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August 13, 1991

Mark Thomson, Esq.
Deputy District Attorney
Consumer & Environmental Protection Division
7677 Oakport Street, Suite 400
Oakland, CA 94621

Re: Harrison Street Garage, 1432 Harrison St., Oakland, California; and,
Alvin Bacharach, et. al. vs. Steven Davis, et. al.

Dear Mr. Thomson:

This firm has been retained by Douglas Motor Services, Inc., ("Douglas") to represent the company in the matter of the cross-complaint filed by Bacharach against Douglas for indemnification against Davis cross-claims, relating to alleged toxic materials on the above-indicated property, which Davis brought against Bacharach.

Ancillary to the above action is the issue of responsibility for the remediation of the hydrocarbon contamination discovered on and near the subject property. There apparently is a substantial question as to who should be named as potentially responsible parties (PRPs) with regard to the cleanup of this contamination and Douglas has asked that our firm assist in this aspect of the matter also. The following comments would more properly be addressed to the Alameda County Hazardous Materials Division ("County") which has been charged with making the PRP determination but, as I understand it, you represented the County at hearings before the State Water Resources Board and I thought it best to submit these comments through you so as to not to commit a breach of professional ethics. To this end, although the following facts are well known to you, I would like to recite them here briefly to be sure that I have them straight:

Initially, the County issued a cleanup and abatement order (CAO) to the property owner, Bacharach, alone. Bacharach then retained counsel to attempt to shift the responsibility on Douglas who operated a public parking facility on the premises for approximately 16 years. At first Bacharach tried to assign both the ownership and operation of the tanks to Douglas. When it became obvious that the facts did not support this contention; i.e., when it came to light that, subsequent to Douglas's

vacating the premises, Bacharach proceeded to lease the property - and the tanks - to Davis, this approached was abandoned. Bacharach then adopted the position that, as the operator of the tanks, Douglas still was responsible for the contamination. At, I believe, two hearing before the State Water Resources Control Board, it became apparent that sufficient evidence to hold Douglas even partially responsible for the contamination was seriously lacking. The State Board thereupon remanded the case to the County for a determination as whether or not there was substantial evidence that Douglas should be named as a PRP and then, and only then, to add Douglas to the CAO as a PRP.

Based on the environmental reports, it is apparent that the County made exactly the determination called for by the State Board when it initially named only Bacharach. The reports show that the property is rife with underground storage tanks (all but two of which were unknown to Douglas). The reports further indicate that another tank or tanks had been abandoned at some unknown earlier time within feet of the tanks operated by Douglas (Douglas quite obviously had no knowledge of these tanks either). In addition, the county knew that, while Douglas may have operated two tanks for approximately 16 years, Bacharach owned them since their installation which may have occurred as much as 30 - 40 years before Douglas leased the property and that during that time Bacharach appeared to have taken no steps to determine the condition of the tanks. Finally, the County was aware that Bacharach and Davis had entered into an lease agreement regarding remediation of any contamination discovered on the property and that no mention was made of Douglas in that agreement. In addition, in his deposition, Bacharach stated that he and Davis had an oral "gentleman's agreement" that, before either of them dealt with any environmental agency regarding contamination on the property, they would converse with each other first. Douglas was not at any time even mentioned in the Bacharach deposition with regard to the tanks or any potential contamination.

The above facts alone militate strongly in favor of the County's initial decision to hold the property owner solely liable for the cleanup. However, there are a couple of additional facts of which you may not be aware and which Douglas has asked that I call to the County's attention for consideration as it evaluates the PRP status of the various entities involved with the subject property. These facts, I believe, add to and further substantiate the County's original stance that only Bacharach should be formally named as a PRP:

1. Fuel was delivered to the Douglas dispensers by means of a suction (vacuum) delivery system. This means that, although at one time Douglas did experience a problem with one of the Mark

tanks, the problem, which manifested itself in delayed delivery to the pumps, did not necessarily result in a release of hydrocarbons to the environment. A suction system can only operate when the system is tight enough to allow a vacuum to be pulled. If there are any substantial leaks in the system, no vacuum will be drawn and no fuel will be delivered to the pumps. Douglas never experienced such a condition. What Douglas did experience, as stated above, was a delay in delivery to the pumps. This normally arises in a vacuum system when there in fact is a small breach in the system's integrity which results in the vacuum being lost when the pump is shut down and, as a result, the system's "prime" also being lost. The most common place for such system breaches to occur is in the product lines. In a suction system, when the pumps are turned off and the prime is lost, any product in the lines immediately returns to the tank (in the case of a pressure delivery system, product continues to be pumped whether it be to the nozzles or to the ground). When an attempt is made to re-establish the prime, if the breach in the system is too large, no prime will occur and no fuel will flow, period. If the system breach is small, a prime will form but fuel will only flow to the dispensers. When the pump is shut off again, any fuel remaining in the lines will return to the tank; no release to the environment necessarily occurs.

