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

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[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

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[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

[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

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[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. The Prosecution Team has Failed to Offer Evidence That The Anaconda Companies Directed Pollution-Causing Activities on Either Site.

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.)