

1 nor for at least another 13 years.

2 65. ITT wished to continue its manufacturing operations at the Property and approached
3 McCray to extend the term of the 1958 Lease or to enter into a new lease. During the ensuing
4 negotiations that led to the 1996 Lease, McCray's predecessor asked ITT to provide information
5 concerning the environmental condition of the Property. During the negotiations, ITT knew that
6 McCray wanted to fully understand the environmental condition of the Property.

7 66. In response to McCray's requests for information, ITT, through Larry Dart, ITT's
8 general manager at the Property, and through Gordon Henry, ITT's real estate broker, represented
9 to McCray in a letter dated April 3, 2006 that the Property had been given a "clean bill of health"
10 after a "costly ground sampling survey," even though McLaren Hart's investigation did not
11 include the entire Property, or inside the building, or the groundwater.

12 67. At the time, McCray was unaware of the 1986 solvent spill or the prior HLA and
13 McLaren Hart investigations. In reliance on ITT's representations, including ITT's April 3, 2006
14 representation that the Property had been given a "clean bill of health" after a "costly ground
15 sampling survey," McCray entered into the new 1996 Lease with ITT.

16 68. On information and belief, from 1996 to approximately 2002, ITT did nothing
17 further to investigate whether contamination resulting from ITT's conduct, including the 1986
18 spill, had in fact been cleaned up, or whether Defendants' conduct at the Property had caused
19 additional contamination.

20 69. On information and belief, in around 2002, as ITT planned to cease operations at the
21 Property and move its manufacturing operations overseas, ITT engaged ENSR, an environmental
22 consulting firm. In approximately 2002 and 2003, ENSR's limited testing of the environmental
23 condition at the Property revealed elevated levels of VOCs in soil and groundwater at the
24 Property.

25 70. On information and belief, despite ENSR's testing, ITT did not attempt in 2002 or
26 2003 to obtain a comprehensive understanding of the environmental condition of the soil and
27 groundwater at or around the Property, or to remediate contamination in the soil or groundwater.

28 71. In 2003, McCray became aware of ENSR's testing and formally requested that ITT

1 provide a complete set of copies of all the reports of environmental investigations conducted by
2 ITT on the Property, that McCray be copied on all future environmental reports pertaining to the
3 Property and all correspondence between ITT, neighboring properties and/or regulatory agencies
4 pertaining to environmental issues at the Property, that McCray be informed of all future
5 environmental activities at the Property or adjacent sites, and that McCray be informed of all
6 future meetings between ITT and any regulatory agencies regarding the Property.

7 72. McCray wanted the environmental information because environmental conditions at
8 the Property would affect McCray's ability to sell or redevelop the Property for high density
9 residential use, after the 1996 Lease terminated in 2006.

10 73. On information and belief, until 2003, ITT had effectively concealed all specific
11 environmental information from McCray, because ITT did not want McCray to fully understand
12 the environmental condition of the Property, or ITT's approach for investigating and remediating
13 the contamination.

14 74. Beginning in 2003, ITT began to provide some, but not all, environmental
15 information to McCray, often on a delayed basis. On information and belief, ITT withheld
16 important information that would have materially changed the course of events had it been
17 disclosed to McCray at or about the time it was received by ITT.

18 75. ITT continued to control and limit the amount of information provided to McCray
19 from 2003 until well-after the 1996 Lease term expired on January 31, 2008. During that time
20 frame, McCray repeatedly requested information be provided in a timely manner, and ITT often
21 failed to provide the information, or did so after a long time delay, thus interfering with McCray's
22 right to verify ITT's compliance with the 1996 Lease.

23 76. On or about February 2, 2004, John McCray spoke with ITT's Bennett Leff ("Leff")
24 (ITT's Director of Environmental Safety and Health). Leff, notified McCray that ITT's consultant
25 ENSR had found an environmental condition on the Property, that ITT did not know the source,
26 that ITT was investigating the condition, and that ITT was getting a bid from ENSR for
27 preparation of a "final report."

28 77. On information and belief, as a result of ENSR's limited investigation in 2003,

1 ENSR formed opinions regarding the need for further testing to discover the source and extent of
2 the contamination at the Property. On or about February 23, 2004, ENSR's Tod Overturf and
3 Blair Burgess sent an opinion letter concerning the Property to ITT's Leff ("ENSR Opinion
4 Letter").

5 78. On information and belief, the ENSR Opinion Letter recommended steps necessary
6 to more fully evaluate the lateral and vertical extent of VOC contamination in the soil, to evaluate
7 groundwater contamination, and specifically to address potential hazardous source locations at the
8 Property that previously had not been investigated. In essence, ENSR proposed further
9 investigations to address data gaps (i.e., areas where further environmental information was
10 needed to understand the environmental condition of the Property), and to better characterize
11 contamination at the Property for purposes of performing the remediation work necessary to
12 obtain a "no further action letter."

13 79. On information and belief, ITT did not want McCray to see the ENSR Opinion
14 Letter because it recommended, and would have resulted in, an investigation that was far broader
15 and much more thorough than the investigation ITT planned to undertake. Instead, ITT pursued
16 an investigation that ITT and its consultants knew or should have known was inadequate to
17 properly understand all of the environmental conditions at the Property, and inadequate to properly
18 design and implement a remediation plan to eliminate contamination. As a result of Defendants'
19 conduct, McCray did not become aware of the ENSR Opinion Letter or ENSR's recommendations
20 until 2008.

21 80. ITT's efforts to investigate contamination were slow and intermittent, and its
22 reluctance to provide environmental information became a concern for McCray. By pressing ITT,
23 McCray finally received the HLA and McLaren Hart documents, which revealed the 1986 solvent
24 spill, HLA's limited investigation in 1990 that did not include any testing, and McLaren Hart's
25 limited soil testing in 1992.

26 81. These circumstances caused McCray to want additional information. Between 2003
27 and the present, McCray repeatedly requested or demanded that ITT timely investigate
28 contamination and provide information concerning environmental testing and remediation,

1 including the results of work performed by ITT's environmental consultants McLaren Hart,
2 ENSR, Environ, and EarthTech to determine the environmental condition of the Property.

3 82. Repeatedly, ITT represented it would provide information and then delayed or
4 refused to provide information to McCray. In 2004, as a result of ITT's continuing refusal and/or
5 delay to provide information, and pursuant to Paragraph 5.4 of the 1996 Lease, McCray retained
6 legal counsel, Diane Smith of Rendon & Smith, and an environmental consultant, Weston
7 Solutions.

8 83. On March 23, 2004, McCray notified ITT's Leff, its Director of Environmental
9 Health and Safety, that McCray was in the process of planning for the future of the Property
10 following expiration of the 1996 Lease, and was concerned that the entire environmental picture
11 for the Property had not been developed, and that such matters be addressed in a timely manner.
12 McCray notified Leff that Weston Solutions had been retained to assist McCray and requested
13 ITT's full cooperation. McCray specifically noted the need to fill in information data gaps.

14 84. ITT's Leff did not disclose the ENSR Opinion Letter, or its recommendations, to
15 McCray even though the ENSR Opinion Letter had a direct bearing on McCray's concern about
16 the environmental picture for the Property and specifically addressed the issue of data gaps.

17 85. On information and belief, in April 2004, ENSR provided a proposal to ITT's Leff
18 for additional site characterization. ENSR recommended additional investigation of previous
19 solvent (VOC) detections and to assess soil gas concentrations in areas inside the building that had
20 not been previously sampled, including the locations of existing floor drains. ENSR noted that
21 because of the age of potential surface releases at the Property, as well as the results of previous
22 soil sampling and site geology, soil gas probes should be advanced to depths of 15 and 30 feet at
23 each location, and that deeper probes may be installed depending on the results of on-site
24 laboratory testing.

25 86. ENSR's 2004 proposal represents the first known proposal to investigate inside the
26 building for sources of contamination. At the time of the ENSR proposal, ITT knew of McCray's
27 future development plans, and that little more than two years remained for ITT to perform its
28 environmental obligations before expiration of the 1996 Lease term.

1 87. McCray's consultant Weston reviewed the environmental data provided by IIT and
2 its consultants (which did not include the ENSR Opinion Letter), and concluded that ENSR's
3 proposed investigation should be expanded and intensified in many respects. ENSR's proposed
4 scope of work remained relatively narrow (in contrast to the recommendations in the still-
5 concealed ENSR Opinion Letter). Weston recommended more sampling locations based on the
6 high concentrations of VOCs detected both on-site and off-site, the reported spill of solvents to
7 unprotected dirt in 1986, and previous detections of elevated soil gas concentrations near the
8 hazardous materials storage area. Weston recommended soil gas sampling inside the building in
9 the area of a former degreaser, around the hazardous materials storage area, at the dirt strip along
10 the south property line, and sampling in a grid pattern across the remainder of the Property.
11 Weston disagreed with ENSR's criteria for advancing probes to only shallow soil, finding that
12 ENSR's criteria would not result in deeper probes when deeper probes would be warranted.
13 Because of the soil types at the Property and previous detections of solvents, Weston
14 recommended that probes be advanced to at least 45 feet. Weston also recommended installation
15 of additional monitoring wells laterally and down gradient, rather than adjacent the Metro Car
16 Wash site to delineate the extent of the groundwater plume.

17 88. In July 2004, IIT acknowledged the validity of some of Weston's
18 recommendations, indicated it would expand parts of its investigation, but disputed some of
19 Weston's recommendations, including those intended to explore the deeper soils and groundwater,
20 and those intended to obtain a comprehensive survey of the entire Property. Specifically, IIT
21 declined to advance additional soil gas probes to more thoroughly explore potential impacts in
22 areas where the degreaser was located, declined to advance soil gas probes to 45 feet or beyond,
23 and declined to install and test additional groundwater monitoring wells as recommended by
24 Weston.

25 89. On information and belief, IIT's strategy was to keep the investigation narrow,
26 rather than to make it comprehensive, and to delay a more thorough investigation until sometime
27 in the future, if at all.

28 90. In September 2004, IIT's in-house environmental lawyer F. Daves notified McCray

1 that ITT had assigned Jeff Melo as the new project manager to replace Leff. ITT also committed
2 to McCray to obtain a "no further action letter."

3 91. As alleged above, McCray and ITT entered into a Tolling Agreement. On
4 information and belief, at the time of the Tolling Agreement, ITT knew that the 1996 Lease term
5 would expire on July 31, 2006, and that ITT had not yet completed its investigation or commenced
6 any remediation activities at the Property.

7 92. In or about December 2004, ITT completed moving its operations out of the
8 Property. ITT retained rights to possession of the Property until at least July 31, 2006, and
9 nothing prevented or hindered ITT from promptly and fully investigating and remediating the
10 contamination.

11 93. On information and belief, in 2004, as in 2002 and 2003, ITT did not initiate any
12 active remediation of contamination of the soil or groundwater at the Property, and did not initiate
13 any restoration of the building or other improvements at the Property. No effort was made to
14 obtain a comprehensive understanding of the environmental condition of the soil and groundwater
15 at the Property.

