Harrison Street Garage

UST Case 1432 Harrison, Oakland

Local lead

CALIFORNIA REGIONAL WATER
MAR 26 1991
QUALITY CONTROL BOARD

File

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BEFORE THE CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

PETITION FOR REVIEW OF FAILURE TO ACT BY THE COUNTY OF ALAMEDA HEALTH CARE SERVICES AGENCY RE: CORRECTIVE ACTION ORDER FOR HARRISON STREET GARAGE, 1432 HARRISON STREET, OAKLAND, CALIFORNIA 94612	No.: RESPONSE OF DOUGLAS MOTOR SERVICES IN OPPOSITION TO PETITION; POINTS AND AUTHORITIES

INTRODUCTION

Douglas Motor Services ("Douglas") submits this response in reply and opposition to Petitioner's petition (the "Petition") for review of the conduct of the Alameda County Health Services Agency (the "County"). For the reasons discussed below, Douglas asserts that the decision of the Agency was neither arbitrary nor capricious but, rather, comports fully with existing law and the rulings of this Board. The County's decision should, therefore, be upheld and Petitioners' petition denied.

FACTS

The subject property has been owned by Alvin Bacharach and Barbara Borsuk, petitioners herein ("Petitioners") since 1945. It is believed that two 550 gallon underground storage tanks ("USTs")

which are referred to in the Petition and this response were acquired by Petitioners at the time they purchased the property.

In 1972, Douglas purchased the parking business on the subject property from Carl Don Skjolander. The deal was for good will and receivables only (See Declaration of Leland Douglas in Response to the Petition of Alvin Bacharach and Barbara Borsuk re: Corrective Action Order for Harrison Street Garage, 1432 Harrison Street, Oakland, California (hereinafter "Douglas Declaration", attached hereto as Exhibit "A"). A lease for the property was contemporaneously, but entirely separately, negotiated with Petitioners. The lease was for the real property and its appurtenances (see leases attached to the Petition as Exhibits "A", "B" and "C").

In 1975, Douglas replaced one of the 550 gallon tank on the premises with a larger 1,000 gallon tank. Because Douglas was replacing a tank that belonged to Petitioners, Douglas attempted to get Petitioners to contribute to the cost of the tank and its installation. Petitioners refused. Douglas chose not to dispute Petitioners' position but rather to simply replace the tank at its expense. (Douglas Declaration). At no time was ownership of the newly installed tank discussed; Douglas always assumed it was, upon installation, Petitioners' property.

In 1982, water was found in the gasoline in the other 550 gallon tank on the property. Douglas discussed the situation with Petitioners on several occasions to no avail (Douglas Declaration; Declaration of Steven Davis in Support of Motion for Order Compelling Answers to Questions at Deposition, attached hereto as

Exhibit "B"[1]). Douglas, thereupon, replaced Petitioners' tank and, as before, approached Petitioners with a request for a contribution toward the cost of the replacement. As before, Petitioners refused; later, Petitioners relented and agreed to pay about 20% of the cost of the replacement.

In 1984 and thereafter, when California law required that USTs be permitted, Douglas complied with the laws, listing itself as the "owner" of the tanks.

Petitioners never asked Douglas to empty the tanks at the expiration of the lease nor did Petitioners ever demand that Douglas remove the tanks. In fact, prior to the termination of the lease with Douglas, Petitioners entered into negotiations with Steven Davis during which, it was suggested that Davis might "use the gas pumps and provide a service to the parkers." (Davis Declaration).

At no time during Douglas's tenure on the property did its tank reconciliation procedures, which consisted of comparison of stick readings with meter readings and sales figures, indicate any loss of product from any tank (Douglas Declaration).

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[1] Exhibit "B" consists of portions of the Declaration of Steven Davis which was filed in a separate action between Mr. Davis and Petitioners.

POINTS AND AUTHORITIES

I.

THE COUNTY'S DECISION TO NOT ADD DOUGLAS TO THE CLEANUP ORDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND SHOULD NOT BE REVERSED

A. Standard of Review.

Petitioners' point out in the Petition that this Board's holding in In Re Exxon Company, U.S.A., WQ 85-7, ("Exxon") confers on the Board a modified "independent judgment rule" standard of review. However, Petitioners fail to note that, also under Exxon, the Board will uphold the decision of the administrative agency if the Board finds that the agency's decision was based on substantial evidence in the record. As is demonstrated below, Alameda County's decision was, in fact, based on substantial evidence and should be upheld.

