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BEFORE THE

CALIFORNIA CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of Kennametal Inc.'s Opposition to Naming Kennametal Inc. in the Regional Water Quality Control Board Central Valley Region Order No. R5-2013-0701	SUBMISSION OF EVIDENCE AND BASIS OF CLAIM

The Central Valley Regional Water Quality Control Board ("Regional Board") has improperly named Kennametal Inc. as a discharger/responsible party for the cleanup of the Mount Diablo Mercury Mine. This claim against Kennametal is due to an allegation of the Regional Board that Nevada Scheelite Corporation ("Nevada Scheelite") operated the mine and because Nevada Scheelite was a wholly owned subsidiary of Kennametal. Kennametal disputes the allegation that Nevada Scheelite operated the mine and presents evidence that Nevada Scheelite did not operate the mine. The Regional Board has also alleged that Kennametal is liable for the actions of Nevada Scheelite because Nevada Scheelite was a wholly owned subsidiary of Kennametal (*i.e.* Kennametal was the only shareholder of Nevada Scheelite). Regardless, however, of whether Nevada Scheelite was an operator of the mine, naming Kennametal as a discharger/responsible party solely as a shareholder of Nevada Scheelite (*i.e.* because Nevada Scheelite was a wholly owned subsidiary of Kennametal) is contrary to both

California and United States law, and nothing short of removing Kennametal Inc. from the Order will remedy this error.

Background

The Regional Board has alleged in Cleanup and Abatement Order No. R5-2013-0701 that Nevada Scheelite, a Nevada corporation and wholly owned subsidiary of Kennametal Inc., leased the Mount Diablo Mercury mine, located in Contra Costa County, from Mount Diablo Quicksilver Company, Ltd., and operated the mine from 1956 to 1958. The Regional Board also alleges that Nevada Scheelite discharged water from the mine into a nearby stream and is liable for environmental damage under the Porter-Cologne Water Quality Control Act. The Regional Board further alleges that Kennametal Inc. was named as a discharger "because of its ownership and control of Nevada Scheelite." Nevada Scheelite Corporation was dissolved pursuant to the laws of the state of Nevada on April 9, 1957, and all of its assets were distributed to Kennametal Inc. as its sole shareholder.[1]

The Regional Board is legally precluded from naming Kennametal as a responsible party solely due to its ownership of its subsidiary, Nevada Scheelite, as will be more fully addressed below. Kennametal also disputes every finding the Regional Board made in Finding No. 18 of the CAO, which constitutes the entire basis for naming Kennametal, with the exception that Nevada Scheelite was a wholly owned subsidiary of Kennametal and that Kennametal has headquarters in Latrobe, Pennsylvania.

I
KENNAMETAL HAS BEEN NAMED AS A DISCHARGER/RESPONSIBLE PARTY CONTRARY TO CALIFORNIA AND UNITED STATES LAW

When the Regional Board issues a Cleanup and Abatement Order, the Regional Board has the burden of proof on all of the necessary elements of that order, and there must be substantial evidence to support a finding of responsibility for each party named. Water Quality Order No. 93-9 at 7 citing WQO No. 84-6 at 10-11. The Regional Board named Kennametal as a discharger/responsible party in Order No. R5-2013-0701 but does not have any evidence, let

[1] See Certificate of Dissolution dated April 9, 1957, signed by Nevada Secretary of State, John Koontz, attached as Exhibit 21.

alone substantial evidence, to make the claim as there are at least three different and independent reasons this was contrary to law. The three reasons Kennametal was improperly named include: (1) Kennametal is not responsible for the actions of Nevada Scheelite; (2) Kennametal is not the alter ego of Nevada Scheelite; and (3) the statute of limitations to make a claim against either Nevada Scheelite or Kennametal have been exceeded. This brief addresses each of those reasons in further detail below.

A. <u>Kennametal is Not Responsible for the Actions of Nevada Scheelite</u>

It is a well-established premise of corporate law that the shareholders of a properly formed corporate entity enjoy limited liability. Shareholders are not liable to the corporation or its creditors beyond payment of consideration for the shares. A shareholder's liability, and hence potential loss, is limited only to the investment of the corporation. The mere fact that a corporation is organized to avoid personal liability does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form. *Roman Catholic Archbishop v. Superior Court*, 15 Cal. App. 3d 405, 412 (1971).

