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BEFORE THE CENTRAL VALLEY

REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of: MOUNT DIABLO MERCURY MINE, CONTRA COSTA COUNTY, CLEANUP AND ABATEMENT ORDER R5-2013-0701	PROSECUTION TEAM REPLY BRIEFING REGARDING EXPRESS AND IMPLIED ASSUMPTION OF LIABLITY

Consistent with the Revised/Supplemental Hearing Procedures in this matter, the Prosecution Team for the Regional Water Quality Control Board, Central Valley Region (Prosecution Team) submits this reply brief regarding Sunoco, Inc.'s (Sunoco) express or implied assumption of Cordero Mining Company's (Cordero) liabilities associated with operations at the Mt. Diablo mine site. In addition to Sunoco's rebuttal brief submitted in this matter, the Prosecution Team issued a subpoena to Sunoco for all documents related to corporate succession. Some of those documents are included herewith as exhibits. It remains the Prosecution Team's position that Sunoco is properly named in the Proposed Cleanup and Abatement Order (CAO).

ARGUMENT

I. Admissible Relevant Evidence Indicates that Sunoco Assumed the Liabilities of Cordero Mining Company

At hearing, the Prosecution Team will argue that Sunoco is responsible for Cordero's liabilities, through two of four exceptions to the general rule that a successor corporation is not responsible for the liabilities of its predecessors. *See Ray v. Alad* (1977) 19 Cal.3d 22. This is not based on Sunoco's status as a shareholder, but rather Sunoco's actions and statements since

Cordero's dissolution, including (1) the responses to interrogatories, correspondence by Sun's[1] legal counsel and a settlement agreement executed by two Sun Company Inc. officials, its Manager for Environmental Projects and Director of Remediation Services in *Santa Clara v. Myers Industries, Inc. et al.*, (2) expenditures by Sunoco in response to EPA and Regional Board directives *without seeking contribution or reimbursement as an innocent party*. All dischargers are allowed and expected to vigorously defend themselves; however, it is not a reasonable inference to conclude that parties without any legal responsibility to incur costs in a cleanup matter would not attempt to exercise their rights to recoup those often significant expenditures.

A. Sunoco's New Self-Serving Interpretation of Interrogatories

The relevant interrogatories are provided for reference:

RESPONSE TO INTERROGATORY NO. 1:

Sun Company, Inc. admits that it is the successor in interest to Cordero Mining Company.

RESPONSE TO INTERROGATORY NO. 2:

Cordero Mining Company, a Nevada corporation, was dissolved on November 18, 1975. At the time of dissolution, a subsidiary of Sun Company, Inc. was the sole shareholder of Cordero Mining Company. This subsidiary was subsequently spun-off to the shareholders of Sun Company, Inc. on November 1, 1988 as part of a corporate restructuring, although Sun Company, Inc. retained responsibility for the liabilities of Cordero Mining Company. Sun Company, Inc. admits that it is the successor in interest to Cordero Mining Company.

Sunoco now claims that the "Cordero Mining Company" referenced in the Interrogatory Response must have been limited to one or two Delaware Cordero companies, and not a single Nevada Cordero at issue in the Mt. Diablo matter. This interpretation is not consistent with the plain language of the Interrogatories, Sunoco's contemporaneous actions and statements in the *Santa Clara* case, or the Distribution Agreement that Cordero cites.

[1] Sun Company, Inc. was the party involved in the Santa Clara case. Sunoco has admitted that Sun Company, Inc. changed its name to Sunoco in 1998.

B. Other Case Documentation Not Submitted by Sunoco

a. Correspondence to Opposing Counsel

Sunoco references confusion by counsel for Myers Industries, Inc. ("Myers") as to which Cordero corporate successor Myers should name in a cross-complaint. Sunoco submitted Exhibits 27 and 28 in support of its new interpretation of the Interrogatory Response, but the exhibits rebut Sunoco's position on their face. Exhibit 28, from the Sun's Senior Counsel, provides in relevant part:

> Please be advised that Sun (or certain of its subsidiaries) not Oryx Energy Company, is responsible for the liabilities, if any, of the **Cordero Mining Company, a former Nevada corporation**, at the Almaden Quicksilver County Park.

