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SAN DIEGO REGIONAL
WATER QUALITY
CONTROL BOARD

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June 23, 2011

**OPPER
&
VARCO
LLP**
THE ENVIRONMENTAL
LAW GROUP

Regional Water Quality Control Board
San Diego Region
San Diego Water Board Advisory Team
Attn: Frank Melbourn
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: San Diego Bay Shipyard Sediment Site
Comments Regarding the Tentative Cleanup and Abatement Order

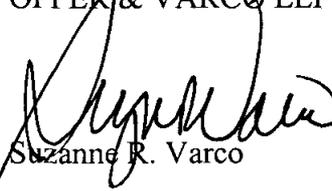
Dear Mr. Melbourn:

Please find enclosed with this letter the written reply submittal by Star & Crescent Boat Company in the matter relating to the San Diego Bay Shipyard Sediment Site, Tentative Cleanup and Abatement Order No. R9-2011-001 and Draft Technical Report.

Thank you for your time and consideration of the comments presented by Star & Crescent Boat Company.

Yours very truly,

OPPER & VARCO LLP



Suzanne R. Varco

SRV/ssr

cc: Sarah Evans, Esq. (via email)
George Palermo, Flagship Cruises & Events (via email)
All parties identified in the attached Service List (via email)

Enclosures: 12 Copies of Star & Crescent Boat Company's Written Reply to the Designated Parties' Comments to the Tentative Cleanup and Abatement Order No. R9-2011-001

SAN DIEGO BAY SHIPYARD SEDIMENT SITE

Star & Crescent Boat Company's Written
Reply to the Designated Parties'
Comments to Tentative Cleanup and
Abatement Order No. R9-2011-0001

Designated Party: Star & Crescent Boat Company

Represented by: Suzanne R. Varco
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June 23, 2011

INTRODUCTION

Opper & Varco, LLP represents Star & Crescent Boat Company, a California corporation, ("S&C Boat") in this matter. On September 15, 2010, the California Regional Water Quality Control Board, San Diego Region ("Water Board") named S&C Boat a "discharger" in its Tentative Cleanup and Abatement Order ("TCAO") and its accompanying Draft Technical Report ("DTR"). The Water Board allocated liability to S&C Boat on the theory that it is a successor-in-interest to an otherwise liable entity.

On May 26, 2011, designated parties submitted comments regarding the Water Board's TCAO and DTR. S&C Boat's comments provided a detailed account of facts and law demonstrating that it is neither a "discharger," nor a responsible party because it does not meet the requirements for successor-in-interest liability. S&C Boat has since had the opportunity to review the comments submitted by the other designated parties in this matter. The submission offered today presents S&C Boat's responses to several of those comments.

For the reasons expressed in its May 26, 2011 submission and its comments submitted today, S&C Boat is not a liable party. The TCAO should be revised to remove reference to S&C Boat as a responsible party, and S&C Boat's designation as a "discharger" should be rescinded.

REPLY COMMENT I

Star & Crescent Boat Company is Not a Successor to San Diego Marine Construction Company.

S&C Boat submits this reply comment in response to Designated Party Campbell Industries, MCCSD, and San Diego Marine Construction Corporation's ("Campbell's") Comment No. 1, which states:

San Diego Marine Construction Company (*subsequently Star & Crescent*) did not sell its leasehold to MCCSD, a wholly owned subsidiary of Campbell Industries in July 1972. In Finding 6 of the Draft Technical Report, in the first sentence of the second paragraph of Section 6.3.1, it states, "San Diego Marine Construction Company (*subsequently Star & Crescent*) sold its leasehold to MCCSD, a wholly owned subsidiary of Campbell Industries in July 1972." This statement is incorrect. San Diego Marine Construction Company (*subsequently Star & Crescent*) sold the business and assets of its Marine Division to MCCSD, a wholly owned subsidiary of Campbell Industries in July 1972.

("Designated Party Campbell Industries Comments on Draft Technical Report," p. 1, lines 12-20 (emphasis added).)

As written, it is not clear to which entity Campbell refers when it uses the term "Star & Crescent" in its comment. To the extent that the comment purports to state that San Diego Marine Construction Company ("SDMCC") became S&C Boat, the comment is inaccurate.

