESPREAD FRAUD AT HPNS

There is little dispute that Tetra Tech engaged in fraud at HPNS. The only dispute is how widespread it was, how many Tetra Tech employees engaged in it, and exactly how far up the corporate ladder it went. Each of these is a classic question of fact. For the purposes of summary judgment, the undisputed facts are sufficient to show that Tetra Tech is liable for the fraud it engaged in. This Court was directly involved in overseeing the criminal proceedings of two Tetra Tech employees. Discovery has substantiated Tetra Tech's fraudulent soil sample swapping and falsification, data manipulation, and issuance of public statements furthering the fraud.

1. Soil Swapping and Falsification

Whistleblower Anthony Smith stated in his declaration that in 2011 and 2012, Tetra Tech employees switched real samples with fake clean soil "pretty much every day" for a total of "between 800 and 1000 times." Ex. B (A. Smith Decl. ¶ 20). By fraudulently attempting to convince others that the soil at HPNS was not contaminated, Tetra Tech could "finish" its remediation more quickly and with less expense, pocketing the difference and leaving the Shipyard and San Francisco residents with the ramifications. Ex. C (G. Joyce Tr. 241:4-7).

The Nuclear Regulatory Commission (NRC) investigated and found deliberate falsification of soil sample data. An April 2014 report by Tetra Tech detailed how the company was caught submitting false soil samples to the U.S. Navy in an apparent effort to hide contaminated soil. The report concluded that the persons listed as the sample collectors on the chain-of-custody forms, either by themselves or in conjunction with others, collected soil samples in areas outside the designated survey units." Ex. D (Tetra Tech, *Investigation Conclusion Anomalous Soul Samples at Hunters*

Point Naval Shipyard, Revision 1, April 2014, at 18) [hereinafter Tetra Tech Investigation Conclusion]. We now know that the fraud was much worse than what was found by the NRC or admitted by Tetra Tech.

2. Data Manipulation

Tetra Tech employees have confirmed that data manipulation was widespread at HPNS. George Chiu, a health physicist who collected and analyzed data at HPNS, acknowledged that there were several instances of "duplicated data" in the measurements collected from two buildings at HPNS. Ex. E (G. Chiu Dep. 22:15-16; 505:8-22). Chiu also acknowledged that data on hundreds of samples collected for at least two buildings at HPNS was "falsified." *Id.* 545:6-13; 546:14-17; 547:5-14. Thorpe Miller, a Tetra Tech employee tasked with investigating data discrepancies, acknowledged that he "came across data discrepancies in other locations" and was "sure there's more" instances of discrepancies in building scan information. Ex. F (T. Miller Dep. 129: 7-19, 131: 1-8). Chiu testified that they "possibly don't have all the data from that time period, there could be other samples" with cesium 137 exceedances at HPNS. *Id.* 53:7-14.

When presented with copies of the data collected at HPNS, even high-ranking Tetra Tech employees agree that the data appeared to be duplicated. Ex. G (A. Bolt Dep. 579:19-580:1); Ex. H (W. Dougherty Dep. 488:8-489:9). Tetra Tech did not have any controls in place to identify or prevent data duplication fraud. Ex. I (E. Abkemeier Dep. 225:12-22). This testimony aligns with the testimony of other employees that Tetra Tech leadership encouraged technicians to "remove certain statistics" that were problematic for the company, *Id.* 18:1-14, and that Project Manager William Dougherty demonstrated hostility toward individuals who raised questions about suspicious data, *see* Ex. J (M. Slack Dep. 261:23-262:14).

3. Public Statements

In April 2018, a few months after Tetra Tech employees were sentenced by this Court to federal prison, Tetra Tech hired a public relations firm to publicly broadcast statements to the HPNS community including, "We stand behind our work at Hunters Point Shipyard" and that Tetra Tech's work was meant to benefit future residents at Hunters Point. Ex. K (D. Batrack Letter to L. Duchnak, April 24, 2018) ("D. Batrack Letter") at 2. Tetra Tech CEO Dan Batrack said, "We have worked to make this site . . . safe for community members and residents." *Id.* at 1. Mr. Batrack further assured the homeowners, "We are proud of Tetra Tech's professionalism . . . and are committed to ensuring the safety of the Hunters Point community." *Id.* at 2.

These comments stood in stark contrast to the reality which was articulated by Representative Nancy Pelosi, who in a July 2018 statement said, "The massive manipulation and falsification of data by Navy contractor Tetra Tech EC has left an unacceptable cloud of fear and doubt over the Hunters Point Community." Ex. L (Rep. Nancy Pelosi, Press Release, *Pelosi Sends Letter to EPA and Navy OIGs Calling for Immediate Investigation and Briefing of Tetra Tech EC's Failed Hunters Point Shipyard Clean-Up*, July 30, 2018) [hereinafter Rep. Pelosi Press Release].

The first of the *Pennington* cases was filed within days of Rep. Pelosi's announcement calling for an immediate investigation by the Offices of Inspectors General of the EPA and Navy of Tetra Tech EC's failed HPNS cleanup. After justifiable outrage from Shipyard residents, CDPH agreed to perform a Gamma scan survey of Parcels A-1 and A-2. On September 7 2018, CDPH discovered a *radioactive naval deck marker* 10 inches below the surface at the corner of Galvez and Donahue Streets, and in February 2019, CDPH released their final report of their findings during the Parcel A-1, Health and Safety Survey, which states "In addition to the naturally occurring potassium-40 that was found, CDPH also detected a radium-containing navy deck marker." Ex. M (CDPH Parcel A-1, Health and Safety Survey, February 5, 2019).

The deck marker, which was buried under approximately 10 inches of soil, had a radiation reading of 0.09 mrem/hr on soil surface. Dr. Kathryn Higley, designated by Tetra Tech as a non-retained expert, testified in her deposition that the radiation readings for this object were 50 times above background. Ex. N (K. Higley Dep. 223:8-9). In light of the discovery of a radioactive source on Parcel A, the likelihood that additional radiation sources could be found under the Shipyard homeowners' homes remains unknown due to the gargantuan costs that adequate re-testing would require. This is not even the latest concerning finding revealed by additional testing. On October 30, 2025, just four days before filing of this motion, the City of San Francisco Department of Public Health (SFDPH) issued a letter expressing that SFDPH is "deeply concerned" about an exceedance of plutonium-239 (Pu-239) detected by the Navy at HPNS in November 2024 and reported to SFDPH *nearly a year later* in October 2025. Ex. OO (SFDPH Letter to Navy Representatives, October 30, 2025).