Counsel for Myers wrote immediately to clarify "the entity or entities that are responsible for the liabilities of Cordero Mining Corporation, **a former Nevada corporation**, at the Almaden site as alleged."[2] Correspondence in July 1993 from Sun's outside counsel clarified that "Sun Company Inc." (without any caveat regarding possible Sun subsidiaries) is responsible for the liabilities of Cordero Mining Company.[3] The Interrogatories were signed by Sun on August 30, 1994. All of the correspondence supports the conclusion that the plain language of the Interrogatories is not subject to any re-interpretation now, that the "Cordero Mining Company" described in the Interrogatory Response was limited to a Delaware company. The correspondence and the parties' conduct for more than a year belies that interpretation.

b. Court Pleadings and Settlement Agreement

After three years of litigation, a majority of the parties, including Myers/BKHN and Sun,

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[2] This document was provided in response to the Prosecution Team's subpoena to Sunoco, and is Bates-stamped SUN_MD0001804-1806. It is a June 3, 1994 letter from Peter Krakaur (counsel for Myers and BKHN) to John Verber (outside counsel for Sun) regarding the proper entity to name in Myers/BKHN's cross-complaint. It is attached hereto as Exhibit A.

[3] This document was provided in response to the Prosecution Team's subpoena to Sunoco, and is Bates-stamped SUN_MD0001807. It is a July 22, 1994 letter from Mr. Verber (outside counsel for Sun) to the judge requesting leave to take a preservation deposition of an elderly witness. The language quoted in is the first paragraph, and the letter is attached hereto as Exhibit B.

entered into a consent decree and settlement agreement. In the Second Amended Cross-Claim against Sun, Myers/BKHN alleged, consistent with the summer 1993 correspondence:

> 9. CROSS-CLAIMANTS are informed and believe, and thereon allege, that CORDERO MINING COMPANY ("Cordero") is or was a **Nevada corporation** doing business in California. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that from in or about 1951 through in or about 1953, Cordero leased the PROPERTY or portions thereof, and/or conducted and/or permitted mercury mining activities at the Property or portions thereof.
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> 10. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the activities, acts and/or omissions of Cordero at the PROPERTY or portions thereof caused, permitted, or contributed to the release or threatened release of hazardous substances, including mercury at the PROPERTY or portions thereof.
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> 11. CROSS-CLAIMANTS are informed and believe, and thereon allege, that cross-defendant SUN COMPANY, INC. ("SUN") is, and was at all relevant times herein, a Pennsylvania corporation authorized to do and doing business in California. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that **SUN is the successor to and/or otherwise responsible for any and all liabilities of Cordero** arising from or related to Cordero's acts or omissions at the PROPERTY.[4]

(emphasis added)

Sun responded to Myers' Second Amended Cross-complaint as follows:

> 5. Sun denies the allegations contained in paragraph 10.
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> 6. **Sun admits the allegations in paragraph 11.**
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> 7. Sun denies the allegations contained in paragraph 12.[5]

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[4] Myer/sBKHN's Second Amended Cross-Claim was provided in response to the Prosecution Team's subpoena to Sunoco, and is Bates-stamped SUN_MD0001936-1959. It is attached hereto as Exhibit C.

[5] Sun Company, Inc.'s Answer Myer/sBKHN's Second Amended Cross-Claim was provided in response to the Prosecution Team's subpoena to Sunoco, and is Bates-stamped SUN_MD0001919-1935. It is attached hereto as Exhibit D.

(emphasis added) The admission by Sun that it was the corporate successor to Cordero, a Nevada company, in a lawsuit related to cleanup costs for a mercury mine in California, was therefore repeated consistently, and in binding court documents.

