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Attorney for Plaintiffs
BRUCE A. BURROWS and
JAMES A. ROESSLER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRUCE A. BURROWS and JAMES A. ROESSLER,
Plaintiffs

CASE NO. C 07-5354 EMC

DWIGHT W. PERRY, CARLETON L. PERRY, KWANG SUK LEE, KUI JA LEE, NAM SUN PARK AND SEUNG HEE PARK,
Defendants.

JOINT STATUS/CASE
MANAGEMENT STATEMENT,
STIPULATION, AND
(PROPOSED) ORDER

DATE: October 26, 2012

TIME: 9:00 a.m.

PLACE: Crt #5, 17th Floor

AND RELATED COUNTERCLAIMS AND
CROSSCLAIMS.

Pursuant to Civil Local Rule ("Civ. L.R.") 16-9, the Standing Order for All Judges of the Northern District of California on Contents of Joint Case Management Statements, and Paragraph 6 of this Court's Civil Standing Order – General, the Parties jointly submit this Case Management Statement, Stipulation, and Proposed Order. Each party certifies that its lead trial counsel, who

1 will try this case, met and conferred for the preparation of this Statement as required by Civ. L.R.

2 16-3.

3 The Parties make the following representations and stipulations:

4 **A. JURISDICTION, VENUE AND SERVICE.**

5 1. This action primarily arises under the federal Comprehensive Environmental
6 Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601, *et seq.* This Court
7 therefore has jurisdiction over the subject matter of this action. This Court has supplemental
8 jurisdiction of the state claims asserted in this action, which are based on the same set of operative
9 facts. Judicial economy, convenience, and fairness to the Parties result from this Court's
10 jurisdiction over the state claims. Venue and intradistrict assignment is proper in this Court, as the
11 subject property and the events occurred in this judicial district. All activities and conduct pertinent
12 to this action occurred and are occurring in Dublin, Alameda County, California. All Parties have
13 been served, respectively, with the Complaint, Counter-Claims and Cross-Claims, except for the
14 Lee Defendants, as set forth below, who have not been located.

17 **B. JOINT STATEMENT OF FACTS AND EVENTS UNDERLYING THE ACTION.**

18 2. Plaintiffs Bruce A. Burrows and James A. Roessler are natural persons, and at all
19 times relevant herein, have been in the business of real estate brokerage and related investment
20 activities. Defendants Dwight W. Perry and Carlton L. Perry (the "Perry Defendants") are natural
21 persons and, from approximately Summer, 1985, until approximately August, 1994, operated a dry
22 cleaning business and leased premises at 7272 San Ramon Road (the address was later renumbered
23 to 7242), which is part of the Lamps Plus Plaza, in Dublin, California (the leased premises are
24 hereinafter referred to as the "Property"). Defendants Kwang Suk Lee and Kui Ja Lee (the "Lee
25 Defendants") are natural persons and, from approximately August, 1994, until approximately
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1 December, 1999, operated a dry cleaning business and leased premises at the Property; the Lees have
2 not been located despite extensive efforts to do so. Defendants and Cross-Complainants Nam Sun
3 Park and Seung Hee Park (the "Park Defendants") are natural persons and, from approximately
4 December, 1999, until the present, operated and continue to operate a dry cleaning business and
5 lease premises at the Property. Cross-Defendant the Chiu Family Trust, Gabriel Chiu, Trustee (the
6 "Chiu Family Trust"), acquired the Property in approximately March, 2005, and is the current
7 owner. Cross-Defendants Dublin Town & Country Associates and William Kartoizian, a general
8 partner in Dublin Town & Country Associates (the "Dublin/Kartoizian Cross-Defendants"),
9 previously owned the Property at all times relevant to the present action and up to approximately
10 March, 2005.

11
12 3. Plaintiffs allege that the Defendants used PCE as a dry-cleaning chemical during
13 their periods of operation at the Property, until approximately March, 2000, when the Parks
14 changed their dry-cleaning operations so that PCE was no longer used, and it has not been used
15 since that time.

16
17 4. The Alameda County Health Care Services Agency, Environmental Health Division
18 (the "County"), has been and currently continues to oversee investigation and remediation of PCE
19 in subsurface soils, soil vapor and groundwater at the property.

