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DRAFT

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

MELINDA A. HENRY-DARE and JOHN)
 L. HENRY, as Administrators)
 of the Estate of John B.)
 Henry, deceased,)
 Plaintiffs,)
 v.)
 TEXACO, INC., a Delaware)
 corporation; TED CURRAN)
 and JOE BABEL, individually)
 and doing business as TED &)
 JOE'S TEXACO,)
 Defendants.)

Civil Action No.
 Real Property

COMPLAINT FOR DECLARATORY
 RELIEF, INDEMNITY AND
 DAMAGES FOR CONTAMINATION
 OF REAL PROPERTY

Plaintiffs Melinda A. Henry-Dare and John L. Henry, as
 Administrators of the Estate of John B. Henry, deceased, allege:

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COMPLAINT

LAW OFFICES OF
MENDELSON & BROWN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
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NATURE OF THIS ACTION

1. Plaintiff Administrators bring this action for declaratory relief, indemnity and damages to require Defendants to pay their shares of the cost of evaluation and clean up and to recover costs and damages incurred by Plaintiffs as the result of the release and discharge of solid and/or hazardous wastes and hazardous substances by the Defendants at, on and beneath the real property now part of the estate.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this action under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Section 6972, and this Court has pendent jurisdiction over the California State law claims alleged.

3. The claims asserted in this complaint arose in this District and venue is proper in this District and Court under 28 U.S.C. Section 1391(b), 42 U.S.C. Section 6972(a) and Rule 105 of the United States District Court, Northern District of California.

PARTIES

4. Plaintiffs Melinda A. Henry-Dare and John L. Henry ("Administrators") are the duly appointed, qualified and acting Administrators of the Estate of John B. Henry ("Henry"), deceased, by virtue of an order duly made that has become final in a proceeding in the Superior Court of California, County of

1 Alameda, titled Estate of John B. Henry, deceased, number
2 _____, and bring this action in such capacity.

3 5. At all times mentioned Texaco, Inc. ("Texaco") was, and
4 now is a Delaware corporation authorized to do and doing business
5 in the State of California.

6 6. Plaintiffs are informed and believe and thereon allege
7 that from about December 1961 through September 1972, defendant
8 Ted Curran ("Curran") was an owner, partner and/or proprietor of
9 Ted & Joe's Texaco ("Ted & Joe's"), and that at all times
10 mentioned Curran was and now is a resident of Alameda County,
11 California.

12 7. Plaintiffs are informed and believe and thereon allege
13 that from about December 1961 through September 1972, defendant
14 Joe Babel ("Babel") was an owner, partner and/or proprietor of
15 Ted & Joe's, and that at all times mentioned Babel was and now is
16 a resident of Alameda County, California.

17 8. Plaintiffs are informed and believe and thereon allege
18 that from approximately December 1961 through September 1972, Ted
19 & Joe's Texaco was an unincorporated association, partnership
20 and/or proprietorship owned and operated by Curran and Babel.

21 9. Plaintiffs are informed and believe and thereon allege
22 that each of the Defendants was the agent, employee, partner,
23 assignee and/or successor of each of the other Defendants, and in
24 doing or failing to do the things alleged, were acting within the
25 course and scope of such relationship.

26 / / /

COMPLAINT

PRELIMINARY FACTS

1
2 10. At all times mentioned commencing September 1972, Henry
3 was and the estate now is the owner of that certain real property
4 commonly known as 1726 Park Street, Alameda, Alameda County,
5 California (the "Property"). The legal description of the
6 Property is attached to this complaint as Exhibit A and
7 incorporated by this reference.

8 11. On or about December 6, 1961, Texaco purchased the
9 Property which Texaco had leased from others for a number of
10 years prior to that date. Plaintiffs are informed and believe
11 and thereon allege that at all times during Texaco's lease and
12 ownership of the Property an automobile service station (the
13 "Service Station") was located and operated on the Property,
14 together with associated underground storage tanks for gasoline
15 and/or diesel fuel and for waste motor oil and solvents, and
16 underground equipment for automobile service lifts.