On November 19, 1996, Sun Company, Inc. entered into a Consent Decree/Settlement Agreement, entered with the Northern District United States Federal court. This agreement resulted in Sun and BKHN making a payment to the California Department of Toxic Substances Control[6] (see page SUN_MD0002068). Therefore, in correspondence to Myers' counsel and the presiding judge in June and July 1993, answers submitted with the court in July 1993, an answer submitted to federal court, and a settlement agreement signed in November 1996, Sunoco at all times understood and agreed that the allegations were brought against Sun Company, Inc. for the actions of Cordero, a Nevada corporation. Sun agreed to pay settlement monies for cleanup of the Almaden mine based on this relationship between it and Cordero. Sunoco's current self-serving statement in its Rebuttal Brief is contrary to the documents it submitted to the Board (exhibit 28) and the documents it submitted to the Prosecution Team in response to the subpoena and submitted herewith (Exhibits A-E).

Sunoco points to the 1988 Distribution Agreement as "support" that the Interrogatories contain an error (Rebuttal, 6:24-8:24). Sunoco states that the Distribution Agreement does not mention what Sunoco now refers to as Nevada Cordero (Rebuttal 7:9-10), even though there is a Cordero Mining Co. (with no state abbreviation) and a Cordero Mining Co. (DE). Sunoco asserts these are both the Delaware entities (Rebuttal 5:2-12).[7] However, Sunoco would like this Board to conclude that an Agreement which <u>does not contain a reference to Cordero Mining Company in Nevada</u> should somehow control and override the plain language of numerous court documents. The Distribution Agreement was signed in 1988. The *Santa Clara* litigation documents were

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[6] The Consent Decree was provided in response to the Prosecution Team's subpoena to Sunoco, and is Bates-stamped SUN_MD0002065-2082. It is attached hereto as Exhibit E.

[7] Sunoco provides no explanation for why, out of the approximately 450 active Sun Company, Inc. businesses and the approximately 500 defunct Sun Company, Inc. companies listed in the appendices to the 1988 Distribution Agreement, Cordero Mining Company of Nevada is the only entity worldwide that was excluded or treated differently.

consistent from 1993 through 1996, with the final result being a settlement agreement and money changing hands based on allegations against Cordero, and Sun Company, Inc. as Cordero's successor. Sunoco's current argument is not plausible given the overwhelming evidence to the contrary.[8]

II. No Writing is Necessary for An Express Assumption

a. The Contract between Cordero and Sunoco Was Reflected in Written, Binding Documents

Sunoco argues that there can be no express assumption of liability without a written contract. This argument is without merit. An express contract is one where the terms are stated in words (California Civil Code Section 1620) and an implied contract is found by examining the parties' conduct (California Civil Code Section 1621). A written contract may be pleaded word for word or generally according to its legal effect. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-99. Here, while we do not have a contract between Cordero and Sunoco, we have numerous writings in which Sunoco communicated its intent that would allow the Board to find that there was an express assumption of Cordero's liabilities by Sunoco. The writings in this matter, including Sunoco's legal admissions, are clear to establish that there was a promise by Sunoco to accept Cordero's liabilities. The writings establish that Sunoco, whether in 1975 at Cordero's dissolution, or in the *Santa Clara* lawsuit between 1993-1996, Sunoco represented it was stepping into Cordero's shoes and responding to claims against Cordero for environmental contamination. The uncertainty of the start date is irrelevant for our purposes, because the promise made by Sunoco (to accept responsibility for Cordero's liabilities) is clear, and even with missing terms, the law will imply reasonable contract terms. *See Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.

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[8] Sunoco speculates that the Regional Board accepted its corporate succession argument in a previous CAO involving Sulphur Creek, but documents provided to Sunoco in response to its Public Record Act (PRA) request indicate otherwise. The Regional Board did not feel that certain entities, including Sunoco, had the requisite level of control and so chose not to name in the final them in the final Order. See Exhibit F, provided to Sunoco on August 28, 2014 in response to its PRA request (pg. 1, paragraph 1).

b. *In re Purex* supports the Prosecution Team's Argument, not Sunoco's

The State Board order *In re Purex Industries, Inc.* (WQ Order 97-04) is not to the contrary, and supports the Prosecution Team's position to name Sunoco. Purex Industries, Inc. (PII) was the corporate successor to Purex Corporation, an operator at the site at issue. PII claimed, however, that a leveraged buy-out with Baron-Blakeslee, Inc. shifted all liability from Purex Corporation to Baron-Blakeslee. The Board disagreed, and instead added Baron-Blakeslee to the Order, so both it (through the contractual assumption of liabilities) and PII (as Purex Corporation's successor) were responsible for Purex Corporation's discharges.

