ATLANTIC RICHFIELD COMPANY'S PREHEARING BRIEF

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

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The Prosecution Team has presented the Regional Board with an extraordinary case. The Regional Board is admittedly liable for the conditions at these Sites, there is an ongoing federal CERCLA remedy on a portion of the Sites, and the Prosecution Team seeks to hold Atlantic Richfield Company ("Atlantic Richfield") liable despite Atlantic Richfield never having owned or operated any part of the Sites at issue. The Prosecution Team not only lacks the evidence to prove such a case, but the Regional Board lacks legal authority for even considering the case. For all of the reasons explained in this Prehearing Brief and the nine Prehearing Motions Atlantic Richfield attaches as appendices hereto, the Board must reject the Draft CAOs.[1]

INTRODUCTION

Atlantic Richfield and its predecessors,[2] International Smelting and Refining Company ("IS&R") and Anaconda Copper Mining Company ("Anaconda") were never owners of the Sites. Nor were these companies among the many successive entities which operated one or both of these Sites. Indeed, Atlantic Richfield's only connection to the mining property at issue here is from a long-ago predecessor's ownership of stock from 1918 to 1945, in a publicly traded company — the Walker Mining Company ("Walker Company") — that itself owned and operated a copper mine and associated facilities located at the Mine Site for a brief portion of the history of these sites ("Walker Mine"). Having spent decades pursuing the Sites' owners (and, through settlements, assuming the liability of some of these owners), the Prosecution Team has come to Atlantic Richfield as the only solvent party left. But the Prosecution Team is wrong: there are others, including this Regional Board, which are liable to pay for

[1] This brief addresses proposed Cleanup and Abatement Order No. R5-2014-XXXX ("Tailings Site CAO") and proposed Cleanup and Abatement Order No. R5-2014-YYYY ("Mine Site CAO," and together the "Draft CAOs"). Together the Mine Site and the Tailings Site are referred to in Atlantic Richfield's brief as "the Sites".

[2] Atlantic Richfield Company does not dispute that Atlantic Richfield is the successor to Anaconda and IS&R through a series of corporate transactions. Together, IS&R and Anaconda are referred to as the "Anaconda Companies" in this brief.

some or all of any needed investigation and remediation. And more importantly, Atlantic Richfield cannot be liable for these Sites.

A foundational principle of corporate law is that shareholders are not liable for the debts and liabilities of the corporations in which they invest. In fact, the corporate veils of publicly traded corporations like the Walker Company have never been pierced. Perhaps recognizing this reality, the Prosecution Team has abandoned its originally pleaded effort to establish the Walker Company was the alter ego of IS&R. The Prosecution Team is left attempting to prove liability by showing that IS&R controlled the waste disposal activities of Walker Mine. The problem is that they have no such evidence because there was no such control. The Prosecution Team then drifts back to where it started: alleging IS&R managed the Walker Mine alongside the Walker Company, apparently as the Walker Company's alter ego.

Of course, a United States Bankruptcy Court ruled on this very question nearly 70 years ago – at a time when witnesses were still around to testify and the events were relatively fresh in human memory. The decision:

> "Debtor is not and has never at any time been an alter ego or instrument or department of [Anaconda] or of [IS&R]";
>
> "Debtor's business and affairs have at all times been carried on and conducted in the manner and according to the methods and practice usually employed by corporations free of any domination or control by others"; and
>
> "[N]o act or omission of [Anaconda] or of [IS&R], their officers, agents and employees, or any of them, establishes any evidence, constitutes or proves any domination or control by them or any of them over Debtor or any of Debtor's acts, business or affairs, or constituted fraud, or occasioned damage or prejudice to or violated any right of Debtor or any of its stockholders."

(Ex. 131.)

The evidence of record and pre-filed materials show that the Prosecution Team has not and cannot meet its burdens of production and persuasion by a preponderance of the evidence.

To provide the Regional Board with a framework for addressing preliminary jurisdictional and liability issues that must be resolved first, and to highlight the relevant facts and law it will need to decide before issuing any CAO here, Atlantic Richfield has included nine prehearing motions as Appendix 1 to this Brief:

1. Atlantic Richfield Company's Prehearing Motion No. 1 Requesting A Regional Board Ruling That CERCLA Prohibits The Regional Board From Issuing The CAOs

2. Atlantic Richfield Company's Prehearing Motion No. 2 Requesting A Regional Board Ruling That The Regional Board Is A Discharger At The Sites

3. Atlantic Richfield Company's Prehearing Motion No. 3 Requesting A Regional Board Ruling That The Doctrine Of Laches Precludes The Board From Issuing The Draft CAOs

4. Atlantic Richfield Company's Prehearing Motion No. 4 Requesting A Regional Board Ruling That Due Process Requires The Board To Recuse Itself

5. Atlantic Richfield Company's Prehearing Motion No. 5 Requesting A Regional Board Ruling That The Prosecution Team's Claim For Contribution Cannot Be Adjudicated In An Administrative Hearing

6. Atlantic Richfield Company's Prehearing Motion No. 6 Requesting A Regional Board Ruling That The Prosecution Team Has The Burden To Prove Each Element Of Its Case Seeking Each Proposed Clean Up And Abatement Order By A Preponderence Of The Evidence

7. Atlantic Richfield Company's Prehearing Motion No. 7 Requesting A Regional Board Ruling That Atlantic Richfield Cannot Be Jointly And Severally Liable For Clean Up And Abatement Of The Mine And/Or Mine Tailings Sites

8. Atlantic Richfield Company's Prehearing Motion No. 8 Requesting A Regional Board Ruling That Past Costs Are Not Recoverable In This Proceeding

9. Atlantic Richfield Corporation's Prehearing Motion No. 9 Requesting A Regional Board Ruling That Certain Opinions Of Dr. Fredric Quivik Are Excluded And Stricken From The Record

Before the hearing commences, Atlantic Richfield respectfully requests separate written rulings on each of these motions.

FACTUAL BACKGROUND[3]

I. THE FIRST 38 YEARS: THE WALKER MINING COMPANY AND THE WALKER MINE

Before IS&R purchased stock in the Walker Company, the Walker Mine property, including a mill, concentrator and tailings pond, were developed and operating through the efforts of the Walker Company's original investors. As early as 1909, J.R. Walker had located and begun work on the mining claims comprising the Mine Site, (Ex. 136), had sunk a shaft on the Site by 1910, (Ex. 198), and had two operating tunnels with crosscuts by 1915, (Ex. 4.) Mr. Walker and others incorporated the Walker Company in Arizona in 1913. (Ex. 61.) The Walker Company built its first mill at the Sites in 1915, (Ex. 137), and during those early years, disposed of its tailings at a site near the mill, (Lombardi, at p. 10.) Before IS&R took any investment interest in the Walker Company, the Walker Company had already produced over 67,000 tons of ore, 23,340 tons of concentrate and 44,740 tons of tailings. (McNulty, at p. 16, Table 1.)

IS&R later purchased stock in the Walker Company, and IS&R's involvement with the Walker Mine was at all times consistent with corporate norms. In 1918, IS&R acquired 600,020 shares of the Walker Company's stock, a 50.4% interest in the Walker Company. (Ex. 29.) The Walker Company continued to operate as a fully functioning separate enterprise and all corporate formalities were followed. (Haegele, at pp. 5-8.) All loans and services provided by IS&R and its parent, Anaconda, were appropriately accounted for and all sales contracts from the Walker Company to IS&R were market based. (*Id.* at pp. 7-8.) It is undisputed that IS&R's investment in the Walker Company was beneficial to the Walker Company and the minority shareholders, and there is no evidence that the Anaconda

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[3] Atlantic Richfield includes here the factual backdrop for this matter. Additional facts are described in the balance of this brief and in the reports of Atlantic Richfield's exerts. Atlantic Richfield hereby incorporates all Exhibits included in Appendix 2 to this Prehearing Brief. Atlantic Richfield also incorporates the expert reports of William Haegele, Terry McNulty and Marc Lombardi, attached as Appendix 3, Appendix 4 and Appendix 5, respectively.

