Court of Appeal No. H031540

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA et al.,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA,

Respondent.

ATLANTIC RICHFIELD COMPANY, et al.,

Real Parties in Interest.

Santa Clara County Superior Court No. CV 788657
Hon. Jack Komar, Judge Presiding

PETITIONERS' RESPONSE TO AMICUS CURIAE BRIEF OF THE AMERICAN CHEMISTRY COUNSEL

Ann Miller Ravel (#62139)
Santa Clara County Counsel
Aryn P. Harris (#208590)
OFFICE OF THE SANTA CLARA COUNTY COUNSEL
70 West Hedding Street
San Jose, CA 95110
Telephone: (408) 299-5900
Facsimile: (408) 292-7240

Dennis Herrera (#139669)
San Francisco City Attorney
Owen J. Clements (#141805)
SAN FRANCISCO CITY ATTORNEY'S OFFICE
1390 Market Street, Sixth Floor
San Francisco, CA 94102
Telephone: (415) 554-3800
Facsimile: (415) 554-3837

[Additional Counsel Listed Inside]

Michael J. Aguirre (#60402)
City Attorney
Sim von Kalinowski (#96096)
Chief Deputy City Attorney
OFFICE OF THE SAN DIEGO CITY ATTORNEY
1200 Third Avenue # 1620
San Diego, CA 92101
Telephone: (619) 533-5803

Richard E. Winnie (#63048)
County Counsel
Raymond L. MacKay (#113230)
Deputy County Counsel
ALAMEDA COUNTY OFFICE OF THE COUNTY COUNSEL
1221 Oak Street, Suite 450
Oakland, CA 94612-4296
Telephone: (510) 272-6700

Dennis Bunting (#55499)
County Counsel
SOLANO COUNTY COUNSEL
Solano County Courthouse
675 Texas Street, Suite 6600
Fairfield, CA 94533
Telephone: (707) 784-6140

Thomas F. Casey III, County Counsel
Brenda Carlson (#121355)
Rebecca M. Archer (#202743)
SAN MATEO COUNTY COUNSEL
Hall of Justice and Records
400 County Center Sixth Floor
Redwood City, CA 94063
Telephone: (650) 363-4760

Raymond G. Fortner, Jr. (#42230)
County Counsel
Donovon M. Main (#45582)
Robert E. Ragland (#175357)
Deputy County Counsel
LOS ANGELES COUNTY COUNSEL
500 West Temple St, Suite 648
Los Angeles, CA 90012
Telephone: (213) 974-1811

Jeffrey B. Issacs (#117104)
Patricia Bilgin (#164090)
Elise Ruden (#124970)
OFFICE OF THE CITY ATTORNEY
CITY OF LOS ANGELES
500 City Hall East
200 N. Main Street
Los Angeles, CA 90012
Telephone: (213) 978-8097

John A. Russo (#129729)
Christopher Kee (#157758)
OAKLAND CITY ATTORNEY
One Frank H. Ogawa Plaza, 6th Flr.
Oakland, CA 94612
Telephone: (510) 238-3601

Charles J. McKee (#152458)
County Counsel
William M. Litt (#166614)
Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
COUNTY OF MONTEREY
168 West Alisal Street 3rd Floor
Salinas, CA 93901
Telephone: (831) 755-5045

Frank M. Pitre (#100077)
Nancy L. Fineman (#124870)
Ara Jabagchourian (#205777)
Douglas Y. Park (#233398)
COTCHETT, PITRE & McCARTHY
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000

Michael P. Thornton *(Pro Hac Vice)*
Neil T. Leifer *(Pro Hac Vice)*
THERON & NAUMES
100 Summer Street, 30th Floor
Boston, MA 02110
Telephone: (617) 720-1333

Fidelma Fitzpatrick *(Pro Hac Vice)*
Aileen Sprague *(Pro Hac Vice)*
MOTLEY RICE LLC
321 South Main Street
P.O. Box 6067
Providence, RI 02940-6067
Telephone: (401) 457-7700

Mary Alexander (#104173)
Jennifer L. Fiore (#203618)
MARY ALEXANDER & ASSOCIATES
44 Montgomery Street, Suite 1303
San Francisco, CA 94104
Telephone: (415) 433-4440

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INTRODUCTION

The American Chemistry Council's ("Chemistry Council") amicus curiae brief is built on distortions of California law governing public entities and their lawyers. The Chemistry Council advances ethical standards and manufactures disqualifying conflicts that are not supported by the law. The Chemistry Council also turns presumptions about how lawyers will resolve ethical conflicts on their heads.