20
21 5. This action was brought in October, 2007, and assigned to Judge Patel. Following
22 an initial status conference, the Parties met on May 1, 2008, at a settlement conference with
23 Magistrate Judge Laporte. The Plaintiffs, the Perrys Defendants, the Parks Defendants and the
24 Chiu Family Trust reached agreement to share in costs of investigation and necessary remediation.
25 The Plaintiffs and all the Defendants and Cross-Defendants, except the Lees Defendants, also
26 agreed to seek a stay on further discovery beyond initial disclosures, etc., to allow the Parties to
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1 cooperate as far as possible with the County, and the Court ordered a six month stay and scheduled
2 a further case management conference for early December, 2008. Since that time, at the joint
3 stipulation of all the Parties, the stay has been continued and the scheduled dates for case
4 management conferences have been re-scheduled by order of the Court, as the Parties and the
5 County have worked to investigate and toward final remediation of the problem. Workplans and
6 supplemental workplans for study of the problem and means of remediating the PCE contamination
7 have been submitted, reviewed by the County, and implemented by the consultant hired by the
8 Parties, sometimes in accordance with revisions required by the County. The original actions and
9 installations were completed as anticipated in 2010. Thereafter, the County requested and the
10 Parties submitted a further workplan, which, after some months of review by the County, was
11 approved. Additional monitoring wells and soil vapor sampling points were installed, and more
12 rounds of samples were taken. Reporting on the sampling was made, and the County reviewed that
13 reporting. Unfortunately, there was some delay in County review due to re-assignment of the
14 agency project manager, and increased workload. The County requested a proposed Corrective
15 Action Plan ("CAP"), and the proposed CAP was prepared by the consultant and timely submitted
16 to the County on September 22, 2011, by Mr. Roessler, who has led the Parties sharing in costs. By
17 letter dated October 7, 2011, the County approved the proposed CAP, approved soil vapor
18 extraction ("SVE") as the remedial alternative for PCE detected at the Site, approved resumption of
19 Interim Remedial Action, and required implementation of public participation, including but not
20 limited to a fact sheet and solicitation and response to comments by the public, leading to final
21 approval of the CAP and its implementation. Technical comments by the County were also
22 included and a further technical report required.

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27 6. In the past year since October, 2011, the formal CAP was subjected to public

1 review prior to implementation. Public review occurred and thereafter SVE has been performed.
2 The project manager has advised that ten (10) pounds of PCE have been removed since
3 implementation of SVE. Earlier this month, in the first week of October, SVE was temporarily
4 suspended and sampling conducted. The levels of PCE in samples appear to have declined,
5 however the levels are still above the residential goals, which are being applied since part of the
6 building next to the drycleaner is used as a Montessori pre-school. More results of sampling are
7 expected in the next few weeks. At that point, a decision will be made on whether there should
8 be continuing remediation, either constant SVE or "pulsing" (alternating SVE on and off to be
9 more productive of removal of the chemical from the subsurface), or whether closure steps might
10 begin.
11

12 7. The Parties remain hopeful that the County will eventually declare closure, but
13 expect this to occur, realistically, only after concentrations of PCE are reduced below remediation
14 goals. At this point it is possible to say that remediation is succeeding, but it is not possible to say
15 exactly when site closure will be authorized by the County as oversight agency.
16

17 8. Once this is accomplished, only the issue of final cost-sharing will need to be
18 determined.
19

20 9. It is believed that maintaining the case on the Court's docket, and continuing
21 oversight of the Court, through a settlement conference or other dispute resolution proceedings,
22 will allow the Parties to come to an agreement without further litigation.

23 10. As stated above, since May, 2008, a stay has been in effect upon agreements of the
24 Parties and orders of the Court.

25 11. The Plaintiffs, the Perrys Defendants, the Parks Defendants and the Chiu Family
26 Trust Cross-Defendant (the "Cost-Sharing Parties") have been in general compliance with their
27

1 agreement to contribute to and share certain costs, which agreement was reached at the time of the
2 May 1, 2008, Settlement Conference before Magistrate Judge Laporte. Since that time they have
3 reached further agreements to contribute to and share in the additional costs required to implement
4 the work at the site. The actual payments by each of the Cost-Sharing Parties have been recorded
5 as made, as have expenditures for the costs, and will continue to be accounted for, for future
6 reference and for final cost-sharing agreement. Monies remain in the agreed contribution account,
7 however, the monies may need additional replenishment soon. It is hoped that the monies that
8 remain available, or as they may be supplemented, will be sufficient to cover needed work up to the
9 time the County can complete its review of the latest data and a decision be made on whether, in
10 what form and for how long remediation should continue.

12 12. The Plaintiffs, the Perrys Defendants, the Parks Defendants, Cross-Defendant the
13 Chiu Family Trust, and Cross-Defendants Dublin Town & Country Associates and William
14 Kartoian, have all been in compliance with the stay which was part of their agreement reached at
15 the time of the May 1, 2008, Settlement Conference before Magistrate Judge Laporte, and which
16 stay has been extended by further agreement and orders of the Court.