It is also a "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods, et al*., 524 U.S. 51, 61 (1998) citing Douglas and Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L.J. 193 (1929). Limited liability is the rule, not the exception. *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). Thus it is considered a general principle that the exercise of the *control* which stock ownership gives to its stockholders will not create liability beyond the assets of the subsidiary. *Id*. at 61-62 (emphasis in original). That *control* includes the election of directors, the making of by-laws and the doing of all other acts incident to the legal status of stockholders. Id. at 62. Nor will a duplication of some or all of the directors or executive officers be fatal. *Bestfoods* at 62 citing Douglas and Shanks.

As a corporation, Nevada Scheelite was "a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." *Sonora Diamond Corp. v. Superior Court of Tuolumne County* (2000) 83 Cal.App.4th 523, 538. Nevada

Scheelite was a wholly owned subsidiary of Kennametal, but that means nothing more than that Kennametal was the only shareholder of Nevada Scheelite. As the only shareholder of Nevada Scheelite, Kennametal was, therefore, separate and distinct from Nevada Scheelite. Being "separate and distinct" from Nevada Scheelite means that Kennametal bears limited liability for any alleged actions on behalf of Nevada Scheelite, a separate corporate entity.

B. Kennametal is Not the Alter Ego of Nevada Scheelite

The Regional Board appears to be under the mistaken belief that solely because Nevada Scheelite was a wholly owned subsidiary of Kennametal, that Kennametal can be named as a responsible party. However, this is contrary to longstanding law of both California and the United States. In *United States v. Bestfoods*, the United States Supreme Court addressed the issue of whether a parent corporation, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), may be held liable as an operator of a facility owned or operated by a subsidiary. The court answered no, unless the corporate veil may be pierced. *Bestfoods* at 55. For the Regional Board to disregard the separateness of the corporate entities and assign any liability to Kennametal, Kennametal would have had to have engaged in activities that would constitute a "disregard of [the] corporate entity." The disregard of the corporate entity, also known as "piercing the corporate veil" or "alter ego" means that a corporation, e.g., Nevada Scheelite, would have been used by another corporation, e.g., Kennametal, to "perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose." *Sonora Diamond* at 538 (citations omitted). In other words, for Kennametal to be found liable for the actions of Nevada Scheelite, Kennametal would have had to have acted as an alter ego of Nevada Scheelite. "Alter ego is an extreme remedy, sparingly used." *Sonora Diamond* at 536.

Pursuant to the alter ego doctrine, as set forth in *Sonora Diamond*, two conditions must be met before the alter ego doctrine will be invoked: 1) there must be such a unity of interest and ownership between the corporation and its owner that the separate personalities of the corporation and shareholder do not exist and 2) there must be an inequitable result if the acts in question are treated as those of the corporation alone. *Id*. (Citations omitted).

> Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. *Id*. at 538-539 (Citations omitted).
>
> Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. *Id*. at 539 (Citations omitted).

The Regional Board has made no allegations of piercing the corporate veil against Kennametal, yet the only way that the Regional Board could have made Kennametal liable for the activities of Nevada Scheelite is through a claim of piercing the veil or alter ego. As a result, Kennametal is defending against a claim that has not been made.

There is absolutely no evidence that Kennametal committed any of the activities that the courts use to apply the alter ego doctrine. As set forth in Kennametal's Petition for Review and Request for Stay, filed with the State Water Resources Control Board on May 16, 2013,[2] the evidence relied upon by the Regional Board is not only of questionable merit, it does nothing to establish an alter ego relationship between Kennametal and Nevada Scheelite. To the contrary, Kennametal can demonstrate that it adhered to corporate formalities, held regular meetings of both its directors and shareholders, had adequate capitalization, and maintained separate bank accounts.[3] Because Kennametal has done nothing to trigger any of the requirements of shareholder or subsidiary liability, Kennametal must be removed from the Order.

C. <u>The Regional Board is Precluded from Naming Either Kennametal or Nevada Scheelite by the Statute of Limitations</u>

The Statute of Limitations provides yet another reason why the Regional Board cannot name Kennametal in this Order. Under California law, a dissolved foreign corporation is not subject to the laws that apply to California domestic corporations. "It is settled law in California that the effect of corporate dissolution or expiration depends upon the law of its domicile… ." *Riley v. Fitzgerald* (1986) 178 Cal.App. 3d 871, 876. As a former Nevada corporation, Nevada Scheelite, therefore, would be subject to the corporate laws of Nevada. Pursuant to Nevada

[2] This Petition for Review and Request for Stay is incorporated by reference into this submission of evidence.
[3] See for example, Exhibits 2-15, that are attached to this submission of evidence.

corporate law, and which will be explained in greater detail below, the time in which to bring a claim against a corporation is two years after the date of dissolution for claims which were discovered or should have been discovered prior to dissolution or three years after the dissolution for all other claims.

