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BEFORE THE CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF PERCHLORATE CONTAMINATION AT THE 160-ACRE SITE IN THE RIALTO AREA,	Case No. SWRCB/OCC No. A-1824 Hearing Officer: Tam Doduc Hearing Dates: July 9-12, and 18-19, 2007

REBUTTAL BRIEF

EMHART INDUSTRIES, INC., KWIKSET LOCKS, INC., KWIKSET CORPORATION, BLACK & DECKER (U.S.) INC., AND BLACK & DECKER INC.

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Emhart Industries, Inc. ("Emhart"), Kwikset Locks, Inc. ("KLI"), Kwikset Corporation ("Kwikset"), Black & Decker (U.S.) Inc. ("BD(US)I"), and Black & Decker Inc. ("BDI") (collectively the "Emhart Parties") hereby submit this memorandum in response to the Opening Submissions of the City of Rialto ("Rialto") and the Advocacy Team.

Introduction

On February 21, 2007, the Advocacy Team, which has been gathering evidence for more than five years, announced during the pre-hearing conference it was ready to prove its liability case against the Emhart Parties. Rialto, which over the last four years has spent more than $12-15 million on its lawyers and more than $1.4 million on its expert witnesses gathering evidence, announced it too was ready to prove its liability case against the Emhart Parties without any further discovery.[1] The Second Revised Notice of Hearing, which followed these pronouncements, required the Advocacy Team and Rialto to present that evidence in their Opening Submissions and Witness Statements.[2]

Discovery, which closed on May 17, 2007, has allowed the Emhart Parties limited cross-examination of the evidence identified in the Advocacy Team's and Rialto's Opening Briefs and Witness Statements, which confirms that the material empirical and anecdotal evidence necessary to resolve this dispute is not in dispute. That evidence compels the following findings: (1) WCLC did not release perchlorate and/or TCE to groundwater at the 160-Acre Site or to a place where it threatens to adversely impact that groundwater; and (2) the Emhart Parties are not liable under any successor theory under Water Code § 13304 or § 13267 for WCLC's alleged actions. In a desperate attempt to avoid these findings, Rialto resorts, in its Opening Brief, to two stratagems. It simply omits and ignores all the material,

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[1] (E69 and RE6.)

[2] Specifically, with regard to their Witness Statements, the Advocacy Team and Rialto were ordered to submit a detailed description of each witness' testimony: "The detailed description shall include all of the major points of each witness' testimony. The description shall contain sufficient specificity as to eliminate surprise at the evidentiary hearing." (Second Revised Notice, at 3 and 4.) It was also made clear that "[o]ral testimony by witnesses that goes beyond the scope of written submittals will be excluded." (Third Revised Notice of Public Hearing, at 5.)

undisputed empirical and anecdotal evidence with the apparent hope that no one will notice. Then, to give that foolish and ill-advised strategy a chance, Rialto engages in a concerted campaign of misdirection with a blizzard of intentional misstatements and misrepresentations of documents and deposition testimony.

Thus, this rebuttal brief is organized as follows. Section I addresses the allegations that WCLC caused releases of potassium perchlorate and/or TCE to groundwater, with subsections that identify and analyze (i) the material facts not in dispute, and (ii) the purported factual and legal issues raised by Rialto. Section II addresses the assumption of liability and de facto merger allegations against the Emhart Parties, with similar subsections. Section III addresses the damage and liability issues raised by the Advocacy Team and Rialto under Water Code §§ 13304 and 13267. Separately, the Emhart Parties have filed several in limine motions objecting to improper evidence submitted by the Advocacy Team and Rialto.[3]

The sections in the Emhart Parties' Rebuttal Brief, of course, address the four liability issues regarding the Emhart Parties, framed by the proposed 2007 CAO and set forth in their Opening Brief. These questions continue to be:

> 1. Did WCLC's operations (circa 1952-1957) cause or permit, or threaten to cause or permit, a discharge of perchlorate or TCE to the groundwater in the Rialto/Colton Groundwater Basin that will adversely and unreasonably affect the beneficial uses of that groundwater?
>
> 2. To the extent WCLC discharged perchlorate or TCE, does that discharge require any further investigation or any remediation?

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[3] Each of the documents, deposition testimony excerpts, rebuttal declarations, and statements of rebuttal witness testimony cited herein and submitted this date, are part of the Emhart Parties' rebuttal to the City of Rialto's Opening Submission. As the Hearing Officer is aware Rialto Opening Submissions were received two business days prior to April 17, 2007 due date for the Emhart Parties' Opening Submission. For this reason, the Emhart Parties did not address any portion of Rialto's Opening Submissions in their April 17, 2007 filing; there simply was not enough time (two business days) to do so. Further, a number of depositions were taken after April 17, 2007, and thus to the extent relevant to the Emhart Parties' rebuttal arguments, they too have been included. In order to keep the evidentiary record clear, the Emhart parties hereby withdraw three exhibits which are part of Exhibit E202. The withdrawn exhibits are Exhibit 35, 37 and 38 to Exhibit E202.

3. Is Emhart liable under Water Code §§ 13304 or 13267 for any necessary future investigation or remediation of WCLC's alleged discharges under the de facto merger theory?

4. Did Emhart (AHC) in 1958 expressly assume by contract KLI's alleged liabilities under Water Code §§ 13304 and 13267, which would not be enacted until many years later?

As set forth in detail below, the Advocacy Team's and Rialto's proffered evidence does not allow a single affirmative answer to the four questions presented. The preponderance of the evidence overwhelmingly establishes that WCLC did not release perchlorate or TCE to groundwater or to a place that threatens that groundwater, and that the Emhart Parties are not liable.

Rebuttal Argument

I. The Discharge Allegations Against WCLC

A. The Material Facts Not In Dispute

1. The Empirical Evidence Establishes No WCLC Release or Threatened Release of Perchlorate or TCE to Groundwater

For the past three years, ENVIRON International ("ENVIRON"), at the request of Emhart and with the oversight of the U.S. EPA and Regional Board staff, has conducted a comprehensive investigation of all areas on the 160-Acre Site where WCLC is known or suspected to have used, handled, stored, and/or released potassium perchlorate and TCE. (E1.) No empirical evidence, contrary or otherwise, has been gathered or submitted by either the Advocacy Team or Rialto.

Thus, the following ENVIRON findings stand uncontroverted:

1. No perchlorate was found in the shallow soil in the 17 WCLC Study Areas investigated for perchlorate, except for trace amounts detected in Study Areas 11, 37, and 18. (E1, at 11, Table 2.)[4]

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[4] Specifically, no perchlorate was detected in the shallow soil at or near the following WCLC buildings which involved or are suspected of having involved operations where potassium perchlorate was handled: Building 41—mixing; and Building 40 weighing and blending. (E1, at 11, Table 2.)

2. In WCLC Study Area 11 (Building 47—screening and drying), perchlorate was detected in one soil sample taken between 5 and 10 feet bgs at 58 ppb; this detection is bounded by deeper and lateral samples reporting no detections. All other soil samples reported NDs (no detections).
3. In WCLC Study Area 37 (soil and rock pile), perchlorate (*Id.*, at 6; RE1.)was detected in one soil sample taken between 0 and 6 feet bgs at 110 ppb; this detection is bounded by deeper and lateral samples reporting no detections. All other soil samples reported NDs (no detections). (*Id.*, at 7; RE1.)
4. In WCLC Study Area 18 (Building 42—loading), trace amounts of perchlorate in the shallow soil (less than 25 feet bgs) were detected in 34 of 197 soil samples; all 165 other soil samples reported NDs (no detections). All detections have been bounded with deeper and lateral samples reporting no detections. Twenty-three (23) of the 25 soil samples taken between 20 and 25 feet bgs reported ND (no detection). All 31 soil samples between 25 and 50 feet reported ND (no detection). (E1, at 7, 8 and 9; RE1; Bunker REI-5.)
5. In the 21 WCLC Study Areas investigated for TCE, no TCE was found in any of the 30 soil and 162 soil gas samples taken. (E1, at 9.)
6. In groundwater monitoring well CMW-3, which is immediately downgradient of Study Area 18, no perchlorate was found, except an initial detection of 2.2 ppb (less than background) when the well was installed; all samples since well installation in 2006 reported ND (no detection). (*Id.*)
7. On May 24, 2007, CMW-3 was sampled again. No detection of perchlorate was found at any well screening level. (RE17; Bunker Decl., Ex. C.)

Thus, it is <u>undisputed</u> on the record now before the Hearing Officer that there is no empirical evidence that WCLC released potassium perchlorate or TCE at the 160-Acre Site: (a) to groundwater at all; (b) to groundwater in an amount sufficient to adversely and unreasonably affect the beneficial uses of that groundwater; or (c) to a place that threatens to discharge to groundwater and adversely and unreasonably affect its beneficial uses.

2. The Advocacy Team and Rialto Admit That WCLC Did Not Release Perchlorate or TCE to Groundwater

The Advocacy Team's Witness Statement, dated April 6, 2007, does not identify a single witness, expert or otherwise, who will testify at the hearing that WCLC caused or permitted a release of perchlorate or TCE to the groundwater. The only Advocacy Team allegation in its Opening Brief regarding the empirical evidence (presented in the form of a "finding") concerning WCLC is that trace amounts of perchlorate were found in the shallow soil (less than 25 feet bgs) in one limited part of the northern portion of the 160-Acre Site where WCLC had operated:

> Soil investigations in the northern portion of the Property found that perchlorate was present in the shallow soil (less than 25 feet below ground surface (bgs)[)] at various locations associated with the manufacturing . . . activities of . . . WCLC;
>
> * * *
>
> Soil and groundwater investigations conducted to date lead to the following conclusions: . . . Perchlorate is present in shallow soils in the northern portion of the property where WCLC . . . conducted operations.

(Advocacy Team's Opening Br., at 93 and 99.)[5]

Rialto's Witness Statement, dated April 12, 2007, also does not identify a single witness, expert or otherwise, who will testify at the hearing that WCLC caused or permitted a release of perchlorate or TCE to groundwater. Indeed, on May 15, 2007, Rialto's only expert witness identified to testify about the environmental condition of the 160-Acre Site, Daniel B. Stephens, PhD., admitted that, during the three and one-half years he has been working for Rialto on this matter, he has never been asked to form any opinions regarding WCLC's historical activities at the 160-Acre Site:

> Q. . . . What opinions, if any, were you asked to provide [prior to 2007] to the attorneys for the City of Rialto with regard to West Coast Loading Corporation?

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[5] Nor has the Advocacy Team identified WCLC in any of its other "findings," based on empirical evidence, as: (i) having released TCE to the soil at all; (ii) having released perchlorate to the soil anywhere in the southern half of the 160-Acre Site where the McLaughlin Pit and other disposal pits and trenches (that no one associates with WCLC operations) have been discovered; or (iii) having caused or permitted, or threatening to cause or permit, a release of perchlorate or TCE to groundwater on the northern half of the 160-Acre Site. (*Id.*, at 93-100.)

A. I don't recall any requests for opinions prior to this year.

* * *

Q. Were you asked to form any opinions with regard to West Coast Loading Corporation's operations at the 160-acre site at any time?

A. In a general way, we had the understanding that West Coast Loading occupied the site.

Q. Dr. Stephens, I didn't ask you for your understanding. I asked you the question of whether or not you have been asked to form any opinions with regard to West Coast Loading operations at the 160-acre site?

A. No, not specifically.

(RE8, Stephens, at 534:24-540:9.) As Mr. Saremi, the Advocacy Team's principal technical investigator, reluctantly admitted on behalf of the Advocacy Team at his deposition on March 27, 2007:

Q. In other words, you cannot—you have no data that you rely upon to indicate that West Coast Loading Corporation caused or contributed to groundwater contamination; is that correct?

A. Yeah, I—I think that—that's a—that's a correct statement.

(RE9; Saremi, at 654:21-655:1.)

3. The Advocacy Team Admits That No Further Site Investigation of WCLC's Historical Operations Is Necessary

The Advocacy Team's Witness Statement does not identify any witness who proposes to testify that further site investigation of any area where WCLC operated on the 160-Acre Site is needed. Indeed, each of technical members of the Advocacy Team, Robert Holub, Kamron Saremi, and Ann Sturdivant, have testified under oath that ENVIRON investigated every area on the 160-Acre Site where WCLC is known or suspected to have used, handled, stored, and/or released potassium perchlorate and TCE. The testimony of Mr. Holub and Mr. Saremi on this issue is set forth in the Emhart Parties' Opening Brief, at pages 11 and 12. Ms. Sturdivant, who reports to Mr. Holub, is Mr. Saremi's immediate supervisor, and is the only Regional Board staff person designated by the Advocacy Team's Witness Statement to testify about WCLC, confirmed on May 12, 2007, that she too is satisfied:

Q. Do you know who on your staff oversaw the ENVIRON Work?

A. Yes.

Q. Who was that?

A. Mr. Saremi

Q. And did you participate in its oversight in any way of this work?

A. Yes, as a supervisor to him, we would interact on recommendations.

* * *

Q. And do you know whether or not Mr. Saremi made specific requests to look in certain areas beyond the scope of [ENVIRON's] work plan?

A. Yes, he did.

Q. And do you know whether ENVIRON did that work?

A. To my knowledge, they did so.

Q. Do you know of any area on the 160-acre site with regard to West Coast Loading historical operations that was not investigated by ENVIRON in connection with their work there for the last couple of years?

A. Nothing I can think of, no.

(RE10, Sturdivant, at 1432:18-1434:4.)[6]

4. The Undisputed Anecdotal Evidence

(a) WCLC's Use of Potassium Perchlorate Was Limited

On April 17, 2007, the Emhart Parties submitted the expert witness declaration of David Dillehay. PhD. (E3.) Dr. Dillehay, who holds a PhD in Chemistry, has almost 50 years of specialized skill, knowledge, experience, and training in the fields of the composition of munitions, munitions containing potassium perchlorate, the manufacturing processes for such munitions, and the explosive characteristics of those munitions. (*Id*, at ¶ 4.) Neither the Advocacy Team nor Rialto has identified in their Witness Statements any expert or fact witness to testify regarding the subjects of Dr. Dillehay's expert witness testimony. Thus, the following opinions of Dr. Dillehay are undisputed:

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[6] The key working principle underlying Environ's investigation has been, if perchlorate or TCE were detected in the shallow soil, that detection would be investigated further until it was bounded both laterally and vertically with NDs (no detections). (E1at 2; Bunher Dec.; RE11.)

1. During its five years at the 160-Acre Site, WCLC manufactured 13 different munitions, only three of which contained or used potassium perchlorate: the M112 Photoflash Cartridge, XF-5A Photoflash Cartridge, and M115 Groundburst Simulator. (E3, at ¶¶ 7-9.)
2. For two and one half months (late January 1955 to April 12, 1955), until Building 42 and the M112 loading machinery were destroyed by an explosion, WCLC loaded, assembled, and packaged 55,310 M112 Photoflash Cartridges ("M112"), approximately 16% of total M112 production. (E2, ¶ 11, Ex. C-4; and E3, ¶¶ 10-20.)
3. For seven and one half months (October 1955 to May 6, 1956), following redesign and construction of a new Building 42 and M112 loading machinery, WCLC loaded, assembled, and packaged 292,299 additional M112s, 84% of the M112 units production. (*Id.*)
4. For one week ending September 28, 1956, WCLC loaded, assembled, and packaged 250 XF-5A Photoflash Cartridges ("XF-5A") as a pilot project. (*Id.*)
5. For eight weeks ending January 14, 1957, WCLC loaded, assembled, and packaged 50,250 M115 Groundburst Simulators ("M115"). (*Id.*)

It is also undisputed that WCLC's production of the M112, XF-5A, and M115 was limited to the northern half of the 160-Acre Site where its facilities were located. There is no anecdotal evidence (document or deposition testimony) suggesting that WCLC conducted any operations, let alone operations involving potassium perchlorate, on the southern half of the 160-Acre Site at or near the McLaughlin Pit, the Goodrich Burn Pits, or the South Disposal Area. (E1.) Neither the Advocacy Team nor Rialto have identified any witness in their Witness Statements who will testify to the contrary.

(b) The Advocacy Team Retracts Its Claim That WCLC Generated And Discharged 2,257 Lbs. Of Scrap Potassium Perchlorate To The Bare Ground

Dr. Dillehay will testify that the Advocacy Team's claim that WCLC generated and dumped on the bare ground at least 2,257 lbs. of scrap potassium perchlorate during its

production of the M112, XF-5A, and M115 is unreasonable and baseless because, among numerous analytical deficiencies, Ms. Sturdivant, who wrote this section of the Advocacy Team's Opening Brief, ignored WCLC's actual production and scrap records.

Specifically, Dr. Dillehay will testify that:

1. WCLC's production records establish that at most approximately 123.23 lbs. of scrap potassium perchlorate was generated during production of the these three munitions:
    a. 115 lbs. during the ten total months of M112 production;
    b. potentially 0.23 lbs. during the one week of XF-5A production;
    c. potentially 8 lbs. during the eight weeks of M115 production.

    (E3, at ¶¶ 11-20.)
2. There is no reasonable basis to conclude that scrap potassium perchlorate generated during the manufacture of the M112, XF-5A, and M115 was disposed of to the bare ground by WCLC employees. (*Id.*, at ¶¶ 21-24.)
3. The explosion of Building 42 on April 12, 1955, did not cause a release of potassium perchlorate to the environment. (*Id.*, at ¶¶ 25-31.)

(i) The Advocacy Team Retracts Its Scrap Estimate

On May 12, 2007, Ms. Sturdivant retracted the Advocacy Team's claim that 2,257 pounds of scrap potassium perchlorate was generated by WCLC. Specifically, after agreeing that WCLC's actual production records should have been used rather than initial rule-of-thumb estimates, Ms. Sturdivant first retracted her "estimate" that 1,832 lbs. of scrap potassium perchlorate had been generated during M112 production:

> A. I think it would be more correct to look at the actual production numbers.
>
> * * *
>
> Q. Do you have any reason to believe that the amount of scrap generated in the M112 production was anything other 115 pounds?
>
> A. I don't remember the number . . . at the moment . . . assuming it is the final report and it is that number, that would be correct.
>
> * * *

Q. So the statement here [in the Advocacy Team's April 6, 2007 Witness Statement]: "We conclude that at least 2,257 pounds of potassium perchlorate was expected to be lost as scrap," that's no longer accurate, is it?

A. . . . Yeah, I—I'm pretty sure that that number needs to be corrected.

* * *

Q. So you had estimated prior to today that there was 1,832 pounds of perchlorate scrap that had been generated during the M112 production, and that went into this calculation of 2,257 pounds; is that correct?

A. Yes.

Q. And that estimate based on the final materials data status report was wrong?

A. The total, yes.

Q. Yes, the total of 1832?

* * *

A. I would say that we need to correct the number. . . .

(RE12; emphasis added.) At the time of her deposition, Ms. Sturdivant had not reviewed Dr. Dillehay's opinion regarding the amount of scrap generated during WCLC's limited production of the XF-5A (estimated by Dr. Dillehay to be potentially 0.23 lbs.) and M115 (estimated by Dr. Dillehay to be potentially 8 lbs.); thus, she was unable to comment on those amounts. (RE13.)

Other than Ms. Sturdivant, who admits that she has no expertise in the field of munitions manufacturing or munitions scrap and has no personal knowledge of WCLC's operations,[7] neither the Advocacy Team nor Rialto, which simply parrots the Advocacy Team's assertions on this issue,[8] has identified in their Witness Statements a single witness to testify about the amount of scrap potassium perchlorate generated during the limited time WCLC manufactured the M112, XF-5A, and the M115 at the 160-Acre-Site.

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[7] RE14.)

[8] (Rialto's Opening Brief, at 12-14.)

(ii) No Evidence of Scrap Discharged To Bare Ground

The Advocacy Team and Rialto claimed in their Opening Briefs that at least 2,257 lbs. of WCLC scrap potassium perchlorate was discharged to the bare ground at the 160-Acre Site. (Advocacy Team's Opening Br., at 19 and 62; Rialto Opening Br., at 12.) Rialto also claims that an additional 1,730 lbs. of scrap ammonium perchlorate was generated and discharged to the bare ground. (Rialto's Opening Br., at 13 and 19.) Not only are these allegations belied by the undisputed empirical evidence, neither the Advocacy Team nor Rialto has identified any witness, expert or other, to testify regarding the fate of WCLC's scrap potassium perchlorate in their Witness Statements.