The Chemistry Council further claims that the Political Reform Act prohibits the government from retaining contingency-fee counsel because it gives private counsel a prohibited financial interest in the outcome of the case. However, the contingency fee contracts in this case merely give private counsel a stake in their *own* contract. They do not allow private counsel to steer other public contracts to themselves or to related third parties, which is the type of conflict of interest prohibited by the Act. California decisions, including *Clancy,* endorse the use by public entities of contingency fee agreements in the proper circumstances, which completely undermines the Chemistry Council's Political Reform Act argument. Further, the Fair Political Practices Commission, the governing body in charge of enforcing the Act, has opined that analogous fee arrangements were proper.

The Chemistry Council next claims that public entities are violating the competitive public bidding process. The legislature, however, has exempted contracts for highly specialized professionals, such as lawyers, from the competitive bidding process and the California Supreme Court has endorsed the wisdom of that exemption.

Finally, the Chemistry Council suggests that statutory schemes for addressing lead poisoning in children are all that is needed to address the

problem. While the legislative remedies are beneficial they are reactive in nature in that they provide medical intervention and education for children who have already been poisoned. They do not prevent the poisoning in the first place, unlike the remedy sought in this case - total abatement.

ARGUMENT

I. COUNSEL IS PRESUMED AND TRUSTED TO PLACE THEIR ETHICAL OBLIGATIONS BEFORE FINANCIAL INTERESTS.

The Chemistry Council makes several arguments that private lawyers cannot, consistent with their ethical obligations, serve as co-counsel for the public under a contingency fee agreement in a public nuisance case. Many of these arguments have already been addressed by Petitioners in the Reply to the Return but some deserve additional attention.

In an effort to turn attorneys' ethical obligations and the presumptions about attorneys' conduct on their head, the Chemistry Council has suggested that the ethical dilemma presented by this case is as follows:

> The question is not whether attorneys can *generally* be counted upon to place their client's goals above their own. Nor is the question whether they can be trusted to "do their best" to do so. Instead, the issue is whether private counsel, as human beings, <u>can always</u> be trusted to do so.

(Brief at 9 [emphasis added].) The law governing attorneys does not cater to lowest common denominator. Rather it presumes that lawyers will act ethically. (*Frazier v. Superior Court* (2002) 97 Cal.App.4th 23, 36.) And mere speculation of an unethical conflict of interest, without more, is insufficient to disqualify counsel:

> As distinguished from judicial recusals, which may be required on the basis of a mere "appearance of impropriety" (Cal. Code Jud. Ethics, canon 2; see Code Civ. Proc., § 170.1,

> subd. (a)(6)(C)), *such an appearance of impropriety by itself does not support a lawyer's disqualification.* (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 305 308.) "'Speculative contentions of conflict of interest cannot justify disqualification of counsel.' [Citation.]" (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 582.)

(*Dch Health Servs. Corp. v. Waite* (2002) 95 Cal.App.4th 829, 833 [emphasis added].) As the Preamble to the ABA Model Rules recognizes, these and other duties and interests of the attorney sometimes are in conflict. Attorneys, however, are expected to resolve such conflicts "through the exercise of sensitive professionalism and moral judgment." (ABA Model R., Preamble.) Or, as Sharon Dolovich puts it, the conflicts are resolved through the exercise of "the quality of integrity." (*See* Sharon Dolovich, Ethical Lawyering and the Possibility of Integrity, 70 Fordham L. Rev. 1629, 1636 (2002).)

Moreover, the foundation for the Chemistry Council's argument that courts should presume that an attorney lacks the internal ability to balance their ethical duties is based on the assertion that extreme zealous advocacy must exclusively guide the conduct of an attorney's representation. (Brief at 6.) The Chemistry Council proffers that this duty is achievable and consistent with other ethical duties only when "both the private client and private lawyer share the goal of maximizing recovery." (*Id.*) Here, the Chemistry Council's claims that the private lawyers' goal of maximizing recovery is inconsistent with the public's goal of seeking justice.

Yet, no authority is cited for this overly simplistic formulation of ethical duties, which has been increasingly rejected as contrary to the interests of society. In fact, much of the article to which the Chemistry Council cites for this very argument is a criticism of this formulation on

these grounds. (70 Fordham L. Rev. at 1636.) More accurately, "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." (ABA Model R., Preamble.) "[A]n attorney, as a person licensed to practice law, is considered an 'officer of the court,' with certain public duties and responsibilities incident to that status." (1 Witkin Cal. Procedure (4th 1996) Attorneys § 2, p. 35.)

