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CALIFORNIA REGIONAL WATER QUALITY BOARD

SAN DIEGO REGION

IN THE MATTER OF: SHIPYARD SEDIMENT SITE TENTATIVE CLEAN-UP AND ABATEMENT ORDER NO. R9-2011-0001	CITY OF SAN DIEGO'S HEARING BRIEF Dates: November 9, 14, 15, and 16

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TO THE REGIONAL WATER QUALITY CONTROL BOARD, DESIGNATED PARTIES, AND THEIR ATTORNEYS OF RECORD:

Pursuant to the September 19, 2011 Notice of Public Hearing, the City of San Diego ("City") hereby submits its Hearing Brief summarizing technical comments, evidence and argument concerning the Tentative Cleanup and Abatement Order No. R9-2011-0001 ("TCAO") and its associated Draft Technical Report ("DTR") for the San Diego Bay Shipyard Sediment Site, San Diego County ("Shipyard Sediment Site" or "Site").

The City offers this summary on selected issues consistent with the current procedural posture of this proceeding. The City expressly preserves, and does not waive, any and all objections to those technical comments, technical issues, evidence or legal argument to which the City does not address herein, and further reserves the right to supplement, modify or withdraw its comments on any issue identified herein.

I.

THE CITY OF SAN DIEGO'S POSITION REGARDING THE PROPOSED CLEANUP FOOTPRINT IN THE TCAO AND THE DTR.

The City supports the scope of the remedial footprint proposed by the Cleanup Team ("CUT") in the TCAO and DTR. As demonstrated in the TCAO and DTR, the Site sediments have been subject to extremely intensive study over numerous years. All potential risks to human health and the aquatic and benthic environments have been fully analyzed. The City believes that the cleanup methodology developed to evaluate those risks and determine the appropriate scope for the remedial footprint is both conservative and reasonable.

II.

THE PROPOSED REMEDIAL FOOTPRINT PROPERLY EXCLUDES POLYGON NA22.

The Coast Keeper / Environmental Health Coalition ("EHC") asserted in its comments that the "Proposed Remedial Footprint excludes eight polygons that, under the DTR's own methodology, should have been included" and that "[t]he Proposed Remedial Footprint improperly excludes NA22" and that "[t]he DTR acknowledges that polygon NA22 is "Likely"

impaired and should be remediated because Contaminants of Concerns in sediments are likely adversely affecting benthic invertebrates within this polygon."[1]

Polygon NA22 is within the subject area encompassed within the TMDL for the Mouth of Chollas Creek ("the Chollas Creek Mouth TMDL"). As stated by the CUT in its Response to Comments Report, the area within polygon NA22 has been subject to much more sampling and investigation in the TMDL process , than in the Shipyards Site investigation.[2] The Shipyards Site investigation focused on sampling at only one location within polygon NA22: station NA22. Conversely, the Chollas Creek Mouth TMDL investigation has included over one dozen sampling sites. With the availability of far more investigatory data in the Chollas Creek Mouth TMDL, the CUT made the reasonable decision to exclude polygon NA22 from the proposed remedial footprint for the Shipyards Site, and instead address this area within the Chollas Creek Mouth TMDL process.

EHC also comments that "The TMDL process cannot provide a vehicle for remediating contaminated sediment within the NA22 polygon. A new and separate remediation process—another Cleanup and Abatement Order—would need to be initiated after completion of the Creek Mouth TMDL to address existing contaminated sediment in NA22, if it is not remediated under the current Order. When asked in depositions, no Cleanup Team member could point to a TMDL that had been implemented through dredging. This means that removing NA22 from the Proposed Remedial Footprint virtually guarantees that it will never be dredged—even though the DTR agrees that it is "Likely" impaired. Furthermore, TMDLs are given a long time period—typically twenty years—before they need to be implemented. Adding this delay together with the time it would take to develop another cleanup and abatement order to address NA22 means that any possible cleanup of NA22 would not be for decades down the road. It is a waste of time and resources to put off remediating NA22 when a framework for its remediation has already been established in this process."[3]

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[1] San Diego Coastkeeper and Environmental Health Coalition Technical Comments, Legal Argument, and Evidence ("EHC Comments"), p. 25-26.