On May 12, 2007, Ms. Sturdivant, the only witness identified by either the Advocacy Team or Rialto to testify about WCLC historical handling of scrap, confirmed that the Advocacy Team will present no such testimony at the hearing:

> Q. In the advocacy team's brief, the assertion was made that all of this potassium perchlorate scarp was dumped on the bare ground. Do you recall that? . . .
>
> A. . . . Yes.
>
> * * *
>
> Q. So I notice in the witness statement that you have prepared . . . that there's no statement in the first bullet [which describes Ms. Sturdivant's scrap testimony] as to where the scrap went; is that correct?
>
> A. I read it that way. We didn't put it in there specifically.
>
> Q. . . . So you don't intend to testify at the hearing as to what happened to whatever amount of scrap we ultimately determine was generated, is that correct?
>
> A. I can't say that. You have to realize, I'm not going to stand up and read this statement, so—
>
> Q. . . . But this is a summary of your testimony. And isn't it true, Ms. Sturdivant, that if there were some scrap generated, its fate is relevant to this proceeding?
>
> A. Yes.
>
> Q. All right. And you didn't state anywhere in your witness statement what its fate was, did you?
>
> A. Not here, no.

Q. Not in your witness statement?

A. Right.

(RE15.)

Dr. Stephens, the only Rialto expert witness designated to address releases of perchlorate at the 160-Acre Site, is completely silent in his "Declaration" on the amount of WCLC scrap potassium and ammonium perchlorate generated or their fate. Nor could he provide a meaningful estimate. On May 16, 2007, Dr. Stephens admitted that, in preparing his limited "factual" description of WCLC's operations at the 160-Acre Site in his "Declaration," he: (1) incorrectly assumed all WCLC's products manufactured at the 160-Acre Site contained potassium perchlorate; (2) has no one on his staff who is an expert in munitions or munition chemicals; and (3) was not aware that WCLC manufactured only three products which contained potassium perchlorate over a very limited time period. (RE16.)

5. The Expert Witness Testimony of Dr. Chu and Dr. Powell Is Uncontroverted By the Advocacy Team And Rialto

The rate at which perchlorate moves downward through the 400 foot vadose zone under the 160-Acre Site has been a central issue before the Santa Ana Regional Board since it issued its first CAO in these ongoing proceedings in June 2002, and Rialto filed its federal lawsuit in 2004. In July 2005, in connection with a second but now abandoned CAO issued on February 28, 2005, against the Emhart Parties, the Advocacy Team and Rialto met and agreed that they needed a vadose zone model and/or vadose zone calculations to verify the allegations that WCLC's operations had released perchlorate to groundwater. (RE17.) It is no less of an issue in this proceeding.

Thus, counsel for the Emhart Parties retained Robert Powell, PhD., and Jacob Chu, PhD., to evaluate the potential mobility of surficial perchlorate and TCE downward through the vadose zone to groundwater at the 160-Acre Site. Drs. Powell's and Chu's detailed opinions are set forth in the Emhart Parties' Exhibits E4 and E5, submitted on April 17, 2007. Neither the Advocacy Team nor Rialto have identified any witness, expert or otherwise, in their Witness Statements who have prepared a vadose zone model or vadose zone

calculations to demonstrate that potassium perchlorate in the WCLC Study Areas has migrated to groundwater or threatens to adversely and unreasonably affect that groundwater.

Ms. Sturdivant confirmed in her deposition that the Advocacy Team has elected not to prepare any such analysis or testimony:

> Q. In connection with the investigation that you've performed, has the regional board created—itself created any models?
>
> A. No, not to my knowledge.
>
> Q. No vadose zone model, for example?
>
> A. No.
>
> * * *
>
> Q. How long does it take if you have just a flat spot where rain is occurring for perchlorate to mobilize from the surface 400 feet all the way to the groundwater in North Rialto?
>
> A. I don't have a number. We did not do a model of that sort.
>
> Q. Do you have any idea in terms of years by an order of magnitude?
>
> A. Only from the documents [the expert opinions of Drs. Chu, Powell, Kresic] we're reviewing now.
>
> * * *
>
> Q. You don't have a number?
>
> A. I said that. I don't have a number.
>
> Q. And you can't give me a number with [an] order of magnitude?
>
> A. Today, no.
>
> * * *
>
> Q. Has any work been done yet by the staff or yourself with regard to the vertical migration of wastewater that you're referring to here—[in your witness statement] and how far it's traveled in the vadose zone?
>
> A. No.

(RE18, emphasis added.)

> Q. Has anyone [on the Advocacy Team] been assigned to prepare any type of mathematical models with respect to vadose zone transport in rebuttal?
>
> A. No, not that I'm aware of.
>
> Q. How about to do any calculations with respect to vadose zone transport?

A. I don't know.

(RE19, emphasis added.)

As noted above, Dr. Stephens, Rialto's expert witness, confirmed in his deposition that he has not been asked to form any opinions regarding WCLC's historical activities at the 160-Acre Site:

> Q. Were you asked to form any opinions with regard to West Coast Loading Corporation's operations at the 160-acre site at any time?
>
> A. In a general way, we had the understanding that West Coast Loading occupied the site.
>
> Q. Dr. Stephens, I didn't ask you for your understanding. I asked you the question of whether or not you have been asked to form any opinions with regard to West Coast Loading operations at the 160-acre site?
>
> A. No, not specifically.

(RE20.) Dr. Stephens did estimate in his unverified "Declaration" that the rate of transport through the vadose zone at the 160-Acre Site is 1.25 feet per year or 15 inches per year. (Stephens Decl. at 14.) At Dr. Stephens' estimated rate, however, perchlorate would not reach the groundwater for 320 years (400 feet divided by 1.25 feet per year). (RE21.)[9] Critically, like the Advocacy Team, Dr. Stephens' "Declaration" contains no opinion, based on a vadose zone model or calculation, that WCLC's historical operations between 1952 and 1957 have impacted or threaten to adversely impact groundwater.

Thus, the following opinions of Drs. Chu and Powell that WCLC did not release perchlorate or TCE to groundwater, or to a place that threatens to adversely impact that groundwater are uncontroverted.

Dr. Chu determined that:

> The estimated long-term average net recharge rates by U.S. Geological Survey and by the Darcian method show that the perchlorate migration distance under Site conditions may reach 5 to 8 feet over a period of 50 years. This is consistent with the site soil sampling results around Building 42, which

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[9] Section I.C.1., below, establishes that Dr. Stephens' 15 inches per year estimate, based solely on his "professional judgment," is unreasonable and inconsistent with all relevant scientific literature and data gathered from the 160-Acre Site. Motion in Limine No. 1 sets forth the Emhart Parties' objections to Dr. Stephens "Declaration" which require that it be stricken from the record because he refused to verify it under oath.

> show that most of detected samples were found to be within 10 feet below ground surface.

(E5-8 at 11, emphasis added.) Dr. Chu then "concluded that the downward movement of perchlorate from surficial soil due to natural precipitation is very limited and has not adversely impacted regional groundwater quality." (*Id.*) In developing his opinion, Dr. Chu relied, in part, on the most recent and comprehensive scientific study (published in 2006) that addresses the net recharge rates from precipitation in the San Bernardino area.[10] That study is U. S. Geological Survey, Open-File Report 2005-1278, entitled "Hydrology, Description of Computer Models, and Evaluation of Selected Water-Management Alternatives in the San Bernardino Area, California," prepared in cooperation with the San Bernardino Valley Municipal Water District ("USGS 2005-1278"). (E5, at 2, 4, 8, 11, and 12 (Danskin); Goodrich Kresic Declaration, Ex. 8.) In pertinent part, USGS reports:

> As part of the process of determining local runoff for the San Bernardino area (refer to this report, pages 26-28), direct recharge from precipitation was estimated as a separate component of precipitation (table 4). During 1945-98, direct recharge is assumed to occur in only 6 years (1969, 1978, 1980, 1983, 1993, 1998). For 1945-98, this infrequent recharge equates to an average rate of about 1,000 acre ft/yr.

(Goodrich Kresic Declaration, Ex 8, at 40; emphasis added.) As noted in this passage, the data supporting USGS's assumption is set forth in Table 4 of USGS 2005-1278, which shows that during the 53 years between 1945 and 1998, less than one percent of the 15.91 inches of annual average precipitation in the San Bernardino area, or 0.15 inches per year, is retained in the soil in the San Bernardino area as direct recharge from precipitation. (E5, at 3-4.)

As Dr. Chu explains in his verified study (E5), using the Darcian method and actual soil moisture data collected by ENVIRON at the 160-Acre Site, the site-specific average direct net recharge rate due to precipitation is calculated to be between 0.009 and 0.1 inches/year. (E5, at Table 4.) Dr. Chu then conservatively accepted the U.S. Geological

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[10] The "net recharge rate" is the amount of precipitation that falls on an area that is retained by the soil and ultimately will migrate downward through the vadose zone to groundwater. (E5-8 at 3-4.)

Survey's direct net recharge rate of 0.15 inches of precipitation per year as the upper bound and most scientifically reasonable rate for the 160-Acre Site. (*Id.*) When this net recharge rate is coupled with a conservative 8% soil moisture assumption, which is also based on data collected at the 160-Acre Site, Dr. Chu determined that the transport rate for chemicals like perchlorate released to the surface downward through the vadose zone is six to eight feet every 50 years, which is fully consistent with the empirical data collected at the 160-Acre Site. (*Id.*)[11]

Adding his more than 30 years of experience in the field of hydrogeology, Dr. Powell found:

> Perchlorate is a persistent chemical that does not readily degrade in soil or water into some other chemical form. Perchlorate was only used by WCLC in a dry powder form. Once released onto soil, perchlorate would only migrate through the soil horizon by dissolution into water percolating through the soil. In arid regions like San Bernardino County this percolation is expected to be very slow and traces of perchlorate released even 50 years ago should still remain in shallow soils at the release site today, as confirmed by the data in ENVIRON's 2007 Report and Dr. Jacob Chu's analysis set forth in Exhibit B hereto.

(E4, at ¶ 9d.) Dr. Powell then concluded:

1. There is no empirical evidence of a significant release of perchlorate between 1952 and 1957 at the 160-Acre Site in the WCLC Study Areas; only trace amounts of perchlorate were released in these areas which are confined to the shallow soil.
2. The trace amounts of perchlorate released to the soil in WCLC Study Areas 11, 18, and 37 have not migrated to a significant degree towards the deeper water table. They have been retained in the shallow soil and have not impacted groundwater quality.
3. These trace amounts of perchlorate in the shallow soil do not threaten groundwater quality.

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[11] As Dr. Chu explains, the average downward migration velocity of infiltrated water can be calculated using the following generally accept scientific equation: $V = I_n/\theta$, where V is average downward velocity, I_n is net recharge rate, and θ is volumetric water content. (E5, at 8.)

4. There is no empirical evidence that TCE has been released to the soil in any WCLC Study Area.

(Ex 4, passim.)

6. Preliminary Conclusion

The undisputed empirical evidence establishes that only trace amounts of perchlorate are in the shallow soil in three of the 28 WCLC Study Areas investigated. The uncontroverted expert witness testimony of Dr. Chu and Dr. Powell establishes that these trace amounts are all that was released in these areas, and that these trace amounts do not threaten to adversely impact groundwater in the near or distant future, or ever.

If the Advocacy Team or Rialto ever intended to prove their allegations that WCLC caused, or threatens to cause, a release of perchlorate to groundwater with a vadose zone model or vadose zone calculations, the Notices of Public Hearing issued in this proceeding required that all such evidence be identified in detail in their Witness Statements and or expert witness reports. Rialto and the Advocacy Team have elected not to do so. Thus, the uncontroverted empirical evidence and expert witness testimony of Dr. Chu and Dr. Powell establish that neither WCLC nor the Emhart Parties are liable under Water Code §§ 13304 or 13267 for the perchlorate or TCE found in the groundwater in the Rialto/Colton Groundwater Basin.

We turn then to what is left of the prosecution's case against the Emhart Parties.

B. Rialto's Litany Of Unsupported Allegations, Omissions, and Affirmative Misrepresentations Of The Anecdotal Evidence

In California, the integrity and fairness of judicial and administrative proceedings demand that all public prosecutors, which includes Rialto, act impartially and evenhandedly to develop a full and fair record and not use their positions to bring about unjust results.[12]

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[12] As the California Supreme Court explained in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746): "[The prosecutor] is a representative of the sovereign; he must act with the impartiality of those who govern; second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly . . . . Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper

Rialto has breached this obligation. Its Opening Brief is replete with purported statements of fact unsupported by any evidence, statements unsupported by the citations provided, and numerous misrepresentations and omissions of relevant anecdotal evidence. Indeed, Rialto's purported proof, based exclusively on anecdotal evidence, approaches fraud, which includes "a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive. . . ."[13]

Because of these breaches, the Emhart Parties and ultimately the State Water Board have been forced to untangle the true facts from a deliberate maze of false innuendo, misstatements, and misrepresentations of the anecdotal evidence. What emerges from this necessary sorting with compelling force is that the Advocacy Team, having no evidentiary basis for its claims, never should have named the Emhart Parties in the proposed 2007 CAO, and Rialto, fully aware of these deficiencies, has attempted to salvage a bankrupt joint prosecution of the Emhart Parties with nothing more than false and misleading representations of documents and deposition testimony.

1. WCLC Did Not Generate 3,502 lbs. Of Scrap Potassium And Ammonium Perchlorate, Or Discharge It to the Environment

Parroting the Advocacy Team's now retracted allegations, Rialto asserts that during M112 production, WCLC generated 1,832 lbs. of scrap potassium perchlorate, all of which was discharged to the environment:

> There is substantial evidence in the record to support a finding that WCLC discharged 1,832 pounds of potassium perchlorate into the environment to produce the M112 photoflash cartridges under contract number 595. (See page 15 et seq. below.)

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function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. . . . A government lawyer in a civil or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or bring about unjust settlements or results."

[13] Black's Law Dictionary, Sixth Edition 1990, at 660.

(Rialto Opening Br., at 13.) to this Rialto adds a second scrap claim of 1,732 lbs. of scrap ammonium perchlorate:

> [T]here is substantial evidence in the record to support a finding that WCLC discharged 1,732 pounds of ammonium perchlorate into the environment drying ammonium perchlorate under contract with Grand Central Rocket Company. (See page 18 et seq. below.)

(Rialto's Opening Br., at 13.) Both of these assertions are a fraud on this proceeding.

The first claim of an alleged 1,832 lbs. (almost one ton) of scrap potassium perchlorate is simply a contrivance of Rialto's lawyers. Rialto has not identified a single witness in its Witness Statement who proposes to testify regarding the amount of scrap potassium perchlorate purportedly generated by WCLC. Rather, like the Advocacy Team, ignoring the actual final production records, Rialto's lawyers simply took the initial pre-production rule-of-thumb estimated scrap rate of 4% and multiplied it by the amount of potassium perchlorate needed for M112 production and then assumed that the product of these two numbers, 1,832 lbs., was actually generated and discharged to the bare ground. (Rialto's Opening Br., at 16.)

It is undisputed, however, as the Advocacy Team now concedes, that the final "WCLC Material Status Report" for M112 production expressly states that during M112 production 115 lbs. of scrap potassium perchlorate was generated, no more no less. Dr. Dillehay, an expert in the field, has reviewed all of WCLC's pertinent records and will so confirm at the hearing. (E3, at ¶ 3.)[14] Dr. Dillehay will also confirm, as stated in his declaration, that WCLC's final production records for the M112 fully account for the disposition of the 47,000 lbs. of potassium perchlorate delivered to WCLC for M112 production, as follows: 46,221 lbs. loaded into the M112s produced + 649 lbs. still in inventory + 115 lbs. of scrap as reported in the Scrap Report + 15 lbs. unaccounted for = 47,000 lbs. (E2, at 12-16.)

The second claim of a purported 1,730 lbs. (also almost a ton) of "scrap" ammonium perchlorate allegedly discharged to the environment during the drying operation for Grand

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[14] This issue is discussed in detail in the Emhart Parties' Opening Brief, at 24-34.

Central Rocket is also based entirely on the speculation of Rialto's lawyers, and, disturbingly, the concealment of eye-witness testimony to the contrary. Again, Rialto has failed to identify in its Witness Statement or Opening Brief any evidence to support this assertion. Moreover, on April 21, 2005, former WCLC employee Frank Gardner, now deceased, who personally handled the drying of all 43,250 lbs. of ammonium perchlorate for Grand Central Rocket, testified at his deposition that no spill occurred during the drying operation; and that no dust escaped:

> Q. Do you recall spilling any ammonium perchlorate when you were doing the drying operation for Grand Central Rocket?
>
> A. I don't recall spilling any, no.
>
> Q. Do you recall any dust escaping from the drying operation?
>
> [Objection]
>
> A. No.

(RE22.) This testimony stands uncontroverted.

Rialto's omission of this portion of Mr. Gardner's testimony is not an oversight. Rialto's "proof" begins, at page 18 of its Opening Brief. There, Mr. Gardner's deposition is cited for the proposition that WCLC "dried" and "delivered" 43,250 pounds of ammonium perchlorate for and to Grand Central Rocket; and that the "powder" was "placed on trays" and "wheeled through the open air into a steam-heated room," which was "wet mopped on weekends." (*Id.* at 19.) To support these statements, Rialto cites pages 88, 90, 92, and 98 of Mr. Gardner's deposition. Mr. Gardner's testimony that no spills occurred is on pages 97 and 98, right in the middle of and on the pages cited, which Rialto simply ignored. (RE23.)

The last sentence in Rialto's "proof" states: "Using the same 4% loss figure for the ammonium perchlorate that WCLC used for potassium perchlorate, **WCLC discharged 1,730 pounds of ammonium perchlorate** while fulfilling its contract with Grand Central Rocket Company." (Rialto's Opening Br., at 19; emphasis original.) Yet, this statement is not supported by any citation to evidence. The mere fact that WCLC performed the drying operation for Grand Central Rocket, however, is not evidence that 1,730 pounds of scrap

ammonium perchlorate, or any for that matter, was generated, let alone discharged to the environment, especially when Mr. Gardner, the very person who did the work, affirmatively testified that no spill occurred. Moreover, Rialto ignored the fact that there is no empirical evidence that such a postulated release, which would amount to a small sand dune of ammonium perchlorate, ever occurred. ENVIRON, who sampled the area where this drying operation occurred as approved by the U.S. EPA and Regional Board staff, found one sample with 58 ppb of perchlorate at 5 to 10 feet bgs, all others reported no detection. (E1, Study Area 11, at 6.)

In short, Rialto's assertion that WCLC generated and released more than 3,500 pounds of scrap potassium and ammonium perchlorate to the environment is an irresponsible fraud on this proceeding. We are thus left with Rialto's descriptions of alleged eye-witness accounts of alleged incidental releases of potassium perchlorate at the 160-Acre Site.

2. There Is No Credible Evidence That Any Significant Amount Of Potassium Perchlorate Was Released to the Environment As the Result of A Spill Or As Fugitive Dust During WCLC's Manufacturing of the M112, XF-5A, or M115

(a) The Relevant, Undisputed Facts Omitted by Rialto

As noted above, WCLC manufactured three products that contained or used potassium perchlorate during four limited time periods. For two and one half months (late January 1955 to April 12, 1955), WCLC loaded, assembled, and packaged 16% of the M112 Photoflash Cartridges made for the Department of the Army ("M112 Phase I"). (E2, ¶ 11, Ex. C-4; and E3, ¶¶ 7-20.) This initial production run was interrupted for seven months by an explosion which destroyed Building 42 on April 12, 1955. (*Id.*) Following the design and construction of a new Building 42 and new M112 loading machinery, which were virtually dust free, the remaining 84% of M112 were produced in seven and one half months, from October 1955, to May 7, 1956 ("M112 Phase II"). (*Id.*; Rialto E-168.) For one week ending September 28, 1956, WCLC loaded, assembled, and packaged 250 XF-5A Photoflash Cartridges as a pilot project. (*Id.*) Over the eight weeks ending January 14, 1957, WCLC loaded, assembled, and packaged 50,250 M115 Groundburst Simulators. (*Id.*)

With regard to WCLC's production of the M112, XF-5A, and M115, the following undisputed facts suggest that, at most, trace amounts of photoflash mix, with potassium perchlorate in it, were released during M112 Phase I production at Building 42 ; after the redesign of Building 42 and the loading machinery, virtually no photoflash mix was released during Phase II. Here are the undisputed facts omitted by Rialto:

(i) M112 Phase I (Late January to April 12, 1955)

For ease of reference, the undisputed facts regarding M112 Phase I production are set forth in numbered paragraphs:

1. During Phase I, 16% of the M112s ordered by the Department of Army were produced. (E2-G.) Some dust was generated in the original Building 42. The floor in that building was mopped several times a day and machinery was wiped with wet rags. The mop water was disposed outside the several building doors on the ground near the building. (RE24.) All rags went to an off-site laundry. (RE3 and E2, at ¶ 12.)

2. On April 12, 1955, Building 42 was destroyed by an explosion which shut down M112 production. (RE25. A. Scott memo.)

3. The April 12 explosion did not involve a fire and no fire suppression water was used. (E20.) Any photoflash powder in the building at the time was consumed in the explosion. (E3, at ¶¶ 25-31; E20, RE26.)

