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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 SAN DIEGO UNIFIED PORT  
12 DISTRICT, a public corporation,  
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14 Plaintiff,  
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16 v.  
17 MONSANTO COMPANY;  
18 SOLUTIA INC.; and  
19 PHARMACIA CORPORATION,  
20  
21 Defendants.

Case No.: 15cv578-WQH-JLB

**ORDER**

22 HAYES, Judge:

23 The matter before the Court is the motion for leave to file a supplement to the First  
24 Amended Complaint filed by the San Diego Unified Port District. (ECF No. 214).

25 **I. BACKGROUND**

26 On March 13, 2015, Plaintiffs San Diego Unified Port District (“Port District”) and  
27 the City of San Diego (the “City”) initiated this action by jointly filing a Complaint against  
28 Defendants Monsanto Company, Solutia Inc., and Pharmacia Corporation (“collectively,  
Monsanto”). (ECF No. 1).

1 On August 3, 2015, the Port District filed a First Amended Complaint against  
2 Monsanto, the operative pleading in the Port District’s action.<sup>1</sup> (ECF No. 25). The Port  
3 District alleged causes of action for public nuisance, equitable indemnity, and purpresture  
4 against Monsanto relating to PCB contamination of the San Diego Bay (“the Bay”). *Id.*

5 On September 28, 2016, the Court granted in part and denied in part a motion to  
6 dismiss the First Amended Complaint. The Court granted the motion to dismiss with  
7 respect to equitable indemnity and denied the motion to dismiss with respect to public  
8 nuisance and purpresture. (ECF No. 81). The Port District is proceeding in this litigation  
9 on its public nuisance cause of action and purpresture cause of action.

10 On April 20, 2018, the Port District filed a motion for leave to file a supplement to  
11 the First Amended Complaint pursuant to Federal Rule of Civil Procedure 15(d). The Port  
12 District seeks to supplement its claims with “(1) damages the Port District has continued  
13 to suffer after the filing of the Original Complaint on March 13, 2015 and (2) additional  
14 damages that the Port District will continue to suffer, as long as the public nuisance remains  
15 unabated, up to the time of judgment.” (ECF No. 214-1 at 6).

16 On May 14, 2018, Monsanto filed a response in opposition. (ECF No. 219)

17 On May 21, 2018, the Port District filed a reply. (ECF No. 222).

18 **II. CONTENTIONS OF THE PARTIES**

19 The Port District moves the Court for leave to file a supplemental pleading under  
20 Rule 15(d) seeking post-filing, pre-judgment damages in connection with its nuisance  
21 claim. The Port District asserts that a plaintiff harmed by a continuing nuisance is entitled  
22 to post-filing damages until the time of judgment under California law. The Port District  
23 contends that a supplemental pleading is appropriate because separate concurrent actions  
24 would be duplicative and separate successive actions may be time-barred. The Port District  
25 contends that a prayer for declaratory relief as to all damages that continue to accrue to the  
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28 <sup>1</sup> The City filed a separate amended complaint and is currently litigating independently against Monsanto.

1 time of judgment is in the interest of judicial economy. The Port District contends that it  
2 has the right to seek costs, loss of use damages, and abatement under section 731 of the  
3 California Code of Civil Procedure.<sup>2</sup> The Port District contends that the Legislature has  
4 authorized it to seek damages due to its unique position as trustee of the submerged lands.  
5 The Port District contends that Monsanto would not be prejudiced by the proposed  
6 supplemental pleading.