While parts of the above scenario are, without further investigation, somewhat conjectural, the simple fact remains that the Douglas system <u>was</u> a suction delivery system which further detracts from Bacharach's position that Douglas contributed to the contamination and, therefore, should be named as a PRP and, in like manner, from any establishment of substantial evidence to that effect.

2. In his declaration, page 8, lines 12 - 27, copy attached, Bacharach states that it was he and Davis who entered into an agreement concerning the "possibility of contamination" under the garage and that they further agreed to "ignore the problem until we had to do something about it ...". Bacharach was evidently aware that a problem probably existed and was trying to push off whatever responsibility he could on anybody he could find. Even then, he never considered Douglas as such a party, as reflected by the fact that Douglas's name never came up in any discussions concerning the site until Bacharach hired counsel to try to draw Douglas into the fray by appeal to the State Board.

It is quite apparent that Bacharach knew that Douglas had no part in the contamination of the property and, therefore, made no attempt to bring Douglas into the matter until his deal with Davis fell through, at which time, obviously panicing, he cast

the net far and wide to try to snare anyone he could to participate in the remediation of any contamination found.

If you are the wrong person to address these comments to, my apologies. If such is the case, I would appreciate it if you would forward the letter to the appropriate party for consideration. If, on the other hand, either you, or anyone from the County with your permission, wishes to discuss this matter further before a final decision is made regarding PRPs, please feel free to contact me at your convenience. If not, I hope that the above discussion will assist you and the County in reaching the conclusion that the original decision to name only the property owner as a PRP was the correct one.

Your patience and cooperation in accepting and considering this letter is most appreciated.

Very truly yours,

RANDICK & O'DEA

Bernard F. Rose

BFR:rt

Enclosure

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Attorneys for Plaintiffs/Cross-complainants
ALVIN H. BACHARACH and
BARBARA JEAN BORSUK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ALVIN H. BACHARACH and BARBARA JEAN BORSUK, Plaintiffs, vs. STEVEN DAVIS, LEONARD DAVIS, ROBERT L. DAVIS, and Does 1 to 25, inclusive, Defendants. AND RELATED CROSS-ACTION	Consolidated Action No. 670066-3 DECLARATION OF ALVIN H. BACHARACH IN OPPOSITION TO MOTIONS TO COMPEL DEPOSITION ANSWERS AND DOCUMENT PRODUCTION Date: January 22, 1991 Time: 9:30 a.m. Dept: 19 Trial Date: To Be Set

I, Alvin H. Bacharach, declare:

1. I am one of the plaintiffs in this action and make this declaration in opposition to the two Motions of Davis to Compel Further Answers at Deposition and Document Production. The statements herein are upon personal knowledge and, if called to testify, I could and would testify competently thereto.

2. My sister and I are the owners of the garage located at 1432 Harrison Street in Oakland, California. The garage extends from Harrison Street to Alice Street and provides six stories of parking on the Alice Street side. We have owned the garage since 1945 and have leased it to a series of parking, service station and garage operators since that time.

3. In 1987, the garage was leased to Douglas Parking. The lease was expiring at the end of March 1988 and we could either relet to Douglas or find another lessee.

4. On or about March 5, 1987, I received an offer to purchase the garage from Steve Davis delivered through Al Stephens of Grubb & Ellis Commercial Brokerage Group. A true and correct copy of Mr. Stephens' letter to me of March 5, 1987 and the proposed purchase agreement is attached hereto as Exhibit "A". As stated in Mr. Stephens' letter, Mr. Davis wanted to purchase the garage in order to provide parking for the tenants of his apartment house across the street. However, neither I nor my sister were interested in selling the garage. Mr. Davis was persistent and continued in his attempts to purchase the garage through June of 1987, as shown in the attached letter from Mr. Stephens dated June 15, 1987, a copy of which is attached hereto as Exhibit "B".

5. The attempts to purchase evolved into proposals to lease the garage at the termination of the Douglas lease which was coming up in the following spring. As shown by the attached letter from Al Stephens, a copy of which is attached hereto as Exhibit "C", we were getting close to making a deal on a lease by the end of August, 1987.

