I. PETITION FOR REVIEW


1 All further references to the “Water Code” refer to the California Water Code unless otherwise noted.
The Order attempts to address the contamination of soil and groundwater with volatile organic compounds ("VOCs"), including tetrachloroethene ("PCE") and trichloroethene ("TCE"), resulting from a metal plating operation that existed at 6341 Arizona Circle, Los Angeles, California (the "Site") from about 1962 to about 1992. Ehrlich Decl., Exh. 1, enc. (a), pp. 3-4. However, the Cleanup and Abatement Order ("CAO") is fatally flawed in two primary respects: (1) during Petitioner's ownership period, no credible evidence indicates that Petitioner knew or should have known that its tenant's operations created a reasonable possibility of a discharge; and (2) the Regional Board failed to issue the CAO to the parties that owned the Site for 20 of the 30 years' time between 1962 and 1992: the Kitay family and various trusts and entities created by the Kitays. The specific Kitay owners to add to the CAO are: Kitay Properties; Phillip Kitay; Arthur Kitay; Joyce Kitay; Harold Kitay; Phillip Kitay, as Trustee of the Phillip Kitay Trust No. 1 dated June 18, 1984; The Kitay Family Revocable Trust; The Arthur Kitay Revocable Trust; and The Joyce F. Kitay Trust R-401 (together, the "Kitay Family" or "Kitay Family entities").

Instead, the Regional Board issued the Order to two parties: Arizona Circle Partners, LLC ("ACP"), the current owner of the Site, and Petitioner, an out-of-possession landlord that owned the Site nearly fifty (50) years ago, between 1958 and 1973. Ehrlich Decl., Exh. 1, enc. (a), p. 3. The Order requests these parties to take various actions with respect to the Site, including, among other things, to: (1) develop and submit a conceptual site model; (2) complete a site assessment and delineation of the extent of the contamination; (3) submit a site-specific human health risk assessment; (4) conduct remedial action, including, but not limited to, developing and implementing a comprehensive Remedial Action Plan ("RAP") and submitting quarterly remediation progress reports; and (5) conduct quarterly groundwater monitoring (together, the "Work"). Ehrlich Decl., Exh. 1, enc. (a), pp. 13-16.

The Regional Board must rescind the Order as to Petitioner because Petitioner.
never occupied or operated at the Site and did not know, and could not have known, that a tenant’s operations created a discharge or a reasonable possibility of a discharge during Petitioner’s ownership period. In fact, all evidence indicates that the contaminants of concern were released after Petitioner owned the Site and, other than serving as an out of possession landlord during the plating tenant’s initial operation, no evidence supports any theory by which contamination occurred during Petitioner’s ownership. The Regional Board’s circumstantial evidence and pure speculation to the contrary do not support naming Petitioner in the Order.

By contrast, the Kitay Family owned and controlled the Site from 1973 to at least 2018, maintained the plating facility as a tenant for twenty (20) years during that period, and the subject plating operations demonstrably expanded and increased during their ownership. In fact, the plating tenant and its successors went bankrupt during the Kitay Family ownership—leading to operational shortcuts even after operations had expanded. Together, all evidence indicates that the suspected release sources (e.g., the clarifier) were built and operated during this time, and the discharges occurred during Kitay Family ownership.

The evidence further demonstrates the Kitay Family knew of the contamination. In 1989, for example, the Kitay Family retained Dames & Moore to test the soil and groundwater on the Site. Dames & Moore found that VOCs and heavy metals existed, all of which was reported to the Regional Board for oversight of assessment and remediation. Ehrlich Decl., Exh. 12. Letters to and from the Kitay Family, meanwhile, recognized the Dames & More report and expressed concern regarding the contamination. See, e.g., Ehrlich Decl., Exhs. 18 and 19.

Decades later, very little has been accomplished. Rather than focus on legitimate cleanup efforts, the Kitay Family and ACP have focused on attempting to avoid their proper liability, dragging their feet for the past several decades. Among other things, the Kitays and ACP have cycled through a litany of environmental consultants—including, without limitation, EnviroMD, EnviroSpectrum,
Environmental Consulting Services (“ECS”), Environmental Support Technologies Incorporated, Environmental Management Strategies, Inc., Andersen Environmental, Conservation Consulting International, just to name a few—and consistently have suggested or implemented the least costly (and often, the least effective) efforts possible. At the same time, the contamination continues to migrate, endangering neighboring properties (including those owned in whole or in part by Petitioner). Clearly, the Site requires a comprehensive plan for assessment and remediation to avoid these continued delays, and Kitay and ACP must bear the cost of it. We request that the State Board take appropriate action to ensure that cleanup is fully effectuated once and for all.