7 Monsanto contends that leave to supplement the First Amended Complaint should  
8 be denied on the grounds of futility. Monsanto contends that the Port District has pleaded  
9 a permanent nuisance cause of action, in which a party is not entitled to file successive  
10 actions for damages until the nuisance is abated. Monsanto further contends that California  
11 law requires parties to bring successive actions to recover damages incurred post-filing on  
12 continuing nuisance claims. Monsanto contends that the non-representative nuisance cases  
13 relied on by the Port District are inapplicable because, as a matter of law, damages are  
14 unavailable in a representative public nuisance action under section 731 of the California  
15 Code of Civil Procedure. Monsanto contends that it would be prejudiced by the proposed  
16 supplemental pleading due to “discovery and other litigation burdens” associated with the  
17 futile requests for additional damages. (ECF No. 219 at 8). Monsanto contends that  
18 California law precludes recovery of damages for already-incurred costs under the guise of  
19 an abatement remedy. Monsanto contends that the Port District’s “hybrid creation of a  
20 *representative action* on behalf of the People *for damages* is prohibited by C.C.P. Section  
21 731.” *Id.* at 11. Monsanto contends that the Port District’s “expanded damage claims”  
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24 <sup>2</sup> The Port District asserts that this Court “has already concluded that the Port District may seek damages  
25 for injuries to the resources of the Bay.” (ECF No. 222 at 6). The Port District cites language from the  
26 Court’s ruling on September 28, 2016 in which the Court declined to strike the Port District’s fifth prayer  
27 for relief for natural resource damages on grounds separate from any consideration of the type of recovery  
28 allowed for a nuisance action under California Code of Civil Procedure section 731. (ECF No. 81 at 20–  
22). In the same order, the Court explicitly declined to rule on the issue of whether damages were available  
in connection with this representative public nuisance claim. *See* ECF No. 81 at 11 n.3 (“The Court does  
not address the issue of damages the Port District may recover in a representative capacity at this state in  
proceedings.”).

1 should be rejected by the Court as an attempt to “circumvent products liability laws by  
2 recasting ordinary products liability claims as public nuisance claims for damages.” *Id.* at  
3 13.

### 4 **III. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 15(d) states:

6 On motion and reasonable notice, the court may, on just terms, permit a party  
7 to serve a supplemental pleading setting out any transaction, occurrence, or  
8 event that happened after the date of the pleading to be supplemented. The  
9 court may permit supplementation even though the original pleading is  
10 defective in stating a claim or defense. The court may order that the opposing  
11 party plead to the supplemental pleading within a specified time.

12 Fed. R. Civ. P. 15(d). Rule 15(d) applies to claims that could not have been litigated until  
13 after the original complaint was filed. *See Cabrera v. City of Huntington Park*, 159 F.3d  
14 374, 382 (9th Cir. 1998). Rule 15(d) affords district courts broad discretion in allowing  
15 supplemental pleadings. *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). “[S]ome  
16 relationship must exist between the newly alleged matters and the subject of the original  
17 action” but the new allegations “need not all arise out of the same transaction.” *Id.* at 474.  
18 Rule 15(d) is favored as a tool of judicial economy and convenience. *Id.* at 473. “To  
19 determine if efficiency might be achieved courts assess ‘whether the entire controversy  
20 between the parties could be settled in one action . . . .’” *Planned Parenthood of Southern*  
21 *Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (quoting 6A Charles Alan Wright,  
22 Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2D* § 1506  
23 (1990)). District courts additionally consider whether undue prejudice to the opposing  
24 party will result. *See LaSalvia v. United Dairymen of Arizona*, 804 F.2d 1113, 119 (9<sup>th</sup> Cir.  
1986).

### 25 **IV. DISCUSSION**

26 The Port District’s First Amended Complaint includes the following allegations  
27 related to damages for the public nuisance cause of action: “As a direct and proximate  
28 result of Monsanto’s creation of a public nuisance, Plaintiff Port District and the public

1 have suffered and continue to suffer, actual damages and injuries to property requiring  
2 abatement and other costs to be determined at trial.” (ECF No. 25 at 24). The Port District  
3 seeks to supplement the First Amended Complaint such that the allegations related to  
4 damages for the public nuisance cause of action state:

5 89. As a direct and proximate result of Monsanto’s creation of a public  
6 nuisance, Plaintiff Port District and the public have suffered, *preceding the*  
7 *filing of this action*, actual damages, and injuries to property requiring  
8 abatement and other costs to be determined at trial.

