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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; and
13 CITY OF SAN DIEGO, a municipal
corporation,

14 Plaintiffs,

15 v.

16 MONSANTO COMPANY; SOLUTIA
17 INC.; and PHARMACIA
CORPORATION,

18 Defendants.
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Case No.: 15-cv-578-WQH-AGS

ORDER

20 HAYES, Judge:

21 The matter before the Court is the Motion for Summary Judgment of Affirmative
22 Defenses filed by Plaintiff San Diego Unified Port District. (ECF No. 426).

23 **I. PROCEDURAL BACKGROUND¹**

24 On March 13, 2015, Plaintiffs San Diego Unified Port District (the “Port District”)
25 and the City of San Diego (the “City”) initiated this action by filing a Complaint. (ECF No.
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28 ¹ The relevant factual background is set forth in the Court’s Order on Monsanto’s Motions for Summary Judgment against the Port District.

1 1). On August 3, 2015, the Port District and the City filed separate First Amended
2 Complaints against Defendants Monsanto Company, Solutia Inc., and Pharmacia
3 Corporation (collectively, “Monsanto”). (ECF Nos. 24, 25). In its First Amended
4 Complaint (“FAC”), the Port District brings claims against Monsanto for public nuisance,
5 equitable indemnity, and purpresture relating to the alleged contamination of San Diego
6 Bay (the “Bay”) from polychlorinated biphenyls (“PCBs”) manufactured by Monsanto.
7 (ECF No. 25).

8 On September 28, 2016, the Court issued an Order granting in part and denying in
9 part Monsanto’s Motion to Dismiss the Port District’s FAC. (ECF No. 81). The Court
10 granted the Motion to Dismiss the Port District’s equitable indemnity claim and denied the
11 Motion to Dismiss the Port District’s purpresture and public nuisance claims.

12 On April 14, 2017, Monsanto filed a First Amended Answer and Counterclaims.
13 (ECF No. 110). On May 12, 2017, the Port District filed a Motion to Strike Monsanto’s
14 Affirmative Defenses (ECF No. 112) and a Motion to Dismiss Monsanto’s Counterclaims
15 (ECF No. 113). On January 30, 2018, the Court issued an Order granting the Port District’s
16 Motion to Dismiss Monsanto’s Counterclaims and denying the Port District’s Motion to
17 Strike Monsanto’s Affirmative Defenses. (ECF No. 192). On April 19, 2018, the Port
18 District filed a Motion for Judgment on the Pleadings on Monsanto’s affirmative defenses.
19 (ECF No. 213). On September 6, 2018, the Court issued an Order denying the Port
20 District’s Motion for Judgment on the Pleadings. (ECF No. 253).

21 On August 2, 2019, Monsanto filed Motions for Summary Judgment against the Port
22 District on the Port District’s request for an abatement remedy (ECF No. 422), the Port
23 District’s purpresture claim (ECF No. 423), and the Port District’s public nuisance claim
24 (ECF No. 424). On August 2, 2019, the Port District filed a Motion for Summary Judgment
25 of Affirmative Defenses. (ECF No. 426). The Port District moves for partial summary
26 judgment against Monsanto on several of the affirmative defenses asserted by Monsanto
27 in its First Amended Answer. On October 1, 2019, Monsanto filed an Opposition to the
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1 Port District’s Motion for Summary Judgment. (ECF No. 449). On October 18, 2019, the
2 Port District filed a Reply. (ECF No. 455).

3 On December 6, 2019, the Court heard oral argument on the Motions for Summary
4 Judgment.

5 **II. CONTENTIONS**

6 The Port District moves for summary judgment in its favor on several of Monsanto’s
7 affirmative defenses. The Port District contends that Monsanto’s affirmative defenses
8 under the Comprehensive Environmental Response, Compensation, and Liability Act of
9 1980 (“CERCLA”), as amended by the Superfund Amendments and Reauthorization Act
10 of 1986, 42 U.S.C. §§ 9601 *et seq.*, and the California Hazardous Substance Account Act
11 (“HSAA”), Cal. Health & Safety Code §§ 25300 *et seq.*, fail because there are no pending
12 CERCLA or HSAA claims. The Port District contends that Monsanto’s equitable
13 affirmative defenses are not appropriate in this public nuisance action. The Port District
14 contends that Monsanto asserts several defenses that negate an element the Port District
15 must prove. The Port District contends that Monsanto’s affirmative defenses based on the
16 Port District’s negligence and comparative fault “fail because comparative fault cannot be
17 used to circumvent the governmental immunity afforded under the California Tort Claims
18 Act” (ECF No. 426-1 at 11). The Port District further contends that “Monsanto has
19 failed to produce admissible evidence to support its affirmative defenses based on
20 negligence and comparative fault.” (*Id.*).

21 Monsanto contends that it properly asserts as an affirmative defense that the Port
22 District’s public nuisance claim is a disguised products liability claim. Monsanto contends
23 that its equitable defenses are appropriate because the Port District’s witnesses testified to
24 facts that show “justice and right” require the equitable defenses to remain. (ECF No. 449
25 at 8). Monsanto contends that summary judgment is not the proper vehicle to dispose of
26 non-affirmative defenses. Monsanto contends that the California Tort Claims Act does not
27 preclude Monsanto’s negligence or comparative fault affirmative defenses, and the Port
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1 District’s witnesses “testified at length regarding the Port’s own negligence in causing or
2 contributing to the alleged PCB discharges into the Bay” (*Id.* at 7-8).

