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SUNOCO, INC.

CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

STATE OF CALIFORNIA

In the Matter of: RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER R5-2013-0701, MOUNT DIABLO MINE, CONTRA COSTA COUNTY, DATED APRIL 16, 2013	**SUNOCO, INC.'S HEARING BRIEF** Hearing Date: March 27/28, 2014

I. SUMMARY OF SUNOCO, INC.'S ARGUMENT[1]

It is a general principle of corporate law "deeply ingrained in our economic and legal systems that a parent corporation ... is not liable for the acts of its subsidiaries." (U.S. v. Bestfoods, *et al.* 524 U.S. 51, 56 (U.S. Sup. Ct. 1998)) (citations omitted)). In Bestfoods, the United States Supreme Court concluded that a parent corporation, which actively participates in and exercises control over the operations of a subsidiary, *may not, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary, unless the corporate veil can be pierced.* (Id. at 63). The California State Water Resource Control Board ("State Board") has recognized that it is bound by this legal principle and requires that more "than solely a parent-subsidiary corporate relationship" must be shown by the Regional Boards to create "discharger" liability of a parent under the Water Code for the actions of its subsidiary. (WQ 93-9, In the Matter of the Petitions of Aluminum Co. of America, 1993 Cal. ENV LEXIS 17) (citation omitted). A Regional Board must show complete management and control by the parent so as to make the subsidiary merely an instrumentality, agent, conduit, or adjunct of the parent. (Id.) A Regional Board has the burden to prove by a preponderance of the evidence that the parent corporation acted as the *alter ego* of the subsidiary. (Christian and Porter Aluminum Co. v. Titus, et al., 584 F.2d 326, 338 (9th Cir. 1978)).

Here, the Central Valley Regional Water Quality Control Board ("Regional Board") seeks to pierce the corporate veil of a former subsidiary, the Cordero Mining Company ("Cordero"), and hold Sunoco Inc. ("Sunoco") liable as the

[1] Sunoco's oral argument before the Regional Board will focus on Sunoco's non-liability as the successor in interest to Sun Oil Company, the former parent company of Cordero Mining Company of Nevada ("Cordero"). Sunoco will rest on its written submissions, set forth in Sunoco's Comments Regarding the CAO, in support of its additional arguments that: 1) Nevada's 2-year statute of limitations period for initiating actions against dissolved corporations bars any action by the Regional Board against Cordero; and 2) Cordero's liability for its ~ one year operation at the Site, which did not produce mercury, is *deminimis* in relation to and divisible from the other Dischargers' operations at the Site.

successor-in-interest to Cordero's former parent, Sun Oil Company ("Sun Oil"), for Cordero's ~ maximum 12 months of prospecting activities at the Mount Diablo Mercury Mine site ("Site"). However, the Regional Board fails to meet its burden of proof. In support of its claims against Sunoco, the Regional Board relies entirely upon the argument set forth in Cleanup and Abatement Order R5-2013-0701 ("CAO"). The Regional Board's Prosecution Team confirmed this reliance *via* email on March 3, 2014 – stating that it would not be lodging a hearing brief and that the CAO alone contains the Regional Board's factual and legal argument for piercing Cordero's corporate veil and naming Sunoco as a discharger. Yet, the CAO has only a single paragraph linking Sunoco to the Site and that paragraph contains no evidence, admissible or otherwise, supporting the piercing of Cordero's corporate veil.

> The U.S. EPA, Region IX, named Sunoco Inc. a responsible party for the Mount Diablo Mercury Mine in the [2008] Unilateral Administrative Order for Performance of a Removal Action ... *due to its corporate relationship to the Cordero Mining Company* ... Sunoco is a named Discharger in this Order.

(See, Prosecution Team Exhibit ("Prosecution Exh.") 40 at ¶ 17) (italics added).

This statement of why EPA did what it did provides no pertinent facts or legal theory as to why or how Cordero's corporate veil should be pierced by the Regional Board. Indeed, the CAO relies solely on the parent-subsidiary corporate relationship between Sun Oil and Cordero in support of naming Sunoco as a discharger, which was expressly rejected as a basis for corporate veil piercing by the State Board in In Re Aluminum Co. of America. Thus, without relevant, admissible evidence and a persuasive legal theory based on that evidence, the Regional Board's claims against Sunoco fail as a matter of law.