17 12. Plaintiffs are informed and believe and thereon allege
18 that from approximately December 1961 and thereafter until
19 September 1972, Texaco subleased and/or leased the Service
20 Station on the Property to Curran and Babel and/or Ted & Joe's,
21 all of whom operated the Service Station during that time.

22 13. Plaintiffs are informed and believe and thereon allege
23 that at all times that Texaco leased and owned the Property,
24 Texaco transported and delivered gasoline and other petroleum
25 products and solvents to the Service Station and its underground
26 storage tanks and removed waste motor oil and solvents from its

1 underground storage tank.

2 14. Plaintiffs are informed and believe and thereon allege
3 that at all times during the lease of the Service Station and
4 Property from Texaco, Curran, Babel and/or Ted & Joe's sold and
5 dispensed refined petroleum products to the public from the
6 underground storage tanks on the Property, accepted delivery of
7 such products into the underground storage tanks, placed used
8 motor oil and solvents into the underground storage tank used for
9 that purpose and serviced automobiles by using the automobile
10 service lifts and their associated underground equipment.

11 15. Plaintiffs are informed and believe and thereon allege
12 that at or about August 1972, Texaco, Curran, Babel and/or Ted &
13 Joe's ceased operating the gasoline Service Station on the
14 Property and that as part of the transaction in which the
15 Property was sold to Henry, in about February 1973, Texaco
16 removed the underground storage tanks for gasoline and/or diesel
17 fuel located on the Property. At no time thereafter has the
18 Property been used for the receipt, storage, use, distribution or
19 sale of motor vehicle fuels.

20 16. Plaintiffs are informed and believe and thereon allege
21 that at all times mentioned Texaco, Curran, Babel and Ted &
22 Joe's, and each of them, generated, handled, stored, treated,
23 transported, transferred, released, discharged and disposed of
24 gasoline and/or diesel fuel, motor oil, lubricants and other
25 petroleum products and solvents at, on and beneath the Property,
26 thereby contaminating the Property and its soil and groundwater.

1 17. Plaintiffs are informed and believe and thereon allege
2 that at no time have Texaco, Curran, Babel and/or Ted & Joe's, or
3 any of them, conducted any tests and/or made any notification or
4 reports of and for contamination of the Property and/or its soil
5 and/or groundwater by gasoline and/or diesel fuel, motor oil,
6 lubricants and other petroleum products and solvents to Henry
7 and/or any United States, state or local government agency.

8 18. Plaintiffs are informed and believe and thereon allege
9 that when Texaco removed the underground storage tanks for
10 gasoline and/or diesel fuel it was obvious that the tanks had
11 leaked and had released and discharged gasoline and/or diesel
12 fuel into the soil at and beneath the Property, but that Texaco
13 did nothing to remedy or otherwise clean up this condition and
14 merely refilled and paved over the excavation which had contained
15 the tanks, leaving all contaminants remaining in the soil at and
16 beneath the Property.

17 19. After Henry's death, Administrators undertook to
18 dispose of the estate's assets, including the Property. As part
19 of that plan, the Administrators engaged an environmental
20 consultant to investigate the Property, resulting in the
21 discovery of its contamination on or about September 4, 1991. At
22 no time prior to that date did Plaintiffs discover or have reason
23 to discover the existence of this contamination. As a result of
24 this discovery, additional investigation and soil and groundwater
25 monitoring and clean up of the site must be undertaken at a cost
26 of many hundreds of thousands of dollars.

1 FIRST CLAIM FOR RELIEF

2 (Citizen's Suit Pursuant to RCRA)

3 20. Plaintiffs incorporate paragraphs 1 through 19,
4 inclusive above, as if fully set forth here.