B. TETRA TECH'S FRAUD WAS DIRECTED BY MANAGEMENT

Tetra Tech's fraud was directed by management, including project manager Bill Dougherty and assistant project manager Richard Weingarz. *See Ex. O (*A. Bolt 30(b)(6) Dep. 144:4-6) (identifying Dougherty as having a management role at Tetra Tech); Ex. P (R. Weingarz Tr. 102:5-20) (identifying Weingarz as having a management role at Tetra Tech). Executive-level employees, such as company president Andrew Bolt and CEO Dan Batrack, affirmed the actions of lower-level actors and perpetuated a culture of pressure and retaliation. Ex. Q (D. Batrack Tr. 304:23-305:6) (asserting that he is still "proud of" Tetra Tech's work at HNPS); *see also Ex. I (*E. Abkemeier Tr. 519:14-24) (affirming that Bolt and Dougherty both "encouraged, asked, or suggested" that he compromise his ethics); Ex. R (S. Andrews Tr. 321:2-11) (affirming that "the culture instilled by Tetra Tech was to cover up bad RAD practices"); Ex. J (M. Slack Dep. 261:23-262:13) (reporting "essentially getting bullied by the project manager for the company," Dougherty).

Tetra Tech employees acknowledged that fraudulent sampling practices were driven by pressure from management. *See Ex. R (*S. Andrews Tr. 319:4-7) ("Q. You believe that the bad RAD practices that you observed went up to at least Bill Dougherty within Tetra Tech; is that correct? A. I do believe he knew."); Ex. C (G. Joyce Tr. 244:10-20) (explaining that he did not believe the fraudsters acted independently, but that he "believe[d] that there was a direction" from someone above Rolfe and Hubbard). Tetra Tech employees repeatedly asserted that they received direct instructions from Dougherty and other site management to falsify samples, to ignore problematic data, and to keep quiet about their concerns:

- Technician Susan Andrews was instructed to destroy "screaming hot survey results" and felt pressure to keep her mouth shut. Ex. R (S. Andrews Tr. 321:2-11).
- Radiation Safety Officer Erik Abkemeier remembered Dougherty and others "encouraging [him] to remove certain statistics because they didn't work in Tetra Tech's favor." Ex. I (E. Abkemeier Tr. 518:1-14).
- Lead technician Carey Bell reported that "managers made it clear to [him] that they did not want to let the Navy know that this parcel that was supposed to be clean was radiologically contaminated." Ex. S (C. Bell Tr. 117:18-25; 118:1-4).

- Technician Joseph Cunningham reported that management pressured technicians to finish work as quickly as possible. Ex. T (J. Cunningham Tr. 154:17-24). He was told by site superintendent Dennis McWade that "we were not remediating the whole goddamn site." *Id.* 155:9-16.

- Dougherty directed multiple technicians to dig for green soil, because they knew it would not be contaminated. *See e.g.* Ex. T (J. Cunningham Tr. 116:24-25; 117:1) ("if it's green, it's clean"); Ex. P (R. Weingarz Tr. 254:20-22; 255:2-5) (acknowledging that "clean is green" indicated that the green, "serpentine rock-looking chips normally came in with lower numbers," but denying ever hearing Tetra Tech employees use "that expression exactly").

- Dougherty directed RAD technician Jeffrey Rolfe to get soil "off to the side" if previous samples did not come up clean, which Rolfe understood to mean "he wanted to try to and get it – a survey unit to come up clean." Ex. U (J. Rolfe Tr. 581:8-19).

- Dougherty also told Jeffrey Rolfe that Tetra Tech was "looking for a scapegoat" after evidence of fraud reported to the Navy. Ex. U (J. Rolfe Tr. 504:3-5).

President Bolt acknowledged that the project manager and Tetra Tech EC would bear some accountability for hypothetical soil tampering. Ex. G (A. Bolt Tr. 459:8-25; 460:1-11). And "no corrective action was taken at all on anybody in the rad group until—until after the guys confessed." Ex. C (G. Joyce Tr. 252:2-5). Indeed, Dougherty thought Rolfe and Hubbard "did great work" up until the time fraud charges were brought against them, Ex. H (W. Dougherty Tr. 176:13-178:7)

C. THE FRAUD FINANCIALLY BENEFITTED ONLY THE COMPANY, NOT THE WORKERS

Tetra Tech employees had no independent incentive to fake clean soil samples. The fraud sped up remediation efforts and shortened the project, but employees were paid on a per diem basis. *See* Ex. U (J. Rolfe Tr. 70:19-21). The individuals investigating the sampling fraud "definitely didn't believe that the techs would have done it because if the techs did anything, they would have gone and gotten contaminated soil, which would prolong the job." Ex. C (G. Joyce Tr. 159:13-19).

Tetra Tech technicians went along with the fraud for fear of their livelihoods. Ex. R (S. Andrews Tr. 321:12-19) (she "would have been fired" if she did not comply with instructions to "keep [her] mouth shut"); Ex. T (J. Cunningham Tr. 154:12-16) ("if you don't do it, they are going to find someone who would"); *Id.* at 267:22-25; 268:1 ("we would not be working there if you didn't go along with what was going on"); Ex. V (C. Taylor Tr. 141:23-25; 142:1-8) (affirming that "every time" he raised radiological concerns to Dougherty, "he was replaced and sent somewhere else to work”). As one Tetra Tech employee put it, “We were directed to do what we did.” Ex. T (J. Cunningham Tr. 162:8-12).

D. TETRA TECH KNEW ITS WORK WAS DONE FOR THE BENEFIT OF FUTURE RESIDENTS ON THE SITE

Tetra Tech and its employees understood that the work they were performing on the site was for the benefit of future residents. Susan Andrews, a radiological technician involved in the cleanup displayed this knowledge when she said, **“I was told . . . to keep my mouth shut because I didn't live there. . . . [W]hy should you care about anybody that lives in San Francisco because you don't live here.”** Ex. R (S. Andrews Tr. 212:2-8). “It just didn't compute in my head, this is -- this is radiation, it's dangerous and toxic waste all over the place and you're just blowing it off so we can make money? Insane.” Ex. R (S. Andrews Tr. 320:22-321:1). Tetra Tech’s remediation team knew that the site was set to be used for residential development—they knew that “kids would be living in the -- the area.” Ex. U (J. Rolfe Tr. 117:16-118:1-)3. And Tetra Tech executives asserted that the remediation was meant to make HPNS “safe for community members and residents.” Ex. K [D. Batrack Letter at 1].

E. SITE DEVELOPMENT HAS BEEN DELAYED

Because of the shadow cast by Tetra Tech’s fraud, development of further construction projects at the Shipyard is long-stalled and developers’ plans for future sales are long-delayed. Developers have testified in this litigation that timetables have been pushed back at least fifteen years, including FivePoint Chairman Emile Haddad who said, “Well, we have a project now that is on hold. And based on the latest schedules that at least I've seen from the Navy, things have been pushed back probably 15 years.” Ex. W (E. Haddad Dep. 174:14-22).

