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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL and the TOXIC SUBSTANCES CONTROL ACCOUNT,

Plaintiffs,

v.

NL INDUSTRIES, INC., et al.,

Defendants.

No. 2:20-cv-11293-SVW-JPRx

PLAINTIFFS' PRETRIAL BRIEF

Judge: Stephen V. Wilson
Action Filed: December 14, 2020
Trial Date: May 30, 2023

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I. Introduction

The Vernon Plant (the "Plant"), a former industrial site in Vernon, California, engaged in secondary lead smelting activities[1] for over eight decades. The Plant received unusable lead-bearing waste, principally spent lead-acid car batteries, and processed it to recover usable lead and lead alloys. These activities released large amounts of pollution to the air, ground, groundwater, and built structures, contaminating the Plant and its surroundings. Exide Technologies, LLC ("Exide"), the final operator of the Vernon Plant, was responsible for investigating and cleaning up the contamination. But Exide went bankrupt and abandoned the Plant.

Plaintiffs, the California Department of Toxic Substances Control ("DTSC") and the Toxic Substances Control Account, are state agencies charged with protecting Californians from harmful toxic substances. Plaintiffs have spent millions of dollars responding to the Plant's hazardous substance releases. To recover these public costs, Plaintiffs sued nine defendants ("Defendants"), bringing—as relevant here—cost-recovery claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the statute's state-law counterpart, the Hazardous Substance Account Act ("HSAA").

These claims have four basic *prima facie* elements.[2] First, the plaintiff must show that "the site on which the hazardous substances are contained is a 'facility.'" *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (quotations omitted). Second, the plaintiff must show that "a 'release' or 'threatened release' of any 'hazardous substance' from the facility has occurred." *Id*. (quotations

[1] A primary lead smelter produces lead from mined ore; a secondary lead smelter produces lead from lead-bearing waste.

[2] Plaintiffs' CERCLA and HSAA cost-recovery claims have the same *prima facie* elements. Cal. Health & Safety Code § 25323.5(a)(1) ("'Responsible party' or 'liable person,' . . . means those persons described in [CERCLA] Section 107(a) . . . ."); *Orange Cnty. Water Dist. v. Sabic Innovative Plastics US, LLC* (*Sabic*), 14 Cal. App. 5th 343, 371 (2017) ("Although the HSAA and CERCLA are not identical, the HSAA adopts CERCLA's standards for determining liability.").

omitted). Third, under the release-causation element, the plaintiff must show that "such 'release' or 'threatened release' has caused the plaintiff to incur response costs." *Id.* at 870–71 (quotations omitted).[3] Fourth, under the covered-person element, the plaintiff must show that each "defendant is within one of four classes of persons subject to [CERCLA's] liability provisions." *See id.* at 871 (quotations omitted).

Here, the nine Defendants divide into two categories of "covered persons" subject to CERCLA liability. Two Defendants—NL Industries, Inc. ("NL") and Gould Electronics Inc. ("GEI")—are covered persons because they formerly owned and operated the Vernon Plant, or are successors to entities that did so. *See* 42 U.S.C. § 9607(a)(2). [4] The remaining seven Defendants—Clarios, LLC ("Clarios"); International Metals Ekco, Ltd. ("Ekco"); Kinsbursky Bros. Supply, Inc. ("Kinsbursky"); Oregon Tool, Inc. (f/k/a Blount, Inc.) ("Oregon Tool"); Quemetco, Inc. ("Quemetco"); Ramcar Batteries, Inc. ("Ramcar"); and Trojan Battery Company, LLC ("Trojan")—are covered persons because they or their predecessors[5] arranged to transport, and/or transported, hazardous waste to the Vernon Plant. *See* 42 U.S.C. § 9607(a)(3)–(4). Plaintiffs will refer to these Defendants as the "A/T Defendants."

In May 2022, the Court held a "Phase I" trial about the "compensable cleanup area – the area within which Plaintiffs are entitled under CERCLA and HSAA to seek

[3] Under the third element, Plaintiffs' costs are presumed to be consistent with the National Contingency Plan ("NCP") and thus recoverable. The parties have agreed to defer the issue of NCP consistency, as well as the precise amount of Plaintiffs' recoverable response costs, to a later phase. *See* Dkt. 517 at 6 (Joint Case Management Report) ("the consistency of Plaintiffs' response costs with the National Contingency Plan" will not be part of Phase II); Dkt. 593 at 1–2 (Pretrial Order) (declining to disturb the parties' agreement).

[4] NL and its predecessor Morris P. Kirk & Son, Inc. ("Kirk") owned and operated the Plant; GEI's predecessor Gould Inc. ("Gould"), but not GEI itself, owned and operated the Plant.

[5] As Plaintiffs will explain in their post-trial contentions of law and fact, Clarios—formerly known as Johnson Controls Battery Group, LLC—is liable as a successor to the relevant liabilities of Globe-Union Inc., Johnson Controls, Inc., and Johnson Controls Battery Group, Inc.

recovery of their response costs." Dkt. 227 at 18; *see* Dkt. 231. After that trial, the Court issued a Decision and Verdict holding that "Defendants' [airborne] releases [] caused Plaintiffs to incur response costs within the half-mile radius surrounding the Vernon Plant," an area known as the Industrial Area, but not the more distant Residential Areas. Dkt. 482 at 63.

Then, the Court set this "Phase II" trial. This trial is slated to address the four aforementioned *prima facie* elements of Plaintiffs' CERCLA and HSAA cost-recovery claims; Defendants' argument that DTSC is a "covered person" that is liable under CERCLA and HSAA; and Defendants' affirmative defenses except those relating to the divisibility of harm. Dkt. 593 at 1–2. Many of the *prima facie* elements of Plaintiffs' claims are, or should be, uncontroversial. The Vernon Plant is undoubtedly a "facility" (Element 1), from which releases or threatened releases occurred (Element 2). Plaintiffs' response costs were undoubtedly caused by those releases (Element 3). Indeed, the Court found release-causation in the Industrial Area after the Phase I trial, *see* Dkt. 482 at 63, and GEI stipulated to release-causation in Phase II, *see* Dkt. 679 at 4. As for covered-person status (Element 4), GEI and NL have stipulated or admitted that they were former owners and operators of the Plant when hazardous substances were disposed there, *id.* at 3; Dkt. 628 at 2–3, and there is ample evidence that the A/T Defendants engaged in arranger or transporter conduct.

Accordingly, Plaintiffs anticipate that the Phase II trial will center on several key issues. First, the A/T Defendants will likely contest whether they had the requisite intent to be deemed as "arrangers" under the covered-person element. But Plaintiffs' evidence conclusively shows such intent. Second, the A/T Defendants will assert an affirmative defense under the Superfund Recycling Equity Act ("SREA"), 42 U.S.C. § 9627, arguing that their shipments to the Vernon Plant qualify for a safe harbor from CERCLA liability. Plaintiffs' evidence shows that the A/T Defendants cannot prove the many necessary elements of a SREA defense. In any event, the A/T Defendants' SREA defense cannot limit their HSAA liability. Third, some Defendants will argue

that the Plant's hazardous substance releases did not cause Plaintiffs' response costs relating to deeper layers of groundwater beneath the Vernon Plant. But Plaintiffs' experts opine the Plant's releases have threatened to contaminate—and actually contaminated—the so-called Exposition Aquifer beneath the Plant, and also threatened to contaminate even deeper groundwater formations that are available for drinking water. Fourth, Defendants will contend that DTSC is liable as an "operator" of the Vernon Plant. This argument is unavailing because DTSC's regulatory oversight of the Plant has not constituted operating it, and CERCLA and the HSAA expressly protect government regulators like DTSC from liability.

Plaintiffs also understand that NL intends to argue that no future response actions are needed because the current contamination at the Vernon Plant poses no threat to the environment or human health. But the Court already ruled at the Final Pretrial Conference that this evidence is irrelevant to Phase II. In any event, if necessary, Plaintiffs will provide ample evidence to show that the extensive contamination remaining at the Plant poses a serious risk, requiring at a minimum continued investigation and assessment of potential remedies.

Plaintiffs will prove all elements of CERCLA and HSAA liability at issue in the Phase II trial. Defendants' defenses will fall short. Defendants likewise will not show that DTSC is liable as an operator. The Court should find for Plaintiffs.[6]

II. Factual Background

A. The Vernon Plant

The Vernon Plant is a former industrial site in the City of Vernon consisting of five parcels.[7] For more than eight decades, operations at the Vernon Plant released hazardous substances into the air, soil, and water, resulting in extensive contamination at and near the site. Sampling data confirms that soil, soil gas, dust, groundwater, and

[6] For readability, this brief largely dispenses with evidentiary citations. Such citations will be provided in Plaintiffs' post-trial contentions of law and fact.

[7] These parcels are located at 2700 and 2717 South Indiana Street, 3900 East 26th Street, and 3841 and 3901 Bandini Boulevard in Vernon, California.

built structures at and near the Vernon Plant contain hazardous substances above levels deemed safe by regulators.

The Vernon Plant's history divides into two phases. During the first phase, from about 1927 to 1982, a secondary lead smelter operated in the Plant's South Yard, and for most of this period there were also various other industrial activities at the Plant. Between 1980 and 1982, a more modern smelter was constructed in the Plant's North Yard to replace the old smelter, which was demolished in 1983. The second phase of Vernon Plant operations consists of the time period when the new smelter operated, which was from late 1982 until all smelter operations ceased in 2015.

Although two smelters operated at the Vernon Plant, the industrial process remained the same. The Plant received lead-acid batteries and other lead-bearing waste. This waste was melted and refined at high heat to separate lead from other constituents. With this lead, the Plant made ingots of pure lead or lead alloys.

B. Spent Lead Acid Batteries and Secondary Lead Smelting

Most of the lead-bearing waste materials processed at the Vernon Plant over the decades were spent lead acid-batteries. Lead-acid batteries, which are used in motor vehicles and some other applications, consist of several cells, each comprised of a series of metallic lead plates and lead oxide paste that is applied to the plates. The plates are submerged in an electrolyte solution of sulfuric acid. The batteries contain some other lead components, such as posts (battery terminals), and are enclosed inside an exterior case (typically made of plastic or rubber).

Once they go bad, spent lead-acid batteries and/or their components are typically sent to secondary lead smelters to recover lead. The process of recovering lead from spent batteries at the Vernon Plant involved three primary steps: (1) battery breaking (to separate battery components); (2) smelting (to remove impurities and recover pure lead); and (3) refining (to further purify the lead and sometimes add constituents to meet customers' requirements).

Breaking. The Vernon Plant broke apart spent batteries. Once broken, the Plant

separated the batteries' three main components: the lead components, the plastic or rubber casing, and the liquid sulfuric acid. In the early years, the sulfuric acid was spilled or dumped into pits, including an acid pit in the Plant's West Yard. Later, the Plant neutralized sulfuric acid. The plastic or rubber casing was dumped or, in later years, sent off-site for disposal or recycling.

Smelting. In the second step, lead-bearing battery components (and other lead-bearing materials received by the Plant) were placed into large furnaces. The heat caused the lead-bearing materials to melt. Once the material was molten, impurities known as dross rose to the top. Dross typically had a glass-like appearance and was composed primarily of metal oxides, as well as other impurities that were present in the original raw material. Dross was skimmed off the surface of the molten metal and disposed of as waste. This smelting process would also create slag, which was formed when flux materials (such as limestone) were added to the molten metal to help remove impurities. The flux material reacted with the impurities to form slag, which was also skimmed off the surface of the molten metal and had to be disposed as waste.

Refining. Once the smelting process was complete, the Vernon Plant's operators transferred the molten lead into refining pots, where the lead was further purified. Near the end of this refining process, the Vernon Plant's operators would sometimes add other metals in conformance with specifications provided by entities that received lead from the Plant. The refined lead and lead alloys were then placed into molds to cool into solid ingots, which were used by the Plant's customers—primarily battery companies—to manufacture new products.