In addition to owing a duty of zealous representation to one's client, an attorney owes duties to other constituencies, such as: a duty of candor to the tribunal, (ABA Model R. 3.3); a duty of fairness to an opposing party and counsel, (ABA Model R. 3.4); a duty to the public and tribunal to maintain the tribunal's decorum and impartiality, (ABA Model R. 3.5); and a duty of truthfulness to all. (ABA Model R. 4.1.)

Thus, zealous advocacy is only one of many duties that govern a lawyer's conduct. The premise that lawyers will be motivated by their financial interests to the detriment of the client is not supported by the law. One author has even argued that this viewpoint represents an unfairly prejudicial mind-set:

> It is rank prejudice to believe that an attorney who bears the risk that she will earn nothing for her services in order to provide those services to her client has less of that quality available than one who charges by an hourly rate.

(Scott Turow, "The Billable Hour Must Die: It rewards inefficiency. It makes clients suspicious. And it may be unethical" 93 A.B.A.J. 32 (August 2007).)

The Chemistry Council also claims that the financial interest in the outcome of a proceeding, which a contingency fee contract creates, "is wholly absent when government employees pursue the same claims" (Brief

at 7) and California law requires strict neutrality, in appearance and fact, for attorneys representing the government. (Brief at 13 et seq.) In fact, California law not only allows, but creates, situations in which government attorneys have an interest in the outcome of certain types of proceedings. Under the civil forfeiture provision of the Uniform Controlled Substances Act, funds from the forfeiture of seized property (net of expenses of sale) are distributed inter alia: "Ten percent to the prosecutorial agency which processes the forfeiture action" (Cal. Health & Safety Code § 11489(b)(2)(B)) and sixty-five percent of such funds to the "law enforcement entities that participated in the seizure." (*Id.*, § 1489(b)(2)(A).)

The Chemistry Council's interpretations of a lawyer's ethical conflicts do not hold water. Zealous advocacy is but one part of a lawyers duties and can be reconciled with a lawyers other duties even when the lawyer serves on a contingency fee basis.

II. THE CALIFORNIA POLITICAL REFORM ACT DOES NOT PROHIBIT PUBLIC ENTITIES FROM RETAINING OUTSIDE COUNSEL ON A CONTINGENT FEE BASIS.

The Chemistry Council asserts that the California Political Reform Act (Government Code § 81000 et seq.) bars public entities from retaining contingency counsel, because contingency counsel necessarily have a financial interest in the outcome of the matter for which they are retained. The Chemistry Council cites no authority in support of this remarkably broad assertion, which fails for several reasons.

First, the Chemistry Council's Political Reform Act argument proves too much. If accepted, this argument would categorically bar all California public entities from *ever* retaining contingency fee counsel, because

attorneys working for a contingent fee by definition have a financial stake in the outcome of the engagement. Even Real Parties concede that there are situations in which public entities appropriately may hire contingency fee counsel, e.g., to protect their own proprietary interests or to recover damages in tort cases. (Return at 46.)

Second, California Courts have repeatedly stated that public agencies can hire contingency fee counsel in appropriate circumstances. The *Clancy* decision itself, which was decided eleven years after the Political Reform Act was adopted, noted that "[c]ertainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case." (*People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 748, citing *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580; see also *City and County of San Francisco v. Philip Morris* (1997) 957 F.Supp. 1130, 1135.) Thus, the supposed categorical rule against contingency fee contracts with public agencies, suggested by the Chemistry Council, has yet to be discovered by the courts.

Third, the Chemistry Council misconstrues the nature of the conflict of interest provisions of the Political Reform Act. That Act does not prohibit a contractor from having an interest in the outcome of its own contract. Such a "conflict" is inherent in the nature of contracting. Service providers always have an interest in maximizing their own compensation, whether calculated on an hourly or a percentage basis, and the public entity always has an interest in minimizing costs consistent with the other objectives of the contract. So long as the compensation to be provided under a contract is negotiated up front and specifically set forth in a contract approved by the appropriate public officials, a "negotiating conflict" over the amount to be paid to a vendor does not create any conflict of interest

under the Political Reform Act.