9 90. *Additionally, Plaintiff Port District and the public continued to suffer,*  
10 *from the date this action was originally filed until the time of filing this*  
11 *Supplement, actual damages, and injuries to property requiring abatement*  
12 *and other costs to be determined at trial.*

13 91. *Plaintiff Port District and the public also will continue to suffer damages*  
14 *from the time of filing this Supplement until judgment actual damages and*  
15 *injuries to property requiring abatement and other costs to be determined at*  
16 *trial.*

17 92. *Because of the continuing nuisance, Monsanto is liable for the*  
18 *additionally accrued damages as well as damages that will accrue to the time*  
19 *of judgment. Plaintiff Port District requests judgment declaring that*  
20 *Monsanto is liable for damages accruing from the filing of the Supplement to*  
21 *the time of judgment.*

22 (ECF No. 214-3 at ¶¶ 89–92 (proposed additional language in italics)). The Prayer for  
23 Relief in the First Amended Complaint states, in part:

- 24 1) Any and all compensatory damages according to proof including, but not  
25 limited to, all past and future costs and expenses related to the  
26 investigation, remediation, and removal of PCBs from in and around the  
27 Bay, loss of use of portions of the Bay, and diminution in value of real  
28 property in and around the Bay;

(ECF No. 25 at 26). The Port District seeks to alter this paragraph to state,

- 1) Any and all compensatory damages according to proof including, but not  
limited to, all *allowable* past, *present* and future costs and expenses related  
to the investigation, remediation, and removal of PCBs from in and around  
the Bay, loss of use of portions of the Bay, and diminution in value of real  
property in and around the Bay;

1 (ECF No. 214-3 at 29 (proposed additional language in italics)). The Port District further  
2 seeks to add the following to the Prayer for Relief: “(2) A judicial determination that each  
3 Defendant is liable for allowable damages up to time of judgment[.]” *Id.*

4 “Two distinct classifications have emerged in nuisance law which determine the  
5 remedies available to injured parties and the applicable statute of limitations.” *Baker v.*  
6 *Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 870 (Cal. 1985). “[P]ermanent  
7 nuisances are of a type where ‘by one act a permanent injury is done, [and] damages are  
8 assessed once for all.’” *Id.* (quoting *Williams v. Southern Pac. R.R. Co.*, 89 P. 599 (1907)).  
9 “In such cases, plaintiffs ordinarily are required to bring one action for all past, present and  
10 future damages within three years after the permanent nuisance is erected.” *Id.*

11 On the other hand, if a nuisance is a use which may be discontinued at any  
12 time, it is considered continuing in character and persons harmed by it may  
13 bring successive actions for damages until the nuisance is abated. Recovery  
14 is limited, however, to actual injury suffered prior to the commencement of  
each action. Prospective damages are unavailable.

15 *Id.* A party asserting a continuing nuisance claim may bring successive actions for periodic  
16 damages incurred prior to the commencement of each action until abatement takes place.  
17 See *Mangini v. Aerojet-General Corp.*, 912 P.2d 1220, 1227–30 (Cal. 1996); *Baker*, 705  
18 P.2d at 870; *Arcade Water Dist. v. United States*, 940 F.2d 1265, 1269 (9th Cir. 1991). As  
19 the Supreme Court explained in *Spaulding v. Cameron*,

20 If the defendant is not privileged to continue the nuisance and is able to abate  
21 it, he cannot complain if the plaintiff elects to bring successive actions as  
22 damages accrue until abatement takes place. . . . On the other hand, if it  
23 appears improbable as a practical matter that the nuisance can or will be  
abated, the plaintiff should not be left to the troublesome remedy of successive  
actions.

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25 239 P.2d 625, 628 (Cal. 1952).  
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1 In this motion, the Port District asserts that it has brought a continuing nuisance  
2 claim<sup>3</sup> and that it is entitled to recover post-filing, pre-judgment damages. Rather than file  
3 successive actions, the Port District seeks leave to file a supplemental pleading requesting  
4 post-filing, pre-judgment damages in this action. A limited number of courts have allowed  
5 plaintiffs to recover post-filing, pre-judgment damages within the same continuing  
6 nuisance action to avoid the problem of successive actions being filed concurrently. *See*  
7 *Renz v. 33rd Dist. Agricultural Assn.*, 46 Cal. Rptr. 2d 67, 70–71 (Ct. App. 1995) (“While  
8 numerous Court of Appeal decisions mention that continuing nuisance damages may be  
9 recovered only for damages suffered prior to the *commencement* of the action . . . we are  
10 not bound by any of these decisions.”); *Orange Cty. Water Dist. v. Unocal Corp.*, No.  
11 SACV0301742CJCANX, 2016 WL 11201024, at \*9 (C.D. Cal. Nov. 3, 2016). However,  
12 this Court concludes that under California law a plaintiff in a continuing nuisance action  
13 can only seek damages incurred *prior to the commencement of the action*. *See Baker*, 705  
14 P.2d at 870; *McCoy v. Gustafson*, 103 Cal. Rptr. 3d 37 (Ct. App. 2009); *Arcade Water*, 940  
15 F.2d at 1269; *see also People v. Kinder Morgan Energy Partners, L.P.*, 159 F. Supp. 3d  
16 1182, 1196–98 (S.D. Cal. 2016) (“The Court has undertaken an exhaustive review of  
17 relevant state and federal law, and concludes that the City may only seek damages incurred  
18 during the three years immediately preceding the filing of this lawsuit.”).

