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15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
16 **IN AND FOR THE COUNTY OF SACRAMENTO**

17 Coordinated Proceeding  
Special Title (Rule 3.550)

18 **OROVILLE DAM CASES**

JCCP NO. 4974

Assigned to: James E. McFetridge, Dept. 30

**OPPOSITION TO DEFENDANT'S  
MOTION TO STRIKE**

Date: February 15, 2019  
Time: 10:00 a.m.

28 **OPPOSITION TO DEFENDANT'S MOTION TO STRIKE; JCCP No. 4974**

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1     **I. INTRODUCTION**

2             Defendant California Department of Water Resources (“DWR”) asks this Court to strike critical  
3 portions of complaints that are relevant to causation of the failure of the Oroville Dam. The Dam failed  
4 because of long term managerial misconduct, inadequate maintenance, financial malfeasance, and the  
5 systemic existence of a toxic and hostile work environment for maintenance employees. The  
6 allegations DWR seeks to strike go directly to the toxic and hostile workplace at the Dam which  
7 inhibited DWR’s ability to perform safety functions. These facts, along with other failures, caused the  
8 Oroville Dam crisis in February 2017. DWR’s motion applies to four categories of factual allegations:

- 9             (1) Factual allegations of racist conduct by DWR managers and employees;  
10            (2) Factual allegations of sexual harassment by DWR managers and employees;  
11            (3) Factual allegations financial fraud by DWR executives and of theft of equipment by DWR  
12 managers and employees; and,  
13            (4) Factual allegations of destruction of evidence and DWR’s efforts to conceal its misconduct.

14            DWR argues these facts are irrelevant or included for an improper purpose. DWR’s  
15 justifications are legally insufficient and factually incorrect, especially at this stage.

16            That DWR is offended by the conduct of its employees and managers speaks to their conduct  
17 not the inclusion of the allegations in this lawsuit. DWR harassed and discriminated against African  
18 American employees for years, including regular use of the n-word and condoning the hanging of a  
19 noose in a conference room. DWR harassed and discriminated against women, especially gay women,  
20 by using derogatory terms about their gender and sexual preferences. This toxic atmosphere was a  
21 substantial factor in DWR’s failure to ensure the Oroville Dam was safe.

22            DWR employees and managers stole supplies and equipment designated for use at the Oroville  
23 Dam. DWR management and executives kept two sets of books, one consistent with public records  
24 and a second, “real,” set of books reflecting how DWR actually allocated funds. These actions reduced  
25 the funds, materials, and time DWR spent ensuring the safety of the Oroville Dam. The allegations  
26 related to hiding and destroying documents, or both, also go directly to DWR’s culpability. DWR’s  
27 contention that there is no cause of action for spoliation is immaterial to whether the allegations should  
28 be stricken based on the valid claims actually alleged.

1 All of these allegations are relevant to the causation of the failure of the Dam. Plaintiffs need  
2 not prove the allegations in their complaints at this stage—they are assumed to be true. Nonetheless,  
3 plaintiffs provide the Court with an offer of proof about these claims in the declarations provided with  
4 their Opposition. (See Declarations of Dr. Robert Bea (“Bea Dec.”), Amy Lazarus (“Lazarus Dec.”),  
5 Prof. Kimberlee Shauman (“Shauman Dec.”), Prof. Amy Mickel, Mike Hopkins (“Hopkins Dec.”),  
6 Richard Harriman (“Harriman Dec.”), Trevor Hunter (“Hunter Dec.”), Joseph Cotchett (“Cotchett  
7 Dec.”) and Genoa Widener (“Widener Dec.”).) It is for a jury to decide whether harassment, theft, and  
8 unlawful conduct was a substantial factor in the Dam’s failure.

9 Harassing and discriminatory conduct is, under longstanding and clear California and United  
10 States Supreme Court precedent, recognized as a violation of law. The case law related to both Title  
11 VII and Fair Employment and Housing Act claims confirms that hostile and harassing conduct in the  
12 workplace is unlawful and harms productivity. Plaintiffs’ claims are plausible, relevant, acknowledged  
13 in the case law, and supported by substantial expert analysis and opinion.

14 Both Dr. Amy Mickel of C.S.U. Sacramento and Professor Kimberlee Shauman of U.C. Davis,  
15 after reviewing the complaint and DWR’s motion concluded that, assuming the allegations are proven  
16 true, DWR’s hostility toward women and minorities and the toxic culture and hostile work  
17 environment, that it “would more likely than not affect the ability of employees to productively perform  
18 their jobs, including jobs responsible for Oroville Dam safety.”