Finally, Petitioner requests that the State Board hold an evidentiary hearing on the Petition. An evidentiary hearing will permit Petitioner to provide additional evidence that Petitioner does not qualify as a discharger—including evidence that Petitioner did not know, nor should it have known, that its tenant’s operations created a reasonable possibility of a discharge—and to provide additional evidence that the Order should be revised to name Kitay Family entities as responsible parties.

A. NAME, ADDRESS, TELEPHONE NUMBER AND EMAIL ADDRESS OF PETITIONER

Westchester Industrial Tract
433 N. Camden Drive, Suite 810
Beverly Hills, CA 90210
Telephone: (310) 247-9055
Email: ken@westlandpartners.com

Petitioner requests that copies of all communications and documents relating to this Petition also be sent to:

Kenneth Ehrlich, Esq.
Jackson McNeill, Esq.
Elkins Kalt Weintraub Reuben Gartside LLP
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Los Angeles, California 90064
Telephone: 310-746-4400
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jmcneill@elkinskalt.com
B. ACTION FOR REVIEW: REGIONAL BOARD'S ISSUANCE OF ORDER

Petitioner requests that the State Board rescind the Order as issued to Petitioner on May 16, 2022, and add the following parties to the CAO: Kitay Properties; Phillip Kitay; Arthur Kitay; Joyce Kitay; Harold Kitay; Phillip Kitay, as Trustee of the Phillip Kitay Trust No. 1 dated June 18, 1984; The Kitay Family Revocable Trust; The Arthur Kitay Revocable Trust; and The Joyce F. Kitay Trust R-401.

C. DATE ON WHICH THE REGIONAL BOARD ACTED

The Regional Board acted on May 16, 2022, when it issued the Order to Petitioner. Ehrlich Decl., Exh. 1, enc. (a), p. 1.

D. PETITIONERS' STATEMENT OF THE REASONS THAT THE ACTION WAS IMPROPER

Petitioner specifies the impropriety of the action taken by the Regional Board in its Statement of Points and Authorities contained in Section I.G, below.

In brief: No credible evidence indicates that Petitioner knew or should have known that a reasonable possibility of a discharge existed. Instead, the evidence unequivocally demonstrates that the discharges occurred during the Kitay Family entities’ ownership of the site and that the Kitay Family entities should be named in the Order. Among other things, and as discussed in Section I.G, below:

- Site maps, photographs, and an equipment inventory, among other records, show that the specific suspected sources of contamination were installed and used by Burton Silver Plating Co. (“Burton Plating”) after 1973 and during the Kitay Family entities’ ownership, not Petitioner’s ownership.

- This same evidence shows that the operations expanded and increased during the Kitay Family Ownership and that Burton

2 Also known or variously referred to in the records as Burton Plating Inc. or Burton Plating Co.
Plating utilized poor waste management practices during this period.

- The evidence—including subsurface investigations undertaken in the 1980’s—show that the Kitay Family knew of the contamination during their ownership.

- The lease between Petitioner and the Burton Plating relied upon by Regional Board fails to show that Petitioner knew or should have known that a reasonable possibility of a discharge existed. Instead, it shows that Petitioner had the same knowledge and rights as a typical landlord and that Petitioner acted prudently.

- The Regional Board mistakenly relies upon out of context citations of academic and scientific literature not related to the Site to support a strained argument that the hazards caused by degreasing agents were well known by the mid-20th century. This speculative, circumstantial and non-site specific evidence fails to show that actual industrial operators understood the same risks or hazards, much less that out-of-possession landlords—and much less Petitioner—would have been aware of the danger posed by their tenants' potential use of degreasers or other chemicals used in plating operations. To the extent this argument has any merit at all, it bears equally on the Kitay Family entities and ACP, who succeeded Petitioner in ownership.

In short, the Regional Board relies entirely on unfounded speculation and circumstantial evidence to incorrectly name Petitioner in the Order. This approach does not comport with state law. The Regional Board has not and cannot meet its legal burden to show that Petitioner knew or should have known that a reasonable possibility of discharge existed at the Site during its out-of-possession ownership. The credible evidence, meanwhile, unequivocally demonstrates that discharges occurred.
while the Kitay Family owned the Site. Together, the State Board must rescind the Order as to Petitioner and name the Kitay Family as a responsible party instead.