Companies ever advanced their own interests to the detriment of the Walker Company. (*Id.* at pp. 8-9, 10.)

The Anaconda Companies direct involvement in the Walker Mine was limited to certain administrative and procurement services and to providing geological expertise, primarily for long-range planning and ore prospecting. (McNulty, at pp. 9-10; Haegele, at pp. 11-14.) The Anaconda Companies had special expertise in geology. (McNulty, at p. 9.) Its exploration geologists served as consultants to the Walker Company in support of exploration and development activities at the Walker Mine, which is the search for ore deposits to book reserves and plan for future mining. (McNulty, at p. 9.) The Anaconda Companies were compensated for these consulting services and the Walker Company employees performed all of the underground work related to prospecting, exploration and development. (Haegele, at p. 11; McNulty, at p. 5.)

Ore prospecting is not waste disposal. After the operator locates the ore, it must physically remove that ore from the mine. Once the operator removes the ore from the mine, it must mill and process that ore in a concentrator to separate the ore from the rock. After this process is complete, the operator ships the now enriched copper for sale and disposes the mill tailings as waste. (McNulty, at p. 15.) At the Walker Mine, the Walker Company originally disposed of these tailings at a tailings pile near the mill. (Lombardi, at p. 10.) The Walker Company later established a tailings impoundment at what is now known as the Tailings Site.

There is no evidence that Anaconda directed or controlled those core mining activities of the Walker Company, and important to this proceeding, there is no evidence of Anaconda's involvement in waste disposal decisions. (McNulty, at p. 15; Haegele, at pp. 14-16.) The Walker Company had hundreds of employees who ran the operations at the Walker Mine. The Anaconda Companies neither operated nor managed the Walker Mine. (McNulty, at p. 10; Haegele, at p. 16.)

With respect to the Tailings Site, the Walker Company and the United States Government alone arranged for permitting and development of the tailings impoundment. In 1919, the Walker Company applied to the U.S. Department of Interior ("DOI") for permission to build a tailings reservoir downstream from the Mine Site at what is now known as the Tailings Site. (Ex. 9.) The United States Government owns the Tailings Site. After imposing certain requirements, including the construction of a tailings dam to government standards, the DOI approved the Walker Company's application in 1920. (Ex. 24.) Thereafter, the tailings were carried by water from the Mine Site to the Tailings Site by a wooden trough. (Ex. 137.)

The Walker Company mine operated for less than twenty-three years. With the Depression came low copper prices, decreasing the Walker Company's profitability and sometimes forcing it to suspend mining or cut back its operations. For instance, low copper prices forced the mine to shut down from 1932 to 1935. (Ex. 133.) Even after the mine reopened, copper prices remained low and the Walker Company lost money. The copper content of the known ore bodies began to decline at the same time. An extensive search for additional ore was conducted in 1939 to 1941, with disappointing results. The mine closed in October 1941, and the Walker Company filed for bankruptcy in 1944. (Ex. 128.)

At the time of the bankruptcy, a United States Judge determined that the Anaconda Companies did not control the Walker Company. When IS&R filed a claim for an outstanding loan to the Walker Company, the minority shareholders in the Walker Company challenged the claim. After an eight day hearing on this challenge, the special master allowed IS&R's claim. (Ex. 132.) The bankruptcy judge adopted the special master's findings, concluding that "no act or omission of [Anaconda] or of [IS&R], their officers, agents and employees, or any of them . . . proves any domination or control by them or any of them over Debtor or any of Debtor's acts, business or affairs . . ." (Ex. 131.)

II. THE NEXT 70 YEARS: SUBSEQUENT OWNERS AND THE REGIONAL BOARD

The Mine Site has had several owners from 1945 to the present. Safeway Signal purchased the Mine Site out of the Walker Company bankruptcy estate. (Ex. 140.) There appear to be no records remaining that describe what operations Safeway Signal conducted and whether it altered the Mine Site. From at least the mid 1940's until the mid-1990's Robert Barry and entities which Barry controlled owned the Mine Site. (Ex. 175.) Barry leased or otherwise allowed several mining companies to conduct operations on the Mine Site. (Exs. 142, 141.) In 1997, Daniel Kennedy purchased the property and transferred it to an entity he controlled, Cedar Point Properties ("CPP"), shortly thereafter. (Ex. 238.) These owners logged the site.

The Regional Board has, through settlement, assumed the obligations of Barry, Kennedy, and their respective companies, releasing them from further liability and holding them harmless. In 1958, the Regional Board issued Waste Discharge Requirements for the Mine Site to Robert Barry. (Ex. 180.) After multiple attempts to enforce various Water Code requirements against Barry, in 1991, the Board settled with Barry, the Calicopia Corporation he controlled and others apparently affiliated with the Mine Site's ownership. (Revised Draft CAO No. R5-2014-YYYY at ¶ 28.) Pursuant to this settlement, Barry and the others paid $1.5 million to the Board; in return, the Regional Board released and agreed to hold harmless all the settling parties. (*Id.*) When Kennedy later purchased the Mine Site, the Regional Board issued a Cleanup and Abatement Order to CPP and imposed a lien against the Mine Site property for $238,334. (Revised Draft CAO No. R5-2014-YYYY at ¶ 29; Ex. 147.) The amount of the lien apparently corresponded to the amount the Board had spent at the Mine Site by that time, less the $1.5 million obtained from Barry. Like Barry, Kennedy and CPP were able to settle their liability with the Board. (Revised Draft CAO No. R5-2014-YYYY at ¶ 29.) In exchange for the proceeds of a timber harvest, which eventually netted an additional $102,370.60 beyond the amount of the lien, the Board agreed to release and hold harmless Kennedy. (*Id.*; Ex. 154.) Although the Board did not release CPP, CPP's corporate status appears to have been suspended by the time the agreement was reached. (Revised Draft CAO No. R5-2014-YYYY at ¶ 29.)

The Regional Board began conducting remedial activities in at least 1984. (Ex. 202.) The cleanup has not successfully remediated the site and it is unclear whether incomplete response efforts to date have increased the future costs to clean up the Mine Site. (Lombardi, at pp. 13-14.)

In 1991, USFS began conducting its own investigation of the Tailings Site pursuant to USFS's delegated authority to take action pursuant to CERCLA on lands within its jurisdiction. (Ex. 145, at pp. 4-5.) In 1994, USFS issued its Record of Decision ("ROD") selecting a remedy to implement on the Tailings Site, (*see generally id.*), and in 2001, the USFS issued an amended ROD. (Ex. 153.) The USFS has begun implementing the remedy, but work remains unfinished. (Lombardi, at p. 21.) Much of USFS's work has been funded by the settlement it reached with Atlantic Richfield in 2005, in which Atlantic Richfield admitted no liability for the acts of its predecessors. Pursuant to that agreement, which the parties formalized in a judicially approved Consent Decree, USFS granted contribution protection to Atlantic Richfield in exchange for $2.5 million to use in remediating the Tailings Site. (Ex. 155.) That judicially approved settlement and contribution protection shields Atlantic Richfield from any further responsibility for the Tailings Site.