Notwithstanding the Regional Board's failure to state its *prima facia* case, Sunoco performed an extensive records search to find relevant evidence

concerning the nature of the parent-subsidiary relationship between Sun Oil and Cordero. The evidence found clearly demonstrates that Cordero was a fully capitalized, independently operated company; with its own Board of Directors and assets separately maintained from those of Sunoco's predecessor Sun Oil. Consequently, even if the Regional Board argued that Sun Oil acted as the *alter ego* of Cordero, which it has not, the relevant evidence does not support such an argument. Instead, the evidence supports removing Sunoco as a discharger from the CAO.

Moreover, there is no evidence that Sun Oil was the successor-in-interest to Cordero. Cordero was liquidated and dissolved in 1975 pursuant to Nevada law with the approval of the Nevada Secretary of State and there is no evidence that Sun Oil continued any mercury exploration activities thereafter.

Therefore, for the reasons stated above and as set forth more fully below, the Regional Board's actions have aggrieved Sunoco because the CAO fails to carry the Regional Board's burden of proof to prove that Sun Oil acted as Cordero's *alter ego* at any relevant time. As such, Sunoco requests that the Regional Board reconsider the CAO and remove Sunoco from the list of dischargers.

II. RELEVANT PROCEDURAL HISTORY[2]

In December 2008, in response to a Unilateral Administrative Order ("UAO") from the EPA, Sunoco commissioned work at the Site, without prejudice, to shore up the "toe" of the water impoundment at the base of the Site. This work was deemed a "Time-Critical Removal Action" by the EPA's Emergency Response Section and was purportedly meant to help assure that Dunn Creek would not undercut the impoundment, potentially causing the release of mercury

[2] A more detailed procedural history, including copies of the various reports produced on behalf of Sunoco, can be found in Sunoco's Comments Regarding the CAO being submitted simultaneously herewith.

contaminated sediments. (See, Sunoco Exh. 1).[3] In a letter dated December 15, 2008, Sunoco agreed to perform the work with the understanding that compliance with the UAO will not be construed by the EPA as a waiver of Sunoco's right to object to such "unauthorized demands" in any future orders or in connection with any expanded demands for work; and, to the extent that Sunoco had not commented on any of the factual (or legal) assertions made by the EPA in the order, its silence should not be taken as assent to or an admission of their accuracy or justification. (See, Sunoco Exh. 2). Sunoco, through its consultant the Source Group, Inc., completed the work in 2009 and has not been ordered to perform any additional work by the EPA since that time. (See, Sunoco Exh. 3).

On March 25, 2009, the Regional Board issued an order to Sunoco, *et al.* directing it to submit a site investigation work plan and report. On April 24, 2009, Sunoco filed a Petition for Stay of the order. The 2009 Petition was later voluntarily withdrawn without prejudice.

On June 30, 2009, the Regional Board issued a revised order to Sunoco, *et al.* In response, Sunoco submitted a Divisibility Position Paper, outlining the historical activities at the Site. In July 2009, Sunoco also submitted a voluntary Potentially Responsible Party Report, wherein it identified more than 20 former owners and operators that the Regional Board had failed to name as dischargers on its June Order, including Bradley Mining – which operated the Site from 1936-1951, producing over 10,000 flasks of mercury and a great majority of the waste rock and mine tailings at the Site. (See, Prosecution Exh. 40 at ¶ 10).

On December 30, 2009, the Regional Board issued a Revised Order seeking to hold Sunoco jointly and severally liable to investigate and develop a remediation work plan for the entire Site. In January 2010, Sunoco submitted a Petition for Review and Stay of the Revised Order. The 2010 Petition was later voluntarily

[3] Unless otherwise stated, the term "Sunoco Exh." shall refer to the exhibits attached to Sunoco's List of Evidence being submitted simultaneously herewith.

withdrawn without prejudice.

On January 20, 2012, in advance of an in-person meeting with the Regional Board, counsel for Sunoco, John Edgcomb, sent State Board Senior Staff Counsel, Julie Macedo, Esq. a letter, copying Regional Board representative, Victor Izzo, which outlined Sunoco's position of non-liability as a former shareholder of Cordero (*i.e.* the parent-subsidiary argument). The letter detailed Cordero's corporate history, its dissolution, the argument that Sunoco cannot be held liable for the actions of Cordero, and Nevada law time-baring the Regional Board's actions against Cordero. (See, Sunoco Exh. 4).