[2] The Cleanup Team ("CUT") Response to Comments Report ("CUT Response"), August 23, 2011, page 33-24

[3] EHC Comments, p. 26.

Contrary to comments from EHC otherwise, the TMDL process, as well as its general legal authority under the Clean Water Act, provides the Regional Board with all of the legal tools necessary to ensure that any legally required remediation can be accomplished. In fact, the draft implementation plan for the Chollas Creek Mouth TMDL calls for the Regional Board to issue a CAO for the cleanup of contaminated sediment at the mouth of Chollas Creek, including the area encompassed by polygon NA22. It is not unprecedented for Regional Boards to include as part of the TMDL process a requirement of dredging of contaminated sediments. The upper and lower Newport Bay organochlorine compound TMDL includes stipulations in its implementation plan for dredging of sediments in addition to special studies, natural attenuation, and discharge controls. The dischargers, among numerous other requirements, are to submit a report that "Evaluate[s] feasibility and mechanisms to fund future dredging operations within San Diego Creek, Upper and Lower Newport Bay." See Santa Ana Regional Water Quality Control Board Resolution No. R8-2007-0024 (City Ex. 4 to City's Reply Comments and Legal Arguments). Accordingly, to the extent contamination within polygon NA22 is required to be remediated under the appropriate regulatory guidelines, the Regional Board has ample regulatory authority as part of the Chollas Creek Mouth TMDL process, or otherwise, to accomplish the goal.

In sum, following years of technical analysis and mediation, the CUT made the reasonable regulatory and technical decision to exclude polygon NA22 from the proposed cleanup footprint, so that it can be properly addressed in the Chollas Creek Mouth TMDL process. The City believes that all of the named Dischargers concur in this decision.

III.

THE RECORD SUPPORTS THE NAMING OF THE PORT DISTRICT AS A PRIMARILY RESPONSIBLE PARTY.

The Port District ("Port") is named as a primarily responsible Discharger based on 1) discharges by the Port's tenants, and 2) discharges from the Port's ownership and operation of the MS4 system.

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A. If A Trustee Has Legal Liability Under The California Water Code, Then The Port District Is Appropriately Named As A Primarily Responsible Discharger on that Basis.

The City has maintained that trustees, such as the City and the Port, are not liable under the California Water Code for discharges from its tenants' operations. Heretofore, this argument has been rejected by the Regional Board. Although the City continues to maintain this position, assuming for the sake of argument that the Regional Board is correct that trustees in the positions of the City and Port are liable under the California Water Code, then the evidence supports the naming of the Port as a primarily responsible discharger on this basis.

The City believes the CUT's analysis and conclusions, as delineated in its Response, directly hit the mark. The DTR identified that the Port District should be held primarily responsible "to the extent the Port's tenants, past and present, have insufficient financial resources to cleanup the Shipyard Sediment Site and/or fail to comply with the order." (TCAO Finding 11; DTR § 11.2.) The Port contends, however, that it is entitled to status as a secondarily responsible party, instead of primarily responsible party because "[t]he Port's tenants have more than sufficient assets to conduct the cleanup." (*Id.* at 8.) The Port falls woefully short of meeting its burden of proving that each of its tenants have the financial resources available to conduct the cleanup.

One of the Port's tenants is the entity San Diego Marine Construction Company (SDMCC"), which conducted a shipyard operation under a lease with the Port from 1963-1972. SDMCC ceased to exist as an entity many years ago and has not participated in these proceedings. Campbell Industries' subsidiaries conducted shipyard operations under leases with the Port from 1972-1979. Campbell Industries has also been out of business for many years. The Port's attempts to close the gap and show that the tenants for the period of time from 1963-1979 have the financial resources necessary to conduct the cleanup are unavailing.