B. Substantial evidence in the record demonstrates that Petitioners are the owners of the underground storage tanks on the premises.

Exxon, as does the case at hand, involved the issue of ownership of USTs. The local agency in Exxon decided that the Exxon Company was the owner of certain USTs based on personal property tax records which indicated that the company had paid personal property taxes on several items on the property including the USTs. The Exxon Company disputed the records and the Board agreed, holding that the records did not compromise "substantial evidence" of ownership.

In the present instance, there can be no dispute that Petitioners owned the original 550 gallon tanks which Douglas eventually replaced. Petitioners, however, attempt to claim that,

by replacing the tanks, Douglas somehow became the owners of the newly installed tanks. The position is in direct contradiction with the terms of the leases. Paragraph 4 of the leases required Lessee to "surrender the premises in the same condition as received". The premises were received with tanks in place and were returned in the same condition. Paragraph 5 of the lease states that:

> all alterations, additions and improvements, including fixtures made in, to or on the premises, except unattached moveable business fixtures shall be the property of Lessor and shall remain upon and be surrendered with the premises ... .

This lease term comports with the mandates of California Civil Code § 1013:

> When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed ... belongs to the owner of the land, unless he chooses to require the former to remove it ... .

Petitioners never demanded the emptying or removal of the tanks with Douglas at the expiration of Douglas's lease (Douglas Declaration). Further, Petitioners' negotiated with the subsequent lessee for the use of the tanks (Davis Declaration). Both the law and the leases clearly place ownership of the newly installed tanks with Petitioners.

Petitioners then argue against the plain terms of the lease by suggesting that Douglas's conduct establishes that Douglas considered itself the owner of the USTs. To the contrary, Douglas's conduct reinforces the fact that it did <u>not</u> consider itself to be the owner of the tanks. On the occasion of both tank replacements, Douglas requested financial assistance from Petitioners. On vacation of the premises at the expiration of the

lease, despite having received minimal financial assistance with the tank replacements from Petitioners, Douglas made no attempt to obtain compensation for the tanks. When the law required the owners of USTs to permit their tanks and Petitioners refused to do so, Douglas took it upon itself to comport with the law. Douglas only performed that task that circumstances and Petitioners' refusal to act dictated.

Plaintiff states that the this Board adopted "as its own" the holding of the appellate court in Murr v. Cohen (1927) 87 Cal.App.3d 478 to the effect that an UST is a removable fixture which does not become part of the realty. Ignoring for the moment the fact that no authority is cited in support of Petitioners' implication, certainly such a holding could not and would not be invoked by a court or this Board in contravention of the clear terms of a lease.

Alameda County's determination that Petitioners, not Douglas, are the owners of the USTs is supported by substantial evidence; the County's cleanup order should be allowed to stand.

II.

PETITIONERS ARE THE PROPER PARTIES TO BE CHARGED WITH CLEANUP OF THEIR OWN PROPERTY

A. As the owners of the USTs and the property, Petitioners were the proper focus of Alameda County's compliance order.

The California Underground Storage of Hazardous Substances law (the "Statute") authorizes a local agency to issue compliance orders to the "owner, operator or other responsible party." Alameda County, based on substantial evidence in the record, -

determined that Petitioners were the owners of the USTs and therefore were proper parties to name.

In addition, Petitioners, without question owners of the property, may be held liable as an "other responsible party". This Board itself stated in In the Matter of the Petition of Vallco Park, Ltd., WQ 86-18, that "[T]he ultimate responsibility for the condition of the land is with the owner." Perhaps even more succinctly, this Board held in In the Matter of the Petitions of Arthur Spitzer, Harvey Jack Muller, Bettina Brendel, Spic & Span, Inc., S & S Enterprises, Inc. and Aratex Services, Inc., WQ 89-8, that:

> A long line of State Board orders have upheld Regional Board orders holding landowners responsible for cleanup of pollution on their property regardless of their involvement in the activities that initially caused the pollution.