Finally, although the Chemistry Council does not cite to any authority interpreting the Political Reform Act, this area is not a blank slate. The California Fair Political Practices Commission has approved of legal services contracts with public entities in analogous circumstances, including contracts in which compensation was contingent on the outcome of the representation. In the *McEwen Advice Letter*, the Commission considered the issue of:

> whether [a] law firm remains a potentially disqualifying economic interest for the "consultant" attorney when the attorney participates in agency decisions that will foreseeably result in a payment, including additional fees, to the attorney's law firm from the agency.
>
> Our answer to this question depends upon the contract under which the "consultant" attorney provides legal services to the governmental agency. If the contract, as it exists at the time the attorney participates in the agency's decision, expressly provides for payment for the additional services required from the law firm, then we do not believe that the attorney would be participating in making any agency decisions that would have a foreseeable financial effect on the attorney's law firm. This is because the governmental decision to pay the law firm for the legal services specifically enumerated in the contract has already been made by disinterested agency officials and the attorney's participation merely constitutes the implementation of that preexisting decision.

(*McEwen Advice Letter*, 1993 Cal. Fair-Pract. LEXIS 4, *16-17.)

The Commission then applied this general principle to a number of different hypotheticals, including two that are determinative here. First, the Commission considered a hypothetical involving a contract city attorney who qualified as a consultant under the act. The Commission concluded

that a contract city attorney could permissibly render legal advice concerning pending or threatened litigation, even though the city attorney's law firm would likely be asked to provide additional legal services as a result of that decision, provided that "the contract under which the city attorney participates in making these decisions expressly provides for payment for the litigation work which is discussed." (*Id.* at *18-19.)

Next, the Commission considered whether bond counsel can be paid a fee that is in part contingent on the size or success of a bond issue, when bond counsel participates in determining the size of the bond issue. The Commission concluded:

> A bond counsel may be compensated by a city on a contingent fee basis. Bond counsel may participate in the determination of the size of the bond issue, provided the contract under which the bond counsel is making this governmental decision includes payment in this form for the legal services rendered by the bond counsel.

(*Id.* at *27-28.)

The same result follows here. Private counsel played no role in advising the Boards of the public agency plaintiffs whether those Boards should enter into the contingency fee agreements at issue. Instead, those Boards obtained neutral advice from their County Counsels or City Attorneys about whether and on what terms to enter such contracts. Once the Boards approved those contracts, it creates no conflict of interest for private counsel to provide the contracted services in exchange for the specified compensation. The fact that the compensation is specified as a percentage of recovery, rather than on an hourly basis, makes no difference to the conflict of interest analysis.

III. HIGHLY EXPERIENCED LEGAL COUNSEL ARE EXEMPT FROM THE COMPETITIVE PUBLIC BIDDING PROCESS.

The Chemistry Council argues that because the State Attorney General "has direct supervision over the district attorneys of the several counties of the State . . ." and certain provisions of state law outline a procedure by which ***state agencies*** open legal work to competitive bidding based on an hourly rate, the ***counties and cities***, which are plaintiffs in this action, are also required to engage in the same bidding process. (See Brief at 18-19 [quoting Cal. Gov. Code § 12550].) This argument is both simplistic and wrong. As the Second District Court of Appeal stated regarding an analogous argument offered over 50 years ago, "[t]he contention here made has long since been denied judicially and legislatively." (*Cobb v. Pasadena City Board of Education* (1955) 134 Cal.App.2d 93, 96.)

In 1946, the California Supreme Court, reaffirmed its holding of five years earlier that notwithstanding statutory or city or county charter provisions to the contrary, "[t]he employment of a person who is highly and technically skilled in his science and profession is one which may properly be made without competitive bidding." (*Kennedy v. Ross* (1946) 28 Cal.2d 569, 582 (quoting *City and County of San Francisco v. Boyd* (1941) 17 Cal.2d 606, 620).) The Court explained that this rule flowed from a pragmatic approach that seeks to facilitate the procurement by city and counties the very best services available:

> It has long been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not

> apply.

(*Id.* at 581 [internal quotation omitted].) Thus, the Court continued:

> Provisions as to competitive bidding have been held not to apply to contracts for personal services depending upon the peculiar skill or ability of the individual, ***such as an attorney at law*** . . .

(*Id.* [internal quotation omitted; emphasis added]; see also *Graydon v. Pasadena Development Agency* (1980) 104 Cal.App.3d. 631, 635.)