As reflected in S&C Boat's May 26, 2011 comment submittal, SDMCC was comprised of three divisions: the Marine Division (which operated on the Shipyard Sediment Site), the Boat Division (which operated the harbor excursion business north of the San Diego-Coronado Bay Bridge), and the Investment Division.¹ In 1972, Campbell purchased SDMCC's interest in the Shipyard Sediment Site² and SDMCC surrendered its Shipyard Sediment Site lease with the Port. Campbell later entered into its own lease with the Port for the Shipyard Sediment Site.³

Thereafter, also in 1972, SDMCC changed its name to Star & Crescent Investment Company ("Investment Co.").⁴ It was not until 1976, four years after the sale of the shipyard business and surrender of the Shipyard Sediment Site lease that S&C Boat was incorporated.⁵ Following its incorporation in 1976, S&C Boat purchased only specified assets of the Investment Co.'s harbor excursion business.⁶ S&C Boat did not purchase all assets and liabilities of Investment Co., but, as documented in S&C Boat's May 26, 2011 comment letter, only purchased very limited assets of Investment Co., and Investment Co. continued to own and operate assets unrelated to S&C Boat until 1991.

Thus, for the reasons described herein and explained in further detail in S&C Boat's initial comment submission dated May 26, 2011, S&C Boat has no knowledge of, and never had any involvement with, the business or assets of SDMCC's Marine Division. While San Diego Marine Construction Company did change its name to Star & Crescent Investment Co., San Diego Marine Construction Company did *not* subsequently become Star & Crescent Boat Company.

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¹ United States Tax Court's opinion in *Estate of Oakley J. Hall, Deceased, Southern California First National Bank, Executor v. Commissioner of Internal Revenue* (1975) (attached as Exhibit 1 to S&C Boat's May 26, 2011 comment letter), pp. 1 and 3.

² See Exhibit 1 to S&C Boat's May 26, 2011 comment letter, p. 8.

³ Surrender of Port Lease, dated July 14, 1972 (attached as Exhibit 8 to S&C Boat's May 26, 2011 comment letter); and Port District Ordinance Accepting Surrender of Lease from SDMCC (attached as Exhibit 9 to S&C Boat's May 26, 2011 comment letter).

⁴ Certificate of Amendment of Articles of Incorporation (attached as Exhibit 10 to S&C Boat's May 26, 2011 comment letter).

⁵ Articles of Incorporation of S&C Boat, filed on April 7, 1976 (attached as Exhibit 16 to S&C Boat's May 26, 2011 comment letter).

⁶ Minutes of Meeting of Board of Directors of S&C Boat dated April 9, 1976 (attached as Exhibit 17 to S&C Boat's May 26, 2011 comment letter).

REPLY COMMENT II

The Port's Reference to S&C Boat's Alleged Insurance Assets is Inaccurate and Improper.

S&C Boat submits this reply comment in response to Designated Party San Diego Unified Port District's ("Port's") Comment No. III (A) (5), which states:

Based on its review of relevant documents, the Port believes that Star & Crescent has millions of dollars of liability coverage that would be potentially applicable to the remediation and monitoring efforts. Additionally, Star & Crescent has stipulated that it has assets totaling between \$750,000 and \$1 million. [...]

The Port is aware that the Star & Crescent entity that is currently named in the TCAO and DTR disputes its successor liability for the other predecessor entities that operated at the Shipyard Sediment Site. [...] ***Regardless of whether the current Star & Crescent entity is liable for the earlier operations at the Shipyard Sediment Site, the identified insurance assets would still apply, so long as the insured entity is named as a discharger under the TCAO and DTR.*** Thus, if the TCAO and DTR were amended to name all of the potentially liable entities - San Diego Marine Construction Company, Star and Crescent Boat Company and Star & Crescent Investment Co. -- the insurance assets should be available to address directly any established liability, whether or not these entities are still in existence.

("San Diego Unified Port District's Submission of Comments, Evidence and Legal Argument," pp. 10-11 (citations omitted, emphasis added).)

The Water Board must reject the Port's assertion that certain additional entities be named to the TCAO and DTR purely based upon their potential insurance coverage. Consideration of such facts by the Water Board would be contrary to fact and would violate established legal doctrine regarding the admissibility of such insurance information.

The Water Board is charged with making a determination about whether S&C Boat is a "discharger" responsible for costs associated with remediating or monitoring contamination at the Shipyard Sediment Site. The only relevant inquiry in determining whether a party is a "discharger" is whether there is a basis *in law* to attach "discharger" or responsible party obligations. For the reasons stated in its May 26, 2011 submission of comments, S&C Boat is not liable because it did not directly contribute to the contamination and is not liable under the law for any contamination caused by any other entities.

Making inquiries and assumptions about whether S&C Boat has insurance proceeds available to pay for remediation of contamination *for which it is not liable* is inappropriate.⁷ Although S&C Boat understands that the possibility of accessing a large insurance policy's proceeds might seem attractive to the Port and the Water Board, where there is no right to those proceeds, the existence of insurance does not matter. The only proper question is that of legal liability.