E. **PETITIONER IS AGGRIEVED**

It remains inconsistent with Water Code §§ 13267 and 13304 and wholly inequitable to require Petitioner, an out-of-possession owner of the Site nearly fifty years ago, to bear the time, effort, costs, and other resources to undertake the Work required by the Order, when no credible evidence exists that Petitioner knew or should have known that a discharge occurred during its ownership. Further, it remains inequitable for Petitioner to bear this burden when other clearly responsible parties remain unnamed in the Order.

The Kitay Family entities and ACP have delayed and avoided cleaning up the site for decades. Absent the relief demanded by this Petition, both the state and Petitioner will not obtain the serious, prompt, and complete remediation that state law requires.

F. **ACTIONS PETITIONER REQUESTS THE STATE BOARD TO TAKE**

As further discussed in this Petition, Petitioner requests that the State Board:

- Rescind the Order as to Petitioner; and
- Revise the Order to name the Kitay Family entities as responsible parties.

G. **PETITIONER’S STATEMENT OF POINTS AND AUTHORITIES**

1. **Relevant site history**

Petitioner owned the site from approximately 1958 through 1973. Ehrlich Decl., Exh. 1, enc. (a), p. 3; see also Ehrlich Decl., Exh. 3. The Kitay Family entities owned the site from 1973 to 2011, when the Site was acquired by ACP. Id. However, as explained in Section G.3, below, it appears that the Kitay Family controlled and maintained an interest in ACP until at least 2018. Id. The Kitays assignment of their interest to a limited liability corporation does not release the Kitay’s of their responsibilities and liabilities. Petitioner can no longer definitively state whether the
Kitay Family has an interest in, or controls, ACP.

Burton Plating used the Site as a plating facility for gold, silver, and other metals from approximately 1962 to approximately 1992. Ehrlich Decl., Exh. 1, enc. (a), pp. 3-4. Burton Plating operated at the Site for almost twenty (20) years under Kitay Family ownership, from about 1973 to 1992 (id.), close to double the time that Burton Plating operated under Petitioner’s ownership, and during which Burton Plating’s operations significantly expanded and increased.

2. **Petitioner does not qualify as a discharger under state law**

By its own terms, the Regional Board issued the Order pursuant to Water Code § 13267 and 13304. Ehrlich Decl., Exh. 1, enc. (a), p. 9-12. However, Water Code § 13304, subd. (a) only authorizes the Regional Board to require action from:

“[a] person who has discharged or discharges waste into the waters of this state ... or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state....”

Cal. Water Code § 13304(a). Similarly, Section 13267 only authorizes the Regional Board to require action from a “person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste....”

The California Courts of Appeal, meanwhile, have clarified the circumstances in which a prior out of possession landowner may be named in a Water Code section 13304 Cleanup and Abatement Order (“CAO”) as a party who “permitted” the discharge of contaminants resulting from a tenant’s operation. *United Artists Theatre Circuit v. San Francisco Regional Water Quality Control Board*, 42 Cal. App. 5th 851, 887 (2019) (“United Artists”). Specifically, a prior landowner must have been aware of a risk of discharge, and proof must exist that the owner knew or should have known that a lessee’s activity created a reasonable possibility of a discharge. *Id.*

Here, the Regional Board has not provided any facts demonstrating that Petitioner knew or should have known that its lessee’s activity created a reasonable...
possibility of a discharge. Critically, other than pointing to the general history of the Site, the Order only makes the bare, unsupported assertion that “Westchester Industrial Tract was aware of the activities that resulted in the discharges of waste and, as the lessor of the property, had the ability to control those discharges.” Ehrlich Decl., Exh. 1, enc. (a), pp. 11-12, 18. The Order provides no facts or arguments to support this claim.

