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7  
8 CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD  
9 STATE OF CALIFORNIA

10  
11 In the Matter of:

12  
13 RECONSIDERATION OF CLEANUP AND  
ABATEMENT ORDER R5-2013-0701,  
14 MOUNT DIABLO MINE, CONTRA  
15 COSTA COUNTY, DATED APRIL 16, 2013

**SUNOCO, INC.'S REBUTTAL TO  
THE PROSECUTION TEAM'S  
ASSUMPTION OF LIABILITY  
BRIEF**

16  
17 Hearing Date: October 10, 2014

18  
19 Sunoco, Inc. ("Sunoco") submits this brief in rebuttal to the Prosecution Team's  
20 Briefing Regarding Express and Implied Assumption of Liability ("PT Brief"), pursuant  
21 to the Central Valley Regional Water Quality Control Board's ("Regional Board")  
22 Hearing Procedures issued on August 19, 2014. The hearing in this matter is scheduled  
23 for October 10, 2014.  
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1           **I.     INTRODUCTION**

2           The single issue before the Regional Board is whether Sunoco<sup>1</sup>, a parent company  
3 who never owned, leased, or operated the Mt. Diablo Mercury Mine (“Site”), is liable as  
4 a shareholder for the alleged historical activities of its dissolved subsidiary, the Cordero  
5 Mining Company of Nevada (“Cordero”). This is not an issue of a parent company that  
6 itself operated a facility and thereafter sought to pass its discharger liability on to a later-  
7 formed subsidiary. This is not an issue of a parent company that dissolved its subsidiary  
8 and then continued its subsidiary’s business. This is not an issue of a parent company  
9 purchasing the assets and liabilities of a subsidiary in an asset transfer agreement, then  
10 dissolving that subsidiary. Here, it is undisputed that: Sunoco never owned, leased, or  
11 operated the Site and is therefore not a direct discharger; Sunoco never continued  
12 Cordero’s mercury mining operations after Cordero dissolved in 1975; and there is no  
13 evidence of an asset transfer agreement between Sunoco and Cordero. Sunoco was  
14 simply Cordero’s shareholder, which status presents no legal basis whatsoever for  
15 assigning any Cordero liability to Sunoco in relation to the Site.

16           As such, Sunoco cannot properly be named as a discharger on a 13304 Order  
17 unless the Prosecution Team proves through admissible, relevant evidence and legal  
18 principles that Sunoco either merged with Cordero in 1975 or somehow assumed the  
19 liabilities of Cordero related to the Site in 1975.<sup>2</sup> This brief rebuts the Prosecution  
20 Team’s express and/or implied assumption of liability arguments – which, for the  
21 following reasons, fail.<sup>3</sup>

22           The Prosecution Team’s “express” assumption of liability argument fails for two

23 \_\_\_\_\_  
24 <sup>1</sup> Unless otherwise specified, the use of the term “Sunoco” in this brief shall mean Sunoco, Inc., Sun  
Company, Inc., and/or Sun Oil Company.

25 <sup>2</sup> Despite the Prosecution Team’s argument that it is a “long-standing position of the Water Boards to  
26 liberally apply” the rules of corporate law (PT Rebuttal Brief – Corp. Successor Liability 1:9-11), we find  
no precedent for this argument and remain confident that the Regional Board will rely on the  
preponderance of the evidence standard when assessing the Prosecution Team’s case, and will base its  
decision on a strict reading of corporate and contract law.

27 <sup>3</sup> The Regional Board has ruled that no new evidence or arguments shall be presented in relation to the  
28 Prosecution Team’s *de facto* merger argument. In addition, the Prosecution Team has withdrawn its  
piercing the corporate veil argument.

1 reasons. First, it relies entirely on 20 year old Interrogatories,<sup>4</sup> which were based on an  
2 incorrect application of an historical agreement to Cordero of Nevada, and are therefore  
3 immaterial to this matter. Second, and more importantly, California courts and the State  
4 Water Resources Control Board (“State Board”) agree that there can be no “express”  
5 assumption of liability without an asset transfer agreement establishing the express  
6 assumption of liabilities alleged. Here, the Prosecution Team admits that no asset  
7 transfer agreement exists.