IV. <u>ARGUMENT</u>

A. PLAINTIFFS’ PERMANENT NUISANCE CLAIMS SURVIVE SUMMARY JUDGMENT

Defendants’ fraudulent conduct created—and continues to further—a widespread public perception and stigma that radiological and other contaminants continue to exist at the Shipyard and under Plaintiffs’ homes. “Liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." *City of Modesto Redevelopment Agency v. Superior Ct.*, 119 Cal. App. 4th 28, 38 (2004), and here the record is clear: Tetra Tech's fraud created the nuisance. This nuisance manifests as a "cloud of fear and doubt," *see Ex. L (*Rep. Pelosi, Press Release), that has diminished Plaintiffs' property values and interferes with Plaintiffs' ability to use and enjoy their homes.

B. Diminution in Value is Cognizable in Stigma Cases

Uncertainty as to the continued existence of harmful waste on a property and the persisting stigma from the same are sufficient factors to find non-abatable stigma and thus recovery of permanent nuisance damages against the party that created that uncertainty. This is supported by the Ninth Circuit's decision in *Bartleson v. United States*, 96 F.3d 1270 (9th Cir. 1996). In that case, owners of large ranches adjacent to a military base brought claims for nuisance related to misfired artillery shells landing on their property. *Id.* at 1275. "The main injury alleged by the plaintiffs was the diminution in their property values due to the stigma caused by the past shelling of their properties and the uncertainty regarding future shelling and the *possible* presence of unexploded shells on the properties." *Id.* (emphasis added). The uncertainty of the continued possible presence of unexploded ordinance was a key factor in finding that stigma nuisance permanent and non-abatable. *Id*. at 1276.

Defendants cite *Oliver v. AT&T Wireless Servs.*, 76 Cal. App. 4th 521, 534 (1999) for the proposition that diminution in value without interference with the present use of property does not constitute a nuisance. Ex. X Defendants' Motion for Summary Judgment ("Mot.") at 9. *Oliver* involved a loss-of-view nuisance claim relating to the construction of a cell phone tower, where "the only allegation in support of plaintiffs' nuisance claim is that the new tower's *appearance* interferes with their enjoyment of the property." *Id*. Far worse than an unsightly view, Plaintiffs here seek redress for the stigma that radiological and other contaminants may continue to exist on their properties as a direct result of Tetra Tech's fraud, and because this same stigma interferes with Plaintiffs' use and enjoyment of their homes.

Tetra Tech's fraud created permanent uncertainty as to the extent of continued presence of toxic contaminants at HPNS, and this stigma permits Plaintiffs to recover damages for diminution in property value. Just as the *Bartleson* court found that "the stigma caused by the location of the plaintiffs' property near a shelling range that has a history of misfirings will likely not be abated unless the range is closed completely," *id.* at 1276, the stigma resulting from Tetra Tech's fraud will not be abated until the site is fully remediated, despite the fact that this is impossible because homes are already built there and stigma is not a physical condition directly capable of remediation.

The extent and magnitude of the stigma caused by Tetra Tech's fraud and its impact on Plaintiffs' property values is a question for the finder of fact, not a matter for summary judgment.

1. Defendants' Fraud Substantially and Unreasonably Interfered with Plaintiffs' Use and Enjoyment of Their Property

Defendants cite *Koll-Irvine Ctr. Prop. Owners Assn. v. Cnty. of Orange* 24 Cal. App. 4th 1036, 1041 (1994) for the proposition that "[f]ear of a catastrophic accident" does not constitute an interference with the use and enjoyment of … land" to argue that the Plaintiffs here have not suffered any harm to the use and enjoyment of their properties. This case is inapposite. The core of Plaintiffs' claims are not fears of a catastrophic accident, but harms flowing from the stigma generated by a government contractor that took millions of dollars to remediate a site contaminated with radiation and engaged in widespread fraud. "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance." Prosser & Keeton, Torts (5th ed. 1984) § 87, p. 620 (fns. omitted). Plaintiffs are not required to show that the levels of contamination on their properties are a risk to health. Tetra Tech cites *Rose v. Union Oil Co. of Cal.*, 1999 WL 51819, at 6 (N.D. Cal. Feb. 1, 1999) as requiring such a showing; however, *Rose* cites the definition of "nuisance" in California as encompassing not just "anything which is injurious to health . . ." but also that which "is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . ." *Id.* at 5 (citing Cal. Civ. Code Sec. 3479).

Living at the site, Shipyard homeowners are daily disturbed in their enjoyment of their property as a result of Tetra Tech's fraud:

- "I don't feel like we can trust any of the cleanup -- if there was fraud in one portion of the cleanup, how do we -- how can we trust any of the process?" Ex. Y (C. Morgan Tr. 107:7–10).

- "The stress of the possibility of cancer is like a shadow hanging over me constantly." Ex. Z (T. Lupton M.D. Tr. 76:7–8).

- "I spent my pregnancy worrying about what the toxic chemicals at The Shipyard were doing to the baby. Now that my son is a toddler, I worry about his health and the future of his brain, endocrine system, and all other aspects of him." Ex. AA (V. Ellington Tr. 92:20–93).

- "Every time they get an illness or every time they get a nose bleed or every time someone's sick, it's always, okay, is this a direct correlation of living here? Is this direct correlation of this construction happening across the street?" (Ex. BB T. Ellington 106:8–13).

Shipyard Homeowners are regularly confronted with the realities of the public perception of the safety of their homes, beyond the daily reminder that they have lost money:

- "Neighbors, you know, my partner at the time -- joked that I was living in a toxic waste site in front of me and friends; that we were glowing." Ex. CC (C. Davidson Tr. 77:25–78).

- "When we told people that we were selling it, they would sort of say, Oh, well, it's out there where the nuclear stuff is, or they would laugh about that and say, Well, good luck selling that." Ex. DD (J. Burack Tr. 86:24–87).

- "Then after I heard everything and after my property tax kept going up and up while the value of property is going down, and then my friend, his godmother, said, 'Karla, I'm not coming to visit you.' She doesn't want to be exposed to any of what's going on there." Ex. EE (K. Bravo Tr. 31:18-23).

- "A friend of mine, who was unaware that I lived in the Shipyard, said some very derogatory things. They said something, again, to the effect of you would have to be a fucking idiot to move there." Ex. FF (J. Gosnell DTr. 141:20–142:1).

Based on Plaintiffs' testimony, a reasonable jury could find that Plaintiffs' use and enjoyment of their property has been unreasonably interfered with.