In its attempt to show that SDMCC and Campbell, as well as its other tenants, have sufficient financial assets, the Port cites to its tenants' insurance coverage as evidence of sufficient financial assets to fund the cleanup. However, as the CUT appropriately concludes:

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"the Port District merely cites to what it says are policy limits for historical policies. The Port District makes no showing whatsoever (1) whether the policy provides actual coverage for the claims and anticipated obligations at issue here, (2) whether the insurer is defunct or insolvent, (3) whether any policy amounts have been sold back or are otherwise unavailable, and (4) most importantly, whether any insurer for any party has actually accepted coverage for indemnity obligations. This lack of evidence is unsurprising, as courts have consistently held that the obligation to indemnify does not arise until the insured's underlying liability is established. See, e.g., *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 659 n.9 (1995). Without any such evidence or showing, the Port District's "belief" as to BAE Systems' and other dischargers' "potential" insurance assets is unsupported, insufficient, and certainly is not evidence upon which the Regional Board can or should change the Port District's status to that of a secondarily responsible party."[4]

The Port also argues that Star & Crescent Company ("Star & Crescent") is a legal successor to SDMCC; therefore, the time period from 1963-1972 is covered by Star & Crescent. This argument fails for a number of reasons. First, Star & Crescent disputes that it is a legal successor to SDMCC. In fact, this issue is now the subject of a motion for summary judgment proceeding in the federal court action. Second, even if Star & Crescent is a legal successor, the Port cannot show that Star & Crescent has sufficient financial resources to conduct the cleanup. The fact that Star & Crescent has stipulated that it has assets totaling between $750,000 and $1 million does not mean that this sum is sufficient. In fact, SDMCC conducted operations at the shipyards for 50-60 years. Accordingly, it is certainly possible that SDMCC's appropriate responsibility for the cleanup is going to be considered greater than $1 million. The Port's arguments that Star & Crescent has insurance coverage to fund its share of the cleanup is equally unavailing for the same reasons described above for each of its other tenants.

In sum, as appropriately concluded by the CUT, the Port has been appropriately named as a primarily responsible party for its tenants' discharges because the Port cannot meet its burden of showing that its tenants from 1963-1979 have sufficient financial resources to fund the cleanup.

B. The Port District is Appropriately Named as a Primarily Liable Discharger for Discharges from the MS4.

Although the City continues to maintain that there is a lack of evidence to support a finding of sufficient discharges from the SW4 and SW9 outfalls to impose liability upon the

[4] The CUT Response, p. 11-23.

City, assuming for the sake of argument there is sufficient evidence, the Port should also be considered primarily responsible for such discharges.

In its Comments submitted on May 26, 2011, the Port argues that it has no liability because it does not own or operate the SW4 and SW9 outfalls, or the MS4 facilities leading to these outfalls, and that the City is responsible because both outfalls and related MS4 facilities are operated by the City under an easement. As described below, and in the CUT's Response, the CUT fully recognizes the legal fallacies and lack of evidence supporting these Port arguments.

First, in fact, the Port does not dispute that its MS4 facilities lead to outfall SW4. As identified by the CUT:

> "the Port District's (untimely) proffered expert opinion of Mr. Collacott admits that the 'portion of the Port District that is not leased to tenants and is tributary to outfall SW4 is limited to portions of Belt Street (approx. 1 acre) consisting of an estimated one-half mile (1/2 mile street) of curb and gutter, four storm drain inlets, and an estimated 770 feet of underground storm drains 24-inches in diameter and smaller.' (Declaration of Robert Collacott In Support of the San Diego Unified Port District's Submission of Comments, Evidence and Legal Argument, at 4:9-14.) Presumably the Port District has owned and operated this tributary system to outfall SW4 since 1962."[5]

Thus, the Port's own evidence supports the conclusion that the Port does, in fact, own and operate MS4 facilities leading to outfall SW4.