Six years later, the Second District Court of Appeal recognized that the California State Legislature had added Section 53060 to the Government Code in 1951 to bring it into accord with these decisions and "remove[] all questions of the necessity of advertising for bids for 'special services' by a person specially trained and experienced and competent to perform the special services required." (*Cobb,* 134 Cal.App.2d at 96.) In relevant parts, Section 53060 stated then, as it states now:

> The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district of special services and advice in . . . ***legal*** . . . matters if such persons are specially trained and experienced and competent to perform the special services required.
>
> . . .
>
> The legislative body of the corporation or district may ***pay from <u>any</u> available funds such compensation <u>as it deems proper</u> for services rendered.***

(Cal. Gov. Code § 53060 [emphasis added]; *compare Cobb*, 134 Cal.App.2d at 95-96 [quoting from the section as enacted in 1951].) Sections that vest the same authority in the legislative bodies of cities and counties contain the same operative language. (*See* Cal. Gov. Code § 31000 [giving the county board of supervisors the authority to contract for

special services, including ***"legal"*** services, and pay for those services "from any available funds such compensation ***as it deems proper*** . . ."]; Cal Gov. Code § 37103 [giving the legislative body of city governments the same authority].)

The Chemistry Council's argument wholly ignores this controlling judicial and statutory authority. It instead states that it would be "incongruous to presume" that the California State Legislature would both give the State Attorney General ultimate supervision over county district attorneys and yet provide a different process by which counties and cities can hire and compensate outside counsel than that applicable to state agencies. (Brief at 19.) As the above shows, there is no need to presume, the State Legislature has given the legislative bodies of cities of counties the authority to compensate outside counsel hired for special services in any manner ***they "deem[] proper."*** (Cal. Gov. Code §§ 31000, 37103 [emphasis added].)

Nor is this grant of authority incongruous with the State Attorney General's ultimate supervisory authority over actions by county district attorneys and the different process by which state agencies are required to hire outside counsel. Rather, the grant reflects the reasoned judgment of the California State Legislature that the legislative bodies of local governments should have the authority to exercise ***their*** reasoned judgment in deciding which outside counsel to hire for the particular special services it needs and how it should best compensate them for such services. (*See generally Harvey v. County of Butte (*1988) 203 Cal.App.3d 714, 725-27.) That the State Legislature may have determined that a state agency does not have the same authority when it hires outside counsel is not incongruous but rather appears to reflect labor relations particular to state agencies. (*See* Cal. Gov.

Code § 11045.) Furthermore, it is arguably quite sensible given the fact that executive agencies lack of the same direct democratic checks to which a county or city legislative body is subject.

The State Legislature's grant to the State's chief prosecutor of ultimate supervisory authority over county level prosecutors is merely a restatement of Article V, Section 13 of the California Constitution, and reflects the section's purpose that "the laws of state are uniformly and adequately enforced." (Cal. Const. Art. V § 13; *see* 4 Witkin & Epstein Cal. Crim. Law [3d ed. 2000] Intro. to Crim. Proc. § 15, pp. 22-23.) The Chemistry Council's argument ignores these distinctions, the reasoned determinations which underlie them, and the statutory enactments which embody them.

IV. THE CALIFORNIA LEGISLATURE'S LEAD PAINT POISONING PREVENTION PROGRAM TREATS THE SYMPTOM. THIS LITIGATION TREATS THE PROBLEM.

The Chemistry Council claims that because the legislature created a statutory scheme to address the State's childhood lead poisoning problem, this litigation is unnecessary (Cal. Health & Saf. §§105275-105310). In fact, the Chemistry Council accuses Petitioners of wasting public resources because this legislative scheme is the better remedy. (Brief at 27.) In support, the Chemistry Council points out that the number of children with extremely high blood lead levels has declined nationwide.

While Petitioners commend the legislative, administrative, and public health efforts that have made progress in reducing the number of children poisoned by high levels of lead, frankly they have their limits. For one, treatment of lead poisoned children and intervention efforts occur

because a child has already elevated blood lead levels.[1] In other words, the child already already has been poisoned. Thus, the statutory scheme provides reactive intervention efforts to reduce the neurological and cognitive damage that has already occurred by reducing the blood levels and treating the symptoms. Thereafter, educational efforts and sometimes abatement are used to reduce continued exposure. Conversely, this litigation seeks to wipe out the lead hazard before a child is harmed - perhaps irreparably - by preventing the lead poisoning in the first place.

A second limitation to legislative and administrative processes is that, unlike the judicial system, they are vulnerable to partisan agendas of the lead industry. For instance, in 2002, the CDC Advisory Committee on Childhood Lead Poisoning Prevention was preparing to consider whether to revise the 1991 federal standard for lead poisoning.[2] This Advisory Committee is charged with assessing the scientific data and recommending changes to CDC policy to prevent lead poisoning, including assessing whether the blood lead level limits were adequate. These blood lead levels are then used to determine which children are at risk for adverse health effects, and how much remediation must be done to ensure that a lead-contaminated site is safe. The Committee has guided major changes in lead poisoning policy for more than a decade.[3] For example, in 1991, the acceptable blood lead level limits were revised from 25 μg/dL (micrograms per deciliter, the unit used to measure blood lead levels) down to 10 μg/dL in a report released by CDC and developed in part by the Advisory

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[1]http://www.dhs.ca.gov/childlead/html/chld_rsk.html

[2]http://www.ucsusa.org/scientific_integrity/interference/lead-poisoning-prevention-panel.html

[3]www.cdc.gov/nceh

Committee.