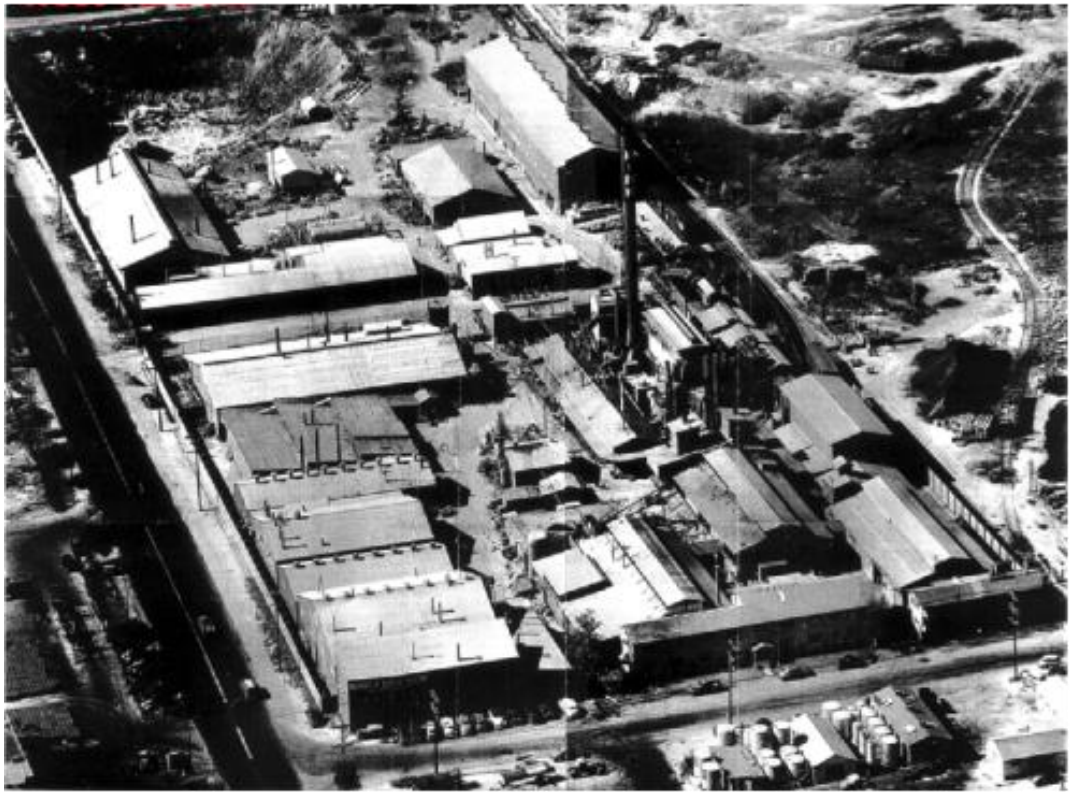
C. History of Disposals and Releases at the Vernon Plant

Aerial photography confirms that Kirk, NL's predecessor, brought the Vernon Plant into operation by 1927. Likewise, a 1928 insurance map documents the presence of a smelter. During these early years, the Plant's operations occupied only the area now known as the South Yard.

Over the two ensuing decades, the Vernon Plant expanded—first to the west (to

an area now known as the West Yard) and then to the north (to an area now known as the North Yard). An insurance map reveals that by 1950, the Vernon Plant occupied all three yards. Later, the Vernon Plant also came to encompass a property to the east, just across Indiana Street, which housed an administrative building.

As noted, a secondary lead smelter generates several hazardous waste products that must be disposed or treated, including dross, slag, sulfuric acid, and battery casings. During the early decades, Kirk often chose to dump this waste on-site. Several large, unlined pits at the Plant were used for dumping, including a massive pit in the West Yard that was first excavated in the 1930s and was subsequently expanded. An aerial photograph from around 1950 (Exhibit PX_2-0107) shows the pit in the top left:



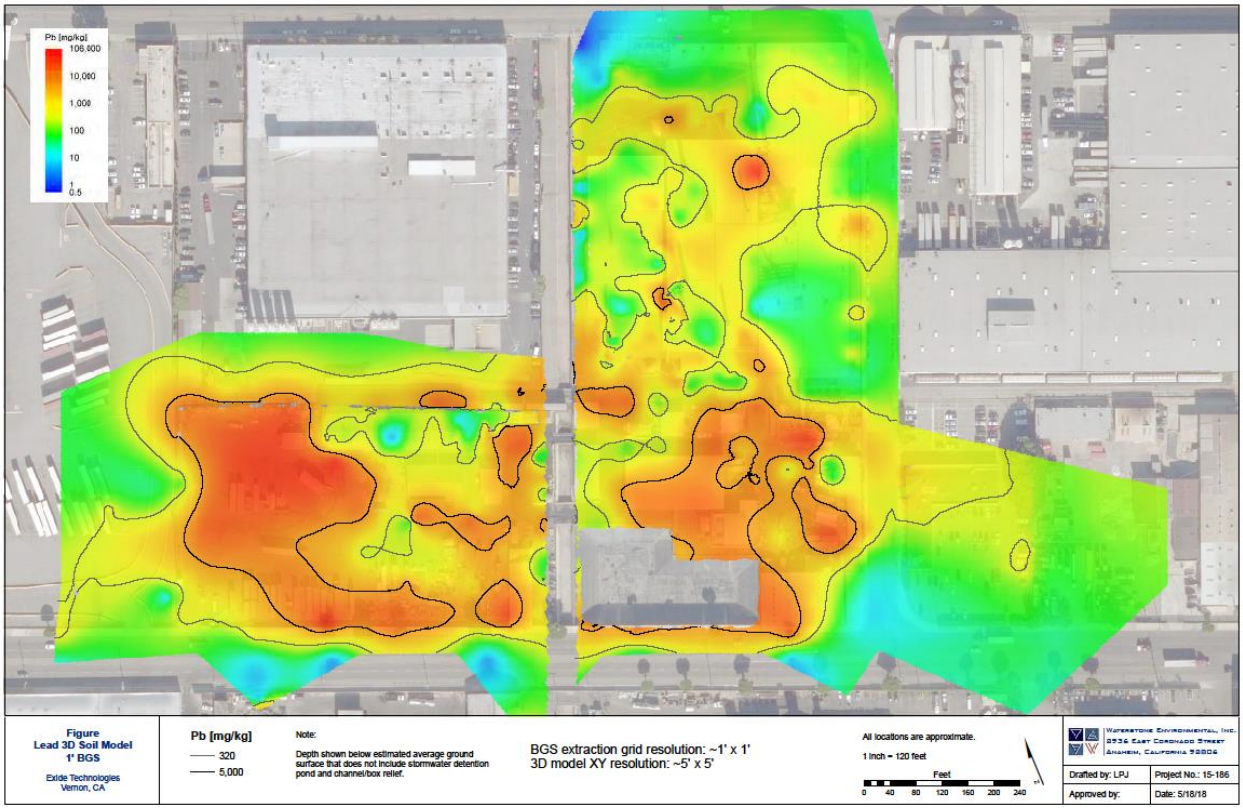
Former Vernon Plant workers recall the West Yard pit being as deep as 70 or 80 feet, and stretching as much as 200 feet across. The pit was used intensively in the 1940s and 1950s, and was completely filled by 1959. A variety of hazardous substances were disposed in the pit, including slag, old battery casings, and drums.

The West Yard pit was only one of several dumping grounds used by NL and

Kirk. Another large pit was constructed just south of the Vernon Plant across Bandini Boulevard. Likewise, the North Yard was home for decades to various waste piles. In the South Yard, soil borings have confirmed that large amounts of hazardous waste were buried as fill material near a rainwater retention pond that exists today.

D. Current Contamination

During these operations, arsenic, trichloroethylene ("TCE"), and other hazardous substances were disposed and released at and near the Vernon Plant. The resulting contamination remains today, as confirmed by high contaminant levels found in soil, soil gas, groundwater, and built improvements. The following figure (Exhibit PX_2-0020) depicts soil lead concentrations (in mg/kg) 1 foot below the surface.



As the figure shows, the highest concentrations of lead contamination are found in the West Yard, which served as the Plant's dumping ground for many decades. Extensive contamination is also present in the South Yard, which for over fifty years hosted the secondary lead smelter operated by NL and its predecessor Kirk. Even in the North Yard, which was home to the more modern smelter constructed by Gould

that better controlled toxic releases, there is significant lead contamination.

E. Industrial Area

The Vernon Plant's operations caused contamination beyond its boundaries. As the Court held in its Phase I Decision and Verdict, the Plant's airborne lead emissions contaminated the Industrial Area within a half-mile radius of the Plant. *See* Dkt. 482 at 1, 63. As noted, there also was a large disposal pit used by the Vernon Plant immediately to the south of Bandini Boulevard. There were also documented releases of contaminated stormwater running off the Vernon Plant and onto adjacent streets. Plaintiffs' experts also identify offsite monitoring wells showing groundwater contamination emanating from the Vernon Plant. Finally, sampling data and aerial photographs suggest the West Yard dump pit extended beyond the strict property boundary and into the adjoining property to the west.

F. 1980 Soil Removal in the North Yard

A transition occurred at the Vernon Plant after 1979, when NL sold the Plant to Gould, GEI's predecessor. Between 1980 and 1982, Gould constructed a new smelter in the North Yard. After the new smelter began operating in fall 1982, Gould demolished the old smelter in the South Yard that Gould, NL, and Kirk had operated.

Before the new smelter was constructed, Gould conducted shallow soil sampling in the North Yard and uncovered lead-contaminated fill material left behind by NL and Kirk. In response, Gould in 1980 removed some shallow soil in the North Yard at varying depths of between six inches to 3.5 feet. Gould then replaced this soil.

This soil removal left untouched deeper contamination that NL and Kirk had caused by breaking and storing lead-acid batteries on bare soil, which had allowed lead to leach and penetrate deep into the North Yard's soils. NL and Kirk's contribution to deep soil contamination in the North Yard has been confirmed by deeper soil samples taken both in and after 1980.

G. Plaintiffs and Their Response Actions to Date

Plaintiffs are DTSC and the Toxic Substances Control Account, a fund

administered by DTSC that has paid for response costs relating to the Plant. DTSC's predecessor was established in the early 1970s as a unit within the California Department of Health Services ("DHS"). That unit came to be known as the Toxic Substances Control Division in 1981 and became a separate department—DTSC—in 1991. DTSC is a regulator charged with protecting Californians from harmful toxic substances, regulating hazardous waste facilities like the Vernon Plant, and overseeing the cleanup of contaminated properties.

DHS started regulating the Vernon Plant in the early 1980s, after the passage of the Resource Conservation and Recovery Act of 1976 ("RCRA"). DTSC's oversight of the Plant ramped up significantly in the 2000s, after DTSC and Exide (the Plant's final owner and operator) entered a consent order finding that the Plant had released hazardous substances into the environment. Exide was responsible for investigating and cleaning up the resulting contamination. As a regulator, DTSC reviewed reports submitted by Exide, provided comments, and ensured that Exide's responses met legal requirements designed to protect human health and the environment.

In 2015, the Vernon Plant ceased operations. Under DTSC's RCRA regulatory oversight, Exide planned for the "closure" of the Vernon Plant, which involves ensuring that the Plant is safely closed, dismantled, and decontaminated. Around this time, DTSC started to ramp up its investigation and cleanup activities in so-called "offsite areas" that DTSC believed had been contaminated by the Vernon Plant's emissions, including the Residential Areas that were the focus of the Phase I trial.

Before it finished closing the Vernon Plant, Exide filed for bankruptcy in May 2020. *See In re Exide Holdings*, No. 20-1157-CSS, 2021 WL 3145612, at *1 (D. Del. July 26, 2021). In October 2020, a bankruptcy court confirmed Exide's bankruptcy plan over DTSC's objections, allowing the company to abandon the Vernon Plant. *Id.* at *2–3. To prevent the abandoned Vernon Plant from causing an acute release of hazardous substances that would endanger the public, DTSC agreed to allow the Plant to be transferred to the Vernon Environmental Response Trust ("VERT"), a legal

entity that now owns and is responsible for the Vernon Plant. DTSC and the U.S. Environmental Protection Agency ("EPA") are the VERT's key beneficiaries, as reflected in trust documents approved by the bankruptcy court.

Using certain non-taxpayer funds transferred to it during the bankruptcy process, the VERT continued the Vernon Plant's closure work for some time. In particular, the VERT finished deconstructing the North Yard smelter building in or around May 2022. Since May 2022, monitoring, safety, security, and continuing closure work has been covered by $132 million in taxpayer money appropriated by the California Legislature in 2021. Because these funds are public monies that must be managed by a state agency, DTSC has contracted for that work.

Throughout this time, Plaintiffs have responded and incurred millions of dollars in taxpayer-funded costs at the Vernon Plant and in the Industrial Area because of the Plant's hazardous substance releases.