Second, the Port's argument that the City is solely responsible for discharges from both outfalls because the outfalls and related MS4 facilities are operated under an easement is incorrect. As the CUT appropriately concluded:

> "The Port District's argument that it does not own or operate any of those portions of the MS4 system that outfall through SW04 and SW09 is based on the erroneous assertion that the City of San Diego's retention of an easement for its MS4 system to pass through the Port District's tideland properties foisted the responsibility for discharges from the tideland properties onto the City. The Port District is wrong. The City of San Diego correctly observed in its rebuttal comments that the Port District is a unique entity that overlays the City's jurisdictional boundaries. The Port District has all rights and obligations of inspection and action with respect to the MS4 within its jurisdictional boundaries – namely the tidelands. Indeed, the MS4 permit issued by the San Diego Water Board recognizes this. The City's easements merely allow its storm drains to pass through the tidelands to drain the upland areas into San Diego Bay. The Port District is fully responsible under the MS4 permit and its agreements with the co-permitees to take all necessary actions to prevent discharges of pollutants into the MS4 system from the tidelands areas, including both public areas *and* those

[5] The CUT Response, p. 11-26

leased to other entities. But, as outlined below, there is substantial evidence that relevant COCs were conveyed by the Port District's MS4 system to the Shipyard Sediment Site."[6]

In conclusion, as described by the CUT, the record contains ample evidence to support the naming of the Port as a primarily responsible party for both its tenants' discharges and discharges from the MS4 system.

IV.

STAR & CRESCENT COMPANY IS APPROPRIATELY NAMED AS A PRIMARY DISCHARGER BECAUSE IT IS THE LEGAL SUCCESSOR TO SAN DIEGO MARINE CONSTRUCTION COMPANY.

Star & Crescent Company ("Star & Crescent") claims that there is no evidence it is a legal successor to San Diego Marine Construction Company ("SDMCC"), one of the parties potentially responsible for contamination of the Shipyard Sediment Site as a result of its historical shipyard operations. Yet the very evidence submitted by Star & Crescent with its comments to the Board demonstrates that it was a mere continuation of San Diego Marine Construction Company ("SDMCC"), if not a fraudulent transfer to hide or escape liabilities, such that Star & Crescent is a corporate successor of SDMCC.[7] The evidence Star & Crescent submitted in fact demonstrates the strength of the successor liability case against Star & Crescent and proves it is the proper successor and that Star & Crescent is appropriately named as a Discharger to this proceeding.

The evidence demonstrates that a few years after SDMCC changed its name to Star & Crescent Investment Company ("Investment Company"), Investment Company, led by O.J. Hall, Jr., created Star & Crescent (installing himself and his children as directors) so as to transfer its $800,000 harbor business to it, for which it received grossly inadequate consideration. Following the transfer, Star & Crescent, led by O.J. Hall, Jr.'s children, continued the harbor business while Investment Company retained control over Star & Crescent, reviewing its operations, financials, and dictating and approving its directors salaries, bonuses and its stock dividends (actually marked "approved" by O.J. Hall, Jr. in Board of Directors meeting minutes).

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[6] The CUT Response, p. 11-33.

[7] A detailed description of this evidence can be found in the City's Reply Arguments and Legal Argument, pages 2-6, submitted on June 23, 2011.

The evidence also shows there was officer and director overlap between the two companies, first with O.J. Hall, Jr. leading both companies, and later via Kenneth Beiriger as a director of both companies and via Investment Company—still led by O.J. Hall, Jr.—controlling Star & Crescent. Also, O.J. Hall, Jr.'s three children--Judy Hall, Stephen Carlstrom and Janet Miles--were the directors and shareholders of Star & Crescent.

The evidence also supports the conclusion that the creation of Star & Crescent and transfer of assets and liabilities to it was fraudulent in nature, based on sham initial director appointments, unsupported stock valuations, and questionable stock swaps, which is another basis for successor liability.