The Board went on to say in Spitzer that a landowner is ultimately responsible for the condition of his property, even if he is not involved in the day-to-day operations. If the property owner knows of a discharge on his property and has sufficient control of the property to correct it, he should be subject to a cleanup order under Water Code section 13304. Although this case does not directly engage the Water Code, the "other responsible party" phrase in the Statute suggests that the same analysis pertain.

B. Petitioners had access to the property and the tanks at any time.

Petitioners claim that they did not have access to the property, could not ascertain its condition without Douglas's cooperation and therefore did not have the ability to comply with the Statute or any other relevant laws. This position is belied

by the terms of the lease wherein it is stated in Paragraph 7 that:

> Lessee agrees that Lessor and his agents may enter upon the demised premises at all reasonable times to inspect the same, ..., or to make any changes or alterations or repairs which Lessor shall consider necessary for the protection, improvement or preservation thereof ... .

Petitioners had contractual access to the property at any time but chose not to exercise it. This is further manifested by the fact that Mark Borsuk, on behalf of Petitioners, contacted James Bowers of Subsurface Consultants in September, 1987, while Douglas's lease was still in force, to discuss the possibility of retaining Subsurface Consultants to perform a site investigation on the subject property (Declaration of James P. Bowers in Opposition to Plaintiff's Application For Right to Attach Order and Motion For Appointment of Receiver (Bowers Declaration) attached hereto as Exhibit "C"[2]). Despite Mr. Bowers opinion that an investigation ought to be done, Petitioners did nothing until June of 1990 (Bowers Declaration).

C. Douglas complied throughout its tenure on the property with all operative laws including the Statute.

Prior to 1984, no environmental laws affecting the underground storage of gasoline were in effect. Douglas's decisions to replace the two 550 gallon USTs were predicated on business decisions. When the Statute was enacted, it was Petitioners, not Douglas, who refused to comport with the law which required that the owners of USTs register them. In spite of

[2] The declaration of James Bowers was filed as part of the action between Petitioners and Steven Davis as discussed in Footnote 1.

Petitioners' inaction, Douglas took it upon itself to comport with the law.

Petitioners allege, with no substantiation whatsoever, that Douglas did not monitor the tanks. In fact Douglas did perform inventory reconciliations which is all that was required of it (Leland Douglas Declaration).

Petitioners allege, again on no evidence, that Douglas knew of unauthorized releases, failed to report unauthorized releases and failed to take any type of corrective action. In fact, there is no evidence that Douglas, was ever aware of any unauthorized release (See Douglas Declaration). Not knowing of a release, of course, renders reporting moot. As for as taking corrective action, when it became aware that the gasoline in one of the tanks was becoming contaminated with water, even though inventory reconciliation indicated that no product was being lost, Douglas promptly reported the matter to the tank owners, Petitioners. When Petitioners refused to do anything about the situation, Douglas, prior to the passage of the Statute, on its own, replaced the tank.

Petitioners suggest that Douglas failed to close the tank on termination of its lease, yet Petitioners' at that very time, without consulting Douglas, were negotiating with the subsequent lessee, Davis, to use the tanks and sell gasoline. Clearly, Petitioners considered themselves to be in control of; i.e., the owners of, the tanks. Furthermore the tanks were not being considered abandoned at that time and Douglas had no duty to close them. It was only after Davis declined Petitioners' offer of the

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use of the tanks that Petitioners attempted to place responsibility for the tanks on Douglas.

D. Neither the County nor the State Board are bound by contractual terms and conditions entered into between the parties to the contract.

Petitioners argue that Douglas should be the primary focus of the County's cleanup order because of a variety of contractual terms and conditions in the leases which allegedly place the responsibility on Douglas. This Board, however, has consistently held that it is not appropriate for the local agency or the State Board to involve itself in deciding issues of allocation of responsibility between different parties to a cleanup. In the Matter of the Petition of San Diego Unified Port District, WQ 89-12. In that case, the Board upheld the Regional Board's finding that the Port District was primarily responsible for the cleanup on property which the Port District argued it merely owned but was not involved in the activities causing the pollution. Similarly, in In the Matter of the Petition of John Stuart, Doing Business as Stuart Petroleum, WQ 86-15, the Board dismissed a sublessor's argument that the terms of the sublease between it and the sublessee determined their relative duties regarding a cleanup:

> "[I]t is not the province of this Board to assign rights and duties between various third parties based on their mutual contractual obligations. Those issues must be decided elsewhere.