19 Amy Lazarus, the Founder and CEO of InclusionVentures, a company that consults to build  
20 productive workplace cultures, explains that “if proven, the conduct and acts described in those  
21 allegations would create a toxic and hostile workplace culture which would impact the Department of  
22 Water Resources’ ability to accomplish tasks.”

23 Dr. Robert Bea, from U.C. Berkeley explains the “allegations of racism, sexism, theft, falsified  
24 books, and destruction of evidence which have resulted from a toxic organizational culture, if proven,  
25 would be consistent with the inattention to dam safety I have observed.”

26 The Court should deny DWR’s motion.

27  
28 ///

1     **II.     PROCEDURAL HISTORY**

2             At issue are the First Amended Complaint filed by the City of Oroville (“City Complaint”), and  
3     the complaints filed by JEM Farms et al. (“Individual Plaintiff Complaint”), and Jordan Crossing  
4     Ministries et al. (“Class Complaint”). The operative City Complaint was filed after consolidation in  
5     this court on November 21, 2018. The Individual Plaintiff Complaint was filed on January 31, 2018.  
6     The Class Complaint was filed February 8, 2018. The City of Oroville filed its original complaint on  
7     January 17, 2018, which included the allegations DWR now asks to have stricken. (See City of Oroville  
8     Original Complaint ¶¶ 71-81, 85, 86, 137, 140-142, 151, 153.) On April 30, 2018, DWR answered the  
9     City of Oroville’s original complaint.

10            The complaint filed by Mary’s Gone Crackers and Wilbur Ranch (the “MGC Complaint”), also  
11    represented by undersigned counsel, was filed on June 8, 2018. The MGC Complaint includes the  
12    same allegations DWR asks to have stricken. (See MGC Complaint ¶¶ 72-82, 86, 87, 138, 141-143,  
13    152, 154.) DWR answered the MGC Complaint on July 16, 2018. The allegations will remain in the  
14    MGC Complaint and be part of this litigation under any circumstances.

15            Nothing has changed in the last nine months that makes the allegations at issue in this motion  
16    less relevant today than they were when DWR previously answered them.

17     **III.    LEGAL STANDARD**

18            As all California Courts have been cautioned, “We emphasize that such use of the motion to  
19    strike should be cautious and sparing. We have no intention of creating a procedural ‘line item veto’  
20    for the civil defendant.” (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4<sup>th</sup> 1680, 1683.) A court  
21    may strike “irrelevant, false, or improper” allegations. (C.C.P. § 436(a).) “In passing on the correctness  
22    of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a  
23    whole, all parts in their context, and assume their truth. (*Courtesy Ambulance Service v. Superior Court*  
24    (1992) 8 Cal.App.4<sup>th</sup> 1504, 1519; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91; see  
25    California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p. 611.) In ruling on a  
26    motion to strike, courts do not read allegations in isolation. (*Perkins v. Superior Court* (1981) 117  
27    Cal.App.3d 1, 6, 172 Cal.Rptr. 427.)” (*Clauson v. Superior Court* (1998) 67 Cal.App.4<sup>th</sup> 1253, 1255,  
28    emphasis added.)

1 **IV. FACTUAL BACKGROUND**

2 Over a period of decades, DWR managed the Oroville Dam to failure. (City Complaint ¶ 2.)  
3 DWR’s management and culture led to ignorance, avoidance, short term patches, and systemic failures  
4 to notice and fix vulnerabilities in the main and emergency spillways. (City Complaint ¶ 2.) This  
5 caused serious damage to the City of Oroville, property owners, businesses, and led to the evacuation  
6 of over 200,000 people. (See City Complaint, Class Complaint, and Individual Plaintiff Complaint.)

7 DWR had inspection reports for nearly twenty years of maintenance and management of the  
8 Oroville Dam. (City Complaint ¶ 40.) DWR did not adequately heed or follow these reports and work  
9 that had been requested for years was not completed. (City Complaint ¶ 42.) And even where DWR  
10 tried to perform investigations of the safety of the spillway, it did so—for example, by assigning a  
11 legally deaf employee to listen for hollow sounds under the spillway—in ways that made its work the  
12 “subject of [internal] jokes.” (City Complaint ¶ 57.) When the deaf employee told the supervisor that  
13 his plan “[wa]sn’t going to work,” she was told to get back to work. (City Complaint ¶ 57.) These are  
14 not comical or joking matters, and DWR’s conduct caused devastation for thousands of Californians.<sup>1</sup>

15 **A. DWR Violated the Law by Allowing a Culture of Harassment and Discrimination**  
16 **against African Americans**