H. Defendants

The nine Defendants divide into two groups. The first group consists of NL and GEI, who are liable under CERCLA and the HSAA because they are, or are successors to, entities that owned or operated the Vernon Plant while hazardous waste was disposed there. *See* 42 U.S.C. § 9607(a)(2). NL admitted that it is a successor to the relevant liabilities of Kirk, which owned the Plant from December 12, 1927, to 1974. Dkt. 628 at 2–3. In 1974, NL took over ownership of the Plant from Kirk, then continued to own the Plant until January 31, 1979. *Id.* GEI admitted it is a successor to Gould, which owned and operated the Plant from January 31, 1979, until at least December 31, 1982. Dkt. 679 at 3.[8]

The second group is comprised of the A/T Defendants, who arranged to transport, and/or transported, hazardous waste to the Vernon Plant. *See* 42 U.S.C. § 9607(a)(3)–(4). This group consists of Clarios, Ekco, Kinsbursky, Oregon Tool,

[8] Although irrelevant to Phase II, Plaintiffs and GEI dispute whether GEI continued to own or operate the Vernon Plant from January 1983 to April 1984.

Quemetco, Ramcar, and Trojan. Two important differences exist within this group. First, although all the A/T Defendants were arrangers under CERCLA Section 107(a)(3), only Clarios, Ekco, Kinsbursky, and Quemetco were also transporters under Section 107(a)(4). Second, the available evidence indicates that Kinsbursky, Oregon Tool, Quemetco, and Ramcar shipped hazardous waste to the Vernon Plant only after 1982. The remaining three Defendants (Clarios, Ekco, and Trojan) each shipped hazardous waste to the Vernon Plant both before and after 1982.

III. Plaintiffs Satisfy All Affirmative Elements of CERCLA Liability at Issue.

The Phase II trial will determine Defendants' liability for Plaintiffs' CERCLA Section 107(a) cost recovery claim and their parallel claim under the HSAA. Each of the four elements of these claims is satisfied.

A. The Vernon Plant Is a CERCLA "Facility."

Most Defendants have admitted that, at minimum, the Vernon Plant is a CERCLA "facility." Even absent such admissions, the uncontroverted evidence establishes that the Plant contained buildings and other improvements—most notably, a secondary lead smelter—while it operated, and thus satisfies the definition of a "facility" under CERCLA. *See* 42 U.S.C. § 9601(9)(A) ("facility" includes "any building, structure, installation, equipment"). Plaintiffs' and many of the Defendants' experts have accepted that "hazardous substance[s]" have "come to be located" at the "site" that is the Vernon Plant, which is another basis to find the Plant to be a facility. *See* 42 U.S.C. § 9601(9)(B).[9]

[9] Because the Court found in its Decision and Verdict that the Vernon Plant's airborne releases had contaminated the Industrial Area, *see* Dkt. 482 at 1, 63, the Court could find that the "facility" includes both the Plant and the adjoining Industrial Area because "hazardous substance[s]" have "come to be located" there. *See* 42 U.S.C. § 9601(9)(B). That said, it makes little practical difference whether the "facility" includes the Industrial Area, because Plaintiffs' ability to recover response costs in the Industrial Area does not turn on whether it is part of the "facility." Rather, Plaintiffs may recover "all costs of removal or remedial action" caused by the Plant's releases. *See id.* § 9607(a)(4)(A).

B. The Plant's Releases Caused Plaintiffs To Incur Response Costs.

Under the second and third elements of a CERCLA cost-recovery claim, Plaintiffs must show that "a 'release' or 'threatened release' of any 'hazardous substance' from the [the Vernon Plant] has occurred," and that "such 'release' or 'threatened release' caused [Plaintiffs] to incur response costs." *See Carson Harbor Vill., Ltd.*, 270 F.3d at 870 (quotations omitted).

1. The Vernon Plant Released Hazardous Substances.

CERCLA defines "release" broadly to encompass virtually any way a hazardous substance can enter the environment: "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment [with certain exclusions]." 42 U.S.C. § 9601(22).

It is indisputable that releases have occurred from the Vernon Plant throughout its operational history. In the Decision and Verdict after the Phase I trial, the Court found undisputed that the Plant had released lead and other hazardous substances into the air throughout its many decades of operation. *See* Dkt. 482 at 1. Indeed, NL and GEI have admitted that the Vernon Plant released hazardous substances,[10] and many of the other Defendants' experts have embraced that there were releases.

Even more, Plaintiffs' experts Dr. Fredric Quivik, Dr. W. Richard Laton, and Vandana Mistry have amassed evidence showing that the Vernon Plant released massive amounts of hazardous substances to the ground, groundwater, and built structures. As Dr. Quivik observes in his study of the Vernon Plant's operational history, the most significant releases include a massive slag pit in the West Yard where slag containing heavy metals was dumped over multiple decades; a nearby acid pit where battery acid was dumped; battery storage and breaking activities throughout the Plant, often on bare soil, that released sulfuric acid and lead to the ground; and myriad other releases such as spills of TCE and leaks from waste piles.

[10] *See* Dkt. 679 at 3–4 (GEI's stipulation); PX_2-0408, PX_2-0409 (NL's admissions).

As Dr. Laton and Vandana Mistry attest, the Vernon Plant's reams of sampling data corroborate this historical analysis. The Vernon Plant's subsurface is pervasively contaminated, principally from heavy metals, at varying depths. Soil gas data shows volatile organic compound contamination in multiple areas, and acidic conditions are present in multiple areas (including near the former acid pit) that may mobilize heavy metals and cause them to migrate downward. Built structures at the Vernon Plant have been found to be pervasively contaminated with lead.

The Vernon Plant likewise released pollutants to groundwater, most worryingly TCE. Dr. Quivik observes that TCE was used and released in the South Yard of the Vernon Plant, where a metal extrusion operation was formerly located. Dr. Laton and Ms. Mistry state that sampling data corroborates such releases and also demonstrates that TCE from the Vernon Plant is entering a "perched" aquifer that lies beneath the Vernon Plant, then migrating further downward into the deeper Exposition Aquifer. Dr. Laton confirms that this TCE contamination poses risks to even deeper groundwater formations that are available for drinking water.

2. The Vernon Plant's Releases Caused Plaintiffs To Incur Response Costs.

The Vernon Plant's releases undoubtedly caused Plaintiffs' response costs at the Vernon Plant and in the Industrial Area. CERCLA requires only a "causal link" between the Vernon Plant's releases and Plaintiffs' response costs. *See* Dkt. 482 at 5 (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1186 (C.D. Cal. 2003)). Notably, Plaintiffs "need not show that a *specific* defendant's waste caused Plaintiffs to incur response costs," *id.* at 6–7, or show "actual contamination, *id.* at 13. And nothing in CERCLA requires Plaintiffs to catalogue every instance when the Vernon Plant released hazardous substances, or reconstruct the entire history of how the Plant became so heavily contaminated. *See Carson Harbor Vill., Ltd.*, 287 F. Supp. 2d at 1186–87 (collecting cases requiring only a "loose" causal nexus between releases and response costs). Defendants may offer such an analysis later

when attempting to establish divisibility and equitably allocating liability among jointly and severally liable parties, but such an analysis is irrelevant now.

Following the Phase I trial, the Court concluded that the Vernon Plant's airborne releases "caused Plaintiffs to incur response costs within the half-mile radius surrounding the Vernon Plant," i.e., the Industrial Area. *See* Dkt. 482 at 63.[11] Because the Court has already decided airborne release causation in the Industrial Area, there are only two remaining release-causation issues for the Phase II trial: (1) whether the Vernon Plant's myriad releases caused Plaintiffs to incur response costs at the Plant itself; and (2) whether the Plant's non-airborne releases caused Plaintiffs to incur corresponding response costs in the Industrial Area.

First, releases at the Vernon Plant undoubtedly caused Plaintiffs to incur response costs there. As the Court recognized in its Decision and Verdict, release causation is "relatively simple" to the extent "a release, contamination, and [response actions] occur at one site." *See* Dkt. 482 at 16 n.13. Some courts have gone as far as to say that release causation is "presumed" in such cases. *See Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382, 1386 (W.D. Mo. 1994).

DTSC witness Peter V. Ruttan attests that Plaintiffs have incurred response costs at the Vernon Plant because of on-site releases of hazardous substances to the ground, groundwater, and air. Mr. Ruttan states that DTSC acted and incurred response costs because DTSC—as a regulator of the Vernon Plant that knew about sampling data indicating risky contamination—reasonably came to believe that the

[11] The Court later held that response costs in the Industrial Area caused by airborne releases are not recoverable from NL and GEI. *See* Dkt. 526. The A/T Defendants have filed a partial summary judgment motion seeking a ruling that they also are not liable for response costs caused by such airborne releases; the Court has not yet resolved that motion. *See* Dkt. 629. Regardless of the Court's ruling about NL and GEI, and regardless of how the Court resolves the A/T Defendants' motion, it remains true that the Vernon Plant's airborne releases caused Plaintiffs to incur response costs in the Industrial Area. Even if the Court finds those costs to be unrecoverable, the Vernon Plant nonetheless caused Plaintiffs to incur them.

Vernon Plant's releases necessitated a government response. This suffices to prove release causation. Mr. Ruttan's testimony is further corroborated by Dr. Laton's, Ms. Mistry's, and Dr. Quivik's testimony about the severity of the contamination caused by the many decades of releases from the Plant, which provides circumstantial evidence that Plaintiffs were responding to the Plant's releases and nothing else.

Second, releases at the Vernon Plant caused Plaintiffs to incur response costs immediately nearby in the Industrial Area. Plaintiffs incurred myriad regulatory costs to review Exide's sampling plans for soil and dust in the Industrial Area, and to analyze the results of that sampling. Likewise, Plaintiffs supervised Exide's efforts to sample and clean a stormwater channel that connected the Vernon Plant to the Los Angeles River. These unreimbursed costs were squarely targeted at the Vernon Plant's contamination that had been carried beyond the Plant's boundaries.

Reflecting the overwhelming evidence of release-causation, GEI has admitted that releases from the Vernon Plant "caused DTSC to incur at least some response costs." *See* Dkt. 679 at 4. And the other Defendants will not be able to seriously challenge release-causation.[12]

C. All Defendants Are Covered Persons Under CERCLA.

Each Defendant falls within one or more of the four covered-person categories. NL and its predecessor Kirk, as well as GEI's predecessor Gould, owned and operated the Vernon Plant while hazardous substances were disposed there. Accordingly, NL and GEI are jointly and severally liable covered persons. *See* 42 U.S.C. § 9607(a)(2).

All the A/T Defendants were arrangers because they arranged for the disposal

[12] A full and complete accounting of Plaintiffs' past response costs is neither necessary for nor within the scope of the Phase II trial. That is because a liability determination under CERCLA requires only that Plaintiffs incurred *some* response costs. *Cf. City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1005 (9th Cir. 2010) (explaining that a CERCLA claim becomes ripe "after plaintiffs spend some money responding to an environmental hazard" (quotations omitted)). The parties have reserved the issue of the precise *amount* of Plaintiffs' recoverable response costs under the NCP for a future phase. *See supra* n.3.

or treatment of hazardous substances at the Vernon Plant. *See id.* § 9607(a)(3). Of the A/T Defendants, four—Clarios, Ekco, Kinsbursky, and Quemetco—were also transporters because they accepted hazardous substances for transport to the Vernon Plant, which was a disposal or treatment facility. *See id.* § 9607(a)(4).

1. NL and GEI Have Admitted to Covered-Person Status.

NL and GEI have stipulated or admitted to all the elements of covered-person status: specifically, that disposals of hazardous substances occurred at the Vernon Plant while they (or their predecessor) owned or operated it.[13] *See* 42 U.S.C. § 9607(a)(2) (statutory provision pertaining to former owners and operators). Because NL and GEI are covered persons, they are "joint[ly]," "several[ly]," and "fully liable for the entire[ty]" of Plaintiffs' response costs caused by the Vernon Plant's releases, even if NL and GEI were "in fact responsible for only a fraction of the contamination." *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 945 (9th Cir. 2002). NL and GEI may avoid such joint and several liability only to the extent they prove an affirmative defense such as divisibility or apportionment, *see Burlington N. & Santa Fe Ry. Co. v. United States* (*BNSF*), 556 U.S. 599, 613–15 (2009), an issue that the Court expressly reserved for a future phase of this action, *see* Dkt. 593 at 3.

2. The Arranger/Transporter Defendants Are Covered Persons.

All the A/T Defendants were CERCLA arrangers because they took intentional steps to send lead-bearing materials, which are hazardous substances, to the Vernon Plant for either treatment of disposal. *See* 42 U.S.C. § 9607(a)(3). This conclusion is supported by evidence about the A/T Defendants' shipments, their knowledge about what would happen to the lead-bearing materials once they arrived at the Vernon

[13] *See* Dkt. 628 at 2 (NL's description of its admissions that it is a successor to Kirk with regard to liabilities relating to the Vernon Plant; that Kirk owned or operated the Vernon Plant; that NL owned or operated the Vernon Plant; and that there was a disposal of a hazardous at the time NL and Kirk owned or operated the Vernon Plant); Dkt. 679 at 3–4 (GEI's stipulation that it is a successor to Gould's liabilities; that Gould owned or operated the Vernon Plant; and that a disposal of a hazardous substance occurred while Gould owned or operated the Vernon Plant).