Petitioners argument that, if Douglas is not named, it will hinder their future legal remedies does not comport with the acknowledged approach of the Board or the law. As the Board clearly implies in its decisions, Petitioners have at their disposal the full panoply

of legal remedies. It is there they should look for vindication of their position, not to this Board.

III.

THE DECISION OF THE COUNTY TO NAME ONLY PETITIONERS AS RESPONSIBLE PARTIES COMPORTS WITH BOTH THE LAW AND THE DECISIONS OF THE STATE BOARD; PETITIONERS' PETITION SHOULD BE DENIED

Petitioners cite Exxon, supra, for the proposition that "generally speaking it is appropriate ... to name all parties for which there is reasonable evidence of responsibility ...". In Exxon, however, the Board elaborated on its finding by stating that, to name a party, there must be substantial evidence to support the finding of responsibility and "substantial evidence" means "credible and reasonable evidence". Alameda County investigated the present situation and found no such credible and reasonable evidence; indeed, none exists. The tanks which were removed had been on the property and owned by Petitioners for 30 and 37 years, respectively. Douglas operated the tanks for only 3 and 10 years, respectively. During this time, there was no indication of product loss as evinced by Douglas's inventory reconciliation practices. One tank was removed and replaced with a larger one in 1975. When the other tank exhibited signs of a potential problem; i.e., when the gasoline in that tank became contaminated with water, Douglas removed and replaced the tank. There is no suggestion that the tanks that Douglas installed had failed. As the Board stated in Exxon:

> ... [W]e have not hesitated to uphold the Regional Board when it has named parties where there is substantial support in the record. ... The record in this case simply does not contain the requisite evidence ... .

Petitioners cite Stuart, supra, in support of its Exxon argument and to further suggest that the question is not one of present control of the contaminated property. The question certainly is not one of control, nor is it one of contract or status either; the question simply whether or not substantial evidence exists in the record to name Douglas as a responsible party. The Board has indeed stated that, under the appropriate circumstances, it is correct to name just a tenant on a cleanup and abatement order - if such is justified by the evidence in the case. In another instance, it may be just as correct, as it is here, to name only a landowner. Each case must be addressed on its own merits. The facts in the present case simply do not support the addition of Douglas as a primarily responsible party.

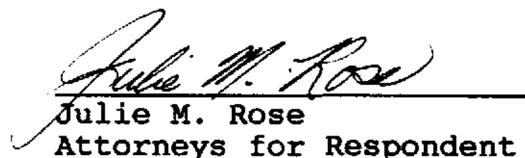
CONCLUSION

Alameda County thoroughly investigated the facts surrounding the contamination on the subject property and found substantial evidence in support of naming Petitioners only as the parties responsible for the cleanup. Petitioners have produced no credible evidence to support their claim that Douglas should be named as a primarily responsible party. The decision of the County should stand and Petitioners' petition should be denied.

Dated: March 25, 1991

Respectfully submitted,

RANDICK & O'DEA



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BEFORE THE CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

PETITION FOR REVIEW OF FAILURE TO ACT BY THE COUNTY OF ALAMEDA HEALTH CARE SERVICES AGENCY RE: CORRECTIVE ACTION ORDER FOR HARRISON STREET GARAGE, 1432 HARRISON STREET, OAKLAND, CALIFORNIA 94612	No.: DECLARATION OF LELAND DOUGLAS

I, LELAND DOUGLAS, declare that:

1. I am a general partner in Douglas Motor Services and I have personal knowledge of the matters stated herein and could competently testify thereto if called on do so at trial.

2. In 1972, Douglas purchased the parking business in existence on the subject property from Carl Don Skjolander. The terms of the sale called for the purchase of the business (good will, receivables and some inventory) only. It was understood that all improvements on the premises were owned by the petitioners in this matter, ALVIN BACHARACH AND BARBARA BORSUK (hereinafter referred to as "Petitioners").

3. Concurrent with the purchase of the business, Douglas entered into a lease for the property with the Petitioners. Two additional leases extending Douglas's leasehold interest to March 31, 1988 were subsequently executed (Copies of the leases are attached to Petitioner's Petition as Exhibits "A", "B" and "C").