A. Star & Crescent Company has Successor Liability for SDMCC.

The general rule of successor liability under the laws of California is that the corporate purchaser of another corporation's assets presumptively does not assume the seller's liabilities, unless:

(1) there is an express or implied agreement of assumption;

(2) the transaction amounts to a consolidation or merger of the two corporations;

(3) the purchasing corporation is a mere continuation of the seller; or

(4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

Ortiz v. South Bend Lathe (1975) 46 Cal. App. 3d 842, 846, disapproved on other grounds in *Ray v. Alad Corp.* (1977) 19 Cal. 3d 22, 34; *Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust* (2002) 95 Cal. App. 4th 1182, 1188.

Here, as discussed further below, the evidence demonstrates that Star & Crescent was a mere continuation of SDMCC/Investment Company, and also indicates that the creation of Star & Crescent and Investment Company's transfer of assets to it was also of a fraudulent nature to escape or hide liabilities.

1. Star & Crescent Is A Mere Continuation of SDMCC/Investment Company.

With respect to the mere continuation exception, in discussing this exception to the general rule of successor non-liability, the California Supreme Court in *Ray v. Alad* stated that

liability has been imposed on a successor corporation upon a showing of *one or both* of the following factual elements:

1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors;

2) one or more persons were officers, directors, or stockholders of both corporations.

Ray v. Alad, supra, 19 Cal. 3d at p. 29 (citing cases).

In this matter as to Star & Crescent, both of these factors are met.

a. There Was Grossly Inadequate Consideration Paid for Investment Company's $800,000 Harbor Assets.

On April 7, 1976, Star & Crescent was created, with six "directors" who all, two days later, simultaneously resigned without explanation and were replaced by O.J. Hall, Jr., the president and director of Investment Company, along with five others, at least one of whom was also related to Investment Company (Kenneth Beiriger), with the remainder being O.J. Hall, Jr.'s children and one of their spouses.[8] Simultaneously with this uniform directorship replacement with O.J. Hall, Jr./family-led Investment Company personnel, Investment Company transferred its $800,000+ harbor business to Star & Crescent to continue that business in exchange for, at most, $15,000 of newly created stock of Star & Crescent and Star & Crescent's assumption of $86,000 of liabilities—grossly inadequate consideration for the significant assets conferred on Star & Crescent.[9].

The consideration becomes even more grossly inadequate and the marked mere continuation of the business revealed when one examines the inter-relationship of Investment Company and Star & Crescent over the next several years following its creation and this asset transfer. This was clearly a family enterprise that O.J. Hall, Jr. created and controlled. While Star & Crescent focuses in its Comment on how these shares were really worth over $700,000 and how Star & Crescent paid this back to Investment Company over the next few years (after

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[8] Star & Crescent's Written Comments submitted on May 26, 2011 ("S&C Comments"), Exhibits 16, 17. City's Reply Comments and Legal Argument, Exhibit 3.

[9] S&C Comments, Exhibit 17.

Investment Company actually gave the shares back to Star & Crescent six months later!),[10] it leaves out the critical facts that 1) it was O.J. Hall, Jr. and family who created the alleged $700,000 "fair market value" for this stock out of thin air on April 9, 1976, two days after Star & Crescent was created, when the stock's par value was a maximum $15,000[11]; 2) that O.J. Hall, Jr.'s children were the shareholders of Star & Crescent[12] and 3) that Star & Crescent was operationally and financially controlled by Investment Company following its creation such that any dividend payments being made by Star & Crescent to Investment Company for this stock were basically payments to itself and the family business, because O.J. Hall, Jr. and Kenneth Beiriger, Investment Company officers and directors, were designating and approving the amounts of the dividends of Star & Crescent![13]

The documents submitted by Star & Crescent itself with its Comment undisputedly reflect that Investment Company and Star & Crescent Company were closely inter-related and controlled by O.J. Hall, Jr. and family and Kenneth Beriger, and basically the same family-run company. They are discussed together in minutes of the Board of Directors meetings for Investment Company for years after Star & Crescent's creation.[14] Discussions and proposals regarding Star & Crescent were all "Approved" by O.J. Hall, Jr. and K.N. Beringer (Mr. Beiriger was also a Star & Crescent director) including the designation of and approval of salaries and bonuses for Star & Crescent directors in 1978; the review of Star & Crescent's operations and financials and designation of and approval of the salaries and bonuses, and dividends, of Star & Crescent Company in 1979 and 1981; and Investment Company's guaranty of a $300,000+ loan for Star & Crescent in 1981.[15]