In March 2002, the Advisory Committee issued Recommendations entitled "Managing Elevated Blood Lead Levels Among Young Children," which provided health care case managers guidance on how to assess and treat children with elevated blood lead levels.[4] This report revealed disturbing changes to the membership of the Advisory Committee that indicated that the nominations of renowned scientists with a long record in determining the health effects associated with childhood lead poisoning were rejected, and that instead the vacancies were filled by individuals who have direct ties to the lead industry and a financial interest in the policies adopted by the Advisory Committee.[5] In fact, one of the appointee's was Dr. William Banner, who served as an expert witness for the lead industry in the Rhode Island litigation and testified that lead is harmful only at levels that are 7-10 times as high as the current CDC blood lead levels and that lead does not cause childhood cognitive disorders.[6]

The Chemistry Council urges the Court to allow the legislature to fix the problem. But the lead industry has proven able to permeate the same process that has allowed for the nationwide decline the Chemistry Council touts as evidence that this litigation is unnecessary. Moreover, since the Advisory Committee that guides lead prevention policies is packed with industry insiders it is easy for the industry to claim that legislative and administrative efforts are addressing the problem. This litigation is not susceptible to the lead industry's influences and seeks to abate the entire

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[4]http://www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm

[5]http://www.mindfully.org/Health/2002/Lead-Into-Gold-MARKEY8oct02.htm

[6]*Id.*

problem, rather than continue to treat the most serious symptoms.

CONCLUSION

The Political Reform Act, public contracting principles, and ethical restraints on lawyers do not prohibit the use of a contingency fee agreement in this case. The Chemistry Council's distortions of the law on these points provides no basis to disqualify private counsel. Accordingly, Petitioners respectfully request that the Court grant their writ and overturn the order of the Superior Court.

Dated: September 25, 2007 SANTA CLARA COUNTY COUNSEL

By: ARYN PAIGE HARRIS
Deputy County Counsel

SAN FRANCISCO CITY ATTORNEY

By: OWEN J. CLEMENTS

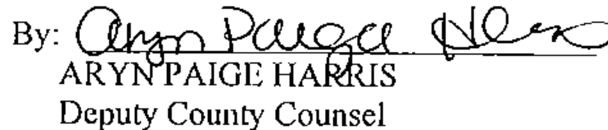
OAKLAND CITY ATTORNEY
ALAMEDA COUNTY COUNSEL
SOLANO COUNTY COUNSEL
SAN DIEGO CITY ATTORNEY
MONTEREY COUNTY COUNSEL
SAN MATEO COUNTY COUNSEL
LOS ANGELES CITY ATTORNEY
LOS ANGELES COUNTY COUNSEL
COTCHETT PITRE & McCARTHY
THORNTON & NAUMES
MOTLEY RICE LLC
MARY ALEXANDER & ASSOCIATES

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in Word Perfect for Windows software, this brief contains 3,918 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 25, 2007.

SANTA CLARA COUNTY COUNSEL

By: 
ARYN PAIGE HARRIS
Deputy County Counsel

SAN FRANCISCO CITY ATTORNEY
OAKLAND CITY ATTORNEY
ALAMEDA COUNTY COUNSEL
SOLANO COUNTY COUNSEL
SAN DIEGO CITY ATTORNEY
MONTEREY COUNTY COUNSEL
SAN MATEO COUNTY COUNSEL
LOS ANGELES CITY ATTORNEY
LOS ANGELES COUNTY COUNSEL
COTCHETT PITRE & McCARTHY
THORNTON & NAUMES
MOTLEY RICE LLC
MARY ALEXANDER & ASSOCIATES

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IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PROOF OF SERVICE BY MAIL

County of Santa Clara v. Atlantic Richfield Company, et al. Case No. H 031540

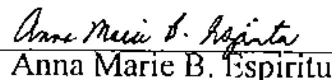
I, Anna Marie B. Espiritu, say:

I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 70 West Hedding, East Wing, 9th Floor, San Jose, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served a copy of **PETITIONERS' RESPONSE TO AMICUS CURIAE BRIEF OF THE AMERICAN CHEMISTRY COUNSEL,** by placing said copy in an envelope addressed to:

See Attached List

which envelope was then sealed, with postage fully prepaid thereon, on **September 25, 2007**, and placed for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at San Jose, California, on the above-referenced date in the ordinary course of business; there is delivery Service by United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **September 25, 2007**, at San Jose, California.