8 The Prosecution Team’s “implied” assumption of liability argument also fails for  
9 multiple reasons. It relies on inaccurate statements that should be ignored by the  
10 Regional Board; and it relies on the misguided, inequitable and legally unsupported  
11 assertion that, if a parent company *cooperates* with a Regional Board and performs work  
12 in relation to a subsidiary’s historical activities at a site, that such cooperation will later  
13 be used against that parent to prove it assumed the liability of the subsidiary. This is an  
14 unprecedented “no good deed goes unpunished” argument by the Prosecution Team, with  
15 potential longer term negative consequences for all PRP cooperation, that should be  
16 rejected by the Regional Board.

## 17 **II. ARGUMENT**

### 18 **A. THE REGIONAL BOARD SHOULD GIVE THE** 19 **INTERROGATORIES LITTLE WEIGHT IN THIS MATTER**

#### 20 **1. The Prosecution Team’s case law in support of its argument in** 21 **relation to the Interrogatories is misplaced**

22 The Prosecution Team argues that the Regional Board should disregard Sunoco’s  
23 rebuttal evidence because interrogatories are given “great weight” and, under the  
24 circumstances, Sunoco should be prevented from “filing a declaration that purports to  
25 impeach” the Interrogatories. (PT Brief 3:18-19; 3:7-8) (Relying on D’Amico v. Board  
26 of Medical Examiners, 11 Cal.3d 1 (1974)). However, there is no legal support for this  
27 demand under these circumstances.

28 <sup>4</sup> The term “Interrogatories” in this brief shall have the same meaning as defined in the PT Brief.

1           The “*D’Amico* rule” bars a party opposing summary judgment from filing a  
2 declaration that purports to impeach his or her own prior sworn testimony as the sole  
3 means to create a triable issue of fact. (See e.g, D’Amico, *supra*). There is no precedent  
4 for applying this rule in an administrative hearing. Nor is there precedent for applying  
5 this rule to anything other than self-serving declarations and affidavits in summary  
6 judgment proceedings. Further, the *D’Amico* rule “only permits a trial court to disregard  
7 declarations by a party which contradict his or her own discovery responses (*absent a*  
8 *reasonable explanation for the discrepancy*), it does not countenance ignoring other  
9 credible evidence that contradicts or explains that party's answers or otherwise  
10 demonstrates there are genuine issues of factual dispute.” (See, Scalf v. D. B. Log  
11 Homes, Inc. 128 Cal.App.4th 1510, 1524–1525 (2005) (emphasis added)). “No party's  
12 responses to interrogatories constitute ‘incontrovertible judicial admissions’ of a fact that  
13 bar the party from introducing other evidence that controverts the fact.” (*Id.* at p. 1522)  
14 (citation omitted).

15           Indeed, courts consistently refuse to apply the *D’Amico* rule to exclude evidence  
16 when the evidence credibly explains or contradicts a party's earlier admissions. (See, Ahn  
17 v. Kumho Tire U.S.A., Inc., 223 Cal. App. 4th 133, 144 (Cal. App. 2014) (citing Scalf,  
18 *supra*, 128 Cal.App.4th at p. 1523 [party's deposition testimony that there were no defects  
19 in log cabin kit credibly explained by other evidence showing the defects became  
20 apparent only after the kit was inspected]; Niederer v. Ferreira 189 Cal.App.3d 1485,  
21 1503 (1987) [the plaintiff's deposition testimony that note was never assigned to her  
22 credibly explained by the plaintiff's supplemental declaration stating she did not  
23 understand the question asked of her at deposition]; cf. Whitmire v. Ingersoll-Rand Co.  
24 184 Cal.App.4th 1078, 1087 (2010) [the plaintiff's declaration stating he was exposed to  
25 asbestos while working at a plant while the defendant was working there was properly  
26 disregarded as not credible in view of the plaintiff's prior interrogatory responses  
27 unequivocally indicating that the defendant was working elsewhere at the time].)

28           This is an administrative law proceeding, not a summary judgment proceeding,

1 and Sunoco intends to introduce relevant facts that both explain and controvert the  
2 Interrogatories. The *D'Amico* rule is inapplicable.