4. ENVIRON's investigation of Study Area 18 (where Building 42 was and still is located today) found only trace amounts of perchlorate in the shallow soil around and under Building 42. (E1.) The trace detections of perchlorate under the building were found under two sections of concrete floor added when the Building 42 footprint was enlarged during reconstruction in the Summer of 1955 by WCLC and again in 1960 by Goodrich, thereby effectively creating a time capsule which has preserved the perchlorate in the shallow soil just outside the west facing doors of the original 1955 Building 42 before those slabs were constructed. This time capsule confirms that only trace amounts had been released. (E1, Appendix B; Figure 4, at 15; E4, E5, and RE1.)

(ii) M112 Phase II (October 1955 to May 7, 1956)

Again, for ease of reference, the undisputed facts regarding M112 Phase II production are set forth in sequential numbered paragraphs:

1. Over the Summer of 1955, Building 42 and the M112 loading machinery were redesigned and built anew. (E1, Appendix B; and RE25.) Thereafter, between October 1955 and May 7, 1956, seven and one half months, WCLC manufactured the remaining 84% of the M112s. (E2, at ¶ 11; E3, at ¶ 10.)

2. On January 6, 1956, almost the midpoint of Phase II M112 production, Angus Scott, WCLC's Plant Manager, prepared a detailed written report which described the operation of the new M112 loading machine and new Building 42, with a particular focus on fugitive dust:

> The design of this machine is such that little or no dust is produced during the filling operation. This is in contrast with the design of the previous machine. . . . The ventilation equipment has been so designed to produce a negative pressure within the filling cubicle so that any dust that could be produced would remain within the cubicle and not sift out into any of the adjoining areas.
>
> (RE27, KWK 3145, 3151; emphasis added.)

3. Several months earlier, on September 28, 1955, as M112 production was in pre-production startup, a Safety Inspector with the Department of Army in Los Angeles, B. N. Cousens, prepared a detailed report. He too described the new M112 loading machine and new building as essentially dust free. After noting that the new Building 42 was "used exclusively for loading charge cases for [the] M112," Safety Inspector Cousens wrote:

> Operation of the machine develops a minimum of dust. . . . Particular interest was given to the housekeeping conditions. The loading machine was checked immediately after emptying each of several batches of photoflash powder. There was no evidence of dust on the machinery other than a very small amount which accumulated on the dumping device. This was cleaned off each time by the operator who recharged the machine. There was no evidence of dust in the take-off cubicle and very little on the surface of the charge container units which center the three charge cases under the filling tubes of the loading machine. . . . The operator who places the charge case closure and applies petman cement, wipes off powder with a damp cloth each time the container passes over her table.

(RE29, KWKA 454348; emphasis added.)

4. As noted, during M112 Phase II, all rags were sent to an off-site laundry. (RE3 and E2, at ¶ 12.)

(iii) XF-5A (One Week Ending September 28, 1956) and M115(Eight Weeks Ending January 14, 1957)

With regard to the XF-5A (one week of production) and the M115 (eight weeks of production), Rialto has not identified any witness or deposition testimony of a WCLC employee who, during the one week the XF-5A was manufactured or the eight weeks the M115 was manufactured, worked on these products, observed their production, or observed a spill, release of fugitive dust, or the dumping of potassium perchlorate or photoflash during their production. Thus, there is no evidence of XF-5A or M115 spill or fugitive dust release of photoflash or potassium perchlorate. Indeed, given the April 12, 1955 explosion of Building 42 and the destruction of the loading machinery, their redesign to minimize fugitive dust, and obvious concerns regarding employee safety, in the absence of any evidence to the contrary, it is reasonable to infer that, with regard to fugitive dust, the manufacture of the XF-5A and the M115, like the M112 Phase II, generated a minimum of dust.

In summary, the undisputed empirical and anecdotal evidence, ignored completely by the Advocacy Team and Rialto, establishes that, at most, during the two and one half months M112 Phase I production, only trace amounts of photoflash mix, which contained potassium perchlorate, were released to the soil at and near Building 42, and it is still there in the shallow soil today. There is no evidence that any measurable fugitive dust was generated during M112 Phase II, XF-5A, and M115 production.

(b) Rialto Resorts to Fraud

Thus confronted, Rialto attempts to divert the focus of this proceeding away from the compelling, undisputed empirical and anecdotal evidence that WCLC did not release perchlorate to groundwater, by filling its Opening Brief, pages 19 through 36, with a blizzard of false and misleading statements. There, Rialto asserts that WCLC's employees regularly and repeatedly spilled potassium perchlorate and photoflash powder, which contained potassium perchlorate, in buildings; released it as fugitive dust in buildings; mopped it up with

wet mops and rags; dumped that mop water on the ground outside buildings; and dumped that mop water, spilt potassium perchlorate, and spilt photoflash powder into a six to eight foot deep disposal trench located outside the then existing northern fence line of WCLC's facility. To "support" these claims Rialto relies, almost exclusively, on the deposition testimony of Arnold Clayton (citing it 38 times) and Raymond Davis (citing it 82 times) in the 17 pages which purport to present the evidence that supports its assertions. (Rialto's Opening Br., at 19-36.)

Yet, Mr. Clayton has no personal knowledge regarding the manufacture of the M112, XF-5A, of the M115, let alone the release, disposal, or spilling of potassium perchlorate or photoflash powder, which contained potassium perchlorate. Mr. Clayton worked at WCLC for only six months, from June 11, 1953, to January 8, 1954. (RE29.) Thus, he left WCLC more than one year before WCLC commenced production of its first munition (the M112) which contained potassium perchlorate. Mr. Davis also has no personal knowledge regarding WCLC's manufacture of the XF-5A or the M115. As noted, Mr. Davis' last day of work at WCLC was September 13, 1956, before the XF-5A and M115 were manufactured.

Extraordinarily, in making these assertions, Rialto nowhere claims that these alleged spills, fugitive releases, or buckets of mop water have caused any significant amount of potassium perchlorate to be released, let alone that any has reached groundwater or threatens to adversely impact groundwater. Yet, the inescapable implication of such allegations is that such releases occurred. Thus, Rialto's allegations cannot go unexamined and unrebutted.

(i) Rialto's Fraud Regarding Mr. Clayton

As noted above, Mr. Clayton has no personal knowledge regarding the manufacture of these three products, let alone the release, disposal, or spilling of potassium perchlorate or photoflash powder, which contained potassium perchlorate, during their production. Mr. Clayton worked at WCLC for only six months, from June 11, 1953, to January 8, 1954. (RE29.) Thus, he was gone long before any munitions containing potassium perchlorate were produced by WCLC. It necessarily follows that the following Rialto statements and

representations in its Opening Brief, which cite only to Mr. Clayton's deposition testimony, are a fraud on this proceeding.

In the section of its Opening Brief entitled "WCLC's Clean-up of Perchlorate And Photoflash Powder Generated In Its Manufacturing Processes Resulted In Discharges To The Bare Ground," at page 30, Rialto makes the following assertions regarding the discharge of large amounts of potassium perchlorate to the ground, citing only Mr. Clayton's deposition:

> White powder was visible on the ground around the Batch Plant (where illuminating flares were assembled) (Ex. 49 [E-133]), and WCLC applied water to the powder and raked it into the dirt. (Clayton DT 24:9-25:14; 57:11-58:6 [E-134].) Large amounts of the white powder that came from cardboard boxes were spread around the dirt outside the Batch Plant, and powder was watered down to prevent it from blowing away. (Clayton DT 58:7-60:3, 63:8-64:25 [E-135].) Once watered down, the powder would dissolve and disperse into the ground. (Clayton DT 57:16-59:18 [E-136].) The powder covered an area about half the size of a basketball court, and was 1.5 to 2 inches deep. (Clayton DT 107:15-23, 228:20-25 [E-137].) The floors in the illuminating flare assembly area generated significant amounts of black dust that adhered to work surfaces, walls, the floor, tools; and the floors of the illuminating flare assembly area were mopped daily using a solution of water and a solvent with a very strong smell, like ammonia. (Clayton DT 26:18-27:8, 30:5-11 [E-138].)

(Rialto's Opening Br., at 32; emphasis added.) This passage is fraudulent for at least four reasons: (1) as noted, Mr. Clayton left WCLC more than a year before M112 production commenced; thus, as admitted in his deposition, he had no knowledge about perchlorate or photoflash powder, and so testified in his deposition (RE30); (2) WCLC's illuminating flares (the 60 mm flare and the 4.2" shell) did not contain any potassium perchlorate (E3, at 8; and RE4); there is no evidence that the Batch Plant was ever used for M112, XF-5A, or M115 processes; and (4) the white powder Mr. Clayton referred to from the Batch Plant building was most likely sodium nitrate, an ingredient in WCLC's illuminating flares. (RE4.)

In the section of its Opening Brief entitled "Fugitive Photoflash Powder And Dust Emissions," at page 34, Rialto makes the following statements concerning photoflash powder fugitive dust allegedly generated by WCLC, again citing only Mr. Clayton's deposition:

> Arnold Clayton testified there was white-colored powder "around every place you stepped" on the bare ground outside the buildings where photoflash powder was mixed. (Clayton DT 22:10-23:22 [E-147].) Water was applied to the ground to keep the dust from blowing around, which drained into the ground and stabilized the situation until more powder was deposited. (Clayton DT 57:16-59:18 [E-148].) The facility was generally very dirty from black and white dust being blown around everywhere and onto everything.(Clayton DT

> 68:4-15, 102:4-19 [E-149].) Assemblers were concerned that the fugitive dust could impact their ability to breathe. (Clayton DT 260:18-23 [E-150].) The wind at the Property blew strongly enough to blow doors open and powder onto everything and, at times, even strong enough to cause rock to roll. (Clayton DT 261:16-264:1, 285:8-24 [E-151].)

(Rialto Opening Br., at 34; emphasis added.) These assertions are fraudulent for at least three reasons: (1) Mr. Clayton did not testify at page 22:10-23:22 of his deposition that he saw photoflash powder on the bare ground (Rialto's E-147); Rialto cites here the same testimony it relied on in its earlier fraudulent passage regarding the Batch Plant, illuminating flares, and sodium nitrate, which had nothing to do with potassium perchlorate (Rialto's Opening Br., at 32); (2) Mr. Clayton, as noted, has no knowledge concerning perchlorate or photoflash powder (RE30); (3) Mr. Clayton did not testify about any buildings or operations where photoflash powder was used; indeed, those buildings were not erected until late 1954 (RE31.); and (4) Mr. Clayton, as noted, left WCLC more than a year before it started production of its first product which contained or used potassium perchlorate.

In the section of its Opening Brief entitled "WCLC's Perchlorate Wastewater Dumping Trench," at pages 34-35, Rialto makes the following statements concerning alleged dumping of perchlorate-containing wastewater and rags at WCLC, again citing only Mr. Clayton's deposition:

> At times, rags and gloves used to clean equipment during the production process were put into the mop buckets, the bucker water was then emptied onto the bare ground, and then the gloves and rags were taken to the trench for disposal. (Clayton DT 246:14-247:6 [E-153].)
>
> * * *
>
> While waste materials, including perchlorate contaminated mop water and rags, were deposited in the trench about every third day, the trench was burned only about every six weeks. (Clayton DT 82:14-83:13 [E-158].)

(Rialto Opening Br., at 34 and 35; emphasis added.) These assertions are fraudulent for at lest five reasons: (1) Mr. Clayton, as noted, left WCLC more than a year before WCLC started production of its first product which contained or used potassium perchlorate; thus, none of his cited testimony is about potassium perchlorate or photoflash powder; (2) Mr. Clayton never personally observed what was burned in the trench he described

(RE32); (3) he gave inconsistent testimony as to the location of the alleged trench; he could not verify its location in a 1953 photograph of the WCLC facility taken while he was working there; (4) despite ENVIRON's comprehensive site investigation, no such trench, gloves, rags, or ash has ever been found (E1; E8); and (5) the historical aerial photographs contain no evidence of any such trench or pit. (E6.)

In short, Rialto's repeated representation in its Opening Brief that Mr. Clayton's testimony supports its allegations against WCLC is a fraud on this proceeding.

(ii) Rialto's Fraud Regarding Mr. Davis

As a threshold matter, on June 6, 2007, Raymond Davis, who is now 93, executed under oath, at the request of the Emhart Parties, a short rebuttal declaration (RE3.) Thus, Mr. Davis will be available at the hearing for cross-examination. The Emhart Parties have been compelled to call Mr. Davis as a witness because of the numerous misrepresentations by Rialto of his deposition testimony, which are almost impossible to sort through because both Rialto's characterizations of his testimony and the deposition testimony itself are not specific as to time, product, chemical, and whether Mr. Davis in fact was testifying as to his own personal knowledge; indeed, many of the questions posed to Mr. Davis were objected to as to form, because they assumed facts that had not been and are not established, were compound, overbroad, and/or ambiguous.

Thus, in the judgment of the Emhart Parties, the only effective way to bring coherence and discipline to the characterization, presentation, and evaluation of Mr. Davis' testimony is to have him testify in person in response to specific questions, proper as to form, asked by the Advocacy Team and Rialto. Under such circumstances, all present will be able to hear him first hand and his deposition testimony will not be admissible, except in connection with possible impeachment.[15]

We turn, nevertheless, to a brief examination of some of Rialto's most blatant misuse and misstatement of Mr. Davis' deposition testimony.

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[15] (See Third Revised Notice of Public Hearing, at 5; Evid. Code §§ 1191 and 1192.)

(A) XF-5A and M115 Production

Mr. Davis confirms that which is not in dispute, namely, that he has no personal knowledge regarding WCLC's manufacture of the XF-5A or the M115 because he did not work there at the time. (RE, at ¶¶ 1-4.) Thus, insofar as Rialto has cited Mr. Davis as an eye-witness in support of its contentions regarding alleged spills or releases of potassium perchlorate or photoflash mix during the production of the XF-5A and M115, such claims are a fraud on this proceeding.

(B) The Six to Eight Foot Deep North Disposal Trench

In its Opening Brief, Rialto makes the following statements regarding a purported six to eight foot deep disposal trench, citing Mr. Davis and Mr. Clayton as eye-witnesses to the dumping and burning potassium perchlorate and all sorts of things containing potassium perchlorate:

> **The trench has an earthen bottom and, after the photoflash powder-containing liquid was dumped into the trench, it would sink into the ground**. Davis DT [E-48]).
>
> The storage building where potassium perchlorate was kept was swept out from time-to-time; and the sweepings were denatured in water. (David DT 369 [E-52].) **The contaminated water was then taken out to and disposed of in the trench or on the bare ground**. (Davis DT 373 [E-53].)

(Rialto Opening Br., at 20-21; bold original.)

> WCLC stored waste mop water from clean the production buildings (i.e. screening, weighing and mixing rooms) in 15 and 55 gallon drums, then transported them to and dumped then into a trench. (Exs. 71A, 80 (KWK 43836); Davis DT 1263:1-1265:9, 184:7185:2; Skovgard DT 347:3-350:11 [E-152]') At times, rags and gloves and rags used to clean equipment during the production process were put into the mop buckets, the bucket water was then emptied onto the bare ground, and then the gloves and rags were taken to the trench for disposal. (Clayton DT 246:14-247:6[E-153].)
>
> The trench was bare earth, and approximately six-to-eight feet deep and 10 feet long. (Davis DT 184:7-185:2 [E-154]). The trench is identified on Exhibit 84 as "Trench." (Ex. 84 [E-155].) Various WCLC employees personally witnessed liquid, perchlorate-contaminated waste materials being poured into the trench. (Ex. 244; Davis DT 262:9-265:11, 793:21-794:21, 799:8-15; Pfarr DT 53:15-54:19; Clayton DT 30:25-31:8 [E-156].) Residual powders and leftover materials in the trench were occasionally burned. (Davis DT 163:1-165:9, 803:6-804:2, 806:25-807:11 [E-157].) While waste materials including perchlorate contaminated mop water and rags, were deposited in the trench

> about every third day, the trench was burned only about every six weeks. (Clayton DT 82:14-83:13[E-158].)
>
> * * *
>
> The water poured into the trench accumulated and seeped into the bare ground, and on occasion leftover dry residue would be burned. Scrap material was stored in water until it was time for "safe" disposal, at which time it would be poured into the trench. (Ex. 80, ¶ 33; Davis DT 184:7-185:2 [E-163].) Excess waste powder from the assembly process was also taken to WCLC's trench for disposal. (Davis DT 265:15-267; Clayton DT 32:3-33:8 [E-164].) Solvents were also disposed of in the WCLC trench. (Davis Ex. 71A, ¶ 10; [E-165].)

(Rialto's Opening Br., at 34:17-35:25; emphasis added.) All these Rialto statements are a fraud on this proceeding. As noted above, Mr. Clayton certainly has no such personal knowledge, and Rialto knew it when it submitted its Opening Brief.

Moreover, as set forth in the Emhart Parties' Opening Brief, at pages 34-37, Mr. Davis did not testify in his deposition that the trench he recalled was six to eight feet deep; rather he testified: "Oh, I would say that it was a shallow trench, maybe 6 to 8 inch deep and maybe 18 to 24 inches wide, and I would say that probably it was 10 feet long." (E21, Davis, at 164; emphasis added.) Mr. Davis also testified in detail in his deposition that he observed the trench only once when saw Mr. Rupert pour a wastebasket-full of unknown white powder in it. (E22, Davis, at 798-800.) This testimony of Mr. Davis was never shaken by further cross-examination during his deposition. Mr. Davis now reaffirms that deposition testimony in his Rebuttal Declaration:

> As I testified during my deposition (November 29, 2004, at page 164, lines 22-24; Attachment G) the dimensions of the disposal trench I recall seeing Mr. Rupert prepare was approximately 6 to 8 inches deep, and maybe 18 to 24 inches wide, and I would say that it was probably 10 feet long. The City of Rialto's brief is inaccurate where it states that I testified that the trench was 8 feet deep. As I also testified (March 24, 2005 at page 799, lines 14-15; Attachment H), my best present recollection is that I saw Mr. Ruppert dispose of approximately a wastebasket-full of unknown material into that trench. I have no personal knowledge of seeing waste disposed of in the trench on any other occasion.

(RE3, at ¶ 7(d).) Mr. Davis also testified in his deposition that he never saw any burning in the trench. (E22, Davis, at 799.) Finally, as noted in the Emhart Parties' Opening Brief, at 36-37, on March 25, 2006, ENVIRON dug four separate trenches in Study Area 9 (the "north

trench" identified by Mr. Davis) in an effort to locate remnants of rags, gloves, waste powder, ash from a fire, or any other indication of buried or dumped waste. (E8, at ¶ 2.) ENVIRON collected and analyzed nine soil samples to analyze for perchlorate and six separate soil gas samples to analyze for VOCs. (E1, at Table 2, at 11; and Table 9, at 16.) Nothing was found in Study Area 9; no perchlorate, no TCE, no gloves, no rags, no cans, not any other kind of waste materials. (E8, ¶ 2.)

Rialto's decision to ignore the uncontroverted investigation results and then deliberately misstate Mr. Claytons' and Mr. Davis' deposition testimony is fraud.

(C) Fugitive Dust and Hosing Drying Trays

In its Opening Brief, at pages 19-36, Rialto asserts, without ever quantifying it, that fugitive dust, containing potassium perchlorate, was routinely generated during WCLC screening, drying, and blending operations, which was either discharged directly to the environment, through the dumping of mop water, and/or the hosing off of the drying trays. Again, Mr. Davis is cited almost exclusively. Notably absent from Rialto's supporting citations is the testimony of Gerry Bland, the former WCLC employee, who actually screened and dried potassium perchlorate, and Frank Gardner, who, among other jobs, blended the photoflash mix.

Here is what Mr. Bland had to say about what he personally did and observed with regard to the screening of potassium perchlorate, all of which was ignored by Rialto. What he recalls is that very little, if any, screening was necessary for potassium perchlorate:

> Q. Do the procedures that are outlined here on drying potassium generally comport with what you recall you did?
>
> A. Yeah, but I don't remember the screening. I—As I recall, if there was any lumps in there, it was miniscule, and you'd just take the scoop and break them up. I don't remember screening that.

(RE34.) In connection with drying potassium perchlorate, Mr. Bland expressly denied ever washing out the trays used for drying potassium perchlorate:

> Q. Whether at West Coast Loading or at the Goodrich facility, do you have any recollection of ever having washed out the trays into which you placed perchlorate?
>
> [Objection.]

A. I do not recall washing out the trays.

Q. . . . Based upon your recollection, as you sit here today, of having loaded the trays depicted in Exhibit 562 with perchlorate, would there have been any reason for you to have washed out those trays after having loaded them with perchlorate?

