

1 ALLAN R. FRUMKIN, ESQ. (SBN 50543)
2 CAROLYN N. PETTIFER, ESQ. (SBN 245810)
3 LAW OFFICES OF ALLAN R. FRUMKIN, INC.
4 3180 CROW CANYON PLACE, SUITE 255
5 SAN RAMON, CA 94583
6 Telephone Number: (925) 355-1555
7 Facsimile Number: (925) 355-0555
8 Attorney for Plaintiff
9 Pedro Pulido

8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF ALAMEDA

11 PEDRO PULIDO) Case No: RG12617620
12)
13 Plaintiff) PLAINTIFF PEDRO PULIDO'S
14 v) MEDIATION STATEMENT
15)
16 LOYAL MOORE, MARY MOORE) Date: June August 7, 2012
17) Time: 9.00 a.m.
18 Defendants)
19)

18 PEDRO PULIDO ("Plaintiff") submits the following Mediation Statement:

19 **1. Parties and Counsel of Record:**

20 Plaintiff: Pedro Pulido
21 Counsel for Plaintiff: Allan R. Frumkin, Esq.,
22 Law Offices of Allan R. Frumkin, Inc.
23 3180 Crow Canyon Place, Ste 255
24 San Ramon, CA 94583

25 Defendants: Loyal Moore and Mary Moore, *in pro per*
26 30689 Prestwick Avenue
27 Hayward, CA 94544

26 **2. General Statement of the Case**

27 Plaintiff is seeking damages from Defendants because Plaintiff's business has
28 been harmed by Defendants' failure to clean up the property known as 2700 23rd

1 Avenue, Oakland, CA ("the Property") within a specified period of time and, according
2 to the terms of their agreement. Because Defendants failed to clean up the Property,
3 on February 17, 2012, Plaintiff filed a Complaint against Loyal Moore and Mary Moore
4 ("Defendants") alleging causes of action which included Breach of Contract, General
5 Negligence, Fraud, Negligent Interference with Business Relations, and Lost Profits.

6 **3. Relevant Factual Background**

7 On August 5, 2009

8 The parties entered into a Commercial Property Purchase Agreement and Joint
9 Escrow Instructions ("Agreement.") Under the terms of that Agreement, Plaintiff agreed
10 to purchase the Property from Defendants for the purchase price of \$350,000. (See
11 copy Agreement attached hereto and incorporated herein by this reference as Exhibit
12 A.) Close of Escrow was to be no later than August 31, 2010.

13 On May 7, 2010

14 Basics Environmental ("Basics") provided a Local Regulatory Agency File
15 Review: "the Phase I Report". (See Exhibit B attached hereto and incorporated herein
16 by this reference.)

17 The Phase I Report provided the history of the Property. Basics reported the
18 following:

- 19 • By 1928 the Property was developed with a gas station;
- 20 • By 1952 an auto repair shop was added;
- 21 • By 1967 the gas station appears to have been demolished;
- 22 • By 1967/1968 the Property was redeveloped for occupancy by Ed's

23 Liquors, a liquor store. Plaintiff is the present owner of that liquor store.

24 Because of the Property's history of occupancy as a gas station and auto repair
25 facility, Basics' conclusions in its Phase I report were that there should be an
26 "evaluation of former hazardous materials handling practices conducted at the subject
27 site i.e., identification of former underground storage tank(s), size, type and locations,
28 pump island locations, auto maintenance areas, reports of any incidents, etc.)" (Phase I

1 Report, 1:26-29.)

2 Furthermore, according to the Phase I report, when plans were submitted for
3 construction of the liquor store, a note was attached to those plans which said:

4 "Remove existing gasoline storage tanks below grade and fill with engineered fill.
5 Verify with utility company exact location of gasoline line and verify with city exact
6 location of water and sewer line." (Phase I report, 3:22-24).

7 The Report went on to say:

8 "The diagram did not indicate how many tanks were located onsite, their
9 capacities, or locations. **There was no indication in the OBD records that this work
10 was performed.** However, no obvious evidence of USTs¹ was observed onsite during
11 the performance of the Environmental Transaction Screen." **(Emphasis added.)**

12 Because the Property had previously been a gas station, the Phase I report
13 included recommendations that there be: "Performance of subsurface sampling to
14 address a former gas station and auto repair facility located at the subject site." (Phase
15 I Report, 4:19-10.)

16 In fact, specifically because the Phase I report found there were "possible
17 environmental concerns onsite" (Phase I report, page 4, line16) the parties added an
18 Addendum to their Agreement to address the potential hazardous problems that might
19 still exist on the Property.

20 On July 13, 2010

21 The parties agreed to an Addendum ("Addendum") to the Agreement which was
22 signed by all parties on August 24, 2010. (See copy Addendum attached hereto as
23 Exhibit C and incorporated herein by this reference.)

24 In the Addendum, the Defendants agreed:

25 "... to undertake and complete the full scope of work for the subsurface
26 hazardous materials clean-up work at 2700 23rd Avenue – Oakland, CA in accordance
27 with the findings in the Phase 2 Environmental Site Assessment ("Site Assessment")
28 from Schutze & Associates, dated August 24, 2010." (See copy Site Assessment
attached hereto as Exhibit D and incorporated herein by this reference.)

¹ Underground Storage Tanks

1 In that Addendum, the Defendants also agreed:

2 "Work to commence before or after the close of escrow, but in no event later than
3 September 15, 2010."

