

TO: MR. GRANT DESTACHE, Acting Chair and Presiding Officer for Pre-Hearing Proceedings

FROM: DESIGNATED PARTIES PARTICIPATING IN PROCEEDING

RE: Tentative Cleanup and Abatement Order R9-2011-0001 (Shipyard Sediment Site)

SUBJECT: **REPORT TO PRESIDING OFFICER ON "MEET-AND-CONFER" RE SELECTION OF DISCOVERY REFEREE, PER OCTOBER 27, 2010, "ORDER REOPENING DISCOVERY PERIOD, (ETC.)"**

## **INTRODUCTION**

This memorandum is submitted to the Presiding Officer to comply with the Presiding Officer's request for a report on the results of the meet-and-confer process regarding the selection of a Discovery Referee in this matter, as set forth in Section VI of the above-referenced Order. It is jointly submitted by the following Designated Parties who are participating in the above-referenced administrative enforcement proceeding (in alphabetical order):

BAE Systems San Diego Ship Repair, Inc. (formerly Southwest Marine, Inc.) ("BAE Systems")  
Campbell Industries, Inc.  
City of San Diego ("City")  
Cleanup Team, Regional Water Quality Control Board, San Diego Region  
Environmental Health Coalition  
National Steel and Shipbuilding Company (NASSCO)  
San Diego Coastkeeper  
San Diego Gas & Electric Company ("SDG&E")  
San Diego Unified Port District ("Port District")  
Star & Crescent Boat Company ("Star & Crescent")  
United States Navy ("Navy")

## **MEET-AND-CONFER PROCESS AND RESULTS**

On November 4, 2010, the Port District circulated a letter to the other Designated Parties to initiate the meet-and-confer process regarding the selection of a Discovery Referee. A copy of that letter is attached as "Exhibit A" to this memorandum. The Port District proposed that Mr. Gallagher be excused as the Discovery Referee in this proceeding and suggested four alternative candidates to serve in that role. The Port District's expressed concern is that Mr. Gallagher serves in multiple roles, including his role in mediating this matter with certain Designated Parties, as well as his roles as the Discovery Referee and Mediator for allocation purposes in the related federal litigation. Consequently, from the Port District's perspective, there is risk of, and opportunity for, *ex parte* communications concerning discovery matters that may be presented for dispute resolution in this proceeding. A conference call was set for November 9, 2010, to discuss the Port District's proposal.

On November 8, 2010, BAE Systems submitted its written response to the Port District's proposal, which is attached hereto as "Exhibit B." BAE Systems expressed its support for having Mr. Gallagher continue in his role as the Discovery Referee, given his extensive experience with and knowledge of the matters at issue, and given the parties' prior stipulation to have him serve in that role in these proceedings and in the related federal litigation. BAE Systems proposed that Mr. Gallagher continue to serve as Discovery Referee, with his rulings subject to appeal to the Presiding Officer. It also denied that there had been any *ex parte* communications regarding discovery issues and said there was no risk for such communications because there had been no mediation sessions for several weeks and none were currently planned.

The Designated Parties submitting this report participated in a conference call on November 9, 2010. The Port District discussed its lingering concerns regarding the integrity of the process and the risk of *ex parte* communications with Mr. Gallagher. It disagreed with BAE Systems' position that there had been no such communications to date. No other party joined in the Port District's proposal to select a new Discovery Referee. Environmental Health Coalition, San Diego Coastkeeper, the Cleanup Team, NASSCO, and SDG&E all expressed support for continuing to retain Mr. Gallagher, although not necessarily for all of the same reasons outlined in BAE Systems' letter. Those supporting parties pointed to the increased cost and potential delays associated with getting a new Discovery Referee "up-to-speed;" the retainer required by Judicate West (with whom three of the proposed candidates are affiliated);<sup>1</sup> the lack of any such *ex parte* communications regarding discovery issues, the parties' awareness of their ethical duties; the parties' avoidance of substantive discussions with Mr. Gallagher regarding topics that may become the subject of a discovery dispute; Mr. Gallagher's impartiality in ruling on prior discovery disputes; and the fact that there would be a right to appeal any ruling to the Presiding Officer. These parties did not believe the appeal process would pose timing issues, even given the current discovery schedule, anticipating that rulings would be made quickly by Mr. Gallagher and the Presiding Officer.

The Navy, on the other hand, said it shared the Port District's concerns regarding *ex parte* communications, but stated it does not object to Mr. Gallagher serving as the Discovery Referee. Navy's counsel stated he intends to address the issue of *ex parte* communications separately with the parties to the federal litigation.

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<sup>1</sup> The Port District counsel subsequently followed up with Judicate West and was informed that, given the concerns about a retainer and given that not all parties would necessarily be involved in discovery disputes, the retainer would be unnecessary and only the \$150 filing fee for opening the matter and running conflicts checks would be required. The hourly rates for the two Judicate West retired judges are as follows: Judge Milliken (Ret.)--\$400/hr. and Judge Sheffield (Ret.)--\$660/hr. Any "retainer" would be billed if and at the time of any discovery disputes based upon the estimated hours for that particular matter and would be billed solely to the parties involved in that dispute. Judge Papas (Ret.) does not handle discovery disputes and was eliminated from consideration. For reference purposes, Mr. Gallagher's hourly rate is \$650.

Having considered all of the comments made in the meet-and-confer process, the Port District still believes that selection of a new Discovery Referee would be best to ensure the integrity of this process. Nevertheless, the Port District is willing to agree to the appointment of Mr. Gallagher to continue to serve as the Discovery Referee in these proceedings subject to (a) the appointment being conditioned upon an order that there be no ex parte communications with Mr. Gallagher concerning any discovery matters, and (b) a right of appeal to the Presiding Officer.