6. Steven Davis in his Declaration filed in support of his motions attaches an Exhibit "A" (Exhibit "D" to this Declaration), which he says was his "offer" to lease the garage. At the time of that document, (August 24, 1987), we had already been negotiating since March, 1987, and, as shown by the attached memo dated August

18, 1987, from Al Stephens, (Exhibit "E" hereto), various offers and counter-offers had gone back and forth. There were a number of provisions in the August 24, 1987 offer of Davis that I did not agree with. Specifically, I did not agree with his proposal at paragraph 6 of Addendum A that his attorney would draw the lease. It had always been my practice that my attorney prepares the lease and I changed that provision on the Davis proposal. A true and correct copy of the changed provision is attached to my deposition as Exhibit 25 and attached hereto as Exhibit "F". At Paragraph 6, I provided that my attorney would prepare the lease and that Davis would share the cost of preparation "50/50" with me. Davis agreed and signed the Addendum. I do not know why he failed to attach the correct Exhibit to his Declaration other than to try to give the false impression that we had agreed that my attorney was to also be his attorney, which was never the understanding.

7. In early September, 1987, shortly after the Davis proposal, as amended, was agreed upon in principal, I went to my attorney Bob Buchman. Because Bob had done legal work for me in the past and I consider him to be very expert in preparing leases, I employed Bob to represent me. There was never any discussion that Bob would represent anyone but me. I would never have agreed to any type of joint representation as Davis now contends. I provided Bob with various documents he would need to prepare the lease. Around the 23rd of September, I received the prepared lease from Bob and I required certain revisions to be made to it. I did not provide this initial draft lease to Davis since its drafting was between me and my attorney. Bob delivered the revised lease to me on or about September 28, 1987 and I caused

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[illegible] VALLEY ROAD SUITE 310
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that lease to be delivered to Mr. Stephens for Mr. Davis' review. To my knowledge, at that time neither Stephens nor Davis had ever spoken to Buchman.

8. Davis, through his real estate broker Stephens, returned comments on the lease to me, a true copy of which is attached hereto as Exhibit "G". It is my best recollection that I forwarded those comments on to Bob and that he and I discussed them. Neither Davis nor Stephens, to my knowledge, communicated to Bob about those comments nor were they authorized to do so.

9. I set up a meeting at Bob's office on or about September 9, 1987, so we could iron out the comments and get a final draft of the lease. I invited Davis and Stephens to be present so we could get everything settled in one meeting. I arrived at Bob's office an hour before Davis and Stephens so I could meet with my attorney before they arrived. Davis and Stephens arrived about 11 a.m. and I introduced Bob to them as my attorney. Neither of them objected. Neither gave any indication that they considered Bob Buchman to be their attorney. Had they done so we could not have proceeded and would have insisted they get their own attorney. Bob never gave them any indication he was acting for anyone but me. To the best of my recollection, the fact that I would be collecting one-half of the attorneys fees from Davis as part of the consideration for the lease was not even discussed in Bob's presence. I have read Bob Buchman's declaration filed in opposition to this motion and I agree with his recollection of what was discussed at the meeting, and I particularly agree that Bob did not give Davis any advise or do anything that would lead

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Davis to believe he was representing Davis.

10. About two days later, I met with Bob about the requests made at the meeting by Davis and Stephens and authorized him to communicate my decisions to Stephens, which I am informed he did. On or about October 28, 1987, I picked up a revised lease from Bob's office. Both I and my nephew, Mark Borsuk, also an attorney advising me in this matter and who I had asked to make comments on the lease, sent additional revisions to Bob. A further revised lease was received on or about November 16, 1987. On or about November 19th or 20th, I received further proposed lease revisions from Davis (attached hereto as Exhibit "H"). It is interesting that he sent these comments to me and not to his now alleged attorney, Buchman. I sent the Davis' proposed revisions to Bob and some were incorporated into the final lease. The lease was not signed in the presence of Bob Buchman and to the best of my knowledge and belief, Bob only met Davis and Stephens on that one occasion, on October 23, 1987, prior to the execution of the lease. Davis' statement in his Declaration at page 2,line 21 that he "met several times with (Buchman) in order to discuss the terms of the lease" is simply a lie and illustrates the lengths to which Davis and his attorneys will go in their mutual search for "damages".

11. In December, 1987, after the lease had been signed, I received a bill from Bob for the lease preparation. I paid the bill. I then sent the bill and a memo (attached hereto as Exhibit "I") to Steve Davis and requested his check be sent to me for half the bill as was our agreement, but for some reason, he sent his check directly to Buchman. I am informed that Bob deposited

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Davis' check into a trust account and sent me a check out of the trust account. I received and cashed that trust check.