Plant, certain A/T Defendants' purchases of reclaimed lead from the Vernon Plant, and the absence of other reasons for sending materials to the Vernon Plant.

Some A/T Defendants may resist arranger liability by arguing that the materials they sent to the Plant were "useful product[s]," not "waste." *See Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 508 F.3d 930, 934 (9th Cir. 2007). But each Defendant sent unusable junk—ranging from spent lead-acid batteries to spent air filters—to the Vernon Plant. Such materials are not useful products under CERCLA or any commonsense understanding. Even though the Plant recovered some usable lead from these junk materials, that does not alter the fact that these materials were waste, not useful products. Indeed, the Ninth Circuit has already rejected a very similar arguments and held that spent batteries (and battery components) are "clearly" waste, not useful products, that gives rise to arranger liability. *See Catellus Dev. Corp. v. United States* (*Catellus*), 34 F.3d 748, 752 (9th Cir. 1994).

Four of the A/T Defendants—Clarios, Ekco, Kinsbursky, and Quemetco—are also covered persons because they were CERCLA transporters. These four entities chose to transport lead-bearing hazardous substances to the Vernon Plant, a disposal or treatment facility, as is required to establish transporter activity.

a. All the A/T Defendants Were Arrangers.

A person is an arranger if they "by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for *disposal* or *treatment*, of hazardous substances owned or possessed by such person." *See* 42 U.S.C. § 9607(a)(3) (emphasis added). CERCLA does not define what it means to "arrange for" disposal of hazardous substances. *See id.* § 9601. Courts have interpreted this phrase to mean someone who "takes intentional steps to dispose of [or treat] a hazardous substance." *See KFD Enters., Inc. v. City of Eureka*, No. C 08-4571 MMC, 2010 WL 4703887, at *6 (N.D. Cal. Nov. 12, 2010) (alteration in original) (quoting *BNSF*, 556 U.S. at 611).

Breaking this down: arranger liability requires that (1) hazardous substances

owned or possessed by the defendant; were (2) treated *or* (3) disposed; (4) with the required intent. The A/T Defendants were arrangers because each element is satisfied.

Hazardous Substances Owned or Possessed. A mountain of evidence shows that the A/T Defendants owned or possessed the hazardous substances they sent to the Vernon Plant. Plaintiffs' documentary evidence, which includes uniform hazardous waste manifests required by regulations that recorded shipments of hazardous waste to the Vernon Plant,[14] shows that each of the A/T Defendants sent lead-bearing materials to the Vernon Plant. Indeed, each A/T Defendant has admitted as much through their experts' reports or their representatives' testimony. And lead is a hazardous substance under CERCLA. *See* 40 C.F.R. § 302.4, tbl.302.4.

The evidence likewise shows that the A/T Defendants each owned or—at minimum—possessed the hazardous substances they sent to the Vernon Plant. Each A/T Defendant (or their predecessor) is listed as a "generator" on hazardous waste manifests, meaning that they either "produce[d] [the] hazardous waste" or took actions "caus[ing] a hazardous waste to become subject to regulation." *See* 40 C.F.R. § 260.10. These manifests show that this hazardous waste was shipped from the A/T Defendants' facilities to the Vernon Plant. And each A/T Defendant's corporate representative's testimony demonstrates ownership and possession.[15]

Treatment. "Treatment" refers to ways in which hazardous waste can be made more reusable, more amenable for recovery, or less hazardous, dangerous, or voluminous. It is defined as "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume." 42 U.S.C. § 6903(34).

[14] 40 C.F.R. pt. 262, subpt. B (manifest requirements for generators); *id.* pt. 263, subpt. B (manifest requirements for transporters).

[15] *See also GenCorp v. Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) (noting that CERCLA allows liability based on *constructive* ownership or possession).

Plaintiffs' evidence—including documentary evidence and deposition testimony by percipient witnesses describing the Vernon Plant's processes—amply shows that the Vernon Plant treated lead-bearing hazardous wastes. As for the whole lead-acid batteries that many of the A/T Defendants sent to the Vernon Plant, the Plant's battery breaking process crushed spent lead-acid batteries so that the lead-bearing metals, acid, and plastic inside could be separated. This separation, in turn, allowed the lead-bearing metals to be smelted and refined. The battery breaking process thus changed the physical character of the battery to make the waste "amenable for recovery." *See id.* Then, the Vernon Plant's acid neutralization process neutralized sulfuric battery acid, thus changing the acid's chemical character or composition, neutralizing it, and making it nonhazardous.

As for all the lead-bearing wastes sent to the Vernon Plant (including, but not limited to, lead-acid batteries), the Vernon Plant's smelting process melted lead-bearing materials and allowed pure lead to be separated from impurities, thus changing the waste's physical and chemical character, and making it amenable for recovery. Then, the Vernon Plant's refining process elevated the lead to an even higher level of purity, and—in some instances—reincorporated metals other than lead to create desired lead alloys. The resulting lead and lead alloys were cooled, resolidified, and sold for the manufacture of new products. These methods, techniques, and processes—both individually and collectively—changed the physical and chemical character or composition of lead-bearing wastes to make them amenable for recovery.

Indeed, it scarcely bears mentioning that *any* secondary lead smelter is in the business of treating lead-bearing hazardous waste. A secondary lead smelter's primary purpose is to take spent, unusable lead-bearing waste material, and make it "amenable for recovery" of lead by changing the waste's physical and chemical composition.

Or Disposal. "Disposal" refers to many kinds of occurrences: "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous

waste or any constituent thereof *may enter* the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3) (emphasis added). This definition is read "liberally." *Voggenthaler v. Md. Square LLC*, 724 F.3d 1050, 1064 (9th Cir. 2013). Importantly, numerous courts have interpreted "any land" as "applying to disposal inside a building," including disposals into or onto "fixtures." *See United States v. Fleet Factors Corp.*, 821 F. Supp. 707, 722 (S.D. Ga. 1993) (canvassing the case law); *accord Premium Plastics v. LaSalle Nat'l Bank*, 904 F. Supp. 809, 813–14 (N.D. Ill. 1995) (similarly collecting "ample authority" along these lines). Embracing this line of case law, the Ninth Circuit has held that "any land" encompasses putting hazardous substances on the "floor" of a building, instead of "the land or water." *Voggenthaler*, 724 F.3d at 1064 (citing, *inter alia*, *Amland Props. Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 791 (D.N.J. 1989) ("[P]lacement of hazardous wastes inside an enclosed manufacturing facility may constitute disposal of such waste into or on any land so as to satisfy the CERCLA definition.")). Also importantly, a disposal may occur even if the hazardous substance "never enter[s] the environment," as the definition uses the phrase "*may* enter," not *entered*. *Id.*

Plaintiffs' evidence establishes that disposals of waste occurred at the Vernon Plant throughout its operational history as an integral part of its treatment process. Specifically, the Vernon Plant's operators routinely placed lead-bearing wastes in the Plant's waste storage areas (which, depending on the time period, were either bare soil, paved outdoor ground, or paved indoor floors). The operators then "plac[ed]" or "spill[ed]" this "waste" inside the Plant's buildings, including fixtures like its battery breaker and smelters. *See* 42 U.S.C. § 6903(3). These disposals onto "any land" (as interpreted liberally by the Ninth Circuit) risked that the waste, or constituents thereof, "*may* enter the environment or be emitted into the air or discharged into any waters."[16]

[16] As the court observed in *Premium Plastics*, 904 F. Supp. at 814, the Ninth

Intent to Treat or Dispose. Likewise, Plaintiffs' evidence overwhelmingly shows that the A/T Defendants acted with the requisite intent to treat or dispose. Fundamentally, the Vernon Plant was a secondary lead smelting facility whose core business was to treat lead-bearing hazardous waste to recover lead. It is thus difficult to imagine what the A/T Defendants would have intended *other* than treatment.

The Ninth Circuit has addressed the intent element using a totality-of-the-circumstances inquiry. *E.g.*, *Alco Pac., Inc.*, 508 F.3d at 939 (endorsing "a full factual inquiry into the actions of the parties"). As is the case in other legal areas, the Ninth Circuit has accepted that intent may be inferred from the circumstances. *Team Enters., LLC v. W. Inv. Real Est. Tr.*, 647 F.3d 901, 909 (9th Cir. 2011) (considering arguments for such "infer[ences]" on the merits, but rejecting the inferences).[17] While the Ninth Circuit has not addressed the issue, the First, Fourth, Sixth, and Seventh Circuits agree that the intent element is satisfied when the intent to dispose or treat is only one of multiple motives that prompted an arranger to send hazardous waste to a facility.[18]

Here, Plaintiffs have both indirect and direct evidence of intent. For example,

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Circuit's decision in *3550 Stevens Creek Associates v. Barclays Bank of Cal.*, 915 F.2d 1355 (9th Cir. 1990), does not counsel a narrower interpretation of the phrase "any land." In *3550 Stevens Creek Associates*, the Ninth Circuit held that "buil[ding] [asbestos materials] into [a] structure" was not disposal, because the asbestos caused only risks "within the building." *Id.* at 1361. By contrast, here, hazardous substances were placed onto the Vernon Plant's waste storage areas and into the battery breakers and smelters (fixtures), creating a risk that hazardous substances may enter the environment.

[17] *Accord Emhart Indus., Inc. v. New England Container Co.*, No. CV 06-218 WES, 2022 WL 15437874, at *3 (D.R.I. Oct. 27, 2022) (collecting non-Ninth Circuit cases showing that "courts rely on circumstantial evidence of the totality of the circumstances to find arranger liability when direct evidence is lacking").

[18] *United States v. Gen. Elec. Co.*, 670 F.3d 377, 385 (1st Cir. 2012) (arranger was liable even though it had the "subordinate and incidental" motive to profit from their arranger activities); *Consol. Coal Co. v. Ga. Power Co.*, 781 F.3d 129, 149 (4th Cir. 2015) (nothing "foreclose[d] arranger liability as a matter of law based on a secondary intent"); *Am. Premier Underwriters, Inc. v. Gen. Elec. Co.*, 14 F.4th 560, 573 (6th Cir. 2021) (approving of "mixed-motive" theories of intent); *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 852 (7th Cir. 2008) (similar).

Clarios, Ramcar, and Trojan entered into agreements with the Vernon Plant's operators whereby they promised to send lead-bearing materials to the Vernon Plant, then pay the Plant's operators to recover the lead. Corporate representatives for the A/T Defendants similarly testified that they understood the Vernon Plant to be a secondary lead smelting facility. Likewise, the A/T Defendants have repeatedly admitted that they sent materials to the Vernon Plant for "recycling"; the term "recycling" is just another way of saying that the Vernon Plant would make waste "amenable for recovery" of lead. *See* 42 U.S.C. § 6903(34). Indeed, "recycle" means "to pass . . . through a series of changes or treatments: such as [] to process [something] in order to regain material for human use," or to "recover." *See Recycle*, Merriam-Webster Dictionary Online (retrieved May 22, 2023).

Moreover, Plaintiffs' evidence demonstrates that the A/T Defendants' involvement with the Vernon Plant consisted of more than isolated, incidental occurrences. Each A/T Defendant sent many shipments of lead-bearing hazardous waste to the Vernon Plant, underscoring their intent for those materials to be processed through the facility's treatment and disposal processes.

Each element of CERCLA arranger liability is satisfied for the A/T Defendants.

b. The Useful Products Doctrine Does Not Absolve the A/T Defendants of Arranger Liability.

Certain A/T Defendants will likely counterargue that they may not be held liable as arrangers because the materials they sent to the Vernon Plant were "useful product[s]," not "waste." *See Alco Pac., Inc.*, 508 F.3d at 934. This counterintuitive argument fails because the Plant—a secondary lead smelting facility—was in the very business of putting useless lead-bearing waste through a multi-step process to recover an unrecognizably different, useful product: ingots of pure lead and lead alloys.

Under the "useful product" doctrine, the A/T Defendants may escape arranger liability only if the material they sent to the Vernon Plant was a "useful product," not "waste." *See id.* This doctrine emanates from the intent-to-treat-or-dispose element of

arranger liability. *See BNSF*, 556 U.S. at 610–12; *see also Team Enters., LLC*, 647 F.3d at 908 ("The useful product doctrine serves as a convenient proxy for the intent element . . . .").[19] The useful product doctrine's premise is that for an arranger to intend for a hazardous substance to be disposed or treated, the substance must be waste that no longer "serves any useful purpose." *See Team Enters. LLC*, 647 F.3d at 908.