19 The cases relied on by the Port District discuss the proper procedure by which a  
20 plaintiff may seek post-filing damages *in a non-representative continuing nuisance action*  
21 *brought by a property owner*. In this case, the Port District is proceeding in a representative  
22 capacity under section 731 of the California Code of Civil Procedure. (ECF No. 25; *see*  
23 *also* ECF No. 81 at 9 n.2, 11–12). Recovery is limited to abatement in a representative  
24 action for public nuisance. Cal. Code Civ. Proc. § 731 (“A civil action may be brought in  
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27 <sup>3</sup> The Port District did not identify its public nuisance action as a continuing or permanent public nuisance  
28 in the First Amended Complaint. (ECF No. 25).

1 the name of the people of the State of California to abate a public nuisance . . .”); *Cty. of*  
2 *Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 329 (Ct. App. 2006) (“The third  
3 amended complaint clearly alleges that lead *remains present* in buildings in Santa Clara,  
4 SF, and Oakland, and that removal of this lead is necessary to prevent future harm to the  
5 public. . . . While Santa Clara, SF, and Oakland may not recover damages or reimbursement  
6 for past remediation of these hazards, the pleaded representative public nuisance cause of  
7 action seeking future abatement suffers from no apparent infirmity.”); *People v. ConAgra*  
8 *Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 560 (Ct. App. 2017), *reh’g denied* (Dec. 6,  
9 2017), *review denied* (Feb. 14, 2018) (“While damages may be available in both public and  
10 private nuisance actions, damages are not an available remedy in the type of public  
11 nuisance action that was brought by plaintiff in this case, a representative public nuisance  
12 action.”); *People ex rel. Van de Kamp v. Am. Art Enterprises, Inc.*, 656 P.2d 1170, 1173  
13 n.11 (Cal. 1983) (“[A]lthough California’s general nuisance statute expressly permits the  
14 recovery of damages in a public nuisance action brought by a specially injured party, it  
15 does not grant a damage remedy in actions brought on behalf of the People to abate a public  
16 nuisance. . . . In the absence of explicit statutory authorization, the Court of Appeal has  
17 held that an award of such damages is improper.”).<sup>4</sup>

18 California law does permit the Port District to seek abatement in connection with its  
19 representative public nuisance claim. “An abatement of a nuisance is accomplished by a  
20 court of equity by means of an injunction proper and suitable to the facts of each case.”  
21 *Santa Clara*, 40 Cal. Rptr. 3d at 329. In *ConAgra*, the court of appeal stated,

22 A public entity may not recover in a representative public nuisance action any  
23 funds that it has already expended to remediate a public nuisance. This court  
24 acknowledged as much in *Santa Clara I.* (*Santa Clara I, supra*, 137  
25 Cal.App.4th at p. 310, 40 Cal.Rptr.3d 313.) The trial court’s abatement order

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27 <sup>4</sup> In its reply, the Port District states that it is entitled to damages in relation to its purpresture claim. (ECF  
28 No. 222 at 6 n.3). The Port District’s motion to supplement the FAC sought to include additional  
allegations related only to its nuisance cause of action. The Court makes no determination as to relief  
available to the Port District in connection to its purpresture cause of action.

1 in this case did not attempt to award any already-incurred costs to plaintiff or  
2 to any of the 10 jurisdictions. Instead, the court’s abatement order directed  
3 defendants to deposit funds in an abatement fund, which would be utilized to  
4 prospectively fund remediation of the public nuisance. None of these funds  
5 were permitted to be utilized to reimburse plaintiff, any of the 10 jurisdictions,  
6 or any homeowners for already-incurred costs.