17 One of the few African American employees that were hired over the decades that worked for  
18 DWR at the Oroville Dam was expected to work in an environment where supervisors condoned having  
19 a noose hanging in the conference room used by DWR staff each day. (City Complaint ¶¶ 72, 73.)  
20 Various employees made vile and racist comments about the same employee, referring to slavery and  
21 regularly using the “n-word.” (City Complaint ¶¶ 74, 75.) Supervisors, rather than promote a culture  
22 of accountability and cohesiveness, ratified the conduct by refusing to act. (City Complaint ¶¶ 74, 75.)  
23 As a result, those who were victims of the toxic culture, or who attempted to speak up against that  
24 culture, were ignored, or worse, threatened with violence. (City Complaint ¶ 78.)  
25  
26  
27

28 <sup>1</sup> DWR does not seek to have any of the preceding allegations stricken, acknowledging the relevance  
of claims of systemic failure and organizational toxicity.



1           **B. Women and LGBTQ Employees were Mistreated, Harassed and Discriminated**  
2           **Against, in Violation of the Law**

3           DWR management at the Oroville Dam was also openly hostile to women, especially gay  
4 women. (City Complaint ¶ 71.) This created a toxic climate that impacted DWR workers and  
5 undermined DWR’s ability to adequately and properly maintain a safe and functioning dam. (City  
6 Complaint ¶ 71.) Indeed, the cultural failures and harassment was designed to discourage employees  
7 from attending a conference because it was attended by women. (City Complaint ¶ 77.) Discouraging  
8 employees from attending professional educational conferences has consequences, and the Independent  
9 Forensic Team (“IFT”) Report<sup>2</sup> acknowledges that a necessary component of good organizational  
10 culture is the ability to continue to learn and attend professional seminars to keep abreast of best  
11 practices in the field. (See IFT Report, § 6.7, p. 69.)

12           **C. DWR Allowed Wide-Spread Theft and Sale of Goods and Equipment to be Used for**  
13           **Maintenance on the Oroville Dam**

14           The allegations of theft and improper bookkeeping are also relevant. DWR contends that these  
15 allegations should be stricken because there is no causal connection to the spillway failure. As for the  
16 theft claim, the complaints allege the stolen supplies were intended for use at the Oroville Dam. (City  
17 Complaint ¶¶ 81, 85.) This is more than enough to show the allegations are relevant as the inadequate  
18 maintenance was one of the causes of the failure. DWR supervisors responsible for maintenance at the  
19 Oroville Dam stole asphalt and tools from Oroville Dam worksites. (City Complaint ¶ 81.) DWR  
20 managers also used state funds to purchase out of area, expired, inappropriate, and overpriced products  
21 to benefit themselves or their friends. (City Complaint ¶¶ 82, 85.)

22           **D. DWR Kept Two Sets of Financial Records to Conceal Financial Malfeasance**

23           Management’s malfeasance was so extensive that DWR kept two sets of books—an “official”  
24 system for use with the public, and a set that reflects DWR’s actual finances. (City Complaint ¶ 86.)

25 \_\_\_\_\_  
26 <sup>2</sup> After the Oroville Dam spillway incident in February 2017, the Federal Energy Regulatory  
27 Commission (“FERC”) required DWR to engage an Independent Forensics Team to develop findings  
28 and opinions on the causes of the incident. The team members were retained directly by DWR. The  
IFT Report is attached to the City Complaint as Exhibit G. For the Court’s convenience, the portions  
of the IFT Report regarding organizational failures cited in this opposition are attached to the Harriman  
Dec. as Exhibit D.

1 In the discrepancy between the sets of books are unauthorized decisions about where and how to expend  
2 funds that had been earmarked for work on the projects. (City Complaint ¶ 86.)

3 **E. There Were Wide-Spread Allegations DWR Destroyed Documents, Reports and**  
4 **Other Evidence, and Concealed Information from the Public**

5 After the failure of the Dam, there were rumors of destruction of evidence and reports about  
6 maintenance problems and the removal of physical evidence before inspection and testing. (City  
7 Complaint ¶¶ 137, 141.) DWR also prevented renowned experts from inspecting the Dam. (City  
8 Complaint ¶ 142.) And the Board of Consultants (“BOC”), hired by DWR, who issued reports on the  
9 Dam’s failure and DWR’s role was so filled with redactions that the public has been unable to obtain  
10 information about the causes of the failures. (City Complaint ¶¶ 149-151, Ex. J.)<sup>3</sup>

11 **V. ARGUMENT**

12 The Court should deny DWR’s motion. DWR makes slim attempts to justify striking the  
13 allegations at issue. DWR argues that it “strains credulity” to see how having ongoing deplorable and  
14 harassing conduct in a workplace could impact the ability of the employees and organization to do its  
15 job. DWR’s hyperbole is both incorrect and insufficient.