"The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account." *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal. 4th 893, 938 (1996). This analysis is notably absent from Defendants' brief. In both cases Tetra Tech relies on to attack Plaintiffs' nuisance claims, the conduct at issue had at least minimal social utility. *Koll-Irvine*, 24 Cal. App. 4th at 1039 (airport fuel tanks); *Oliver*, 76 Cal. App. 4th 521, 534 (cell tower). There is no social utility in allowing massive government contractors to perpetrate fraud. *See City & Cnty. of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936, 1000 (N.D. Cal. 2022) ("There is no social utility in violating a federal regulation designed to protect the public from harm.").

A jury could find an unreasonable interference with Plaintiffs' enjoyment of their property.

C. The Nuisance is Not Reasonably Abatable

The nuisance created by Tetra Tech's fraud is not reasonably abatable with respect to Shipyard homeowners —that is, it cannot be "remedied at a reasonable cost by reasonable means." *Mangini v. Aerojet-Gen. Corp.*, 12 Cal. 4th 1087, 1103 (1996). This is because (1) the nuisance created by Tetra Tech's fraud is a stigma of uncertainty about the continuing levels of hazardous contamination at HPNS which cannot simply be abated, and (2) because, unlike the rest of HPNS, the homeowners' properties are already built with homes and cannot be remediated at a reasonable cost by a reasonable means. Dr. Kathryn Higley testified that Plaintiffs' homes would all have to be destroyed in order to be certain of the extent of remaining contamination at Parcel A. Ex. N (K. Higley Tr. 212:21-25).

Hazardous waste contamination with uncertain extent, uncertain qualities, and unascertainable depth and costs for decontamination is not reasonably abatable. *Mangini*, 12 Cal. 4th at 1103. In *Mangini*, Defendants dumped and burned toxic solid fuel components on Mangini's ranch, but, as here, the full extent of that contamination was not known in large part due to Defendant's own faulty testing. *Mangini*, 12 Cal. 4th at 1092. Indeed, the California Supreme Court found in *Mangini* that the hazardous waste contamination at issue was not reasonably abatable due to the uncertainty surrounding the extent of contamination, the depth of decontamination required, and the unascertainable costs, which were estimated to be millions of dollars. *Mangini*, 12 Cal. 4th at 1103. Accordingly, the *Mangini* court found that "the evidence clearly showed that no one knows how bad the contamination is or how to remedy it—indicating an absence of substantial evidence of abatability." *Id.* at 1097.

On these facts, the *Mangini* court concluded that the nuisance was permanent and not abatable and that the result of the uncertainty regarding extent of the contamination necessarily makes it uncertain whether a nuisance is reasonably abatable. *Id.* at 1103. Similarly, the limited, non-Tetra Tech re-testing that has been done on Parcel A has already revealed radiological items which further call into question the reliability and safety of Tetra Tech's cleanup, contrary to Tetra Tech's public proclamations. As in *Mangini*, Plaintiffs here remain uncertain as to the extent, qualities, depth, and costs for reasonable decontamination. Tetra Tech's fraud itself created this "cloud of uncertainty about the cleanup," a stigma, that cannot be abated through physical cleanup efforts. Ex. GG (R. Wilson Tr. 35:11–13).

As is clear from the market reaction to the widespread revelation of Tetra Tech's fraud, *see Ex. HH (*Reynolds Supp. Report (July 2025) ¶13, the public proclamations of Rep. Pelosi, and numerous statements of Plaintiffs on record in this case, *see* Ex. II *(*U. Brown Tr. 74:7-12); Ex. EE (K. Bravo Tr. 147:21-22); Ex. JJ (M. Vo Tr. 52:12-16),Tetra Tech's fraud has created a meaningful and measurable stigma that impacts Parcel A homeowners, regardless of the actual magnitude of residual contamination. This stigma manifests itself in community members' ongoing suspicions that radiological and other toxic contaminants continue to exist at the site. Tetra Tech compounded this stigma by making false and misleading statements that further damaged public perception about the reliability of cleanup efforts performed at the site.

This case's similarities to *Mangini* are sufficient for this Court to deny this motion, but the facts here are substantially worse than in *Mangini*, as the nature of Tetra Tech's fraud here is one of the main causes of the uncertainty. Many of Tetra Tech's employees destroyed evidence related to the cleanup, including soil samples that had tested positive for radiation near the location where homes were built. *See, e.g., Ex.* S. R (Andrews Dep. 321:2-11) (instructed to destroy "screaming hot samples"); Ex. B (A. Smith Decl. ¶ 20) (switched fake clean samples for contaminated samples "between 800 and 1000 times.").

D. PLAINTIFFS' NEGLIGENCE CLAIMS ARE COGNIZABLE

Plaintiffs have presented cognizable theories of recovery for both economic and noneconomic damages flowing from Tetra Tech's negligence.

1. Plaintiffs are Permitted to Recover Economic Damages

The California Supreme Court has held that fraud or a special relationship with the plaintiff are both conditions sufficient to overcome the typical bar on negligence damages for "pure economic loss." *See e.g. J'Aire Corp. v. Gregory*, 24 Cal. 3d 799 (1979) (allowing recovery for economic losses where a "special relationship" exists between the parties); *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979 (2004) (allowing plaintiffs to pursue tort claims for economic losses in cases involving fraud).

a. Special Relationship

Tetra Tech's knowledge of the purpose of their work for the benefit of Parcel A residents creates a "special relationship" between Parcel A residents and Tetra Tech that provides a direct avenue for recovery in tort. *See e.g. J'Aire Corp. v. Gregory*, 24 Cal. 3d 799 (1979). Where a "special relationship" exists between the parties, a plaintiff "may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." *Id.* at 804.

A special relationship exists when "the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." *Southern California Gas Leak Cases*, 7 Cal. 5th 391, 400 (2019) (finding no special relationship where an industrial accident harmed an indeterminate class of plaintiffs). The "special relationship" is determined by factors such as the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. *North American Chemical Co. v. Superior Court*, 59 Cal. App. 4th 764 (1997). These factors do not warrant a "rote application" but rather require a "comprehensive look at the 'sum total' of the policy considerations before us." *Gas Leak Cases*, 7 Cal. 5th at 399.

Extent to Which HPNS Clean Up Was Intended to Benefit Pennington Plaintiffs. In *Biankanja*, the defendant improperly drafted a will, leaving the intended beneficiary with only a fraction of the inheritance she was due. *Biakanja v. Irving*, 49 Cal. 2d 647, 651 (1958). That behavior was "not only negligent but was also highly improper," considering that the execution of a will was "an important transaction requiring specialized skill." *Id.* The court concluded that "[s]uch conduct should be discouraged and not protected by immunity from civil liability." *Id.* Applying similar considerations, in *J'Aire Corp. v. Gregory*, the court held that plaintiffs whose business was located in a building undergoing renovation pursuant to a contract between defendants and the county had a special relationship with defendants, because defendants' performance "was intended to, and did, directly affect" plaintiffs. 24 Cal. 3d 799 at 804 (1979).