The Ninth Circuit has never "adopt[ed] or craft[ed] a concrete test for this fact-intensive inquiry," whose "contours are not entirely clear." *See Alco Pac., Inc.*, 608 F.3d at 935, 938. That said, the court has categorically held that certain materials are wastes, not useful products. For example, "[s]lag is indeed a waste by-product." *See A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1113 (9th Cir. 1998). And "spent batteries would clearly be defined as waste," not useful products. *Catellus*, 34 F.3d at 752. Likewise, "lead components from spent batteries" are waste. *Id.*

To the extent some of the materials the A/T Defendants sent to the Vernon Plant were ones that the Ninth Circuit has not yet addressed, the U.S. Supreme Court and Ninth Circuit have identified non-exclusive factors that help distinguish between waste and useful products:

- Whether the material was "unused," *BNSF*, 556 U.S. at 612;
- Whether it was a "principal business product[]" or a "by-product[]" that had to be "g[otten] rid of," *Alco Pac., Inc.*, 508 F.3d at 935 (quoting *La.-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1575 n.6 (9th Cir. 1994));
- Whether the material had more than a "nominal commercial value," *id.*;
- Whether the material would "continue to be used in its identical state" after the transaction, *id.* (quoting *Catellus*, 34 F.3d at 751);

[19] A plaintiff need not show intent to treat or dispose to prove that a defendant was a CERCLA "transporter." The useful product doctrine therefore has not been applied to transporter liability.

- "[T]he 'commercial reality' and value of the product," *id.* at 938;
- What "the actions of the seller" show about "the intent underlying the transaction," *id.*; and
- Whether the material would be useless unless contamination was removed, *id.* at 936 (citing *Cadillac Fairview/Cal., Inc. v. United States* (*Cadillac Fairview*), 41 F.3d 562, 566 (9th Cir. 1994) (per curiam)).

Plaintiffs' evidence—including hazardous waste manifests, deposition testimony, and agreements between certain A/T Defendants and the Vernon Plant's former operators—shows that under this case law, each of the arrangers sent waste, not useful products, to the Vernon Plant. The arrangers sent a wide range of lead-bearing junk including not only spent batteries and battery components (which, as noted, the Ninth Circuit has expressly categorized as waste, *see Catellus*, 34 F.3d at 752), but also other useless materials like spent air filters that had captured lead particles, lead-bearing factory waste, lead dust, dross, and lead-bearing mud. All the materials shipped to the Vernon Plant were used, spent materials that were at the ends of their useful lives (or were never useful in the first place), could not be used in their existing states, and had to be gotten rid of.

While this waste may have had "residual value" because of the recoverable lead inside them, the practical and commercial reality was that it "no longer was useful for its original intended purpose." *See EPA v. TMG Enters., Inc.*, 979 F. Supp. 1110, 1123–24 (W.D. Ky. 1997) (finding that scrap copper wire sent for recycling was not a useful product). Put differently, the lead-bearing hazardous wastes that the A/T Defendants sent to the Vernon Plant were useless in and of themselves; their only possible purpose was to be a source of recoverable lead.

The facts here are even starker than those in *Cadillac Fairview*, 41 F.3d 562 (9th Cir.). There, the defendants were rubber companies that used the organic chemical styrene to make synthetic rubber. *Id.* at 563–64. The production process

contaminated the styrene and made it unusable. *Id.* at 566. The defendants sold this contaminated styrene to a chemical company at a reduced price, which re-distilled the styrene to remove its contaminants. *Id.* Then, the defendants bought re-distilled, cleaned styrene from the chemical company at a higher price. *Id.* Under those facts, the Ninth Circuit—reversing the district court's grant of summary judgment to the defendants—held that a reasonable factfinder "could readily conclude" that the contaminated styrene was waste, not a useful product. *Id.* at 566. After all, the contaminated styrene was no longer useful in and of itself; its only remaining purpose was to be a source of fresh styrene following treatment through re-distillation. *See id.* Thus, the defendant rubber companies could be held liable as having arranged for the treatment of hazardous waste. *Id.* Similarly, here, the A/T Defendants sent useless, contaminated lead-bearing waste to the Vernon Plant. The Plant would smelt the waste, remove contaminants, and yield usable pure lead (or lead alloys).

It is unsurprising that the materials the A/T Defendants arranged to send to the Vernon Plant were not useful products. After all, the Vernon Plant was a secondary lead smelter; its primary purpose was to recover useful lead and lead alloys from useless waste. The useful products doctrine does not absolve the A/T Defendants.

c. Clarios, Ekco, Kinsbursky, and Quemetco Were Also Transporters.

Clarios, Ekco, Kinsbursky, and Quemetco were not only "arrangers," but also "transporters." Transporter liability attaches to any person who "accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release . . . ." *See* 42 U.S.C. § 9607(a)(4). "Transportation" is defined expansively to include "the movement of a hazardous substance by any mode." *Id.* § 9601(26).

Here, the transportation activities of Clarios, Ekco, Kinsbursky, and Quemetco are well-documented in hazardous waste manifests that list them as "transporter[s]" that transported lead-bearing hazardous waste to the Plant, and in their corporate

representatives' testimony corroborating what is in those manifests. The manifests indicate via signed certifications that Clarios, Ekco, Kinsbursky, and Quemetco "accepted" shipments of hazardous waste. And the Vernon Plant was a "disposal or treatment facilit[y]" for reasons already discussed in this brief. That suffices to show transporter liability.[20]

D. Because Defendants Are Covered Persons Under CERCLA, They Are Also Covered Persons Under the HSAA.

CERCLA and the HSAA are identical for the purposes of the *prima facie* elements of Plaintiffs' cost-recovery claims.[21] Because Defendants are covered persons under CERCLA, they are also covered persons under the HSAA.

[20] Some courts, but not the Ninth Circuit, have held that the phrase "selected by such person" in CERCLA Section 107(a)(4) modifies not only "sites," but also "disposal or treatment facilities." *E.g.*, *Tippins, Inc. v. USC Corp.*, 37 F.3d 87, 93–94 (3d Cir. 1994). These decisions are wrong because the modifier "selected by such person" is not preceded by a comma, signaling that the restrictive modifier applies only to "sites" (the last antecedent), not the other items in the list of destinations that may give rise to transporter liability. *United States v. Nishiie*, 996 F.3d 1013, 1022 (9th Cir. 2021) ("Given the restrictive relative clause is not set off from the immediately preceding category by a comma, common grammatical rules suggest that Congress intentionally tied it to the last antecedent.").

Even if the Court were to find a statutory requirement that Clarios, Ekco, Kinsbursky, and Quemetco selected the Vernon Plant as a disposal or treatment facility, Plaintiffs would satisfy it. For each of the four Defendants, Plaintiffs' evidence includes manifests listing them as *both* the "generator" of hazardous waste *and* the "transporter" that took it to the Vernon Plant. Federal hazardous waste regulations (as well as the manifest forms themselves) have long required the "generator" to select or "designate" the facility to which hazardous waste is sent. *See* 40 C.F.R. § 262.20(b)–(d); *see also* Standards for Generators of Hazardous Waste, 45 Fed. Reg. 33,140, 33,143 (May 19, 1980) (promulgating this rule in 1980). Thus, Clarios, Ekco, Kinsbursky, and Quemetco necessarily selected and transported hazardous waste to the Vernon Plant.

[21] *See supra* n.2.

IV. Defendants' Affirmative Defenses Fail.

A. The Superfund Recycling Equity Act ("SREA") Does Not Absolve the A/T Defendants of CERCLA or HSAA Liability.

The A/T Defendants[22] may assert a "recycling" defense under the Superfund Recycling Equity Act ("SREA"). *See* 42 U.S.C. § 9627. SREA provides that certain shipments of recyclable materials to disposal or treatment facilities cannot be a basis for CERCLA liability. *See id.* § 9627(a)(1). Therefore, to avoid CERCLA liability using SREA, each A/T Defendant must show that *all* of its shipments to the Vernon Plant that give rise to CERCLA liability qualify for SREA protection. And to show that a shipment is SREA-qualifying, an A/T Defendant must satisfy numerous statutory requirements. No A/T Defendant can meet this monumental burden.[23] Even if the A/T Defendants were to somehow prove that all their shipments to the Vernon Plant qualify for SREA, that would be a hollow victory because SREA does not limit the A/T Defendants' HSAA liability.

1. The A/T Defendants Do Not Satisfy SREA's Many Elements or Escape Its Exclusions.

SREA defines three categories of "recyclable material" that are addressed in three subsections: (1) "scrap paper, plastic, glass, textiles, or rubber," *id.* § 9627(c); (2) "scrap metal," *id.* § 9627(d); and (3) "spent batteries" including spent lead-acid batteries, *id.* § 9627(e). Here, the two relevant categories are "scrap metal" and "spent batteries." For these categories, SREA sets forth a wide range of requirements, *see id.*

[22] SREA does not apply to former owners and operators (or their successors), and thus is irrelevant to NL and GEI. *See* 42 U.S.C. § 9627(g).

[23] SREA places the burden of proof on the A/T Defendants. *Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d 930, 941 (E.D. Cal. 2003) ("The burden is on the person who arranged for a transaction . . . to demonstrate by a preponderance of the evidence that the statutory criteria are met." (quotations omitted)); *United States v. Freter*, 31 F.3d 783, 788 (9th Cir. 1994) ("[A] defendant who relies upon an exception to a statute made by a proviso or distinct clause . . . has the burden of establishing . . . that he comes within the exception.").

§ 9627(d)(1)(B)–(C), (2)–(3) (scrap metal); *id.* § 9627(e)(2)(A)–(C) (spent batteries), and also cross-references other requirements enumerated in the subsection for "scrap paper, plastic, glass, textiles, or rubber," *id.* § 9627(d)(1)(A), (e)(1). Then, SREA provides for "exclusions" that further narrow its applicability. *See id.* § 9627(f)(1).

While each A/T Defendant's SREA defense fails for many reasons, there are some common and straightforward points of failure.

a. Commercial Specification Grade

A shipment of scrap metal or spent batteries does not qualify for SREA unless "[t]he recyclable material met a commercial specification grade." *See* 42 U.S.C. § 9627(c)(1). Courts have not defined "commercial specification grade," but the legislative history clarifies that it must be a widely accepted standard. Commercial specification grade "can include specifications as those published by industry trade associations, or other historically or widely utilized specifications are acceptable." *Evansville Greenway & Remediation Tr. v. S. Ind. Gas & Elec. Co., Inc.*, No. 3:07-CV-66-SEB-WGH, 2011 WL 13237784, at *5 (S.D. Ind. Feb. 25, 2011) (quoting *SREA Legislative History*, 145 Cong. Rec. S14986-03, S15049, 1999 WL 1050353).

Here, the A/T Defendants will not show that each of the different types of lead-bearing waste they sent to the Vernon Plant met a "commercial specification grade." When deposed, the A/T Defendants' corporate representatives were unable to satisfactorily identify grades, specifications, or other standards that applied to the materials they sent to the Vernon Plant. Likewise, two percipient witnesses, Evert Desart and Joseph Preuth, who worked at or supervised the Vernon Plant, were unable to identify grades, specifications, or other standards that governed the different types of materials that were received by the Vernon Plant. Because the A/T Defendants cannot identify an applicable commercial specification grade, they axiomatically cannot show that the myriad materials they sent to the Vernon Plant actually "met" such a grade. This failure is fatal to every A/T Defendant's SREA defense.

b. Materials that Were Not Spent Batteries or Scrap Metal

Six of the seven Defendants—Clarios, Kinsbursky, Oregon Tool, Quemetco, Ramcar, and Trojan—sent materials to the Vernon Plant that were neither "spent batteries" nor "scrap metal." Because these shipments do not qualify for SREA, these A/T Defendants remain liable.

Dross. Clarios, Kinsbursky, Oregon Tool, Quemetco, and Ramcar each sent lead-bearing dross to the Vernon Plant. Dross—the glass-like material that appears on the surface when lead-bearing materials are melted—is plainly not a battery. *See* 42 U.S.C. § 9627(e). Nor is it "scrap metal," which "means bits and pieces of metal *parts* (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be *combined together with bolts or soldering* (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled." *Id.* § 9627(d)(3) (emphasis added). And even if dross were somehow "scrap metal," dross does not qualify for SREA because it was "melt[ed]" before it was brought to the Vernon Plant. *Id.* § 9627(d)(1)(C).