Nonetheless, on April 16, 2013, the Regional Board issued the CAO, naming seven "Dischargers": Jack and Carolyn Wessman; the Bradley Mining Co.; the United States Department of Interior; Mt. Diablo Quicksilver, Co., Ltd; Kennametal Inc.; the California Department of Parks and Recreation; and Sunoco. (See, Prosecution Exh. 40).

On May 15, 2013, Sunoco filed a Petition for Review and Rescission of the CAO with the State Board ("Sunoco's State Petition"). Sunoco's State Petition seeks the rescission of the CAO on three (3) grounds:

> 1. The CAO lists Sunoco as a Discharger based solely on its relationship to Sun Oil, the former shareholder of Cordero. There is no legal support, however, for finding Sunoco liable for Cordero's historical activities. First, Sun Oil is a former shareholder of, not a successor-in-interest to, Cordero; second, there is no statutory liability for pre- or post-dissolution claims against a shareholder such as Sunoco unless that shareholder acted as the *alter ego* of the corporation; and, third, there is no evidence that Sun Oil acted as the *alter ego* of Cordero. As such, Sunoco cannot be held liable for the actions of Cordero as a matter of law, regardless of whether Cordero is deemed to be capable of being held responsible today.

2. The California Corporations Code and a recent California Supreme Court decision dictate that the Regional Board must look to Nevada law to determine whether and to what extent Cordero, a dissolved Nevada corporation, can be sued as a discharger in California. Nevada law requires that any claim against Cordero must have been commenced within 2 years after the date of Cordero's November 18, 1975, dissolution, *i.e.* before Nov. 18, 1977. The Regional Board, however, waited until 2009, or over 30 years after Cordero was legally dead and gone, to make any claim against Cordero. As such, the Regional Board is barred from issuing a CAO against Cordero, a non-existent company.

3. In addition to arguments 1 and 2, which require rescission of the CAO, the factual record does not support allocating any responsibility to Cordero for the purported elevated contaminant levels on and/or emanating from the Site, and there is a reasonable basis for apportioning Cordero a *de minimis* share of the cleanup: (i) Cordero was involved with the Site for a very short period of time on a small area of the Site, did not mill any ore or generate any tailings, and contributed only 1.2 percent (%) of the waste rock (as opposed to tailings) at the Site; (ii) 88% of the mercury sourced from the Site is linked to the mine tailings disposed of on the hillside of the Site by other Dischargers; (iii) the remaining mercury is sourced from groundwater seeping as a spring from a 165'-level adit constructed by a former Discharger and unrelated to Cordero's historical activities; and (iv) as a lessee, Cordero cannot be held liable for prior property owner/lessees' discharges.

(See, Sunoco's Comments Regarding the CAO). A hearing before the State Water Quality Control Board regarding Sunoco's State Petition has not yet been scheduled.

On August 8, 2013, the Regional Board notified Sunoco *via* letter that it would schedule a hearing to reconsider the CAO *within the scope of the issues presented in Sunoco's State Petition.* (See, Sunoco Exh. 5) (italics added). The

Regional Board further explained that a "Prosecution Team" would be assigned to prosecute the matter on behalf of the Regional Board and an "Advisory Team" would provide the Regional Board with legal and technical advice. (Id.)

On or about January 23, 2014, the Advisory Team approved the Hearing Procedure for Reconsideration of the CAO ("Hearing Procedure"), which scheduled the Regional Board hearing for March 27/28, 2014. (See, Sunoco Exh. 6). The Hearing Procedure also required the Prosecution Team to submit "[a]ll legal and technical arguments or analysis" including "the legal and factual basis for its claims against Sunoco" by February 21, 2014. (Id. at p.5)

On February 21, 2014, the Prosecution Team provided Sunoco with its Evidence List and copies of its Hearing Exhibits, including a copy of the CAO. On March 3, 2014, the Prosecution Team confirmed that it would not be lodging a hearing brief, but that the CAO contained the legal and factual basis for its claims against Sunoco. (See, Sunoco Exh. 7).[4]

III. FACTUAL BACKGROUND

A. Sunoco is a Successor to Sun Oil Company of Delaware, a Former Shareholder (or Parent) of Cordero Mining Company (a Subsidiary), a Dissolved Nevada Corporation with No Remaining Assets.