7 The abatement fund was not a “thinly-disguised” damages award. The  
8 distinction between an abatement order and a damages award is stark. An  
9 abatement order is an equitable remedy, while damages are a legal remedy.  
10 An equitable remedy’s sole purpose is to eliminate the hazard that is causing  
11 prospective harm to the plaintiff. An equitable remedy provides no  
12 compensation to a plaintiff for prior harm. Damages, on the other hand, are  
13 directed at compensating the plaintiff for prior accrued harm that has resulted  
14 from the defendant’s wrongful conduct. The distinction between these two  
15 types of remedies frequently arises in nuisance actions. Generally, continuing  
16 nuisances are subject to abatement, and permanent nuisances are subject to  
17 actions for damages. (*Baker v. Burbank-Glendale-Pasadena Airport  
18 Authority* (1985) 39 Cal.3d 862, 868-870, 218 Cal.Rptr. 293, 705 P.2d 866.)  
19 As Code of Civil Procedure section 731 permits a public entity plaintiff to  
20 seek abatement of a public nuisance in a representative action, the trial court  
21 could properly order abatement as a remedy in this case.

22 *ConAgra*, 227 Cal. Rptr. 3d at 569.

23 The Port District has represented to this Court on numerous occasions that it is  
24 proceeding only in a representative capacity on behalf of the people of the state of  
25 California in this public nuisance action. *See* ECF No. 33 at 9 (“The Port District brings  
26 this action as trustee for the people of the state of California, an inherently representative  
27 capacity, to hold Monsanto responsible for the PCB contamination in the Bay.”); ECF No.  
28 33 at 16 (“The Port District has asserted its public nuisance claim for abatement in a  
representative capacity – as trustee for the public and successor to the power of cities and  
counties within its jurisdiction.”); ECF No. 66 at 64–65. In the prior Order denying the  
motion to dismiss, the Court concluded that “the Port District has standing to bring a  
representative cause of action under section 731.” (ECF No. 81 at 12). In its reply brief,  
the Port District asserts that it has the right to “seek costs and loss of use damages, in

1 addition to abatement, under Section 731” relying on *Selma Pressure Treating Co. v.*  
2 *Osmose*, 271 Cal. Rptr. 596 (Ct. App. 1990) *reh’g denied and opinion modified* (July 24,  
3 1990), and *disapproved of by Johnson v. Am. Standard, Inc.*, 179 P.3d 905 (Cal. 2008).<sup>5</sup>  
4 (ECF No. 222 at 4). The Port District further asserts that its “unique” position as “trustee  
5 of the submerged lands . . . in San Diego Bay” entitles it to recover damages in a  
6 representative capacity. (ECF No. 222 at 2, 7). However, *Selma* addressed a public entity’s  
7 ability to bring a non-representative nuisance claim for damages as a property owner:

8 Respondents argue, however, that the terms of Code of Civil Procedure  
9 section 731 limit absolutely the remedies available to the State—only  
10 abatement is available. We disagree. Properly viewed, the statute, and cases  
11 interpreting the statute, limit the State only when it acts in its representative  
12 capacity protecting the public interest generally. Where the State has a  
13 property interest which has been injuriously affected by a nuisance, the State  
14 can, like any property owner, seek damages

15 271 Cal. Rptr at 603. *Selma* does not provides legal authority for the Port District’s  
16 argument that it can seek damages in a representative public nuisance action. *Id.* at 603–  
17 04. The Court concludes that the Port District fails to provide an adequate legal basis for  
18 a supplemental pleading for post-filing, pre-judgment damages related to its representative  
19 public nuisance cause of action under California Code of Civil Procedure section 731. The  
20 motion for leave to file a supplemental pleading is denied. Fed. R. Civ. P. 15(d).

## 21 V. CONCLUSION

22 IT IS HEREBY ORDERED that the motion for leave to file a supplement to the First  
23 Amended Complaint is DENIED. (ECF No. 214).

24 Dated: August 30, 2018

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Hon. William Q. Hayes  
United States District Court

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<sup>5</sup> The Port District has not previously represented to the Court it asserts a non-representative claim for damages as a governmental property owner.