

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

3/4/94

In re:

208 Jackson Street,
Oakland, California

PETITION OF KRETSCHMAR
BRANDS, INC. FOR REVIEW
UNDER WATER CODE SECTION
13320(a) OF ACTION BY THE
REGIONAL WATER QUALITY
CONTROL BOARD, SAN FRANCISCO
BAY REGION

Fred L. Pillon
Kimberly S. McGovern
GIBSON, DUNN & CRUTCHER
One Montgomery Street
San Francisco, CA 94104
(415) 393-8200

Attorneys for Petitioner
Kretschmar Brands, Inc.

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In re:

208 Jackson Street,
Oakland, California

PETITION OF KRETSCHMAR
BRANDS, INC. FOR REVIEW
UNDER WATER CODE SECTION
13320(a) OF ACTION BY THE
REGIONAL WATER QUALITY
CONTROL BOARD, SAN FRANCISCO
BAY REGION

I.
INTRODUCTION

This Petition is filed pursuant to California Water Code § 13320(a) and California Code of Regulations ("C.C.R."), Title 23, § 2050. Petitioner, Kretschmar Brands, Inc. ("Kretschmar"), hereby makes this special appearance to seek review of action taken by the Regional Water Quality Control Board, San Francisco Bay Region ("regional board"), on February 24, 1994. Specifically, Kretschmar seeks review of the regional board's action in designating Kretschmar a responsible party and requiring it to submit a technical report pursuant to California Water Code § 13267(b).

Kretschmar does not concede, and is filing this petition on the condition that it is not so conceding, that either the regional board or the State Water Resources Control Board ("State Board") has jurisdiction over it. Rather, Kretschmar is filing this petition to contest the regional board's assertion of jurisdiction.

The regional board lacks jurisdiction over Kretschmar because Kretschmar does not have the requisite

"minimum contacts" with the state of California. Kretschmar has never owned the property at 208 Jackson Street, nor has it owned or operated an underground storage tank at that property. See 23 C.C.R. § 2720. Both East Bay Packing Co., the most recent prior owner, and Mr. Ming Chen, the current owner, have been named as responsible parties in the Order. Kretschmar is not, however, a "responsible party" under California law, and the regional board cannot lawfully exercise jurisdiction over Kretschmar and require it to submit a technical report under California Water Code § 13267(b).

Kretschmar also does not have the requisite "minimum contacts" as a "parent corporation" of East Bay Packing Co. to allow the regional board to exercise jurisdiction. While Kretschmar and East Bay Packing Co. were affiliated corporations, the regional board has no basis to disregard the corporate separateness of these two entities and use the contacts of East Bay Packing Co. to justify its exercise of jurisdiction over Kretschmar.

II. PETITION

1. Name and address of the petitioner:

Kretschmar Brands, Inc., by its attorneys, Fred L. Pillon and Kimberly S. McGovern, Gibson, Dunn & Crutcher, One Montgomery Street, San Francisco, California 94104.

2. Specific action State Board requested to review:

Kretschmar requests review of the regional board's issuance of a Legal Designation of Responsible Party/Request for Submittal of a Technical Report on February 24, 1994 (the "Order"). Specifically, Kretschmar requests review of the regional board's assertion of jurisdiction over Kretschmar in this Order by designating Kretschmar a responsible party as a "parent corporation" of East Bay Packing Co. A copy of the regional board's Order is attached to this Petition as Exhibit A.

3. Date on which regional board acted:

February 24, 1994.

4. Statement of reasons why action was inappropriate or improper:

In designating Kretschmar a responsible party in its Order, the regional board unlawfully asserted jurisdiction over Kretschmar. The regional board does not have personal jurisdiction over Kretschmar because Kretschmar does not have sufficient "minimum contacts" with the state of California to be subject to the regional board's authority. Kretschmar has never owned the property at issue. It did not own or operate the underground storage tanks at this property. The regional board also cannot use the contacts of a prior owner of the property, East Bay Packing Co., to assert jurisdiction over Kretschmar, even if Kretschmar and East Bay Packing Co. were affiliated or related corporations, without some basis for

disregarding the corporate veil. The regional board did not have sufficient basis to do so here.