16 What DWR thinks a jury may find credible as a contributing cause of the failure of the Oroville  
17 Dam is not the question. The question is what the complaints allege as a whole, and whether the  
18 allegations in the complaints that DWR seeks to have stricken—which are assumed to be true—are  
19 improper, irrelevant or false. (See *Clauson v. Superior Court*, *supra*, 67 Cal.App.4th at p. 1255.)  
20 DWR does not seek to have the allegations stricken as false. The only question is whether they are  
21 truly irrelevant. The allegations more than meet this bar.

22 **A. The Allegations of Racism and Sexism are Relevant and Should Not Be Stricken**

23 DWR seeks to strike the following:

- 24 • “Over the decades, DWR has perpetuated a toxic culture and hostile work  
25 environment at the Oroville Dam. DWR management at the Oroville Dam was  
26 openly hostile to women and minorities. This toxic culture has not only impacted  
its workers but also undermined the maintenance and safety of the Dam.”

27  
28 <sup>3</sup> Excerpts of BOC reports and the BOC overview are attached to the Harriman Dec. as Exs. E and F.

- “For example, in 2010 or 2011, supervisors at DWR condoned and allowed a noose to be hung at a meeting room used daily by DWR staff. It was directed at an African-American employee. The noose remained there for two to three months in plain view of supervisors until the African-American employee took it down himself.”
- “As but another example of the atmosphere of workplace harassment, the same African-American DWR employee at the dam found a doll hanging in his locker. It is believe that DWR has hired no more than one or two African-Americans at the Oroville Dam over the past 20 years.”
- “In or around 2010, a white DWR employee told an African-American employee that ‘This job is not like picking cotton.’ A DWR supervisor, Maury Miller was present and heard the racist comment, but took no action when confronted, stating ‘I heard nothing.’”
- “This African-American employee was also called ‘[the n-word],’ but no action was taken by DWR management to address the racist behavior.”
- “DWR has also allowed sexual harassment against female employees to proceed with impunity.”
- “For example, one of the few female employees at Oroville Dam was constantly harassed by her male supervisors and counterparts. One supervisor repeatedly asked her out on lunch dates. She was exposed to graphic images, including a CPR mannequin posed in a sexual position at one of her worksites. DWR employees described a woman’s conference attended by a female employee as a ‘Dyke conference,’ and regularly referred to female employees as dykes.”
- “When employees spoke up on behalf of the victims of harassment, they were at times physically threatened by other DWR employees outside of the work site.”

(See DWR’s Notice of Motion and Motion.)

The complaints specifically allege the causal connection between the racist and sexist conduct and the failure of the Oroville Dam: “DWR has perpetuated a toxic culture and hostile work environment at the Oroville Dam. DWR management at the Oroville Dam was openly hostile to women and minorities. This toxic culture has not only impacted its workers but also undermined the maintenance and safety of the Dam.” (See City Complaint ¶ 71.) At this stage, those allegations control, and because that factual allegation must be taken as true, the motion should be denied. Plaintiffs’ contentions are well supported by the facts, expert opinion testimony, and the case law.

*1. The Expert Declarations Confirm Widespread Harassment and Discrimination lead Lowered Productivity and Worse Employee Performance*

On top of being alleged in the complaints, see City Complaint ¶ 71, the declarations by Ms. Lazarus, Dr. Bea, and Professor Shauman confirm that deplorable workplace conduct alleged in the

1 complaints has negative consequences. (See Bea Dec., Mickel Dec., Lazarus Dec., Shauman Decl.)  
2 When organizations suffer from dysfunction and hostile environments, the objectives and goals of the  
3 workforce are compromised. (See, e.g., Lazarus Dec. ¶¶ 12, 13.) DWR was obligated to protect the  
4 safety and property of the victims of the Oroville Dam failure. It failed to do so. One of the many  
5 reasons for that failure was its dysfunctional, discriminatory, harassing, and hostile workplace.

6 When harassment and discrimination occur against minorities in the workplace, and upper level  
7 management condones, ratifies or fails to end the harassment and discrimination, entities fail to  
8 function effectively. (Lazarus Dec. ¶¶ 14-16, 19-21.) As applied specifically the allegations in the  
9 Complaints and DWR’s motion, the conduct would create a hostile work environment which decreased  
10 the productivity, communication, and cohesiveness the entire group. (*Id.* ¶¶ 8-13, 17.) “The fact that  
11 the toxic culture at Oroville Dam was allowed to persist [means] the management at DWR jeopardized  
12 the organization’s performance.” (*Id.* ¶ 22; see also Bea Dec. ¶ 19 [the “allegations of racism, sexism,  
13 theft, falsified books, and destruction of evidence which have resulted from a toxic organizational  
14 culture, if proven, would be consistent with the inattention to dam safety I have observed”]; Shauman  
15 Dec. ¶ 4 [DWR’s openly hostile conduct “would more likely than not affect the ability of employees  
16 to productively perform their jobs, including jobs responsible for Oroville Dam safety”]; Mickel Dec.  
17 ¶ 4 [same].) These experts in their fields make clear that discrimination, harassment, and the creation  
18 and perpetuation of a toxic work culture and hostile work environment worsen productivity. Here, the  
19 negative impact was on dam safety. The allegations of discrimination and harassment are relevant.  
20 The Court should deny the motion.

