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VIA E-MAIL

(Original will follow via U.S. Mail)

Kent Aue California Regional Water Quality Control Board 1515 Clay Street, Suite 1400 Oakland, California 94612 E-mail: kaue@waterboards.ca.gov

Re: 625 Jackson St., Fairfield, California

Comments on Tentative Order – Site Cleanup Requirements

Dear Mr. Aue:

Our firm represents Obie Goins, Lucilla Hazard, Ray Johnson, and Judy Lawing in connection with the above-referenced matter. This letter is in response to Mr. Bruce Wolfe's letter dated April 13, 2012 regarding the California Regional Water Quality Control Board – San Francisco Bay Region's (the "Water Board") proposed adoption of site cleanup requirements for the above-referenced property. For the reasons set forth in this letter, we respectfully request, on behalf of our clients, that that they not be named as dischargers. At the very least, we respectfully request that the Water Board exercise its discretion, in the interest of justice and fairness, and substantially limit their liability in this matter.

BACKGROUND

In order to understand our clients involvement, it is necessary to provide a brief background. Between 1965 and 2005, and possibly even earlier, the property was used as a cleaners. Based on the information we have to date, the following is a brief summary of who owned/operated Fairfield Cleaners during that timeframe:

<u>Date:</u>	<u>Operator</u>	<u>Owner</u>
1965 – 1970	Ruth V. Clarkson	Michael McInnis and Robert Dittmer
Short time in 1970	Ben and Jewel Hirsch	Michael McInnis and Robert Dittmer
1970 – 1975	William and Jean Trumbull	Michael McInnis and Robert Dittmer
1975 – 1980	Ben and Jewel Hirsch	Michael McInnis and Robert Dittmer
Short time b/t 1980	John Blue, Obie Goins, and	Michael McInnis and Robert Dittmer
- 1981	Ray Johnson	
1981 - 2005	Ben and Jewel Hirsch	Michael McInnis and Robert Dittmer



Our clients' connection to the property is extenuating to say the least. Sometime in or about 1980 (it appears to be around June 1980), Obie Goins, John Blue (now deceased), and Ray Johnson formed a partnership and purchased Fairfield Cleaners from Ben and Jewel Hirsch. As part of that transaction, my clients agreed to pay the purchase price to the Hirsch's in monthly payments over time.

John Blue's role in the partnership was to conduct the day-to-day operations of the cleaners. He was assisted by Lucilla Hazard's daughter (Obie Goins' stepdaughter) who was an employee. Mr. Goins and Mr. Johnson's role in the partnership were passive investors, business consultants, and they assisted in marketing. They were not involved in the day-to-day operations of the cleaners; they had other jobs. They have no knowledge of the chemicals stored, used, handled, produced, recycled, or disposed at the property during the period of operation.

In her deposition testimony, Ms. Jewel Hirsch testifies that about four to five months after selling the business to my clients they stopped making the monthly payments to her because they could not afford them. She further testified that within two or three months after failing to receive payments she took the cleaners back from our clients. Thus, our clients were associated with Fairfield Cleaners for a very short period of time - it appears to be somewhere between 6 months to a year – more than 30 years ago.

DISCUSSION

1. There Is No Evidence That Our Clients Caused Or Permitted Any Hazardous Waste To Be Discharged Into The Waters Of The State.

California Water Code section 13304 authorizes the Water Board to issue cleanup and abatement orders <u>only</u> to persons who have "caused or permitted . . . waste to be discharged . . . into the waters of the state. . ." In this case, there is no evidence that our clients caused or permitted waste to be discharged at the property.

As part of the lawsuit filed by Mr. McInnis and Mr. Dittmer in connection with the contamination, there have numerous depositions taken – including, specifically, the depositions of Robert Dittmer, Ben Hirsch, and Jewel Hirsch. These individuals have all testified that they never observed our clients spill dry cleaning chemicals at the property or dispose of dry cleaning chemicals at the property. They have further testified that they are not aware of any incidents of spills at the property during the time my clients owned Fairfield

¹ The evidence also shows that with respect to Ray Johnson his involvement may be even shorter than the others as it appears he may have relinquished all of his rights, title, and interest in the partnership to Obie Goins and John Blue prior to Ms. Hirsch taking back over the cleaners.



Cleaners. Unlike Ms. Hirsch, our clients were never cited by a governmental agency for violating hazardous waste regulations pertaining to the usage or storage of such waste.