In 1941, Cordero was incorporated in Nevada, to "engage in the business of mining generally," with its principal office and place of business in McDermitt, Nevada. (See, Sunoco Exh. 8). At the time of incorporation, and at all relevant times thereafter, Sun Oil owned 100% of Cordero's common stock. (Id.) Cordero's Articles of Incorporation established a Board of Directors and By-laws,

[4] Notably, the only evidence produced by the Prosecution Team on February 21, 2014, which references a corporate relationship between Sun Oil and Cordero, is Prosecution Exh. 41. This one-page printout, purportedly from Sunoco's website, supports the historical beginning of Cordero as a subsidiary to Sun Oil, stating that "[t]he mining business attracted Sun in 1941, when Sun formed the Cordero Mining Company in Nevada to supply mercury for Sunoco motor oils." (See, Factual Background for more detail on the 1941 formation of Cordero).

which were separate and apart from Sun Oil. (Id.; see also, Sunoco Exh. 9). Cordero's initial capitalization came by way of a stock purchase agreement to Sun Oil, where Sun Oil purchased 750 shares of Cordero common stock @ $100/share, or $750,000. This stock purchase transaction was authorized by the Board of Directors on March 11, 1941. (See, Sunoco Exh. 10). Also in March 1941, Cordero's Board of Directors instructed Cordero's treasurer to open a bank account "in the name of the Company with the First National Bank of Reno, Nevada ... to carry on the operations of the Company [Cordero] in the State of Nevada." (Id.)

Moreover, the record shows that Cordero held regular board meetings, separate and apart from Sun Oil, as well as stockholder meetings during its entire time of existence. (See, Sunoco Exh. 11, sample set of Meeting Minutes). As such, all available evidence indicates that Cordero was a fully capitalized, independently operated company that followed all requisite corporate formalities, with its own Board of Directors, Bi-Laws, and assets separate and apart from Sun Oil.

In 1972, pursuant to the Agreement and Plan of Liquidation dated December 31, 1972, between Cordero and its sole shareholder, Sun Oil, the officers of Cordero were directed to liquidate the company by selling or otherwise liquidating all remaining tangible assets of Cordero, providing for all proper debts of the corporation, and distributing all remaining assets (if any remained) to its sole shareholder, Sun Oil. (See, Sunoco Exh. 12). To provide for its debts, on March 6, 1973, the directors of Cordero agreed to transfer the responsibility of the Cordero Retirement and Stock Purchase Plans to Sun Oil, which is the only record of any Cordero liability being transferred to Sun Oil and, notably, the transfer was made *via* a declaration of the officers of Cordero and not an agreement executed by Sun Oil.

On November 18, 1975, Cordero was legally dissolved as a corporate entity, as acknowledged by the Nevada Secretary of State. (See, Sunoco Exh. 13). There

is no evidence that indicates Sun Oil continued any mercury mining operations thereafter. In or around 1998, Sun Company, Inc. (f/k/a Sun Oil Company) changed its name to Sunoco, Inc. (See, Sunoco Exh. 14)

Sunoco has searched its historical files and public records for any evidence of any Cordero's assets that may exist today, as well as any evidence of what assets (if any) may have been distributed by Cordero to Sun Oil at the time of Cordero's dissolution. After a reasonable and diligent search, Sunoco has been unable to identify any remaining Cordero assets or assets distributed to Sun Oil. (See, Sunoco Exh. 15). Nor has Sunoco been able to locate any insurance policies held by Cordero during that time period, or other policies that would cover the CAO and/or time period at issue here. (See, Prosecution Exh. 32). In addition, Cordero's federal dissolution tax form for the period ending December 31, 1972, appears to demonstrate that any assets distributed to Sun Oil by way of the dissolution in 1975 were offset by the limited liabilities assumed at that time – making Cordero's balance sheet as of December 31, 1972, zero (0) and the value of any distributed assets zero (0). (See, Sunoco Exh. 16).

B. Cordero's 14 Months of Prospecting Activities at the Site from November 1954 to December 1955 without Violations, Claims, or Penalties Issued by the Regional Board.