Anna Marie B. Espiritu

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SERVICE LIST

County of Santa Clara, et al. v. Atlantic Richfield Company, et al.

ATTORNEYS FOR PLAINTIFFS

Dennis J. Herrera
City Attorney
Owen J. Clements
Chief of Special Litigation
Erin Bernstein
Deputy City Attorney
SAN FRANCISCO CITY ATTORNEY
Fox Plaza
1390 Market Street, Sixth Floor
San Francisco, CA 94102
Tel: (415) 554-3800
Fax: (415) 554-3837

Michael J. Aguirre
City Attorney
Sim von Kalinowski
Chief Deputy City Attorney
OFFICE OF THE SAN DIEGO CITY ATTORNEY
CITY OF SAN DIEGO
1200 Third Avenue # 1620
San Diego, CA 92101
Tel: (619) 533-5803
Fax: (619) 236-7215

Richard E. Winnie
County Counsel
Linda L. Nusser
Deputy County Counsel
ALAMEDA COUNTY
OFFICE OF THE COUNTY COUNSEL
1221 Oak Street, Suite 450
Oakland, CA 94612-4296
Tel: (510) 272-6700
Fax: (510) 272-5020

Dennis Bunting
County Counsel
SOLANO COUNTY COUNSEL
Solano County Courthouse
675 Texas Street, Suite 6600
Fairfield, CA 94533
Tel: (707) 784-6140
Fax: (707) 784-6862

Thomas F. Casey III
County Counsel
Brenda Carlson, Deputy
Rebecca M. Archer, Deputy
COUNTY OF SAN MATEO
400 County Center, Sixth Floor
Redwood City, CA 94063
Tel: (650) 363-4760
Fax: (650) 363-4034

Raymond G. Fortner, Jr.
County Counsel
Donovon M. Main
Robert E. Ragland
Deputy County Counsel
LOS ANGELES COUNTY COUNSEL
500 West Temple St, Suite 648
Los Angeles, CA 90012
Tel: (213) 974-1811
Fax: (213) 626-7446

Jeffrey B. Issacs
Patricia Bilgin
Elise Ruden
OFFICE OF THE CITY ATTORNEY
CITY OF LOS ANGELES
500 City Hall East
200 N. Main Street
Los Angeles, CA 90012
Tel: (213) 978-8097
Fax:(213) 978-8111

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Frank M. Pitre
Nancy L. Fineman
Ara Jabagchourian
Douglas Y. Park
COTCHETT, PITRE & McCARTHY
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Tel: (650) 697-6000
Fax: (650) 697-0577

John A. Russo
Christopher Kee
OAKLAND CITY ATTORNEY
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612
Tel: (510) 238-3601
Fax: (510) 238-6500

Charles J. McKee
County Counsel
William M. Litt
Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
COUNTY OF MONTEREY
168 West Alisal Street 3rd Floor
Salinas, CA 93901
Tel: (831) 755-5045
Fax: (831) 755-5283

Michael P. Thornton
Neil T. Leifer
THORNTON & NAUMES
100 Summer Street, 30th Floor
Boston, MA 02110
Tel: (617) 720-1333
Fax: (617) 720-2445

Fidelma Fitzpatrick
Aileen Sprague
MOTLEY RICE LLC
321 South Main Street
P.O. Box 6067
Providence, RI 02940-6067
Tel: (401) 457-7700
Fax: (401) 457-7708

Mary Alexander
Jennifer L. Fiore
MARY ALEXANDER & ASSOCIATES
44 Montgomery Street, Suite 1303
San Francisco, CA 94104
Tel: (415) 433-4440
Fax: (415) 433-5440

ATTORNEYS FOR DEFENDANT
ATLANTIC RICHFIELD COMPANY

Sean Morris
Shane W. Tseng
John R. Lawless
Kristen L. Roberts
ARNOLD & PORTER
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel: (213) 243-4000
Fax: (213) 243-4199

Philip H. Curtis
William H. Voth
ARNOLD & PORTER
399 Park Avenue
New York, NY 10022
Tel: (212) 715-1000
Fax: (212) 715-1399