3 **2. The Interrogatories refer to the Cordero Mining Company of**  
4 **Delaware, a coal mining company, and not the Cordero Mining**  
5 **Company of Nevada, and are therefore immaterial to this matter**

6 **i. Background of the Multiple Cordero Mining Companies**

7 Historically, there have been three Cordero Mining Companies – one mined for  
8 mercury and two mined for coal. None existed and operated at the same time. In April  
9 2009, the Regional Board was put on notice of this potentially confusing fact in the  
10 Sulphur Creek Mines matter in Colusa County, California.<sup>5</sup> At that time, the Regional  
11 Board believed that “the Cordero Mining Company purchased by Kennecott Corporation  
12 in 1993 [the coal company] is one and the same company that was created in 1941 by  
13 Sun Oil Company [the mercury company].” (See, Sunoco Exh. 20). Because Kennecott  
14 was a wholly owned subsidiary of Rio Tinto Services, Inc (“Rio Tinto”), the Regional  
15 Board named Rio Tinto as a discharger on a Sulphur Creek Mines order. (*Id.*) Rio Tinto  
16 notified the Regional Board that there were multiple Cordero Mining Companies and that  
17 the Regional Board had named the wrong one on the order. (See, Sunoco Exh. 21)  
18 Based on a Public Records Act Request performed by Sunoco’s counsel, it appears that  
19 the Regional Board does not have any records related to the outcome of this  
20 correspondence between the Regional Board and Rio Tinto (See, Sunoco Exh. 22 Email).  
21 Noticeably, however, neither Rio Tinto nor Kennecott are named on any subsequent  
22 Sulphur Creek Mines order.

23 Rio Tinto’s argument, which appears to have been accepted by the Regional  
24 Board, is also supported by public documents, as well as documents in the Prosecution  
25 Team’s possession. The Cordero Mining Company of Nevada was formed in 1941  
26 (hereinafter, “**Nevada Cordero**”). (See, Sunoco Hearing Brief 7:20-9:16; and Sunoco  
27 Reply Brief re De Facto Merger 3:17-5:13). The Nevada Cordero leased the Mt. Diablo

28 <sup>5</sup> The full caption for this site is “Central Hill, Empire, Manzanita, and West End Mines, Colusa County.”

1 Mercury mine in circa 1955. (Id.) The Nevada Cordero dissolved completely in 1975,  
2 liquidated all of its assets, and closed all of its existing operations. (Id.) A second  
3 Cordero Mining Company – similar in name only – was formed in or around 1975 in  
4 Delaware by Sun Oil Company to mine for coal (hereinafter, “**Delaware Cordero I**”).  
5 (See, Sunoco Exh. 23). In 1983, Delaware Cordero I merged with a Sun Oil Company  
6 subsidiary in its coal division, SUNEDCO that had also been incorporated in Delaware in  
7 circa 1975, and Delaware Cordero I dissolved as a corporate entity – becoming defunct.  
8 (Id.)<sup>6</sup> SUNEDCO then took the name “Cordero Mining Company” and continued  
9 operating in the coal mining business (hereinafter, “**Delaware Cordero II**”). (See  
10 Sunoco Exh. 24). Delaware Cordero II, the coal company, was then sold to Kennecott  
11 Corp. in 1993. (See, Sunoco Exh. 25). Kennecott Corp. had been purchased four years  
12 earlier by Rio Tinto. (Id.)

13 Thus, of the three historical Cordero Mining Companies, two had absolutely  
14 nothing to do with the Mt. Diablo Mercury Mine Site. The only Cordero Mining  
15 Company that had any limited contact with the Site was the Nevada Cordero, which  
16 dissolved entirely in 1975 and there is no record that Sunoco ever continued its  
17 operations. Further, there is no record of any direct connection between Nevada Cordero  
18 and Delaware Cordero I or Delaware Cordero II.