BURDEN OF PROOF

The Prosecution Team has the twin burdens of producing evidence and persuading the Board that Atlantic Richfield's long-ago predecessors: (1) operated or directed pollution causing activities at each of the two sites; (2) which caused the environmental harm the Draft CAOs seek to address. The second requirement — that Atlantic Richfield's actions and activities it directed are responsible for the pollution conditions the Prosecution Team seeks to abate — is particularly important here, as the Walker Mine (along with a mill, tailings pond and other mine infrastructure) was established and producing ore before IS&R invested in the Walker Company and because the record evidence shows that the Walker Company alone directed all of the pollutant generating operations through the acts of its own employees. Further, several owners and operators of the Mine Site followed Walker Company to span it's hundred-year history. The Regional Board approved settlements with some of these owners and in so doing has assumed the liabilities of those persons for conditions at the Sites.

As discussed more fully in Atlantic Richfield's Prehearing Motion No. 6, filed herewith, the prosecution must prove each element of its claim by a preponderance of the evidence. In other words, the Prosecution Team must introduce evidence showing each element is more likely than not. If the Prosecution Team does not affirmatively establish evidentiary proof for any element of its case, or if the evidence equally supports a circumstance that would not lead to Atlantic Richfield's liability, the Prosecution Team has not met its burden and the Regional Board must reject the Draft CAOs.

SUMMARY OF THE ARGUMENT

Several of the prehearing motions listed above show that this matter must be dismissed, in its entirety, for substantial jurisdictional and procedural reasons. Because the Regional Board waited too long to bring this action, and only after representing to Atlantic Richfield that Atlantic Richfield would not be named as a discharger, the doctrine of laches precludes issuance of the Draft CAOs to Atlantic Richfield. Further, because the Regional Board is itself admittedly a responsible party with a financial interest in the outcome of this hearing, it is improper for the Regional Board to serve as the finder of fact and law in this proceeding, and the Regional Board should recuse itself. The Regional Board may bring an action for monetary damages, if at all, only as a contribution action in federal or state court. This, and additional deficiencies in the hearing procedures, require dismissal of this case. Moreover, the ongoing CERCLA[4] cleanup at the Tailings Site, vests jurisdiction with the federal court and precludes the Regional Board's issuance of both CAOs.

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[4] Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9601.

In this brief, Atlantic Richfield shows why the Regional Board falls short of meeting its burden of proving that IS&R or Anaconda are directly liable for the conditions the draft CAOs seeks to address. To the contrary, the available evidence indicates that the Anaconda Companies' role with the Walker Company was consistent with the typical and expected role of a majority investor, and there is nothing to warrant the extraordinary step of disregarding the liability protections the American legal system affords to shareholders. Direction of where to explore and recover ore reserves based upon an understanding of the geology is not legally sufficient to create liability; rather, the Prosecution Team must show the Anaconda Companies directed "operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." The Prosecution Team cannot cure its lack of evidence by making unsupported *assumptions*, nor by offering speculation from its expert.

Atlantic Richfield concludes by showing that even if predecessors' direction of exploration and development could give rise to liability for the waste generated from that activity (and, it does not) that the environmental conditions the Draft CAOs seek to address do not arise from that activity. Instead, they arise from activity of the Walker Company itself, and subsequent owners and operators of the properties, including the United States Forest Service and the Regional Board, that have created the conditions at issue here.

ARGUMENT

I. ATLANTIC RICHFIELD IS NOT LIABLE FOR EITHER SITE

For the Prosecution Team to succeed, it must prove that Anaconda or IS&R "caused or permitted . . . waste to be discharged . . . into the waters of the state and create[d] . . . a condition of . . . nuisance."[5] Cal. Water Code § 13304(a). Of course, neither Anaconda nor IS&R owned or operated the

[5] The Prosecution Team's case depends on its ability to avoid the lawful activities bar to Water Code liability. *See* Cal. Water Code § 13304(j) (the Water Code "does not impose any new liability for acts occurring before January 1,

Sites. Rather, IS&R was merely a shareholder in one of several entities which have owned or operated the Mine Site since the early 1900s. Consequently, the Prosecution Team's only means to hold Atlantic Richfield liable for these Sites is to prove Atlantic Richfield's activities qualify for the direct-operator exception to shareholder non-liability approved in the U.S. Supreme Court's decision in *United States v. Bestfoods*.

The Prosecution Team's burden is to produce evidence and prove its case by a preponderance of the evidence, i.e., to prove that the facts supporting liability are more likely than not. The Prosecution Team fails to sustain the burdens of production of the evidence and persuasion by the evidence as to either Site. Indeed, the Prosecution Team expressly requests that the Board "assume" the existence of the very evidence the Prosecution Team lacks. (Pros. Op. Br. at 13.)

A. *United States v. Bestfoods* Permits Only Two Narrow Exceptions To The Ordinary Rule of Shareholder Non-Liability.

In *United States v. Bestfoods*, the United States Supreme Court affirmed the "bedrock principle" of corporate law that protects a shareholder from liability for the conduct of a company in which it owns shares. 524 U.S. at 62. *See also Sonora Diamond Corp. v. Superior Ct.*, 99 Cal. Rptr. 2d 824, 836 (Cal. Ct. App. 2000) ("Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations."). The policy behind this limited liability is to encourage investment. *Dietel v. Day*, 492 P.2d 455, 457 (Ariz. Ct. App.

1981, if the acts were not in violation of existing laws or regulations at the time they occurred."). Atlantic Richfield here renews its objection to the Prosecution Team's interpretation of the lawful activities bar as permitting the Board to hold Atlantic Richfield liable based upon a finding that one of Atlantic Richfield's predecessors contributed to a public nuisance. (*See* Pros. Open. Br. at 18-19 (relying on State Board decisions rejecting Section 13304(j) defenses upon concluding that a public nuisance constitutes a "violation of existing laws" for purposes of Section 13304(j)).) Water Code Section 13304(j)'s reference to "violation of existing laws or regulations" clearly refers only to statutory or regulatory law, not common law doctrines such as public nuisance. Even if the Prosecution Team's interpretation of Section 13304(j) is correct, however, the Prosecution Team can avoid the lawful activities bar to Water Code liability only if the Prosecution Team proves a nuisance; the Prosecution Team cannot rely on the language in Section 13304(a) imposing liability for "a condition of pollution." *See* Water Code § 13304(a) (imposing liability for either "a condition of pollution or nuisance").

1972). Accordingly, only under two "exceptional circumstances" can the corporate separateness be disregarded. *Burnet v. Clark*, 287 U.S. 410, 415 (1932); *see also NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993) ("The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception.") (quoting *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960)). The Prosecution Team has not and cannot prove one "exceptional circumstance" for supporting shareholder liability and fails to meet its burden of proof in attempting to prove the other.

The first exceptional circumstance justifying a departure from the general rule of shareholder non-liability is variously referred to as corporate veil piercing, alter-ego liability, and indirect or derivative liability. Arizona (the state in which the Walker Company was incorporated) and California apply the generally accepted two-prong test for piercing the corporate veil: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the shareholder no longer exist, and (2) failure to disregard the corporations' separate identities must result in fraud or injustice. *Sonora Diamond Corp.*, 99 Cal. Rptr. 2d at 836; *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991). It is extremely difficult to establish a unity of interest between legitimate and conscientious companies. In fact, it is unheard of with publicly traded companies, such as the Walker Company. Atlantic Richfield is unaware of *any* case in the history of American law in which an attempt to pierce the corporate veil of a publicly traded company has succeeded.[6] Unsurprisingly, then, the Prosecution Team has indicated that it will not pursue a corporate veil piercing (*i.e.*, alter-ego) theory of liability in this proceeding. (Pros. Open. Br. at 21, § VIII.b.)

The second exceptional circumstance in which the Supreme Court allowed shareholder liability – and which the Prosecution Team says it intends to prove here – is known as direct operator liability. In

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[6] *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1039 (1991) (noting that study of 1600 veil-piercing cases revealed that piercing "*does not occur in public corporations*") (emphasis added). *See also* Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, Conn. J. of Intern. L. 379, 384-85 (Spring 1999) (observing that study of an additional 2200 veil-piercing cases leads to same conclusion).