Lead Dust and Other Miscellaneous Junk. Clarios, Ramcar, and Trojan sent lead "dust" to the Vernon Plant. Lead dust does not fall within the definition of "scrap metal" because it is not "bits and pieces of metal parts" or "metal pieces that may be combined together with bolts or soldering." *Id.* § 9627(d)(3). Similarly, Oregon Tool sent spent air filters that contained lead; Ramcar sent "lead oxide mud"; and Trojan sent a range of junk materials like "wood with acid," "remelt lead scrap," "used belts," "soda ash," "trash," "sump mud," "trash sump," and "floor sweeping." Again, such materials were not "scrap metal."

c. Unidentifiable Lead-Bearing Materials

Plaintiffs' evidence shows that four A/T Defendants—Clarios, Ekco, Kinsbursky, and Trojan—sent unidentified and unidentifiable lead-bearing materials to the Vernon Plant. Because the A/T Defendants bear the burden of showing that all of their relevant shipments that may give rise to liability qualify for SREA's

protections, these unidentifiable shipments are fatal to their affirmative defense.

Specifically, Plaintiffs' evidence includes hazardous waste manifests that document shipments of lead-bearing materials by Clarios, Kinsbursky, and Trojan to the Vernon Plant, but do not sufficiently identify their contents. Also, documentary evidence *other* than manifests shows that Clarios, Ekco and Trojan started shipping lead-bearing hazardous waste to the Vernon Plant long before manifests started to be used in the 1980s to record shipments. Clarios, Ekco and Trojan will not be able to prove what those shipments contained. For example, a 1973 agreement between Clarios's predecessor and NL stated that Clarios's predecessor would send unidentified lead-bearing "plant scrap" to the Plant. Similarly, 1978 invoices issued by NL to Ekco indicate that Ekco sent "Battery Plates" and "Ind. Groups" to the Vernon Plant. Ekco has not produced evidence proving that "Ind. Groups"—whatever they were—were SREA-qualifying scrap metal or spent batteries.

Because Clarios, Ekco, Kinsbursky, and Trojan will not prove what exactly was inside their shipments to the Vernon Plant, they will not show that these shipments were SREA-qualifying.

d. Clarios, Ekco, Kinsbursky, and Ramcar's Shipments of Non-Qualifying Battery Plates and Parts

Clarios, Ekco, Kinsbursky, and Ramcar each sent battery plates or other battery parts to the Vernon Plant. Such shipments do not qualify as "spent batteries" that trigger SREA's liability exemption.

Section 127(e)(1) specifies that to qualify for the battery recycling exemption, an arranger or transporter must show that it did not "recover the valuable components of [spent lead-acid] batteries" before sending the waste. Accordingly, when a person extracts the "valuable lead" bearing components of batteries and then sends only those "valuable components" to a smelting facility, those "battery related transactions do not qualify for § 127 exemption." *Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d at 965; *accord* SREA Legislative History, 145 Cong. Rec. S14986-03, S15050, 1999

WL 1050353 (only "a person who generates, transports, and/or collects a spent battery, but does not themselves break . . . such battery" "to reclaim the valuable components," qualifies for SREA's exemption); PX_2-0376 at 9 (August 2002 EPA guidance document) ("One example of recovering 'valuable components' may involve battery cracking. Batteries are sometimes cracked to retrieve the metal plates inside; the plates can then be sold.").

Here, Clarios, Ekco, Kinsbursky, and Ramcar each sent lead battery parts to the Vernon Plant. They sent only the batteries' "valuable components" so that the lead inside them could be recovered. These A/T Defendants therefore "do not qualify for [SREA] exemption." *See Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d at 965.

These A/T Defendants may attempt to circumvent Section 127(e)(1) by arguing that battery parts may be classified as "scrap metal" under Section 127(d). "[The] argument that the battery parts were 'scrap metal' conflicts with the actual wording of § 127. Section 127 separates battery recycling and imposes separate eligibility requirements. If the legislature intended battery parts to be treated the same as 'scrap metal,' the battery recycling exemption under 127(e) would be superfluous." *Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d at 965. Also, categorizing battery parts as scrap metal would unduly undermine SREA's requirement that the defendant must not have "recover[ed] the valuable components of [spent lead-acid] batteries." *See* 42 U.S.C. § 9627(e)(1).

Therefore, the A/T Defendants that sent battery parts to the Vernon Plant do not qualify for SREA protection.

e. Reasonable Care On or After February 27, 2000

SREA Section 127(c)(5) requires that for "transactions [on or after February 27, 2000]," the arranger or transporter must have "exercised reasonable care to determine that the facility . . . was in compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, . . . applicable to the handling, processing, reclamation, storage, or other

management activities associated with recyclable material." 42 U.S.C. § 9627(c)(5). "Reasonable care" is "determined using criteria that include (but are not limited to)" the price paid for the materials, the defendant's "ability . . . to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with recyclable material," and "the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies)." *Id.* § 9627(c)(6).

All the A/T Defendants sent hazardous waste to the Vernon Plant on or after February 27, 2000. When questioned in depositions, none of these A/T Defendants' corporate representatives showed that they took substantial affirmative measures to ensure the Vernon Plant's compliance with substantive environmental-law provisions that approached anything resembling reasonable care.

Section 127(c)(5)'s reasonable-care requirement applies regardless of whether the Vernon Plant was actually in or out of compliance. That said, the A/T Defendants' failure to exercise reasonable care is underscored by the fact that for significant periods of time after February 27, 2000, the Vernon Plant was non-compliant with substantive legal requirements relating to waste handling, processing, reclamation, storage, or management.

The A/T Defendants cannot show that they exercised the reasonable care.

f. Kinsbursky and Quemetco's Deficient Waste Handling Practices

SREA has three provisions that bar arrangers and transporters from enjoying an exemption if their own waste handling practices were deficient.

First, Section 127(f)(1)(C) establishes that a defendant cannot be held liable for arranging for the disposal or treatment of a recyclable hazardous waste if the defendant "failed to exercise reasonable care with respect to the management and handling of the recyclable material (including adhering to customary industry practices current at the time of the recycling transaction . . .)." *See* 42 U.S.C. § 9627(f)(1). Second,

Section 127(d)(1)(B) requires that to qualify for the scrap-metal exception, the defendant must have been "in compliance with any applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal that the Administrator promulgates under the Solid Waste Disposal Act subsequent to November 29, 1999." *Id.* § 9627(d)(1)(B). Third, Section 127(e)(2)(A) provides that to qualify for the spent lead-acid battery exception, the defendant must have been "in compliance with applicable Federal environmental regulations or standards, and any amendments thereto, regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries." *Id.* § 9627(e)(2)(A).

Kinsbursky and Quemetco do not qualify for SREA because their waste handling practices were deficient. Kinsbursky's facility from which it shipped hazardous wastes to the Vernon Plant was cited for violations of its RCRA hazardous waste facility permit during time periods relevant to Kinsbursky's shipments. Likewise, when Quemetco sent spent lead-acid batteries to the Vernon Plant between May and June 2001, its wastewater treatment system—which was integral to Quemetco's handling of spent batteries—was out of compliance.

In summary, SREA is a complicated statute with many hurdles for a defendant seeking its protections. The A/T Defendants' attempts to invoke SREA stumble because of these many hurdles.

2. SREA Does Not Limit the A/T Defendants' HSAA Liability.

The A/T Defendants' SREA defense does not limit their HSAA liability.

The HSAA nowhere incorporates SREA. *See* Cal. Health & Safety Code § 25300, *et seq.* When passing the HSAA, the California Legislature could not have incorporated SREA by implication, because the HSAA predates SREA.[24] Indeed,

[24] The HSAA was originally "enacted in 1980," the same year as CERLCA. *See BKHN, Inc. v. Dep't of Health Svcs.*, 3 Cal. App. 4th 301, 305 (1992). The HSAA "became inoperative on January 1, 1999" because of a sunset clause, and its

when incorporating CERCLA defenses, HSAA Section 25323.5(b) provides that "the defenses available to a responsible party or liable person shall be those defenses specified in Sections 101(35) and 107(b) of the federal act." *See* Cal. Health & Safety Code § 25323.5(b). That obviously excludes SREA, which is not codified there.

The A/T Defendants may point to some Ninth Circuit district court decisions—including a previous order by the Court in this action—where courts have said that the HSAA "expressly incorporates" CERCLA's defenses. *See* Dkt. 176 at 5 (quotations omitted). This is accurate for the "defenses specified in Section 101(35) and 107(b) of [CERCLA]," as well as the federally permitted release defense.[25] But no court has ever recognized that SREA limits HSAA liability; on the contrary, the Fifth Circuit has held that SREA does not apply to Texas's state-law CERCLA equivalent. *See Del-Ray Battery Co. v. Douglas Battery Co*., 635 F.3d 725, 732–33 (5th Cir. 2011).[26] The lack of a recycling exemption is therefore one of those rare instances where CERCLA and the HSAA "are not identical." *See Sabic*, 14 Cal. App. 5th at 371.

B. The Federally Permitted Release Exception Is Not Satisfied, and In Any Event Is Subject to a Future Divisibility Showing.

Plaintiffs expect GEI, Oregon Tool, Quemetco, and perhaps other Defendants to assert a "federally permitted release" defense to CERCLA liability. The doctrine is an affirmative defense on which Defendants bear the burden of persuasion.[27]

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reenacted version—which remains in force today in a materially unchanged form—came into effect on May 26, 1999. *See Fireman's Fund Ins. Co.*, 302 F.3d at 934 n.2. SREA was not enacted until November 26, 1999. *See* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 6001, 113 Stat. 1501 (1999).

[25] *See* Cal. Health & Safety Code § 25366(b).

[26] At least eight states have passed state SREA equivalents to protect recycling or scrap transactions. These laws would be unnecessary if SREA automatically applied to state equivalents. *See* Ark. Code Ann. § 8-7-524; Fla. Stat. § 403.727(8); Ga. Code Ann. § 12-8-92(9)(c); Mich. Comp. Laws § 324.20126(1)(d)(i)–(ii); N.C. Gen. Stat § 130A-310.7(b1); 35 Pa. Cons. Stat. § 6020.701(b)(5); S.C. Code Ann. § 44-56-200(C)(2); Tenn. Code Ann. § 68-212-202(a)(4)(E)(iii).

[27] *See Freter*, 31 F.3d at 788; *United States v. Shell Oil Co.*, No. CV 91-0589-RJK, 1992 WL 144296, at *6 (C.D. Cal. Jan. 16, 1992).

CERCLA's federally permitted release defense, which the HSAA incorporates into state law,[28] bars Plaintiffs from recovering "response costs" to the extent Defendants can prove they "result[ed] from a federally permitted release." 42 U.S.C. § 9607(j). Here, some Defendants will likely argue that at certain relevant times, the Vernon Plant's airborne releases were "subject to a permit or control regulation" issued under the Clean Air Act. *See id.* § 9601(10)(H) (defining "federally permitted release" by reference to Clean Air Act provisions). This defense fails for two reasons.

1. The Vernon Plant Was Often Out of Compliance with Federal Permits and Control Regulations.

CERCLA Section 101(10) defines eleven types of federally permitted releases. As relevant here, Section 101(10)(H) includes "any emission into the air *subject to* a permit or control regulation under [certain Clean Air Act provisions]." *Id.* § 9601(10)(H). CERCLA does not define the phrase "subject to," which has many possible definitions including "falling under . . . the power or dominion of," and "obedient [to]." *See* Subject, *Webster's Third New International Dictionary, Unabridged* (1961). Accordingly, CERCLA's text is ambiguous as to whether airborne releases that are *covered* by—but *noncompliant* with—a federal permit or regulation qualify for the exception. *See Dep't of Human Servs. v. U.S. Dep't of Educ.*, 46 F.4th 1148, 1155 (9th Cir. 2022) (finding ambiguity "[g]iven the lack of statutory definition and the abundance of dictionary definitions"). Surrounding statutory provisions do not resolve this ambiguity. Most significantly, some of the other paragraphs in Section 101(10) that describe other types of federally permitted releases use the phrase "in compliance with"—e.g., "(A) discharges *in compliance with* a permit under [the Clean Water Act]." 42 U.S.C. § 9601(10)(A) (emphasis added).

Under statutory interpretation canons, Congress's use of the phrase "in

[28] *See* Cal. Health & Safety Code § 25366(b).

compliance with" could support two opposite inferences (or no inference at all).[29] First, a reasonable court could find that "subject to" has the same or similar meaning as "in compliance with," as phrase "gathers meaning" from surrounding statutory terms. *See, e.g., Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Second, since "the use of different words or terms within a statute" can show that "Congress intended to convey a different meaning for those words," *see SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003), a reasonable court could find that "subject to" does not mean "in compliance with." Nor do other CERCLA provisions clarify what "subject to" means. *See* 42 U.S.C. § 9601, *et seq*.