Cordero first leased the Site from Mt. Diablo Quicksilver Company, Ltd. on November 1, 1954, prospected the site for ~ 12 months, and transferred its lease to Nevada Scheelite, Inc. in March 1956. (See, Sunoco Exh. 17; see also, Prosecution Exh. 40 ¶¶ 17, 18). In contrast to the extensive mining, milling, and tailings generation and disposal activities of the three prior owner/operators between 1930 and 1951 (21 years), Cordero conducted only underground mining activities, in a separate location (the DMEA Shaft), over approximately a one-year period (1954-

55).[5]

In December 1955, Cordero indefinitely suspended all mining activities due to heavy rainfall that flooded the mine to the 130-foot level. During the entire time it had any relationship to the Site, all available evidence demonstrates that Cordero was strictly prospecting. Indeed, the Regional Board admits that "[t]here is no record of mercury production for this time period and the amount of mercury production, if any, from this time period is unknown." (See, Prosecution Exh. 40 at ¶ 17).

There is no evidence that Cordero was ever found to be non-compliant or issued an administrative order or other directive related to the Site from a state or federal agency. Indeed, the Prosecution Team's exhibits from this time period indicate that no violations were issued, no complaints were recorded, and no penalties assessed during the entire time Cordero leased the Site. (See, Prosecution Exhs. 7 and 8). In the only activity and inspection report on record during the short period Cordero operated the Site, the Water Board stated "there ought not to be any problems this year;" and there are no citizen complaint letters on record from this period. (Id.) Moreover, the first cleanup and abatement order on record for the Site appears to be in 1978, issued to the then owners Jack and Carolyn Wessman. (See, Prosecution Exh. 6). As such, there were no known existing liabilities for which Cordero could be held responsible related to the Site prior to its dissolution in 1975.

The Site remained idle until March 1956, when the Cordero lease with Mt. Diablo Quicksilver was transferred to Nevada Scheelite, Inc., which began dewatering the mine and conducted some basic prospecting activities. (See, Prosecution Exh. 40 ¶¶ 17, 18).

Notably, during the short period of time that Cordero was active at the Site,

[5] A more detailed account of Cordero's activities at the Site during this time period can be found in Sunoco's Comments Regarding the CAO.

there is no evidence in the record that Sun Oil, Sun Company, or Sunoco ever directly owned, leased, operated, or otherwise had any direct contact with the Site.

IV. LEGAL BASES FOR SUNOCO'S CHALLENGE TO THE CAO

A. The law does not impose liability on Sunoco solely in the capacity of being a successor in interest to Sun Oil, the former stockholder (or Parent) of Cordero (a Subsidiary).

i. The Regional Board has not met its burden of proof required to pierce the corporate veil of Cordero.

In Bestfoods, the United States Supreme Court addressed the issue of whether the parent corporation(s) of wholly owned subsidiaries could be held liable when their subsidiaries had operated a chemical manufacturing plant, which developed a contamination problem after many years of operation. (See, Bestfoods, 524 U.S. at 56-59 (1998)). Specifically, the Supreme Court was faced with determining whether the parent companies could be liable under section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for the acts of their subsidiaries. (Id. at 56). After an extensive analysis of both fact and law, the Supreme Court ruled that a parent corporation is not liable for the acts of its subsidiaries, unless the subsidiaries' corporate veil is pierced. (Id.) The Supreme Court cited to the following principles of corporate law: i) a parent corporation is not liable for the acts of its subsidiaries; ii) the mere fact that there exists a parent-subsidiary relationship between two corporations does not make the one liable for the torts of its affiliate; and iii) limited liability of parent corporations is the rule not the exception. (Id. at 61). The Supreme Court further recognized that "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts." (Id. at 69) ("Control through ownership of

shares does not fuse the corporations, even when the directors are common to each").