4 On August 27, 2010

5 Schutze & Associates "(Schutze)" completed a subsurface geophysical survey
6 report. ("Phase II report"). (See copy report attached hereto as Exhibit E and
7 incorporated herein by this reference) The purpose of the survey was to determine
8 whether or not underground storage tanks or subsurface structures were still in
9 existence under the Property.

10 Included in that Phase II report were the results of the July 29, 2010 subsurface
11 investigation at the Property. Based on the laboratory results from that investigation,
12 Schutze concluded:

- 13
- 14 • "Soil at the south portion of the parking area has been impacted by diesel-range
 - 15 and motor oil-range petroleum hydrocarbons;
 - 16 • Shallow perched groundwater (approximately 15 bgs) at the south portion of the
 - 17 parking area had been impacted by gasoline-range, diesel-range and motor oil
 - 18 range petroleum hydrocarbons, as well as naphthalene.
 - 19 • Shallow perched groundwater (approximately 13 bags) at the west portion of the
 - 20 parking area has been impacted by motor oil-range petroleum hydrocarbons.
 - 21 • Soil vapor at the south central portion of the parking area has been impacted by
 - 22 ethylbenzene and naphthalene." (Page 2, lines 12-20)

23 That initial investigation also stated:

24 "TPH-g, TPH-d, TPH-mo², naphthalene and ethylbenzene were detected at the
25 subject site above the corresponding Environmental Screening Levels (ESLs) of
26 the San Francisco Bay Area Regional Water Quality Control Board (RWQCB).
27 The likely sources of the contamination were former leaking underground storage
28 tanks (USTs) and/or associated product lines." (Page 2, lines 21-25.)

In its Phase II report, Schutze also included the results of its geophysical survey
completed on August 27, 2010 and, recommended:

"... excavating a series of test pits at the location of the potentially existing former
product line and at the location of the metal anomaly discovered at the south portion of

1 the parking area, an area which coincides with high TPH and naphthalene²
2 concentrations detected at the site during the previous investigation.” (Page 4, lines 29-
3 33.)

3 Despite the Addendum described above which specifically states that
4 Defendants would “undertake and complete the full scope of work for the subsurface
5 hazardous materials clean-up work” at the Property, and despite the fact that the Phase
6 II report specifically demonstrates the existence of hazardous contamination, no such
7 clean-up work has been performed. Additionally, after Plaintiff took possession, he
8 discovered four metal barrels on the Property. Areas of soil around the Property had
9 turned green.

10 On February 17, 2012

11 Plaintiff filed his complaint against Defendants.

12 On March 8, 2012

13 Doulos Environmental (“Doulos”) prepared a Hydrolic Investigation of the
14 Property. (See copy Hydrolic Investigation attached hereto as Exhibit F and
15 incorporated herein by this reference.) The Investigation shows that there is still
16 contamination in the wells on the Property. Doulos collected soil samples from a depth
17 of 3.25’ and at 6.25’. As a result of those samples, Doulos states unequivocally that:
18 “Both soil samples contained measurable amounts of petroleum hydrocarbons.” (Page
19 1, lines 28-29). i.e., there is still contamination at the Property.

20 According to the Doulos investigation, it will cost between \$69,000 and \$750,000
21 to clean up the Property. (Page 3, lines 28 and 39.) Significantly, the Phase I Report
22 found no evidence of the Underground Storage Tanks. If those tanks had been
23 removed before 1980, Plaintiffs would not be eligible to receive any assistance from the
24 Federal clean-up fund to defray the cost.

25 Plaintiff – and his customers – are acutely aware of the obvious and continuing
26 contamination not least because parts of the soil on the Property has turned green.

27
28

² Naphthalene destroys or changes red blood cells so they cannot carry oxygen.

1 Because the contamination is continuing, Plaintiff has lost and, continues to lose
2 business.

3 **Conclusion**

4 Plaintiff contends that Defendants had a duty under the Agreement and/or
5 Addendum to that Agreement to clean-up the contamination on the Property.
6 Defendants have failed to perform because approximately twenty (20) months have
7 passed without that work being either commenced or completed. Because the clean-up
8 work has not been performed, Plaintiff and his customers remain potentially at risk from
9 the environmental hazard caused by the underground contamination. Moreover,
10 because of the continuing contamination, Plaintiff has lost profits, lost business
11 opportunity and incurred damages as described above.

12 Dated: LAW OFFICES OF ALLAN R. FRUMKIN, INC.

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ALLAN R. FRUMKIN, ESQ.
Attorney for Plaintiff, Pedro Pulido

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PROOF OF SERVICE BY MAIL

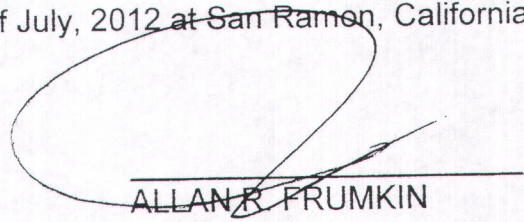
I am a citizen of the United States and a resident of the County of Contra Costa. I am over the age of 18 years and not a party to the within above entitled action; my business address is 3180 Crow Canyon Place, Suite 255, San Ramon, CA 94583.

On July 23, 2012, I served the within **PLAINTIFF PEDRO PULIDO'S MEDIATION STATEMENT** on the parties listed below, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

ADAM S. FERBER, ESQ.
FERBER LAW OFFICE
1180 BROWN AVE. STE 100
LAFAYETTE, CA 94549

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed this 23rd day of July, 2012 at San Ramon, California.


ALLAN R. FRUMKIN