5. The manner in which Kretschmar is aggrieved:

The regional board has unlawfully attempted to assert personal jurisdiction over Kretschmar. Pursuant to this wrongful exercise of jurisdiction, the regional board, without any legal basis, is seeking to require Kretschmar to submit a technical report within a specified period of time or, if it fails to comply, to risk fines of up to \$1,000 per day.

6. Requested action by state or regional board:

Petitioner requests that the State Board order the regional board to amend its Order by removing the designation of Kretschmar as a responsible party as a "parent corporation" to East Bay Packing Co.

7. Statement of points and authorities in support of legal issues:

(a) The regional board lacked jurisdiction to name Kretschmar as a responsible party in its Order: see, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408 (1984); *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (1990); *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299 (9th Cir. 1986); *Seagate Technology v. A.J. Kogyo Co.*, 219 Cal. App. 3d 696 (1990); United States Constitution; California Code of Civil Procedure, § 410.10.

(b) The regional board cannot exercise personal jurisdiction over Kretschmar and require submission of a technical report since Kretschmar has never been an "owner" or "operator" of the property or of any underground tanks at that property: see California Water Code § 13267(b); 23 C.C.R. § 2720; see also, e.g., In re Wenwest, Inc., SWRCB Order No. WQ 92-13 (Oct. 22, 1992).

(c) The contacts of a related corporation cannot be used to justify the assertion of jurisdiction over a separate corporate entity without some basis to disregard the corporate veil: see, e.g., Rollins Burdick Hunter v. Alexander & Alexander, 206 Cal. App. 3d 1 (1988); In re Aluminum Company of America, SWRCB Order No. WQ 93-9 (July 22, 1993); In re Spitzer, SWRCB Order No. WQ 89-8 (May 16, 1989).

Kretschmar is requesting that this Petition be held in abeyance, see III., below. If this Petition is not to be held in abeyance, Kretschmar requests leave to supplement the foregoing statement of points and authorities.¹

¹Apart from the jurisdictional issues which this Petition presents for review, there are additional bases for review of the regional board's action in designating Kretschmar a responsible party, among them that Kretschmar has filed for bankruptcy, and any potential liability under this Order has been or will be discharged. See, e.g., *In re Jensen*, 995 F.2d 925 (9th Cir. 1993). Pending a decision on the jurisdictional issues, therefore, Kretschmar requests leave to amend its Petition to assert additional arguments as to why it is not a "responsible party" under the regional board Order.

8. List of persons with interest in subject matter:

In addition to Kretschmar, the following parties were named in the regional board's Order:

(a) East Bay Packing Co. and The Courtenay Corporation, by their attorneys, Fred L. Pillon and Kimberly S. McGovern, Gibson, Dunn & Crutcher, One Montgomery Street, San Francisco, California 94104.

(b) Tzu Ming Chen, by his attorneys, Jonathan W. Redding, Esq., Fitzgerald, Abbott & Beardsley, 1221 Broadway, 21st Floor, Oakland, CA 94612.

(c) Hunter/Krey/Kretschmar, 6038 N. Lindbergh Avenue, Hazelwood, Missouri 63042

(d) John Morrell & Co., 250 East 5th Street, Cincinnati, Ohio 45202.

9. Statement of service of Petition on regional board and discharger:

See attached Declarations of Service.

10. Request for preparation of regional board record:

Kretschmar is requesting that this Petition be held in abeyance, see III., below. Subject to this Petition being held in abeyance, Kretschmar has requested the regional board to prepare the record for submittal to the State Board. (See Exhibit B, attached.) If this Petition is held in abeyance, the regional board should not be required to prepare and submit the record, except and until required to do so by the State Board.