[Objection omitted]

A. I can't imagine why they would want to wash out the trays.

Q. And you have no recollection of ever having done so; is that correct?

A. That is correct.

(RE35.) June 13, 2005. Mr. Davis confirms in his Rebuttal Declaration that he is not aware of any facts that contradict Mr. Bland's testimony "about the minimal need to perform the screening for potassium perchlorate" or the fact that there was no need to wash the drying trays. (RE3 (1-5) at ¶ 5.) Obviously, the absence of any such screening, minimizes the potential for dust generation, and the absence of any hosing of the drying trays minimizes any potential release to the ground.

Here is what Mr. Gardner had to say about what he personally did and observed in connection with drying and blending potassium perchlorate, all of which was ignored by Rialto. Mr. Gardner, who blended the photoflash mixture at WCLC, testified that no spills and minimal dust was generated during that process, and water was not used at all during the blending process because the photoflash mix was very hydroscopic:

A. The blender was known as a Patterson Kelley Blender, and it had two containers that fit into a V-section. In one of the containers magnesium and aluminum was placed, in the other container was the oxidizer. That's the magnesium/aluminum fuel. And after placing this—these containers on the blender, you left the room, went be behind the retaining wall and turned it on. And blended it for a period of time, then the blender was turned off. You went in and—and placed the blender in a position where at the bottom of the V the explosives could be taken out. And it was taken out and sent to the loading rooms.

* * *

Q. Now when the machine was emptied do you have—do—do you recall that any of the blended photoflash powder was ever spilled?

A. No.

Q. Do you recall that any dust escaped at the time that the machine was being unloaded?

A. No.

Q. Did you ever observe any mopping or any other cleaning of the room where the photoflash blender operated?

A. Yes. After—when the unit was shut down and on weekends. It was mopped.

Q. Okay. So when you say when the machine was shut down, what do you—what do you mean?

A. The end of the contract.

(RE36, Gardner, at 66:1-15.)

Q. . . . When you would—when you would load the oxidizers into the second barrel, was dust created?

A. Not that I remember.

Q. So you would then transfer the barium nitrate and potassium perchlorate into the drum, but you can't recall any dust? Is that it?

[Objections]

Q. Is that your testimony, sir?

A. Yes.

* * *

Q. Okay. And did you have occasion to use any rags for cleanup during the photoflash blending operation at any time while you were at West Coast Loading?

A. Not that I recall.

Q. Do you recall whether any, whether there was a bucket of water that was maintained at—or a bucket of water that was maintained at the blending building for mopping purposes?

A. Definitely not. Some of the materials were hydroscopic, and if it picked up moisture and humidity, it wouldn't function properly.

Q. Okay. So what do you mean hydroscopic?

A. Picked up water.

Q. So—so the materials could absorb water?

A. Yes.

Q. Or vapor?

A. Some of the materials could, yes.

Q. Was that the case with photoflash powder?

A. Yes.

Q. So there was—so one would not—so because the materials were hydroscopic, one would not want to have water come into contact with them during this blending operation?

[Objection]

A. That's right.

(RE37.) Mr. Davis also confirmed that he is not aware of any facts that contradict Mr. Gardner's testimony that "minimal dust was generated by the photoflash powder blending process because he was the person who performed the blending." (RE3, at ¶ 6.)

Despite the testimony of the very person who dried potassium perchlorate that the trays were not hosed down, Rialto asserts, citing Mr. Davis, that: "**The perchlorate drying trays were "hosed off" after each use with water just outside the drying buildings over bare ground.**" (Rialto's Opening Br., at 22; bold original.) This statement is simply not true, and to ignore the testimony of the very person who did the drying is a fraud on this proceeding.

Despite the testimony of the very person who mixed potassium perchlorate to the contrary, Rialto, citing Mr. Davis who never did it, again claims that:

> The missing/blending rooms were mopped at least four times during each shift to clean up any dust that go onto the floor. (Davis DT 122:8-124:16 [E-99].) Traces of photoflash powder were left on the mixer/blender after each batch. (Gardner DT 495:3-17; Ransom DT:145:18-146:15 [E-101].) . . . **The perchlorate dust generated in the blending and mixing process was discharged to the bare ground at WCLC.**

(Rialto's Opening Br., at 27.) These Rialto assertions, like so many others noted above, are likewise a fraud on this proceeding. They must not for a moment divert attention from the undisputed empirical and anecdotal evidence which compels the conclusion that only trace amounts of potassium perchlorate were released during M112 Phase I at and near Building 42, which are still there in the shallow soil. All undisputed empirical evidence as well as a fair reading of the anecdotal evidence presented and ignored by Rialto, compels such a conclusion. As noted above, nowhere in its Opening Brief does Rialto claim that its asserted

spills, fugitive releases, or buckets of mop water have caused any significant amount of potassium perchlorate to be released, let alone that any has reached groundwater or threatens to adversely impact groundwater.

(D) Rialto's Fraud Re: WCLC Fire and Explosions

Rialto's Opening Brief, at page 36, contains a section entitled "Incidents (Fires and Explosions) That Resulted In A Discharge of Perchlorate." This entire section is a fraud on this proceeding. Rialto begins with this statement, which might lead the reader to believe that potassium perchlorate was involved given the declared subject of the section:

> WCLC records indicate there were at least four explosions and/or fires resulting on losses from which WCLC made insurance claims in 1955 alone. (KWK3149-3152 [E-168.) The losses resulted from "incendiary and/or explosive action." (KWK3149 [E-169].) There were fires in Buildings 7, 47 and 34, resulting in claimed damages to buildings and equipment totaling approximately $22,000. (*Id.*)

(Rialto's Opening Br., at 36; emphasis added.) None of the fires in these three buildings involved potassium perchlorate. Rialto's E-168 and 169, the same document, is a written report which describes these three fires and the chemicals involved in detail.

- The chemicals involved in the Building 7 fire were "Barium Nitrate, Silicon, Zirconium Hydride, Tetranitracarbazole, and Laminac B." (Rialto E-168, at 3149.)
- The chemicals involved in the Building 47 fire were "stored red phosphorous pallets consisting of red Phosphorous, Linseed Oil, Zinc Oxide, Magnesium Powder, Manganese Dioxide, and Aerosol." (*Id.*, at 3151.)
- The Building 34 fire "occurred on the Dennison Press while illuminating composition was being consolidated into the 4.2 steel canisters. The composition consists of Sodium Nitrate, Magnesium, Laminac A, Polyvinyl Chloride." (*Id.*, at 3152.)

It is a fraud on this proceeding to represent or imply that any of these building fires involved a discharge of perchlorate. Perchlorate was not present at all.

With regard to the April 12, 1955 explosion of Building 42, which involved photoflash powder, which contained potassium perchlorate, Rialto asserts only, without any supporting

citation, that "[needless to say, all of the chemicals in the building were lost too." Any implication that "lost" potassium perchlorate was "discharged to the environment" as a result of this explosion is not supported by any evidence in the record. As set forth in detail in the Emhart Parties' Opening Brief, at 31-34, Mr. Davis, who was there on the day the building was destroyed, testified that all potassium perchlorate and photoflash powder was consumed in the explosion. Dr. Dillehay, the Emhart Parties' explosives expert, confirms that all potassium perchlorate was destroyed. (E3., at 25-31.)

C. Dr. Stephens, Rialto's Expert, Has No Valid Or Credible Testimony

One of the issues, if not the central issue, framed by the 2007 CAO is whether WCLC caused or permitted perchlorate or TCE to be discharged to groundwater or a place where it adversely threatens groundwater. Rialto, however, has not identified any witness, expert or otherwise, to so testify, including Daniel B. Stephens, PhD., its only designated expert hydrogeologist. (RE8, Stephens, at 534:24-540:9.) As noted above, such a failure should be fatal to the Advocacy Team's and Rialto's case against the Emhart Parties. Undaunted, Dr. Stephens, as directed by Rialto, prepared two limited expert opinions which focus, not on liability, but rather on the need for more investigation.

1. Dr. Stephens' First Limited Opinion That The Transport Rate Through The Vadose Zone Is 1.25 Ft/Yr Lacks Integrity And Is Not Scientifically Valid

(a) It Has No Integrity

On February 7, 2007, two days after this proceeding commenced, Rialto's lawyers directed Dr. Stephens, who had been working on this matter for more than three years, to prepare a vadose zone calculation to show that Emhart's proof that perchlorate and TCE from WCLC were <u>not</u> there in fact proves instead that more investigation in necessary.

Specifically, Mr. Elliott, one of Rialto's lawyers, directed Dr. Stephens in an e-mail to: "tie existing studies to perchlorate fate/transport to rebut shallow soil investigation results." (RE 40.) Notes of a February 8, 2007, telephone conversation between Mr. Elliott and Jenny Sterling, Stephens & Associates' Project Manager for its Rialto work, confirm that Dr. Stephens was instructed by Mr. Elliott to prepare the following opinion: "Need to test

vadose zone & show that shallow NDs don't mean much." (RE 41.) In plain English, Dr. Stephens was told the answer before he was given the question.

Dr. Stephens so admits in his deposition. On May 15, 2007, he testified that the assigned objective of his opinion that the transport downward through the vadose zone is 1.25 ft/yr, or 15 inches, is a contrivance to justify more investigation:

> A. Well, one of the points about coming up with this net infiltration was primarily to establish the likelihood that some of the soils at shallow depth may not have much perchlorate left in it because the recharge rates could have been maybe 5 percent.
>
> . . . The objective here was mostly—with this calculation for the declaration purpose was mostly to establish the likelihood that perchlorate may be found at depths greater than the samples that were collected at the site.

(RE 38, Stephens, at 636:16-20; emphasis added.)

Dr. Stephens also admitted that, in "preparing" this opinion, he did not rely on any data, relevant scientific study, or modeling exercise. (RE38.) Rather, based solely on his "professional judgment," he simply assumed: (i) a net recharge rate in the vadose zone at the Rialto Site of 5%; (ii) 15 inches of rainfall per year; and (iii) a 5% soil moisture content. Given these assumptions, Dr. Stephens calculated a net recharge rate of 0.75 inches per year and a transport rate of rain water downward through the vadose zone of 1.25 ft/yr., or 15 inches per year. (Rialto, Stephens' Declaration, at 14.)

Conveniently, Dr. Stephens' "back of the envelope" opinion should put perchlorate, released 50 years ago to the surficial soil at the 160-Acre Site at a depth of 75 feet (1.25 inches per year times 50 years); thus, slightly below Environ's shallow soil boring depth but still far above the groundwater. As Dr. Stephens explained:

> [O]ver the years since perchlorate was released to the shallow soils, I expect that infiltration of rain and runoff has flushed some of the perchlorate downward at a rate of approximately 1.25 ft/yr or more, especially during the rainy season, abnormally wet years, and areas of focused recharge. Thus, over a period of a few decades, rainfall on bare ground may displace contaminated pore water in the upper few tens of feet of shallow soils. These data also make it clear that shallow soil samples near sources of contamination may not detect perchlorate soil contamination.

(Rialto, Stephens Declaration, at 16; emphasis added.) In other words, as Rialto directed, Dr. Stephens had provided the "proof" that nothing found proves only that you need to look

more and deeper. Such convenient and baseless expert opinions lack any integrity and credibility.

(b) It Has No Scientific Validity

Dr. Chu and Dr. Powell will testify that Dr. Stephens's First Opinion that the perchlorate transport rate down through the soil is 1.25 ft/yr. is not scientifically valid because it is inconsistent with (i) the relevant scientific literature and known scientific facts; (ii) site specific geotechnical conditions; and (iii) site specific soil chemistry data. (RE 2.)

First, as noted above, Dr. Stephens' assumption that the net recharge rate is 0.75 inches per year is not supported by the relevant scientific literature. The most recent, relevant scientific study (published in 2006), which addresses the net recharge rates from precipitation in the San Bernardino area, is the U. S. Geological Survey's Open-File Report 2005-1278, entitled "Hydrology, Description of Computer Models, and Evaluation of Selected Water-Management Alternatives in the San Bernardino Area, California," prepared in cooperation with the San Bernardino Valley Municipal Water District ("USGS 2005-1278"). (E5, at 2, 4, 8, 11, and 12 (Danskin); Goodrich Kresic Declaration, Ex. 8.) In pertinent part, USGS reports:

> As part of the process of determining local runoff for the San Bernardino area (refer to this report, pages 26-28), direct recharge from precipitation was estimated as a separate component of precipitation (table 4). During 1945-98, direct recharge is assumed to occur in only 6 years (1969, 1978, 1980, 1983, 1993, 1998). For 1945-98, this infrequent recharge equates to an average rate of about 1,000 acre ft/yr.

(Goodrich Kresic Declaration, Ex 8, at 40; emphasis added.) The data supporting USGS's assumption is set forth in Table 4 of USGS 2005-1278, which shows that during the 53 years between 1945 and 1998, less than 1% of the 15.91 inches of annual average precipitation in the San Bernardino area, or 0.15 inches per year, is retained in the soil in the San Bernardino area as direct recharge from precipitation. (E5, at 3-4.) Dr. Stephens' estimate, based solely on his "professional judgment," of 0.75 inches per year, is five times the USGS's estimate of 0.15 inches per year. Moreover, 5% is considered in the scientific literature as the upper bound net recharge rate in semiarid and arid regions globally. (E5, at 5.)

Second, Dr. Stephens' net recharge rate assumption is not supported by Budyko's Hydrological Model which, based on site specific water balance data, also conservatively predicts an upper bound net recharge rate of 5%. (E5, at 4-5; RE 2.)

Third, Dr. Stephens' assumption that the average volumetric water content for soils on the 160-Acre Site is 5% is not supported by the geotechnical data. Based on site specific data, Dr. Chu determined that 8% is a conservative estimate of the average volumetric water content for the native soil in the vadose zone at the 160-Acre Site. (E5; RE2.)

Finally, Dr. Stephens' estimate of 1.25 ft/yr. is not consistent with the distribution of the perchlorate found in the shallow soil in the WCLC Study Areas at the 160-Acre Site. Specifically, if Dr. Stephens' estimate were correct, perchlorate should be found more or less uniformly throughout the first 50 feet of the vadose zone, which is not what was found. Perchlorate found in Study Area 18 was mostly located in very shallow soil (10 feet bgs) with ever decreasing concentrations and frequency as depth increased. (E1, at 7 and 8; E5; RE2.)

In short, Dr. Stephens' 5% estimated net recharge rate lacks integrity and is not scientifically valid.

2. Dr. Stephens' Second Limited Opinion That More Investigation Is Needed In Areas Where WCLC Operated Is Baseless And Has Been Withdrawn

Dr. Stephens identified at page 17 of his "Declaration" a number of specific areas where, in his opinion, without having conducted any investigation, it is "likely" perchlorate has migrated through the vadose zone to the water table because it is possible that additional free water may have been applied to the surface. Importantly, Dr. Stephens did not identify any WCLC area of operation:

> There are likely multiple areas within the Goodrich/Black & Decker site where perchlorate migrated through the vadose zone to the water table. Two such areas, as discussed above, include the Goodrich Burn Pit (an unlined earthen pit) and the McLaughlin Pit (a concrete pond). . . . Deep vadose zone transport is also possible at other burn pits and waste disposal areas within the Black & Decker Site, including the Southwest Pit, the Apollo Burn Pit, Pyro Spectaculars' waste burning pit, and others (Exhibit 3) . . . .

(Rialto, Stephens Declaration, at 17; emphasis added.)[16] The "other" potential likely areas identified on Exhibit 3 (five purported disposal areas) to the Stephens' Declaration were investigated by Environ and, unlike the specific areas named in his "Declaration," no perchlorate or TCE was found. (Id., Ex. 3.) Further, Exhibit 11 to Dr. Stephens' Declaration purports to identify several additional areas he believes warrant further investigation.

(a) It Has No Integrity

On May 15, 2007, Dr. Stephen's refused to verify his Declaration under oath because, among numerous other errors, the exhibits attached to it, including Exhibits 3 and 11, contained errors:

> Q. You signed it [your declaration] in the beginning [on the first page]. But there's nothing in here that indicates that you're swearing that this is truthful; is that correct? There's no sworn statement here?
>
> A. There's no sworn statement, that's true.
>
> * * *
>
> Q. The document that's been marked as 4901 that you signed on April 12, 2007, knowing what you know today, you could not sign under penalty, could you, sir?
>
> [Objections]
>
> A. Based on what I know today, I would say I would have to update the report to make it true and correct.
>
> * * *
>
> Q. Focus on my question, please. Knowing what you know today, May 15, 2007, you could not sign the April 12, 2007 document without any changes to it under penalty of perjury, could you, sir?
>
> A. Without any changes, I wouldn't sign it.

---

[16] The reference to the 160-Acre Site as the "Goodrich/Black & Decker Site" is but another example of Dr. Stephens' willingness to do exactly as instructed by Rialto's attorneys, even when the instruction is to present false information. For more than three years the 160-Acre Site was known to Dr. Stephens and his staff as the 160-Acre Site, as it has been known to all those engaged in this and related proceedings. In connection with the preparation of his declaration, Dr. Stephens was instructed by Rialto's attorneys to state in his declaration that the 160-Acre Site is "known as the Goodrich/Black & Decker Site", even though it has never been so known. (E38, at 489:7-492:11.)

(RE38, Stephens, at 280-282; emphasis added.) Dr. Stephens further admitted that, at the time he submitted his "Declaration" to Rialto's attorneys for filing in this proceeding, he knew it was inaccurate:

> Q. Would you tell us which of the exhibits to your declaration . . . have you revised. . .?
>
> A. We've revised exhibits I believe 1 through 4, Exhibits 5, 6, 8, 9, and 11. Probably all of them to some extent.
>
> * * *
>
> Q. Now Dr. Stephens, as a professional are you comfortable with the report that you submitted, Exhibit 4901, being in the public record, being before the hearing officer, with all the errors in it that we've talked about these last couple of days?
>
> A. I think the report is clear on why the so-called errors appear. But I would change the report to reflect accurate information whenever I had the opportunity.
>
> * * *
>
> Q. Is it your practice as a professional to submit a report with uncertain data in a proceeding like the one that we're engaged in here; is that something you commonly do?
>
> A. We did the best we could with the available information. We made it clear what the available information was. We pointed out that some inaccuracies in locations likely exist and, therefore, confound interpretations. That's clearly stated in the report. And it also says that I reserve the right to revise Exhibits 4 and 5 and my opinions if more complete field investigation reporting is made available for review.
>
> * * *
>
> Q. So you disclosed to the reader at the time you submitted the declaration that Exhibits 4 and 5 have inaccuracies in them?
>
> A. Yes we did.
>
> Q. And you knew what they were?
>
> A. We couldn't tell what the inaccuracies were because we didn't have the—all the necessary information. We couldn't tell what was accurate or what was not accurate. We had some suspicions, but we couldn't tell.

(RE38, Stephens, at 476:4--484:4.) In other words, Dr. Stephens has no Exhibit 3 or 11 which purports to identify areas of additional necessary investigation.

(b) It Has No Scientific Validity

With regard to the WCLC Study Areas, given that Dr. Stephens' limited opinion regarding the transport rate through the vadose zone is not scientifically valid, Dr. Stephens' opinion that additional investigation in needed in particular areas of shallow soil that have already been examined to 25 and 50 feet bgs utterly falls apart.

James Bunker, one of the most experienced field investigators of sites with perchlorate in the soil, and Drs. Chu and Powell all have provided opinions that the trace amounts of perchlorate found in three WCLC Study Areas have been bounded laterally and vertically and thus no further investigation is either warranted or necessary. (RE1; E4; E5.)

Finally, all the relevant scientific literature and site specific chemistry data, the geotechnical data, and the opinions of the experts who properly examined the issue, compel the conclusion that the transport rate downward through the vadose zone is very slow, an order of magnitude of six to eight feet every 50 years. Such a rate conclusively establishes that, absent very large volumes of free water, and there is no evidence of any such water application in the WCLC Study Areas, any perchlorate released 50 years ago will still be present in the shallow soil and certainly any significant release would have been detected.

3. Dr. Stephens' Recent Change Of Heart Increasing His Transport Rate Ten Fold Lacks Any Integrity And Is Not Supported By The Scientific Literature, Site Specific Geotechnical Data, Or The Profile Of Perchlorate Found In The Soil

(a) It Has No Integrity

Apparently, unbeknownst to Rialto at the time, Dr. Stephens' transport rate downward through the vadose zone of 1.25 feet per year contained a fatal admission to Rialto's case against WCLC and the Emhart Parties: If the rate of transport though the vadose zone is 1.25 ft/yr., as Dr. Stephens asserts, it would take 320 years (400 ft divided by 1.25 ft/yr) for perchlorate released on the surface of the soil at the 160-Acre Site to reach groundwater through precipitation.