Because Nevada Scheelite was a Nevada corporation, a California court would apply Nevada law when deciding whether Kennametal is liable for the actions of Nevada Scheelite. The California Supreme Court issued a recent opinion on this issue in *Greb v. Diamond Int'l Corp.*, (2013) 56 Cal.4th 243. In *Greb*, the Plaintiff filed a personal injury action against Diamond Int'l Corp. ("Diamond"), a dissolved Delaware corporation. Diamond claimed that it lacked the capacity to be sued, having been dissolved more than three years prior to the filing of the complaint. Delaware corporate law provides for a three year window of liability for dissolved corporations. Plaintiff argued that California corporate law should apply because the actions leading to liability took place in California. The Court determined that California's domestic corporation law did not apply to foreign corporations doing business in California. Instead, California courts should look to the corporation law of the state of incorporation. Therefore, Diamond did not have capacity to be sued in California under Delaware's corporation law. Similarly, because Nevada Scheelite was a Nevada corporation, Nevada law would apply to questions of liability for the alleged actions of Nevada Scheelite in California.

Nevada Revised Statute §78.585(1) states that the dissolution of a corporation does not impair any action brought by or against the corporation or its directors, officers, or shareholders, if commenced within two or three years of the dissolution of the corporation (two years if the plaintiff knew of should have known of the cause of action and three years for all others). It also provides that any action not commenced within the applicable period is barred. NRS §78.597(1)-(3) states that a shareholder of a dissolved Nevada Corporation, whose assets have been distributed, is not liable for a claim against the corporation if not brought within (i) two years after the date of dissolution for claims which were discovered or should have been discovered prior to dissolution, or (ii) three years after the date of dissolution for all other claims. These time limitations are incorporated into N.R.S. §78.597 by making reference to N.R.S.

§78.585 (setting a two year period for continuing a corporation in order to wind the business up, and prohibiting any action against the corporation after three years from the date of dissolution). Further, to the extent that a shareholder may be liable for the actions of a dissolved corporation, that liability is limited to the amount distributed to that shareholder. N.R.S. §78.597(3).[4]

As stated above, the Nevada Scheelite Corporation was dissolved on April 9, 1957. Since the Regional Board knew about the operations at the mercury mine, the Regional Board was required to commence an action against either the corporation, Nevada Scheelite, or the shareholder, Kennametal, within two years (i.e. April 9, 1959) or in no instance later than April 9, 1960. This action was not commenced, and as a result the Regional Board's action to name Kennametal in Order No. R5-2013-0701 is barred. For this reason, Kennametal must be removed from the Order.

II
KENNAMETAL CANNOT BE CONSIDERED LIABLE PURSUANT TO WATER CODE SECTION 13304

Notwithstanding all of the reasons noted above that preclude the Regional Board from naming Kennametal as a discharger in this Order, the Regional Board does not have substantial evidence to name Kennametal pursuant to Water Code section 13304.

A. Kennametal Did Not Operate the Mount Diablo Mercury Mine

The Regional Board has named Kennametal within the CAO order solely on anecdotal information provided by others. Kennametal addressed many of the inconsistencies and contradictions within its Petition for Review filed with the SWRCB in May 2013, but provides additional evidence of its position with the meeting minutes of the Directors of the Nevada Scheelite Corporation. In the minutes from the Meeting of the Nevada Scheelite Board of Directors of February 17, 1956, included as Exhibit 10, it was acknowledged that the Mt. Diablo

[4] Prior to the passage of N.R.S. §78.597 in 2011, the governing law would have been N.R.S. §78.225, which provided that no shareholder is liable for the debts or liabilities of the corporation *(*See *Assurance Co. of America v. Campbell Concrete of Nevada, Inc.* (D. Nev. 2011) 835 F.Supp.2d 995, holding that shareholders cannot be held liable for claims filed after the dissolution of the corporation). Consequently, even if the court were to look to earlier statutes for guidance on shareholder liability, the law would be even stricter against shareholder liability prior to passage of N.R.S. §78.597 in 2011.