16 94. On information and belief, in January 2005, ENSR explored the vertical extent of
17 solvents in the soil in the vicinity of two degreasers that existed at the Property. Elevated levels of
18 TCE were identified in the soil in the vicinity of the degreasers at 15 feet, 30 feet, 45 feet and 60
19 feet below ground surface (BGS), and in the groundwater at that location. ENSR also identified
20 elevated levels of TCE in the soil at 15 feet, 30 feet, 45 feet and 60 feet BGS and in the
21 groundwater in the vicinity of the Hazardous Material Storage Area along Village Way and at the
22 west portion of the Property adjacent the building. None of ITT's prior testing had explored these
23 areas in depth, and on information and belief, this testing would not have occurred had McCray
24 not hired Weston and Smith and forced ITT to address the issues.

25 95. On information and belief, by March 2005, ITT decided to replace Jeff Melo with T.
26 Olmstead ("T. Olmstead"), ITT's Director of Environmental Programs and Vice-President of
27 Defendant ITT Remediation Management, Inc. ITT also decided to replace ENSR. T. Olmstead
28 notified McCray that ENSR would no longer be involved, that she was managing approximately

1 100 clean-up cases for ITT, and that she wanted yet another environmental consulting firm,
2 Environ, to become involved in the investigation and remediation.

3 96. In May 2005, ITT's T. Olmstead notified McCray that ITT had obtained proposals
4 from two contractors for remediation, but did not disclose the proposals to McCray.

5 97. In June 2005, ITT's attorney F. Daves acknowledged McCray's intention to sell or
6 redevelop the Property for high-density residential use. At no time prior had ITT notified McCray
7 that ITT's clean-up goals would be inconsistent with a high-density residential use, and in
8 response to this notice, ITT did not disclose that its remediation goals were in fact inconsistent
9 with such use.

10 98. On July 13, 2005, McCray notified ITT's F. Daves of McCray's serious concern
11 about ITT's lack of progress in commencing additional work to fully characterize the Property and
12 in selecting a remediation contractor, of McCray's intent to sell or redevelop the Property into
13 residential units after expiration of the 1996 Lease, and that obtaining a closure letter from the
14 Regional Board was essential to any sales or development transaction. McCray reminded ITT that
15 use and development of the Property would be seriously impacted by further delays. McCray
16 requested that ITT provide the status of selecting a remediation contractor, ITT's schedule for
17 conducting site characterization and remediation, and ITT's intent to meet McCray's schedule for
18 sale and redevelopment of the Property. McCray also asked for copies of any final report and
19 analyses from previous testing, and notified ITT that a Remedial Action Plan was necessary before
20 the 1996 Lease term expired to avoid damages to McCray.

21 99. In July 2005, ITT's T. Olmstead notified McCray that ITT had selected Earth Tech
22 as its remediation contractor, and that Earth Tech would be preparing a comprehensive report of
23 all data and a Remedial Action Plan for soils. ITT again acknowledged McCray's efforts to sell
24 the Property, and requested language in sale documentation concerning ITT continuing access "for
25 so long as is necessary for monitoring and any further work required by the Regional Board." At
26 that time, only one year of the term of the 1996 Lease remained.

27 100. In July 2005, ITT's T. Olmstead provided ITT's draft soil remediation schedule to
28 McCray. No allowance for cleanup of groundwater contamination was made. Instead, ITT

1 notified McCray that groundwater issues would be addressed during implementation of a soil
2 vapor extraction system.

3 101. On information and belief, as of July 28, 2005, ITT knew the 1996 Lease term
4 would expire on July 31, 2006. Yet, ITT's initial schedule for soil cleanup alone contemplated
5 pilot testing in August and September 2005 and included operations until September 2007, with
6 system removal targeted for December 2007. At the time it provided the schedule, ITT knew that
7 its schedule for soil remediation extended beyond the end of the 1996 Lease term, and that any
8 groundwater remediation would have to occur well-beyond the end of the lease term. On
9 information and belief, ITT knew, but ITT did not address the effect of its soil remediation
10 schedule on McCray's future use of the Property.

11 102. On information and belief, ITT's operations at the Property had ceased and there
12 were no impediments to investigating any part of the Property. Because McCray had previously
13 notified ITT of McCray's intent to pursue a sale or redevelopment of the Property for high density
14 residential use, ITT's lack of effort concerned McCray. In or around the summer of 2005,
15 McCray informed ITT that McCray was willing to undertake the investigation and remediation at
16 the Property in order to obtain a more timely remediation.

17 103. On information and belief, ITT retained control of the investigation and remediation.
18 In September 2005, Earth Tech provided its Soil Vapor Extraction Pilot Test Work Plan to ITT.
19 The work plan identified three suspected source areas; the former degreaser area, former
20 hazardous materials storage area, and the former assembly area adjacent floor drain piping inside
21 the building. None of these areas would have been investigated previously had McCray not
22 retained Weston and Smith to push for investigations in these areas. Earth Tech's proposed test
23 plan acknowledged the existence of the degreaser and floor drain areas previously identified by
24 HLA in its 1992 sampling plan, which McLaren Hart did not test in 1993, and which were not
25 tested by ENSR until after Weston's recommendations were made. ITT did not provide this plan
26 to McCray until December 2005.

27 104. On information and belief, as of September 2005, ITT had yet to commit to conduct
28 an off-site groundwater investigation. In September 2005, McCray notified ITT that if it did not

1 commit to such an investigation, McCray would pursue the investigation at ITT's expense under
2 the terms of the 1996 Lease.

3 105. On information and belief, within two weeks, ITT committed to perform the
4 investigation of off-site groundwater contaminants that ITT characterized as directly related to
5 ITT's former operations at the Property. Although ITT's investigation of contamination had
6 resumed in 2002 and three years had passed, ITT was forced to admit that it could not complete
7 the remediation by the July 31, 2006 expiration of the 1996 Lease term.

8 106. On information and belief, ITT's inability to complete remediation by the expiration
9 of the 1996 Lease term was caused entirely by ITT's conduct, including its plan to conduct too
10 narrow an investigation and an incomplete clean-up, and by ITT's failure to pursue both
11 investigation and remediation in a timely fashion.

12 107. In October and November 2005, McCray notified ITT that McCray was
13 disappointed and frustrated with ITT's conduct, and that McCray was entertaining offers for the
14 Property, but that a sale required groundwater remediation, which ITT was far from implementing.
15 In response, ITT's F. Daves accused McCray of being too aggressive, and ITT's F. Daves
16 (improperly) took the position that McCray had no right to proceed with any investigation or
17 remediation work until expiration of the 1996 Lease term.

18 108. By January 2006, ITT had yet to initiate an off-site groundwater investigation. In
19 February 2006, McCray's consultant Weston performed an off-site investigation and discovered
20 TCE down gradient. TCE was one of the chemicals discovered by ENSR in its soil tests in the
21 vicinity of the degreasers and hazardous materials storage area at the Property.

22 109. In May 2006, McCray notified ITT that Weston had conducted an off-site
23 groundwater investigation. ITT's T. Olmstead objected to McCray's effort to determine if off-site
24 groundwater contamination existed, even though the investigation was performed because ITT had
25 refused to do so and such investigation was necessary in connection with ITT's duties under the
26 1996 Lease.

27 110. On information and belief, although ITT knew of soil contamination at the Property
28 no later than 2002, and hired EarthTech in 2005 to prepare a soil remediation plan, ITT failed until

1 at least May 2006 to install and test a soil remediation system. ITT and EarthTech knew at the
2 time they selected soil vapor extraction ("SVE") as a remediation technology that an SVE system
3 might not be a feasible technology for the contamination at the Property.

4 111. On information and belief, by early July 2006, ITT had just commenced remediation
5 of some soils contamination, but had not yet commenced any effective investigation of
6 groundwater contamination. The term of the 1996 Lease was to expire on July 31, 2006. ITT
7 knew of contamination in the soil and groundwater at the Property by no later than 2002, yet over
8 the course of four years, had failed to undertake action sufficient to clean up the contamination.
9 ITT also had failed to take steps to maintain, repair and restore the physical improvements at the
10 Property by the end of the 1996 Lease term, to the condition required by the 1996 Lease. On
11 information and belief, ITT's choice was to surrender the Property in an environmentally and
12 physically impaired, degraded condition in breach of the 1996 Lease, or seek an extension of the
13 lease term to perform ITT's obligations under the 1996 Lease and applicable law.

14 112. Previously, on September 21, 2004, ITT had represented to McCray that ITT takes
15 its environmental responsibilities seriously, and ITT had committed to McCray to obtain a "no
16 further action letter." Representations made by ITT after September 2004 reaffirmed ITT's
17 express intention to obtain a "no further action letter." ITT needed to retain possession of the
18 Property to perform its lease and legal obligations. ITT sought a lease term extension from
19 McCray.

20 113. On June 28, 2006, in reliance on ITT's representations that it needed possession of
21 the Property to perform its obligations, that ITT would pay rent for possession, that ITT takes its
22 environmental responsibilities seriously, and that ITT would obtain a "no further action letter,"
23 McCray entered into a First Amendment to Lease with ITT Industries, Inc. extending the term of
24 the 1996 Lease to January 31, 2008 and adjusting the base rent.

25 114. The extended term gave ITT an additional approximate 18 months to perform its
26 obligations, including those to investigate and remediate the contamination, and to restore the
27 physical condition of the Property. ITT's T. Olmstead expressed her thanks to McCray for
28 extending the lease term so that ITT could allow its recently installed soil remediation system to

1 continue to run.

2 115. On October 10, 2006, Pam Penalosa of ITT's Remediation Management Inc. sent a
3 report to McCray indicating that the shallow soil contamination at the Property may not be fully
4 characterized and that additional shallow soil sampling was recommended. No explanation was
5 provided for ITT's failure to fully characterize the soil contamination during the preceding four or
6 more years.

7 116. On information and belief, although ITT either knew of, or suspected, groundwater
8 contamination no later than 2002, by October 2006, ITT had not yet proposed or begun a
9 comprehensive investigation of the groundwater. Because ITT had not yet investigated the
10 groundwater, it had not yet started on a proposed remedial action plan for the groundwater.

11 117. By the Fall of 2006, McCray had incurred costs and expenses of experts and
12 consultants retained by McCray to inspect the condition of the Property and to verify ITT's
13 compliance with the 1996 Lease, including its environmental activities. By early 2007, McCray
14 requested payment pursuant to the 1996 Lease, and after ITT objected, ITT paid some but not all
15 of McCray's costs and expenses incurred as of that time. Since then, McCray has incurred
16 additional costs and expenses, which McCray seeks as part of the damages alleged in this
17 Complaint.

18 118. ITT's failure to timely provide reports and information continued into 2007, and its
19 failure continued to interfere with McCray's efforts to understand the environmental condition of
20 the Property and to verify ITT's compliance with the 1996 Lease and applicable laws.