Likewise, Tetra Tech engaged in an important and highly specialized transaction—the remediation of a contaminated shipyard—and Plaintiffs were the intended beneficiaries. Although *Pennington* Plaintiffs are not in contractual privity with Tetra Tech, Tetra Tech employees—from low-level technicians to the CEO—knew that HPNS was being cleaned up in order to open the site up for residential and commercial development. *See e.g. Ex. G (*A. Bolt Tr. 601:7-11) ("there were discussions that it may be getting developed for residential use"); Ex. K (D. Batrack Letter at 1) (acknowledging Tetra Tech's work to make HPNS safe for community members and residents); Ex. U (J. Rolfe Dep. 117:16-118:1-3) (admitting to knowing the site would be used for residential development). The "end and aim" of the remediation was to render HPNS usable for development, including for residential housing. *See Biankanja*, 49 Cal. 2d at 649. The remediation directly affected Plaintiffs. *See J'Aire*, 24 Cal. 3d at 804. The fraud perpetrated at the site was not just negligent, but highly improper. *Id.* at 651. As such, it should not be protected from civil liability.

Questions of intent are matters for a jury and are not appropriate for summary judgment. Here, a reasonable jury could find that the clean-up was intended to benefit Plaintiffs.

Certainty of Plaintiffs' Injuries. In *J'Aire* and *Bainkanja*, plaintiffs' injuries were certain and measurable. The business owner in *J'Aire* lost one month of revenue, 24 Cal. 3d at 804, and the beneficiary in *Bainkanja* lost most of her promised inheritance, 49 Cal. 2d at 651. *Pennington* Plaintiffs' damages are similarly concrete, and Plaintiffs have presented expert evidence calculating the diminution in the value of their homes. *See Ex. HH (*Reynolds Supp. Report (July 2025).

Foreseeability of Harm. Improper remediation of toxic waste will clearly cause foreseeable harm. As this Court noted, "There is a neighborhood in San Francisco that is contaminated with radioactivity. Everybody in the world of common knowledge knows that that is a bad and dangerous thing." Ex. A (Rolfe Sentencing Tr. 19:15-17).

Connection Between Tetra Tech's Fraud and Plaintiffs' Injuries. Plaintiffs have credibly testified over and again to the stigma created by the fraudulent clean-up at HPNS. See supra at 10. The nexus between Tetra Tech's widely-publicized fraudulent remediation and decreased property value is obvious and could be found by a reasonable jury.

Moral Blame and Preventing Future Harm. The public policy considerations that have cut against recovery for economic losses in other would-be special relationship cases simply do not exist here. True, remediation work is a valuable service that should be encouraged. But the fraudulent clean-up at issue here obviously should not. If the Restatement approach described in the *Gas Leak Cases*, is concerned with threatening defendants with "exaggerated pressure to avoid an activity altogether," then good—there should be exaggerated pressure to altogether avoid fraudulent clean-ups of hazardous waste. 7 Cal. 5th at 407.

Moreover, the harmed class in this case is self-limiting. Unlike the *Gas Leak Cases*, there are "clear special bounds within which to cabin" these claims. *Id.* at 408. In the *Gas Leak Cases*, plaintiffs proposed a 5-mile radius for harms stemming from the gas leak, but there was no clear basis for that delineation. *Id.* A primary reason the court found no special relationship there was the bare fact that it did not see a way to limit the losses. *Id.* Here, Plaintiffs own property *within* HPNS. The demarcation line is one drawn by Defendants and the Navy when they parceled out HPNS for remediation. There is no risk of indeterminacy here: the class of harmed plaintiffs is clearly circumscribed within Parcel A.

The policy considerations at the heart of the special relationship test weigh heavily in favor of Plaintiffs. The consequences at issue here are direct, not remote, and are not at all "out of proportion to the magnitude of the defendant's wrongful conduct." *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 808 (1979). Rather, the "willful failure" of Tetra Tech operate with any level of diligence supports imposing a special relationship in this case. *See id.* at 805.

b. Fraud Exemption

The California Supreme Court in *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th

979 (2004) emphasized that fraud claims are exempt from the economic loss rule due to the intentional nature of the misconduct. *See, e.g., Rattagan v. Uber Technologies, Inc*., 17 Cal. 5th 1 (2024); *see also Lazar v. Superior Court*, 12 Cal. 4th 631, 646 (1996) ("a plaintiff advances the public interest in punishing intentional misrepresentations"). Courts also examine foreseeability in this analysis. The foreseeability of the economic harm and the nexus between the defendant's conduct and the plaintiff's injury determine the applicability of the economic loss rule. *See Rattagan*, 17 Cal. 5th at 20.

Here, the record is replete with evidence that Tetra Tech and its employees understood that the work they were performing on the site was for the benefit of new residents. For example, in 2004, Tetra Tech **co-authored** a Finding of Suitability for Transfer ("FOST") Ex. KK, which facilitated transfer of Parcel A to private ownership for residential use. In authoring the FOST—upon which not only multiple government agencies relied—but also on which the City and County of San Francisco (and subsequently developers) made representations and assurances to residents, Tetra Tech knew that the work they were doing on Parcel A was intended to be for the benefit of future residents and, thus, any economic harm flowing from Tetra Tech's work on the site would be foreseeable and flow directly to future purchasers and residents of Parcel A.

Further, an April 2014 report by Tetra Tech detailed how the company was caught submitting false soil samples to the U.S. Navy in an apparent effort to declare the soil free of radiological contamination when it may not have been. *See Ex. D (*Tetra Tech Investigation Conclusion). In addition, this Court previously oversaw the criminal proceedings of two Tetra Tech employees who were sentenced to prison for their role in the fraud, and one of those felons, Stephen C. Rolfe, admitted that he committed the fraud at the direction of his supervisors, Ex. A (Rolfe Sentencing Tr., 19:15-17). The resulting harms from Tetra Tech's fraud were both foreseeable and closely tied to Defendant's conduct at the Shipyard.

2. Plaintiffs are Permitted to Recover Non-Economic Damages

As a direct result of the now-widespread knowledge that Tetra Tech was engaged in pervasive fraud in the clean-up of HPNS, many *Pennington* Plaintiffs live with mental anguish and fear of developing cancer from the contaminants Tetra Tech was tasked with remediating. Defendants claim that Plaintiffs have failed to produce sufficient evidence that contamination at the shipyard has significantly increased Plaintiffs' risk of cancer, yet completely ignore that their own fraud, destruction of evidence, and repeated, false public statements is a substantial contributing factor in preventing Plaintiffs' from to obtaining the evidence that Defendants insist is required.