> Q. Okay. Let's be clear. The 1.25 feet per year is how fast it would get from the top of the soil column down to groundwater; that's the estimate?
>
> A. That's correct.

Q. Okay. And we talked earlier about it being hundreds of years, right?

A. It could be depending on the rate.

Q. And, if it's 400 feet and you use this estimate, you're talking about 320 years, right?

A. Approximately, yes.

(E38, at 766:20-767:4.)

Given this opinion, the Advocacy Team and Rialto should have advised the State Water Board that their allegations against WCLC and the Emhart Parties cannot be proven because, based upon Dr. Stephens' professional judgment, it will take at least 320 years for any perchlorate to reach the groundwater unless significant additional free water had been applied to a particular release area, like the 13 million gallons used by Robertson's Ready Mix released at the gravel washing ponds at the County's landfill.

But Rialto and Dr. Stephens chose a different course of action.

On May 15, 2007, during the second day of his deposition, Dr. Stephens announced that he had changed his "professional judgment" on the rate of transport downward through the vadose zone. He claimed that he, and necessarily the two other professionals on his staff, who had formally peer reviewed and signed off on his 1.25 ft/yr. opinion, failed to consider the amount of vegetation in areas of perchlorate release. Thus, on that day, he changed his earlier "professional judgment" to adjust his downward transport velocity 10 fold because, he said, in the absence of vegetation, the net recharge rate should be between 50% and 70% of mean annual precipitation, or 7.5 to 10 inches per year of the 15 inches of annual rainfall on the 160-Acre Site:

Q. Okay. So now that was your opinion in your declaration. Now, you've come to the deposition and you're telling me you've changed your opinion. Can you please tell me what your opinion is now concerning net infiltration as a result of rainfall?

A. In areas that are unvegetated and underlain by very coarse soils, the net infiltration in those areas could be as much as 50 percent, maybe more, of precipitation.

Q. How many feet per year, what's your number now, sir, what's the new number?

A. It could be on the order of ten times more.

(RE38, Stephens, at 394:17-395:11; emphasis added.)

Q. What, sir, was new information that you didn't have before April 12, 2007, that has formed the basis for changing your opinion? I mean it's not the vegetation, right? You've been looking at the vegetation in photographs for sometime now, right?

A. I have looked at the photographs on more than one occasion.

Q. It's not the principles of hydrogeology, correct? Those were in place that you were relying upon for purposes of giving your opinion on April 12, 2007, correct?

MR. SOMMER: Are you including the pleadings in the case in this?

BY MR. DINTZER: Q. I'm saying that the principles of hydrogeology that you are relying upon to give your expert opinion, they were around on April 12, 2007; is that correct?

A. They were around, yes.

Q. Field data with respect to the soils and what kinds of soils were out there, that was available to you on April 12, 2007, wasn't it?

A. No.

Q. Boring logs from all of the—

A. Oh, the boring logs were, yes, the boring logs were.

Q. Yeah. You know what the lithology looks like in the North Rialto area at the 160-acre parcel, right?

A. Just generally from the boring logs.

Q. And you say in your report it's very heterogeneous, don't you?

A. We do say that.

Q. And you describe in detail the types of soils that are found to depth, don't you?

(Objection omitted.)

A. Well, we do describe the soils generally, yes.

Q. And so that was all available to you. What about rainfall, I mean did some new information come about with respect to historical rainfall data?

A. We may have been—we may have updated our rainfall data, I'm not certain.

Q. Well, since April 12 has historical rainfall data changed such that it's changing your opinion here?

A. No.

(RE38, Stephens at 396:4- 400:7; emphasis added.) Later Dr. Stephens must have decided that his chances of getting to present his change of mind might be enhanced if he characterized his new opinion as a "supplement" to his first:

> Q. . . . Between sometime on April 12, when you submitted your declaration, and today, you changed your mind about your opinion, correct?
>
> A. I've indicated that the recharge rate could be much higher in the absence of vegetation.
>
> Q. I understand that. So you've changed your mind or you changed your opinion or you haven't?
>
> A. I would say it's a supplement to this opinion. There's nothing wrong with 5 percent . . . as comprising net infiltration where vegetation is sparse. Where vegetation is absent, it could be, for these types of soils, as much as 50 to 70 percent of precipitation.
>
> * * *
>
> Q. . . . You said a moment ago that your opinion about how much recharge could occur as a result of rainfall was a supplement to the opinion you've given here in your declaration; is that correct?
>
> A. Yes, that's what I said.

(RE38, Stephens, at 629:6-21; 634:13-17.) Dr. Stephens then admitted that on April 12, 2007, the date his declaration was submitted, he was fully aware of the impact vegetation could have on the recharge rate but did not put it in his opinion because the object of his April 12 opinion, as instructed by Rialto's attorneys, was simply to cast doubt on the numerous NDs (no detections) for perchlorate in the shallow soil:

> Q. And the 50 to 70 percent estimation [of annual precipitation retained in the soil] that you have come up with today, a recent epiphany I gather; is that correct?
>
> [Objection]
>
> A. I believe it was in the last few weeks.
>
> Q. All right. And how long have you been working on vadose zone hydrogeology?
>
> A. Oh, probably since the mid seventies.
>
> Q. All right. And you've never had that thought before; is that correct?
>
> A. Which thought?

> Q. The thought that the lack of vegetation could have a significant impact on the amount of net recharge to a factor of tenfold or more.
>
> [Objection]
>
> A. I've had that thought before.
>
> Q. You've had that thought before?
>
> A. Yes.
>
> Q. If you've had that thought before, why didn't you consider it and put it down in the opinion you made on April 12 that was submitted to the hearing officer?
>
> A. Well, one of the points about coming up with this net infiltration was primarily to establish the likelihood that some of the soils at shallow depth may not have much perchlorate left in it because the recharge rates could have been maybe 5 percent. . . . If the recharge rate were more than 5 percent, then it's even more likely that some of the surface soils were flushed. The objective here was mostly—with this calculation for the declaration purpose was mostly to establish the likelihood that perchlorate may be found at depths greater than samples than were collected at the site.

(RE38, Stephens, at 635:7-636:20.)

It, therefore, appears that Dr. Stephens' changed opinion has no integrity whatsoever.

(b) It Has No Scientific Validity

It is important to understand the context in which Dr. Stephens announced his changed opinion. It was not written out. It was not set forth in Rialto's Witness Statement. It was not researched, thought through, studied, or peer reviewed. It was not based on a site visit or study of vegetation on the 160-Acre Site, though there had certainly been plenty of time for that. And no location where this supposed north Rialto swampland is located has been identified. Dr. Stephens just announced his new opinion in response to the question asked whether he stood by his original opinion of 1.25 ft/yr: "It could be on the order of ten times more."

Dr. Stephens then explained, when pressed, that, as noted above, his change of opinion was driven by a new assumption, namely, that, absent vegetation, the net recharge rate could be 50% to 70% of all mean precipitation on the 160-Acre Site. (RE38, Stephens, at 395:3.) When asked if he was aware of any scientific studies that support his new opinion, Dr. Stephens said that there was a study which had been conducted at a site in Hanford,

Washington, by Glendon Gee at the Pacific Northwest Laboratories, which he had failed to bring to his deposition, even though he testified earlier that he had brought everything he had studied and relied on. (RE38, at 13:3-5.)

Subsequently, on May 24, 2007, Dr. Stephens' office sent counsel for Goodrich copies of two studies involving Hanford, Washington sites: (1) Fayer, M.J. and G.W. Gee. 2006. *Multiple-Year Water Balance of Soil Covers in a Semiarid Setting.* J. Environ. Qual. 35:366-377; and (2) Gee, G.W., M.J. Fayer, M.L. Rockhold, and M.D. Campbell. 1992. *Variations in Recharge at the Hanford Site.* Northwest Science. 66:237-250.

Dr. Chu and Dr. Powell have reviewed these two studies and have undertaken limited research of this issue in the available time since Dr. Stephens announced his changed opinion. Both have concluded that with regard to the 160-Acre Site it has no scientific validity. Indeed, examination of the two studies cited by Dr. Stephens establishes that neither supports his opinion. The details of Dr. Chu's and Dr. Powell's views are set forth in Dr. Chu's rebuttal declaration and Dr. Powell's Witness Statement. (RE 2.)

We close this issue with one final observation. During his deposition, Dr. Stephens admitted that he had never visited the site, never taken any samples, never been authorized to develop a vadose zone model or undertake any vadose zone calculations, other than Mr. Elliott's limited assignment in early February 2007. (Rialto, Stephens, at 532:20-534:2; 669:1- 671:6.) Such a cavalier approach to the science of an important issue in this proceeding speaks volumes. All those who have applied sound science and careful consideration of the issue have concluded that Dr. Stephens' opinions lack merit.

Even though Rialto has failed to prove any contamination of the groundwater by WCLC, or any threat to the groundwater, we are compelled to now rebut Rialto's theories of successor liability.

II. Emhart Is Not Liable As A Successor For The Alleged Discharges By WCLC

The controlling facts material to successor liability and the controlling law of successor liability, neither of which is in dispute, have been ignored by Rialto because they compel the conclusion that Emhart is not liable under Water Code §§ 13304 and 13267.[17] Asserting arguments similar to those put forward by the Advocacy Team, Rialto completely ignores the controlling authority of *Swenson v. File* on the express assumption issue. On the question of whether there was continuity of the WCLC munitions business with AHC (Emhart), Rialto simply pretends that AHC's continuation of the lockset business was enough, even though as a matter of law it is not.[18]

Apparently sensing—with good reason—that neither its express assumption nor its de facto merger arguments make factual or legal sense, Rialto goes beyond the Advocacy Team position by explicitly invoking two further successor liability theories—implied assumption of liability and fraudulent transfer liability. The implied assumption argument, however, is inapplicable as a matter of law. Moreover, it is based on desperate accusations of spoliation by Emhart that are supported by no specific evidence and are contrary to fact. The fraudulent transfer theory—that the 1958 dissolution of KLI coupled with the distribution and transfer of its lockset business to AHC without provision being made for the future environmental liabilities of a defunct company resulting from unforeseeable changes in law decades later—is also defective as a matter of law and contrary to fact.

Before turning to the necessary point by point rebuttal of Rialto's arguments, that which is not in dispute is next summarized below.

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[17] The 2007 CAO seeks to impose successor liability on four Emhart Parties—Emhart, Kwikset, BD(US)I, and BDI. By stipulation, BDI has agreed to stand in the shoes of Emhart should it be finally adjudged liable, thereby making it unnecessary to separately adjudicate the liability of BDI, Kwikset, or BD(US)I. (RE100.)

[18] Emhart refers the Hearing Officer to the detailed refutation of the Advocacy Team's positions on these issues set forth in the Emhart Parties' Opening Hearing Brief (at pages 40-62).

A. The Controlling Law And Material Facts Not In Dispute

1. Rialto Ignores *Swenson v. File*

In 1970, the California Supreme Court held, in *Swenson v. File* (1970) 3 Cal.3d 389, 393-394, the seminal case regarding assumption by contract of liabilities created by later-enacted statutes, that no such liability will be imposed on a contracting party unless the contract expressly so states:

> "'all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.'" [citations.] However, laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties. [citations.]

(3 Cal.3d at 393; emphasis added.) The Court explained:

> The parties are presumed to have had existing law in mind when they executed their agreement [citations]; to hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions.

(Id., at 394; emphasis added.)[19]

Like the Advocacy Team, Rialto neither cites nor discusses *Swenson*. As discussed below, there in no proof of any agreement satisfying the *Swenson* requirement for the assumption of liabilities created under later enacted statutes.

2. Rialto Pretends That There Was Continuity Of Enterprise

Rialto's de facto merger theory is equally misguided because both Rialto and the Advocacy Team admit that WCLC was completely discontinued as a business enterprise long before KLI was dissolved. Here are their admissions:

> On July 19, 1957, KLI sold the 160-acre Rialto property to the B.F. Goodrich Company. KLI ceased its manufacturing activities in Rialto, but continued operating as a "division" of AHC, doing business in Anaheim, California, producing Kwikset's well-known product line of household door locks.

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[19] *Swenson* involved the interpretation of a covenant not to compete between an accounting firm and one of its partners. Shortly before the partner retired, the law governing the scope of permissible geographic restrictions in such agreements was amended. For the reasons noted above, the Supreme Court held that the law in effect at the time the covenant not to compete was executed governed. *Swenson*, 3 Cal.3d at 392-393.

(Advocacy Team Opening Br., at 33; emphasis added.)

> On July 19, 1957, KLI sold the 160-acre Rialto property to the B.F. Goodrich Company. KLI ceased its manufacturing activities in Rialto, but continued its Kwikset household product line operations in Anaheim.

(Rialto Opening Br., at 83; emphasis added.) Although these admissions acknowledge that all manufacturing ceased in Rialto, it is blatantly false that those activities were ever conducted by KLI. The undisputed corporate history so discloses.

As set forth in the Emhart Parties Opening Brief and below, one of the essential elements of a de facto merger is the continuation of the same enterprise whose activities gave raise to the alleged liability. Without the benefits of the ongoing enterprise, the burdens do not follow.

3. The Undisputed Corporate History

KLI was a public manufacturing corporation formed in 1946. KLI's principal business was the manufacture and sale of the "Kwikset" brand of residential locksets. KLI's headquarters and lockset manufacturing plant were in Anaheim. In 1951, KLI began to seek U.S. Government defense contracts for the Korean War. In 1952, KLI organized WCLC as a subsidiary to serve as a subcontractor to load and assemble munitions for such defense contracts. The WCLC plant was located at the 160-Acre Site in Rialto. WCLC erected various buildings and hired management and employees to operate the munitions business. WCLC produced various munitions from 1952 until February 1957, when the decision was announced that KLI was exiting the defense business and WCLC was to be shut down. WCLC then closed. All its management and employees terminated by March 15, 1957. At June 30, 1957, the remaining WCLC corporate shell was merged into KLI, and WCLC was no more. The sale of the 160-Acre Site to Goodrich was then completed a few days later.

Effective July 1, 1957, KLI was acquired by The American Hardware Corporation ("AHC"), a NYSE traded company based in New Britain, Connecticut, through an exchange of stock. AHC's main business was the manufacture of builders' hardware. Its purpose in acquiring KLI was to obtain control of its residential lockset business in Anaheim to complement AHC's builders' hardware business and East Coast distribution facilities.

One year later, on June 30, 1958, KLI was dissolved as a California corporation. The KLI lockset manufacturing business was distributed and transferred to AHC pursuant to the dissolution. The KLI assets and liabilities on the books at June 30, 1958 were transferred to the books of AHC. The Kwikset lockset manufacturing business in Anaheim thereafter operated as AHC's Kwikset Division.

In connection with the dissolution, the AHC Board of Directors on June 5, 1958 authorized AHC management to "expressly assume and guarantee in good faith to pay all debts, liabilities and obligations of [KLI] in existence on the date of such distribution and transfer of its [KLI's] assets and business, contingent or otherwise known or unknown. . . ."

The KLI Dissolution Certificate dated June 30, 1958, which was signed and acknowledged by the KLI directors under penalty of perjury, recites that KLI's

> known debts and liabilities have been actually paid or adequately provided for by the assumption of all such unpaid debts and liabilities by [AHC] . . . pursuant to an agreement dated June 30th, 1958, between [KLI] and [AHC] by virtue of which said [AHC] assumed and became responsible for all of the debts and liabilities of said corporation [KLI] remaining unpaid as of June 30, 1958.

The June 30, 1958 assumption agreement authorized by the AHC Board Resolution and described by the Dissolution Certificate, despite exhaustive searches, has not been found. Neither has a second contemporaneous corporate document—the KLI "Plan of Dissolution"—which is also mentioned in the June 5, 1958 AHC Board Resolution.

We now specifically refute the four successor liability arguments asserted by Rialto: express assumption, de facto merger, implied assumption, and fraudulent transfer.

B. AHC Did Not Expressly Assume All KLI Liabilities "Without Limitation"

Rialto puts forward a long series of miscellaneous arguments to show that AHC expressly assumed all KLI liabilities "without limitation" (Rialto Opening Br., at 88-100). None of these arguments, however, establishes that in 1958 AHC *by clear language* agreed to assume potentially burdensome KLI liabilities that might arise under later enacted statutes. In this regard, it is remarkable that although Rialto has known Emhart's legal argument on the

express assumption issue for years,[20] Rialto neither cites, acknowledges, nor discusses the controlling California Supreme Court authority—*Swenson*. Under *Swenson*, the 1958 assumption agreement cannot be interpreted to incorporate subsequent changes in law that later imposed greater burdens or responsibilities than existing law "unless its language *clearly indicates* this to have been the intention of the parties." 3 Cal.3d at 393. As will be shown, Rialto's silence on such a critical legal matter is plainly an admission that the evidence does not satisfy the *Swenson* proof requirement.

As the Emhart Parties explain in their Opening Brief (at 51-55), the 1958 assumption agreement is described and referenced in two contemporaneous, and closely related, legal documents—the June 5, 1958 AHC Board Resolution, and the June 30, 1958 KLI Dissolution Certificate. The AHC Board Resolution expressly limited management's authority to assume liabilities to those then "in existence." The KLI Dissolution Certificate likewise describes the liabilities assumed as known liabilities remaining up paid. Those two documents and the assumption agreement were all drafted by the Los Angeles corporate attorney, Maurice Jones, Jr., for AHC and KLI in order to satisfy the then existing requirements of the California dissolution statute. As the Supreme Court verified in *Ray v. Alad* (1977) 19 Cal.3d 22, 31, the Corporations Code in effect in 1958 "contained no requirement that provision be made for claims such as plaintiff's that had not yet come into existence." Accordingly, it is not surprising that the descriptions in the AHC Board Resolution and in the KLI Dissolution Certificate of the liabilities that AHC assumed by the 1958 assumption agreement do not contain any language—much less clear language—showing an intention on the part of AHC to assume open-ended liability for future changes in law when the law did not so require.

1. Rialto Willfully Misreads the KLI Dissolution Certificate

Rialto initially (at 89 n.84) argues that the language of the Dissolution Certificate really means that AHC intended to assume "all" liabilities under later enacted statutes. But as noted in the Emhart Parties' Opening Brief (at 54), the Dissolution Certificate refers to the

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[20] Letter to U.S. EPA, Region IX, dated August 15, 2003, at 10-18 (RE101).

assumption only of known and unpaid debts as of June 30, 1958. These plainly are a subset of liabilities then "in existence." Rialto's interpretation does not square with the clear and specific language of the Dissolution Certificate.

2. The Testimony of Hutchison and Parrett Is Not Admissible

Rialto (at 89-90) relies heavily on the former testimony[21] of former KLI directors Hutchison and Parrett. However, as the Emhart Parties explained in their Opening Brief (at 58-59), neither Hutchison nor Parrett ever saw or read the 1958 assumption agreement. Their subjective understandings as to the terms or meaning of the assumption agreement are thus not admissible to prove its contents and are legally irrelevant.[22]

3. Rialto Misreads the AHC Financial Statements and Tax Claim

Rialto (at 90-91) also relies on statements in AHC's financial statements that KLI's assets and liabilities "were transferred" to AHC, as well as on a similar statement in a 1961 tax refund claim. However, as the Emhart Parties' Opening Brief (at 58-59) explains, these statements are consistent with the stated intention to transfer only the "existing" liabilities as set forth in the AHC Board Resolution and the KLI Dissolution Certificate. The cited statements are not the "clear language" required by *Swenson v. File* to show an intention to assume responsibility for new post-dissolution liabilities created by later enacted statutes.

Moreover, as KLI's former chief accountant, Cleland Nelson, testified, such statements, being made in or in connection with the financial statements, are descriptive of the transactions that actually occurred, and thus do no more than disclose that the transferred liabilities referred to were those that were actually on the books, not hypothetical future liabilities that needed to be neither recorded nor disclosed. (E63) Finally, the law instructs the trier of fact to rely heavily on the contemporaneous extrinsic evidence as the most accurate reflection of the intentions of the parties to an agreement. These subsequent

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[21] Cal. Evidence Code § 1290(c).

[22] Hutchison and Parrett both signed the KLI Dissolution Certificate under penalty of perjury. (Hutchison 154:12-13, RE102; Parrett 304:24-305:10, RE103) The Dissolution Certificate states only that the assumption agreement pertained to known liabilities at June 30, 1958. (E2-K1.)

statements in the financial and tax documents say nothing that is inconsistent with or contradicts the language of the AHC Board Resolution or the KLI Dissolution Certificate confining the assumption agreement to liabilities then in existence.