California courts follow the principles articulated in Bestfoods. To be sure, they hold fast to the rule that the only basis on which the parent can be liable for the subsidiary's wrongdoing is under an *alter ego* theory based on clear evidence that would permit a plaintiff to pierce the subsidiary's corporate veil. (Armenta ex rel. City of Burbank v. Mueller Co., 142 Cal. App. 4th 636, 652 (Cal. App. 2006)) (citations omitted). Further, "*alter ego* liability can never be based on the mere fact of the parent-subsidiary relationship," or on the mere existence of common directors and officers. (Id.) (citing to Bestfoods 524 U.S. 61–62 (1998)). It "is well recognized that '[t]he law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities'—i.e., parent and subsidiary corporations." (Id.) (citing to Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2006) ¶ 2:52.7, quoting Cascade Energy and Metals Corp. v. Banks (10th Cir. 1990) 896 F.2d 1557, 1576)).

Cordero was a Nevada corporation. These parent-subsidiary non-liability principles have also been codified in Nevada Revised Statute ("NRS") 78.225, "[u]nless otherwise provided in the articles of incorporation, no stockholder of any corporation formed under the laws of this state is individually liable for the debts or liabilities of the corporation." Similarly, NRS 78.747 provides that "[e]xcept as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the *alter ego* of the corporation."

Finally, it is settled law in both California and Nevada that the party seeking to have the corporate entity disregarded has the burden of proving by a preponderance of the evidence that the *alter ego* theory should be applied. See Christian and Porter Aluminum Co. v. Titus, et al., 584 F.2d 326, 338 (9th Cir. 1978); and Ecklund v. Nev. Wholesale Lumber Co., 93 Nev. 196, 197 (Nev. Sup.

Ct. 1977).

To meet this burden, the Regional Board offers only the arguments set forth in the CAO. The CAO alleges that the sole nexus between Sunoco and the Site is that the "U.S. EPA, Region IX, named Sunoco, Inc. a responsible party for the Mount Diablo Mercury Mine in the [2008] Unilateral Administrative Order for Performance of a Removal Action, U.S. EPA Docket No. 9-2009-02, due to its *corporate relationship to the Cordero Mining Company*." (Prosecution Exh. 40) (italics added). Yet, Sunoco's predecessor, Sun Oil, only formerly owned 100% of Cordero's common stock and was no more than a shareholder (or parent) of Cordero. All available evidence demonstrates that Sun Oil never owned, leased, or operated the Site. Moreover, as demonstrated above, Cordero was a fully capitalized, independently operated company, with its own Board of Directors, assets separate and apart from Sun Oil, and that followed all requisite corporate formalities. Consequently, Sunoco is immune from liability for the alleged actions of Cordero, a dissolved Nevada corporation, unless the Regional Board can demonstrate *alter ego* liability by a preponderance of evidence – which it has not.

Further, the fact that Sunoco agreed to cooperate with the EPA in 2008 does not support an *alter ego* theory, nor is it relevant. Sunoco's December 15, 2008, letter to the EPA demonstrates that Sunoco performed the work because the EPA considered it a time sensitive emergency and, as such, Sunoco concluded that it was appropriate to perform the work immediately, while reserving all rights to argue its non-liability at a later date. There have been no express conclusions reached by the EPA concerning the parent-subsidiary issue, nor any arguments made by the EPA that Sun Oil acted as the *alter ego* of Cordero, and there is nothing in the EPA's 2008 UAO – cited by the Regional Board in the CAO – that supports piercing Cordero's corporate veil. (See, Sunoco Exh. 1).

Thus, because the Prosecution Team confirmed that the only facts and law supporting the Regional Board's action of naming Sunoco as a Discharger are set

forth in the CAO, the Regional Board has not met its burden of proof and its claims against Sunoco must fail as a matter of law.

ii. Notwithstanding the fact that the Regional Board has failed to allege a *prima facia* case against Sunoco, there is no factual basis to pierce Cordero's corporate veil.

The Ninth Circuit's *alter ego* test considers: (1) the amount of respect given to the separate identity of the corporation by its shareholders; (2) the fraudulent intent of the incorporators; and (3) the degree of injustice visited on the litigants by recognition of the corporate entity. (See Basic Mgmt. v. United States, 569 F. Supp. 2d 1106, 1118 (D. Nev. 2008) (citing Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 769 (9th Cir. 1992); see also Bd. of Trustees. v. Valley Cabinet & Mfg. Co., 877 F.2d 769, 772 (9th Cir. 1989).)