12. Around April 1, 1988, about four months after the lease was signed, I was informed by letter from Al Stephens that the former tenant, Douglas, had left the garage in a mess. A copy of Stephens' April 1 letter is attached hereto as Exhibit "J". In order to work out an agreement on the cleanup costs, we again met at Bob Buchman's office around April 7, 1988. Stephens was again representing Davis as a real estate broker. Bob represented me as an attorney and Davis never indicated that he considered Bob to be representing him in any way. We negotiated an addendum to the lease in which I agreed to pay up to $6,625 towards cleanup of the Douglas mess. A copy of the addendum is attached as Exhibit "K" hereto. I paid Buchman's fees for his services in this matter. Davis was not asked to pay nor did he volunteer to pay any of the fees.

13. Everything seemed to be going smoothly until January of 1989, when I was contacted by Steve Davis requesting a rent abatement. He explained that he had lost $49,722 in his first year of operation. Although we had agreed to a monthly rent in the first twelve months of $12,200 a month which was to increase to $12,810 in months thirteen through twenty-four, he wanted me to reduce the rent to $8,200 per month for at least three years. His personal request was followed up by a letter from Al Stephens attached hereto as Exhibit "L". I contacted my lawyer, Bob Buchman, and after consultation, directed him to communicate my rejection of the Davis request by letter, a copy of which is

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1990 TICE VALLEY BOULEVARD, SUITE 200
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attached as Exhibit "M". Davis and Stephens then requested a meeting which was held at Bob's office on April 14, 1989. They complained that parking revenues had not met their expectations and prospective additional parkers from the Housing Authority and Post Office had not materialized. Davis said he was operating at a $1,500 negative every month and he requested that much of a reduction in rent every month. I considered his request over the weekend and consulted with my sister. We agreed to give Davis rent relief in the form of a one year abatement of the rental increase, which was to have gone into effect in April, 1989. I directed Bob Buchman to communicate that to Davis in writing. A copy of the Buchman letter dated April 20, 1989 is attached as Exhibit "N.

14. Apparently, Davis continued to lose money in his operation of the garage, in that when I called him almost one year later on April 14, 1990, to advise him about the new lease year, that the rental abatement period was over, that the rent would be going up from $12,200 to $13,450, and that I had decided that it was time he and I look seriously into the possible toxic problem, he advised me he wasn't paying rent any longer, he wanted out of the lease since he was losing $4,000 a month, and wanted his $100,000 security deposit back and to be made whole. He threatened me by saying he was going to have the city condemn the building because of earthquake structural damage and his advice to me was that I sell the building.

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15. Later, and apparently after consultation with his law school friend and attorney on this case, Greg Matteosian, he began to bring up the toxic non-disclosure allegations even though the issue of possible contamination from the gas tanks on the property had been discussed before the lease was signed and was dealt with in the lease. He successfully used the rent from the property to fund a defense to the unlawful detainer litigation, delaying eviction for almost eight months and costing me over $150,000 in damages. On the very day the trial was finally to begin, he simply walked out turning over the keys to me and stealing the November auto rents.

16. The issue of environmental compliance was discussed in the lease negotiations and was covered in the lease at Paragraph 4.2. A copy of that paragraph is attached hereto as Exhibit "O". Davis and I agreed that even though we both knew that there was the possibility of contamination under the garage, we would ignore the problem until we had to do something about it and we limited his exposure by contract for clean up costs to a maximum of $75,000 of which $50,000 would be amortized over the term of the lease. This supposed contamination never interfered in any way with Steve Davis' operation of the garage and he continued to fully operate the garage throughout the eight months he delayed the eviction. His contention that the cleanup of the gasoline will require the destruction of the garage and cost a million dollars is unrealistic and is based upon a hypothetical question posed to an expert witness. It is a fact of business that gasoline cleanups of this type are occurring all the time and we

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believe, based on expert consultation, that the spillage here is not abnormally high and can be accomplished with little interference to the parking business operation now being successfully conducted by another operator.

17. There is absolutely no merit in Davis' contention that Bob Buchman was his attorney at any time in this transaction or that either Bob Buchman or Mark Borsuk were retained by me to perpetrate a fraud. This is simply an effort by Davis and his lawyers to construct a case to compensate Davis for his business failure.

Executed this 14th day of January 1991, at Walnut Creek, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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Alvin H. Bacharach

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