Instead, the “Responsibleness Summary” attached to the cover letter that transmitted the Order purports to explain the Regional Board’s decision to name Petitioner (“Summary”). The Summary responds to Petitioner’s specific objections raised on August 13, 2021 to an earlier draft of the Order. Ehrlich Decl., Exh. 1, enc. (b). The Summary relies on, at best, circumstantial and non-site specific evidence, and pure speculation at worst, to argue that Petitioner knew or should have known of the reasonable probability of a discharge. The Regional Board primarily alleges:

(1) the historical operations conducted by Burton Plating involved the use and storage of various chemicals, operation of a vapor degreaser, generation of hazardous wastes which required onsite treatment before disposal, and construction and use of waste disposal structures such as troughs, clarifiers, conveyance piping, storage tanks, etc.;
(2) the 1971 lease agreement between Petitioner and the plating facility acknowledges the presence of troughs and the possibility of corrosion due to fumes from the plating process;
(3) a Los Angeles Department of Public Works memorandum alleges violations involving discharges of cyanide to the public sewer; and
(4) it was general knowledge that plating and the chemicals used for plating were hazardous or caused groundwater contamination.

Ehrlich Decl., Exh. 1, enc. (b), pp. 12-15; see also Exh. 1, enc. (a), pp. 11-12. The Regional Board produces absolutely no direct evidence to support these contentions, and we address each of these contentions in turn.
(a) The Order relies on suspected sources of contamination that did not exist during Petitioner’s ownership

The Order names Petitioner based in part on allegations that the historical plating operations conducted by Burton Plating involved the use and storage of various chemicals, operation of a vapor degreaser, generation of hazardous wastes which required onsite treatment before disposal, and—in particular—construction and use of waste disposal structures such as troughs, clarifiers, conveyance piping, storage tanks, etc. Ehrlich Decl., Exh. 1, enc. (a), pp. 11-12. Burton Plating did operate while Petitioner owned the Site. However, the equipment that the records point to as likely having caused the contamination did not exist during Petitioner’s ownership.

Importantly, an Andersen Environmental March 1, 2018 Supplemental Subsurface Investigation Report and Work Plan for Additional Investigation ("Andersen Report") identified a clarifier used by Burton Plating to process liquid waste from rinse tanks as a suspected source of contamination, located in the northwest corner of the Site structure. Ehrlich Decl., Exh. 5, p. 5. Environmental Support Technologies June 9, 2010 Soil, Soil Gas and Groundwater Assessment Report ("EST Report"), meanwhile, concluded as follows:

The highest concentrations of VOCs were detected in the 10 foot depth soil sample from boring FBP-8 located near the north-central area of the printing shop. This area also contained the highest concentrations of VOCs detected in soil gas. This area is suspected to be where VOC degreasing activities were performed by the former precious metals plating operation. A review of Figures 9 through 14 indicates the soil source area of groundwater contamination appears to be near the location of the former clarifier (near the northwest corner of the site building). This area contains the highest concentrations of PCE and TCE detected in soil near groundwater at 30 feet bgs ... Based on the apparent distribution of VOCs observed in groundwater, the primary source area for groundwater contamination appears to be near the location of the former clarifier (near the northwest corner of the site building).

Ehrlich Decl., Exh. 6, p. 11.
But the clarifier and western containment area, for example, did not exist during Petitioner’s ownership. The site map attached to a Buyer and Seller Agreement dated April 10, 1973, depicts the outdoor areas as used solely for parking, with no indication of the source clarifier or western containment area or any chemical storage whatsoever. Ehrlich Decl., Exh. 7, pp. 5-6. Likewise, these maps do not depict any degreasers. Id.

Other evidence corroborates Petitioner’s position that subsequent owners or operators installed the specific equipment linked to the contamination. Critically, Burton Plating prepared a due diligence memorandum in August 1986 in connection with a potential purchase of the Site. This memorandum includes a list of machinery and equipment present on the Site as well as their installation date. Ehrlich Decl., Exh. 8, pp. 12-16. This list shows that degreasers were installed in 1975 and the chemical storage tanks were installed in 1983. Id. at pp. 12, 15. Further, the chemical storage tanks are first noted and depicted outside the Site building in a 1983 Site Survey attached to a Surveillance and Compliance Report for the Site. Ehrlich Decl, Exh. 9, p. 8.

A 1989 Dames and Moore investigation, meanwhile, detected TCE in soil samples and TCE and PCE in groundwater samples—over 15 years after Petitioner was no longer the owner. Ehrlich Decl., Exh. 12, pp. 15. Prior to this, a November 13, 1986 Report by Keystone Environmental Resources, Inc. concluded no detectable levels of VOCs were found in soil and groundwater samples. Ehrlich Decl., Exh. 11, pp. 10, 13. Likewise, a May 1986 DTSC Preliminary Assessment Summary concluded “no evidence of on-site disposal of hazardous wastes has been found in regulatory files. Local regulatory agencies thoroughly and regularly inspect the facility. Staff recommends continued inspections, no further action under the Abandoned Site Assessment Program.” Ehrlich Decl., Exh. 10, p. 15. Clearly, the possibility of a discharge did not arise until long after Petitioner had sold the Site.