Nevada law regarding the establishment of *alter ego* liability is similar to the Ninth Circuit's analysis, and requires findings that: (1) the corporation is influenced and governed by the stockholder asserted to be its *alter ego*; (2) there must be such unity of interest and ownership that the corporation and the stockholder are inseparable from each other; and (3) adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice. (Basic Mgmt., supra, 569 F. Supp. 2d 1106, 1117-1118, citing NRS § 78.747.); see also Sonora Diamond Corp. v. Sup. Ct., 83 Cal. App. 4th 523, 539 (Cal. Ct. App. 2000) (applying similar *alter ego* requirements in California).

Here, requirements 1 and 2 are clearly not met. The evidence demonstrates that Sun Oil and Cordero had separate Boards of Directors and Officers, separate headquarters, separate bank accounts, separate tax statements, and observed the required corporate formalities – such as regular shareholder and director meetings. (Sunoco Exhs. 8-14). In addition, the dissolution documents indicate that Sun Oil was a shareholder only, that Cordero's Board acted independently when

determining its dissolution, and that no assets existed at the time of Cordero's dissolution in 1975. (Id.).

Likewise, requirement 3 has not been established. Unlike the case sometimes relied upon by the Regional Board to impute liability on shareholder(s) of dissolved corporations, J.F. Katenkamp v. Superior Court, 16 Cal.2d 696 (1940), there is no evidence that Cordero was undercapitalized throughout the relevant time period; nor is there any evidence of fraudulent intent on the part of Sun Oil in maintaining Cordero as a separate corporate subsidiary between 1941 and 1975. Because there was no known claim, or even evidence of a violation of regulation or law, asserted by the Regional Board against Cordero related to cleanup prior to its 1975 dissolution, a fundamental element of fraud (scienter or knowledge) is missing and, therefore, this matter is distinguishable from Katenkamp. (Id.) (holding a shareholder of a dissolved corporation responsible for the actions of the corporation where the original claim against the corporation was made *before* dissolution and the dissolution was performed *to effectuate a fraud and avoid liability*). Accordingly, Katenkamp is inapplicable and, based on the evidence, the Regional Board cannot establish *alter ego* liability of Sunoco for Cordero's actions at the Site.

The State Board has recognized that a Regional Board has the burden to prove by a preponderance of the evidence that the parent corporation acted as the *alter ego* of the subsidiary in order to pierce the subsidiary's corporate veil. For example, in WQ 93-9, In Re Aluminum Co. of America, the State Board (addressing a similar fact pattern to that presented here) considered petitioner Alcoa's contention that it could not be considered a discharger under a Waste Discharge Cleanup and Closure Order because: 1) Alcoa was never an owner or operator of the Leona Heights Sulfur Mine, and 2) it could not be considered liable as either the successor or *alter ego* of CDI or ACS (both subsidiaries of a subsidiary of Alcoa), each of which previously held ownership interests in the

mine. (See, Sunoco Exh. 18, WQ 93-9, In the Matter of the Petitions of Aluminum Company of America, (et al.) 1993 Cal. ENV LEXIS 17). After a review of the record searching for evidence indicating that Alcoa was in fact the successor or *alter ego* of CDI or ACS, the State Board concluded that there was insufficient evidence to hold Alcoa (a shareholder) liable for the actions of CDI or ACS on an *alter ego* basis. In reaching its conclusion, the State Board acknowledged the very limited circumstances where a parent corporation can be held liable for the actions of its subsidiary, holding:

> More is required ... than solely a parent-subsidiary corporate relationship to create liability of a parent for the actions of its subsidiary. Walker v. Signal Companies, Inc., 84 Cal.App.3d 982, 1001 (1978). Rather, *where, in addition to stock ownership, there is relatively complete management and control by the parent so 'as to make [the subsidiary] merely an instrumentality, agency, conduit, or adjunct of' the parent*, the *alter ego* doctrine will be applied. McLoughlin v. L. Bloom Sons Co., Inc., 206 Cal. App.2d 848, 851-852, (1962).

(WQ 93-9 at *7) (italics added).

Similarly, there is no evidence that Cordero was merely an instrumentality, agency, conduit, or adjunct of Sun Oil. To the contrary, the record demonstrates that Cordero had its own independent Board of Directors, a separate management structure and staff, separate offices, etc. (see above). Therefore, there are no material facts that support piercing Cordero's corporate veil to find its shareholder, Sun Oil, liable for the alleged activities at the Site on an *alter ego* basis.

iii. Sunoco cannot be held liable as the "successor-in-interest" to Cordero.