4. Rialto's Tortured Interpretation of the Words "In Existence" in the AHC Board Resolution Is Wrong

Rialto (at 91-94) also submits a series of convoluted arguments as to why the words "in existence" in the AHC Board Resolution really mean the exact opposite, i.e., that AHC actually intended by the language of the resolution to assume liabilities under later enacted statutes that were *not* then "in existence." This argument culminates in the non sequitur (stated at 94) that because the "environmental contamination [allegedly caused by WCLC] giving rise to liability under California law was 'in existence' at [that] time AHC assumed all of KLI's liabilities." Even if, for the sake of argument, there may have been contamination at the former WCLC plant in June 1958, when KLI was dissolved, it does not follow that liability for such contamination created by later enacted statutes, e.g., in this case Water Code §§ 13304 and 13267, was then "in existence."

(a) A Liability Is Nonexistent Until It Is Created By Law

In support of this forced argument, Rialto first contends (at 92) that "liabilities are 'in existence' at the time the underlying act is committed, not when a subsequent cause of action is created or accrues." This argument is nothing more than sophistry. To support the argument, Rialto cites a supposed general rule that a liability "is created by the consummation of the contract, act, or omission by which the liability is incurred." *GMS Props. v. Fresno County* (1963) 219 Cal.App.2d 407, 413-14. But Rialto completely misinterprets this language and the case. All that the case stands for is the unremarkable proposition that a liability is created when an obligation is incurred. Plainly, until a statute declares conduct illegal or imposes liability, it is axiomatic that engaging in the conduct that it regulates does not violate the law or create a liability.

This rule was convincingly explained in *Chrysler Corp. v. Ford Motor Co.*, 972 F.Supp. 1097, 1108-1109 (E.D. Mich. 1997). That case required the district court to interpret a 1956

sale agreement providing for the "assumption of all liabilities of Kaiser existing on the closing date of every nature whatsoever, whether absolute or contingent." The defendants argued that this language required the assumption of all environmental liabilities, including those arising under CERCLA enacted some 24 years later. Making exactly the same kind of argument that Rialto is now advancing, the defendants contended that "CERCLA liability was an 'existing' contingent liability at the time of the sale, because the seller (whose liabilities were being assumed) "had already released the waste which in the future would give rise to liability." *Id.* at 1108.

The district court rejected this argument with the following succinct analysis:

> On its face, defendants' argument seems to stretch the meaning of the word contingent. A contingent liability is defined as, "One which is not now fixed and absolute, but which will become so in the case of the occurrence of some future and uncertain event." Black's Law Dictionary, 321 (6th Ed. 1990). To say that the "future event" may include the passage of a law creating the liability is pointless and illogical. A liability is nonexistent until it is created by law. Were it otherwise, there would be no distinction between a contingent liability and a future-arising liability, making the contractual assumption of both redundant. In this case, there was no mention of future arising liabilities. To the contrary, the parties specifically limited liabilities to those "existing at the closing date." (emphasis added)

(*Id.* at 1109.) The parallels between the assumption clause in *Chrysler* and the 1958 assumption agreement at issue here are quite apparent. It obviously would be nonsensical to say that in 1958, a person who had released hazardous substances then had liability in existence under CERCLA . The CERCLA liability by definition could not have come into existence until CERCLA was later enacted. There would be no point to a retroactive liability statute if the retroactive liability were already in existence.

(b) In 1958, No Dickey Act Liability Existed

Rialto next contends (at 92-93) that the Dickey Act supports its argument. But its reliance on the Dickey Act is also misplaced because, as explained by the Emhart Parties' Brief on Threshold Issues: Section 13304 and Res Judicata, at 3-6, the Dickey Act contained no prohibition on discharges, i.e., it did not prescribe an obligation that imposed a liability. Rather, the Dickey Act provided a mechanism by which the State Water Board and regional boards could, by administrative action, prescribe waste discharge requirements for certain

activities, investigate, and, in the event of a discharge contrary to any such requirements, summon for hearing "all persons alleged to be creating" the discharge condition. Former Water Code §§ 13053-13055, 13060-13064. Because the Dickey Act thus provided for an administrative order prohibiting discharges, but did not itself contain such a prohibition, the Act itself could not have been violated by WCLC for anything pertaining to perchlorate at the 160-Acre Site. Moreover, there is no evidence that any administrative discharge requirements under the Dickey Act were ever imposed on or threatened against WCLC or KLI with respect to the 160-Acre Site.

Rialto's brief concedes as much. In this regard, Rialto states (at 92), "As of 1958, the acts and omissions giving rise to the [alleged] contamination at WCLC's Rialto facility had the potential to form the basis for liability under the Dickey Act." (Emphasis added.) But a mere vague "potential to form the basis for liability" under the Dickey Act is not the same thing as a "violation of a statute or regulation" for exactly the reasons stated in the preceding paragraph. Consequently, there was no Dickey Act liability "in existence" in 1958 that AHC could have assumed from KLI under the June 30, 1958 assumption agreement.

Moreover, Rialto's statement that "as of 1958," there was some sort of "potential to form a basis for liability" on the part of KLI under the Dickey Act is wrong for a further reason. The Dickey Act authorized administrative action only against "persons creating" the condition of discharge. This present-tense usage plainly contemplated regulation only of current dischargers. By June 30, 1958, however, KLI had already sold the 160-Acre Site to Goodrich. There is no evidence that at that point, KLI was creating any conditions at all at the 160-Acre Site, and it obviously was not. There was thus no potential for liability on the part of KLI that was then in existence under the Dickey Act and, consequently, none that could have been assumed by AHC under the 1958 assumption agreement.

(c) Rialto's CERCLA Precedents Are Distinguishable

Rialto next incorrectly suggests (at 93-94) that under CERCLA, federal courts would simply ignore the limiting phrase "in existence" in a pre-CERCLA liability assumption agreement. This is not correct.

As explained in the Emhart Parties' Opening Brief (55-57), certain CERCLA cases hold that pre-CERCLA agreements assuming "all liabilities," without any qualifying limitations, are sufficiently general to encompass the assumption of CERCLA liability. The cases cited by Rialto are standard examples of the application of this rule. *GNB Battery Technologies, Inc. v. Gould, Inc.*, 65 F.3d 615, 623-24 (7th Cir. 1995); *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985); *Sherwin-Williams Co. v. Artra Group, Inc.*, 125 F.Supp.2d 739, 755-57 (D.Md. 2001). The rule of interpretation used in such CERCLA cases, as we explained, is directly contrary to the controlling California law set forth in *Swenson v. File*, which requires language clearly indicating that the parties intended to incorporate later enacted statutes into their agreement.

There are also CERCLA cases that hold that a pre-CERCLA assumption agreement limited to "existing" liabilities does not extend to retroactive liabilities created years later by CERCLA. In *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 653 (7th Cir. 1998), a case citied by Rialto, the Seventh Circuit held:

> The use of the word 'existing' [to describe liabilities assumed in 1941 agreement] 'fairly obviously forecloses the possibility that [the purchaser] agreed to assume any contingent liabilities, much less the environmental liabilities [under CERCLA] at issue here.

See also Chrysler Corp. v. Ford Motor Co., *supra,* 972 F.Supp. 1097, 1108-1110 (E.D. Mich. 1997)(CERCLA liabilities not "existing on the Closing Date"); *United States v. Vermont American Corp.*, 871 F.Supp. 318, 321 (W.D. Mich. 1994)(CERCLA liabilities "not existing on the Closing Date"); and *United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1233, 1244 (E.D. Cal. 1997). Thus, under both California state and federal law, the "in existence" limitation is controlling. These cases clearly show that under federal law, the "in existence" limitation in the 1958 assumption agreement would preclude a finding that liability under the later enacted Water Code §§ 13304 and 13267 had been assumed.

Rialto's interpretation of the AHC Board Resolution is thus highly contrived. That Rialto finds it necessary to resort to such a tortured interpretation is itself strong proof that the extrinsic evidence nowhere contains the language required by *Swenson v. File* that "clearly

indicates" the intention to incorporate responsibility for liabilities created by later enacted statutes.

5. Rialto's "Absorption" Argument Is Without Merit

Rialto contends (at 95-100) that "logically" AHC "must have assumed all of KLI's assets and liabilities" because "[o]therwise how could AHC continue to operate the business and manufacture locksets?" Under the applicable law and the facts, the answer is, very easily.

As has been noted, WCLC had already been defunct for over a year when KLI was dissolved. The 160-Acre Site had already been sold. It was never AHC's intention to acquire or operate the WCLC munitions business. At June 30, 1958, the only business that AHC intended to continue to operate was the lockset manufacturing business in Anaheim, not the discontinued munitions business. AHC thus had no practical reason to assume environmental liability for a previously defunct business on land that KLI had sold to a major company that was then using it for its own manufacturing operations. There is also no evidence that there were any outstanding WCLC-related liabilities. In short, an assumption agreement that did not include such liabilities would not have been illogical at all.

In support of this argument, Rialto cites (at 95) to *United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1233 (E.D. Cal. 1997).[23] For reasons discussed in the Emhart Parties' Opening Brief (at 55-57), Rialto's reliance on *Iron Mountain*, however, is misplaced, because that case instead supports Emhart's position that it is not subject to successor liability under the express assumption theory.

First, the court in *Iron Mountain* agreed that the law is that an assumption agreement limited to liabilities "in existence," such as that described by the AHC Board Resolution, does not extend to liabilities created by a later enacted statute. *Iron Mountain*, supra, 987 F.Supp. at 1241.

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[23] Rialto at the same time cites *Marks v. Minnesota Mining and Manufacturing Co., Inc.* (1986) 187 Cal.App.3d 1429, but does not provide any explanation as to how it applies to the "absorption" argument.

Second, the court in *Iron Mountain* found that the assuming party—Stauffer—had actual knowledge in December 1968 when the assumption agreement at issue was made, that the Iron Mountain Mine was polluted in violation of applicable regulations. This fact was unambiguously established by a memorandum written by its Vice President for West Coast Operations in August 1967, and by meetings attended by other Stauffer personnel to discuss the mine pollution. *Id.* at 1236-38. Indeed, the court refers to evidence that the mine was a known source of pollution during the 1940's and 1950's. *Id.* Here, however, Rialto does not even contend that AHC had actual knowledge of the alleged perchlorate and TCE contamination at WCLC. Indeed, the first time that a claim of contamination was ever made was not until June 2002. As is further discussed below, Rialto's argument that AHC was "on notice" is thus nothing more than idle speculation.

Third, and very significantly, in the *Iron Mountain* case, the polluted facility itself—the Iron Mountain Mine—was an asset that was distributed to Stauffer as part of the 1968 dissolution and assumption agreement at issue. The mine afterward was "mostly inactive," and was sold in 1976. *Id.* at 1236-1238 n.8. In contrast, here WCLC was already defunct and the 160-Acre Site was already owned by Goodrich at the time of the 1958 dissolution and assumption agreement with AHC. Thus, here it cannot be said of AHC, as did the court in *Iron Mountain* of Stauffer, that "Stauffer did not purchase a component of Mountain Copper's business or a portion of its assets. . . . Stauffer absorbed all of Mountain Copper into itself. This was Stauffer's intention from the beginning." *Id.* at 1242. These necessary telling facts are not present in this case. WCLC and the 160-Acre Site were never absorbed into AHC.

(a) AHC Due Diligence Did Not Discover Illegal Pollution at WCLC

As noted in the Emhart Parties' Opening Brief (at 57), Rialto's position (at 97-98) that AHC was "on notice" of potential WCLC environmental liability because in January 1957 it did "extensive due diligence" at WCLC is rank speculation.

The true facts are that on January 29, 1957, when they were in California for two days to negotiate the exchange of stock, AHC senior executives Parker, Berry and Muirhead made a brief stop at WCLC accompanied by Maurice Jones, Jr.[24] The written report of their visit to WCLC shows that their attention was focused on financial issues—that WCLC had been unprofitable, that it was being shut down, and that the 160-Acre Site was going to be sold.[25] The short plant visit obviously did not last longer than was necessary to confirm these facts, and to confirm that WCLC did not present any issues that needed to be addressed by the exchange offer. The AHC report says nothing about WCLC's operations, or about any use of chemicals or contamination. The fact is that at that date, the WCLC plant was being mothballed, with only a skeleton crew of 19 employees remaining. (Thompson Decl., E2, Exs. C-1, D, K-2.) The language used by the report is hardly that of executives who considered themselves on notice of any environmental liabilities.

(b) The Law Did Not Require AHC to Assume Liabilities Created by Later Enacted Statutes

Rialto's argument (at 98-100) that AHC "logically must have" assumed "all" KLI liabilities, including ones later created by future-enacted statutes, in order to protect KLI directors from potential liability on post-dissolution claims is also rank speculation. As was explained in the Emhart Parties' Opening Brief (at 57-58), the KLI directors had no risk at all

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[24] The WCLC Visitor Registration Log shows that they signed in at 3:15 p.m. and signed out at 4:50 p.m.—a total of 95 minutes. (RE104).

[25] The AHC executive committee report contains only the following statement concerning WCLC:

> For diversification of product this company [KLI] formed West Coast Loading Corporation in 1952 to process Government orders for shell loading and manufacturing other pyrotechnic devices. This operation is located on a 160 acre site near Fontana, California in the foothills about 50 miles from Los Angeles. This operation has proved unprofitable due to entire dependence on Government contracts and is being put on a standby basis in February 1957. The land consists of 50 odd buildings located on leased property title to which land can be had for $34,000 thru an option which expires within the next couple of months. It is expected that title to this land will be acquired thru the exercise of this option. (E43)

with respect to unknown claims, particularly based on later enacted laws, because the Corporations Code at the time did not require them to make any provision for such claims before they were required by the statute to make the liquidating distribution to shareholders. The directors' obligation to creditors upon dissolution was only to pay or make provision for the known claims. Prior Law §§ 5000, 5001, 5200; see *Ray v. Alad*, *supra*, 19 Cal.3d at 31; *Phillips v. Cooper Laboratories, Inc.* (1989) 215 Cal.App.3d 1648, 1653 n.1; *Penasquitos v. Superior Court* (1991) 53 Cal.3d 1180, 1191. The argument that former director Parrett had liability exposure for failing to make provision for other claims that might eventually be made on later enacted statutes simply because he was never told that he did, is utter nonsense. His lack of potential exposure for such claims did not depend on what he was or was not told on this point. Moreover, whether or not Cleland Nelson, the former controller of KLI, was so advised is also beside the point, as he was not a KLI director anyways. Rialto's further argument that KLI failed to provide notice of its dissolution to creditors is contrary to the express language of the KLI Dissolution Certificate, in which the KLI directors stated, under penalty of perjury, that such notice was given. (E2-K1.) Contrary to Rialto's assertion, moreover, KLI's controller, Mr. Nelson, did not testify that notice to creditors of the dissolution was not given; he in fact assumed that it was but did not specifically recall. (RE105.)

In short, Rialto's so-called "absorption" argument is wrong, factually and legally. It was never AHC's intention to acquire or operate WCLC or to own or operate at the 160-Acre Site in Rialto, and it never did so.

C. There Was No De Facto Merger Because There Was No Continuity of Enterprise

For purposes of de facto merger analysis, the single, critical, undisputed fact is that the munitions business conducted at the 160-Acre Site in Rialto was shut down, its management and employees terminated, and its property, plant, and equipment sold well before KLI was dissolved. That munitions business was distinct from lockset business continued by AHC in Anaheim after KLI's dissolution.

As the Emhart Parties have already shown in their Opening Brief (at 40-51), for the de facto merger doctrine to apply, the business enterprise whose operations gave rise to the claimed damage, i.e., the munitions loading business, must have been acquired and continued by the asset purchaser. Absent such continuity of enterprise, successor liability cannot be imposed at a matter of law on an asset purchaser under the de facto merger doctrine. *Ray v. Alad*, *supra*, 19 Cal.3d at 28; *Phillips v. Cooper Laboratories* (1989) 215 Cal.App.3d 1648, *Marks v. Minnesota Mining and Manufacturing Co.*, *supra*, 187 Cal.App.3d at 1437; *Potlatch Corp. v. Superior Court* (1984) 154 Cal.App.3d 1144, 1150-1151; *Louisiana-Pacific v. Asarco, Inc.*, 909 F.2d 1260, 1264 (9th Cir. 1990); *Chrysler Corp. v. Ford Motor Co.*, *supra,* 972 F.Supp. at 1111-12.

Ignoring these immutable facts and controlling law, Rialto, nevertheless, asserts (at 101-102) that there are many examples of documents indicating that "Kwikset" had "merged" with AHC, and that after 1958 when AHC "took over," there was a total lack of change in the Anaheim operation. Some Kwikset employees even colloquially referred to the acquisition as a "merger." But these "characterization" arguments are irrelevant. Nowhere did anyone ever say, write, assert, or represent that AHC "merged" its hardware business with WCLC's munitions business, which had been discontinued and wound up more than one year before AHC acquired the assets of KLI.

D. The Implied Assumption Doctrine Is Inapplicable

Rialto's argument (at 101-105) that AHC impliedly assumed post-dissolution liabilities under later enacted statutes, if it did not do so expressly in the 1958 assumption agreement, is defective as a matter of the rules of contract interpretation. Rialto's arguments concerning the continuation by AHC of the KLI lockset return policy, the continuation of the Kwikset employee pension trust, and the alleged spoliation of the 1958 assumption agreement and KLI Plan of Dissolution are factually and legally inaccurate.

1. The Necessary Factors for Implied Assumption Are Absent

The implied assumption argument is legally insufficient for two reasons. First, California law disfavors implied contract terms because they interfere with the right of the

parties to freely set the terms they choose. The authority to imply a contract term that allegedly was omitted from an agreement is thus circumscribed by several strict requirements. These include the requirement that the term in question would have been expressly made if attention had been called to it, and that its subject was not already covered by the agreement. *City of Glendale v. Superior Court* (1993) 18 Cal.App.4th 1768, 1778 (rejecting implication of term waiving eminent domain to prevent early termination of lease by city tenant). It would be absurd to infer that AHC, had it been given the conscious choice, would have agreed to assume liability at the 160-Acre Site under burdensome later enacted statutes such as CERCLA or the Water Code or any other new legislation. Moreover, the liabilities that were assumed under the 1958 assumption agreement, it can be presumed, were completely reflected by the financial statements, and therefore no further terms on the subject could validly be implied.

Second, under *Swenson v. File*, an agreement specifically to assume liabilities created by later enacted statutes must be evidenced by "language [which] *clearly indicates* this to have been the intention of the parties." 3 Cal.3d at 393. For the many reasons already discussed above, there is no evidence that would permit the conclusion to be drawn that AHC in 1958 clearly agreed to assume any such asserted KLI liabilities based on later enacted statutes.

2. The Continuation of the Lockset Return Policy and the Pension Trust Are Not Probative

In further support of the implied assumption argument, Rialto cites (at 101-102) anecdotal testimony and historical documents referring to the 1957 stock acquisition and the 1958 dissolution as a "merger" between AHC and KLI. This evidence, however, plainly does not contain clear statements by the corporation of an intention to assume KLI liability under later enacted statutes, much less environmental liability at the 160-Acre Site that was sold a year before the dissolution. As noted above, this evidence has nothing whatsoever to do with WCLC, and everything to do with AHC's continuation of the Anaheim lockset business.

Rialto also argues (at 102-103) that AHC's continuation of KLI's lockset return policy and of the Kwikset Pension Trust by AHC show that AHC assumed "all of KLI's liabilities." The Emhart Parties refuted this simplistic argument in their Opening Brief (at 61-62), and the Hearing Officer is referred to that discussion for rebuttal. With regard to the continuation of the lockset return policy, it may also be observed that the locksets in question came from Anaheim, not from WCLC. Moreover, WCLC employees were never covered by the Kwikset Pension Trust, and they received nothing from it when their employment at WCLC terminated. (RE106, RE107, RE108, RE109.) This evidence is further confirmation of the undisputed fact that KLI did not continue the WCLC enterprise.

3. The Spoliation Argument Has No Factual or Legal Merit

As a further basis for its implied assumption argument, Rialto contends (at 103-105) that the Emhart Entities' failure to locate the 1958 "Form of Assumption Agreement" and the "KLI Plan of Dissolution," which are described in the KLI Dissolution Certificate and in AHC Board Resolution, "amounts to spoliation of evidence and merits the Water Board inferring that the documents would have established that AHC assumed all of KLI's liabilities, whether known or unknown." This argument is highly inappropriate, as it wrongly accuses the Emhart Parties—without the offer of any proof whatsoever—of having suppressed these ancient documents. The documents, however, though missing, have not been willfully or otherwise suppressed, and the fact that they have not been found by the Emhart Parties does not permit an adverse inference to be drawn against any of them.