A. The Port's Reference to the Existence and Amount of Alleged Insurance Coverage Is Not Factually Supported.

The Port alleges that S&C Boat has "millions of dollars of liability coverage" for remediation and monitoring activities. The Port's allegations are inaccurate to the extent they attempt to establish that S&C Boat has insurance coverage, or that a certain amount of insurance funds are available to respond to remediation efforts. That statement is not supported by any facts, is wildly speculative, and misleads the Water Board into believing that if it were to assign liability to S&C Boat, there would be ample funds available for cleanup efforts.

At this time, despite diligent efforts, S&C Boat has not obtained any insurance proceeds and, despite tendering claims to numerous insurance carriers, has received no agreement for defense or indemnity from any insurance carrier. Nevertheless, consideration of these facts by the Water Board is inappropriate.

B. Reference to Alleged Insurance Coverage Violates the Rules of Evidence, Is Irrelevant to the Shipyard Sediment Site Matter, and Is Prejudicial to S&C Boat.

Even assuming the Port District's allegations regarding insurance proceeds were true, the Water Board's consideration of this information would violate established legal doctrine regarding the admissibility of such evidence. Further, such evidence is irrelevant to the issue about which the Water Board is responsible for making a determination – the issue of liability. Finally, suggestion that such insurance coverage exists is prejudicial to S&C Boat.

The law is clear that evidence of insurance is inadmissible to prove wrongdoing. The California Evidence Code specifically states that "[e]vidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing." (Cal. Evid. Code § 1155.)

⁷ This inquiry is just as inappropriate as, and no more unreasonable than, if the Water Board were asked to consider the status of Wal-Mart's insurance coverage for the purpose of paying for remediation of the Shipyard Sediment Site. Like Wal-Mart, S&C Boat has no liability for the contamination caused at the Shipyard Sediment Site, and therefore, any question about availability of insurance coverage is both inappropriate and irrelevant.

Further, the question of insurance is irrelevant. Whether S&C Boat has insurance coverage has no bearing whatsoever on the issue before the Water Board - whether S&C Boat is legally responsible for the alleged acts of another corporate entity. The *only* appropriate inquiry is whether S&C Boat meets the legal requirements for liability, which it does not. The existence or absence of insurance coverage is of no consequence to the matter before the Water Board and is not relevant.

Courts routinely give juries specific instructions on this very issue. The standard rule provided to jurors is: "You must *not* consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence." (Judicial Council of California Civil Jury Instructions (2011), No. 105 (emphasis added.) In this matter, the Water Board is subject to a similar requirement, and must consider only relevant facts and law.

Last, introduction of such evidence is prejudicial to S&C Boat. Discussion of this irrelevant information could improperly encourage the Water Board to make its decision regarding liability based on information having nothing to do with the facts or law regarding liability. Improperly (and inaccurately) suggesting that S&C Boat has the ability to pay for cleanup from insurance proceeds misdirects the Water Board's focus from the only legitimate issue before it - that is, liability - under which its task is to determine whether S&C Boat bears any responsibility for the contamination in the first place.

In a case where a trial court had discussed evidence of an alleged wrongdoer's insurance coverage, a California Court of Appeal reversed the judgment, stating that such evidence is both irrelevant and prejudicial. (*Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 830 (citations omitted).) The courts have made specific findings that the existence of liability insurance is irrelevant to the question of liability. (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122-1123.) In fact, attempts to introduce such evidence are sometimes considered so inappropriate and such a flagrant violation of the law that they can constitute grounds for attorney misconduct. (*Blake* at 830, citing *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469; Witkin, Cal. Evidence (2d ed. 1966) § 374, pp. 332-333.)

Evidence regarding alleged insurance coverage has nothing to do with the Water Board's task of determining whether S&C Boat bears liability for the actions of a separate corporate entity. It is inadmissible, irrelevant, and prejudicial, and must be disregarded.

C. The Port's Suggestion to Name Additional Entities Is Inappropriate and Not Factually Supported.

The Port District's suggestion that the Water Board should name S&C Boat simply to access insurance proceeds, "*regardless of whether the current Star & Crescent entity is liable for the earlier operations at the Shipyard Sediment Site*" is inappropriate and lacks any factual basis. The Water Code requires a legal determination be made to

name a party as a "discharger" in a Cleanup and Abatement Order. Only a person who discharges waste into the waters of the state, creating a condition of pollution or nuisance, is liable under the statutory mandates of the Water Code. (Cal. Water Code Sec. 13304(a).) The Water Code liability is without regard to insurance proceeds.