18 13. With the purpose of minimizing costs to the Parties and the waste of time of this
19 Court, all the Parties (except for Cross-Defendant the Chiu Family Trust, whose counsel has
20 passed away and who is believed to be seeking replacement counsel, see ¶ U, below in this
21 statement) hereby stipulate to and request a further continuance of the stay and rescheduling of
22 the Status/Case Management Conference before the Court. It is agreed by the Parties that a
23 continuance of the stay and rescheduling of the conference again would be best made for
24 approximately one year – to some time in October, 2013, to allow for completion of
25 implementation of the CAP. Should it become apparent prior to that time that the CAP has been
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1 completed and site closure has been granted, the Parties will report to the Court and take necessary
2 steps to conclude the case.

3 **C. LEGAL ISSUES.** Legal issues regard responsibility for and allocation of costs for
4 responding to contamination of the Property.

5 **D. MOTIONS.** Except for the item noted in the next sentence, there have been no prior
6 motions, nor are any now pending or anticipated. Cross-Defendants Dublin Town & Country
7 Associates and William F. Kartoian have a pending Application for Relief from Default (docket
8 items 50-53). Based on consultation among counsel for all Parties (except for Cross-Defendant
9 the Chiu Family Trust, which is believed presently to be seeking replacement counsel, because its
10 counsel of record, Mr. Edward W. Polson, has passed away, see ¶ U, below in this statement),
11 counsel hereby stipulate to and request the Court to grant relief from that default.
12

13 **E. AMENDMENT OF PLEADINGS.** Currently none are expected.

14 **F. EVIDENCE PRESERVATION.** Evidence in the form of lease agreements, property
15 transfer documentation, results of environmental testing, chemical usage, etc., have been
16 preserved.
17

18 **G. DISCLOSURES.** Initial disclosures have been made, including but not limited to relevant
19 documents, etc., on costs incurred and reports and communications with regulatory agencies on
20 environmental conditions at the site which is the subject of this action, on purchase and sale
21 agreement and amendments, and on tenants at the property.
22

23 **H. DISCOVERY.** Discovery has been stayed.

24 **I. CLASS ACTIONS.** None.

25 **J. RELATED CASES.** None.

26 **K. RELIEF.** Fair and equitable cost-sharing and costs-allocation are the relief sought. Response
27

1 costs are continuing to be incurred, and the Cost-Sharing Parties have records of these costs.

2 Currently it is anticipated that costs should be under \$1 million. Efforts are being made to be
3 cooperative rather than adversarial, in order to keep legal fees and litigation costs to a minimum,
4 so that funds may be most productively used for investigation and remediation.

5 **L. SETTLEMENT AND ADR.** The one settlement conference that occurred successfully led
6 to a cost-sharing agreement and agreement to stay discovery. Once response costs are completed,
7 the Parties anticipate use of negotiation and possibly more formal ADR if necessary. Continuance
8 of this case on the Court's docket should assist the success of this effort.

9
10 **M. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES.** The Parties were
11 pleased with the results of their settlement conference under the oversight of Magistrate Judge
12 LaPorte, but they have not yet decided, nor do they feel they are ready to decide if all issues can be
13 resolved best by a Magistrate Judge. This may be clearer as final remedy and costs are known.

14
15 **N. OTHER REFERENCES.** The present cooperation is successful. Should this change, which
16 is not now anticipated, the Parties may revisit the question of other references.

17 **O. NARROWING OF ISSUES.** The cooperative work to investigate, remediate and close the
18 site has effectively narrowed the issues to a great extent.

19
20 **P. EXPEDITED SCHEDULE.** The schedule is dependent upon the practical realities of the
21 environment investigation and mitigation process. It is currently being conducted on an efficient
22 and cost-effective basis, even though the case has been on the Court's docket for a long time.

23 **Q. SCHEDULING.** The parties believe it is premature to set hard dates for designation of
24 experts, discovery cutoff, hearing of dispositive motions, pretrial conference and trial.

25
26 **R. TRIAL.** Whether the case should be tried to a jury or the Court, and estimated length of a
27 trial, are difficult to decide until the investigation and remediation process has been completed.

1 **S. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS.** Initial

2 disclosures have been made by the Parties, including but not limited to interested persons.

3 **T. OTHER MATTERS TO FACILITATE JUST, SPEEDY, INEXPENSIVE**

4 **DISPOSITION.** The Parties believe the current cooperative efforts are successful.

5 **U. IDENTIFICATION AND SIGNATURE OF LEAD TRIAL COUNSEL**

6 The Parties hereby respectfully request that the Court continue the stay previously ordered in
7 this case until October, 2013. The Parties further respectfully request that the Court reschedule the
8 pending Status/Case Management Conference to a date in October, 2013, on or shortly before or
9 after October 25, 2013. Karl R. Morthole, attorney for the Plaintiffs, hereby attests that
10 concurrence in this Joint Case Management Conference Statement was obtained from Lead Trial
11 Counsel for the Defendants listed immediately below, except from Mr. Polson, who was Lead
12 Trial Counsel for Cross-Defendant the Chiu Family Trust, but who has passed away. Cross-
13 Defendant the Chiu Family Trust has been informed of the need to consider retaining replacement
14 counsel and is believed to be searching for such replacement counsel as of the date this Statement
15 and (Proposed) Order is filed with the Court.