Typically, fear of cancer claims require a showing that plaintiffs will more likely than not develop cancer. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 998 (1993). The California Supreme Court lowered this standard in cases of intentional misconduct, creating an oppression, fear or malice exception "focused on the totality of the circumstances in evaluating a defendant's conduct." *Id.*

In *Potter*, officials who knew about the danger of careless hazardous waste disposal "actively discouraged compliance" with internal policies for hazardous waste disposal, "solely for the sake of reducing corporate costs." *Id.* at 1000. The Court found that "especially reprehensible" behavior sufficient to warrant the application of a lower standard of proof: a significantly increased risk of cancer. *Id.* However, the Court also noted that "certain aggravated conduct may warrant different treatment." *Id.* at 998.

The misconduct in this case is significantly more problematic. Not only did Tetra Tech act "in conscious disregard of the danger to the health or interests of others," *Potter*, 6 Cal. 4th at 999, it obscured and destroyed the evidence that may have enabled *Pennington* Plaintiffs to meet the lowered *Potter* standard. Tetra Tech knew that the radioactive materials they were tasked with cleaning up can pose significant threats to human health, and they destroyed evidence of the same.

This is even more reprehensible than the kind of "aggravated conduct" that warranted different treatment in *Potter*. *Potter*, 6 Cal. 4th at 999. Tetra Tech's fraud created irrevocable uncertainty about the extent of contamination at Parcel A and HPNS. Tetra Tech's own training materials teach that improper soil sampling creates the risk that contamination will persist on the site undetected, creating radiological health hazards. Ex. G (A. Bolt Tr. 612:10-25; 613:6-15). Numerous radioactive items have been found since Tetra Tech left HPNS, and Dr. Kathryn Higley confirmed that there is "always, always the possibility" of finding more contaminated objects. Ex. N (K. Higley Tr. 212:1-2). And, because radiation cannot be detected without specialized equipment, residents of the Shipyards and their children could pick up contaminated objects without ever knowing they were being exposed to radiation. *Id.* 225:4-16. It would be impossible to be certain of the extent of continued contamination at Parcel A without destroying residents' homes and excavating underneath them. *Id.* 212:21-25.

It is a long-established practice to prevent bad actors from gaining legal advantage through fraud. "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). The logic of *Potter* aligns with that principle: "[a]ny burden or consequence to society from imposing liability is offset by the deterrent impact of holding morally blameworthy defendants fully responsible for the damages they cause." *Potter*, 6 Cal. 4th at 998.

Tetra Tech is "morally blameworthy," and it would be a perversion of justice to reward it by requiring Plaintiffs to meet an evidentiary burden made impossible by Tetra Tech's fraud. Therefore, to establish a cognizable negligence claim, Plaintiffs need only establish that their fear of cancer is "reasonable, genuine, and serious in order to recover damages," and a reasonable jury could find this burden met. *Id.*

E. TETRA TECH MADE FALSE AND MISLEADING STATEMENTS

The elements of Plaintiffs' intentional misrepresentation claim are: (1) a misrepresentation; (2) knowledge of falsity (*scienter*); (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) damages. *Broomfield v. Craft Brew All., Inc.*, 2018 WL 4952519, at *12 (N.D. Cal. Sept. 25, 2018). The elements of the negligent misrepresentation claim are the same except that there is no requirement to show *scienter* or intent to induce reliance. *See Small v. Fritz Cos., Inc.* 30 Cal.4th 167, 173 (2003). Plaintiffs have evidence to support all factors of both claims.

In their motion, Defendants' sole argument is that Defendants' misstatements to "government agencies" cannot form the basis for Plaintiffs' claims. Ex. X (Mot. at 19). Defendants rely on *Bily v. Arthur Young & Co.* for the proposition that Tetra Tech's misrepresentations were made to the Navy and other government agencies and not intended to benefit or influence Plaintiffs. But *Bily* ultimately supports Plaintiffs' position. "Under *Bily*, [Tetra Tech Defendants] are liable for (1) negligent misrepresentation if they knew it was substantially certain that [Plaintiffs] would receive the misstatements and (2) intentional misrepresentation if it was reasonably foreseeable [Plaintiffs] would receive the statements." *Murphy v. BDO Seidman*, 113 Cal. App. 4th 687, 702–03 (2003) (citing *Bily v. Arthur Young & Co.*, 3 Cal.4th 370 (1992)); *see also Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1550 (1998) (reversing summary judgment where party making misrepresentation "had *every reason to expect* that" the misrepresentation would be repeated to and relied upon by the party being deceived).

There is plenty of evidence in the record to show that Defendants made statements with false representations and omissions to the Navy and the public regarding its clean-up efforts. For example, Tetra Tech authored the before mentioned FOST report in 2004, knowing and intending that the City and County of San Francisco would rely upon that document and share the representations therein with the developers. There is also plenty of evidence in the record from which a finder of fact could conclude that Tetra Tech was substantially certain and/or that it was reasonably foreseeable to Tetra Tech that its misrepresentations would be shared with the public who would rely upon them in purchasing homes. *See*, *e.g.*, *Ex. R (*S. Andrews Tr. 212:2-8).

Further, there is evidence in the record to show that Tetra Tech's statements were transmitted to Plaintiffs by the City and developers, and that Plaintiffs relied upon those statements. Because there is evidence in the record from which a jury could conclude that Tetra Tech knew that its misstatements would be transmitted to the public, and evidence that Plaintiffs did in fact rely upon those statements in purchasing homes, Tetra Tech's motion should be denied.

F. THE PAA DOES NOT BAR PLAINTIFFS' CLAIMS

On their *fourth* motion for summary judgment, and for the first time in this already seven-years-long litigation, Defendants assert that the Price-Anderson Act (PAA) preempts the entirety of Plaintiffs' complaint and each asserted claim. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210). Plaintiffs' causes of action are not preempted by the PAA, which is only a partial preemption statute and permits state-law claims that do not conflict with the PAA. Moreover, Defendants' arguments (1) conflict with the PAA's broader purpose and detailed indemnification scheme, (2) are procedurally defective, and (3) substantively fail on several accounts.

1. Broader PAA Goals & Purpose

Defendants' arguments and effort to defeat any compensation through this procedural gambit completely contravenes the basic purpose of the PAA to assign liability of covered claims. The PAA exists to provide efficient, equitable, prompt, and certain payments to plaintiffs for covered injuries. United States Nuclear Regulatory Commission, The Price-Anderson Act: 2021 Report to Congress, Public Liability Insurance and Indemnity Requirements for an Evolving Commercial Nuclear Industry (December 2021), at 1-16, 4-2.