21 119. On information and belief, in April 2007, ITT finally commenced an off-site
22 groundwater investigation.

23 120. On information and belief, by September 2007, ITT's status report indicated that
24 concentrations of TCE being removed by the SVE had increased to 3,900 ppbv from the 1700
25 ppbv reported in May 2007, and that ITT planned to conduct additional soil sampling and analysis.

26 121. On information and belief, ITT's supplemental soil sampling locations were located
27 inside the building in the vicinity of the degreasers used by ITT, and outside the building
28 immediately to the west of the degreaser locations. Four months remained under the extended

1 term of the 1996 Lease, and ITT was still investigating the soil condition, and had not yet reported
2 the condition of the groundwater to McCray, or commenced any groundwater remediation.

3 122. By late 2007, ITT concluded that its SVE system was inadequate, and that air
4 sparging technology was needed in addition to the SVE system to remediate some of the
5 groundwater contamination immediately beneath the Property. Only a couple of months remained
6 prior to expiration of the 1996 Lease term and this first effort by ITT at localized groundwater
7 remediation had not yet been implemented, and did not address off-site groundwater
8 contamination associated with the Property.

9 123. On information and belief, in late 2007, in anticipation of the expiration of the 1996
10 Lease term on January 31, 2008, McCray retained Building Analytics to conduct an inspection of
11 the improvements at the Property. Building Analytic's December 2007 report confirmed that
12 substantial repairs to improvements were needed to restore the Property to the condition required
13 by the 1996 Lease.

14 124. Despite the fact that ITT knew of the contamination in 2002, and had not yet
15 completed remediation of the soil, or commenced remediation of the groundwater as of 2008, ITT
16 refused to extend the term of the 1996 Lease beyond January 31, 2008 in order to perform its
17 obligations under the lease and applicable law. Instead, ITT demanded an access agreement
18 without offering appropriate and fair value to McCray for such an agreement, and without any
19 explanation of ITT's failure to effectively use the preceding six or more years to perform its
20 obligations.

21 125. On information and belief, although McCray believed that a lease extension was
22 more appropriate than an access agreement, McCray proposed a reasonable access agreement,
23 which ITT rejected.

24 126. Had Defendants properly performed their obligations, they would have promptly
25 initiated a reasonable investigation prior to and no later than 2002 and pursued both the
26 investigation and remediation of the contamination so as to complete the remediation prior to the
27 termination of the 1996 Lease term, limit the migration of the contamination in the soil and
28 groundwater, and surrender the Property to McCray in a condition that would allow the Property

1 and adjacent property to be used for high density residential use.

2 127. On information and belief, Defendants' wrongful delay in performing their
3 obligations to investigate and remediate the contamination resulted in the spread of contamination
4 and prevented McCray from selling or redeveloping the Property and adjacent property for high
5 density residential use.

6 **VI. DEFENDANTS' ABANDONMENT OF THE PROPERTY IN A STATE OF**
7 **CONTAMINATION AND DISREPAIR**

8 128. On or about January 25, 2008, McCray sent its notice regarding Lease Expiration
9 Matters, Demand for Performance, Preliminary Notice of Default and Anticipatory Default.
10 McCray notified ITT that the 1996 Lease would soon expire and that ITT would be in default
11 under the 1996 and 1958 Leases if they returned the Property to McCray in its contaminated and
12 dilapidated state.

13 129. On or about January 27, 2008, ITT responded to McCray's January 25, 2008 letter,
14 indicating that ITT would cease all remediation efforts unless it received an access agreement by
15 January 31, 2008. ITT did not provide a proposed access agreement or offer appropriate and fair
16 compensation.

17 130. On or about January 30, 2008, McCray unsuccessfully proposed that the 1996 Lease
18 term be extended to give ITT and McCray time to create a remediation plan.

19 131. On or about January 31, 2008, ITT surrendered the Property without remediating the
20 contamination or restoring the Property or its improvements to the condition required by the 1996
21 and 1958 Leases. Instead, ITT left discarded machinery and structures on the Property, and
22 surrendered the Property in a contaminated condition and with many of its improvements damaged
23 or in disrepair or needing cleaning and restoration, including without limitation the cement pad,
24 sheds, parking lot, vehicle gates, paint (interior and exterior), structural steel, guard rails,
25 windows, fencing, roof, skylights, landscaping, warehouse lighting, office interiors, restrooms,
26 electrical, HVAC, fire sprinkler system, plumbing and gas systems, and other improvements.

27 **VII. MCCRAY'S EFFORTS TO FILL THE DATA GAPS**

28 132. Since 2004, McCray has continued to work towards filling data gaps using

1 environmental consultants. McCray undertook this work pursuant to the 1996 Lease.

2 **VIII. DAMAGES, LOSSES AND REMEDIES**

3 133. As a result of Defendants' conduct, the soil, groundwater and improvements to the
4 Property have been damaged, and McCray was unable to lease, sell or redevelop the Property at
5 the end of the initial 1996 Lease term and the extended lease term as intended by McCray and as
6 known by Defendants. On information and belief, McCray's damages and losses include, but are
7 not limited to, the costs, expenses and fees incurred for attorneys, and environmental consultants
8 to investigate and verify Defendants' (non)compliance with the 1996 Lease and perform
9 Defendants' obligations (currently in excess of \$180,000); the costs, expenses and fees to
10 investigate, analyze, monitor, remove, remediate and/or abate the on-site contamination to obtain
11 approvals to use the Property and adjacent McCray property for high density residential uses
12 (which may exceed \$1 million if indicated by a health risk assessment); the cost to restore
13 improvements to the Property to the condition required under the 1996 Lease (currently estimated
14 to be in excess of \$1.2 million); eleven months of lost rent (\$509,542); unpaid late fees pursuant to
15 the 1996 Lease (currently no less than \$27,163.43); unpaid CPI increases pursuant to
16 paragraph 4.2 of the 1996 Lease (\$7,932); eleven months of unpaid property taxes (\$19,729.27 i.e.
17 \$1,793.57 per month from February 2008); interest charges pursuant to paragraph 18 of the 1996
18 Lease; attorneys' fees pursuant to paragraph 29 of the 1996 Lease; diminution in value of the
19 Property; interest; the lost profits for interference with redevelopment of the Property and the
20 adjacent property in an amount that may exceed \$10 million; and the costs, expenses, fees and
21 other liabilities to investigate, analyze, monitor, remove, remediate and/or abate off-site
22 contamination associated with the Property, all in amounts to be established at trial.

23 134. Damages may not fully compensate McCray, and Court orders requiring ITT to
24 investigate, analyze, monitor, remove, remediate and/or abate contamination, and indemnify and
25 hold McCray harmless from, the contamination may be necessary to provide a complete remedy to
26 McCray. McCray reserves the right to request injunctive remedies at or prior to trial, including
27 orders involving off-site groundwater contamination.

28 *///*

1 FIRST CAUSE OF ACTION

2 (Breach of 1996 Lease Covenants Concerning Environmental Conditions
3 against all Defendants)

4 135. McCray re-alleges and incorporates by reference paragraphs 1 through 134,
5 inclusive, of this Complaint.

6 136. McCray performed all of its obligations under the 1996 Lease, except those excused
7 or waived by Defendants.

8 137. Paragraphs 5 and 6 of the 1996 Lease contain covenants and conditions concerning
9 the environmental condition at and about the Property. Without limiting any of the duties in the
10 1996 Lease, and as more specifically provided in the 1996 Lease, McCray alleges that ITT has
11 numerous duties that it breached.

12 138. Pursuant to paragraph 5.1 of the 1996 Lease, ITT has the duty not to use or permit
13 the use of the Property in any manner that creates waste or a nuisance.

14 139. As a result of Defendants' conduct, including creation of waste and nuisance at the
15 Property, ITT breached the 1996 Lease.

16 140. Pursuant to paragraph 5.1 of the 1996 Lease, ITT has the duty not to use or permit
17 the use of the Property in a manner that causes damage to neighboring properties.

18 141. As a result of Defendants' conduct, including the resulting soil and groundwater
19 contamination, ITT damaged neighboring properties and breached the 1996 Lease.

20 142. Pursuant to paragraph 5.2(a) of the 1996 Lease, ITT has the duty to use hazardous
21 substances in compliance with all Applicable Law and in a manner that does not expose the
22 Property or neighboring properties to any meaningful risk of contamination or damage or expose
23 Lessor to any liability therefor.

24 143. As a result of Defendants' conduct, including violation of Applicable Law, exposure
25 of the Property and neighboring properties to contamination and damage, and exposure of McCray
26 to liability for such contamination, ITT breached the 1996 Lease.

27 144. Pursuant to paragraph 5.2(b) of the 1996 Lease, ITT has the duty to immediately
28 give written notice to the Lessor if Lessee knows, or has reasonable cause to believe, that a

1 hazardous substance or a condition involving a hazardous substance has come to be located at the
2 Property.

3 145. As a result of Defendants' conduct, including failure to timely report and to actively
4 conceal soil and groundwater contamination, ITT breached the 1996 Lease.

5 146. Pursuant to paragraph 5.2(b) of the 1996 Lease, ITT has the duty to immediately
6 give Lessor a copy of documents concerning the presence, spill, release, discharge of, or exposure
7 to, any hazardous substance or contamination in, on, or about the Property.

8 147. As a result of Defendants' conduct, including failure to timely report, or to actively
9 conceal, documents reflecting the existence of hazardous substances and contamination, ITT
10 breached the 1996 Lease.

11 148. Pursuant to paragraph 5.2(c) of the 1996 Lease, ITT has the duty to indemnify,
12 protect, defend and hold Lessor and the Property harmless from and against any and all loss of
13 rents and/or damages, liabilities, judgments, costs, claims, liens, penalties, permits and attorneys'
14 and consultant's fees arising out of or involving any hazardous substance or storage tank brought
15 onto the Property by or for ITT or under ITT's control. ITT's duty includes but is not limited to
16 the effects of any contamination or injury to person, property or the environment, and the cost of
17 investigation (including consultant's and attorneys' fees and testing), removal, remediation,
18 restoration and/or abatement of any contamination. ITT's duty survives the expiration of the 1996
19 Lease and extends to the previous Lease terms, inclusive of the entire time ITT has occupied the
20 Property.

21 149. As a result of Defendants' conduct, including its failure to indemnify, protect,
22 defend and hold harmless Lessor, ITT breached the 1996 Lease.

23 150. Pursuant to paragraph 5.3 of the 1996 Lease, ITT has the duty at Lessee's sole cost
24 and expense, to fully, diligently and in a timely manner, comply with all Applicable Law as
25 defined in the 1996 Lease. Applicable Law includes the duty to investigate and remediate
26 environmental contamination.

27 151. As a result of Defendants' conduct, including failure to promptly investigate and
28 fully remediate the contamination, ITT breached the 1996 Lease.