21 2. Substantial Case Law Confirms the Relevance of the Allegations and the  
22 Unlawfulness of DWR’s Conduct

23 Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e *et seq.*, and the Fair  
24 Employment and Housing Act (“FEHA”), Government Code section 12900 *et seq.*, prohibit  
25 discrimination, harassment, and the creation of a hostile work environment on the basis of race, sex,  
26 sexual preference. (See 42 U.S.C. §§ 2000e *et seq.* [Title VII]; see also Gov. Code §§ 12900 *et seq.*  
27 [FEHA].) Failing to comply with Title VII and FEHA is a violation of law. (See *Harris v. Forklift*  
28 *Systems, Inc.* (1993) 510 U.S. 17, 21 [“Title VII of the Civil Rights Act of 1964 makes it an unlawful

1 employment practice for an employer ... to discriminate against any individual ... because of such  
2 individual's race, color, religion, sex, or national origin.”]; see also *Aguilar v. Avis Rent A Car System,*  
3 *Inc.* (1999) 21 Cal.4th 121, 131, 132, 141-42 (“*Aguilar*”) [same for FEHA].) “[Government Code]  
4 Section 12920.5 adds: ‘In order to eliminate discrimination, it is necessary to provide effective  
5 remedies that will both prevent and deter unlawful employment practices and redress the adverse  
6 effects of those practices on aggrieved persons.’” (*Aguilar*, 21 Cal.4th at p. 131, emphasis added.)

7 “The pervasive use of racial epithets that has been judicially determined to violate the FEHA is  
8 not protected by the First Amendment, and such unlawful conduct properly may be enjoined.”  
9 (*Aguilar, supra*, 21 Cal.4th at pp. 141-42.) DWR personnel’s use of the n-word “is highly offensive  
10 and demeaning, evoking a history of racial violence, brutality, and subordination.” *McGinest v. GTE*  
11 *Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1116. It is “perhaps the most offensive and inflammatory  
12 racial slur in English.” (*Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 817, quoting Merriam-  
13 Webster’s Collegiate Dictionary 784 (10th ed.1993).)

14 DWR’s treatment of women was also unlawful. In *Lyle v. Warner Brothers Television*  
15 *Productions* (2006) 38 Cal.4th 264 (“*Lyle*”), Justice Ming Chin detailed the purposes of FEHA’s  
16 prohibition of harassment and discrimination on the basis of sex. (*Id.* at pp. 277-79.) “[I]t is an  
17 unlawful employment practice for an employer, because of sex, to harass an employee. Under the  
18 statutory scheme, harassment because of sex includes sexual harassment and gender harassment.” (*Id.*  
19 at p. 277, internal quotations omitted, citing Gov. Code § 12940(j)(1), Gov. Code § 12940(j)(4)(C),  
20 *Brown v. Superior Court* (1984) 37 Cal.3d 477, 485, and *Mogilefsky v. Superior Court* (1993) 20  
21 Cal.App.4th 1409, 141.)

22 Under Title VII, to assess “whether a work environment is sufficiently hostile, the court  
23 examines the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening  
24 or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an  
25 employee’s work performance.’” *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 787–88 (quoting  
26 *Harris*, 510 U.S. at p. 23.).” (*Reynaga v. Roseburg Forest Products* (9th Cir. 2017) 847 F.3d 678,  
27 687.) The complaints and offer of proof describe conduct that interfered with work performance.