16
17
18 *Martin Deutsch by KRM of counsel*

19 Martin Deutsch, 440 North First Street, Suite 200, San Jose, CA 95112, 408-947-1760
20 By Sosan Akbar, Esq., in absence of Mr. Deutsch
21 [Parks Defendants and Cross-Complainants Lead Trial Counsel]

22 *Thomas M. Downey*

23 Thomas M. Downey, 1904 Harrison Street, 11th Floor, Oakland, CA 94612, 510-444-6800
24 [Perrys Defendants Lead Trial Counsel]

25 [Deceased: Client seeking replacement counsel]

26 Edward W. Polson, PO Box 1223, 31 Graeagle Meadows, Graeagle, CA 96103, 530-836-1255
27 [Chiu Family Trust Cross-Defendant Lead Trial Counsel]

28 *Gregory C. Brandt*

Gregory C. Brandt, 1111 Broadway, 24th Floor, Oakland, CA 94607-4036, 510-834-6600
[Dublin Town & Country Associates and William Kartoian Cross-Defendants Lead Trial
Counsel]

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Date: October 19, 2012

Respectfully submitted,

LAW OFFICES OF KARL R. MORTHOLE

By *Karl R. Morthole*

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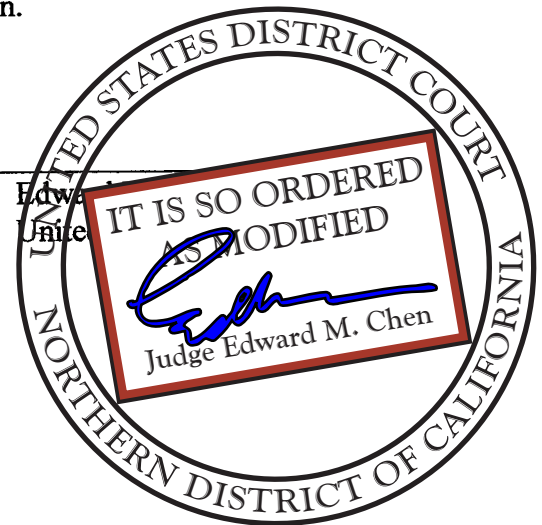
(PROPOSED) ORDER

The Court finds that each party was represented by lead trial counsel responsible for trial of this matter and was given an opportunity to be heard as to all matters encompassed by this Status/Case Management Statement, Stipulation, and (Proposed) Order filed prior to the date of this conference. The Court adopts this statement as modified and enters it as the Order of this Court pursuant to Civ. L.R. 16-8(b), including, but not limited to removal of the default of Cross-Defendants Dublin Town & Country Associates and William F. Kartoizian, stipulated to by counsel signing this statement.

The foregoing joint statement, as amended by setting the date for the next Status/Case Management Conference for October 24 at 9:00 a.m., 2013, is adopted by this Court as the Case Management Order in this action in accordance with Civ. L.R. 16 and other applicable Local Rules, and shall govern all further proceedings in this action.

IT IS SO ORDERED.

Date: October 25, 2012



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7 Attorney for Plaintiffs
8 BRUCE A. BURROWS and JAMES A. ROESSLER

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 BRUCE A. BURROWS and JAMES A.)
12 ROESSLER,) CASE NO. C 07-5354 EMC
13 Plaintiffs)
14 v.) CERTIFICATE OF SERVICE
15 DWIGHT W. PERRY, CARLETON L.)
16 PERRY, KWANG SUK LEE, KUI JA LEE,)
17 NAM SUN PARK AND SEUNG HEE)
18 PARK,)
19 Defendants.)

20 I declare that on the date set forth below, I served the attached

21 **JOINT STATUS/CASE MANAGEMENT STATEMENT,**
22 **STIPULATION, AND (PROPOSED) ORDER**

23 by e-filing on all parties by their counsel so appearing, except for Cross-Defendant the Chiu
24 Family Trust, Gabriel Chiu, Trustee, whose original trial counsel is deceased and who is in the
25 process of retaining replacement counsel, to whom I served by regular U.S. Mail, postage pre-paid,
26 at the following address

27 Mr. Gabriel Chiu, Trustee
28 The Chiu Family Trust
1767 Germano Way
Pleasanton, CA 94566

I declare under penalty of perjury that the foregoing is true and correct and that this declaration
was executed on the date hereinafter set forth.

San Francisco, CA
Date: October 19, 2012

/s/ Karl R. Morthole
Karl R. Morthole