ATTORNEYS FOR DEFENDANT
AMERICAN CYANAMID COMPANY

Richard W. Mark
Elyse D. Echtman
ORRICK, HERRINGTON & SUTCLIFFE, LLP
666 Fifth Avenue
New York, NY 10103
Tel: (212) 506-5000
Fax: (212) 506-5151

Peter A. Strotz
Daniel J. Nichols
FELICE BROWN EASSA & McLEOD LLP
Lake Merritt Plaza
1999 Harrison Street, 18th Floor
Oakland, CA 94612-0850
Tel: (510) 444-3131
Fax: (510) 839-7940

ATTORNEYS FOR DEFENDANT
CONAGRA GROCERY PRODUCTS COMPANY

Lawrence A. Wengel
Bradley W. Kragel
GREVE, CLIFFORD, WENGEL & PARAS, LLP
2870 Gateway Oaks Drive, Suite 210
Sacramento, CA 95833
Tel: (916) 443-2011
Fax: (916) 441-7457

Allen J. Rudy
Glen W. Schofield
RUDY & SCHOFIELD
125 South Market Street, Suite 1001
San Jose, CA 95113-2285
Tel: (408) 998-8503
Fax: (408) 998-8503

James P. Fitzgerald
McGRATH, NORTH, MULLIN & KRATZ, P.C.
1601 Dodge Street, Suite 3700
Omaha, Nebraska 68102
Tel: (402) 341-3070
Fax: (402) 341-0216

Clement L. Glynn
Patricia L. Bonheyo
GLYNN & FINLEY LLP
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596
Tel: (925) 210-2800
Fax: (925) 945-1975

ATTORNEYS FOR DEFENDANT
E.I. DU PONT DE NEMOURS AND COMPANY

Steven R. Williams
Collin J. Hite
McGUIRE WOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
Tel: (804) 775-1000
Fax: (804) 775-1061

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ATTORNEYS FOR DEFENDANT MILLENNIUM INORGANIC CHEMICALS, INC.

Michael Nilan
HALLELAND, LEWIS, NILAN & JOHNSON, P.A.
600 U.S. Bank Plaza South
222 South Sixth Street
Minneapolis, MN 55402-4501
Tel: (612) 338-1838
Fax: (612) 338-7858

James C. Hyde
ROPERS, MAJESKI, KOHN & BENTLEY
80 North lst Street
San Jose, CA 95113
Tel: (408) 287-6262
Fax: (408) 918-4501

ATTORNEYS FOR DEFENDANT NL INDUSTRIES, INC.

James H. McManis
William W. Faulkner
Matthew Schechter
McMANIS, FAULKNER & MORGAN
50 W. San Fernando Street, 10th Floor
San Jose, CA 95113
Tel: (408) 279-8700
Fax: (408) 279-3244

Donald T. Scott
BARTLIT, BECK, HERMAN, PALENCHAR & SCOTT
1899 Wynkoop Street, Suite 800
Denver, CO 80202
Tel: (303) 592-3100
Fax: (303) 592-3140

Timothy Hardy
837 Sherman, 2nd Floor
Denver, CO 80203
Tel: (303) 733-2174

ATTORNEYS FOR DEFENDANT THE SHERWIN-WILLIAMS COMPANY

Charles H. Moellenberg, Jr.
Paul M. Pohl
JONES DAY
One Mellon Bank Center
500 Grant Street, 31st Floor
Pittsburgh, Pennsylvania 15219
Tel: (412) 391-3939
Fax: (412) 394-7959

Brian J. O'Neill
JONES DAY
555 South Flower Street, 50th Flr
Los Angeles, CA 90071
Tel: (213) 489-3939
Fax: (213) 243-2539

John W. Edwards, II
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Tel: (650) 739-3912
Fax: (650) 739-3900

ATTORNEYS FOR AMICUS CURIAE
THE AMERICAN CHEMISTRY COUNSEL

Richard O. Faulk
John S. Gray
GARDNER WYNNE SEWELL LLP
1000 Louisiana, Suite 3400
Houston, TX 77002-5007
Tel: (713) 273-5500
Fax: (713) 276-6500

Jay E. Smith
STEPTOE & JOHNSON LLP
633 West Fifth Street, Suite 700
Los Angeles, CA 90071
Tel: (213) 439-9430
Fax: (213) 439-9599

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OTHER COURTS & ENTITIES

Clerk of the Court
Santa Clara Superior Court
Old Courthouse
161 North First Street
San Jose, CA 95113

Edmund G. Brown, Jr.
California Attorney General
1300 I Street
Sacramento, CA 94244

(4 copies)
Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102