1 152. Pursuant to paragraph 5.4 of the 1996 Lease, ITT has the duty to pay the costs and
2 expenses of inspections by experts and/or consultants retained by McCray to verify ITT's
3 compliance with the 1996 Lease and to investigate the contamination caused or materially
4 contributed to by the Lessee, and to advise McCray with respect to the Lessee's activities.

5 153. As a result of Defendants' conduct, including failure to pay McCray for its expert
6 and consultant expenses, ITT breached the 1996 Lease.

7 154. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty, subject to certain
8 exceptions, at Lessee's sole cost and expense and at all times, to keep the Property and every part
9 thereof in good order, condition and repair.

10 155. As a result of Defendants' conduct, including failure to keep the Property in good
11 order, condition and repair, ITT breached the 1996 Lease.

12 156. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty not to cause or permit
13 any Hazardous Substance to be spilled or released in, on, under or about the Property (including
14 through the plumbing or sanitary sewer system).

15 157. As a result of Defendants' conduct, hazardous substances were spilled or released at
16 the Property and ITT breached the 1996 Lease.

17 158. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty to promptly, at
18 Lessee's expense, take all investigatory and/or remedial action reasonably recommended, whether
19 or not formally ordered or required, for the cleanup of any contamination of the Property or
20 neighboring properties involving hazardous substances.

21 159. As a result of Defendants' conduct, including failure to take reasonably
22 recommended actions by ENSR, Weston and others to investigate and cleanup contamination of
23 the Property and neighboring properties, ITT breached the 1996 Lease.

24 160. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty to exercise and use
25 good maintenance practices in performing its duty to keep the Property in good order, condition
26 and repair.

27 161. As a result of Defendants' conduct, including failure to use good maintenance
28 practices, and failure to keep the Property in good order, condition and repair, ITT breached the

1 1996 Lease.

2 162. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty to perform
3 restorations, replacements or renewals when necessary to keep the Property and all improvements
4 thereon or a part thereof in good order, condition and state of repair.

5 163. As a result of Defendants' conduct, including failure to investigate and remediate
6 the contamination notwithstanding at least six years within which to do so prior to expiration of
7 the extended term of the 1996 Lease, ITT breached the 1996 Lease.

8 164. Pursuant to paragraph 6.4(c) of the 1996 Lease, ITT has the duty to surrender the
9 Property by the end of the last day of the Lease term or any earlier termination date, with all of the
10 improvements, parts and surfaces thereof clean and free of debris and in good operating order,
11 condition and state of repair, ordinary wear and tear excepted. ITT's obligation includes the
12 removal, replacement, or remediation of any soil, material or groundwater contaminated by
13 Lessee. "Ordinary wear and tear" does not include any damages or deterioration that would have
14 been prevented by good maintenance practice or by Lessee performing all of its obligations under
15 this Lease.

16 165. As a result of Defendants' conduct, including creation of soil and groundwater
17 contamination and surrender of the Property in a contaminated condition, ITT breached the 1996
18 Lease.

19 166. Pursuant to paragraph 6.4(c) of the 1996 Lease, ITT has the duty to repair any
20 damage occasioned by the removal, replacement, or remediation of any soil, material or
21 groundwater contaminated by Lessee, all as may then be required by Applicable Law and/or good
22 service practice.

23 167. As a result of Defendants' conduct, including failure to repair the environmental
24 conditions, ITT breached the 1996 Lease.

25 168. As a result of Defendants' default, McCray prepare a Notice of Default (the "Notice
26 of Default"), which was served on Defendants on January 25, 2008 in the manner required by the
27 Lease.

28 169. After receiving the Notice of Default, ITT failed to cure its defaults and breaches.

1 170. As a direct, proximate and foreseeable result of Defendants' breaches of the 1996
2 Lease, McCray has and will continue to suffer general, consequential and compensatory damages
3 as alleged above.

4 171. McCray reserves the right to seek injunctive remedies as alleged above.

5 172. Pursuant to paragraph 29 of the 1996 Lease, the prevailing party shall be entitled to
6 reasonable attorneys' fees. As a result of Defendants' conduct, McCray hired attorneys and has
7 incurred and will continue to incur attorneys' fees.

8 SECOND CAUSE OF ACTION

9 (Breach of 1996 Lease Covenants Concerning Property Conditions other than
10 Environmental Matters against all Defendants)

11 173. McCray re-alleges and incorporates by reference paragraphs 1 through 172,
12 inclusive, of this Complaint.

13 174. McCray performed all of its obligations under the 1996 Lease, except those excused
14 or waived by Defendants.

15 175. Paragraphs 5 and 6 of the 1996 Lease contain covenants and conditions concerning
16 the physical improvements at the Property, and those serving the Property, including without
17 limitation, the buildings, building systems, parking lots, and driveways, as may be more
18 particularly described in paragraph 6.1 of the 1996 Lease.

19 176. On January 31, 2008, the lease term expired. ITT surrendered the Property to
20 McCray in a dilapidated condition requiring substantial delayed maintenance, restoration and
21 repair.

22 177. Pursuant to paragraph 5.1 of the 1996 Lease, ITT has the duty not to use or permit
23 the use of the Property in any manner that creates waste or a nuisance.

24 178. As a result of Defendants' conduct, including surrender of the Property in a
25 dilapidated condition, ITT breached the 1996 Lease.

26 179. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty, at Lessee's sole cost
27 and expense and at all times, to keep the Property and every part thereof in good order, condition
28 and repair, including all equipment or facilities serving the Property, such as plumbing, heating,

1 air conditioning, ventilating, electrical, lighting facilities, boilers, fired or unfired pressure vessels,
2 fire sprinkler and/or standpipe and hose or other automatic fire extinguishing system, including
3 fire alarm and/or smoke detection systems and equipment, fire hydrants, fixtures, walls (interior),
4 ceilings, roofs (except as provided for in paragraph 6.2(b)), floors, windows, doors, plate glass,
5 skylights, landscaping, driveways, parking lots, fences, retaining walls, signs, sidewalks and
6 parkways located in, on, about, or adjacent to the Property.

7 180. As a result of Defendants' conduct, including failure to keep the Property in good
8 order, condition and repair, ITT breached the 1996 Lease.

9 181. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty to exercise and use
10 good maintenance practices in performing its duty to keep the Property in good order, condition
11 and repair.

12 182. As a result of Defendants' conduct, including failure to perform good maintenance
13 practices and failure to keep the Property in good order, condition and repair, ITT breached the
14 1996 Lease.

15 183. Pursuant to paragraph 6.1 of the 1996 Lease, ITT has the duty to perform
16 restorations, replacements or renewals when necessary to keep the Property and all improvements
17 thereon or a part thereof in good order, condition and state of repair.

18 184. As a result of Defendants' conduct, including failure to perform restorations,
19 replacements and renewals when necessary, ITT breached the 1996 Lease.

20 185. Pursuant to paragraph 6.4(c) of the 1996 Lease, ITT has the duty to surrender the
21 Property by the end of the last day of the Lease term or any earlier termination date, with all of the
22 improvements, parts and surfaces thereof clean and free of debris and in good operating order,
23 condition and state of repair, ordinary wear and tear excepted. "Ordinary wear and tear" shall not
24 include any damages or deterioration that would have been prevented by good maintenance
25 practices or by Lessee performing all of its obligations under this Lease.

26 186. As a result of Defendants' conduct, including surrendered of the Property in a
27 dilapidated condition, ITT breached the 1996 Lease.

28 187. Pursuant to paragraph 6.4(c) of the 1996 Lease, ITT has the duty to repair any

1 damage occasioned by the installation, maintenance or removal of Lessee's Trade Fixtures,
2 furnishings, equipment, and Alterations and/or Utility Installations, as well as the removal of any
3 storage tank installed by or for Lessee, and the removal, replacement, or remediation of any soil,
4 material or groundwater contaminated by Lessee.

5 188. As a result of Defendants' conduct, including surrender of the Property in a
6 dilapidated condition, ITT breached the 1996 Lease.

7 189. As a direct, proximate and foreseeable result of Defendants' breaches of the 1996
8 Lease, McCray has and will continue to suffer general, consequential and compensatory damages
9 in connection with restoration of the Property as alleged above.

10 190. Pursuant to paragraph 29 of the 1996 Lease, the prevailing party shall be entitled to
11 reasonable attorneys' fees. As a result of Defendants' conduct, McCray hired attorneys and has
12 incurred and will continue to incur attorneys' fees.

13 **THIRD CAUSE OF ACTION**

14 **(Breach of 1996 Lease Indemnity and Covenants Re Late Charges and**

15 **Notices against all Defendants)**

16 191. McCray re-alleges and incorporates by reference paragraphs 1 through 190,
17 inclusive, of this Complaint.

18 192. McCray performed all of its obligations under the 1996 Lease except those excused
19 or waived by Defendants.

20 193. Pursuant to paragraph 7.7 of the 1996 Lease, except for Lessor's
21 negligence and/or breach of express warranties or any other obligation of Lessor under the Lease,
22 Lessee has the duty to indemnify, protect, defend and hold harmless the Property, Lessor and
23 its agents, partners and Lenders, from and against any and all claims, loss of rents and/or damages,
24 costs, fees, judgments, penalties, permits, attorney's and consultant's fees, expenses and/or
25 liabilities arising out of, involving, or in dealing with, the occupancy of the Property by Lessee,
26 the conduct of Lessee's business, any act, omission or neglect of Lessee, its agents, contractors,
27 employees or invitees, and out of any Default or Breach by Lessee in the performance in a timely
28 manner of any obligation on Lessee's part to be performed under this Lease.

1 194. As a result of Defendants' conduct, including failure to indemnify, protect, defend
2 and hold harmless McCray and the Property, ITT breached the 1996 Lease.

3 195. Defendants, and each of them also breached the 1996 Lease by failing to pay CPI
4 increases, interest charges, property taxes, late charges and attorneys' fees as required by the 1996
5 Lease.

6 196. As a direct, proximate and foreseeable result of Defendants' breaches of the 1996
7 Lease, McCray has and will continue to suffer general, consequential and compensatory damages,
8 as alleged above.

9 197. McCray reserves the right to obtain injunctive remedies as alleged above.

10 198. Pursuant to paragraph 29 of the 1996 Lease, the prevailing party shall be entitled to
11 reasonable attorneys' fees. As a result of Defendants' conduct, McCray hired attorneys and has
12 incurred and will continue to incur attorneys' fees.

13 **FOURTH CAUSE OF ACTION**

14 **(Breach of 1958 Lease Covenants against all Defendants)**

15 199. McCray re-alleges and incorporates by reference paragraphs 1 through 198,
16 inclusive, of this Complaint.

17 200. McCray performed all of its obligations under the 1958 Lease except those excused
18 or waived by Defendants.

19 201. Pursuant to paragraph 7 of the 1958 Lease, ITT was required at its own expense to
20 keep the Property in good condition, order and repair and keep the Property in a clean and
21 healthful condition according to all laws, ordinances and governmental regulations.