Bestfoods, the Court held that direct-operator liability may be imposed upon a shareholder for pollution caused by a facility owned by a corporation in which the shareholder invested, but only if that shareholder itself engaged in pollution-causing activities. The shareholder itself must "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." Id. at 66-67. Thus, the Prosecution Team has adopted the burden of proving that Atlantic Richfield's predecessors (1) directed or conducted pollution-causing activities at each of the two Sites; (2) which cause the environmental harms the Draft CAOs seek to address. *Accord* Cal. Water Code § 13304(a) (imposing liability only on those who "caused or permitted . . . waste to be discharged . . . into the waters of the state and create[d] . . . a condition of . . . nuisance") and § 13304(n) (defining a "nuisance" as a condition that "occur[red] during, or as a result of, the treatment or disposal of wastes").

In establishing these two narrow exceptions to shareholder non-liability, the *Bestfoods* Court specifically rejected a third potential exception based on a shareholder's "authority to control" or "actual control" over the company in which the shareholder invested. "[I]t is hornbook law," the Supreme Court said, "that the exercise of the 'control' which stock ownership gives to the stockholders will not create liability" for the shareholder. *Bestfoods*, 524 U.S. at 61-62; *see also Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 151 (3d Cir. 1988) ("It is to be expected that a corporation seeking to acquire majority ownership of another will seek to achieve control."); *id.* at 150 ("It is assumed to be the norm that a parent will have 'not only . . . the potential to exercise control [over the subsidiary], but to exercise it to a substantial degree.'") (quoting P. Blumberg, The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations § 10.02, at 187 (1987)). Thus, because *all* majority shareholders and parent companies exercise control over the companies in which they invest, allowing a "control" exception to limited liability would create an exception that would swallow the rule.

B. The Prosecution Team Misapplies The *Bestfoods* Standard And Much Of Its Evidence Is Therefore Irrelevant.

Despite acknowledging that *Bestfoods* governs its attempt to prove an exception to shareholder non-liability,[7] and despite citations to some of the same passages from *Bestfoods* that are quoted above, the Prosecution Team repeatedly asserts that IS&R exercised "pervasive control" over the Walker Company and "operated the Walker Mine and Tailings concurrently" with the Walker Company. *See, e.g.*, Opening Brief at 3, 13, 15 & 18; Quivik Report at 2, 20.[8] However, this "concurrent operation/pervasive control" theory is the very same strategy the Supreme Court rejected in *Bestfoods*.

In support of its control theory, the Prosecution Team cites the Board to two pre-*Bestfoods* cases that are no longer good law. The Prosecution Team first cites to *Kaiser Alum. & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1994) for the proposition that liability attaches when a shareholder "actually exercised . . . control." (Pros. Open. Br. at 12.) This "actual control" test is the same test the lower court had applied in *Bestfoods*, the same test the Supreme Court overruled. 524 U.S. at 67 (explaining that "[t]he well-taken objection to the actual control test . . . is its fusion of direct and indirect liability"). Likewise, the Prosecution Team's citation to *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, is equally inapposite. 32 F.3d 1364, 1367 (9th Cir. 1994) (requiring "active control . . . before someone will be held liable as an 'operator'").

Given its misunderstanding of the *Bestfoods* standard, much of the Prosecution Team's evidence is irrelevant. Evidence that IS&R personnel also served as officers or directors of Walker – or even that IS&R controlled or was active in the management of Walker, as the Prosecution Team alleges – is wholly irrelevant to an allegation of "direct" liability. *Id.* at 70. So, too, Dr. Quivik's extensive discussion of

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[7] The Prosecution Team acknowledges, as it must, that the Board must apply the law from *Bestfoods*. (*See Open. Br.* at p. 12.)

[8] The Prosecution Team cites Dr. Quivik for its conclusion that the Anaconda Companies "operated" the mine. Pros. Op. Br. at 4. Dr. Quivik, however, alleges only that the Anaconda Companies "managed" the mine. He finds that the Walker Company "operated" the mine. Quivik at 8, finding A.

Anaconda's management structure is irrelevant, as well as the supposed "integration" of management of the Walker Company into Anaconda, overlapping officers and directors, and the oversight of Walker Company by the Anaconda Companies. All are a red herring that misconstrue or conflate the *Bestfoods* standards.

C. The "Control" Alleged By The Prosecution Team Does Not Meet the Alter Ego Test Required To Establish Derivative Liability.

The Prosecution Team dropped its alter ego claim. (Pros. Op. Br. at p. 21.) Yet, as just discussed, many of the facts on which the Prosecution Team relies are relevant only to a derivative liability claim, and only if they rise to the level of the Anaconda Companies being the "alter ego" of the Walker Mining Company. *See Bestfoods*, 524 U.S. at 68 ("Control of the Subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability. . . ."). The Prosecution Team's "pervasive control" argument thus appears to be a back-door attempt at establishing derivative liability.[9] Further, the relief the Prosecution Team seeks — liability for the actions of the Walker Company for the entire time of IS&R's stock ownership — can only be obtained upon a derivative liability finding. Because the Prosecution Team conflates the liability theories and seeks a derivative liability outcome in this case, Atlantic Richfield explains here why the facts of this case preclude such relief.

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[9] This theory may also be an attempt to apply a watered-down joint-venture theory. However, under California law, the members of a joint venture must have joint control over the venture, they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. *Orosco v. Sun-Diamond Corp.*, 51 Cal. App. 4th 1659, 1666 (1997). The Prosecution Team fails to allege facts supporting these elements, as none exist. (*See* Haegele, at pp. 5-15 (describing the Anaconda Companies relationship with the Walker Company as a typical investor relationship.) Moreover, if stock ownership rights and attendant relationships were sufficient to imply a joint venture agreement, then every stockholder – or at least every allegedly controlling shareholder – would be a joint venturer with the corporation in which it owned shares. *See, e.g., Secon Serv. Sys., Inc. v. St. Joseph Bank and Trust Co.*, 855 F.2d 406, 417 (7th Cir. 1988) (observing that if loaning money, serving on corporate boards, and controlling funds were sufficient to establish a joint venture, then "*every parent corporation is a joint venturer with its subsidiaries, and every majority shareholder is a joint venturer with his corporation.* This would eliminate, in a great number of instances, the protection from liability afforded by the corporate form.") (emphasis added).

To analyze, among other things, the corporate separateness of the Walker Company from the Anaconda Companies, Atlantic Richfield retained William Haegele, a forensic accountant and expert in business organization, to review all of the historical records, of which Atlantic Richfield is aware, that have survived in the nearly 65 years since the Walker Company's bankruptcy.

Mr. Haegele concludes there is strong evidence of corporate separateness and no evidence to form the basis for piercing the corporate veil. (Haegele, at pp. 5-9.) There is no evidence that the Walker Company and IS&R commingled assets or income. IS&R provided financing to the Walker Company through well-documented loans under which IS&R charged interest at market rates. And the contracts between the Walker Company and IS&R for ore sales were fully documented and market based. (*Id.* at pp. 6-7.)

Among other evidence, Mr. Haegele noted that the Walker Company and IS&R appear to have complied with all corporate formalities as between those entities. And that the Walker Company was incorporated by a separate group that had a large (49.6%) and active group of minority shareholders who were represented on the Board of Directors.[10] (*Id.* at p. 6.) The fact that other members of the Walker Company's Board of Directors overlapped with the Boards for Anaconda and IS&R (*i.e.*, certain directors had positions with both companies) is normal and accepted. (*Id.* at p. 9.) Overlapping boards of directors and officers do not provide grounds for disregarding the separate identities of separate corporate entities. *Sonora Diamond Corp.*, 99 Cal. Rptr. 2d at 843 ("It is considered a normal attribute of ownership that officers and directors of the parent serve as officers and directors of the subsidiary.").