In this regard Rialto cites the governing statute, Evidence Code § 413, but does not even attempt to make a showing to meet its requirements. Section 413 provides:

> In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts against him, or his willful suppression of evidence relating thereto, if such be the case. (emphasis added)

Thus, under California law, an adverse inference in these circumstances would first require a finding that evidence was willfully suppressed. *See* BAJI 2.03 (requiring a finding of willful suppression); *Heath v. Cast* 813 F.2d 254, 260 n.5 (9th Cir. 1987) ("in California it is

prejudicial error to give BAJI 2.03 if there is no showing that evidence has been at least willfully, and perhaps fraudulently, suppressed".)[26]

Here, Rialto does not even attempt to establish that the two documents have been "willfully suppressed," nor could they, because there is no such evidence. As all of the parties in this matter are well aware, the search for these two documents commenced in 2002 when WCLC and KLI historical documents were first located at the Schick storage facility in southern California and produced to the Regional Board. Despite extensive further searches lasting for many days of hundreds of boxes of records stored at the Schick facility, by the Emhart Parties, Rialto, and Goodrich, the two missing documents have not been found there.

Emhart has also undertaken repeated, extensive searches of hundreds of boxes of records stored in the corporate archives of The Black & Decker Corporation and its subsidiaries, including the main corporate archives in Maryland, but also did not find the two documents among those records. (RE110.)

A search was also made for the missing documents among the historical records of the defunct Emhart Corporation, which was acquired by Black & Decker in 1989. In 2002, it was learned that at the time of the 1989 acquisition, as Emhart's Connecticut headquarters were closing, many of its corporate records were contributed to the Thomas J. Dodd Research Center at the University of Connecticut.[27] Records of AHC were also contributed

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[26] Numerous California cases, which Rialto ignores, have stated the rule that a finding of willful or even fraudulent suppression must be found before an adverse inference is allowed. *In re Estate of Everts* (1912) 163 Cal. 449, 456 (lost medical chart did not furnish a basis for the adverse inference instruction where there was no evidence that it was willfully destroyed or suppressed); *People v. Von Villas* (1992) 10 Cal.App.4th 201, 245-46 (no error to refuse adverse inference instruction where evidence was lost "without fraudulent intent and was the target of a very diligent search once its loss was realized" and thus it was not within the prosecution's power to produce the evidence); *Dunham v. Condor Ins. Co.* (1997) 57 Cal.App.4th 24, 28 (no liability for negligent spoliation where defendant never had possession or control over the evidence and was not the one who destroyed it); *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598 (failure to call witness was not fraudulent suppression); accord, *In re Estate of Moore* (1919) 180 Cal. 570, 585-86 (prejudicial error to give adverse inference instruction where record contained no evidence of suppression; failure to call witnesses was not suppression).

[27] The Emhart collection is at the following link on the Dodd Center website:

to the Dodd Center at that time.[28] Documents from AHC and Emhart collections located at the Dodd Center in fact were submitted to the Regional Board as evidence for the September 13, 2002 CAO hearing. (RE111.) Further searches by counsel for Emhart, and presumably others, of these archived records did not locate the two missing documents there.

A diligent search of historical records was also made by the law firm of Day Berry & Howard in Hartford, Connecticut. Day Berry was the law firm that represented AHC in 1957 when it acquired KLI, and for several years thereafter. Its custodian of records, Dean Cordiano, was deposed at length. He testified that although Day Berry did locate certain pertinent historical records in its archives (which were produced), they did not contain the two missing documents. (RE112.)

Likewise, the documents were also sought from Maurice Jones' former law firm in Los Angeles, which still bears his name—Jones, Bell, Abbott, Fleming & Fitzgerald LLP. Its custodian of records, attorney Michael Abbott, testified that Mr. Jones died many years ago, and that the law firm retained none of his records. The law firm also does not have the two missing documents. (RE113.)

In addition, subpoenas seeking production of these documents, among other, have been issued to a number of third parties by Rialto itself, and by Goodrich.

In short, there is no master repository for the business records of defunct corporations. No inference of willful suppression of evidence can be drawn, because the two ancient documents either have been lost or no longer exist. The willful suppression argument must be rejected.

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http://www.lib.uconn.edu/online/research/speclib/ASC/findaids/Emhart/MSS19890085.html.

[28] The AHC collection page on the Dodd website is at the following link: http://www.lib.uconn.edu/online/research/speclib/ASC/findaids/American_Hardware/MSS19950001.html

E. The Dissolution of KLI Was Not a Fraudulent Transfer

Rialto's fraudulent transfer argument is factually and legally ludicrous. Rialto asserts (at 113) that "AHC was aware of WCLC's operations, but it was also on notice that WCLC's contamination of the Rialto facility would likely result in liability." This argument is entirely false. There is no evidence that "AHC was aware of WCLC's operations." There is no evidence that AHC was "on notice" of WCLC's alleged contamination of the 160-Acre Site. There is no evidence that, in 1958, such alleged contamination "would likely result in [environmental] liability." And there is no evidence that AHC had any reason to know that this "would result." Rialto's argument consists entirely of speculation and innuendo. It makes no attempt at any reasoned explication or application of how fraudulent transfer liability could even arise under the Uniform Fraudulent Transfer Act, Cal. Civ. Code §§ 3439 et seq. The fact of the matter is that AHC was not clairvoyant. There is no evidence that AHC or anyone else in 1958 could have foreseen that years later environmental laws would be enacted that could impose liability on KLI for WCLC's alleged discharges. The only "grave question" that this fact raises is why Rialto now suggests there are "grave questions" of fraudulent transfer liability on the part of AHC, at the same time that it provides no evidence or argument in support of this accusation. These accusations lack any probable cause and have no place in this proceeding.

III. Rialto Has No Recoverable "Damages"

Rialto seeks over $2 million of alleged costs despite the requirement of Water Code Section 13304(c) that such costs can only be obtained in a civil action, not in water board proceedings. Even if it could conjure up authority for a damages award, Rialto seeks the cost of perchlorate wellhead treatment systems on water supply wells that Rialto's own experts admit do not draw from the Rialto-Colton Basin and are not affected by the alleged perchlorate contamination from the 160-Acre Site.

Rialto's claims also fail because, among other defects:

- Rialto has already received third-party funding for treatment that exceeds Rialto's purported costs;

- Rialto has sufficient capacity in the Rialto-Colton Basin to pump to its planned amounts (the limits imposed by the 1961 decree), despite its scare tactics, without requiring water replacement;
- Rialto's own experts counseled against the actions Rialto took and asks to take again as to "replacement water"; and,
- Rialto's Brief double counts alleged costs.

Rialto cannot recover its asserted costs or damages in this proceeding.

A. Rialto's Damages Claim

Rialto describes its alleged costs as related to its municipal water supply wells named "Chino No. 1" and "Chino No. 2" (the "Chino Wells"). (Rialto's Opening Brief, at 133, lines 11-18.) On its face, Rialto's Opening Brief seeks $2,596,554.22 in costs. However, after netting out twice-counted costs and post-submission retractions, Rialto actually seeks $2,305,944.81. This breaks into three main categories of alleged costs:

- Installing and operating wellhead treatment systems on the Chino Wells and assorted related costs ($2,051,528.66);
- The cost of a short-term groundwater extraction lease with the City of Colton for pumping rights within the Rialto-Colton Basin for a limited period in 2003 ($166,500); and,
- The as-built costs to construct an "inter-tie" to obtain water from Riverside-Highland Municipal Water Company to meet the "water supply emergency" ($87,916.15).

Rialto characterizes all of these as comprising Chino No. 1 and Chino No. 2 replacement water costs.

To support its claims, Rialto relies entirely on the declaration of Peter Fox (although some of the citations mistakenly refer to a Hunt Declaration).[29] In deposition, Mr. Fox

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[29] Mr. Fox was not disclosed in Rialto's descriptions of witness testimony, in violation of the Hearing Officer's order requiring the parties to provide descriptions of all witnesses. Mr. Fox's Declaration should therefore be excluded from the proceedings.

retracted certain costs and was confused as to where the Chino Wells were with regard to the groundwater barrier between basins, the Rialto-Colton Fault.[30] The City's hydrogeology experts have testified that these wells are outside of the Rialto-Colton Basin and therefore could not have drawn perchlorate from the plume beneath the 160-Acre Site. Apparently Rialto never checked with its experts before claiming that the alleged dischargers were responsible for these costs, or worse, did check and claimed them anyways.

B. Water Code Section 13304 Does Not Grant The State Water Board Authority to Award Past Costs

The State Water Board has no authority to award past costs for cleanup and abatement in these proceedings. The Water Code expressly requires a separate civil action. Further, because there is no DHS mandate to stop service of drinking water, there is no justification for "replacement water."

1. Section 13304(c) Provides for Cost Recovery in a Civil Action

Water Code Section 13304(c) addresses cost recovery. Water Code Section 13304(a) addresses a water board's authority to issue orders for cleanup and abatement, which may include replacement water. Section 13304(a) does not provide for cost recovery—that is left entirely to subsection (c), which requires a separate civil action for cost recovery:

> The amount of the costs is recoverable in a civil action by, and paid to, the governmental agency and the state board to the extent of the latter's contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds.

(Water Code § 13304(c); emphasis added.) Section 13304(c) makes clear that a water board itself cannot impose cost recovery on the alleged dischargers. The draft 2007 CAO purports to award cost recovery under Section 13304(c). (See, ¶ 13.) Such a proposal clearly violates Section 13304(c), which requires a separate civil action.

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[30] One of Rialto's experts testified he felt bad because, having read the Fox testimony, realized he was responsible for misinforming Mr. Fox as to the location of the wells. (RE200.)

Recognizing this glaring defect, not even Rialto purports to frame a request for costs under Paragraph 13 of the 2007 CAO or Water Code Section 13304(c) labeled as such. Instead, Rialto has attempted to slip in its claim for cost recovery under the term "water replacement," invoking Section 13304(a). (See Rialto Opening Brief at 133-134.) Inherent in that assertion is a recognition that the Advocacy Team's reliance on Section 13304(c) in the 2007 CAO cannot stand. But also inherent in that assertion is an attempted end-run around the acknowledged bar of Section 13304(c).

Section 13304(a) is prospective in nature. A discharger "shall upon order of the regional board, clean up the waste or abate the effects of the waste...." (Section 13304(a) (emphasis added).) Such an order may include replacement water:

> A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner.

Id. Under Section 13304(a), replacement water is part of the ordered cleanup and abatement. The discharger is obligated to take on such cleanup and abatement "upon order of the regional board." While Section 13304(a) allows a regional board to order provision of or payment for replacement water, nothing in Section 13304(a) suggests that it can order past costs of cleanup and abatement—including replacement water—to be recovered. That is the function of Section 13304(c).

The prospective nature of Section 13304(a)'s replacement water provisions is made clear by the further subsections addressing replacement water. Sections 13304(h) and (i) provide:

> (h) As part of any cleanup and abatement order that requires the provision of replacement water, a regional board or the state board shall request a water replacement plan from the discharger in cases where replacement water is to be provided for more than 30 days. The water replacement plan is subject to the approval of the regional board or the state board prior to its implementation.
>
> (i) A "water replacement plan" means a plan pursuant to which the discharger will provide replacement water in accordance with a cleanup and abatement order.

(Emphasis added).

Water replacement for more than 30 days requires a water replacement plan. The plan must be approved "prior to its implementation." The plan provides for water which "will" be provided under a cleanup and abatement order. These are all forward-looking provisions. As the Legislative Digest to the amendment adding the replacement water provisions stated, "The bill would require a regional board or the state board to request a water replacement plan from the discharger prior to the provision of the replacement water in certain cases." (SB 1004 Digest, 2003 Cal ALS 614, attached as RE252.)

Here, Rialto installed wellhead treatments without a cleanup and abatement order in place. There was no approved water replacement plan to implement. There was no water replacement plan at all. Rialto simply undertook cleanup and abatement activities on its own. In addition, under Section 13304(a), the discharger is to prepare and submit a water replacement plan, not the agency receiving the water. Emhart had no say in the Chino No. 1 and Chino No. 2 wellhead treatment systems installed as part of Rialto's ad hoc water replacement plan. Rialto is attempting to dictate the terms of a water replacement plan by imposing its past costs. That is clearly not how Section 13304(a) is supposed to work.

Past cleanup and abatement costs are recoverable (if at all) only pursuant to Section 13304(c). Such an adjudication of costs and damages is best left to the courts. The legislature reflected this understanding in creating Section 13304(c). When it amended Section 13304(a), the legislature could have selected language to require reimbursement of past costs. It did not do so. Instead, it made the section prospective, leaving incurred costs subject to Section 13304(c).

2. Section 13304(a) Does Not Authorize Water Boards to Order Replacement Water In Contravention of DHS Determinations

Nothing in Section 13304(a) purports to authorize a water board to supercede Department of Health Services ("DHS") determinations on removing a source from the public water supply (which would trigger the need for replacement water). DHS, the agency charged with regulating drinking water suppliers, has not established an MCL for perchlorate. In the absence of an MCL, there is no enforceable standard for requiring a public water

supplier (such as Rialto) to remove a source of drinking water from the water supply. The Chino Wells did not require closure, and any future water replacement order must comply with DHS determinations, which do not require well closure at "zero tolerance" (as Rialto chose) or at the perchlorate PHG.

DHS is the agency authorized to regulate public drinking water suppliers. (See Health & Safety Code §§ 116325 and 116350.) DHS is the agency authorized to set standards regarding contaminants in drinking water. (See Health & Safety Code Section 116365.) "Local decisions on the same subject, varying from county to county, cannot be justified." *Parades v. County of Fresno*, 203 Cal.App.3d 1, 7 (1988). The California Environmental Protection Agency's Office of Environmental Health Hazard Assessment ("OEHHA") is tasked with performing health risk assessments for drinking water under the Safe Drinking Water Act of 1996, but does not regulate drinking water suppliers or the water supply. (See Cal. Health & Safety Code Section 116365.) OEHHA issues public health goals ("PHG"), such as the one for perchlorate. The legislature specified that the PHG is not a legally enforceable standard. Health & Safety Code Section 116365(c)(2) provides: "[OEHHA] and [DHS] shall not impose any mandate on a public water system that requires the public water system to comply with a public health goal."

Perchlorate does not have an MCL established by DHS. Perchlorate is identified as an Unregulated Chemical Requiring Monitoring. For such chemicals, DHS, pursuant to Health & Safety Code Section 116455, establishes Notification Levels and Response Levels. Notification Level means:

> the concentration level of a contaminant in drinking water delivered for human consumption that the department has determined, based on available scientific information, does not pose a significant health risk but warrants notification pursuant to this section. Notification levels are nonregulatory, health-based advisory levels established by the department for contaminants in drinking water for which maximum contaminant levels have not been established.

(Health & Safety Code § 116455(c)(3).)

A Response Level is a level at which action beyond notification is "recommended." (Health & Safety Code § 116455(c)(4).) Importantly, only at the Response Level does DHS

"recommend" taking a well out of service, not at the Notification Level. (DHS requirements and recommendations, at http://www.dhs.ca.gov/ps/ddwem/chemicals/al/default.htm#requirements%20and%20 recommendations.)

The Notification Level for perchlorate is .006 milligrams per liter. (DHS Division of Drinking Water and Environmental Management's Notification Levels website at http://www.dhs.ca.gov/ps/ddwem/chemicals/AL/PDFs/notificationoverview.pdf.) (RE201.) Contaminants detected at the Notification Level only require notification of local agencies, and DHS "recommends" public notification. (*Id.*)

Because perchlorate is listed as having a non-cancer toxicological endpoint, the Response Level for perchlorate is set at ten times the Notification Level. (*Id.*) Only at the Response Level (ten times the Notification Level) does the Health & Safety Code provide for further action and does DHS recommend taking the source out of service. Thus, DHS, the agency actually charged with regulating drinking water suppliers, does not require water source removal at the PHG or Notification Level.

In 2003, DHS expressly informed Rialto that DHS "does not require or recommend the City to put the wells, which contain perchlorate levels below ten times of its action level, offline." (Ex. 4133 to Fox Depo., p.2, May 20, 2003 letter to Peter Fox from DHS, emphasis added.) Those wells were Chino No. 1, Chino No. 2, Rialto No. 4 and Rialto No. 6. (*Id.*) DHS noted that "However, the City prefers not to use these sources. . . ." (*Id.*, emphasis added) Rialto elected to disregard DHS' recommendations. (Fox Depo. at 135:12-136:21.)

The State Water Board has previously rejected a "zero tolerance" approach. In SWRCB Order WQ2005-0007 (In the Matter of the Petitions of Olin Corporation and Standard Fusee), the board rejected the idea of imposing replacement water orders "whenever there is any detection of a contaminant" or allowing local agencies and regional boards set the limits (Order WQ2005-0007 at p. 6). Yet that is exactly what Rialto has done at the Chino Wells.[31]

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[31] That Order WQ2005-0007 failed to recognize, however, in purporting to impose the PHG

There was no DHS requirement that Rialto discontinue water service—no MCL, no requirement to stop service at the Notification Level, no mandatory response to a Response Level. Rialto made a political decision to set the limit at "zero tolerance." It can do so, but cannot impose the costs of that decision on the alleged dischargers. Nor can the State Water Board impose the costs of that decision. Nor can or should the State Water Board reject the DHS determination that the PHG level is not the trigger for replacement water.

C. According to Rialto's Own Experts, The Chino Wells Do Not Draw From the Rialto-Colton Basin and are Not Impacted by the 160-Acre Site

Rialto seeks reimbursement for costs incurred in treating two wells which its own experts testify are not in the Rialto-Colton Basin and are not impacted by alleged contamination from the 160-Acre Site. Dr. Daniel Stephens is a hydrogeology expert identified and relied upon by Rialto in these proceedings.[32] Dr. Stephens testified at his deposition that Chino No. 1 and No. 2 are outside of the plume of alleged perchlorate contamination and are not impacted by the 160-Acre Site:

> Q. Do you see, on that plume map, there's a well named Rialto-Chino-I?
>
> A. I think you're right, but it's not on the map.
>
> Q. It's outside of the plume map, though, isn't it, Rialto-Chino-1?
>
> MR. SOMMER: Meaning exhibit - -
>
> BY MR. HUNSUCKER:
>
> Q. Outside the plume there, it's located physically outside the plume drawn on Exhibit 4932, isn't it?
>
> A. I can get a map that shows where it's location is, but I believe that's correct.
>
> Q. You want to verify that?

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as a trigger for water replacement in the absence of an MCL, is that the DHS, the department charged with regulating safe drinking water, has spoken on the issue. DHS made its determination when it set the Notification Level and Response Level for perchlorate. DHS set the Notification Level at the PHG, meaning that DHS does not recommend closure of a well at that level. DHS does not recommend removing the water source until levels are 10 times the Notification Level—i.e. at the Response Level. Order WQ2005-0007 never addressed or considered Response Level.

[32] The Emhart Parties have moved for an order striking Dr. Stephens' declaration and precluding his testimony at the hearing on this matter.

A. Sure.

Q. Yeah.

A. Yes.

Q. Yes, outside the plume, correct?

A. As we've shown it in the Exhibit 7 of the declaration.

Q. Exhibit 4901?

A. Yes.

Q. And the fact that it's outside of the plume that you've drawn on that exhibit that's a part of Exhibit 4901 means it's not impacted by the 160 acres; isn't that right?

MR. SOMMER: Objection, vague.

THE WITNESS: As we've drawn this plume, that's the interpretation, yes.

BY MR. HUNSUCKER:

* * *

A. I was looking at Exhibit 9-A, for example.

Q. And Exhibit 9-A has somewhere on it Rialto-Chino-2, right?

A. Yes.

Q. Is Rialto-Chino-2 outside of the plume on - -

A. Yes.

Q. And that means that Rialto-Chino-2 is not impacted by the 160 acres, right?

A. That's correct.

(RE202.) Dr. Stephens submitted the maps referenced in the deposition as Exhibits 7 and 9A to his declaration in this proceeding. These clearly show Chino No. 1 and No. 2 to the west of the Rialto-Colton Fault, outside the Rialto-Colton Basin, and outside of the alleged perchlorate plume.

William Hunt, another expert witness for Rialto, also testified that Chino No. 1 and No. 2 draw from the Chino Basin and North Riverside Basin rather than the Rialto-Colton Basin (RE203) (groundwater would pass over the fault south of Chino 2 and Chino 2 does not draw from the Rialto-Colton Basin). Stunningly, within the last year or so, Mr. Hunt was

involved in giving a public and perhaps televised presentation with Daniel B. Stephens & Associates that demonstrated that the Chino Wells are not in the Rialto-Colton Basin and are sealed off from it by the Rialto-Colton Fault. (RE204.) Mr. Hunt testified:

> Q. So you concluded in the end that with respect to Chino Well Number 1 and Chino Well Number 2, in those areas, the groundwater wasn't migrating across the Rialto-Colton fault; correct?
>
> A. Yes, that it wasn't—it wasn't—that it was a fairly tight section of the fault.