Two major purposes underlie the PAA: (1) "to protect the public" and (2) "to encourage the development of the atomic energy industry[.]" 42 U.S.C. § 2210. Defendants' arguments flip the regulatory scheme, trivializing the careful cost-allocation framework designed to ensure a source of funds for victims and ignoring the extensive damages and harm caused by Defendants' fraud. Substantively and procedurally, Defendants' PAA arguments fall short.

2. The PAA Does Not Preempt Plaintiffs' Claims

Defendants note that the PAA is the "exclusive means of compensating victims for any and all claims arising out of *nuclear incidents*." Ex. X (Mot. at 5) (quoting *In re Hanford Nuclear Rsrv. Litig*., 534 F.3d 681, 1009 (9th Cir. 2008) (emphasis added). But Defendants' argue that *Pennington* Plaintiffs' claims do not arise out of a "nuclear incident," which the statute defines as an "occurrence . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). Defendants insist that Plaintiffs have alleged a "nuclear incident" under the PAA, but—at the same time—their motion rests almost entirely on their argument that no facts have been elicited to meet the necessary elements of a PAA claim. Ex. X (Mot. at 1). The PAA "does not preempt and preclude a freestanding state law nuisance claim" when the necessary elements of a PAA claim are not present. *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1103 (10th Cir. 2015) (Gorsuch, J.).

In *Cook*, landowners near a nuclear production facility brought PAA and state-law nuisance claims against the facility operators when their property values plummeted after an FBI raid uncovered evidence of mishandled radioactive waste at the facility. *Id.* 790 F.3d at 1090. At trial, plaintiffs were successful but lost the PAA judgment on appeal. *Id.* On remand, plaintiffs abandoned their PAA claims and proceeded only on state-law nuisance. *Id.* In response, defendants attempted the exact same sort of "judicial jiu-jitsu" Tetra Tech tries here: They asserted that the PAA "embodies a sort of go-big-or-go-home rule of liability" in which recovery is "assured by the full faith and credit of the federal government" for full-blown nuclear incidents, but plaintiffs who allege and do not establish a nuclear incident "are barred from recovery of any kind—even if you can establish a qualifying state law nuisance." *Id.* at 1091-92.

The Tenth Circuit soundly rejected that argument based on a thorough analysis of the text, structure, and history of the PAA. *Id.* at 1095. *Cook* correctly points out that "Congress anticipated the possibility of lesser nuclear occurrences" in its definition of nuclear incident—if there are "occurrences" which cause "bodily injury, sickness, disease, or death" there must also be "lesser occurrences" which do not cause those things. *Id.* After walking through the text, the court concludes: "Where does any of this language—expressly—preempt and preclude all state law tort recoveries for plaintiffs who plead but do not prove nuclear incidents? We just don't see it." *Id.* After considering the statute's structure: "it's hard to conjure a reason why Congress would allow plaintiffs to recover for a full panoply of injuries in the event of a large nuclear incident but insist they get nothing for a lesser nuclear occurrence." *Id.* at 1095-96. And, finally, after reviewing the legislative history: "little in the Act's history suggests an intent to preclude recovery or inhibit the operation of state tort law in cases involving lesser nuclear occurrences that don't give rise to the sorts of injuries and damages involved in more serious nuclear incidents." *Id.* at 1096.

Cook thoroughly addressed Ninth Circuit precedent regarding PAA preemption, acknowledging *Hanford*'s holding that the PAA is the exclusive means for remedying nuclear incidents but noting that the case is silent as to "what happens in the face of a **lesser occurrence**." *Id.* at 1098 (citing *Hanford*, 534 F.3d at 1009) (emphasis added). It similarly disposes of *Dumontier* and *Golden*—cases Tetra Tech relies on heavily—by pointing out that "they cite only *Hanford's* holding that the Act is the exclusive means of compensating victims of nuclear incidents, offering nothing to explain how or why the Act might preclude relief in cases involving lesser occurrences." *Id.* (citing *Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 571 (9th Cir. 2008); *Golden v. CH2M Hill*

Hanford Grp., Inc., 528 F.3d 681, 683–84 (9th Cir. 2008)).[1] Indeed, both *Dumontier* and *Golden* are distinguishable from the facts here and in *Cook*. *Dumontier* dealt with known exposure to cesium-137, 543 F.3d at 569, and *Golden*'s plaintiff had several gallons of radioactive liquid splashed on him, 528 F.3d at 682. Plaintiffs in both cases claimed specific bodily injuries of the type clearly contemplated by § 2014(q), so those courts correctly found that the PAA applied. No one disputes that physical harm is a "jurisdictional prerequisite" under the PAA. *In re Berg Litig.*, 293 F.3d 1127, 1131 (9th Cir. 2002) ("Physical harm to persons or property is thus a jurisdictional prerequisite."). But Defendants themselves argue that "Plaintiffs disclaim physical injury," so that prerequisite is not met. Ex. X (Mot. at 6).

Repeatedly, Defendants insist that Plaintiffs have pled a "nuclear incident" sufficient to state a public liability action and then, in the same breath, argue that Plaintiffs have not presented evidence sufficient to meet the standards of a "nuclear incident" to state a public liability action. Ex. X (Mot. at 5-6). The correct inference is that there simply is *no public liability action*, and, therefore, there is *no basis for preemption* under the PAA. *See, e.g.*, *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325, 340 (D.N.J. 1998) (holding that when "there is no claim for public liability, and without a claim for public liability, there is no federal jurisdiction under Price-Anderson.").

3. Defendants Waived PAA Preemption.

Defendants raised PAA preemption for the first time in the course of more than seven years of litigation in their *fourth* Motion for Summary Judgment. *See* Dkt. 303 (Minute Order noting that "the Court typically does not accept more than one Rule 56 motion from any party"). if the PAA applied to this case—which it does not—it is too late in the litigation for Defendants to raise this defense.

[1] Other cases Tetra Tech relies on provide similarly sparse support for Tetra Tech's propositions. For instance, Tetra Tech cites *Lawson v. General Electric* for its assertion that "nuclear incident" means any alleged radiation exposure "regardless of the size of the occurrence." 140 F.Supp.3d 968, 972 (N.D. Cal. 2015). But the only support *Lawson* provides for that conclusion is a single citation to an unpublished decision from the Eastern District of Louisiana. *Id.* (citing *Gassie v. SMH Swiss Corp.*, 1998 WL 71647 at *5–6 (E.D. La. Feb. 17, 1998).