5 21. During the time Texaco, Curran, Babel and Ted & Joe's
6 owned and/or leased the Property they generated, transported and
7 contributed to the handling, storage, treatment, transportation
8 and disposal of solid or hazardous waste which may present an
9 imminent and substantial endangerment to health or the
10 environment. Therefore, Defendants are liable for all costs and
11 damages which are the result of their acts and omissions and for
12 Plaintiffs' attorneys' fees pursuant to 42 U.S.C. Section 6972.

13 22. As a direct and proximate result of the acts and
14 omissions of Defendants Texaco, Curran, Babel and Ted & Joe's,
15 and each of them, the Property has been, is and will continue to
16 be damaged and impaired because:

17 a. Plaintiffs have incurred and will continue to incur
18 substantial costs related to the investigation of the
19 contamination of the Property;

20 b. Plaintiffs will incur substantial response, removal
21 and/or remediation costs, including, but not limited to, the
22 costs of monitoring, assessing, evaluating and removing the
23 contamination at and beneath the Property resulting from the
24 disposal, release and discharge of solid and/or hazardous wastes
25 and/or hazardous substances on the Property by Defendants and
26 each of them;

COMPLAINT

1 c. Plaintiffs have suffered and will continue to
2 suffer loss of the free and full use and enjoyment of the
3 Property;

4 d. The value and marketability of the Property has
5 been impaired and diminished as a result of the contamination;

6 e. Plaintiffs have incurred and will continue to incur
7 substantial environmental consulting fees and expenses,
8 attorneys' fees and other losses and expenses, all as a result of
9 the disposal, release and discharge of solid wastes and/or
10 hazardous materials and/or hazardous substances on the Property
11 by Defendants and each of them; and

12 f. Plaintiffs may be required to defend existing and
13 future actions and administrative proceedings arising directly
14 and indirectly from the presence of solid and/or hazardous wastes
15 and/or hazardous substances in the soil and groundwater on and
16 beneath the Property and migrating from the Property.

17
18 SECOND CLAIM FOR RELIEF

19 (Negligence)

20 23. Plaintiffs incorporate paragraphs 1 through 19 and 22,
21 inclusive above, as if fully set forth.

22 24. As the owners, possessors and operators of the Property
23 during the time it was contaminated, Texaco, Curran, Babel and
24 Ted & Joe's, and each of them, had a duty to manage and maintain
25 the Service Station and the Property in a safe condition and to
26 prevent injury to adjacent and nearby property. Defendants, and

1 each of them, failed to exercise ordinary and reasonable care in
2 the performance of these duties in that, notwithstanding that
3 each of them knew or should have known of the disposal, release
4 and discharge of solid and/or hazardous wastes and/or hazardous
5 substances on the Property, they did not remediate such releases,
6 discharges and disposals and the conditions caused thereby, or
7 prevent injury to the Property and/or adjacent and nearby
8 properties as a result thereof.

9 25. As a direct and proximate result of the negligence of
10 Defendants, and each of them, the Property has been and continues
11 to be contaminated with solid and/or hazardous wastes and/or
12 hazardous substances, as described above.

13
14 THIRD CLAIM FOR RELIEF

15 (Continuing Trespass)

16 26. Plaintiffs incorporate paragraphs 1 through 19 and 22,
17 24 and 25, inclusive above, as if fully set forth.

18 27. The acts of Defendants, and each of them, were
19 negligent and resulted in the placement in and on the Property of
20 solid and/or hazardous wastes and/or hazardous substances, which
21 continue to be present in and on the Property.

22
23 FOURTH CLAIM FOR RELIEF

24 (Continuing Private Nuisance)

25 28. Plaintiffs incorporate paragraphs 1 through 19 and 22,
26 inclusive above, as if fully set forth.

1 34. By virtue of the damages Plaintiffs have suffered to
2 date and will continue to suffer, the nuisance has specifically
3 affected Plaintiffs.