The Board reviewed the agreement transferring assets and liabilities from Purex Corporation to PII, and from PII to Baron-Blakeslee. (*In re Purex* at *4). Sunoco concludes that the following language indicates that the Board's conclusion would have changed if the contract documents had not been available:

> Baron-Blakeslee/Del's agreement to assume the unknown liabilities related to the former division was contractual in nature. ***Absent the agreement**, the corporation [Baron-Blakeslee] was not legally obligated to assume the liabilities related to the former division...*

(emphasis added by Sunoco; *In re Purex* at *7) Sunoco concludes that the existence of the contract is the critical legal fact. However, based on the entire context of the *In re Purex* order, and the State Board's citations to other matters, it is clear that the Board relied on Baron-Blakeslee's promise to accept Purex Corporation's liabilities, and the written agreements were simply the best evidence available. If Baron-Blakeslee had not promised to assume the liabilities, then the liabilities would have stayed with PII. Without an agreement to assume the liabilities, there was no conduct by Baron-Blakeslee that would have independently subjected it to responsibility under the Water Code.

This reading, that "absent the agreement" must mean that without Baron-Blakeslee's assumption of liabilities, it would not be responsible for the site discharges. It makes much more sense than the Board concluding that an agreement had to be reduced to writing, given the citations

to the Civil Code and other statements by the Board. First, the State Board found that the issue of whether an assumption has occurred is a question of fact, and cited *Ray v. Alad* (which allows implied assumption, which would normally not involve a written contract) and *Beatrice Co. v. Board of Equalization* (1993) 6 Cal.4th 767, 771 (*see In re Purex* fns. 7, 23, 25, 26), which did not have a formal written contract but rather a written consent by the successor entity's Board of Directors.[9] *In re Purex* also cited the *Alcoa* order (WQ Order No. 93-9), which concluded that contractual agreements between individuals or companies were not binding on regional boards. The Board also cited to several sections of the California Civil Code, including section 1643, which requires interpretation in favor of a contract. (*See In re Purex*, fn. 17).

Without an asset transfer agreement to review, the Board can look to other writings that indicate that Sunoco made a legally-binding promise to assume responsibility for the liabilities for Cordero. The Board could find the verified Interrogatory Responses, the admissions in the Answer, or the payment as reflected in the settlement agreement sufficient evidence of an agreement where the terms are stated in words, as required by California Civil Code Section 1620.

c. Even if the Board Does not Find Express Agreement, an Implied Agreement Should be Found on the Facts Presented

As stated above, an implied contract can be found by examining the parties' conduct (California Civil Code Section 1621). Based on the absence of a written agreement, although that alone is not determinative, Sunoco's actions, including three years of affirmative representations in the *Santa Clara* mining case, are substantial evidence that an implied contract existed.

The Prosecution Team's assertion of an express or implied contract is not based on the legal

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[9] Beatrice created Standard Dry Wall on October 28, 1993. At the time of incorporation Standard Dry Wall issued 1,000 shares of stock to Beatrice, but it remained inactive until July 31, 1984, when Beatrice transferred all of the assets of its "Standard Dry Wall Products Division" (the division) to Standard Dry Wall. The transaction was not made pursuant to a written contract between Beatrice and Standard Dry Wall, but was reflected in a "Written Consent" of the Standard Dry Wall board of directors for the issuance and sale to Beatrice of 9,000 shares of Standard Dry Wall stock in exchange for "(1) substantially all of the assets of Beatrice's Standard Dry wall Products Division (the Division) ...; and (11) the assumption by [Standard Dry Wall] of substantially all of the liabilities of the Division..."