It is also expected that an investor, particularly one with industry expertise, will provide substantial advice and guidance. Accordingly, Mr. Haegele found nothing improper about the Anaconda Companies' direction of exploration and development. (Haegele, at pp. 12-14.) Indeed, it appears the

[10] In any event, *Bestfoods* makes it clear that even ownership of all of the stock of a company will not result in liability beyond the assets of the subsidiary. 524 U.S. at 61-62.

Walker Company had only mine geologists on staff on-site, and utilized resources provided by the Anaconda Companies' exploration geologists as they would a consultant. (McNulty, at p. 11.) It also appears as though the Walker Company paid for this professional advice. (Haegele, at pp. 11-12.)

In any event, given Anaconda's known and recognized expertise in mining, it would have been unusual for IS&R, as an investor in Walker Company, to not share its geological expertise with the Walker Company. *See, e.g.*, *Yankee Gas Servs. Co. v. UGI Utils., Inc.*, 616 F. Supp. 2d 228, 256 (D. Conn. 2009) (it is "only natural" to "want to tap into" the resources and expertise of an investor company, and utilizing these resources is "fully consistent with" with an investor/subsidiary relationship); Haegele, at p. 13.

Also, courts recognize that providing value through cash infusions or the provision of services, and increased control by a majority shareholder, is a reasonable reaction of such a shareholder to its failing investment. *Assoc. of Mill and Elevator Mut. Ins. Co. v. Barzen Intern., Inc.*, 553 N.W.2d 446, 450 (Minn. App. Ct. 1996) ("This increase in control by the parent constitutes a reasonable reaction of a parent to its failing subsidiary."); *Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523 (Cal. App. Ct. 2000) (recognizing that "it is not unusual for owners of struggling businesses to infuse, as capital contributions, cash into the business as necessary to pay operating and other essential costs").

Viewed in their totality, the contacts between IS&R and the Walker Company do not even approach the level that would justify holding IS&R liable for the Walker Company's obligations. (Haegele, at pp. 3-5.) The Prosecution Team's "pervasive control" rationale fails both because, as a matter of law, it cannot support a finding of direct liability and, as a matter of fact, because there is no evidence of such "control" as would support a finding of indirect alter-ego liability.

D. <u>The Prosecution Team has Failed to Offer Evidence That The Anaconda Companies Directed Pollution-Causing Activities on Either Site</u>.

As the Prosecution Team admits in its Opening Brief, it bears the burden of proving that either Anaconda or IS&R themselves directed or conducted pollution-causing activities at the Walker Mine.

(Pros. Open. Br. at p. 12.) This is not merely the rule of *Bestfoods*, *see Bestfoods*, 524 U.S.at 64, but also a straightforward application of well-accepted tort liability principles that prevail at common law, *see* 1 William Meade Fletcher, Fletcher Cyclopedia of Private Corps. § 33 ("The shareholders of a corporation are not liable individually for torts committed by the corporation unless they personally participate in them."). This is also a straight forward application of the Water Code. Cal. Water Code § 13304(a) (imposing liability only on those who "cause[] or permit[] . . . waste to be discharged . . . into the waters of the state and create[] . . . a condition of . . . nuisance") and § 13304(n) (defining a "nuisance" as a condition that "occur[red] during, or as a result of, the treatment or disposal of wastes"). Thus, IS&R and Anaconda are liable for their own conduct just as they would be at common law, but they have no liability for the Walker Company's conduct. Because there is nothing in the record to indicate that anyone other than the Walker Company conducted pollution-causing activities while the Walker Company operated the Mine, Anaconda and IS&R cannot be liable for any pollution-causing activities that occurred during those operations.

The Prosecution Team relies heavily on vague assertions that Anaconda and IS&R were involved with the Walker Company's milling operations. The available primary evidence does not support these assertions, however. All of the correspondence relating to the planning and construction of the tailings impoundment involved the U.S. Government and the Walker Company, not IS&R or Anaconda. The correspondence sent to the U.S. Government relating to the construction of the tailings impoundment was written by Walker Company personnel or attorneys working on their behalf. (*See*, *e.g.*, Exs. 8-22, 24.) All of the correspondence from the U.S. Government was sent to the Walker Company, not IS&R or Anaconda. (*Id.*) And though, on one occasion, a Walker Company employee used the wrong letter head, he signed the letter as Manager for the "Walker Mining Company." Further, there was no confusion on the part of the United States about which company it was dealing with. (Haegele, at p. 15 & n.62, including all documents cited therein.)

Indeed, for a majority shareholder, IS&R appears to have had very little correspondence with the Walker Company about milling or waste disposal, and certainly none that could fairly be characterized to represent a preponderance of the evidence that the Anaconda Companies "operated" or "managed" these aspects of the Walker Mine. The entirety of the correspondence of interactions of IS&R relating to the Walker mill or tailings identified by the Prosecution Team's expert, Fredrick Quivik, is as follows:

- An unsubstantiated 1924 article from a secondary source, which claims that "F. C. Torkelson, of the Anaconda Copper Mining Co., superintended the construction of the milling plant, and Julius Kurtz, of [IS&R] installed the electrical equipment." (Quivik Report at p. 16.)
- Nov. 4, 1922 Letter from Mr. Torkelson to Frederick Laist "describing conditions at the Walker mine and mill and recommendations that he, Torkelson, had made to Elton and Hart for improvements." (*Id.* at 27-28.)
- Bernard Morrow, the superintendent of concentration at the Washoe Reduction Works, visited the Walker Mill and generated a report addressing whether it was more economically feasible to increase the capacity of the existing mill or construct a new mill. (*Id.* at 26.)
- Reno Sales, Anaconda's Chief Geologist, made recommendations concerning a land exchange with the U.S. Forest Service for Walker mining and milling operations. (*Id.* at 31.)
- Wilbur Jurden, Anaconda's Chief Metallurgist, provided cost estimates for the expansion of the Walker concentrator. (*Id.* at 38.)
- Bernard Morrow reported to Frederick Laist concerning his trip to the Walker Mine, "approving a few minor revisions to the plan for the concentrator." (*Id.* at 39.)

The most striking thing about these references to the Anaconda Companies' involvement with this aspect of the Walker Company's business is how few exist, given that IS&R was the majority owner of Walker for nearly thirty years. In addition, there is a glaring absence of any reference to direction or decision-making related to tailings or tailings disposal, or any evidence that any IS&R personnel actually operated the mill or other mine infrastructure.

More importantly, these, and the Anaconda Companies' other interactions with the facility, fit squarely within the type of involvement one would expect of a majority shareholder. (McNulty, at p. 9;

Haegele, at p. 15 ("The type and amount of services and support provided were typical of a majority shareholder . . .").) This is dispositive of the Prosecution Team's direct liability allegation. The United States Supreme Court in *Bestfoods* explained that the "critical question" for a direct liability analysis "is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." 524 U.S. at 72.[11]

Even assuming IS&R designed and built the new mill, as the Prosecution Team requests the Regional Board do, the law does not support a finding of direct liability based upon design and/or construction of a facility that eventually discharged hazardous substances. For example, in *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157-58 (7th Cir. 1988), the court rejected an attempt to impose direct-operator liability on the designer of a wood-treatment plant. In that case, the consultant designed and built the plant, trained Hines's employees to operate the machinery, licensed Hines to use its trademark, provided the chemicals used in the wood-treatment process, and received the right of access to the plant to ensure quality control. *Id.* at 156. The court affirmed that CERCLA imposes liability on owners and operators – in contrast, "architects, engineers, construction contractors, and instructors must chip in only to the extent they have agreed to do so by contract." *Id.* at 157. *See also Bestfoods v. Aerojet-General Corp.* ("*Bestfoods* Remand"), 173 F. Supp. 2d 729, 753-54 (W.D. Mich. 2001) (holding that consulting on the production process does not create direct-operator liability); *United States v. Consolidated Rail Corp.*, 729 F. Supp. 1461, 1468 (D. Del. 1990) (finding no direct-operator liability despite defendant "setting up the facility and purchasing the output.").