(RE205.) The PowerPoint presentation they gave repeatedly describes the Rialto-Colton Fault as an "**Impermeable Boundary**." (RE206.) Their maps show Chino No. 1 and No. 2 as west of that fault. (*Id.*, p. 12.) Slide after slide makes the case that Chino No. 1 and No. 2 are hydrogeologically separated from the Rialto Colton basin (and thus the alleged perchlorate plume). Yet, again apparently refusing to consult its own experts, Rialto seeks to recover the costs of wellhead treatments for those two wells in this proceeding.[33]

Questioned at deposition, Mr. Fox admitted he could not say where the perchlorate in Chino No. 1 and 2 came from, could not say that it came from the 160-acre site, and could not say that it came from the former operations of WCLC. (RE210.)

Mr. Fox and the Mr. Baxter, Rialto's Director of Public Works at the time (RE211) *alone* determined which wells would receive wellhead treatments. They chose the Chino Wells out of concern for pumping restrictions in the Rialto-Colton Basin. (RE211.) Whatever they believed at the time as to the source of the perchlorate in those wells, their own experts have made it known for some time that the source is not the 160-Acre Site.

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[33] The Advocacy Team is not much help to Rialto's claim. Robert Holub, on behalf of the Advocacy Team, testified that he had no scientific basis whatsoever to conclude that perchlorate from the 160 acre parcel is in Chino Well Number 1, and no scientific basis to conclude that perchlorate from the 160 acre parcel migrated 4.5 miles from the property. (RE207.) Ms. Sturdivant testified that the Rialto Colton fault is an effective barrier. (RE208.) Mr. Thibeault testified that, in his opinion, the perchlorate in the Chino Basin comes from sources *other than* the 160-acre site, including the Colorado River water and Chilean fertilizer. (RE209.)

D. Rialto's Other Purported "Replacement Water" Costs and Theories Do Not Withstand Scrutiny

1. The Water Lease With Colton Was Not Due to Perchlorate Contamination by the Alleged Dischargers

Rialto includes as a purported cost the short-term water rights lease agreement it entered into with the City of Colton in 2003. (See Rialto Opening Brief at 134.) The costs related to that lease are not tied to the alleged perchlorate contamination at issue.

By July 2003, between its own pumping and its lease of 1600 acre-feet of water rights to the County and Fontana Union Water Company, Rialto had exhausted its pumping rights in the Rialto-Colton Basin under the 1961 Decree governing such rights. (RE212.) The "water year" runs to September 30 of the year. (RE213.) That is, by July 2003, Rialto had already pumped its legal limit in the basin—the contaminated basin. Rialto needed to lease additional water rights from Colton to cover the gap through the remaining water year—to "get through the summer months." (RE214.)

Rialto's Opening Brief and Mr. Fox's Declaration make no attempt to tie this lease, made to cover a shortfall created by the 1961 Decree restrictions, to perchlorate. In deposition, Mr. Fox attempted to do so by suggesting that Rialto's decision to shut down Chino No. 1 and No. 2 under its "internal" "zero tolerance policy" for perchlorate meant that the City did not have water from the Chino Wells available, leading to the lease. (RE215.) But as set forth above, the Chino Wells are not impacted by perchlorate allegedly coming from the 160-Acre Site. Thus, neither of Rialto's proffered reasons for the lease—exhaustion of its rights and perchlorate impacts in another basin—are tied to the alleged dischargers.

2. The Riverside Highland Emergency Tie-In

Rialto's Opening Brief and Mr. Fox's declaration also make no attempt to justify or explain the cost of the connection to the Riverside-Highland water supply system. The cost identified, $87,916.15, apparently relates to the construction of a tie-in to that water purveyor's system. (RE216 and Exhibit F to Fox Decl.)

There is no explanation as to how perchlorate from the 160-Acre Site required Rialto to incur these costs. As below, Rialto has the capacity to pump to the adjudicated limits in

the Rialto-Colton Basin. Rialto's Urban Water Management Plan dated February 2006 projects that the limits will be in place for as long as the plan extends (through 2030) and Rialto's Roadmap to Remedy calls the conditions imposing the restrictions "permanent." Chino No. 1 and Chino No. 2 are active again, and even when inactive were not impacted by perchlorate from the alleged dischargers at issue in this proceeding. Rialto does not even suggest in its Opening Brief that it has used the tie-in. Whatever use it serves must be minimal, as Mr. Hunt's Declaration does not even bother to include this source in his table of Water Production Capacity. (Hunt Decl., Table 2, p. 10 ("Occasional emergency supplies from WVWD, FWD and Riverside Highlands not included in these totals.")) And Rialto's replacement water expert opined that emergency tie-ins were considered an "unfavorable" replacement water source. (McPherson Decl. at Par. 22.)

3. Recharge Uses of the Basin

Attempting to justify its claim for cost recovery for wellhead treatments at Chino No. 1 and No. 2, Rialto contends that pumping them is necessary because "recharge into the contaminated aquifer is inhibited," implying perchlorate is to blame. (Rialto Opening Brief at 133:11-15.) This contention is contrary to the evidence.

As Rialto's expert Mr. Hunt testified, there has not been a significant artificial recharge into the Rialto-Colton Basin since 1993, years before the detection of perchlorate. (RE217, RE218.) The last recharge occurred in 1999, years after the detection of perchlorate. (RE219.) Further, the facilities previously used for recharge, Linden Ponds, were decommissioned. (Hunt Decl. ¶ 5.) Mr. Hunt has not discussed recharge with the Regional Board. (RE220.)

In fact, according to Rialto's own expert, Rialto itself does not have "the facilities to artificially recharge the Rialto Colton basin." (Hunt Decl. at p. 14.) This "absence" may be a "water supply vulnerabilit[y]" (*id.*), but it is not due to perchlorate.

4. Even on Their Face, Rialto's Costs are Overstated and Unreliable

Rialto substantially overstates its purported costs by double-counting significant costs and by including costs that they now wish to retract. The stunning overstatement and

apparent carelessness renders suspect all of Rialto's cost claims. This underscores the wisdom of the legislature in referring cost-recovery claims to the court system under Water Code Section 13304(c), a system far better suited for such adversary proceedings.

Rialto counts certain costs twice. Rialto seeks "Further expenditures on Chino Number 1 and Chino Number 2 of $310,601.78 itemized in the declaration of Hunt [sic. Fox], page 2:1-4 and Exhibit B." (Rialto Opening Brief p. 134, lines 2-3.) A few lines later in Opening Brief, Rialto separately asserts "Expenditures for water leased from Colton" of $166,500, and expenditures to obtain water from Riverside Highland Water Company of $87,916.15. Even a cursory glance at Exhibit B to the Fox Declaration readily reveals that the claimed $310,601.78 for "further expenditures on Chino Number 1 and Chino Number 2" already includes the costs of the City of Colton water rights lease ($165,000) and the expenditures related to the Riverside Highland Water Company ($87,916.15). (Fox. Decl., Ex. B) Rialto thus claims those costs twice.

During his deposition, Mr. Fox retracted a number of the costs claimed in the Rialto Opening Brief and in his sworn declaration. Mr. Fox deleted all costs related to United Strategies, Inc. ($11,536.58) (as set forth in Exhibit B to his declaration) because he had no idea what it was for (Fox Depo. 222:8-17), deleted water and electrical charges related to the Riverside Highland Water Company ($14,462.36), and deleted Brithee Electric costs of $4,594.32 and $5,600. (RE221.)

5. Rialto's Purported "Replacement Water" Past Costs—and its Proposed Future Replacement Water Wellhead Treatments—Do Not Comply With the Proposed 2007 CAO

Even if Rialto were successful in its sleight-of-hand attempt to re-write Section 13304(a) to recover past "replacement water costs," Rialto's installation of the wellhead treatments fails to comply with either the Proposed 2007 CAO or the conclusions of Rialto's own experts as to an appropriate water replacement approach. The 2007 CAO does not contemplate issuing a replacement water order as to Chino No. 2. In paragraph 1 of the proposed order section of the 2007 CAO (at page 29), the Advocacy Team calls for a proposed water replacement plan for the "five wells cited in Finding 56." As to Rialto, Finding

56 (at page 24 of the 2007 CAO) identifies only Rialto No. 2, Rialto No. 4, Rialto No. 6 and Chino No. 1. It does not identify Chino No. 2. (Only the water replacement contingency plan set forth in paragraph 2 of the 2007 CAO, page 29, purports to address Chino Well No. 2.) Similarly, while Rialto proposes new wellhead treatment for the well called Rialto No. 1 (Opening Brief, at p. 133), that well is also not listed in the 2007 CAO's replacement water section.

As to all Chino Wells, Rialto's purported costs are based on complying with its "zero tolerance policy," not the 2007 CAO's use of the public health goal (as above, itself improper). (RE222.) Even the 2007 CAO would not require "zero tolerance" for replacement water—including the additional wellhead treatment systems Rialto proposes.

6. Rialto's Purported "Replacement Water" Approach—"Past" and Future—Is Contrary to its Own Expert's Conclusions on Replacement Water

Rialto acted on its own in deciding to treat the Chino Wells, apparently ignoring or ignorant of the conclusions of its own experts on appropriate water replacement. Rialto's water replacement expert, Michael McPherson, finds the available water supply in the exact locations of the Chino No. 1 and Chino No. 2 to be unfavorable as replacement water sources. (McPherson Decl., ¶ 20.) McPherson also reached the following conclusions as to replacement water sources:

- "Further development in Rialto Basin and wellhead treatment at City of Rialto's four shutdown wells most likely are not viable sources...."
- "Pumping by City of Rialto under its water rights in other basins is not considered an adequate means of replacement...."
- "City of Rialto's rights in other basins not being recommended for the foregoing reasons, pumping by others from those other basins is likewise not recommended...."
- "Another source, the extension of emergency supplies, was considered unfavorable...."

- "Importation with treatment is the replacement water source that most nearly satisfies the various equivalency considerations."

(McPherson Decl., ¶ ¶ 18, 19, 22, and 23.)

In essence, each element of Rialto's unilateral "replacement plan"—wellhead treatment to pump in other basins (Chino No. 1 and Chino No. 2), additional pumping in the Rialto Basin (leasing the Colton pumping rights) and emergency water tie-ins (the Riverside-Highlands emergency connection)—flies in the face of Mr. McPherson's conclusions. Yet Rialto seeks to impose the costs of those actions on the dischargers, and to impose even more wellhead treatments contrary to its expert's findings.

7. Acknowledging the Overreaching of the 2007 CAO, Rialto Partially Limits its Claims

Rialto states it is not seeking damages under Section 13304(c), which "are properly the subject of a civil action." (Rialto Opening Brief at 133:2-4.) During the Fox deposition, counsel for Rialto expressly disavowed seeking certain categories of costs. (RE223.) With respect to the "four additional well sites that cannot be used because of groundwater contamination directly linked to perchlorate" that allegedly need treatment systems, counsel for Rialto stated "[w]e're not claiming the cost of outfitting those four well sites in the State board proceeding." (RE224.) (The additional four well sites are Rialto No. 1, No. 2, No. 4, and No. 6 (RE225).) Rialto is not seeking any monetary costs for the purported "loss" of a "groundwater basin." (RE226.) Rialto is not seeking the cost of conducting remedial investigation. (RE227.)

In his deposition, Mr. Fox testified that his declaration describes all of the costs with respect to perchlorate contamination that Rialto is seeking in the State board proceedings. (RE228.) Those costs are itemized in Exhibits A and B to his Declaration. (RE229.) Rialto has offered no testimony besides that set forth in Mr. Fox's declaration to address the alleged costs or damages incurred by Rialto in these proceedings. No witness summary at all purports to address the costs or damages incurred by Rialto, as Mr. Fox himself is not identified in the witness summaries submitted by Rialto. Thus, even if the Hearing Officer or

Advocacy Team believed an award under Section 13304(c) was authorized, Rialto has submitted no evidence of its claims, other than the irrelevant Chino No. 1 and No. 2 treatment claims.

E. Rialto Has Received Funding to Cover Its Claimed Costs.

Rialto has received substantial third-party funding for its perchlorate treatment attempts—in amounts exceeding the costs it claims in its Opening Brief. The 2007 CAO acknowledges that most costs to date have been covered by outside funding. (2007 CAO at ¶ 57.) So does Mr. Fox, who testified that Rialto was "fully" reimbursed for the $1,087,000 of construction costs and year of resin for the wellhead treatment at Chino No. 1 and the $809,140.42 for construction and pre-purchased resin for the treatment system at Chino No. 2. (RE230.)

Rialto has received more third-party funding than Rialto has actually spent on wellhead treatment. Rialto received $1 million through an interim agreement with Goodrich. (E201-33.) According to Mr. Fox, those funds are still sitting in an account. (RE231.) Rialto also received $1.02 Million in Proposition 50 grant funds, $750,000 from the State Water Board Cleanup and Abatement Account, a grant of approximately $119,000 from another outside source, Regional Board/SEP funds of $35,000 to $50,000, and other funding. (RE232, RE233, RE234, RE235.)

In addition, the wellhead treatment for Rialto No. 3 is paid for by the County, including all extra energy and labor costs. (Water Replacement Order Implementation Agreement with County, Exhibit J to McPherson Decl.))

Setting aside the fact that Rialto elected to put wellhead treatments on wells it admits are unaffected by the alleged "plume" from the 160-Acre Site, Rialto has received more than enough funds to cover such costs.

Mr. Fox asserted that all of the grants were reimbursable. As he went on to explain in his deposition, he meant only that "if" Rialto recovers damages from other parties then Rialto needs to repay the funds. (RE236.) Yet even that is not true. As to Cleanup and Abatement Account funds, Water Code Section 13442 provides that the public agency receiving such

funds "shall not become liable to the state board for repayment of such costs." Neither Proposition 50 itself nor the State Board resolution granting such funds to Rialto imposes any repayment obligation. (RE234; SWRCB Resolution No. 2003-0026.) As to the Goodrich Agreement, the agreement itself shows that Mr. Fox is simply mistaken about obligations to repay the money. (E201-33.)

F. Contrary to the Steady Cry of Crisis, Rialto Can Pump its Full Projected Water Rights From the Rialto-Colton Basin and Meet Demand

Despite cries of water "shortages," Rialto already has the capacity to pump the Rialto-Colton Basin to the full extent of its projections and its legal pumping rights. Rialto can meet its water needs.

1. Rialto Can Pump to its Limits.

As explained in great detail in Mr. McPherson's recitation of the various water rights decrees and agreements, Rialto's rights to pump in the Rialto-Colton Basin are subject to a 1961 Decree. (McPherson Decl.) As the groundwater drops below certain benchmark elevations in certain wells, the 1961 Decree imposes increasingly strict limits on pumping. In its Roadmap to Remedy and its Urban Water Management Plan, Rialto does not expect to ever have unlimited pumping rights in the Rialto-Colton Basin again—they assume that at least the first level of restrictions under the 1961 Decree will be "permanent."

Under the first level of restrictions imposed by the 1961 Decree, Rialto is allowed to pump 4,366 acre-feet per year from the adjudicated Rialto-Colton Basin. (See Exhibit A to McPherson Decl.; RE237; Rialto's "Roadmap to Remedy" at pp. 24-26.) The actual amount that Rialto itself can pump is presently reduced by Rialto's lease of 1600 AF/yr of its allocated pumping rights to the San Gabriel Valley Water Company as agent for the Fontana Union Water Company (through an agreement with the County of San Bernardino) and by Rialto's lease of 2400 AF/yr to the County (for use in the Rialto No. 3 wellhead treatment facility). (RE238, RE235; Agreement Regarding Bunker Hill Well and Rialto Basin Water Rights, p.4 and Standby Water Lease attached thereto.) Thus, as it stands today, Rialto itself has the right to pump only 366 AF/year from the adjudicated Rialto-Colton Basin.

According to its Urban Water Management Plan, Rialto projects pumping the Rialto Basin to its adjudicated restriction of 4,366 acre-feet/year for as far into the future as its projections go (the year 2030).[34] (RE237.) Rialto's "Roadmap to Remedy" states that "dry-year conditions"—i.e. triggering at least the first level of restrictions under the 1961 Decree—**"have become permanent."** (Roadmap to Remedy at p. 25.)

Mr. Fox testified that Rialto can pump to that limit now with existing capacity:

> Q. So between pumping Rialto three with the well head treatment and pumping Rialto five, there—the city can actually exceed its allocated water rights under the drought conditions for the Rialto Colton basin; correct?
>
> A. That's correct.

(R239; see also RE240.) (If he did the calculation, Rialto could probably pump to limits of 1961 Decree restrictions with the two available wells).)

According to Mr. Fox, Rialto No. 3 can provide up to 2000 acre-feet per year. (RE241.) The agreement with the County contemplates up to 2400 acre-feet per year (200 acre-feet per month). (Exhibit J to McPherson Decl. at p. 5 (Water Replacement Order Implementation Agreement and Water Rights Lease).) Rialto No. 5 can produce approximately 3500 acre-feet per year.[35] (RE242.) Rialto No. 5 is not impacted by perchlorate. *Id.*

Further, but for its "zero tolerance policy," Rialto could operate Rialto No. 1. Indeed, the 2007 CAO does *not* purport to require well-head treatment or replacement water for Rialto No. 1. (See 2007 CAO, Findings 66 and 56, p. 26-27 and 24, which exclude Rialto No. 1 from the list of wells requiring replacement water.) As the 2007 CAO notes, Rialto No. 1 has not exceeded even the public health goal (6 μg/l) during the prior 12 months. (See also Hunt Decl., Table 2 at p. 10, identifying "perchlorate at 5.7 ppb" in Rialto No. 1.)

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[34] The UWMP recognizes the lease of 1600 AFA through the year 2020 in its Table, reflecting 2766 AFA until that year, then the full 4366 AFA.

[35] According to Table 2 in the Hunt Declaration, Rialto No. 5 has "Actual Available Capacity" of 2,918 gpm (gallons per minute). Converted to acre-feet per year, Rialto No. 5 could produce 4703 acre-feet per year (1000 gpm = 4.42 AF per day); see http://www.sjd.water.ca.gov/drainage/usefulinfo/index.cfm.

According to Table 2 of the Hunt Declaration, Rialto No. 1 has a rated capacity of 2,167 gpm. (Hunt Decl., p.10.) That capacity converts to 3,496 acre-feet per year. [36]

Thus, Rialto's *existing* production capacity in the Rialto-Colton Basin is more than enough to meet its projected pumping from that basin.

2. Rialto Can Meet Its Water Needs.

Rialto presently has sufficient water supply capacity to satisfy "Title 22" (California Code of Regulations) requirements for capacity. (RE243.) Rialto has always met demand. (RE244, RE245.) Rialto also satisfies DHS requirements of meeting demand even if Rialto's largest well goes out of service. (RE246.)

Even under the proposed regulations cited by Mr. Hunt, the proposed California Water Works Standards (CCR Title 22, Chapter 16) (RE247), Rialto can meet the proposed requirements for Peak Hourly Demand (PHD). (Hunt Decl. at p.13 and RE247.) As to the proposed regulations on "MDD" or maximum daily demand, Mr. Hunt failed to follow the proposed regulations in making his calculations, rendering his analysis useless. Although Mr. Hunt admitted that daily water demand figures—the primary starting point for calculating MDD under the proposed regulations—were probably available to him, he never reviewed them or even asked for them. (RE248.) Instead he used monthly averages and then purported to invoke a multiplier of 1.5 to establish MDD. (RE249.) Further, Mr. Hunt evaluated demand in gallons per minute, not a daily demand as required by the proposed regulations. (See Hunt Decl. p12; RE250.) If Rialto's aim was to demonstrate the "supply shortfalls" it has allegedly suffered, Rialto has missed the target completely. Rialto admits they meet all current regulatory requirements, would meet PHD under the proposed requirements, and failed to follow the proposed regulations in purporting to calculate MDD.

Mr. Hunt also admitted that he made no effort to distinguish the cause of lost capacity in making his assertions, and admitted that Rialto has "lost" capacity (1) due to well closures

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[36] Further, Hunt lists perchlorate levels for Rialto No. 2 and No. 4 as under 10 times the "action level," meaning these wells also could be operated under DHS guidance, adding 3299 AFA and 4020 AFA respectively. (See Hunt Decl., Table 2.)

that have nothing to do with perchlorate and (2) due to the 1961 Decree restrictions. (RE251.) As Mr. McPherson stated, no one in Rialto is dying of thirst, despite every effort to raise that cry.

G. Summary

Rialto has no authority to recover costs under Water Code Section 13304. Even if it did, the costs were incurred for treatment of wells in another basin and Rialto's experts admit a lack of causation by the alleged dischargers. Rialto's claims for cost suffer a host of other defects, and no recovery should be permitted.

IV. Conclusion

For all the foregoing reasons, the proposed 2007 CAO should be rescinded as to the Emhart Parties with prejudice and all proceedings before the State Water Board and Santa Ana Regional Board against the Emhart Parties termination with prejudice.

Dated: June 7, 2007

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