4 35. Defendants, and each of them, have neglected to abate
5 the continuing nuisance upon and/or in the Property.

6 36. The community at large, subsequent owners and occupants
7 of the Property and Plaintiffs have not consented to this
8 nuisance. Defendants, and each of them, knew or should have
9 known that there would be no such consent.

10 37. Plaintiffs are entitled to recover their attorneys'
11 fees pursuant to California Code of Civil Procedure Section
12 1021.5.

13
14 SIXTH CLAIM FOR RELIEF

15 (Declaratory Relief)

16 38. Plaintiffs incorporate paragraphs 1 through 19 and 22,
17 inclusive above, as if fully set forth.

18 39. An actual controversy has arisen and now exists between
19 Plaintiffs and Defendants, and each of them, concerning their
20 respective rights and duties in that Plaintiffs contend that
21 Defendants, and each of them, are liable to Plaintiffs for costs
22 incurred and to be incurred by Plaintiffs for activities
23 performed in evaluating and responding to the contamination of
24 the Property and to abate and/or remediate such contamination and
25 for the reasonable rental value of the Property lost while such
26 evaluation, remediation and/or abatement and/or the contamination

1 of the Property renders the Property unusable. Plaintiffs are
2 informed and believe and thereon allege that Defendants, and each
3 of them, dispute these contentions and deny that they have any
4 liability.

5 40. Plaintiffs desire a judicial determination of their
6 rights and duties and a declaration as to the parties' respective
7 liability for the costs of evaluation, remediation and/or
8 abatement and loss of income from the Property.

9 41. A judicial declaration is necessary and appropriate at
10 this time under the circumstances in order that Plaintiffs may
11 ascertain their rights and duties, particularly in light of the
12 financial burden imposed upon Plaintiffs as a result of the costs
13 of evaluation and remediation and/or abatement.

14
15 SEVENTH CLAIM FOR RELIEF

16 (Indemnity)

17 42. Plaintiffs incorporate paragraphs 1 through 19 and 22,
18 inclusive above, as if fully set forth.

19 43. To the extent Plaintiffs have incurred or will incur
20 any costs or liability as a result of any administrative or
21 judicial proceedings brought against them by any persons,
22 entities or governmental agencies, such liability is purely
23 secondary, imputed and vicarious or technical. Primary liability
24 is that of each of the Defendants, and each of them, and is
25 attributable to their actions and omissions.

26 44. Defendants are jointly and severally liable to

1 indemnify Plaintiffs for all costs, including, but not limited
2 to, costs and expenses of evaluating, responding, remediating
3 and/or abating the contamination of the Property and costs,
4 expenses and damages resulting from any such legal or
5 administrative actions or proceedings.

6
7 PRAYER FOR RELIEF

8 WHEREFORE, Plaintiffs pray for judgment as follows:

9 1. For a declaration that Defendants, and each of them, are
10 responsible for the contamination on the Property and the clean
11 up of such contamination and are jointly and severally liable for
12 Plaintiffs' past and future response, removal and remedial action
13 costs;

14 2. For all of Plaintiffs' response, removal and remedial
15 action costs;

16 3. For compensatory damages, including, but not limited to,
17 loss of or interference with the use of the Property, in amounts
18 to be proven at trial;

19 4. For an amount to be proven at trial as indemnity for
20 losses or liabilities imposed upon Plaintiffs;

21 5. For prejudgment interest;

22 6. For attorneys' fees, costs and disbursements incurred in
23 responding to the contamination of the Property;

24 7. For attorneys' fees, expert witness costs, costs and
25 disbursements incurred in prosecuting this action; and

26 8. For such other and further relief as the Court deems

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proper.

DATED February _____, 1993. MENDELSON & BROWN

BY _____
MICHAEL S. BROWN
Attorneys for Plaintiffs
Melinda A. Henry-Dare and
John L. Henry, as
Administrators of the Estate
of John B. Henry, deceased

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