22 202. As a result of Defendants' conduct, including surrender of the Property in 2008 in a
23 contaminated condition, ITT breached the 1958 Lease.

24 203. Pursuant to paragraph 7 of the 1958 Lease, ITT was required to surrender the
25 Property in at least as good, safe and sound condition as the Property was at the commencement of
26 the lease term.

27 204. As a result of Defendants' conduct, including ITT's surrender of the Property in
28 2008 in a contaminated condition, ITT breached the 1958 Lease.

1 205. Pursuant to paragraph 13 of the 1958 Lease, if ITT defaults on the performance of
2 its obligations under the lease, McCray may rectify the default and add to the rent the reasonable
3 cost and expense in so doing with interest at 10% per annum.

4 206. Defendants concealed their breaches, including concealment of contamination
5 during negotiations for the 1996 Lease and thereafter. Once the contamination was disclosed to
6 McCray, McCray reasonably relied on Defendants' representations that they take their
7 environmental responsibilities seriously and would obtain a "no further action letter," and on the
8 Tolling Agreement and did not pursue legal action, thereby estopping Defendants from asserting
9 that McCray should have pursued its claims on the 1958 Lease prior to now.

10 207. As a direct, proximate and foreseeable result of Defendants' breaches of the 1958
11 Lease, McCray has and will continue to suffer general, consequential and compensatory damages,
12 as alleged above.

13 208. McCray reserves the right to obtain injunctive remedies as alleged above.

14 **FIFTH CAUSE OF ACTION**

15 **(Breach of Implied Covenants of Good Faith and Fair Dealing against all Defendants)**

16 209. McCray re-alleges and incorporates by reference paragraphs 1 through 208,
17 inclusive, of this Complaint.

18 210. There is an implied covenant of good faith and fair dealing in the 1958 Lease and
19 1996 Lease.

20 211. ITT's conduct and representations assured McCray that ITT took environmental
21 responsibilities seriously and that ITT would perform its obligations under the leases. McCray
22 relied on ITT's conduct and representations, including entering into a Tolling Agreement to
23 suspend the statute of limitations and allow ITT to perform its representations and lease
24 obligations.

25 212. As a result of Defendants' conduct, ITT breached the implied covenants of good
26 faith and fair dealing in the 1958 and 1996 Leases.

27 213. McCray reserves the right to discover and prove additional breaches of the implied
28 covenants at the time of trial.

1 214. As a direct, proximate and foreseeable result of Defendants' breaches of the implied
2 ~~covenant~~, McCray has and will continue to suffer general, consequential and compensatory
3 ~~damages~~, as alleged above.

4 215. McCray reserves the right to obtain injunctive remedies as alleged above.

5 216. Pursuant to paragraph 29 of the 1996 Lease, the prevailing party shall be entitled to
6 ~~reasonable~~ attorneys' fees. As a result of Defendants' conduct, McCray hired attorneys and has
7 ~~incurred~~ and will continue to incur attorneys' fees.

8 SIXTH CAUSE OF ACTION

9 (Intentional Misrepresentation against all Defendants)

10 217. McCray re-alleges and incorporates by reference paragraphs 1 through 216,
11 ~~inclusive~~, of this Complaint.

12 218. McCray placed trust and confidence in Defendants, and each of them, to use the
13 ~~Property~~ in accordance with the lease terms as well as applicable law. Nevertheless, Defendants,
14 ~~and each~~ of them, made, authorized or ratified representations to McCray, both express and
15 ~~implied~~, that Defendants knew were false or that Defendants made recklessly without regard for
16 ~~the truth~~ or falsity of the representations.

17 219. Defendants' false representations include, without limitation, (a) their 1996
18 ~~representation~~, through Larry Dart and Gordon Henry, that a costly investigation gave the Property
19 ~~a clean bill of health~~, (b) their representation, through F. Daves, that ITT takes its environmental
20 ~~responsibilities seriously~~ and would obtain a "no further action letter," (c) their representation,
21 ~~through T. Olmstead~~, that ITT would conduct an off-site groundwater investigation, (d) ITT's
22 ~~promises~~ in the leases, including sections 5.1, 5.2, 6.1, and 6.4 of the 1996 Lease, (e) ITT's
23 ~~representation~~ that it needed possession of the Property beyond 1996 to perform its contractual
24 ~~and legal~~ environmental obligations, and (f) ITT's implied representation that it would timely
25 ~~investigate and remediate~~ contamination and obtain a no further action letter consistent with the
26 ~~McCray's~~ intention to sell or redevelop the Property for high density residential use.

27 220. McCray relied on Defendants' representations to its detriment, including without
28 ~~limitation~~, agreeing to enter into the 1996 Lease as written, agreeing to extend the term of the

1 1996 Lease to January 31, 2008, and entering into the Tolling Agreement to allow ITT a further
2 opportunity to perform its obligations and duties.

3 221. Had McCray known the true facts, including without limitation, that ITT's "costly
4 ground sampling survey" was not comprehensive and could not have given the Property a "clean
5 bill of health," and that ITT did not intend to timely investigate and remediate the contamination
6 and to obtain a "no further action letter" consistent with McCray's intended future uses of the
7 Property, McCray would have required additional terms in the 1996 Lease to address existing
8 contamination issues, would have refrained from extending the 1996 Lease without further
9 assurances of investigation and remediation by the end of the extended 1996 Lease term, and
10 would have started much sooner an independent investigation and remediation of contamination at
11 the Property to reduce damage to the Property and put it in a condition to sell or redevelop prior to
12 the downturn in the real estate market.

13 222. As a direct, proximate and foreseeable result of Defendants' intentional
14 misrepresentations, McCray has suffered general, consequential and compensatory damages, as
15 alleged above.

16 223. McCray reserves the right to obtain injunctive remedies as alleged above.

17 224. On information and belief, Defendants authorized or ratified the conduct of their
18 agents who made the misrepresentations. Defendants' conduct occurred over an extended period
19 of time as a knowing, intentional plan in willful and conscious disregard for the law, public health
20 and safety, as well as the rights of McCray. Defendants' conduct was oppressive, fraudulent
21 and/or malicious. Accordingly, McCray is entitled to punitive damages in an amount to be proven
22 at trial.

23 SEVENTH CAUSE OF ACTION

24 (Negligent Misrepresentation against all Defendants)

25 225. McCray re-alleges and incorporates by reference paragraphs 1 through 224,
26 inclusive, of this Complaint.

27 226. If Defendants did not intentionally make the misrepresentations, then Defendants
28 had no reasonable grounds to believe the representations were true.

1 227. Defendants intended McCray to rely on Defendants' negligent misrepresentations,
2 and McCray did reasonably rely on the misrepresentations as alleged above.

3 228. As a direct, proximate and foreseeable result of Defendants' negligent
4 misrepresentations, McCray has suffered general, consequential and compensatory damages, as
5 alleged above.

6 229. McCray reserves the right to obtain injunctive remedies as alleged above.

7 EIGHTH CAUSE OF ACTION

8 (Fraudulent Concealment/Partial Suppression of Facts
9 against all Defendants)

10 230. McCray re-alleges and incorporates by reference paragraphs 1 through 229,
11 inclusive, of this Complaint.

12 231. Defendants, and each of them, had a duty to disclose to McCray information
13 concerning the environmental condition of the Property and Defendants' conduct concerning that
14 condition by virtue of the landlord/tenant relationship, including Sections 5.2(b) of the 1996
15 Lease, the 1996 negotiations including Larry Dart's and Gordon Henry's representation, McCray's
16 many requests for information, and Defendants' communications with McCray concerning
17 environmental conditions and issues. Defendants had the duty to communicate fully so that their
18 communications did not suppress material facts.

19 232. Defendants, and each of them, knowingly and intentionally withheld information
20 from McCray and/or partially suppressed material facts, thereby actively concealing material facts,
21 including without limitation, the extent of the contamination, the potential areas of concern at
22 which environmental investigations should have been conducted, recommendations for
23 investigation and cleanup (including the ENSR Opinion Letter), ITT's secret intention not to fully
24 investigate and remediate the contamination as required by the leases, and ITT's secret intention to
25 obtain a "no further action letter" that was inconsistent with McCray's intended future uses of the
26 Property and the requirements of the leases.

27 233. ITT's active concealment of the ENSR Opinion is reflected, in part, in its
28 manipulation of McCray's expectation of receiving a "report" from ENSR. ITT's Leff represented

1 to McCray that ENSR would prepare a "report," and that the "report" would be provided to
2 McCray. ENSR's project manager Jeff Melo also represented that ENSR would provide a report.
3 Starting no later than August 2003, McCray repeatedly requested the final ENSR report.
4 Defendants repeatedly delayed providing the report, and then told McCray that no report existed.
5 On information and belief, ITT instructed ENSR not to prepare a "report" with recommendations
6 that would have to be disclosed to McCray pursuant to the 1996 Lease, and instead instructed
7 ENSR to put its recommendations in the ENSR Opinion Letter, which ITT actively concealed
8 from McCray. ITT then rejected those recommendations in large part.

9 234. Defendants' concealment of the contamination made false Defendants' prior
10 representations including those made by ITT through Larry Dart, Gordon Henry, F. Daves and T.
11 Olmstead, as well as Defendants' implied representation that they would timely investigate and
12 remediate contamination and obtain a "no further action letter" consistent with the McCray's
13 intention to sell or redevelop the Property for high density residential use.

14 235. Defendants, and each of them, deliberately concealed and/or suppressed information
15 regarding contamination at the Property with the intent to induce McCray to act as it did.

16 236. McCray was unaware of the true facts and relied to its detriment. McCray would
17 not have acted as it did had Defendants disclosed and not suppressed the true facts. Had McCray
18 known the true facts, McCray would have required additional terms in the 1996 Lease to address
19 prior contamination, would have refrained from extending the 1996 Lease without requiring
20 investigation and cleanup at that time, and would have undertaken an independent investigation
21 and remediation of contamination at the Property to reduce damage to the Property and put it in a
22 condition to sell or redevelop prior to the downturn in the real estate market.

23 237. Had the ENSR Opinion Letter been provided to McCray, as required by the 1996
24 Lease and the ongoing communications between ITT and McCray, McCray would have required
25 ITT to take the steps recommended by ENSR in the ENSR Opinion Letter so that efforts to
26 remediate contamination at the Property would be effective to restore the Property to a condition
27 that would allow McCray to pursue McCray's plans for the Property following the expiration of
28 the 1996 Lease, including without limitation, conversion of the Property from an industrial use to

1 a high density residential use.

2 238. As a direct, proximate and foreseeable result of Defendants' concealments and
3 partial suppressions, McCray has suffered general, consequential and compensatory damages, as
4 alleged above.

5 239. McCray reserves the right to obtain injunctive remedies as alleged above.

6 240. On information and belief, Defendants authorized or ratified the conduct of their
7 agents who made the concealments and partial suppressions of fact. Defendants' conduct occurred
8 over an extended period of time as a knowing, intentional plan in willful and conscious disregard
9 for the law, public health and safety, as well as the rights of McCray. Defendants' conduct was
10 oppressive, fraudulent and/or malicious. Accordingly, McCray is entitled to punitive damages in
11 an amount to be proven at trial.