1 Besides being unlawful, DWR's conduct at issue in this motion is recognized to be the type of  
2 conduct which harms productivity. "Sexual favoritism in the workplace" can "undermine[] plaintiff's  
3 motivation and work performance." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 465.)  
4 It also "deprive[s] . . . female employees of promotions and job opportunities." (*Ibid.*, quoting  
5 *Broderick v. Ruder* (D.D.C. 1988) 685 F.Supp. 1269, 1278, citing Ofc. of Legal Counsel, Policy  
6 Guidance on Employer Liability Under Title VII for Sexual Favoritism (Jan. 12, 1990) No. N-915-  
7 048 in 2 EEOC Compliance Manual § 615.) Conduct that is "disproportionately offensive or  
8 demeaning to women" can "sexualize[] the work environment to the detriment of all female  
9 employees." (*Lyle, supra*, 38 Cal.4th at p. 293, citing *Robinson v. Jacksonville Shipyards, Inc.*  
10 (M.D.Fla.1991) 760 F.Supp. 1486, 1523; see also *Snell v. Suffolk County* (2d Cir. 1986) 782 F.2d 1094,  
11 1104 ["This standard places a reasonable duty on an employer who is aware of a racially discriminatory  
12 atmosphere adversely affecting the emotional well-being and productivity of its employees to take  
13 reasonable steps to remedy it."].) One of the reasons for eliminating harassment recognized by the  
14 Ninth Circuit is "to avoid the loss of well-intentioned productive employees." (*Ellison v. Brady* (1991)  
15 924 F.2d 872, 883, fn. 19.) The allegations are relevant in showing that a hostile work environment  
16 existed at DWR and was a substantial factor in causing DWR's failures.

17 3. DWR's Arguments in the Motion are Unpersuasive

18 DWR's recitation of the elements of plaintiffs' claims do not show the rampant racial and sexual  
19 discrimination and harassment within DWR is irrelevant. For example, to prove a Dangerous  
20 Condition of Public Property, plaintiffs must prove negligent or wrongful conduct creating the  
21 condition. Here, the complaints adequately allege that one factor that created the failure was the  
22 harassment and discrimination by DWR. Organizations with toxic corporate cultures that tolerate and  
23 allow harassment and discrimination have real effects on the ability of those entities to function and  
24 accomplish their duties and goals. (See *Lazarus Dec.*, *Shauman Dec.*, and *Mickel Dec.*) More  
25 fundamentally, plaintiffs will show the toxic work environment was a substantial factor in causing the  
26 safety failure. (See CACI 430 [defining substantial factor].)

4. The IFT Report Confirms DWR's Human and Organizational Failures Impacted Dam Safety

The IFT Report analyzed both the technical and “human and organizational” failures that led to the Oroville Dam crisis. (Compare IFT Report §§ 4, 5 with IFT Report § 6.) In “substantial organizational changes may be needed to address the fundamental needs and grievances of both divisions, based on a realistic understanding of their respective cultures, goals, values, limitations, and circumstances.” (IFT Report, § 6.8.5, p. 74.) The IFT Report explicitly notes that one of the failures was the inability of groups and employees within DWR to communicate effectively among each other about who had responsibility for various obligations and tasks. (See IFT Report § 6.8, pp. 70-75.) The infighting within DWR contributed to an overall environment that contributed to DWR’s failure to meet its obligations with respect to the safety and function of the Oroville Dam. (*Id.*; see also Lazarus Dec. ¶ 19 [hostile and harassing environments inhibit communication and problem solving].)

In analyzing DWR’s failure to maintain the Dam, the first of the four factors IFT identified as needing improvement was DWR’s “organizational culture and working relationships.” (IFT Report § 7.2, p. 80; see also *id.* §§ 7.2.1, 7.2.3, pp. 81, 83.) The IFT Report concluded that organizational and human failures within DWR contributed to the February 2017 crisis. These organizational and human failures cannot be divorced from the racism, sexism, preferential treatment, and ratification of unlawful conduct by DWR.

### 5. The Examples in the Declarations Provide Evidence of Wrongdoing

Chris Thomas was employed as a maintenance worker at DWR. Attached to Mr. Harriman's declaration are the first amended complaint filed by Chris Thomas against DWR, excerpts from Mr. Thomas' deposition, and the settlement of the suit. (See Harriman Dec. Exs. A, B and C, respectively) The complaint alleged claims of racial harassment and racial discrimination. (Harriman Dec. Ex. A.) Mr. Thomas' suit describes his treatment during his time as an employee. (*Id.*) DWR's conduct ultimately cost California's taxpayers over a million dollars in a settlement. (*Id.* Ex. C.) The conduct alleged in Mr. Thomas' lawsuit and testified to under oath during his deposition, including the noose (attached hereto as Exhibit A), hanging a toy in his locker and regular racist comments, including use

1 of the n-word, permeated the culture at the Dam. The relationship among the employees working on  
2 the safety and maintenance of the Oroville Dam was a dysfunctional and toxic environment.