Thus, IS&R's advice in relation to mill technology by knowledgeable and qualified investor representatives does not establish either IS&R or Anaconda as the operator of the off-site tailings impoundment.

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[11] Even the Prosecution Team's expert admits that the Anaconda Companies' relationship with the Walker Mine were consistent with corporate norms and beneficial to the Walker Company. *See, e.g.*, Quivik at 17, 18, 19.

The Prosecution Team also relies on the actions of dual officers and directors of IS&R, Anaconda, and the Walker Company. For example, Dr. Quivik cites the involvement of William Wraith and J.O. Elton, both of whom were Vice Presidents and Directors of the Walker Company. These actions include William Wraith conferring with Frederick Laist, Anaconda's chief metallurgist, about the metallurgical report on the Walker mill. (Quivik Report at 26) (PT Ex. 1, at p. 49).

One of the principles emphasized by *Bestfoods*, however, is that "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary" and "directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." 524 U.S. at 69. Moreover, there is a presumption that a dual officer or director is wearing the "subsidiary hat" when supervising activities at the subsidiary's facility. To overcome this presumption, it must be shown that the officer's conduct was "plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent." *Id.* at 70 n.13. *See also Raytheon Constructors Inc. v. Asarco Inc.*, 368 F.3d 1214, 1219 (10th Cir. 2003) (holding as a matter of law that actions of dual officer and board member cannot be attributed to shareholder without evidence to overcome *Bestfoods* presumption). Dr. Quivik does not deny that IS&R's investment was beneficial for the minority shareholders of the Walker Mining Company and Mr. Haegele confirms that there is no evidence that any action, by dual-hat, or single-hat IS&R or Anaconda people, for that matter, elevated the Anaconda Companies' concerns to the detriment of the Walker Company. (Haegele, at pp. 8, 9-10.)

In sum, there is simply no evidence that the Anaconda Companies directed or managed "operations having to do with the leakage or disposal of hazardous waste" as required to meet the Prosecution Team's burden in this matter.[12]

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[12] In contrast, the Regional Board's assumption of Barry's and Kennedy's legal obligations for cleanup has resulting in pollution that continues to impair surface water quality at both sites. (Lombardi, at pp. 14-16.)

E. <u>The Prosecution Cannot Supplant a Lack of Evidence Of Pollution-Causing Activity With Evidence Related to Exploration and Development Activities</u>.

Notwithstanding the significant portion of Dr. Quivik's report dedicated to chronicling every interaction between the Anaconda Companies and the Walker Company, Dr. Quivik ultimately concludes that the aspect of Walker Company's business enterprise in which the Anaconda Companies' were actually involved, relates to "geology, mining and metallurgy." (Quivik at 8.) The Prosecution Team concludes that the Anaconda Companies were focused on "exploration and development activities." (*See, e.g.*, Pros. Op. Br. at 13.) And Atlantic Richfield's expert, Dr. McNulty, who has a lifetime of expertise and experience in mining operations, explains that the only aspect of Walker Mine in which the Anaconda Companies exercised any control, was exploration and development of ore reserves; in other words, prospecting, finding and quantifying ore reserves for future mining. (McNulty, at p. 6.) Exploration and development however are not mineral pollution-causing activities. (McNulty, at p. 9; Lombardi, at p. 6.) And the Prosecution Team's assertion that direction of activities that indirectly lead to pollution is sufficient to establish liability is simply not the law after *Bestfoods*.

Tellingly, the cases the Prosecution Team cites for support of its argument that directing the activities that later cause pollution is enough, the *Kaiser Aluminum* and *Long Beach* cases, (Pros. *Op. Br.* at p. 12), both *predate* the *Best Foods* case by several years. And this is precisely the broad exception to limited liability that the Supreme Court rejected in *Best Foods*. Every industrial operation – mining being no exception – generates some waste. Thus, a rule imposing liability upon a shareholder who participated in some activity at a waste generating facility would prove too much; any shareholder with any involvement in any activity at any kind of industrial facility would be liable. The Supreme Court recognized this potential pitfall and avoided it by holding that direct operator liability does not turn on general "control" of *any* activity at an industrial operation, but instead attaches only where the shareholder directs or conducts *pollution-causing* activity. The law anticipates that majority shareholders with industry expertise to be involved with the core aspects of a facility in which the shareholder invests. (Haegele, at p. 12.) As discussed above, parental oversight that is consistent with corporate norms cannot form the bases for a direct liability ruling.

Since *Bestfoods*, Courts have recognized that strong parent involvement in a wide range of industrial activities does not equate to involvement in the pollution-causing activity required for direct liability. For example, on remand from the Supreme Court in the *Bestfoods* case itself, the district court addressed the assertion that the parent company, CPC, operated the pollution-causing facilities of its subsidiary, Ott II. *Bestfoods* Remand, 173 F. Supp. 2d at 751-55. The parent company provided financing to expand operations (thus increasing the discharge of pollutants) and provided guidance on a variety of issues, including advice on environmental matters. *Id.* at 737 – 744. The parent also provided technical advice on process development. *Id.* at 753. The court held that "cooperation" between a company and its major shareholder – even cooperation designed to increase production of the product purchased by that shareholder – "simply does not establish the requisite ability to manage, direct or conduct operations specifically related to pollution" required to establish direct-operator liability under CERCLA. *Id.* at 754-55. The court also concluded that the parent's desire to keep its "'finger on environmental problems' at Ott II is fully consistent with CPC's parental oversight role." *Id.*

United States v. Friedland, 173 F. Supp. 2d 1077 (D. Colo. 2001), also underscores the distinction between providing direction on mining operations and meeting the stringent *Bestfoods* test for operating the pollution source. *Friedland* involved mining facilities similar to those in this case – A.O. Smith Corporation held 67% of the stock of SCMI, which owned a mining facility and associated mill. The trial court found at trial that A.O. Smith had considerable involvement in the management of SCMI in general and with certain kinds of activities that impacted mining operations in particular:

- A.O. Smith engineers frequently visited the mine to review operations and to make operational suggestions. *Id.* at 1097.
- A.O. Smith determined the quantity of ore to be processed by the mine. *Id.* at 1098.

- A.O. Smith shipped ore for analysis to assist in developing improved equipment and methods for mine operations. *Id.* at 1098.