Because "subject to" in Section 101(10)(H) is ambiguous, the Court must afford *Chevron* deference to the interpretation the EPA—"the agency charged with administering CERCLA"[30]—adopted through its Environmental Appeals Board ("EAB") in a formal adjudication. *See REDOIL v. EPA*, 716 F.3d 1155, 1161 (9th Cir. 2013) ("[An] EAB proceeding is a formal adjudication that warrants *Chevron* deference."). Specifically, in *In re: Mobil Oil Corp.*, 5 E.A.D. 490 (E.P.A.), 1994 WL 544260, at *9 (E.A.B. 1994), the EPA thoroughly examined Section 101(10)(H) and found it "inherently ambiguous" as to whether air emissions must comply with federal permits and regulations to qualify for the federally permitted release exception.[31]

Then, applying its CERCLA expertise, the EPA found that requiring air emissions to be compliant was the best way to fill that statutory gap to advance CERCLA's purposes. *Id.* at *6–12. This interpretation was reasonable. The Clean Air Act has no mechanism to compel a person who emits airborne pollution in violation of federal law to bear the costs of investigating and cleaning up any resulting

[29] "[E]very" statutory interpretation canon is mirrored by "an equal and opposite canon." *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 806 & n.27 (1983).

[30] *La.-Pac. Corp.*, 24 F.3d at 1573.

[31] Plaintiffs incorporate the EAB's analysis, which is too lengthy to mirror in this brief, by reference.

contamination. *See* 42 U.S.C. § 7401, *et seq*. Interpreting CERCLA to impose response-cost liability on such a polluter would advance Congress's intent of "promot[ing] the timely cleanup of hazardous waste sites, [and] ensur[ing] that polluters [a]re held responsible for the cleanup efforts," through CERCLA. *See Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013).

Here, the Vernon Plant was routinely and repeatedly out of compliance with permits and control regulations issued by the South Coast Air Quality Management District ("SCAQMD") under the Clean Air Act. Therefore, Defendants will not be able to meet their burden to show that Plaintiffs' response costs were caused by airborne releases that qualify for the federally permitted release exception.

Instead of meeting their burden, Defendants—contrary to the EPA's reasonable interpretation of CERCLA Section 101(1)(H)—will likely argue that the federally permitted release exception applies even to airborne releases that violated applicable permits and control regulations. Defendants will likely invoke *Clean Air Council v. United States Steel Corp.*, 4 F.4th 204, 209–10 (3rd Cir. 2021), where the Third Circuit found that the term "any emission into the air *subject to* a permit or control regulation," 42 U.S.C. § 9601(10)(H) (emphasis added), does not require the release to have complied with permits and control regulations. The court reached this holding by observing that some of the other paragraphs in Section 101(10) describe other types of federally permitted releases using the phrase "in compliance with," and assuming that "subject to" must mean something *different* from "in compliance with." *Clean Air Council*, 4 F.4th at 209–10. Accordingly, the Third Circuit held that there was no statutory ambiguity that warranted affording *Chevron* deference to the EPA's interpretation of "subject to."[32]

[32] The Third Circuit also said in dicta that the EAB's interpretation of CERCLA in *In re: Mobil Oil Corp.* does not deserve *Chevron* deference because it was "rooted . . . not in agency expertise, but in ordinary statutory interpretation." *Clean Air Council*, 4 F. 4th at 211. This was also error. In *In re: Mobil Oil Corp.*, the

This was error. The *Clean Air Council* court overreached to find statutory clarity where it is absent. The court did not appreciate that Congress's varying use of "subject to" and "in compliance with" could support a range of inferences. The court's attempt to resolve this irreducible ambiguity based on contextual clues was a fraught exercise because CERCLA is "a hastily passed statute" that was poorly drafted. *See United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005).

In any event, a significant subset of the Vernon Plant's airborne emissions was not federally permitted or regulated *at all*. The Vernon Plant released non-process fugitive lead emissions, which were non-stack lead emissions caused by things other than the Plant's industrial processes. SCAQMD Rule 403, the regulation issued under the Clean Air Act to govern the Vernon Plant's non-process fugitive emissions, did not regulate lead. Rather, Rule 403 regulated particulate emissions. Accordingly, Defendants cannot show that the Vernon Plant's non-process fugitive lead emissions were "subject to a . . . control regulation." *See* 42 U.S.C. § 9601(10)(H).

In summary, the Court must defer to the EPA's reasonable interpretation that requires airborne releases to comply with federal permits and regulations to trigger an exception from liability. Plaintiffs' evidence shows such noncompliance, which defeats Defendants' federally permitted release defenses. Likewise, the absence of control regulations governing non-process fugitive lead emissions dooms any federally permitted release defense.

2. The Federally Permitted Release Defense Will Be Effective Only If Defendants Prove Divisibility.

Even if some releases from the Vernon Plant that caused Plaintiffs' response costs were federally permitted, the analysis does not end there. As Plaintiffs have explained, *see* Dkt. 544 at 6–8, 10–14, Defendants bear the burden of showing not

EPA filled the statutory gap by determining what would best advance CERCLA's purposes. *See* 1994 WL 544260, at *9–12. Such a policy decision deserves *Chevron* deference. *See ACA Connects v. Bonta*, 24 F.4th 1233, 1243 (9th Cir. 2022).

only "which releases are federally permitted," but also "what portion of [Plaintiffs'] damages are allocable to the federally permitted releases." *Shell Oil Co.*, 1992 WL 144296, at *6; *accord Lincoln Props., Ltd. v. Higgins*, No. CIV. S-91-760DFL/GGH, 1993 WL 217429, at *22 (E.D. Cal. Jan. 21, 1993) (similar). Put differently, Defendants must prove that the contamination caused by the federally permitted releases is divisible from the contamination caused by non-federally permitted releases. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1541 (E.D. Cal. 1992) (divisibility is "an essential element of [the] defense"). This burden is heavy: each Defendant must present "concrete and specific evidence" to enable an "intensely factual" divisibility inquiry. *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 589 (9th Cir. 2018) (quotations omitted).

Here, the Court has reserved divisibility issues for a future phase of this litigation. *See* Dkt. 593 at 3–4. Accordingly, even if the Court is persuaded that the certain releases were "federally permitted" under CERCLA, response costs associated with those releases may be excised from Defendants' liability only if they prove divisibility at a later stage of this proceeding.

C. NL's HSAA Non-Retroactivity Defense Fails.

NL, which sold the Vernon Plant in 1979, has asserted a defense under the HSAA's non-retroactivity provision. HSAA Section 25366(a) provides that the statute "shall not be construed as imposing any new liability associated with acts that occurred on or before January 1, 1982, if the acts were not in violation of existing state or federal laws at the time they occurred." Cal. Health & Safety Code § 25366(a).

As explained in Plaintiffs' opposition, Dkt. 528 at 6–9, to NL's summary judgment motion, Dkt. 514, on this issue (which the Court denied, Dkt. 598), NL bears the burden of proof for a few reasons. First, the California Court of Appeal in *Sabic*, 14 Cal. App. 5th at 388–89, accepted that a defendant resisting liability under Section 25366(a) bears the burden of proof. Second, Section 25366(a) establishes an exemption from the HSAA's broad liability scheme: it provides that the HSAA "*shall*

not be construed" as imposing additional liabilities for pre-1982 acts, "*if* the acts were not in violation of existing state or federal laws." Cal. Health & Safety Code § 25366(a) (emphasis added).[33] "[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12, 23 (2010) (cleaned up). So, the burden rests on NL to prove the HSAA's non-retroactivity exemption. Third, the HSAA's remedial purpose, which requires the statute to be read broadly, *see Otay Land Co. v. U.E. Ltd.*, 15 Cal. App. 5th 806, 822 (2017), favors placing the burden on NL.

NL's liability under CERCLA arises because it and its predecessor Kirk owned and operated the Vernon Plant. This liability was associated with a range of acts by NL and Kirk that occurred during its operations at and near the site. As the Court found when denying NL's summary judgment motion on HSAA's non-retroactivity provision, Plaintiffs' evidence—including "evidence of correspondence with OSHA regarding the payment of a fine for the presence of lead at the plant; and a [local air pollution control district] notice of violation for smoke opacity violations"—shows "NL may have violated a state or federal law at the time it operated the plant." *See* Dkt. 598 at 7. Plaintiffs' trial evidence only further supports this conclusion.

NL cannot meet its burden on its HSAA non-retroactivity defense because it cannot show that its liability is not associated with acts that violated then-existing federal or state laws.

V. DTSC Is Not a Covered Person Under CERCLA or the HSAA.

Ironically, Defendants seek contribution from DTSC under CERCLA and the HSAA, arguing the actions DTSC took as a statutorily authorized regulator make the agency a current or former operator of the Vernon Plant. *See* 42 U.S.C. §§ 9607(a)(1)–

[33] *See, e.g.*, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 428, 430 (2002) (interpreting the phrase "shall not" as denoting an exemption to a preemption provision); *McGregor v. Grimes*, 884 A.2d 605, 609 (D.C. 2005) (interpreting "[t]his chapter shall not apply" as denoting a statutory exception).

(2), 9613(f)(1). But Ninth Circuit precedent forecloses that argument, as DTSC never exercised enough control over the Vernon Plant to become an operator. Instead of overseeing the Vernon Plant's private profit-seeking operations that caused pollution, DTSC has merely acted as a government regulator that pushed the Vernon Plant's operators to comply with legal requirements that protect human health and the environment. And even if the Court were to find that DTSC has exerted enough control over the Vernon Plant to be considered an operator, two statutory provisions bar imposing operator liability on DTSC under CERCLA and the HSAA.

A. DTSC's Only Nexus to the Vernon Plant Was As a Regulator.

As Exide recognized, DTSC's role at the Vernon Plant has been limited to that of a statutorily authorized regulator. *See, e.g.*, Ex. PX_2-0332 ("[DTSC] regulates the Facility pursuant to a comprehensive statutory and regulatory framework for the generation, handling, treatment, transport and disposal of hazardous waste"). As Mr. Ruttan attests, DTSC increased its regulatory oversight of the Vernon Plant starting in the early 2000s. A key catalyst was the 2002 Corrective Active Consent Order ("CACO") that DTSC and Exide entered under DTSC's statutory authority. The CACO required Exide to submit a revised RCRA Facility Investigation ("RFI") that would collect information about the Vernon Plant's releases of hazardous substances and inform "corrective actions" to remedy the resulting harm.

After 2002, DTSC's continued to regulate the Plant as Exide dealt with RCRA permitting shortcomings and attempted to satisfy RCRA's corrective action requirements. During this period, DTSC primarily interfaced with Exide in DTSC's role as a permitting agency, and also conducted regulatory oversight of Exide's various RFIs and subsequent corrective actions under RCRA.

As for RFIs and corrective actions under RCRA, Exide submitted a Current Conditions Report to DTSC in May 2002 that documented the Vernon Plant's contamination. The Plant's contamination was so extensive that it required Exide to undergo six RFI phases to investigate different parts of the Plant in conformance with

RCRA. These six phases unfolded between 2004 and 2012. Eventually, Exide requested an opportunity to submit a Comprehensive RFI Workplan that would allow for a broader RFI that was not limited to specific parts of the Plant. In November 2012, Exide submitted such a workplan. Throughout this period, as Exide was investigating the Plant under the RFI process, DTSC also approved interim "corrective measures" under RCRA to temporarily address especially acute contamination.

As for permitting, DTSC evaluated—and rejected—many iterative RCRA permit applications that Exide submitted to DTSC in an effort to bring the Plant into compliance with federal permitting requirements. Back in 1988, the Vernon Plant's then-operator, GNB, had submitted the Plant's first RCRA "Part B" hazardous waste facility permit application to DTSC's predecessor pursuant to the California Code of Regulations. *See* 22 C.C.R. § 66270.10, *et seq*. However, the initial application was deficient, and Exide submitted many revised permit applications over the years that DTSC also found inadequate.

Exide's 2015 cessation of Plant operations triggered a RCRA requirement for it to develop and implement a detailed Closure Plan. Around this time, DTSC expanded its focus from the Plant itself, to nearby industrial and residential neighborhoods that had been impacted by the Plant's airborne releases. Because DTSC came to believe that airborne lead emissions from the Plant had contaminated many off-site areas, DTSC on November 12, 2015—again, acting in its role as a regulator—determined that "there may be an imminent and/or substantial endangerment to the public health or welfare or to the environment because of the release or threatened release of the hazardous substance at the Site"—and that lead from the Plant had caused off-site lead contamination off site. *See* JX007 at 2–4.