3 Genoa Widener, a life-long resident of Oroville who has worked for the nearly two years since  
4 the flood to ensure that the Dam is properly designed and maintained and to protect the residents of  
5 Oroville, confirms the description from Mr. Thomas' litigation. (See Widener Dec. ¶ 7.a.) In addition  
6 to Mr. Thomas, other DWR employees informed Ms. Widener that "workplace culture was hostile,"  
7 that female employees were harassed and referred to by derogatory names, that "jokes" were made  
8 about the sexual preferences of the women who worked on the Dam. (*Id.* ¶¶ 7.b., 7.f., and 7.g.) In  
9 working to gather information about the failure, several DWR employees told her that the  
10 "inappropriate workplace culture at DWR resulted in an inability of DWR to perform basic safety and  
11 maintenance operations at the Dam." (*Id.* ¶ 6.)

12 Mike Hopkins, a former employee of DWR, native of Oroville and U.S. Navy Veteran, was  
13 asked in 2009 at the end of his apprenticeship to sign a false statement alleging that Mr. Thomas had  
14 physically threatened him. (Hopkins Dec. ¶¶ 2, 4.) Hopkins refused because the allegation was not  
15 true. (*Ibid.*) The DWR superintendent who made the request, Terry Stutz, appeared to be trying to get  
16 rid of Mr. Thomas from the team working on safety and maintenance. (*Ibid.*) The "racism that Chris  
17 Thomas experienced while working at DWR was pervasive and created a distraction from work. It also  
18 created division and a lack of trust among DWR employees." (*Id.* ¶ 5.)

19 Mr. Hopkins also witnessed the "constant[] harass[ment]" of a female employee (Ms. Lisa  
20 Melton) by her male supervisors and co-workers. (*Id.* ¶ 8.) When he spoke out about the mistreatment  
21 he observed, he was "physically threatened" and told to "keep [his] mouth shut." (*Id.* ¶ 10.) In ten  
22 years working for DWR, Mr. Hopkins saw firsthand the harassment and mistreatment of DWR workers  
23 and the difficulties that conduct caused for employees to perform their work. (*Id.* ¶ 23.) Mr. Hopkins  
24 was ultimately deposed in the litigation filed by Ms. Melton and relevant excerpts from that deposition  
25 are attached to his declaration as Exhibit A. (*Id.* ¶ 9.)

26 Trevor Hunter, another former employee at DWR who challenged mistreatment of other  
27 employees described DWR, stated: "Employees who spoke out against mistreatment, harassment, or  
28 unsafe practices, were punished by adverse actions, undesirable assignments, and constant



1 monitoring... DWR employees lacked trust in one another and in their supervisors. This all led to a  
2 lack of teamwork and commitment to the job, and shoddy work.” (Hunter Dec. ¶ 18.)

3 **B. The Allegations of Theft are Relevant and Should Not be Stricken**

4 DWR moves to strike:

- 5 • “For years, DWR supervisors were more interested in lining their own pockets than  
6 ensuring the safety of the facility and its workers.”
- 7 • “DWR’s management at the Oroville Dam was at times corrupt, with supervisors  
8 and other employees stealing state equipment and supplies for their own personal  
9 use.”
- 10 • “It is reported that at least one supervisor frequently stole gasoline from the Oroville  
11 field division for his own personal use.”
- 12 • “It is reported that another DWR maintenance supervisor, Chuck Saiz, was denied  
13 a promotion after it was discovered that he has stolen state property, including  
14 asphalt and tools, from Oroville Dam worksites. Saiz has also encouraged a crony  
15 system at Oroville Dam, offering overtime work to the employees whom he  
16 considers to be close friends. This was in direct violation of DWR’s official  
17 overtime policy. The word and the joke among staff was that DWR supervisors  
18 were the ‘water mafia’.”
- 19 • “DWR managers would on occasion purchase overpriced tools and supplies from  
20 friends with state money for use at the Oroville Dam.”
- 21 • “This culture of corruption extended all the way to DWR senior management. It is  
22 reported that DWR maintains two sets of accounting books. DWR’s ‘official’  
23 accounting system is maintained on a SAP server. However, DWR also maintains  
24 a second set of books at a data center located at 1416 9th Street in Sacramento. This  
25 second set of books reflects DWR’s actual finances. It is alleged that the books  
26 show that DWR often expended funds that had been earmarked for one project on  
27 various other projects. This was reported to DWR senior management.”

28 (See DWR’s Notice of Motion and Motion.)

21 The allegations of theft and improper bookkeeping are relevant. DWR contends that these  
22 allegations should be stricken because there is no causal connection to the spillway failure. As for the  
23 theft claim, the complaints allege DWR management stole supplies intended for use at the Oroville  
24 Dam. (City Complaint ¶¶ 81, 85, 86.) This goes directly to the inadequate maintenance of the Dam  
25 and its eventual failure.