Moreover, additional documents produced by Star & Crescent reflect that Investment Company and Star & Crescent Company are also discussed together in the minutes of Board of Directors meetings for Star & Crescent Company in the years following Star & Crescent's

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[10] For reasons unknown. As discussed further *infra*, the facts suggest that these transactions may also have been fraudulent in nature to escape or hide liabilities.

[11] S&C Comments, Exhibit 17.

[12] S&C Comments, Exhibits 17 and 23.

[13] S&C Comments, Exhibits 11-14.

[14] S&C Comments, Exhibits 11-14.

[15] S&C Comments, Exhibits 11-14, 17.

creation, meetings which were at least in part led by Mr. Beiriger. Minutes from Star & Crescent Board of Directors meetings from 1980 discussed Investment Company employee pay checks and stated that Investment Company and O.J. Hall, Jr. approved of Star & Crescent director salaries.[16]

These facts and evidence—largely submitted by Star & Crescent itself in this proceeding—demonstrate that there was not adequate consideration was paid for Investment Company's assets, and the relationship between Investment Company and Star & Crescent was such that Star & Crescent was a mere continuation of Investment Company.

b. Directors and Officers of Investment Company Were Directors and Officers of Star & Crescent and/or Controlled Star & Crescent.

Star & Crescent does not dispute that Investment Company shareholder and director O.J. Hall, Jr. was directly involved in the creation of Star & Crescent in that he became a director (and President) of Star & Crescent two days after its inception and remained such for six months.[17] It also does not dispute that Kenneth Beiriger was simultaneously an Investment Company director and Star & Crescent director at the same time for several years.

However, for some reason, Star & Crescent turns a blind eye to the fact that even after O.J. Hall, Jr. stepped down as a director of Star & Crescent in October 1976, he continued to control Star & Crescent because he was a director and President of Investment Company, as is reflected in the numerous Board of Directors meetings of Investment Company wherein he approved Star & Crescent operations, financials, director salaries and bonuses, and stock dividends.[18].

Star & Crescent also wholly ignores the fact that the directors and shareholders of Star & Crescent were all O.J. Hall, Jr.'s children.[19]

The evidence clearly demonstrates officer and director overlap between the two companies, by key directors, a family-run enterprise by O.J. Hall, Jr. and his children, and

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[16] City's Reply Comments and Legal Argument, Exhibit 1 and 2.
[17] S&C Comments, Exhibit 17.
[18] S&C Comments, Exhibits 11-14, 30.
[19] S&C Comments, Exhibits 17 and 23.

control by Investment Company over Star & Crescent following its creation. While director and officer overlap is not the only factor in assessing successor liability under a mere continuation theory, here, as discussed in detail, *supra*, it is certainly not the only fact demonstrating the mere continuation. When all of the facts are coupled and reviewed together with the legal standard, Star & Crescent is proven to be the successor to SDMCC under the mere continuation theory.

c. Star & Crescent May Have Been Created to Accomplish a Fraudulent Transfer of Liabilities of SDMCC/Investment Company.

While Star & Crescent all but brushes aside this other exception to the rule against successor liability, the facts and the evidence strongly suggest that the transaction whereby Star & Crescent was created with fake directors and its subsequent unsupported stock valuations and stock swaps was for a fraudulent purpose of trying to escape or hide certain liabilities.