11. Request for hearing/presentation of additional evidence:

Kretschmar is requesting that this Petition be held in abeyance, see III., below. Subject to this Petition being held in abeyance, Kretschmar is requesting a hearing before the State Board for the purpose of presenting additional evidence. At that time, Kretschmar will also amend this Petition to include a statement of the nature of the evidence it will submit and why such evidence was not submitted to the regional board.

III.

REQUEST THAT PETITION BE HELD IN ABEYANCE

Kretschmar hereby requests that its Petition be held in abeyance pending compliance with the Order by the current owner of the property, Tzu Ming Chen.

DATED: March 24, 1994

GIBSON, DUNN & CRUTCHER
FRED L. PILLON
KIMBERLY S. MCGOVERN

By 
Fred L. Pillon

Attorney for Petitioner
Kretschmar Brands, Inc.

FA940800.121

DECLARATION OF SERVICE BY MAIL

Carol Goepferd declares as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is One Montgomery Street, San Francisco, California 94104, in said County and State; I am readily familiar with Gibson, Dunn & Crutcher's practice in its above-described San Francisco office for the collection and processing of correspondence for mailing with United States Postal Service; pursuant to that practice, envelopes placed for collection at designated locations during designated hours are deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business; on the 24th day of March, 1994, I served the attached:

PETITION OF KRETSCHMAR BRANDS, INC. FOR REVIEW
UNDER WATER CODE SECTION 13320(a) OF ACTION BY
THE REGIONAL WATER QUALITY CONTROL BOARD, SAN
FRANCISCO BAY REGION

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown below:

Rich Hiatt
San Francisco Bay Region
Regional Water Quality Control Board
2101 Webster Street, Suite 500
Oakland, CA 94612

Jennifer Eberle
Alameda County Health Care Services Agency
Department of Environmental Health
80 Swan Way, Room 350
Oakland, CA 94621

Gilbert Jensen, Esq.
Alameda County District Attorney
Environmental Division
7677 Oakport Street, Suite 400
Oakland, CA 94621

Jonathan W. Redding, Esq.
Fitzgerald, Abbott & Beardsley
1221 Broadway, 21st Floor
Oakland, CA 94612

and by then sealing and placing said envelope(s) for collection at a designated location at Gibson, Dunn & Crutcher's offices at One Montgomery Street, San Francisco, California 94104 during designated hours, for mailing with the United States Postal Service on the above date, following ordinary business practice.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 24th day of March, 1994, at San Francisco, California.



Carol Goepferd

**DECLARATION OF SERVICE BY FEDERAL EXPRESS
AND BY FACSIMILE**

Carol Goepferd declares as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is One Montgomery Street, San Francisco, California 94104, in said County and State; I am readily familiar with Gibson, Dunn & Crutcher's practice in its above-described San Francisco office for the collection and processing of correspondence for delivery by an overnight courier service such as Federal Express; pursuant to those practices, envelopes placed for collection at designated locations during designated hours are delivered to the designated overnight courier service with a fully completed airbill under which all delivery charges are paid by Gibson, Dunn & Crutcher that same day in the ordinary course of business; on the 24th day of March, 1994, I served the attached:

PETITION OF KRETSCHMAR BRANDS, INC. FOR REVIEW UNDER
WATER CODE SECTION 13320(a) OF ACTION BY THE REGIONAL
WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown below:

Mr. Ted Cobb
Office of the Chief Counsel
Water Resources Control Board
901 "P" Street
Sacramento, CA 95814

and by then sealing and placing said envelope(s) for collection at a designated location at Gibson, Dunn & Crutcher's offices at One Montgomery Street, San Francisco,