19 **ii. Confusion in Relation to the Interrogatories**

20 The multiple uses of the name Cordero Mining Company throughout history have  
21 not only caused confusion in the Sulphur Creek Mines matter, but it is apparent that they  
22 also caused confusion in relation to the Interrogatories in the Santa Clara v. Myers  
23 Industries, Inc. et al. matter. This confusion and the evident resulting inaccuracy within  
24 the Interrogatories should be considered by the Regional Board when weighing the  
25 evidence in this matter. To explain this confusion and its likely affect on the  
26 Interrogatories, we address the response to Interrogatory No. 2 within the Interrogatories

27 \_\_\_\_\_  
28 <sup>6</sup> The Certification of Merger has been ordered from the Delaware Secretary of State’s office and will be produced upon receipt.

1 sentence by sentence:<sup>7</sup>

2 ***1. Cordero Mining Company, a Nevada corporation, was dissolved on***  
3 ***November 18, 1975.***

4 This sentence is accurate. On November 18, 1975, the Cordero Mining Company  
5 of Nevada was legally dissolved as a corporate entity, as acknowledged by the Nevada  
6 Secretary of State. (See, Sunoco Exh. 13).

7 ***2. At the time of dissolution, a subsidiary of Sun Company, Inc. was the sole***  
8 ***shareholder of Cordero Mining Company [of Nevada].***

9 This sentence, taken together with the first sentence, is accurate. At the time of  
10 dissolution in 1975, Sun Oil Company of Delaware was the sole shareholder of the  
11 Nevada Cordero. (See, Sunoco Exh. 12). Sun Oil Company of Delaware later changed  
12 its name to Sun Exploration and Production Company (“Sun E&P”) in circa 1981. (See,  
13 Sunoco Exh. 14). Sun E&P was a subsidiary of Sun Company, Inc. (See, Sunoco Exh.  
14 26).

15 ***3. This subsidiary [Sun E&P] was subsequently spun-off to the shareholders of***  
16 ***Sun Company, Inc. on November 1, 1988 as part of a corporate***  
17 ***restructuring, although Sun Company, Inc. retained responsibility for the***  
18 ***liabilities of Cordero Mining Company.***

19 This sentence is inaccurate to the extent that it purportedly refers to the Nevada  
20 Cordero. In 1988, the Board of Directors of Sun Company, Inc. determined that it was in  
21 the best interest of the shareholders to distribute all of the outstanding shares of Sun E&P  
22 to Sun Company, Inc. shareholders. (See, Sunoco Exh. 26). This transaction was  
23 referred to as a spin-off and was memorialized in a 1988 Distribution Agreement between  
24 Sun Company, Inc. and Sun E&P. (*Id.*) In 1989, Sun E&P, the independent company  
25 that remained after the spin-off, changed its name to Oryx Energy Company.

26 The inaccuracy within this sentence is the apparent link it makes between the  
27 November 1, 1988 spin-off of Sun E&P from Sun Company, Inc. and the Nevada

28 <sup>7</sup> The response to Interrogatory No. 1 is repeated in the last sentence of the response to Interrogatory No. 2.

1 Cordero. Pursuant to the 1988 Distribution Agreement – *i.e.* the spin-off referenced in  
2 the Interrogatories – Sun Company, Inc. remained responsible for the “Sun Business  
3 Liabilities,” which are defined within the agreement as “[a]ll liabilities of Sun, including  
4 all liabilities arising out of, in connection with or relating principally to, any of Sun  
5 Businesses.” (*Id.*) The definition of Sun Businesses includes the companies listed in  
6 Appendix B of the 1988 Distribution Agreement. The defunct Delaware Cordero I is  
7 listed on page 4 of Appendix B titled “Sun Company, Inc. – Defunct Companies;”<sup>8</sup> and  
8 the active Delaware Cordero II, the coal company formerly known as SUNEDCO, is  
9 listed on page 7 of Appendix B titled “Sun Company, Inc. Businesses.” (*Id.*) **There is no**  
10 **reference to the Nevada Cordero within the 1988 Distribution Agreement.** Thus, the  
11 statement that as part of the spin-off, Sun Company, Inc. *retained responsibility for the*  
12 *liabilities of Cordero Mining Company* is factually inaccurate to the extent that it  
13 apparently refers to the Nevada Cordero. The 1988 Distribution Agreement references  
14 only the Delaware Cordero Mining Companies – one defunct and the other active. The  
15 fact that there were two “defunct” Cordero Mining Companies as of 1988, Delaware  
16 Cordero I and Nevada Cordero, appears to have caused confusion during the drafting of  
17 the Interrogatories.