4. The leases contain provision regarding Douglas's responsibility for "leakage". No discussion whatsoever concerning the meaning of this term took place; it was assumed by Douglas that this referred to damage due to problems with the sewage system, the water pipes and the sprinkler system on the premises.

5. The only environmental issue that was discussed was that concerning the possibility that vehicular access to the garage would be curtailed by governmental action to address air pollution problems. Paragraph 35 of the first lease (Exhibit "A") and Paragraph 34 of the second lease (Exhibit "B") was the result of these concerns. No discussion at all of the underground tanks took place.

6. From 1972 through 1988, Douglas operated a parking garage on the premises. As a convenience to customers of the garage, gasoline was made available. The amount of gasoline pumped was extremely small, averaging 1,000 gallons per month over the term of the leases.

7. In 1975, it appears that Douglas replaced one of Petitioners' 550 gallon underground storage tanks. Because the tank to be replaced belonged to Petitioners, Douglas requested that Petitioners participate financially in the cost of its replacement. Petitioners refused. Apparently, Douglas thereupon replaced the tank at Douglas's expense.

8. Prior to the replacement of the second 550 gallon tank in 1982, we had numerous discussions with Petitioners regarding the fact that water was showing up in the gasoline in that tank as indicated by the water-detecting "paste" on the stick used to measure product level in the tank. We asked Petitioners what they were going to do about it and they said "nothing". We then asked if Petitioners would contribute to the cost of replacing their tank this time; Petitioners finally agreed to contribute about 20% of the cost.

9. When the law required that permits be obtained by the owners of underground storage tanks for their use, Douglas permitted the tanks to assure compliance with the law.

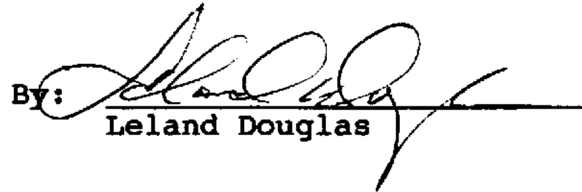
10. Shortly after the laws regarding tanks were enacted, we discussed the requirements for the tanks on the Harrison Street property with local officials and were told that, because of the extremely low throughput, it would not be necessary to conduct yearly tank integrity testing so long as no inventory reconciliation discrepancies appeared.

11. To the best of my recollection, at no time during Douglas's tenure on the property did inventory control procedures, which consisted of comparisons of tank stick readings, meter readings and sales figures, indicate that gasoline was being lost from any tank.

12. In 1988, when Douglas's lease was not renewed, Douglas voluntarily vacated the property leaving the two tanks in place. There was never any discussion as to whether another tenant was going to use the tanks. There was never any reference to their being abandoned. Petitioners never demanded removal of the tanks.

I, LELAND DOUGLAS, am a general partner in Douglas Motor Services and have been authorized to execute this verification on its behalf. I declare under penalty of perjury under the laws of the State of California that the matters stated in this declaration are true and correct and that this declaration was executed on March 25, 1991, at Oakland California.

Dated: March 25, 1991



By: ______________________
Leland Douglas

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FILED
ALAMEDA COUNTY
DEC 21 1990
By

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ALVIN H. BACHARACH and BARBARA JEAN BORSUK, Plaintiffs, v. STEVEN DAVIS, LEONARD DAVIS, ROBERT L. DAVIS, and Does 1 to 25, inclusive, Defendants.	Case No. 670066-3 No. 666290-3 DECLARATION OF STEVEN DAVIS IN SUPPORT OF MOTION FOR ORDER COMPELLING ANSWERS TO QUESTIONS AT DEPOSITION Hearing Date: 1/11/91 Time: 9:30 a.m. Department: 19
AND RELATED CROSS-ACTION	

I, Steven M. Davis, declare as follows:

1. I am one of the three lessees of the garage located at 1428-1432 Harrison Street/Alice Street, Oakland ("the garage") and an individually named defendant herein. The facts stated herein are of my personal knowledge and, if called as a witness to testify in this matter, I could and would testify competently thereto.

2. On March 5, 1987, I made an offer to Mr. Alvin H. Bacharach ("Bacharach") to purchase the garage. Bacharach refused

me on May 2, 1990, and is attached hereto as Exhibit D and incorporated herein by this reference.