The facts support that Star & Crescent was created by Investment Company for the financial purpose of shifting assets and liabilities from Investment Company to this new entity. The installment of the initial six "directors" on April 7, 1976 was clearly a sham, given their uniform, simultaneous resignations two days later and immediate replacement by the O.J. Hall, Jr./family-led Investment Company directors. The creation of 1,500 shares of Star & Crescent stock out of thin air—again, simultaneously with the installment of the O.J. Hall, Jr. family led directors—and designation by the directors that it had a par value of $15,000 but a "fair market value" of over $700,000—smacks of fraud. How could 1,500 newly created shares of a brand new company have a fair market worth of almost three-quarter of a million dollars, when at most, the capital behind them is $15,000?

The fraudulent scheme continued when Investment Company, six months later, for unclear reasons, actually gave these shares back to Star & Crescent (probably because the directors were O.J. Hall, Jr.'s children), and then was paid by Star & Crescent, at least somewhat, for these shares over the next several years, out of its dividends, which dividends were designated and approved by Investment Company. Investment Company appears to have achieved payment to itself for transferring assets and liabilities to a new company, which it

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continued to control, as reflected on the Board of Directors meeting minutes.[20]

Thus, there is also a strong suggestion of fraud in the transactions creating and sustaining Star & Crescent and yet another basis for a finding of successor liability.

2. The Cleanup Team Agrees That There Is Sufficient Evidence to Find That Star & Crescent Boat Company Is the Corporate Successor and Legally Responsible for San Diego Marine Construction Company's Discharges to the Shipyard Site.

As delineated in its response, the CUT determined there is sufficient evidence in the record to establish that Star & Crescent is the corporate successor to SDMCC.[21]

V.

SAN DIEGO GAS & ELECTRIC ("SDG&E") IS APPROPRIATELY NAMED AS A DISCHARGER.

SDG&E has asserted that there is insufficient evidence upon which to name SDG&E as a Discharger and submitted a request for resettlement of discharger designation. As demonstrated below, and as appropriately concluded by the CUT, there is copious evidence that SDG&E's operations caused or contributed to discharges of the subject pollutants into the Shipyard Site.

In response, the City, as well as BAE Systems, submitted references to a mountain of evidence supporting a finding that SDG&E is responsible for discharges to the Shipyards Site.[22]

The CUT found that the evidence identified by the City shows the following:

- PCBs were a component in oils within the Power Plant.
- Oils spilled within the boiler room side of the power plant were intentionally pumped to an oil/water separator called "Nobles Lake"
- Nobles Lake discharged oily waste to the Shipyards Sediment site and San Diego Bay, at a minimum, via a ditch observable in numerous aerial photos, and possibly via a discharge pipe.
- Aroclor ratios found in Shipyard sediments reflect the different types of wastes that were discharged from Nobles Lake and from the substation/switchyard.[23]

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[20] S&C Comments, Exhibits 11-14.
[21] CUT Response, pages 5-1 to 5-6.
[22] The City's references to evidence can be found in the City's Reply Comments and Legal Argument, pages 17-23.
[23] The CUT Response, 9-3.

Evaluating this evidence, the CUT concluded that "Because substantial record evidence demonstrates that PCBs and other relevant COCs were discharged by SDG&E directly to San Diego Bay through its cooling tunnels, were discharged to land at its switchyard where they were washed to San Diego Bay through the MS4 System, and were discharged to open pits in close proximity to the Bay where they overflowed to the Bay and were, at one time, conveyed from one pit directly to the Bay through a trench, SDG&E must remain a named discharger under the TCAO. [24]

In conclusion, the mountain of evidence submitted by both the City and BAE systems, as well as the CUT analysis and conclusions, all strongly support the naming of SDG&E as a responsible party and Discharger.

Dated: October 19, 2011

GORDON & REES, LLP

By: _____

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[24] The CUT Response, 9-4.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP 101 W. Broadway, Suite 2000, San Diego, CA 92101. On October 19, 2011 I served the within documents:

1. **City of San Diego's Hearing Brief.**

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at San Diego, addressed as set forth below. [12 COPIES MAILED TO FRANK MELBOURNE ONLY]

☑ By Electronic Mail Service. I caused all of the pages of the above-entitled document(s) to be electronically served on the parties listed below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 19, 2011 at San Diego, California.

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