18 In addition, the context in which the Interrogatories were drafted supports the  
19 likelihood that confusion regarding the two Cordero Mining entities occurred as a result  
20 of the 1988 Distribution Agreement. In May 1993, before it even became a party to the  
21 Santa Clara v. Myers Industries, Inc. et al. matter, Sun Company, Inc. was contacted by  
22 Myers Industries, Inc.’s (“Myers”) counsel regarding which company Myers should file a  
23 cross claim against, Sun Company, Inc. or Oryx. (See, Sunoco Exh. 27). Myers counsel  
24 believed at that time that Oryx Energy Company, not Sun Company, Inc. was the  
25 immediate successor-in-interest to “Sun Oil Company (Delaware),’ and . . . Sun Oil  
26 Company (Delaware), in turn is alleged to be responsible for the . . . liabilities of Cordero  
27

28 <sup>8</sup> Notably, the defunct company is titled “Cordero Mining Co. (DE).” (*Id.*)

1 Mining Company at the Almaden Quicksilver County Park.” (*Id.*) After what appears to  
2 be a review of the 1988 Distribution Agreement, Sun Company, Inc. determined that  
3 Oryx (*i.e.* Sun E&P) did not keep the responsibility for the Cordero Mining Company  
4 liabilities after the 1988 spin-off. (See, Sunoco Exh. 28). Sun Company, Inc. even made  
5 it clear at that time that the representation was “for purposes of allocating liability, if any,  
6 as between Sun and Oryx, and does not constitute an admission of liability by Sun.” (*Id.*)

7 After Sun Company, Inc. was named as a party to the litigation, the court ordered  
8 all parties to respond to a “First Set of Interrogatories to All Parties” regarding, in part,  
9 corporate succession. (See Sunoco Exh. 29). Sun Company, Inc.’s responses to these  
10 interrogatories are the “Interrogatories” relied upon by the Prosecution Team in its brief.  
11 Interrogatory No. 2 expressly asks for the identity of “all documents constituting *any*  
12 *agreements* for the purchase, sale, assignment, or gift of assets or stock, or other  
13 documents reflecting asset or stock ownership between You . . . and the alleged  
14 Predecessor-in-Interest.” (*Id.*) (emphasis added). In response, Sun Company, Inc. clearly  
15 focused on the 1988 spin-off – or the 1988 Distribution *Agreement* – and mirrored the  
16 position represented to Myers’ counsel regarding the distribution of liability between Sun  
17 Company, Inc. and Oryx/Sun E&P after the 1988 spin-off.

18 Thus, it appears that the focus on the 1988 Distribution Agreement carried through  
19 from the exchange between Myers and Sun Company, Inc. to the responses within the  
20 Interrogatories.

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

23 The facts as stated above demonstrate that it is more likely than not that this  
24 statement erroneously applies the 1988 Distribution Agreement to the Nevada Cordero.  
25 Sunoco’s prior briefing and related evidence demonstrates that Sunoco was simply a  
26 shareholder of the Nevada Cordero. (See, Sunoco Hearing Brief 7:20-9:16; and Sunoco  
27 Reply Brief re De Facto Merger 3:17-5:13).

28 Finally, Sunoco is unaware of any other instance in which an affirmative

1 representation was made that Sunoco is responsible for the “liabilities of Cordero Mining  
2 Company,” other than the Santa Clara v. Myers Industries, Inc. et al. matter.  
3 Accordingly, for the reasons set forth above, the apparent errors made by Sun Company,  
4 Inc. 20 years ago in the Interrogatories should be given little, if any, weight in this  
5 administrative proceeding.