Quicksilver Mine at Clayton, California was being investigated so that the existing organization of key mining personnel of Nevada Scheelite could be continued, in the event that it became necessary to close down the operations of Nevada Scheelite's tungsten mine in Rawhide, Nevada. In the minutes from the next meeting of the Board of Directors on April 24, 1956, included as Exhibit 11, the President of Nevada Scheelite, Donald C. McKenna, stated that "based on an examination of the Mt. Diablo Quicksilver Mine at Clayton, California, it has been decided that it would not be advisable for the Corporation to undertake mining operations at that location." For these reasons, Kennnametal must be removed from this Order.

B. <u>The Regional Board Does Not Have Substantial Evidence to Support Any of the Findings It Used to Name Kennametal</u>

The Regional Board utilized California Water Code section 13304 as its authority to issue the CAO that names Kennametal and the findings made by the Regional Board in order to name Kennametal pursuant to the CAO are contained within Finding No. 18. These are the only findings made by the Regional Board with respect to Kennametal. Kennametal disputes almost all of them, and the Regional Board lacks the substantial evidence to make the claims that Kennametal disputes. The only factually accurate findings of that paragraph are that Nevada Scheelite was a wholly owned subsidiary of Kennametal Inc. and that Kennametal's headquarters are in Latrobe, Pennsylvania.

The Regional Board provides no substantial evidence to support the findings it made or to support the findings necessary to utilize Water Code section 13304 to name Kennametal. For argument's sake, even if it were accepted that Nevada Scheelite pumped water from the mine in 1956, the Regional Board has made no claims that the discharge was in violation of existing laws or regulations at the time they occurred, has no substantial evidence to support such a claim, and has made no findings and provided no substantial evidence support the claim that the activities alleged create or threaten to create, a condition of pollution or nuisance as required.

Again, assuming for argument's sake that Nevada Scheelite did "operate" the mine, the Regional Board has alleged in its findings that Nevada Scheelite operated the mine from 1956 to 1958 but their own evidence shows differently. An inspection from the Regional Board in July

1956 notes a conversation with Vic Blomberg, the president of the Mount Diablo Quicksilver Co. During that conversation, it was stated that the mining operations for the year were limited to pumping water from the mine in an effort to dewater it but for no more than two days, and no other mining operations occurred.[5] The conclusion that no mining occurred during this time is consistent with the conclusions of the DMEA Interim Report dated March 1956 that found that the mine was flooded in December 1955 and that it would take three months of pumping to dewater the mine.[6] The meeting minutes from the annual shareholder meeting of the Mount Diablo Quicksilver Company indicate that operations of Nevada Scheelite ceased as of March 31, 1956,[7] which followed only five days after the lease was approved by the Mount Diablo Quicksilver Company.[8] This Order addresses concerns from the mine tailings and waste rock from mining operations, which, Nevada Scheelite never had any connection with if it had any connection to this mine at all. For these reasons, the Regional Board must remove Kennametal from the Order.

III
CONCLUSION

It has been established beyond all doubt that Kennametal has been improperly named in the proposed Order as a discharger/responsible party for the following reasons:

(1) The Regional Board presented no substantial evidence to support a finding that Kennametal was liable;

(2) Kennametal Inc. was separate and distinct from Nevada Scheelite Corporation and Kennametal, as a shareholder of Nevada Scheelite, is not liable for the actions of Nevada Scheelite;

(3) The Regional Board has not alleged that Kennametal is the alter ego of Nevada

[5] Exhibit 24.
[6] Exhibit 30.
[7] Exhibit 32.
[8] Exhibit 28.

Scheelite;

(4) Kennametal is not the alter ego of Nevada Scheelite;

(5) The Regional Board has not presented any evidence that Kennametal engaged in any activities that a court could use to apply the alter ego doctrine;

(6) Nevada Scheelite was a Nevada corporation subject to Nevada law, including the statute of limitations;

(7) The statute of limitations to bring an action against a dissolved Nevada corporation is either two or three years (depending on the circumstances);

(8) The Regional Board is statutorily barred against bringing an action against either Nevada Scheelite or Kennamental, because Nevada Scheelite Corporation was dissolved in 1957;

(9) Kennametal did not operate the mine; and

(10) The Regional Board has presented no substantial evidence to support its findings of liability pursuant to Water Code section 13304 with respect to Kennametal.

For the reasons identified above, the only remedy that will adequately address the concerns of Kennametal is the complete removal of Kennametal from Order No. R5-2013-0701.

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Respectfully submitted,

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