12 NINTH CAUSE OF ACTION

13 (Negligence against all Defendants)

14 241. McCray re-alleges and incorporates by reference paragraphs 1 through 240,
15 inclusive, of this Complaint.

16 242. Defendants, and each of them, had a duty to use due care in their handling, use,
17 storage, control, disposal, release, investigation, characterization, removal, and remediation of
18 hazardous substances at, and associated with, the Property.

19 243. Defendants, and each of them, knew or should have known that their failure to use
20 due care in these matters would result in contamination of the soil and groundwater in and around
21 the Property, spread of the contamination, and damages to McCray.

22 244. On information and belief, Defendants were negligent, careless and/or reckless in
23 the handling, use, storage, control, disposal, release, investigation, characterization, removal and
24 remediation of hazardous substances at the Property. Their negligence includes, but is not limited
25 to, (a) failure to install systems and establish procedures to prevent, promptly detect, investigate
26 and remediate contamination; (b) failure to promptly notify McCray and the appropriate
27 governmental authorities of contamination at the Property; and (c) failure to promptly and
28 effectively investigate and remediate contamination at, and associated with, the Property.

1 245. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
2 and will continue to suffer general, consequential and compensatory damages, as alleged above.

3 246. McCray reserves the right to obtain injunctive remedies as alleged above.

4 TENTH CAUSE OF ACTION

5 (Continuing Private Nuisance in violation of Civil Code sections 3479 and 3481
6 against all Defendants)

7 247. McCray re-alleges and incorporates by reference paragraphs 1 through 246
8 inclusive, of this Complaint.

9 248. Defendants, and each of them, caused the release of hazardous substances into the
10 soil and groundwater at and around the Property and created a nuisance. Defendants, and each of
11 them, failed to promptly and effectively remediate contamination of the soil and groundwater at
12 and associated with the Property and have thereby allowed the contamination to migrate through
13 the soil at the Property and into the waters of the State of California.

14 249. Defendants' actions causing nuisance continue to damage the Property and McCray
15 on a daily basis. Each actual and/or threatened release and migration of hazardous substance
16 contamination gives rise to a new cause of action until such time as the contamination is
17 completely remediated.

18 250. Defendants' failure to timely abate the contamination has and will continue to
19 damage the Property, the soil and groundwater beneath the Property and nearby properties, and
20 McCray, on a daily basis.

21 251. McCray has repeatedly requested that Defendants, and each of them, abate the
22 contamination. However, Defendants, and each of them, have failed to do so despite the fact that
23 the contamination can be abated using readily available technologies available at a reasonable
24 cost.

25 252. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
26 suffered general, consequential and compensatory damages, as alleged above.

27 253. McCray reserves the right to obtain injunctive remedies as alleged above.

28 ///

1 ELEVENTH CAUSE OF ACTION

2 (Permanent Private Nuisance in violation of Civil Code sections 3479 and 3481
3 against all Defendants)

4 254. McCray re-alleges and incorporates by reference paragraphs 1 through 253
5 inclusive, of this Complaint.

6 255. McCray did not know or have reason to suspect the existence of the alleged
7 contamination and resulting nuisance until sometime in 2003. McCray is justified in not having
8 discovered the contamination earlier, because the contamination was actively concealed by ITT
9 and involved subsurface contamination not apparent upon visual inspection, and McCray did not
10 file this action sooner because of ITT's representations, including its promise to obtain a "no
11 further action letter," and because of the Tolling Agreement.

12 256. Defendants' failure to timely abate the contamination has and will continue to
13 damage the Property, the soil and groundwater beneath the Property and nearby properties, and
14 McCray.

15 257. McCray has repeatedly requested that Defendants, and each of them, abate the
16 nuisance caused by the contamination, but Defendants, and each of them, have failed to do so.

17 258. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
18 suffered general, consequential and compensatory damages, as alleged above.

19 259. McCray reserves the right to obtain injunctive remedies as alleged above.

20 TWELFTH CAUSE OF ACTION

21 (Continuing Public Nuisance in violation of Civil Code sections 3479 and 3480
22 against all Defendants)

23 260. McCray re-alleges and incorporates by reference paragraphs 1 through 259,
24 inclusive, of this Complaint.

25 261. The above described nuisance is injurious to public health, and is specially injurious
26 to McCray, including its affect on McCray's ability to develop and/or rent out the Property and
27 has caused McCray to incur costs and expenses to investigate, assess, monitor, remove, remediate
28 and abate the contamination, and lost profits due to McCray's inability to fully utilize or sell the

1 Property.

2 262. Defendants' actions causing the public nuisance continue to damage the Property
3 and McCray on a daily basis. Each actual and/or threatened release and migration of hazardous
4 substance contamination gives rise to a new cause of action until such time as the contamination is
5 completely remediated.

6 263. Defendants' failure to timely abate the contamination has and will continue to
7 damage the Property and the soil and groundwater beneath the Property and nearby properties, and
8 McCray on a daily basis.

9 264. Any hardship imposed on Defendants in abating the contamination would be
10 minimal, as evidenced by the fact that Defendants, and each of them, previously promised to
11 remediate the contamination, and because Defendants have never contested liability.

12 265. McCray has repeatedly requested that Defendants, and each of them, abate the
13 contamination. However, Defendants, and each of them, have failed to do so despite the fact that
14 the contamination can be abated using readily available technologies available at a reasonable
15 cost.

16 266. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
17 suffered general, consequential and compensatory damages, as alleged above.

18 267. McCray reserves the right to obtain injunctive remedies as alleged above.

19 **THIRTEENTH CAUSE OF ACTION**

20 (Permanent Public Nuisance in violation of Civil Code sections 3479 and 3480
21 against all Defendants)

22 268. McCray re-alleges and incorporates by reference paragraphs 1 through 267,
23 inclusive, of this Complaint.

24 269. McCray did not know or have reason to suspect the existence of the nuisance until
25 2003. McCray is justified in not having discovered the contamination earlier, because the
26 contamination was actively concealed by ITT and involved subsurface contamination not apparent
27 upon visual inspection, and McCray did not file this action sooner because of ITT's
28 representations, including its promise to obtain a "no further action letter," and because of the

1 Telling Agreement.

2 270. The above described nuisance is injurious to public health, and is specially injurious
3 to McCray, including its affect on McCray's ability to develop and/or rent out the Property and
4 has caused McCray to incur costs and expenses to investigate, assess, monitor, remove, remediate
5 and abate the contamination, and lost profits due to McCray's inability to fully utilize or sell the
6 Property.

7 271. Defendants' failure and refusal to timely abate the contamination has damaged the
8 Property and the soil and groundwater beneath the Property and nearby properties.

9 272. McCray has repeatedly requested that Defendants, and each of them, abate the
10 contamination, but Defendants have failed and refused to do so.

11 273. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
12 suffered general, consequential and compensatory damages, as alleged above.

13 274. McCray reserves the right to obtain injunctive remedies as alleged above.

14 **FOURTEENTH CAUSE OF ACTION**

15 (Continuing Trespass against all Defendants)

16 275. McCray re-alleges and incorporates by reference paragraphs 1 through 274,
17 inclusive, of this Complaint.

18 276. Defendants, and each of them, caused the release of hazardous substances in the soil
19 and groundwater at and around the Property without McCray's consent.

20 277. The trespass created by the contamination has and continues to affect McCray's
21 ability to develop and/or rent out the Property and has caused McCray to incur costs and expenses
22 to investigate, assess, monitor, remove, remediate and/or abate the contamination and lost profits
23 due to McCray's inability to fully utilize or sell the Property.

24 278. Defendants' failure to timely abate the contamination has, and will continue to,
25 damage the Property and McCray.

26 279. Any hardship imposed on Defendants in abating the contamination would be
27 minimal, as evidenced by the fact that Defendants previously promised to remediate the
28 contamination, and because Defendants have never contested liability.

1 280. McCray has repeatedly requested that Defendants, and each of them, abate the
2 contamination and the trespass. However, Defendants, and each of them, have failed to do so
3 despite the fact that the contamination can be abated using readily available technologies available
4 at a reasonable cost.

5 281. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
6 suffered general, consequential and compensatory damages, as alleged above.

7 282. McCray reserves the right to obtain injunctive remedies as alleged above.

8 283. On information and belief, Defendants authorized or ratified the conduct of their
9 agents who made the concealments and partial suppressions of fact. Defendants' conduct occurred
10 over an extended period of time as a knowing, intentional plan in willful and conscious disregard
11 for the law, public health and safety, as well as the rights of McCray. Defendants' conduct was
12 oppressive, fraudulent and/or malicious. Accordingly, McCray is entitled to punitive damages in
13 an amount to be proven at trial.

14 **FIFTEENTH CAUSE OF ACTION**

15 (Permanent Trespass against all Defendants)

16 284. McCray re-alleges and incorporates by reference paragraphs 1 through 283,
17 inclusive, of this Complaint.

18 285. Defendants, and each of them, caused the release of hazardous substances into the
19 soil and groundwater at and around the Property without McCray's consent.

20 286. McCray did not know or have reason to suspect the existence of the alleged trespass
21 until 2003. McCray is justified in not having discovered the contamination earlier, because the
22 contamination was actively concealed by ITT and involved subsurface contamination not apparent
23 upon visual inspection, and McCray did not file this action sooner because of ITT's
24 representations, including its promise to obtain a "no further action letter," and because of the
25 Tolling Agreement.

26 287. The above described trespass has diminished the value of the Property and has and
27 will affect McCray's ability to develop and/or rent out the Property and has caused McCray to
28 incur costs and expenses to investigate, assess, monitor, remove, remediate and abate the

1 contamination and lost profits due to McCray's inability to fully utilize or sell the Property.
2 288. Defendants' failure to timely abate the contamination has caused damage to the
3 Property and McCray.
4 289. McCray has repeatedly requested that Defendants, and each of them, abate the
5 contamination and terminate the trespass.
6 290. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
7 suffered general, consequential and compensatory damages, as alleged above.
8 291. McCray reserves the right to obtain injunctive remedies as alleged above.
9 292. On information and belief, Defendants authorized or ratified the conduct of their
10 agents who made the concealments and partial suppressions of fact. Defendants' conduct occurred
11 over an extended period of time as a knowing, intentional plan in willful and conscious disregard
12 for the law, public health and safety, as well as the rights of McCray. Defendants' conduct was
13 oppressive, fraudulent and/or malicious. Accordingly, McCray is entitled to punitive damages in
14 an amount to be proven at trial.