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN FRANCISCO BAY REGION

2101 WEBSTER S. EET, SUITE 500

OAKLAND, CA 94612

(510) 286-1255

ALCO
HAZMAT

91 FEB 25 AM 11:35

RECEIVED

FEB 24 1994



East Bay Packing Company
by Kretschmar Brands Inc., a parent corporation
1 Boatmans Plaza-Price Waterhouse
St. Louis, MO 63101-2602

February 24, 1994
File: 01-0533
& 2198.17
STID3707

East Bay Packing Company
by Hunter/Krey/Kretschmar, formerly Kretschmar Brands Inc.
as parent corporations
6038 N. Lindbergh Ave.
Hazelwood, MO 63042

East Bay Packing Company
by Courtenay Corporation, a successor corporation
Suite 217, 811-14 St. NW
Calgary, Alberta T2N 2A4
Attn: Erwin Greisinger

East Bay Packing Company and Kretschmar Brands Inc.,
as a parent corporation
by John Marshall and Co., as a successor corporation
250 East 5th Street\
Cincinnati, OH 45202

Tzu Ming Chen
208 Jackson Street
Oakland, CA 94607

**RE: Legal Designation of Responsible Party and Request for
Submittal of a Technical Report Resulting from the Alameda
County Department of Environmental Health's Pre-Enforcement
Review Panel Meeting on January 18, 1994**

Dear Sirs:

It has been brought to my attention by Regional Board staff that a condition of soil and groundwater pollution exists on the property located at 208 Jackson Street, Oakland as a result of an underground storage tank release. The Alameda County Department of Environmental Health (ACHD) staff have requested technical reports from you to fulfill your obligations per California Code of Regulations, Title 23 Waters, Chapter 16, Underground Storage Tank Regulations, Article 11, Corrective Action Requirements. It is my understanding that ACHD staff were unsuccessful in eliciting your co-operation in resolving these issues through normal correspondence.

A Pre-Enforcement Review Panel was held at the ACHD offices on January 18, 1994, and attended by Lester Feldman of my staff.

Pursuant to the Regional Board's authority under Section 13267 (b) of the California Water Code, you are hereby required to submit a technical report to address soil and groundwater pollution at this site within 30 days of the date of this letter. This technical report should specifically address the following numbered items:

- 1) workplan to define the extent of groundwater hydrocarbon pollution;
- 2) commencement of quarterly groundwater monitoring and sampling for TPHg, TPHd, and BTEX;
- 3) submittal of quarterly groundwater monitoring and sampling reports to ACHD;
- 4) well surveying with respect to mean sea level;
- 5) a detailed description of work performed in regards to a storage tank removed from inside the building.

All work should adhere to the requirements of the Tri-Regional Board Staff Recommendations for the Preliminary Evaluation and Investigation of Underground Storage Tank Sites-August 10, 1990 and Article 11 of Title 23, Waters, California Code of Regulations.

This request is based on the evidence submitted to the pre-enforcement Review Panel, as well as the documentary record. East Bay Packing Co., its parent companies Kretschmar Brands Inc. and Hunter/Krey/Kretschmar, and its successor corporations, Courtenay Corp., and John Marl & Co., are responsible parties as per Section 2720 of Article 11 of Title 23, Waters, California Code of Regulations, in that they "owned or operated the underground storage tank immediately before the discontinuation of its use", and they "had or has control over a underground storage tank at that time of or following an unauthorized release of a hazardous substance." The record indicates that Kretschmar Brands Inc. is the parent corporation and John Marl & Co. are the successor corporations to East Bay Packing Co. The record also indicates that Hunter/Krey/Kretschmar Brands Inc., and is a parent corporation of East Bay Packing Co.

Mr. Tzu Ming Chin is a responsible party as per Section 2720 of Article 11 of Title 23, Waters, California Code of Regulations, in that he is "an owner of property where an unauthorized release of a hazardous substance from an underground storage tank has occurred."

I am hereby transmitting this request for a technical report to ACHD for service and continued case handling. You should be aware that failure on your part to submit the requested technical report, or late submittal may result in fines up to \$1000 per day of delinquency.