"Litigants ordinarily argue preemption in a motion to dismiss, either for failure to state a claim or for lack of subject-matter jurisdiction." , 813 F.2d 1041, 1043 (9th Cir. 1987)[2].[3]

Federal preemption is a waivable affirmative defense. Federal preemption arguments may create a question of either jurisdiction or choice-of-law. *See Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380 (1986) (holding that jurisdictional preemption arguments may not be waived); *Johnson v. Armored Transp. of California, Inc.*, 813 F.2d 1041, 1043 (9th Cir. 1987).[4] A preemption argument that "would not force [the plaintiff] to bring this action in a different forum" can "affect only the choice-of-law but not the choice-of-forum." *Johnson*, 813 F.2d at 1044. And, where preemption "involves choice of law rather than subject matter jurisdiction, it may be waived by failure to raise it properly." *Hughes v. Blue Cross of N. California*, 215 Cal. App. 3d 832, 851 (1989). True, the PAA creates a channel for federal jurisdiction over public liability claims. But there is already federal jurisdiction in this case. The only reason Defendants raise the PAA is to invoke its heightened substantive standards for injury. Therefore, Defendants' preemption argument implicates only a choice-of-law question, and is, therefore, waivable.

Defendants failed to provide fair notice of PAA preemption. Affirmative defenses must provide fair notice. *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979). Defendants raised preemption as an affirmative defense by referring to "federal statutes and regulations, including those

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[3] This is illustrated by the fact that every single PAA case Defendants cite in their motion raised preemption at significantly earlier stages in litigation. *See Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 569 (9th Cir. 2008) (PAA raised in a motion to dismiss); *Lawson v. Gen. Elec. Co.*, 140 F. Supp. 3d 968, 970 (N.D. Cal. 2015) (deciding a motion to dismiss); *Steward v. Honeywell Int'l, Inc.*, 469 F. Supp. 3d 872 (S.D. Ill. 2020) (deciding a motion to dismiss); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991) (deciding a motion to remand); *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986 (9th Cir. 2008) (PAA raised in a complaint); *Golden v. CH2M Hill Hanford Grp., Inc.*, 528 F.3d 681 (9th Cir. 2008) (PAA raised in an answer); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (PAA raised in a removal action); *Matthews v. Centrus Energy Corp.*, 15 F.4th 714 (6th Cir. 2021) (PAA raised in a removal action); *Hunter v. Boeing N. Am., Inc.*, 2014 WL 12586441, at *4 (C.D. Cal. May 15, 2014) (deciding a motion to dismiss); *Lassair v. New Orleans City*, No. CV 19-11377, 2020 WL 777291 (E.D. La. Feb. 18, 2020) (deciding a motion to dismiss).

[4] Both the PAA and ERISA carry unusual preemptive weight, "under which the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484 n.6 (1999) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)) (cleaned up). If it is possible to waive preemption in ERISA cases, notwithstanding the statute's extraordinary preemptive power, it is also possible to waive preemption under the PAA.

governing exposure to hazardous substances." Ex. LL (ECF 189) (June 2021 Tetra Tech Answer). In an answer, "[s]imply referring to a doctrine or statute is insufficient to afford fair notice." *Gomez v. J. Jacobo Farm Lab. Contractor, Inc.*, 188 F. Supp. 3d 986, 992 (E.D. Cal. 2016); *see also Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004) (a defendant who "simply refers to the doctrines without setting forth the elements of its affirmative defenses . . . does not provide 'fair notice' of its defenses").

Simply noting that preemption may apply, without identifying the "law forming the basis for [the] preemption defense" is not sufficient to provide fair notice. *Grano v. Sodexo Mgmt., Inc.*, 2020 WL 7074905, at *10 (S.D. Cal. Dec. 3, 2020); *see also Nguyen v. HOVG, LLC*, 2014 WL 5361935, at *1 (S.D. Cal. Oct. 20, 2014) (holding that the affirmative defense of preemption lacked sufficient specificity to provide fair notice). Here, Defendants do exactly that. Their vague reference to federal laws "governing exposure to hazardous substances" does not indicate any particular area of law could be a reference to any number of complex regulatory schemes out of agencies from the FDA to EPA to NRC. This is particularly critical because Defendants represented to Plaintiffs and this Court that they did not have *any* applicable insurance, let alone insurance which would implicate the PAA's complex regulatory framework. *See* Ex. MM (Rule 26 Initial Disclosures) (Aug. 20, 2021). In fact, Defendants doubled down on that position in front of this Court three years later—counsel represented that their "disclosures were accurate at the time"—and were rightfully admonished for their "unfair" and "prejudicial" behavior. Ex. NN (Dkt. 312) (Disc. Hr'g Tr. at 43-44 (June 5, 2024)). That is not sufficient to provide fair notice of preemption under the PAA, a seldom-litigated statute.

Defendants' late introduction of the PAA prejudices Plaintiffs. An affirmative defense may be raised for the first time at summary judgment "*only* if the delay does not prejudice the plaintiff." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (emphasis added); *see also Motion Med. Techs., L.L.C. v. Thermotek, Inc.*, 875 F.3d 765, 772 (5th Cir. 2017) (finding no prejudice where preemption was raised two years before trial and plaintiffs did not know what they would have done differently).[5] By raising this argument well after the close of discovery and only a

[5] *Dearth v. Great Republic Life Ins. Co.*, a case from California's intermediate appellate courts, notes that "California law does not require that preemption be alleged as an affirmative defense and

few months in advance of trial, Defendants have significantly and prejudicially limited Plaintiffs' and this Court's ability to confirm in any way the applicability of this statute, their assertions about their status, or whether they complied with the relevant licensing requirements (consider, again, Defendants' years-long refusal to provide insurance information).

Defendants' invocation of the PAA attempts to fundamentally alter the nature of Plaintiffs' case shortly before trial, and, according to Defendants, this transmutation would be fatal. They seek to first shoehorn this case into a brand-new legal framework and then argue, in a move of "judicial jiu-jitsu," that this new framework kills the case. Several years of discovery was conducted to develop state-law theories of injury and defenses to those theories. Now that discovery has closed, Defendants want to throw away the work conducted by both sides up to this point and burden this Court with an obscure legal theory that could—and should—have been articulated (and dismissed) at an earlier point in the case. "After all, at some point it becomes too late to try out promising new theories, gangly litigation must be shaped and defined, and finality has to become more than a faint hope." *Cook*, 790 F.3d at 1093.

V. <u>CONCLUSION</u>

For all the reasons set forth above, Plaintiffs respectfully request Defendants' motion be denied.

Dated: November 4, 2025

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specifically allows preemption to be raised for the first time by summary judgment motion." 9 Cal. App. 4th 1256, 1276 (1992), <u>modified</u> (Oct. 16, 1992). In the context of the state court system, that makes sense: Federal preemption is inherently jurisdictional when raised in state court. But federal case law clearly establishes that preemption is a waivable affirmative defense when it does not raise jurisdictional questions. *See* supra at 23.

Dated: November 4, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2025, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered with the Court's CM/ECF system. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 4, 2025

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