- A member of A.O. Smith's board of directors assumed responsibility for reviewing certain aspects of mine operations. *Id.*

- A.O. Smith ordered SCMI's mine manager to submit frequent reports containing recommendations for modifications to mining operations for review by A.O. Smith. *Id.*

The court found that substantial involvement in the mining operations of SCMI was insufficient to find A.O. Smith an operator of SCMI's facilities. The court emphasized the mandate of *Bestfoods* that, "to be liable as an operator under CERCLA, an individual must manage, direct, or conduct operations *specifically related to pollution*, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 1098 (original emphasis). The court found that A.O. Smith's conduct merely demonstrated a close relationship between SCMI and A.O. Smith, and that A.O. Smith's involvement in SCMI's affairs were "in degree and detail, natural for a parent rather than 'eccentric,' as required for the imposition of direct operator liability under *Bestfoods*." *Id.*[13]

Finally, even if directing mine exploration and development were sufficient to impose direct liability, the Prosecution Team must produce evidence and show by a preponderance of the evidence that the operations directed by the Anaconda Companies have caused the conditions that the Draft CAOs are intended to abate. This the Prosecution Team cannot do. No evidence is offered in the Prosecution's case-in-chief to show the impact of prospecting and exploration upon conditions at the Sites. Atlantic Richfield's experts thus offer the only evidence on this topic and they conclude that

[13] In *United States v. Sterling Centrecorp Inc.*, No. 2:08-cv-02566-MCE-JFM, 2013 WL 3214384 (E.D. Cal. June 24, 2013), under very different facts from this case, the court held that parent company's involvement with subsidiary's facility was not consistent with corporate norms, the parent company had entered into a de facto merger with the prior owner of the mine, and had contractually assumed the liabilities from the prior mine owner that created the mine waste at issue.

exploration and development at the Walker Mine had little, if any, impact on the conditions the Draft CAOs seek to address. (McNulty, at p. 16; Lombardi, at p. 6.) [14]

Exploration and development work produces negligible amounts of marketable ore. Mining and processing of ore produced the concentrate the Walker Company sold and waste tailings that remain on the Sites. (McNulty, at p. 13.) This distinction between exploration and development versus mining is all the more important given the respective functions' varying potential for environmental impact. Exploration and development work occurs primarily in non-mineralized "country rock." (McNulty, at p. 9; Lombardi, at p. 6.) The country rock extracted during exploration and development activities generally is not processed in the mill, does not contribute to the mine's tailings, and does not contain the sulfides potentially contributing to acid mine drainage. (McNulty, at p. 8.) Even when stored on the surface and exposed to rain and snow, country rock will not leach metals as mineralized ore might. (Lombardi, at p. 11.) Mining, on the other hand, by definition involves extracting mineralized ore that is processed in the mill, contributes to tailings, and may release metals. (Lombardi, at pp. 7-19.)

Any pollution-causing activities (i.e., extracting ore, milling, handling of tailings and other wastes) were carried out by the Walker Company, the mine operator, under the supervision of Walker Company managers and by Walker Company personnel. (McNulty, at pp. 13-16.)

F. <u>It Is Impermissible to Assume the Anaconda Companies Directed Pollution-Causing Activities</u>.

The Prosecution Team asks the Board to *assume* the facts it must prove to establish direct operator liability. The Prosecution Team admits this strategy:

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[14] Rather, the Draft CAOs seek to abate metals releases to groundwater and surface water from mining and mineral processing sources, and ineffective response measures taken by the Regional Board. (Lombardi, at p. 14.)

> Moreover, substantial evidence in the record demonstrates that Anaconda and International's control was so pervasive that it is reasonable to assume that they *did* direct placement of waste at the Mine and Tailings.

(Pros. Op. Br. at p. 13, original emphasis).

As an initial matter, it is completely impermissible to assume an essential element of a case. Here the *only* "evidence" of wide-spread control of the Anaconda Companies of the Walker Mine is Dr. Quivik's unsupported and bald conclusion that the Anaconda Companies "managed" the mine. (Quivik at 8.)[15] But California law does not allow a party to establish a fact based on the speculation of an expert witness; Dr. Quivik cannot correct the Prosecution Team's error.[16] Setting aside Dr. Quivik's speculation rather than evidence about pervasive control, as discussed in section I(A), above, pervasive control does not create direct liability without specific evidence of control over pollution-causing activity.

Moreover, the record does not support the Prosecution Team's wild speculation that the Anaconda Companies' must have directed waste disposal, but actually undermines that conclusion.

First, the Anaconda Companies' area of involvement — providing geological services — is but one of many areas of the Walker Company's business enterprise. An operating mine requires numerous other functions. (McNulty, at pp. 13-14.) In particular, the concentration department is tasked with milling and waste disposal, which all takes place outside of the mine workings. (*Id.* at 7.) The concentration department has its own staff, its own managers, and is thus operationally and organizationally distinct from both mining and the provision of geological services. It is simply not credible that the geologists involved from the Anaconda Companies would operate or direct activity in

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[15] Dr. Quivik also appears to have based his conclusion, at least in part, of the actions of "two-hat" people. *See, e.g.*, Quivik at 14-17 and 28-29 (extensive discussion of officers and managers Anaconda "placed" in the Walker Company). As discussed above on page 21, however, two-hat people are presumed to be wearing their "subsidiary hat" when participating in actions involving the subsidiary and, accordingly, their actions cannot be attributed to the parent for the purposes of a direct liability analysis.

[16] *See* Atlantic Richfield's Prehearing Brief No. 9.

the functionally remote world of waste disposal. (McNulty, at p. 10.) Indeed, the only letter from Reno Sales (an Anaconda exploration geologist of great renown) regarding tailings does nothing more than make an introduction to someone else that might provide some advice on tailings. (Ex. 139.) Making an introduction, and nothing more, proves Anaconda was *not* involved in waste related activities, and deferred to mine management on matters related to operations.

Further, mining is highly labor intensive, requiring hundreds of employees at the Walker Mine who brought with them the myriad issues that a modern businessperson would recognize as the purview of a Human Resources department. Additionally, each aspect of the mine's operations would have required various pieces of equipment and the mine had mechanics and machinists to maintain all the equipment. (McNulty, at p. 13.) There was also a substantial wood mill at the Walker Mine. (*Id.* at p. 13.) And all of this is to say nothing of the other components to the town site – the office buildings, the employee housing, the school, the hospital, the post office – established and operated by the Walker Company to support its mining operations. Unsurprisingly, then, the available evidence reports significant business dealings of the Walker Company that do not reference, or involve in any way, the Anaconda Companies. (Haegele, at pp. 14-15 and examples cited therein.)

It is simply unreasonable to assume that because the Anaconda Companies were involved and showed interest in *one* aspect of this multifaceted and robust business, that they were involved in *all* aspects. (*See also*, Haegele, at p. 12, calculating the value of the services provided to the Walker Company by the Anaconda Companies to be modest in comparison to the overall operations). Also, the mine was very isolated during the winter season, which could last up to six months. It would be impractical for Anaconda employees, none of whom lived or worked in the area, to be involved in anything other than long-range planning and occasional site visits.

The Prosecution Team's request that the Board *assume* pervasive control that must have included waste disposal is particularly unfair given the Board's delay in bringing this action. The only records that appear to remain are Anaconda's own records, which obviously disproportionately represent the Anaconda Companies' communications with Walker Company. The Walker Mining Company's own records do not appear to be available and all known witnesses appear to be deceased.

Importantly, when records and witnesses were available, a federal judge rejected an allegation of wide-spread control by IS&R over the Walker Company. After the Walker Company filed for bankruptcy, a group of shareholders challenged IS&R's bankruptcy claim on the grounds that IS&R (or Anaconda) had unfairly dominated the Walker Company's affairs and that the Walker Company was IS&R's alter ego. After trial before a Special Master, which included an eight-day hearing, federal judge Tillman D. Johnson determined that there was insufficient proof that any act or omission of the Anaconda Companies "constitutes or proves any domination or control by them or any of them" over the Walker Company or its "business or affairs." (Exs. 131-32.)

This contemporaneous finding by the Bankruptcy Court forecloses any argument – or assumption – that IS&R pervasively controlled the Walker Mine and thereby controlled pollution-causing activity. The proceeding was brought by other shareholders and creditors of Walker, whose claims competed with IS&R's for the limited assets in the Walker Company's estate. They had a strong motivation to fully litigate the issues. The case was tried shortly after the underlying transactions, when the litigants presumably had access to all of the relevant evidence and the witnesses who had participated in the transactions.