3 **III. RULING OF THE COURT**

4 Monsanto alleges in its sixty-fourth affirmative defense that the Port District’s
5 “alleged nuisance claim is barred, in whole or in part, as a disguised product liability
6 claim.” (ECF No. 110 at 42 ¶ 64). This affirmative defense does not apply in a
7 representative public nuisance action for abatement. *See Cty. of Santa Clara v. Atl.*
8 *Richfield Co.*, 137 Cal. App. 4th 292, 309-310 (2006) (“A *representative* public nuisance
9 cause of action seeking *abatement* of a hazard created by affirmative and knowing
10 *promotion of a product for a hazardous use* is *not* ‘essentially’ a products liability action
11 ‘in the guise of a nuisance action’” (quoting *City of San Diego v. U.S. Gypsum Co.*,
12 30 Cal. App. 4th 575, 586-87 (1994)). The Port District is proceeding on a representative
13 public nuisance claim in which the Port District’s remedy is limited to abatement. The Port
14 District’s Motion for Summary Judgment on Monsanto’s sixty-fourth affirmative defense
15 is granted.

16 Monsanto alleges in its sixth affirmative defense that the Port District’s “alleged
17 claims are barred, in whole or in part, by the doctrine of laches.” (ECF No. 110 at 29 ¶ 6).
18 “[N]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of
19 public right.” Cal. Civ. Code § 3490; *See People v. Gold Run Ditch & Mining Co.*, 66 Cal.
20 138, 152 (1884) (“Against [a public nuisance], however long continued, the State is bound
21 to protect the people.”); *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 136
22 (2017) (explaining that, “[s]ince laches is an equitable defense, it could not be asserted
23 against the government, even if it were not barred by Civil Code section 3490, because
24 such an application would defeat a public policy aimed at protecting the public” from
25 public nuisances). Laches is not available as an affirmative defense in this representative
26 public nuisance action. The Port District’s Motion for Summary Judgment on Monsanto’s
27 sixth affirmative defense is granted.

1 Monsanto further alleges defenses that are based on the Port District’s alleged lack
2 of standing to bring its representative public nuisance claim and seek an abatement remedy,
3 that are based on the Port District’s alleged inequitable actions, and that are based on the
4 Port District’s alleged negligence and comparative fault. “A defense which demonstrates
5 that plaintiff has not met its burden of proof is not an affirmative defense.” *Zivkovic v. S.*
6 *Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). “An affirmative defense is one that
7 precludes liability even if all of the elements of the plaintiff’s claim are proven.” *Gomez v.*
8 *J. Jacobo Farm Labor Contractor, Inc.*, 188 F. Supp. 3d 986, 991 (E.D. Cal. 2016) (citation
9 omitted); see *Kohler v. Staples the Office Superstore, LLC*, 291 F.R.D. 464, 471 (S.D. Cal.
10 2013) (“Affirmative defenses are allegations unrelated to the plaintiff’s *prima facie* case
11 that deny the plaintiff’s right to relief, even if all allegations in the complaint are true.”
12 (citing *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 262 (E.D. Cal. 1987)).
13 However, identifying a defense as “affirmative” when it negates an element of the
14 plaintiff’s case not does not make that defense legally insufficient such that a motion for
15 summary judgment should be granted on that defense. See *Kohler v. Islands Rests., LP*,
16 280 F.R.D. 560, 567 (S.D. Cal. 2012) (denying partial summary judgment on defenses of
17 lack of standing and failure to state a claim, explaining that “simple mislabeling . . . is not
18 grounds for striking or granting partial summary judgment on [the mislabeled] defenses”).
19 In order to succeed on a motion for summary judgment, the moving party must still “show[
20] that there is no genuine dispute as to any material fact and [that] the movant is entitled to
21 judgment as a matter of law.” Fed. R. Civ. P. 56(a).

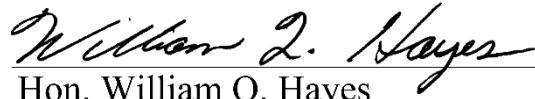
22 The sufficiency of the legal and factual basis of Monsanto’s remaining defenses, as
23 well as the applicability of the defenses to a representative action for abatement of a public
24 nuisance, will be addressed and determined at trial. The Port District’s Motion for
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1 Summary Judgment on Monsanto’s 3-5, 8, 14-16, 26-27, 46-48, 53, 55, 74-76, 80, and 84
2 affirmative defenses is denied.²

3 **IV. CONCLUSION**

4 The Port District’s Motion for Summary Judgment of Affirmative Defenses (ECF
5 No. 426) is granted as to affirmative defenses 6, 31-35, 37-45, and 64 and is otherwise
6 denied.

7 Dated: March 26, 2020


8 Hon. William Q. Hayes
9 United States District Court

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27 ² The Port District moves for summary judgment on Monsanto’s 31-35 and 37-45 affirmative defenses in
28 which Monsanto alleges affirmative defenses applicable to CERCLA and HSAA actions. Monsanto has
withdrawn its 31-35 and 37-45 affirmative defenses.