Together, no evidence supports any theory by which contaminating operations...
occurred during Petitioner’s ownership. Indeed, if the Site had been contaminated during Petitioner’s ownership—and if an out-of-possession landlord such as Petitioner knew or should have known of the reasonable possibility of a discharge—the Kitay Family entities presumably would never have purchased the Site. But they did. Like everything else, this leads to the inexorable conclusion that the discharge occurred during their ownership, not Petitioners.

(b) The 1971 Lease Agreement does not constitute evidence against Petitioner

In naming Petitioner, the Regional Board alleges that the 1971 lease agreement between Petitioner and the plating facility (“Lease”) “acknowledges the presence of troughs and the possibility of corrosion due to fumes from the plating process.” Ehrlich Decl., Exh. 2, pp. 35-36.

The Regional Board misstates the language of the Lease. The Lease actually required the plating facility “to install proper vents to preclude any corrosion due to fumes from the plating process.” Ehrlich Decl., Exh. 2, p. 35 (emphasis added). It does not, by any measure, indicate that corrosion had occurred or was expected to occur or that a discharge had occurred or was expected to occur. If anything, it merely shows prudence on the part of Petitioner.

Similarly, the Lease requires the tenant to “remove the entire floor area encompassed by troughs which have been cut in the floor by Lessee” and to replace the floor slabs. Ehrlich Decl., Exh. 2, pp. 35-36. Again, this at most shows good care by Petitioner and a desire to maintain the building in accordance with the approved building plans. Nothing about this provision implies a discharge or possibility of discharge or that the troughs were being used to possibly discharge or to dispose chemicals of concern. It also certainly proves that Petitioner did not create the troughs. Indeed, given the prudence shown by Petitioner in the provisions of the Lease, one would expect the Lease to have required the tenant to cease this behavior if it existed. It did not.
Finally, the Regional Board notes that the Lease gave Petitioner the ability to enter and inspect the premises. Ehrlich Decl., Exh. 2, pp. 35-36. However, nothing about this common provision indicates that Petitioner actually ever entered or inspected the premises. This was a true triple-net lease where the tenant controlled site operations. More importantly, these entry provisions are typical for commercial leases; further, even absent an explicit entry provision, all commercial landlords have an implied right to enter a tenant’s premises during the lease term. See Sachs v. Exxon Co., U.S.A., 9 Cal. App. 4th 1491, 1498 (1992), reh'g denied and opinion modified (Oct. 29, 1992).

Having the mere right to enter and inspect the premises cannot not constitute evidence that a party knew or should have known of the reasonable possibility of a discharge. If it did, the holding in United Artist would make no sense, as every landlord in every circumstance would be subject to a Section 13304 order just in virtue of its common law right to enter the premises. This absurd result cannot be the law. To the extent the lease constitutes any “evidence” at all (which Petitioner contests), this same lease would have been operative when the Kitays took ownership of the Site, and accordingly, demonstrates that the Kitay Family entities should be named in the order as well.

(c) LA Public Works Memorandum does not constitute evidence against Petitioner

The Regional Board also relies upon a Los Angeles Department of Public Works memorandum from 1971 alleging certain violations involving discharges of cyanide to the public sewer. Ehrlich Decl., Exh. 13. However, the memorandum in question apparently relied on sampling from a manhole east of the area, not sampling at the Site. Id. at 1. This memorandum serves, at most, as weak, speculative, and circumstantial evidence that cyanide might have been a byproduct of some industrial operation somewhere in the area. No direct evidence exists—and the Regional Board provides none—demonstrating that Burton Plating created or
used cyanide as a byproduct of the plating facility at the Site, much less that
Petitioner knew or should have known that a discharge of this material occurred at
the Site. In all cases, Petitioner believed that operations occurred at the site in
conformance with all applicable industry standards and regulations.

(d) The Regional Board’s mistakenly relies on
academic and scientific literature to allege
that Petitioner should have known of a
possibility of a discharge

Finally, the Regional Board argues that “that it was well-established, as early
as the 1940s, that entities using degreasers and/or conducting metal fabrication
and/or plating operations, most of which used TCE, were associated with discharges
of wastes that caused groundwater contamination.” Ehrlich Decl., Exh. 1, enc. (b), p.
14.