G. The Pervasive Control Theory is Particularly Weak with Respect to the Tailings Site.

The Prosecution Team's theory of IS&R liability for the tailings repository relies solely upon the Anaconda Company's guidance *at the Mine Site*. (Pros. Open. Br. at 12; 13; 15.) Indeed the Prosecution Team's Opening Brief fails to assert IS&R conducted *any* operations at the Tailings Site, concurrently with Walker or otherwise.

In fact, Walker Mining Company representatives interacted directly with the USFS on matters related to the tailings site. By 1919, the Walker Company had applied for permission to build a tailings reservoir and impoundment on federal land approximately ¾ of a mile away from the mine. The application was "for the main purpose of the storage of tailings produced by the milling and reduction of copper ores." (Ex. 15.) After its initial application was rejected, Walker Company filed an appeal with the Department of Interior. Before granting the Walker Company's application, the federal government took several steps to ensure that affected federal agencies consented to the proposed reservoir and impoundment. As part of this process, the USFS issued a statement finding that the proposed tailings impoundment would not interfere with the proper occupation and use of U.S. Forest Service lands. (Exs. 10 and 26.) As a condition of approval, the USFS also required the Walker Mining Company to execute a series of stipulations concerning impoundment operations, indicating that the USFS was aware that such impoundments presented some degree of environmental risk, and further indicating that the USFS had the discretion to require site-specific terms to mitigate the risks. The stipulations included the construction of a tailings dam to standards set by U.S. Debris Commission, and Walker Company's promise, which the USFS accepted, to indemnify the government for any damages to the National Forest that might arise if the dam failed, overflowed, leaked or allowed water to seep out. (Exs. 24 and 26.)

Upon receiving approval to build the tailings reservoir and impoundment in 1920, Walker Company proceeded to deposit tailings in the impoundment from the time of its construction until 1941, when the mine shut down. Throughout this period, all of the USFS' communications about the tailings impoundment were directed to Walker Mining Company employees or Walker Company's attorney. *See infra* pp. 18-19. Notably, the USFS did not communicate with IS&R or Anaconda regarding the impoundment. The Forest Service did not attempt to have IS&R, Anaconda, or anyone else guarantee the work that Walker Mining Company performed at the impoundment.

During the time the Walker Company operated the mine, Dolly Creek was diverted around the tailings area. (Ex. 150.) It was only after the Walker Mining Company closed the mine and ceased operations in the 1940s that the U.S. Forest Service allowed Dolly Creek to revert to its original course through the edge of the tailings pond. (Lombardi, at p. 18.)

It is undisputed that the U.S. Government owns the tailings impoundment on lands managed by the USFS, operates the impoundment today, and was the owner at all times in the past when hazardous substances were disposed of there.

II. APPORTIONMENT

To the extent the Regional Board finds that the Prosecution Team has met its burden and holds Atlantic Richfield liable as an operator for pollution-related activities under the *Bestfoods* test, the Draft CAOs must be modified to apportion liability and allocate responsibility for response among all known owners and operators. *See* Atlantic Richfield's Pre-hearing Brief No. 7.[17] Under the facts describing the Anaconda Companies' involvement, allocation of only a minor share of future response activities may be apportioned to Atlantic Richfield. There are several operators and owners of the sites, and the harm the Draft CAOs seek to address is reasonably capable of apportionment.

First, because the original mine, mill and tailings pond were in place when IS&R purchased its shares in October 1918, none of the waste on the mine site can be attributed to pollution-related decisions in which IS&R could have participated, as those decisions were made before IS&R invested in the Walker Company. By virtue of its bankruptcy, the Walker Company's share is an 'orphan' for purposes of allocating future costs.

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[17] *See* Atlantic Richfield Company's Prehearing Motion No. 7 Requesting A Regional Board Ruling That Atlantic Richfield Cannot Be Jointly And Severally Liable For Clean Up And Abatement Of The Mine And/Or Mine Tailings Sites.

Second, exploration and development activities for which the Anaconda Companies provided guidance to Walker Company staff were carried out by Walker Company miners in "country rock" that was barren of mineralization. Dr. McNulty estimates that the amount of country rock removed from the underground was no more than 5% of the total rock (ore + country rock) removed from underground; of this 5%, only a negligible fraction would contain minerals that could be released to the environment. (McNulty, at p. 9; Lombardi, at p. 6.)

Third, as to the Tailings Site later developed on USFS lands, to the extent IS&R would be liable under a direct liability theory, Atlantic Richfield has settled its liability with the USFS for cleanup of the Tailings Site, obtained a release and covenant not to sue, and has contribution protection under the consent decree. The United States is the owner of the Tailings Site; the property is managed by the USFS and the USFS has assumed responsibility for cleanup under the consent decree. Any and all future costs related to cleanup of the Mine Tailings Site are the responsibility of the USFS and the Regional Board (for the assumed liabilities of others as explained below).

Fourth, the Regional Board, through its settlements and hold harmless agreements with other owners and operators, assumed the liabilities of those owners and operators. Further, the Regional Board is an operator arising from the actions the Regional Board itself has implemented since 1958 and those later taken under Cal. Water Code ¶ 13305(i) authority, and in furtherance of the Barry and Kennedy settlements and releases given to the then current and now past owners and operators of the Sites.[18]

Fifth, in apportionment of the harm, temporal factors are appropriately considered. The USFS has managed the federal lands on which the Tailings Site is located since the advent of mining, and approved the tailings repository in 1920, a period of approximately 94 years. At the Mining and Tailings

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[18] *See* Atlantic Richfield Company's Prehearing Motion No. 2 Requesting A Regional Board Ruling That The Regional Board Is A Discharger At The Sites.

Sites operated by the Walker Company, the Anaconda Companies held an investment interest in the Walker Company for a period of approximately 26 years (1919 – 1945), although the mine did not operate continuously during that period. The Regional Board's tenure as an owner and operator is traced to at least 1946 when Robert Barry took ownership and control of the Site. Through its settlements and hold harmless agreements with Barry and others, the Regional Board has assumed their liabilities, a period covering more than 60 years.

Sixth, the evidence shows there are others that have operated at the Sites during the Barry / Calicopia tenure as owner of the Mine Site property. The Regional Board, to the extent it has not compromised its ability to seek relief from such parties, may pursue those entities to participate in Mine Site cleanup.[19]

In sum, should the Regional Board issue the Draft CAOs notwithstanding the legal and fact-based arguments posited by Atlantic Richfield, there is a reasonable basis for apportionment of liability among the responsible parties at the Sites. Apportionment of liability, if any, to Atlantic Richfield must arise from the findings made by the Regional Board in review of the evidence presented at the hearing and in Atlantic Richfield's pre-filed case materials (i.e., specific findings related to pollution-causing activities for which Atlantic Richfield is liable under the *Bestfoods* direct liability standard).

CONCLUSION

For the foregoing reasons, Atlantic Richfield respectfully requests that the Regional Board reject the Draft CAOs in their entirety.

[19] Relief against these parties could be sought in a contribution action. The Regional Board may not lawfully issue a CAO to any party at the Mine Tailings Site for the reasons set forth in Atlantic Richfield Company's Prehearing Motion No. 1 Requesting A Regional Board Ruling That CERCLA Prohibits The Regional Board From Issuing The CAOs.

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DAVIS GRAHAM & STUBBS LLP

By: ______________________________

William J. Duffy, Esq.
Andrea Wang, Esq.
Benjamin J. Strawn, Esq.
1550 Seventeenth St., Suite 500
Denver, CO 80202

James A. Bruen, Esq.
Brennan R. Quinn, Esq.
Farella Braun & Martel LLP
Russ Building, 235 Montgomery Street
San Francisco, CA 94104

Attorneys for Atlantic Richfield Company