As documented in S&C Boat's May 26, 2011 submission, there is no evidence that S&C Boat is directly liable for the contamination, or that S&C Boat is the legal successor to any liable party. That should end the inquiry by the Water Board. The availability of insurance (or the lack thereof) is not a valid consideration in making that legal determination.

CONCLUSION

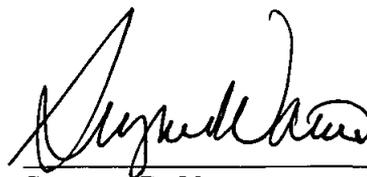
The documented corporate history previously submitted by S&C Boat demonstrates that S&C Boat is not a legal successor to the San Diego Marine Construction Company or Star & Crescent Investment Company. The facts and law, therefore, dictate that S&C Boat is not a legally responsible party for the contamination identified at the Shipyard Sediment Site.

The law further dictates that evidence regarding insurance coverage cannot be introduced to the body making a liability determination. Naming additional entities to the TCAO and DTR or discussing whether S&C Boat has insurance coverage is inappropriate and legally impermissible. For those reasons, the Water Board must not consider whether S&C Boat has insurance coverage in determining whether S&C Boat should be named as a "discharger" in the TCAO.

For the reasons detailed herein and in S&C Boat's initial comments dated May 26, 2011, S&C Boat does not bear legal responsibility for the contamination allegedly caused or allowed by another entity at the Shipyard Sediment Site. Accordingly, S&C Boat respectfully requests that the Water Board amend the TCAO to remove reference to S&C Boat as a responsible party or "discharger."

Respectfully Submitted,

OPPER & VARCO, LLP



Suzanne R. Varco

Counsel for Star & Crescent Boat Company,
a California Corporation

1 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

2 SAN DIEGO REGION

3 IN THE MATTER OF:

4 TENTATIVE CLEANUP AND
5 ABATEMENT ORDER NO. R9-2011-0001
(formerly No. R9-2010-002)(SHIPYARD SEDIMENT SITE)

6
7 **PROOF OF SERVICE**

8 I am employed in the County of San Diego, State of California. I am over the age of 18
9 and not a party to the within action; my current business address is 225 Broadway, Suite 1900,
San Diego, California 92101.

10 On June 23, 2011, I served the foregoing document(s) described as:

- 11 1. STAR & CRESCENT BOAT COMPANY'S WRITTEN REPLY
12 SUBMITTAL OF COMMENTS TO THE TENTATIVE CLEANUP AND
13 ABATEMENT ORDER NO. R9-2011-0001.

14 on the interested parties in this action listed below in the following manner:

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<p>23 Frederick Ortlieb, Esq. fortlieg@sandiego.gov</p> <p>24 <i>CITY OF SAN DIEGO</i></p>	<p>Kelly E. Richardson, Esq. David Mulliken, Esq. LATHAM & WATKINS LLP 600 W. Broadway, Suite 1800 San Diego, CA 92101 Kelly.richardson@lw.com David.mulliken@lw.com Matthew.luxton@nassco.com</p> <p><i>NATIONAL STEEL & SHIPBUILDING COMPANY (NASSCO)</i></p>

28 **PROOF OF SERVICE**

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5 *U.S. NAVY*

U.S. NAVY

6 **BY REGULAR MAIL:** I deposited such envelope in the mail at San Diego, California.
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11 **BY ELECTRONIC MAIL** The parties agreed that they would serve the papers on the
12 date of filing via electronic mail. These papers were served by electronic mail on today's
13 date.

14 **BY FACSIMILE TRANSMISSION (CRC, Rule 2003 & 2008(e))** The recipient's
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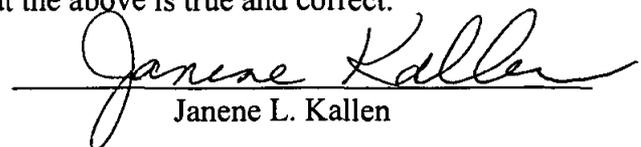
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19 Diego, CA 92101. The envelope was deposited with delivery fees thereon fully prepaid.

20 **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the
above addressee(s).

21 (State) I declare under penalty of perjury under the laws of the State of California that
22 the foregoing is true and correct.

23 (Federal) I declare that I am employed in the office of a member of the Bar of this Court,
24 at whose direction the service was made.

25 Executed on **June 23, 2011**, at San Diego, California. I declare under penalty of perjury
under the laws of the State of California, that the above is true and correct.

26 
27 Janene L. Kallen

28
PROOF OF SERVICE