26 The alleged theft impacted the availability of tools, time, and money to do the necessary  
27 maintenance work on the Oroville Dam. It was another example of the culture of corruption and  
28 entitlement at DWR. Both things contributed to DWR’s systemic and wide-ranging failures to ensure

1 that the plaintiffs were not harmed and many reports of the failure specifically talked about this toxic  
2 culture. The Declarations of Mr. Hopkins and Ms. Widener, included here as an offer of proof, detail  
3 the theft. (See Hopkins Dec. ¶ 12 and Exhibit B; Widener Dec. ¶ 7.h. [“equipment and materials  
4 required for maintenance at the Oroville Dam were purchased by the state but stored and sold from the  
5 warehouse” along Highway 70].) Mr. Hunter observed misuse of funds to purchase over-priced  
6 supplies from friends of DWR supervisors. (Hunter Dec. ¶ 17.)

7 DWR does not address the bookkeeping allegations at all in its brief, grouping them in with the  
8 “petty theft.” It is not remotely accurate to describe senior management’s conduct in misallocating and  
9 mispending earmarked and appropriated funds as petty theft. If true, the allegations are plainly  
10 relevant as it would show that DWR executives took funds that were allocated for safety and  
11 maintenance of the Oroville Dam and spent them elsewhere.

### 12 **C. The Alleged Destruction of Evidence and Cover Up are Also Relevant**

13 DWR seeks to strike:

- 14 • “After the Oroville Dam’s failure, there were rumors that DWR issued a directive  
15 that any notes, files, memos, or other documents regarding the crisis be destroyed.”
- 16 • “DWR also disposed of key physical evidence of its inadequate maintenance.”
- 17 • “DWR disposed of the concrete before it could be inspected or tested according to  
18 some at DWR.”
- 19 • “DWR also barred Robert Bea, a renowned expert in catastrophic risk management  
20 and the head of CCRM from inspecting the Oroville Dam site after the crisis,  
21 claiming potential ‘terrorism concerns.’”
- 22 • “DWR’s redaction of these key documents constitutes a blatant attempt to keep the  
23 public in the dark about the safety of the Oroville Dam and DWR’s failure of  
24 maintenance and supervision.”
- 25 • “. . . and that they are now being brought on to cover-up the fact that supervision  
26 and maintenance of the dam was lacking.”

27 (See DWR’s Notice of Motion and Motion.)

28 Destruction of evidence is always relevant. DWR argues that because there is no cause of action  
for spoliation, these allegations cannot be relevant. Spoliation “can destroy fairness and justice.”  
(*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 8.) But the reason a separate tort  
does not exist has nothing to do with the relevance of spoliation. “Chief among [the reasons] is the

1 evidentiary inference that evidence which one party has destroyed or rendered unavailable was  
2 unfavorable to that party. This evidentiary inference . . . has a long common law history.” (*Id.* at p.  
3 11.) “In determining what inferences to draw from the evidence or facts in the case against a party, the  
4 trier of fact may consider, among other things, the party’s ... willful suppression of evidence.” (Evid.  
5 Code § 413.) The standard jury instructions specifically allow the jury to consider “whether one party  
6 intentionally concealed or destroyed evidence.” (CACI 204.)

7 Before filing the Complaints in these actions, Joseph Cotchett, one of counsel for Plaintiffs,  
8 sent a letter to DWR. (See Declaration of Joe Cotchett (“Cotchett Dec.”) ¶ 3.) That letter described  
9 reports that DWR had begun destroying documents and evidence, and that there was a directive to do  
10 so from the managerial level of the organization. (*Id.* Exhibit A) No response was ever provided to  
11 that letter, and the two witnesses DWR identified as the most knowledgeable about document retention  
12 and preservation were never told of the letter and never told of the alleged evidence destruction. (*Id.*  
13 ¶¶ 6-13.) DWR’s lack of response furthers plaintiffs’ concerns.

14 This also tracks with Dr. Bea’s experience dealing with DWR. As Dr. Bea described, much of  
15 the information that he was provided contained significant redactions. (See Bea Dec. ¶ 18.) As Dr.  
16 Bea explained, where he received both redacted and unredacted information, the redactions were  
17 inconsistent with the CEII concerns identified by DWR and appeared to be intended to conceal  
18 damaging information from the public. (*Ibid.*)

19 **VI. CONCLUSION**

20 The Court should deny DWR’s motion in full.

21  
22 Dated: February 1, 2019

**COTCHETT, PITRE & McCARTHY, LLP**

23  
24 By: \_\_\_\_\_

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ERIC J. BUESCHER  
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JAMES V. NOLAN  
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# **EXHIBIT A**



**Noose found in DWR Meeting Room**

# **EXHIBIT B**







**UP** Louisiana Pacific