10. On November 10, 1987, Stephens sent a soil contamination disclosure statement to Bacharach. Bacharach refused to sign the statement as originally drafted. He had Buchman edit out the first three lines of the disclosure statement. He then signed an edited version dated November 25, 1987. Bacharach had edited out the sentence referring to soil contamination due to underground storage tanks. The edited lines originally read: "This letter is to confirm that at the above premises there exists the potential for soil contamination due to leakage from the existing underground gasoline storage tanks. Additionally, . . .". Attached as Exhibit E are true and correct copies of the above-mentioned statements, incorporated herein by this reference.

11. In or about November of 1987, I was present at a meeting in Buchman's offices where Bacharach stated that the tanks did not leak. He explained that he wanted the three lines removed from the disclosure statement because he felt that they could be construed as an admission by him that the tanks had leaked in the past or were currently leaking. Buchman then suggested that I could use the gas pumps and provide a service to the parkers. I stated that I wanted to have nothing to do with pumping gas as I had been told by my insurance agent at State Farm that I could not get coverage for pumping gas. I personally was afraid of the risk of fire from the gas pumps. I made it very clear to Buchman and Bacharach that I had no intention of pumping gas, washing cars, or doing anything other than parking cars. During the term of the lease to this date, neither I nor my attendants have ever operated the pumps.

12. In the initial draft of the lease, Bacharach and Mark Borsuk included a provision making me responsible for any soil contamination clean-up. I refused to sign this draft of the lease. I asked Bacharach why this clause was inserted if the tanks had not leaked and were not leaking and the soil was not contaminated. He responded that they had not leaked and were not now leaking and that the soil was not contaminated, but that nobody could predict what might occur prospectively over the next fifteen years. Since the lease was to be for fifteen years and since it was to contain a right of first refusal to purchase, Bacharach felt that I should share in some of the responsibility for prospective risk.

13. I also questioned the "as is" clause of the lease in conjunction with the repair and maintenance provisions, and in fact suggested revisions to it. Buchman explained that I was misreading the lease and that my concerns were unwarranted. He said that I was obviously not responsible for rehabilitating or rebuilding the garage. He said that this was a standard clause for a triple net lease. I was just responsible for repairing and maintaining normal wear and tear.

14. On April 24, 1990, I met with Lee Douglas at his garage located on Webster Street. Lee Douglas was the tenant of the garage immediately prior to my tenancy. I took notes of our meeting. After the meeting, Lee Douglas initialed my notes. Mr. Douglas stated that the underground storage tanks were there prior to the inception of his lease in 1974. He stated that he never performed any maintenance on the underground storage tanks. <u>Mr. Douglas said that several months prior to the expiration of his lease, he had lunch at Ripoli's restaurant with Bacharach and Mark</u>

Borsuk. He said he told Bacharach and Mark Borsuk at that lunch that at least one tank was leaking. During lunch, he also said he told them that they had a reporting and registration obligation regarding the unused or abandoned tanks. Mr. Douglas told me that over the years, he had several conversations with Bacharach regarding tank leakage, and that in fact, at least one tank had been repaired or replaced. However, they had determined that at least one tank was still leaking because there was water in the gas. They only used one tank because their customers only needed one type of gas. The other tank had not been used for several years.

15. At the end of our meeting, Mr. Douglas gave me a notice which he had received from the Alameda County Health Services. The notice, which Mr. Douglas said would automatically have been mailed to Mr. Bacharach, discussed a property owner's duties and responsibilities respecting abandoned underground storage tanks. It also discussed penalties for noncompliance. I had never seen this notice before.

16. On May 1, 1990, Greg Matteosian and I went to Alameda County Health Services Agency ("ACHSA") to determine what information was available on the underground storage tanks at the garage. We learned that no tanks had ever been registered as abandoned. ACHSA had no information that any soil or water clean up had ever been undertaken at the garage. There was no record that any tanks had ever been repaired or replaced.

17. On May 2, 1990, Greg Matteosian and I went to the Bay Area Water Quality Control Board. They also had no records of any tanks, soil remediation or clean up, or tank repair at the garage.