The Regional Board re-tools accounts from academic historians indicating that
a basic understanding of hydrology and the processes of groundwater contamination
existed in scientific literature in the early twentieth century an onward, and that,
beginning in the 1940’s, California official recognized the need for groundwater
contaminant regulations. Ehrlich Decl., Exh. 1, enc. (c), pp. 1-3. The agency further
contorts articles from academic journals, papers by engineers, and reports from
government agencies to allege that it was ubiquitously known that metal plating
operations and the use of degreasers posed a hazard and caused groundwater
contamination. Id. at pp. 4-10.

These out of context citations, at most, show a certain scientific or academic
understanding of the potential hazards caused by degreasing agents in the mid-20th
century as well as an increasing desire to regulate the same. See, e.g., id. at p. 6.
They in no way prove that actual industrial operators or landlords, such as WIT,
understood the same risks or hazards, much less that out-of-possession landlords
would have been aware of the danger posed by their tenants’ potential use of
degreasers or other chemicals used in plating operations.
The Regional Board offers no real world or practical evidence (e.g., leases with plating tenants from this period showing hazard disclosures) demonstrating that landlords understood the potential for contamination posed by plating operations. Certainly, nothing about these academic articles indicates that Petitioner would have known or should have known that there was a reasonable possibility of a discharge by this particular tenant. This speculative, circumstantial evidence cannot serve as the basis for naming Petitioner in the Order. See In the Matter of Petition of Exxon Company, U.S.A., et al., WQ 85-7 at 10-11 (1985), Ehrlich Decl., Exh. 24 (“There must be substantial evidence to support a finding of responsibility for each party named. This means credible and reasonable evidence which indicates the named party has responsibility.”).

(e) The Order should be rescinded as to Petitioner

The Regional Board relies entirely on speculation and circumstantial evidence in order to grasp at straws and name Petitioner as a party to the Order. In fact, nothing indicates that Petitioner knew or should have known that a reasonable possibility of discharge exited at the Site. The actual direct evidence, meanwhile, shows that, if anything, discharges occurred after Petitioner’s ownership. The State Board should rescind the Order as to Petitioner.

3. The State Board must name the Kitay Family entities in the Order

(a) ACP no longer appears to be a Kitay Family entity; thus both the Kitay Family entities and ACP must be named in the Order

Petitioner sold the site to a Kitay Family owner entity in 1973, and Kitay Family owner entities held title to the site from 1973 to about 2018—approximately 48 years—and over three times longer than Petitioner. Specifically, the grant deeds show that:

- Kitay Properties owned the Site from 1973-1976;
- Phillip Kitay owned the Site from 1976-1984;
• Phillip Kitay, as Trustee of the Phillip Kitay Trust No. 1 dated June 18, 1984, owned the Site from 1984-1988; and


The Kitay Family purportedly sold the Site to ACP in 2011. However, ACP existed as a de facto Katay family entity until at least 2018. Specifically, the grant deeds show that no documentary transfer tax paid because “[t]he grantors and grantees in this conveyance are compromised of the same parties who continue to hold the same proportionate interest in the property, R & T 11923(d).” Ehrlich Decl., Exh. 3. In other words, this was not an actual, arms-length transfer, and the Kitays’ ownership interests remained the same after the 2011 transfer.

However, on or about December 28, 2018, Arizona Circle Holding LLC (“AC Holding”) became the Principal for ACP as shown on Articles of Amendment received by the Arizona Corporation Commission indicating a change to ACP’s membership. Ehrlich Decl., Exh. 4. Articles of Organization, signed by Roy Jutabha, were filed in the State of California for AC Holding on April 10, 2018, and a Statement of Information was filed on October 25, 2018. Id. These documents now list Charlie Jutabha as the manager for AC Holding LLC with a mailing address of 1400 Benedict Canyon Drive, Beverly Hills, CA. Id. at pp. 5-7. The Order is also addressed to Roy Jutbha. Ehrlich Decl., Exh. 1, enc. (a), p. 1.

Petitioner does not know if Roy Jutabha is related to Charlie Jutabha or if these people (or this person) has any relationship to the Kitay family. It remains less than 100% clear what interest Roy Jutabha and/or Charlie Jutabha have in the Site. Thus, given that ACP and the Kitay Family entities may now be separate and unrelated, it remains critical it keep ACP a named party on the Order and to separately name the Kitay Family entities.