6 **B. THE PROSECUTION TEAM’S EXPRESS ASSUMPTION OF**  
7 **LIABILITY ARGUMENT FAILS WITHOUT AN ACTUAL**  
8 **CONTRACT**

9 Before the Regional Board can rule that an express assumption of liability exists,  
10 the Prosecution Team must prove that an asset transfer agreement exists between Sunoco  
11 and Cordero. (See, No Cost Conference, Inc. v. Windstream Com. Inc., 940 F. Supp. 2d  
12 1285, 1299 (S. D. Cal. 2013).<sup>9</sup> Moreover, the Prosecution Team must not only “plead  
13 the ‘existence of a contract,’” it must prove the terms establishing Sunoco’s liability for  
14 Cordero’s activities at the Mt. Diablo Mercury Mine. (Id.) (citing to Winner Chevrolet,  
15 Inc. v. Universal Underwriters Ins. Co., 2008 U.S. Dist. LEXIS 111530, at \*11 (E.D. Cal.  
16 July 1, 2008); see e.g., Winner Chevrolet at \*12-13 (“[P]laintiffs here must not only plead  
17 the existence of an assumption of liability but either the terms of that assumption of  
18 liability (if express) or the factual circumstances giving rise to an assumption of liability  
19 (if implied).”) In its brief, the Prosecution Team admits that “the record does not contain  
20 a written agreement between Cordero and its successor, Sun Oil Company, regarding the  
21 transfer of Cordero’s liabilities.”<sup>10</sup> (PT Br. 3:28-4:1). As such, the Prosecution Team  
22 cannot successfully argue that Sunoco expressly assumed the liabilities of Cordero –  
23 regardless of the statements made in the Interrogatories, which are not a contract.

24 The State Board has confirmed this important principle of contract law. In the  
25 Matter of Purex Industries, Inc., WQ 97-04, State Board (1997), the regional board named  
26 Purex Industries, Inc. in a cleanup order as the corporate successor of several entities,

27 <sup>9</sup> Notably, each of the cases cited by the Prosecution Team relies on express language within an actual  
28 asset transfer agreement. (See, e.g. U.S. v. Iron Mt. Mines, 987 F.Supp 1233, 1236 (1997)).

<sup>10</sup> Sunoco also refutes that Sun Oil Company is the “successor” to Cordero.

1 including Purex Corp., a former operator of the contaminated site. Purex argued that a  
2 leveraged buy-out in 1982 shifted all liability for the site from Purex Corp. to Baron-  
3 Blakeslee. (See, in re Purex at \*1-2). When addressing the issue of whether Baron-  
4 Blakeslee assumed the liabilities of Purex Corp. in 1982, the State Board noted that the  
5 issue “is a question of fact,” and “[t]o resolve the issue, the Board *must review the*  
6 *contractual agreements* between Purex Corporation and PII Acquisitions, Inc. and  
7 between PII Acquisitions, Inc. and Baron-Blakeslee/Del.” (Id. at \*4) (emphasis added).

8 The State Board ultimately ruled that:

9 Baron-Blakeslee/Del's agreement to assume the unknown  
10 liabilities related to the former division *was contractual in*  
11 *nature. Absent the agreement, the corporation was not*  
12 *legally obligated to assume the liabilities related to the*  
13 *former division because of the general rule that an asset*  
14 *purchaser does not assume the liabilities of the selling*  
15 *corporation.* The legal effect of the agreement was to give PII  
Acquisitions, Inc., and its successors the right to compel  
Baron-Blakeslee/Del to perform its obligations under the  
assumption agreement.

16 (Id. at \*7) (emphasis added).

17 Here, there is no asset transfer agreement between Sunoco and Cordero and,  
18 without such an agreement, the Regional Board cannot find, or even assess whether there  
19 exists, an express assumption of liability. Further, without an asset transfer agreement to  
20 review, the Interrogatories are irrelevant to the issue of whether Sunoco expressly  
21 assumed Cordero's liabilities.

22 **C. THE PROSECUTION TEAM'S "IMPLIED" ASSUMPTION OF**  
23 **LIABILITY ARGUMENT RELIES ON INACCURATE**  
24 **STATEMENTS OF ALLEGED FACT AND THE UNFOUNDED**  
25 **POSITION THAT A PARENT COMPANY'S COOPERATION**  
26 **WITH A REGIONAL BOARD EQUATES TO AN IMPLIED**  
27 **ASSUMPTION OF LIABILITY**

28 Other than the Interrogatories, which are explained and refuted above, the  
Prosecution Team offers the following, additional insufficient evidence in support of its