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RECEIVED
JUL 27 1990
RENE C. DAVIDSON, County Clerk
Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ALVIN H. BACHARACH and BARBARA JEAN BORSUK, Plaintiffs, v. STEVEN DAVIS, LEONARD DAVIS, ROBERT L. DAVIS, and DOES 1 to 25, Defendants.	NO. 666290-3 DECLARATION OF JAMES P. BOWERS IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR RIGHT TO ATTACH ORDER AND MOTION FOR APPOINTMENT OF RECEIVER Date: July 30, 1990 Time: 10:00 a.m. Dept.: 19

I, James P. Bowers, declare as follows:

1. I am President of Subsurface Consultants, Inc. I make this declaration of my own knowledge, and if called as a witness I could testify competently to the matters stated herein.

2. I am a registered Civil Engineer and a registered geotechnical engineer, for the State of California. I have been President of Subsurface Consultants, Inc., since 1983. I have had extensive experience in evaluating soil and groundwater contamination problems. A copy of my current resume, attached hereto as Exhibit A, contains a true description of my professional qualifications and experience.

3. On September 3, 1987, I received a telephone call from Mr. Mark Borsuk of Mark Borsuk, Inc., requesting that a proposal be submitted to investigate several underground gasoline storage tanks that existed on property at 1432 Harrison Street in Oakland, California. Mr. Borsuk indicated that he was representing the owner of the property, Mr. Alvin Bacharach.

4. On September 15, 1987, I met with Mr. Borsuk at the site to inspect the property. During this meeting, we discussed details of the tanks and conducted a brief inspection of the building occupying the property.

5. During the inspection, Mr. Borsuk indicated that a tank had been removed previously and replaced with a new tank. The tank was situated beneath the Harrison Street sidewalk. Mr. Borsuk indicated that the tank that was removed had been observed to be leaking.

6. During the inspection, I discovered piping in the basement of the structure suggesting the presence of another underground storage tank. The tank was suspected to be located beneath the basement floor slab in the southwest corner of the building, adjacent to Alice Street. Black oily stains were noted on the basement wall of the building near the fuel piping for the tank. Similar stains were observed on the floor in the area. It is my opinion that this tank represents a possible source of soil and groundwater contamination. I recommended to Mr. Borsuk that a test boring be drilled in the area to check for indications of tank leakage. The proposal to Bacharach contained the same recommendation.

7. Subsurface Consultants, Inc. subsequently prepared a proposal to conduct a preliminary investigation into past fuel tank leakage on the property. It was submitted to Mr. Alvin Bacharach on September 23, 1987. The cost of the investigation was estimated to be $4,950. A true and correct copy of this proposal and selected records from Subsurface Consultants, Inc. files are attached hereto as Exhibit B.

8. Subsurface Consultants, Inc. was never retained by Alvin Bacharach to conduct the study.

9. On or around June 21, 1990, I received a request from Mr. Jonathan Redding of Fitzgerald, Abbott & Beardsley, to provide consulting services regarding underground fuel storage tanks at the Harrison garage property located at 1432 Harrison Street in Oakland, California.

10. On July 21, 1990, I met with Mr. Redding at the site to inspect the property. During the inspection I observed numerous facilities indicating that the building had previously been used as an automobile service and repair facility. I observed underground fuel storage tanks, a fuel pumping facility, hydraulic hoists, and auto cleaning areas. A schematic diagram of the site and the associated tanks and auto repair facilities are attached hereto as Exhibit C.

11. During the July 21, 1990, inspection, I removed the covers to two underground fuel tanks located under the sidewalk in front of the Harrison Street entrance. I noted that the tanks contained fuels which I judged to be gasoline.

12. On July 24, 1990, I was retained to conduct soil gas vapor and air quality studies using an organic vapor meter (OVM),

PROOF OF SERVICE

I, Christine O'Brien, declare:

That I am a citizen of the United States and am employed in the City of Oakland, County of Alameda, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1800 Harrison Street, Suite 1771, Oakland, California 94612.

On March 25, 1991, I served the following:

RESPONSE OF DOUGLAS MOTOR SERVICES IN OPPOSITION TO PETITION; POINTS AND AUTHORITIES AND DECLARATION OF LELAND DOUGLAS

on each of the parties to the within action by placing a copy thereof enclosed in a sealed envelope and mailed by the United States Postal Service addressed as follows:

See attached list.

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on March 25, 1991 at Oakland, California.

Christine O'Brien

Jonathan S. Leo, Esq.
Hellen, Ehiman, White & McAuliffe
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