15
16 SIXTEENTH CAUSE OF ACTION

17 (Waste in violation of California Code of Civil Procedure section 732
18 against all Defendants)

19 293. McCray re-alleges and incorporates by reference paragraphs 1 through 292,
20 inclusive, of this Complaint.
21 294. Defendants, and each of them, were under a duty to preserve and protect the
22 Property in accordance with their obligations under the 1958 and 1996 Leases, and were required
23 by law to avoid using the Property in a manner that creates waste.
24 295. Defendants' conduct in causing and concealing the release, and allowing the spread,
25 of hazardous substances in the soil and groundwater at the Property, and surrendering the Property
26 in a state of damage and disrepair has resulted in waste and damaged the Property, substantially
27 depreciating its market value.
28 296. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has

1 suffered general, consequential and compensatory damages, as alleged above.

2 297. McCray reserves the right to obtain injunctive remedies as alleged above.

3 **SEVENTEENTH CAUSE OF ACTION**

4 **(Recovery of Damages for violation of Health and Safety Code section 25359.7(b)**
5 **against all Defendants)**

6 298. McCray re-alleges and incorporates by reference paragraphs 1 through 297,
7 ~~inclusive~~, of this Complaint.

8 299. Defendants, and each of them, through authorized agents and representatives
9 ~~including~~ F. Daves, ITT's in-house environmental legal counsel, Bennett Leff and Jeff Mello,
10 ITT's Managers of Environmental Safety and Health and T. Olmstead, Vice-President of ITT
11 Remediation Management Inc., were aware of the release of a material amount of hazardous
12 substances on and beneath the Property and knowingly and willfully failed to provide proper
13 written notice of such to McCray as required by Health and Safety Code section 25359.7(b) and
14 Section 5.2(b) of the 1996 Lease.

15 300. As a direct, proximate and foreseeable result of Defendants' failure to report the
16 ~~contamination~~ to McCray, McCray has suffered general, consequential and compensatory
17 ~~damages~~ as alleged above.

18 301. In addition, McCray is entitled to civil penalties of \$5,000 for each violation by
19 ~~Defendants~~, and each of them, under Health and Safety Code section 25359.7(b)(2)(B).

20
21 **EIGHTEENTH CAUSE OF ACTION**

22 **(Recovery of Cleanup Costs under Health and Safety Code section 25300 et. seq.**
23 **against all Defendants)**

24 302. McCray re-alleges and incorporates by reference paragraphs 1 through 302,
25 ~~inclusive~~, of this Complaint.

26 303. Defendants, and each of them, purchased, stored, used, handled, generated, treated,
27 ~~transported~~, disposed of, controlled, discharged and/or released hazardous substances causing
28 ~~contamination~~ at and around the Property.

1 304. Defendants, and each of them, are liable persons, as defined by Health and Safety
2 Code section 25323.5, for any contamination at or around the Property and in the groundwater
3 under the Property.

4 305. Although McCray did not cause or contribute to contamination at or around the
5 Property, McCray has incurred and will continue to incur costs and expenses related to the
6 investigation, assessment, removal, remediation and monitoring of contamination at the Property.

7 306. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
8 suffered general, consequential and compensatory damages, as alleged above.

9 307. McCray is entitled to indemnification from Defendants, and each of them, pursuant
10 to Health and Safety Code sections 25363(e) and 25323.5 and related provisions for the costs and
11 expenditures McCray has incurred or will incur related to the investigation, assessment, removal,
12 remediation and monitoring of contamination at the Property.

13 NINETEENTH CAUSE OF ACTION

14 (Statutory Indemnity Under California Water Code Section 13000, et seq.
15 against all Defendants)

16 308. McCray re-alleges and incorporates by reference, paragraphs 1 through 307,
17 inclusive, of this Complaint.

18 309. Defendants, and each of them, intentionally, negligently or wrongfully caused
19 hazardous substances to be deposited or discharged in or on the waters of the State of California in
20 a manner that threatens to create or has created a condition of pollution or nuisance.

21 310. McCray did not release, deposit or discharge the hazardous substances at or around
22 the Property and is therefore not responsible for any contamination or nuisance at or around the
23 Property. McCray is thus entitled to indemnification and contribution from Defendants, and each
24 of them, pursuant to Water Code sections 13000, et seq. for the costs and expenditures McCray
25 has incurred or will incur in connection with investigation, monitoring, removal and/or
26 remediation of contamination in the waters of the State of California and any administrative and/or
27 civil penalties imposed on McCray as a result of Defendants' contamination of the Property.

28 ///

1 TWENTIETH CAUSE OF ACTION

2 (~~Unfair~~ Competition Under California Business and Professions Code Section 17200, et seq.
3 against all Defendants)

4 311. McCray re-alleges and incorporates by reference paragraphs 1 through 310,
5 inclusive, of this Complaint.

6 312. Defendants ITT violated Business & Professions Code section 17200 by, among
7 other things, engaging in the conduct alleged above, including without limitation, unfairly,
8 unlawfully and fraudulently making, authorizing and/or ratifying statements that they knew or
9 should have known to be false and untrue about the cause, nature, extent, investigation and
10 remediation of the contamination at the Property, and deliberately withholding information from
11 McCray, thereby actively concealing the extent of the contamination and the existence of potential
12 areas of concern at which environmental investigations should have been conducted, in violation
13 of applicable law.

14 313. McCray is entitled to restitution of all amounts wrongfully obtained by Defendants,
15 and each of them, as a result of their unfair, unlawful and fraudulent business practices, and to
16 injunctive remedies, as alleged above.

17 TWENTY-FIRST CAUSE OF ACTION

18 (Negligence per se against all Defendants)

19 314. McCray re-alleges and incorporates by reference paragraphs 1 through 313,
20 inclusive of this Complaint.

21 315. Laws, regulations, ordinances, rules and orders such as those contained in the
22 California Water Code, California Health and Safety Code, California Civil Code and California
23 Business and Professions Code are intended to prevent environmental contamination, and if it
24 occurs, to provide remedies, including requiring the investigation, removal and/or remediation of
25 the contamination.

26 316. Throughout their possession, use and/or control of the Property or the other
27 Defendants control, Defendants, and each of them, were obligated to comply with all applicable
28 laws, regulations, ordinances, rules, and orders of every state and federal governmental agency

1 having jurisdiction over the Property and/or Defendants' conduct in connection with the Property,
2 including, without limitation, the California Water Code, the California Civil Code, the California
3 Business and Professions Code and the California Health and Safety Code. McCray is a member
4 of the class of persons for whom the protections alleged in the preceding paragraph were adopted.
5 317. Defendants' conduct failed to comply with the California Health and Safety Code,
6 the California Water Code, the California Civil Code and the California Business and Professions
7 Code in that, among other things alleged in this Complaint, Defendants negligently, carelessly
8 and/or recklessly handled, used, generated, transported, treated, stored, controlled, disposed of,
9 released, investigated, characterized, and/or removed hazardous substances, failed to prevent
10 releases and discharges of hazardous substances, failed to install systems and establish procedures
11 to prevent contamination by hazardous substances, failed to install systems and establish
12 procedures to promptly detect, investigate and remediate contamination by hazardous substances,
13 failed to promptly notify McCray and the appropriate governmental authorities of contamination at
14 the Property, and failed to promptly and effectively investigate and remediate contamination at the
15 Property.

16 318. As a direct, proximate and foreseeable result of Defendants' conduct, McCray has
17 suffered general, consequential and compensatory damages, as alleged above.

18 319. McCray reserves the right to obtain injunctive remedies as alleged above.

19 **TWENTY-SECOND CAUSE OF ACTION**
20 **(Declaratory Relief against all Defendants).**

21 320. McCray re-alleges and incorporates by reference paragraphs 1 through 319,
22 inclusive, of this Complaint.

23 321. As a result of the foregoing, there exist numerous actionable controversies between
24 McCray, on the one hand, and Defendants, on the other hand, concerning each party's rights,
25 duties, obligations and liabilities arising under the 1958 Lease and 1996 Lease and applicable law
26 respecting the environmental condition of the soil and groundwater at and in the vicinity of the
27 Property (including off-site groundwater contamination), restoration of improvements at the
28 Property, and liability to others, including governmental and private interests, for personal

1 injuries, bodily injuries, property damages, lost profits, damages, fees, penalties, and expenses and
2 fees for investigating, analyzing, monitoring, removing, remediating and/or abating the
3 contamination.

4 322. The controversies require a judicial determination of the parties' respective rights
5 and duties with respect to one another. A judicial determination is necessary to avoid a
6 multiplicity of actions and possible inconsistent results.

7 323. Paragraph 29 of the 1996 Lease provided that if any party brings an action to declare
8 rights under the lease, the prevailing party shall be entitled to his reasonable attorneys' fees.

9 324. McCray has incurred and will continue to incur attorneys' fees obtaining a
10 declaration of the parties' rights and duties under the 1996 Lease.

11 PRAYER

12 WHEREFORE, McCray prays for judgment against all Defendants, jointly and severally,
13 as follows:

14 1. For general, compensatory and consequential damages according to proof at the
15 time of trial, including, without limitation:

16 (a) all costs and expenses to investigate, analyze, monitor, remove, remediate,
17 abate and/or repair the environmental condition of the Property, including the soil and
18 groundwater, and if necessary the off-site soil and groundwater;

19 (b) all costs and expenses of consultants and attorneys engaged by McCray to
20 verify Defendants' (non) compliance with the 1996 Lease and to investigate and remediate
21 contamination and enforce the 1996 Lease;

22 (c) all costs and expenses to restore the improvements at the Property to the
23 condition required by the 1996 Lease and 1958 Lease;

24 (d) all lost rent caused by Defendants' failure to surrender the Property in the
25 condition required by the 1996 Lease;

26 (e) all lost profits suffered by McCray resulting from Defendants' wrongful
27 conduct in contaminating the Property, thus interfering with the high density residential use
28 McCray intended to make of the Property and adjacent property following expiration of the 1996

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Lease,

- (f) the diminution in value of the Property;
 - (g) other amounts owed pursuant to the 1958 and 1996 Leases; and
 - (h) other damages according to proof at trial;
- For punitive damages in an amount determined at the time of trial;
- For a declaration of rights;
- For injunctive orders;
- For prejudgment interest and costs of suit incurred;
- For attorneys' fees as set forth in the 1996 Lease and/or as required and permitted by law; and
- For such other and further relief as this Court may deem just and proper.

Dated: March __, 2009

RUTAN & TUCKER, LLP
MARK B. FRAZIER

By: _____
Mark B. Frazier
Attorneys for Plaintiff
McCRA Y DALE WAY PARTNERSHIP,
L.P.

6. On or about November 24, 2008, Latham submitted to the Regional Board various materials responsive to staff's requests made at the November 3 meeting, including affidavits from three individuals having a long work history at the site, dating back to the ITT era. The letter summarized the options being considered by the agency as follows: (1) rescind the Order; (2) amend the Order, or issue a new order, adding or changing parties; or (3) a combination of the above. In subsequent communications with the agency, the agency never disputed our characterization of the options it was considering at that time. We urged the agency to rescind the order.