(b) During Kitay Family ownership, the plating
operations expanded and increased, and the discharges necessarily occurred

The Order argues that the historical plating operations conducted by Burton Plating involved the use and storage of various chemicals, operation of a vapor degreaser, generation of hazardous wastes which required onsite treatment before disposal, and construction and use of waste disposal structures such as troughs, clarifiers, conveyance piping, storage tanks, etc. Ehrlich Decl., Exh. 1, pp. 11-12; see also Exh. 1, enc. (b).

As previously noted, the evidence shows that specific suspected sources linked to the contamination were installed and used by Burton Plating after 1973—i.e., after Petitioner’s ownership—and thus, the releases must have occurred during the Kitay Family’s ownership. Notably, the site map attached to a Buyer and Seller Agreement dated April 10, 1973—prior to Kitay’s acquisition of the site—depicts the outdoor areas as used solely for parking, with no indication of the source clarifier or western containment area or any chemical storage whatsoever. Ehrlich Decl., Exh. 7, pp. 5-6. Likewise, these maps do not depict any degreasers on the Site. Id.

By contrast, a 1986 equipment inventory shows degreasers installed in 1975 and the chemical storage tanks installed in 1983. Ehrlich Decl., Exh. 8, pp. 12-16. Corroborating this conclusion, the chemical storage tanks are first noted and depicted outside the Site building in a 1983 Site Survey. Ehrlich Decl., Exh. 9, p. 8. Similarly, photographs from the late 1980’s show greatly expanded degreasing and product cleaning facilities placed on Site during the Kitay Family ownership. Ehrlich Decl., Exh. 14.

Further, it was not until more than sixteen (16) years after Petitioner’s ownership that a 1989 Dames and Moore investigation detected TCE in soil samples and TCE and PCE in groundwater samples. Ehrlich Decl., Exh. 12, p. 15. At this time, Burton Plating began experiencing financial difficulties, which led Burton Plating to cut corners and lax safety protocols. Ehrlich Decl., Exh. 15. Burton Plating

Burton Plating waste control documents during this time reveal poor waste handling operations at the Site. Records indicate, among other things, that “plating lines leak[ing] to bermed areas – berms collecting & accumulating sludge (solve, semi-solid),” and that “sludge [was] removed from beneath floor boards.” Ehrlich Decl., Exh. 15, p. 1.

Contrary to Petitioner, the Kitays clearly knew about the contamination on the site and the poor waste handling practices, including while Burton Plating was still operating. In January 1990, for example, the Kitays received a copy of the Dames & Moore report demonstrating contamination on the Site. Ehrlich Decl., Exh. 16.

Beginning in January 1990, the Kitays retained EnviroMD to examine the Burton Plating facility and review the Dames & Moore report. In March 1990, EnviroMD told the Kitays that based on their review there should be significant concern regarding the potential for future environmental liability and damage to the property. EnviroMD noted, “...there should be significant concern on your part...

These concerns arise from the poor state of housekeeping in the laboratory, maintenance shop, and in the general plating areas; lack of significant protocols on chemical releases to the air and floor of the building; and the disregard for approved safety and hygienic controls for the chemicals used.” Ehrlich Decl., Exh. 17. In June of 1990, likewise, the Kitays acknowledged in letters to Burton Plating’s parent companies and/or successors and affiliates, Allegheny International, Inc. and Integrated Specialties, Inc., that the Site was contaminated with hazardous wastes, including heavy metals and VOCs. Ehrlich Decl., Exhs. 18 and 19.

Finally, as previously discussed, the Order alleges that it was well-known that entities using degreasers and/or conducting metal fabrication and/or plating operations were associated with discharges of wastes that caused groundwater contamination. Ehrlich Decl., Exh. 1, enc. (b), p. 14; enc. (c). This approach makes no sense as applied to all sites. The Regional Board bases this conclusion on primarily
circumstantial academic and scientific literature. No evidence exists that an out of possession landlord would have been aware of this literature, much less Petitioner.

However, to the extent the State Board believes that this argument helps demonstrate that Petitioner knew or should have known of a reasonable possibility of a discharge, the same logic must also apply to the Kitay Family. Indeed, the hazards of degreasing solvents would have been even more well-known—and even better represented in policy and literature when the Kitay Family owned the Site in the 70’s, 80’s, and 90’s than when the Petitioner began leasing the site in the 1960’s.