Enforcement Panel
Page 3 of 3

Your response to this technical report request should be sent to the attention of Ms. Jennifer Eberle at ACHD. Please inform their office at least three working days in advance of all field activities.

Please be advised that this is a formal request for a technical reports pursuant to California Water Code Section 13267 (b). Any extensions of the stated deadlines, or modifications of the required tasks, must be confirmed in writing by either this agency or the ACHD.

If you have any questions regarding the contents of this letter, Please contact Ms. Eberle of ACHD, at (510) 271-4530.

Sincerely,



for

Steven R. Ritchie
Executive Officer

cc: Gil Jensen, ACDA, 7677 Oakport Street, Suite 400, Oakland
94621
Jennifer Eberle, ACHD, 80 Swan Way, Suite 200, Oakland 94621

GIBSON, DUNN & CRUTCHER
LAWYERS

ONE MONTGOMERY STREET
TELESIS TOWER

SAN FRANCISCO, CALIFORNIA 94104-4505

(415) 393-8200

FACSIMILE: (415) 986-5309

March 22, 1994

JAS. A. GIBSON, 1852-1922
W. E. DUNN, 1861-1925
ALBERT CRUTCHER, 1860-1931

NEW YORK
200 PARK AVENUE
NEW YORK, NEW YORK 10166-0193

WASHINGTON
1050 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-5306

BRUSSELS
AVENUE LOUISE 222
B-1050 BRUSSELS, BELGIUM

PARIS
104 AVENUE RAYMOND POINCARÉ
75116 PARIS, FRANCE

LONDON
30/35 PALL MALL
LONDON SW1Y 5LP

HONG KONG
8 CONNAUGHT PLACE
HONG KONG

TOKYO
1-1-3 MARUNOUCHI CHIYODA-KU
TOKYO 100, JAPAN

AFFILIATED SAUDI ARABIA OFFICE
JARIR PLAZA, OLAYA STREET
P.O. BOX 15870
RIYADH 11454 SAUDI ARABIA

OUR FILE NUMBER

LOS ANGELES
333 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-3197

CENTURY CITY
2029 CENTURY PARK EAST
LOS ANGELES CALIFORNIA 90067-3026

ORANGE COUNTY
4 PARK PLAZA
IRVINE, CALIFORNIA 92714-8557

SACRAMENTO
400 CAPITOL MALL
SACRAMENTO CALIFORNIA 95814-4407

SAN DIEGO
750 B STREET
SAN DIEGO, CALIFORNIA 92101-4605

MENLO PARK
3000 SAND HILL ROAD, BUILDING I
MENLO PARK, CALIFORNIA 94025

DALLAS
1717 MAIN STREET
DALLAS TEXAS 75201-7390

DENVER
1801 CALIFORNIA STREET
DENVER, COLORADO 80202-2694

SEATTLE
999 THIRD AVENUE
SEATTLE WASHINGTON 98104-7089

WRITER S DIRECT DIAL NUMBER

(415) 393-8340

T 50143-00001

Mr. Rich Hiett
San Francisco Bay Region
Regional Water Quality Control Board
2101 Webster Street, Suite 500
Oakland, CA 94612

Re: 208 Jackson Street, Oakland
Request for Technical Report dated
February 24, 1994;
Petition for Review filed with State Board on
behalf of Kretschmar Brands, Inc.

Dear Mr. Hiett:

I hereby request preparation of the Regional Board record in the above referenced matter to be submitted to the State Board, pursuant to 23 C.C.R. § 2050.5. Because a request has been made to hold the Petition for Review filed on behalf of Kretschmar Brands, Inc. in abeyance, I ask that the record be submitted only if the State Board does not grant my request to hold the Petition in abeyance. Thank you.

Very truly yours,



Kimberly S. McGovern

KSM/cbg

cc: Jennifer Eberle
Gil Jensen, Esq.

FA940810.038/-1+