1 implied assumption of liability argument: (i) Sunoco did not object to the EPA's  
2 unilateral order; (ii) Sunoco waited until after Kennametal raised corporate succession  
3 arguments before it too raised similar arguments; and (iii) Sunoco has been cooperating  
4 with the Regional Board and performed work at the Site, and therefore has demonstrated  
5 that it assumed the liabilities of Cordero. (See PT Brief 6:5-6; 6:10-12; and 6:6-11,  
6 respectively). The first two statements are simply inaccurate and should be ignored; and  
7 the third – i.e. the “no good deed goes unpunished” argument – is unprecedented and  
8 provides no basis in law or equity for finding Sunoco liable.

9 **1. The Prosecution Team's inaccurate statements**

10 The Prosecution Team's claim that “Sunoco made no objection to the EPA's  
11 Unilateral Administrative Order issued in December 2008” is not true. Sunoco expressly  
12 reserved all rights to dispute its liability before proceeding with its compliance efforts.  
13 (PT Brief 6:5-6). This issue has already been addressed in more detail in Sunoco's prior  
14 Hearing Brief. (See, Sunoco Hearing Brief 3:19-4:10).

15 The Prosecution Team's claim that Sunoco did not dispute its liability in relation  
16 to Cordero “until 2013 when Kennametal began to assert arguments related to corporate  
17 succession” is also not true. (PT Brief 6:10-12). The Prosecution Team fails to disclose  
18 that it has had multiple correspondence, both written and oral, with Sunoco's outside  
19 counsel regarding Sunoco's corporate law arguments over the past 2 ½ years. (See, the  
20 Declarations of A. Baas and J. Edgcomb In Support of Sunoco's Opposition to the  
21 Prosecution Team's Motion in Limine). In fact, it was Sunoco, not Kennametal, that first  
22 raised the corporate law issues in its Petition to the State Board. (See, Sunoco Exh. 19).  
23 Accordingly, the Prosecution Team's “argument” in this regard is false and misleading  
24 and should be disregarded in its entirety.

25 **2. The Prosecution Team's argument that Sunoco's cooperation**  
26 **with the Regional Board equates to an implied assumption of**  
27 **liability is unprecedented**

28 Sunoco has a long record of cooperating with environmental agencies. Its

1 historical cooperation at the Mt. Diablo Mercury Mine is no different. As set forth in  
2 Sunoco's prior briefing, Sunoco has spent considerable time, energy, and money  
3 complying with the Regional Board's orders. (See, Sunoco Exh. 19). Sunoco's  
4 consultant, the Source Group, Inc., has worked cooperatively with Regional Board staff  
5 to characterize the environmental conditions at the Site and prepare a remedial action  
6 work plan that has been approved by the Regional Board. (Id.) Sunoco also challenged  
7 the orders when reasonably appropriate, given the known facts and applicable laws.

8         During this time, Sunoco performed a diligent search for public and private  
9 documents to fully understand the corporate history of the Nevada-based Cordero Mining  
10 Company as it relates to Sunoco. Once its non-liability position was clearly supported by  
11 the documents, Sunoco informed the Regional Board of its corporate law arguments and  
12 requested to be removed from any future orders. (See, the Declarations of A. Baas and J.  
13 Edgcomb In Support of Sunoco's Opposition to the Prosecution Team's Motion in  
14 Limine). Sunoco's decision to cooperate with the Regional Board orders while it  
15 performed a diligent search for historical files and performed research as to the legal  
16 effect of those documents in no way served to waive Sunoco's right to argue its non-  
17 liability at a later date; and in no way should Sunoco's cooperation be used against it as  
18 evidence that it assumed the liabilities of Cordero. Holding Sunoco's cooperation against  
19 it here would go against all notions of equitable treatment and would likely serve as a  
20 disincentive for future Regional Board order respondents to similarly adopt a compliance  
21 stance while further investigating their legal defenses, an outcome that the Regional  
22 Board should not be promoting. Not surprisingly, the Prosecution Team does not cite to  
23 any case law in support of its position – penalizing a PRP for its agency cooperation.

24         As such, the lack of appropriate evidence and legal support call for the Regional  
25 Board to reject the Prosecution Team's implied assumption of liability argument.