In 1972, Cordero agreed to liquidate its remaining tangible assets, pay any

existing debts, and distribute the remainder of its assets (if any) to its shareholder and parent, Sun Oil. Under Nevada law, when a corporation sells or otherwise transfers its assets, the general rule is that the successor corporation is not liable for the acts of the predecessor corporation. (Village Builders 96, LP v. U.S. Labs, Inc. 112 P.3d 1082, 1087 (Nev. 2005) (citation omitted); see also, Lessard v. Applied Risk Mgmt., 307 F.3d 1020, 1027 (9th Cir. 2002) ("Ordinarily a corporation which purchases the assets of another corporation does not thereby become liable for the selling corporation's obligations....").) The exceptions to this general rule are: 1) where the purchaser expressly or impliedly agrees to assume such debts; 2) where the transaction is really a consolidation or a merger; 3) when the purchasing corporation is merely a continuation of the selling corporation; or 4) where the transaction was fraudulently made in order to escape liability for such debts. (Id.)

Identically, in California, "[w]hen a corporation has been duly and lawfully dissolved, its shareholders are not liable for debts of the corporation ..., nor is the rule changed on account of the fact that the shareholder happens to be another corporation, that is, that the dissolved corporation was a wholly owned subsidiary of another corporation." (Potlatch Corp. v. Superior Court, 154 Cal. App. 3d 1144, 1151 (1984)(citations omitted).) The exceptions to this rule in California are similar to those in Nevada: 1) there is an express or implied agreement of assumption, 2) the transaction amounts to a consolidation or merger of the two corporations, 3) the purchasing corporation is a mere continuation of the seller, or 4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. (Cleveland v. Johnson, 209 Cal. App. 1315, 1327 (1212).)

Here, none of these exceptions apply. First, it is clear from the record that, if any liabilities were assumed, Sun Oil only assumed the administration of Cordero's qualified Retirement and Stock Purchase Plans, together with all assets and liabilities related to such Plans. (See, Sunoco Exhs. 12-16). Under Nevada

law, when a corporation is dissolved, the directors of the corporation become trustees of the corporate assets and the trustees have the obligation to pay or provide for payment of all existing liabilities of the corporation. (See, NRS 78.590(1) ([u]pon the dissolution of any corporation under the provisions of NRS 78.580, ... the directors become trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey property, real and personal, and divide the money and other property among the stockholders, after paying or adequately providing for the payment of its liabilities and obligations).) Thus, Cordero was required to either pay or provide for payment of the only known existing liability, its Retirement and Stock Purchase Plans, before dissolving its corporate existence.

Second, the record demonstrates that the liquidation was a dissolution, not a consolidation or merger of Cordero with Sun Oil. Evidence of this consists of Cordero filing a Certificate of Dissolution with the Department of State of Nevada, surrendering its charter, settling its affairs, liquidating its assets, and "ceas[ing] to be and exist as a corporation." (Sunoco Exhs. 9-15). Cordero transferred its one-known remaining liability at the time – the Retirement and Stock Purchase Plan – to Sun Oil along with any remaining assets, which may or may not have offset this liability, and ceased to exist.

Third, there is no evidence in the record that the activities of Cordero were continued after its dissolution in 1975.

Finally, there is no evidence (or allegation) that Cordero's dissolution was made for the purpose of escaping liability or effectuating a fraud. For example, there is no evidence that the Regional Board had asserted any site cleanup liability attributable to Cordero or Sunoco at or just before the time of Cordero's dissolution in 1975. In fact, the evidence shows just the opposite – that there were "no problems" in 1955, during the short period Cordero leased the Site. (See, Prosecution Exh. 8).

Therefore, Sunoco, as the successor to Sun Oil, cannot be considered the successor in interest to Cordero.

V. CONCLUSION

Sunoco requests that the Regional Board remove it from the CAO, which is arbitrary and capricious or otherwise without factual or legal bases. The CAO improperly names Sunoco as a Discharger when Sunoco, as a successor to a former shareholder of Cordero, never owned or operated the Site and never acted as Cordero's *alter ego*.

Respectfully submitted,

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