Exide developed a Closure Plan that would cover early closure actions and started implementing it. However, in May 2020, before substantial progress had been made on the Vernon Plant's closure, Exide filed for bankruptcy because of mounting environmental liabilities across the United States. Exide's bankruptcy plan proposed

abandoning the heavily contaminated Vernon Plant, whose primary smelter building required the constant application of negative air pressure to prevent hazardous dust from escaping. Because abandonment would threaten an environmental and public health emergency and force the public to bear cleanup costs, DTSC unsuccessfully opposed the plan. After a Delaware bankruptcy court approved Exide's bankruptcy plan in October 2020, the Vernon Plant was abandoned and transferred to the VERT, which took over Exide's closure actions for the Plant. Just as DTSC regulated Exide's closure actions, DTSC has continued to regulate VERT's closure actions.

B. DTSC's Regulatory Actions Did Not Make It an Operator.

The foregoing narrative shows that DTSC was acting as a government regulator at all relevant times. Ninth Circuit case law squarely forecloses Defendants' argument that such actions give rise to CERCLA operator liability. And even if DTSC somehow falls within the general definition of an operator, two statutory limitations bar treating DTSC as an operator.

1. DTSC Was Not an Operator While Exide Owned the Vernon Plant.

Because of the Vernon Plant's risks, DTSC extensively regulated Exide's activities. Under controlling case law, DTSC did not become an operator by doing so.

In *United States v. Bestfoods*, 524 U.S. 51, 66 (1998), the U.S. Supreme Court interpreted the word "operate" as "intended by CERCLA" to mean "[t]o conduct the affairs of; manage: *operate a business*." *Id.* (quotations omitted). Similarly, in *United States v. Sterling Centrecorp, Inc.*, the Ninth Circuit stressed that an operator must have had more than "general control over [a] . . . facility," and "play[ed] an active role in *running the facility*, typically involving hands-on, day-to-day participation in the facility's management," 977 F.3d 750, 758 (9th Cir. 2020) (quoting *Long Beach Unif. Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32 F.3d 1364, 1367 (9th Cir. 1994)) (emphasis added).

When DTSC regulated Exide by evaluating its RCRA permit applications and

overseeing its RCRA Facility Investigations and interim corrective actions, DTSC's actions were nothing akin to "direction, management, or control" over the Vernon Plant. *See id.* For example, DTSC had no authority to "control work at [the] plant, choose employees, direct their activities or set prices"; the agency was not "in charge of" the Plant. *See Long Beach Unif. Sch. Dist.*, 32 F.3d at 1368 (quotations omitted).[34] All the agency could do was to exhort or pressure Exide to comply with the law. And DTSC certainly did not "actually participate in the wrongful conduct prohibited by [CERCLA]" that caused the harmful contamination. *See Bestfoods*, 524 U.S. at 65 (quoting *Riverside Mkt. Dev. Corp. v. Int'l Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991)). This conclusion coheres with cases holding that neither "regulatory action[]" nor a failure to regulate gives rise to operator liability. *See United States v. Dart Indus., Inc.*, 847 F.2d 144, 146 (4th Cir. 1988); *accord* Dkt. 177 at 3 (examining *Dart Industries* and similar cases).

Lockheed Martin Corp. v. United States, 35 F. Supp. 3d 92 (D.D.C. 2014), is instructive because the court rejected operator liability in a much starker case. There, the United States contracted Lockheed to research and manufacture rocket motors for government satellites and ballistic missiles. *Id.* at 98–99. To fulfill these contracts, Lockheed established a group of three facilities. *Id.* at 98–99, 101. The United States stationed full-time inspectors who had offices located at one of Lockheed's facilities; these inspectors had free rein over Lockheed's operations and scrutinized the company's standards and specifications. *Id.* at 103–04. Among other things, the inspectors approved hazardous waste disposal standards and conducted safety compliance inspections. *Id.* at 146. More fundamentally, Lockheed was fulfilling government contracts in a rocket industry where the United States was the sole buyer (i.e., a "monoposn[ist]"), such that "the government had a pervasive influence over

[34] *Accord Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1130 (D. Idaho 2003), *modified in part sub nom., United States v. Asarco Inc.*, 471 F. Supp. 2d 1063 (D. Idaho 2005) (government was not an operator where it did not control product prices, wages, or the length of work week or financing decisions).

general activities at the Sites." *Id.* at 149–50. The sites ended up contaminated, and Lockheed argued that the United States should share some CERCLA liability as a former operator. *See id.* at 144–45.

Even under these remarkable facts—where the United States had contracted for and caused the Lockheed sites to be established, specified Lockheed's products, stationed permanent staff at the sites, approved hazardous waste disposal procedures, inspected the sites for compliance, and was the sole purchaser of Lockheed's rocket products—the court readily held that "the government was not an operator of the Sites." *Id.* at 150.[35] The United States "did not manage, direct, or otherwise control on a frequent basis the day-to-day hazardous waste disposal activities at the Sites." *Id.*; *see also PPG Indus. Inc. v. United States*, 957 F.3d 395, 403–405 (3d Cir. 2020) (United States' wartime control and influence over a chemical plant insufficient to establish operator liability).

If the United States was not an operator, DTSC's much less extensive involvement with the Vernon Plant cannot possibly support covered-person status.

2. DTSC Did Not Become an Operator After Exide Abandoned the Vernon Plant.

Alternatively, Defendants may argue that after the Plant stopped operating and Exide abandoned it, DTSC became its operator. This argument would lack merit.

Recall that in *Bestfoods*, the U.S. Supreme Court interpreted the word "operate" as to mean "[t]o conduct the affairs of; manage: *operate a business*." 524 F.3d at 66 (quotations omitted). And in *Sterling Centrecorp*, 977 F.3d at 758, the Ninth Circuit held that an operator "must play an active role in running the facility." (quotations omitted). By the time Exide abandoned the Vernon Plant, the Plant had been shuttered

[35] Ultimately, the court allocated a small share of responsibility to the United States because it had stipulated that it was liable under CERCLA. *See Lockheed Martin Corp.*, 35 F. Supp. 3d at 144. This stipulation only strengthens the persuasive force of *Lockheed Martin* because the district court found that the United States was not an operator in the face of a stipulation that suggested the United States was one.

for years. Such a facility cannot give rise to operator liability for DTSC.

Kaiser Aluminum and Chemical Corp. v. Catellus Development Corp., 976 F.2d 1338 (9th Cir. 1992), corroborates this view. The Ninth Circuit there accepted the "well-settled rule" that operator liability may be predicated only on "control" over the "cause of the contamination *at the time the hazardous substances were released into the environment*." *Id.* at 1341 (emphasis added) (quotations omitted). By the time Exide abandoned the Vernon Plant, the Plant had already caused its contamination by releasing hazardous substances into the environment. Although this contamination had (and still has) the potential to further mobilize, the contamination-causing operations were substantially complete. *See Sterling Centrecorp Inc.*, 977 F.3d at 758 (operator liability "requires some level of direction, management, or control *over the facility's polluting activities*" (emphasis added)).

Even if the abandoned Vernon Plant could somehow be a basis for operator liability, nothing DTSC has done since the abandonment gives rise to operator liability. First, DTSC has supervised continuing closure activities by the VERT. This was a mere continuation of the regulatory oversight that DTSC had long exercised over Exide, except targeted at a different entity. Second, starting in May 2022, DTSC has overseen some limited contracting at the Vernon Plant—primarily for security and remedial work—using funds earmarked by the Legislature for those specific purposes. Defendants have no evidence that these activities reached the high degree of control required by cases like *Bestfoods*, *Sterling Centrecorp*, and *Lockheed Martin Co.*

3. In Any Event, Two Statutory Provisions Bar Imposing Operator Liability on DTSC.

Even if the Court concludes that DTSC engaged in operator conduct, two statutory provisions prohibit holding DTSC liable as an operator under CERCLA or the HSAA. First, if the Court finds that DTSC engaged in operator conduct *after* Exide abandoned the Vernon Plant, CERCLA Section 101(20)(D) would shield Plaintiffs from operator liability following that abandonment:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership *or* control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign.

42 U.S.C. § 9601(20)(D) (emphasis added).

If the Court concludes that DTSC was an operator after Exide's bankruptcy and abandonment, the Court would necessarily have found that DTSC exercised "control" over the Vernon Plant. *See id.* Plainly, that "control" would have been "acquired" "in connection with [DTSC's] law enforcement activity" under the hazardous waste laws that the agency administers, "or through bankruptcy" or "abandonment." *See id.* This would satisfy Section 101(20)(D) and shield DTSC from operator liability for any conduct the agency took after Exide's bankruptcy.

Section 101(20)(D) does establish an exclusion where a government agency "caused or contributed to the release or threatened release of a hazardous substance from the facility." *See id.* Defendants will not be able to prove that exclusion because DTSC has consistently worked to prevent and stop releases.

Defendants may insist that DTSC does not qualify for Section 101(20)(D) because it never "acquire[d] title" to the Vernon Plant. But that modifier ("in which the government acquires title") modifies only the antecedent phrase "other circumstances." *See id.* That is because no comma precedes the modifier, demonstrating that the modifier's sole antecedent is the phrase "other circumstances"—not the other listed items. *See Nishiie*, 996 F.3d at 1022.

Section 101(20)(A), a provision that works in tandem with Section 101(20)(D), confirms this interpretation. Section 101(20)(A) clarifies that "in the case of any facility, *title or control* of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government," "the term 'owner or operator' means . . . any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand." *See* 42

U.S.C. § 9601(20)(A) (emphasis added). Because Section 101(20)(A) requires only the transfer of "title *or* control," Section 101(20)(D) should be read similarly.

If Defendants seek contribution from DTSC under *the HSAA*, CERCLA Section 101(20)(D) would shield DTSC. That is because CERCLA Section 101(20)(D) defines the class of persons subject to owner and operator liability under CERCLA Section 107(a). HSAA, in turn, relies on "Section 107(a)" to define "[r]esponsible party" or "liable person." Cal. Health & Safety Code § 25323.5(a)(1).

Second, DTSC is shielded from operator liability by Section 107(d)(2), which protects states and local governments from response-cost liability "result[ing] [from] actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person." *See* 42 U.S.C. § 9607(d)(2). This provision was enacted to "remove[] a disincentive for governments to respond to emergencies covered by CERCLA." H.R. Rep. No. 99-253(I), at 73 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2855; *see Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 52 n.4 (1989) (White, J., concurring in part and dissenting in part) (similar). Accordingly, it has been interpreted expansively. *United States v. Davis*, 20 F. Supp. 2d 326, 335 (D.R.I. 1998), is instructive. There, the district court explained, "In the hazardous waste context, the existence of a severe or potentially severe environmental problem that threatens to worsen if not promptly addressed, constitutes an emergency." *Id.* (collecting decisions).[36]

Here, DTSC has responded to "a severe or potentially severe environmental problem that threatens to worsen if not promptly addressed." *See id*. As Plaintiffs' experts explain, the contamination at and near the Vernon Plant poses a massive problem. Left unaddressed, there is a material risk that these problems will worsen as contaminants mobilize and risk exposure. That suffices to exempt DTSC from

[36] Some courts have read Section 107(d)(2) even more broadly to mean that "[g]overnmental regulatory action taken to clean up a contaminated site does not subject the government to liability under CERCLA." *Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d at 955.

CERCLA operator liability in the unlikely event it is found.

In sum: DTSC did not become an operator by exercising regulatory oversight over the Plant. That conclusion coheres with CERCLA's statutory purposes. "CERCLA does not intend to discourage the government from making cleanup efforts by making the government liable for such efforts." *FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833, 841 (3d Cir. 1994) (en banc) (cleaned up).[37]

VI. Plaintiffs' Future Response Actions and Costs Are Irrelevant.

Plaintiffs understand that NL intends to focus its trial presentation on whether the current contamination at the Vernon Plant poses any threat to the environment or human health. As noted, NL's goal is to persuade the Court that no future response actions are required because there is no threat. As explained in Plaintiffs' Motion in Limine No. 1, which the Court granted at the Final Pretrial Conference, three Ninth Circuit decisions establish that Plaintiffs' CERCLA and HSAA claims implicate only Plaintiffs' past response costs and the actions that caused them. ECF No. 663 at 1–4 (citing *Pakootas*, 905 F.3d at 586; *Voggenthaler*, 724 F.3d at 1065; *City of Colton*, 614 F.3d at 1007–08). These precedents leave no room for the parties to speculate about potential future response costs and the actions that may give rise to them. In any event, if necessary, Plaintiffs will prove that the Vernon Plant's contamination poses a serious risk that requires—at minimum—careful continued investigation and the assessment of potential remedial measures.

VII. Conclusion

The Court should find for Plaintiffs on all Phase II trial issues.

[37] Indeed, some courts have embraced an even broader "remedial" immunity that bars CERCLA liability *whenever* a government responds to environmental threats. *See Iron Mountain Mines, Inc.*, 881 F. Supp. at 1445 (collecting decisions).

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