The court then referred to this document as the "Assumption Agreement." *Beatrice Co. v. State Board of Equalization* (1993) 6 Cal.4th 767, 771. *See also Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1327.

positions taken by Sunoco, or an attempt to turn every cooperative discharger into a hostile one. It is based on the circumstances presented, which in this case include repeated and verified representations that Sunoco assumed the responsibility for Cordero's discharges. To the extent that an innocent, rather than simply cooperative, discharger incurred significant fees as a result of the actions by an entity for whom it was not legally liable, one would expect the innocent discharger to seek compensation from liable parties. Sunoco has not done so. That fact alone, or cooperation with the Regional Board, does not result in liability under the Water Code. But the *Santa Clara* documents and other representations made by Sunoco are consistent with numerous orders of the State Board that suggest public policy considerations should result in multiple parties being named in cases of disputed responsibility.[10] *In re Purex* at *6 (*citing In re Stinnes-Western Chemical Corp.*; WQ Order 86-16).

III. The Modified Cleanup and Abatement Order

The Prosecution Team submitted revisions to the Cleanup and Abatement Order consistent with the additional argument raised against Sunoco, and the removal of Kennametal as a responsible party. We will address each of those in turn.

a. Sunoco

Sunoco objects to the additional language in Paragraph 17 (the addition of the express/implied assumption argument resulting in Sunoco's liability) and refers to its previous briefs. Sunoco states it is without knowledge or information to refute the modifications to Paragraph 18 (the removal of Kennametal). Sunoco has now briefed the issue of express/implied assumption and has provided evidence to the Prosecution Team, both in submissions to the Board and in response to a subpoena, that indicate the verified Interrogatory Responses were only one of numerous statements made by Sunoco to third parties, including cross-claimants and the federal court, that relied on such statements. Sunoco also entered into a settlement agreement consistent

[10] Cooperation with the Regional Board does not create liability under Water Code section 13304. The Prosecution Team of course would argue that Sunoco has itself received benefits, including financial, from assisting the Regional Boards, including development of the cleanup and the inclusion of numerous parties other than Sunoco being named to the current Cleanup and Abatement Order.

with the assumption of Cordero's liabilities. Based on the evidence presented, the Prosecution Team has met its burden by a preponderance of evidence that Cordero was a discharger under Section 13304 based on its activities at the Mt. Diablo site and that Sunoco assumed Cordero's liabilities for Cordero's actions.[11]

b. Kennametal

Kennametal does not object to its removal from the CAO, but incorporates by reference its arguments related to the other language in Paragraph 17 (the statements related to Nevada Scheelite's activities and discharges at the Mt. Diablo site). The Prosecution Team has met its burden by a preponderance of evidence that Nevada Scheelite conducted mining exploration activities that give rise to Section 13304 liability. Nevada Scheelite, if it still existed, would be properly named in the order. However, there is not sufficient evidence to find that Kennametal assumed the responsibilities for Nevada Scheelite's actions under any of the *Ray v. Alad* exceptions. Therefore, the Prosecution Team recommended the modifications to Paragraph 18 that were submitted on August 22, 2014, but not the removal of Paragraph 18 in its entirety.

IV. Conclusion

The Prosecution Team's previous briefing has alleged that Sun Oil Company, and now Sunoco, are the proper successors to Cordero, including to its environmental liabilities, through either a de facto merger or because it is necessary to pierce the corporate veil. Once the Interrogatories were submitted into evidence, it became clear that Sunoco had expressly assumed Cordero's liabilities and manifested that promise in a previous lawsuit. Sunoco's interpretation of the Interrogatories and previous State Board orders are not persuasive. Sunoco should be bound by its repeated admissions and promise to accept Cordero's liabilities, and be named in the Cleanup and Abatement Order.

September 24, 2014

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[11] The Prosecution Team has no objection to the Board/Advisory Team modifying finding 17 to be consistent in describing additional documents which reflect Sunoco's promise to accept Cordero's liabilities that were not in the Prosecution Team's possession on August 22, 2014.

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