In its tentative order, the Water Board indicates that the "former operator, John Blue, is a discharger because he operated the dry cleaning business during which time it was common industry practice to use and dispose of PCE on-site." Even though it may have been common industry practice to dispose of PCE on-site, that does not mean my clients disposed of it on-site, let alone in an unlawful or negligent manner. Such a conclusion is pure speculation and is contrary to the evidence as set forth above.

There simply were never any spills of contamination, and there is no evidence of any, during the very short time my clients operated Fairfield Cleaners.

2. Our Clients Were Not Involved In The Operations Of Fairfield Cleaners.

There is no evidence that connects our clients to contributing to the contamination other than their sole interest as passive investors in a partnership that owned Fairfield Cleaners. That is not enough. They were not involved in the day-to-day operations of the cleaners.

In City of Modesto Redevelopment Agency v. Superior Court, the Court, in reference to Water Code section 13304, explained that "the Legislature did not intend the act to impose liability on those with no ownership or control over the property or the discharge, and whose involvement in a discharge was remote or passive." (City of Modesto Redevelopment Agency v. Superior Court (1st Dist. 2004) 119 Cal. App. 4th 28, 43; emphasis added.) The Court further explains that "[p]ersons who had no active involvement in activities leading to a discharge do not appear" to be held liable under that law. (Id.; emphasis added.) Mere partial ownership in a cleaners does not equate to causing or permitting hazardous waste to be discharged into California's waterways.

In order to "cause or permit" waste to be discharged, there must be intent or some affirmative act taken to do so. Agreeing with the *City of Modesto* case, the Ninth Circuit Court of Appeals in *Redevelopment Agency of the City of Stockton v. BNSF Railway Company* also recently concluded that "the words 'causes or permits' within section 13304 were not intended 'to encompass those whose involvement with a spill was remote and passive." (*Redevelopment Agency of the City of Stockton v. BNSF Railway Company* (9th Cir. 2011) 643 F. 3d 668, 677 – 678.) The court further explains that "[t]hose who took *affirmative steps* directed toward the improper discharge of [hazardous] wastes . . . may be liable under [section 13304]. . ." (*Id.* at 678.) Our clients involvement with any spills or discharges at the property was not only remote but it was non-existent as set forth above. They did not take any actions to "cause or permit" waste to be discharged at the property



and, in fact, they have no knowledge of the chemicals stored, used, handled, produced, recycled, or disposed during the period of operation.

In its tentative order the Water Board seeks to hold my clients responsible, under a partnership theory, for the alleged acts of John Blue. In its order the Water Board states that "John Blue acted in the ordinary course of the business of the partnership in operating the dry cleaners and *discharging waste* such that the partnership is liable for the injury caused by his acts. . ." (Emphasis added.) That is an inaccurate conclusion. The Water Board is making an implicit finding that John Blue discharged waste at the property causing injury – however, as set forth above, no such evidence exists that John Blue discharged waste at the property. The Water Board's tentative decision is arbitrary and unsupported by any evidence in the record, let alone substantial evidence.

3. Equitable Considerations Require That Our Clients Not Be Named As Dischargers.

Besides the foregoing, equitable considerations require that our clients not be named as dischargers in the cleanup orders. At the very least, equitable considerations require that the Water Board substantially limit our clients liability.

Our clients are elderly and have a very limited finite amount of financial resources – certainly, nowhere remotely close to the amount required to cleanup the contamination. Fortunately, they were able to locate a Certificate of Insurance evidencing that they may have had insurance at the time. However, no insurance policy has been located. Based on the Certificate and other secondary evidence, Farmers Insurance has agreed to provide them coverage for the moment under a reservation or rights. However, they only have \$50,000 worth of coverage.

Their alleged liability in this case came as a complete shock to them and at great mental anguish and stress. They were trying to enjoy the twilight years of their life when this case came about. It has thrown them for a loop. The events transpired more than 30 years ago and they owned the cleaners for maybe 6 months to a year. The cleaners as a whole operated for at least 40 years. Our clients involvement is extremely small, if not insignificant, in proportion to Hirschs', Mr. Dittmer's, and Mr. McInnis involvement. In one way or another, these parties were associated with the property and/or cleaners between 1965 and 2005.

We appreciate your consideration of our comments and respectfully request, on behalf of our clients, that they not be named as dischargers. At the very least, we respectfully request that the Board exercise its discretion, in the interest of justice and fairness, and substantially limit their liability in this matter.

It has been a pleasure working with you and we appreciate your professionalism. We look forward to a successful resolution. If you need additional information or have any questions about our comments, please feel free to contact me.

Very truly yours,

HUNT & JEPPSON, LLP

Jeremy B. Price

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