7. On December 8, 2008, I conferred with Mr. Berchtold who said he had not had a chance to review the November 24 submittal or speak with his team about it. He offered that he would do so and get back with me "before Christmas." I indicated our appreciation of his offering to do so, and asked if I could assume the ball was in his court until then, which he confirmed.

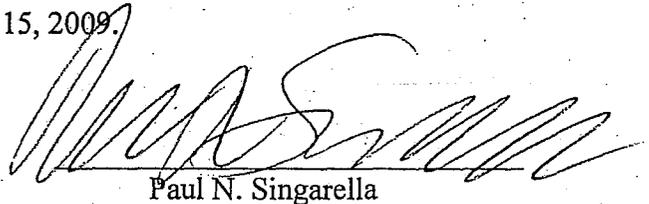
8. Over the next few months, I checked in with Mr. Berchtold periodically, and conferred with him December 23, 2008 and March 9, 2009. In each of those conversations, Mr. Berchtold told me that, while things were progressing slowly, the agency had decided tentatively to rescind the Order, and was moving in that direction.

9. On March 25, 2009, Mr. Veloz and I met with Mr. Berchtold, who told us he did not need any additional information from us, but was waiting to have a communication with ITT before finalizing the rescission. We asked him to not link the communication with ITT to the issuance of the rescission.

10. On April 24, 2009, I met with Mr. Berchtold at a Regional Board hearing in the City of Santa Ana. He indicated that rescission still was on track. I asked if I could call his counsel David Rice regarding the process. He said if I wished to, but suggested it was a straightforward process.

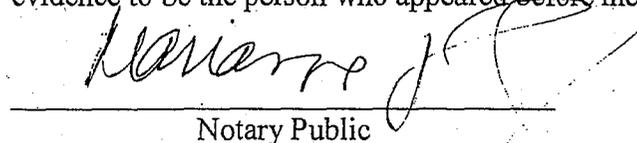
11. On May 15, 2009, I conferred with Mr. Berchtold who first told me that the agency had decided against rescission, but then he said they still would deliberate on the issue. He said that this development was a 180 degree turn. He explained that the agency did not want to change the status quo because representatives of Seventeenth Street Realty had told him in a meeting the week before that Seventeenth Street Realty considered itself to be the successor to the Order and was moving forward expeditiously to clean up the site.

Executed in Orange County, California on June 15, 2009.



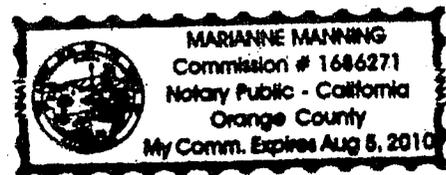
Paul N. Singarella

Subscribed and sworn to before me this 15th day of June 2009 by Paul N. Singarella, proved to me on the basis of satisfactory evidence to be the person who appeared before me.



Notary Public

My commission expires: August 5, 2010
2





California Regional Water Quality Control Board

Santa Ana Region



Winston H. Hickox
Secretary for
Environmental
Protection

Internet Address: <http://www.swrcb.ca.gov>
3737 Main Street, Suite 500, Riverside, California 92501-3339
Phone (909) 782-4130 • FAX (909) 781-6288

Gray Davis
Governor

May 11, 2000

Mr. Robert L. Veloz
1502 East Mountain Drive
Santa Barbara, California 93108

**SUBJECT: OFF-SITE CHARACTERIZATION AND REMEDIATION STATUS
J. C. CARTER FACILITY
671 WEST SEVENTEENTH STREET
COSTA MESA, CALIFORNIA
CLEANUP AND ABATEMENT ORDER NO. 90-126
CASE NO. 083000202T**

Dear Mr. Veloz:

Thank you for attending the May 9, 2000 meeting with us to discuss current and planned activities to address groundwater contamination beneath the facility. The items discussed at this meeting are summarized below:

- Based on information presented at the meeting, an air sparging/vapor extraction *pilot test* was conducted at the site from March 1999 to April 2000. Twelve vapor extraction wells were installed to facilitate this process. Please provide this office with a copy of the well installation report by July 3, 2000.

It is our understanding that the system was initially intended to operate for 30 days to evaluate the applicability of this technology. However, the operating period was extended to provide additional data. The system was shut down in April due to the consistently low influent concentrations. The results of this test indicated that it is not likely that a residual source in soil is present in the vicinity of the extraction points, and a more aggressive technology would be required to positively effect a change in groundwater conditions at this site.

- The current activities have been ineffective in reducing the concentrations of chlorinated hydrocarbons in groundwater beneath the site. Therefore, we require physical testing to examine alternative remedial methods, such as dual phase extraction or other appropriate technologies. Please notify this office as soon as feasibility testing is scheduled. Please submit the results of the feasibility evaluation and a remedial action plan to this office by August 8, 2000.

California Environmental Protection Agency

Mr. Veloz

- 2 -

May 11, 2000

- We discussed the investigation of potential residual sources in soil through extended vapor extraction testing. We are requesting a workplan to conduct this investigation in the areas of wells MW-1 and MW-12 as discussed in the meeting. Please submit the workplan to this office by July 3, 2000.
- We discussed the previously proposed off-site assessment that was prepared and submitted in response to the Board's mandate for characterizing the offsite extent of contamination. We agreed that your current consultants would review that workplan, dated February 12, 1998, which was prepared by Environ, and provide a recommendation for how to proceed. Please submit a brief workplan addendum to this office by July 3, 2000.

Following the meeting, we toured the site and inspected the well locations. We were impressed with the good housekeeping practices observed at the facility and the maintenance of the wells and vapor extraction/air sparging system. During this inspection, other Regional Board staff noted that a potential offsite well south of Well MW-16 appeared feasible. We ask that this be considered during your consultants' review of Environ's workplan.

We are anxious to expedite this process. Therefore, feel free to provide the requested materials before the specified deadlines whenever possible. If you have any questions, please call me at 909-320-6375.

Sincerely,



Rose Scott
Associate Engineering Geologist
Pollutant Investigation Section

cc: Sylvia Marson, J. C. Carter Company, Inc.
Kevin Miskin, SECOR International Incorporated
A.L. Simmons, A.L. Simmons Consultants, Inc.
Diane R. Smith, Law Offices of Diane R. Smith

California Environmental Protection Agency

BEFORE THE
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION

In re

ROBERT L. VELOZ,

Petitioner

Case No. _____

AFFIDAVIT OF ROBERT L. DICKSON, JR.

I, Robert L. Dickson, Jr. hereby declare and state as follows:

1. I am a Senior Paralegal in the Environment, Land & Resources Department of Latham & Watkins LLP. I have been with Latham & Watkins for 15 years, and a paralegal for 9 years.

2. Latham & Watkins has been retained by Mr. Robert Veloz with regard to a regulatory notice letter sent to Mr. Veloz by Rose Scott of the Santa Ana Regional Water Quality Control Board ("Regional Board") regarding property located at 671 West 17th Street, Costa Mesa, California ("Site"). The property was the subject of Cleanup and Abatement Order No. 90-126 (CAO). I have been assisting Latham & Watkins attorneys in their representation of Mr. Veloz in this matter.

3. On October 16, 2008, at approximately 3:30 p.m., I participated in a telephonic conference call with Mr. Veloz; Paul Singarella, a Latham & Watkins partner; and Regional Board staff member Rose Scott.

4. During the conference call, which lasted approximately an hour and 15 minutes, I took detailed notes. The purpose of this affidavit is to preserve key statements relating to the subject property made by Rose Scott during the conference call.

5. Ms. Scott indicated that, when she initially took over the case/file years ago, she met with Mr. Veloz and his attorneys, who presented their case. Subsequent to that meeting and a review of the utilization of the basin and its background water quality, the Regional Board gave the Site a low priority, but did not rescind the CAO.

6. Ms. Scott indicated that the only reason the Regional Board began to work on the Site was because the current owners, Seventeenth Street Realty LLC ("Seventeenth"), are seeking to redevelop the Site.

7. Ms. Scott further stated that Argo-Tech is currently leasing the Site from Seventeenth. Property investigations undertaken pursuant to the sale of the property identified

problems in the cryogenics area of the property, which continues to operate. Ms. Scott characterized the problem as not something new, that had occurred at a much earlier date.

8. Mr. Singarella requested that Ms. Scott describe the recent Regional Board activities involving the Site. In response, Ms. Scott stated that the current activities "came to our office as a new case." Seventeenth approached the Regional Board and asked that the Regional Board look at their data and assist them with a voluntary cleanup plan so that they could redevelop the property.

9. Ms. Scott described a meeting she participated in with representatives of Seventeenth, including an attorney and two consultants from Tetra Tech who had the testing data. They went over the data collected during the property investigations and identified a DNAPL plume, and a source of TCE contamination.

10. Ms. Scott stated that she had not directed Seventeenth to perform the property investigation work, which included core penetrometer testing, sampling, etc. She further stated that Seventeenth performed the work "as property owners who wanted to redevelop" the Site into mixed residential and commercial uses. She also stated that the property would not qualify for residential uses with the existing groundwater contamination.

11. Ms. Scott stated that after the meeting and review of the property investigation reports and data, the Regional Board did not direct a "major cleanup" but "agreed to work with" Seventeenth so the property would be able to qualify for mixed residential use.

12. Ms. Scott stated that no formal letters were drafted until after the Regional Board received Seventeenth's Corrective Action Plan (CAP), dated June 26, 2008. Upon receipt of the CAP, it became necessary to formalize the Site activities, as Seventeenth was not identified as the Site owner in Regional Board records, or on the CAO. When Ms. Scott asked if Seventeenth could be formally identified as the responsible party for the Site, the representatives replied "no, no, no, no - we don't want to do that." Ms. Scott recalls that Seventeenth thought that any alleged non-compliance with the CAO could be corrected via monitoring and off-site characterization.

13. Regarding the CAO, Ms. Scott cannot find any record of a formal decision by the Regional Board or State Water Resources Control Board. She indicated that she would like to close out the CAO, as work performed by Seventeenth during its property investigation appears to have satisfied the CAO's outstanding directives, which were off-site assessment/characterization and quarterly monitoring.

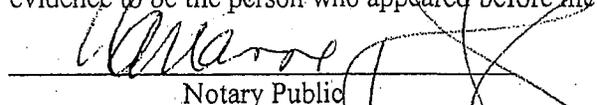
14. Ms. Scott stated that DNAPL was not something that the Regional Board tolerated in the region, and that removal of the DNAPL would be required before a case was closed out. Regional Board staff's position is that the DNAPL source is on site at the property. The Regional Board is now in the process of working out who is responsible for the DNAPL contamination. Ms. Scott stated that she believes the source is from an "earlier time" and that responsibility was never determined.

Executed in Orange County, California on June 15, 2009.



Paul N. Singarella on behalf of, and
at the consent of Robert L. Dickson, Jr.

Subscribed and sworn to before me this 15th day of June 2009
by Paul N. Singarella, proved to me on the basis of satisfactory
evidence to be the person who appeared before me.



Notary Public

My commission expires: August 5, 2010