Similarly, the Order also relies on provisions of the lease to name Petitioner in the Order. Id. This same lease would have been operative when the Kitay Family took ownership of the Site. To the extent the lease constitutes “evidence” that Petitioner knew or should have known of a reasonable possibility of discharge (which Petitioner contests), it applies with equal force to the Kitay Family. Put simply, if the Regional Board can use these non-sensical lines of reasoning as a basis for naming Petitioner as a responsible party in the Order, it has no choice but to name the Kitay Family entities as well.

Together, the only logical conclusion is that the discharges occurred during the Kitay Family ownership, not Petitioner’s, and that the Kitay Family knew about it. No credible reason exists not to name the Kitay Family entities as responsible parties in the Order. Indeed, the Regional Board has named one or more of the Kitay Family entities as responsible parties before. Ehrlich Decl., ¶ 28. It should do so again.

Petitioner wants this Site remediated. Petitioner and a neighboring property owner sued the Kitay Family over Site contamination in the mid-1990s. This lawsuit was suspended primarily due to Kitay’s commitment to clean up the Site under the Regional Board’s supervision. But instead of focusing on legitimate cleanup efforts, the

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3 WESTCHESTER 3 ACRES, a California general partnership, v. Arthur Kitay et al., Case No. YC 017863.
Kitay Family and ACP have spent decades dragging their feet and accomplishing no appreciable remediation or environmental benefit.

Avoiding anything resembling a consistent approach, the Kitays and ACP have cycled through a multitude of environmental consultants, consistently suggesting ineffective, low-cost efforts that will not fully remediate the site. This must stop. The State Board must name the Kitay Family entities alongside ACP and ensure that cleanup is fully effectuated once and for all.

H. COPIES OF THE PETITION OF THE PETITION HAVE BEEN SENT TO THE REGIONAL WATER BOARD, TO ACP, AND TO THE KITAY FAMILY ENTITIES

Copies of the petition have been sent to the Regional Water Board, to ACP, and to the Kitay Family entities. Notwithstanding the foregoing, Petitioner remains unaware of the Kitay Family entities correct address. Petitioner has sent the Petitioner to the following address reflected on previous Regional Water Board documents: P.O. Box 31058, Tuscon, Arizona 95751. Should be Petitioner be informed or become aware of additional or updated contact information for the Kitay Family, it will promptly forward a copy of this Petition thereto.

I. THE SUBSTANTIVE ISSUES AND OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD OR COULD NOT BE RAISED PRIOR TO THE ORDER BEING ISSUED

Petitioner has previously filed documents with the Regional Board stating and demonstrating that that no credible evidence exists indicating that Petitioner knew or should have known that a reasonable possibility of a discharge existed. Ehrlich Decl., Exh. 21. Petitioner has previously also filed documents demonstrating that the Kitay Family entities should be named in the Order. Id. This includes, without limitation, at least sixteen (16) letters, including an August 13, 2021 letter discussed in the Order. Id.

II. REQUEST FOR A HEARING

The Petitioner requests a hearing pursuant to California Code of Regulations,
Title 23, Section 2050.6. An evidentiary hearing will permit Petitioner to provide additional evidence that Petitioner does not qualify as a discharger—including evidence that Petitioner in that did not know, nor should it have known, that its tenant’s operations created a reasonable possibility of a discharge. Among other things, this will include evidence demonstrating that the hazard of degreasing solutions was not generally known by out of possession landlords at the time of Petitioner’s ownership of the Site. Because the Regional Board introduced the argument that said hazards were well known for the first time in the Order, this issue has not previously been adequately presented or briefed.

Further, an evidentiary hearing will allow Petitioner to provide additional evidence that the Order should be revised to name Kitay Family entities as responsible parties. Because previous Regional Board documents in this matter had been addressed to one or more Kitay Family entities, Petitioners expected the Kitays to be named in the Order. Because the Regional Board failed to name the Kitays in the Order, this issue has not previously been adequately presented or briefed.

III.

REQUEST FOR RELIEF

For the reasons stated herein, Petitioner respectfully requests that the State Board: (a) rescind the Order as to Petitioner and (b) revise the Order to name the Kitay Family entities as responsible parties.
DATED: June 15, 2022

Respectfully submitted,

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By:

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