# **EXHIBIT A**

# Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP  
Attorneys at Law  
Three Embarcadero Center, 12<sup>th</sup> Floor | San Francisco, CA 94111-4074  
Telephone: 415.837.1515 | Facsimile: 415.837.1516  
www.allenmatkins.com

Sandi L. Nichols  
E-mail: snichols@allenmatkins.com  
Direct Dial: 415.273.7454 File Number: 299825-00005/SF796896.01

## Via Electronic Mail

November 4, 2010

Designated Party Counsel  
(See Attached List)

**Re: In the Matter of Tentative Cleanup and Abatement Order No. R9-2011-0001**

Dear Counsel:

On behalf of the San Diego Unified Port District ("Port District"), we submit this letter to all Designated Parties, pursuant to the "Order Reopening Discovery Period, Establishing Discovery Deadlines, [etc.]," issued by Acting Chair and Presiding Officer for Prehearing Proceedings Grant Destache on October 27, 2010 (the "New Discovery Order")." Section VI of the New Discovery Order, entitled "Discovery Referee," requires the parties to meet and confer about whether to continue to engage a Discovery Referee and to report back to the Presiding Officer by November 12, 2010, about the results of the meet-and-confer process. Accordingly, by this letter, we seek to initiate the "meet-and-confer" process and set forth the Port District's position regarding the appointment of a Discovery Referee.

As suggested by Presiding Officer Destache, the Port District agrees that the appointment of a Discovery Referee is appropriate for the purposes of resolving any discovery disputes (relating to written discovery served by the Designated Parties in this proceeding and depositions noticed and taken in this proceeding), subject to the right of appeal to the Presiding Officer for final resolution. We note that this approach is consistent with the approach previously agreed to by the Designated Parties in the August 9, 2010, Stipulation entered into in this proceeding. For a variety of reasons, however, the Port District proposes that Mr. Timothy Gallagher be excused from his role as the Discovery Referee in this proceeding and that a new Discovery Referee be agreed to and appointed.

As the Designated Parties are aware, Mr. Gallagher has been serving in multiple roles. These include his prior appointment in June 2008, by then-Presiding Officer David King, as the Mediator (until the mediation was formally terminated by Mr. King on July 14, 2010), and earlier this year, as the Discovery Referee to resolve discovery disputes. In addition, Mr. Gallagher continues to meet with some, but not all, Designated Parties in their voluntary participation in mediation relating to this proceeding and the related federal court litigation. There is, therefore,

Allen Matkins Leck Gamble Mallory & Natsis LLP  
Attorneys at Law

Designated Party Counsel  
November 4, 2010

Page 2

opportunity for, if not occurrence of, "ex parte" communications by parties who continue to meet with Mr. Gallagher, relating to matters that are or could become the subject of a discovery dispute.

Consequently, to avoid any appearance or suggestion of impropriety, and for the benefit and protection of all parties, Mr. Gallagher, and the integrity of the process, the Port District proposes that one of the following retired judges be selected and appointed to serve in the role of Discovery Referee in these proceedings, assuming he/she is willing to serve and has no conflicts of interest. Each of these judges has excellent credentials, experience, and a reputation for fairness. Their respective qualifications are attached to this letter for your reference.

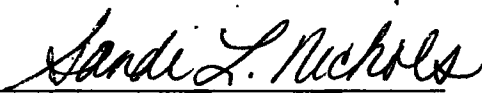
1. The Honorable Ann Kough (Ret.), JAMS Los Angeles
2. The Honorable James R. Milliken (Ret.), Judicate West, San Diego
3. The Honorable Leo Papas (Ret.), Judicate West, San Diego
4. The Honorable William Sheffield (Ret.), Judicate West, San Diego

Given the relatively short timeframe within which we need to report back to the Presiding Officer, we would like to schedule a conference call to discuss this proposal, and any other proposals that may be offered this week, on either Monday, November 8, or Tuesday, November 9, at 10:00 a.m. I can circulate dial-in information once we have an agreed-upon date and time for the call.

Thank you in advance for your consideration of this proposal.

Very truly yours,

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By:   
Sandi L. Nichols  
Attorneys for San Diego Unified  
Port District

SLN:kn  
Enclosures

**ADDRESSEE LIST**

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Christian Carrigan, Esq. Senior Staff Counsel, State Water Resources Control Board ccarrigan@waterboards.ca.gov	Attorney for RWQCB Clean up Team <b>Served via email</b>
Raymond Parra, Esq. Raymond.parra@baesystems.com	Attorney for BAE Systems Ship Repair <b>Served via email</b>
Michael McDonough, Esq. Michael.mcdonough@bingham.com	Attorney for BP West Coast Products LLC <b>Served via email</b>
Christopher McNevin, Esq. chrismcnevin@pillsburylaw.com	Attorney for Chevron USA, Inc. <b>Served via email</b>
Brian Ledger, Esq. bledger@gordonrees.com	Attorney for City of San Diego <b>Served via email</b>
Nate Cushman, Esq. Nate.cushman@navy.mil	Attorney for U.S. Navy <b>Served via email</b>
Marco Gonzalez, Esq. <u>marco@coastlawgroup.com</u>	Attorney for Environmental Health Coalition & SD Coastkeeper <b>Served via email</b>
James Handmacher, Esq. <u>jvhandmacher@bvmm.com</u>	Attorney for Marine Construction & Design; Campbell Industries <b>Served via email</b>
Leslie FitzGerald, Esq. lfitzger@portofsandiego.org	Attorney for San Diego Unified Port District <b>Served via email</b>
Melanie Andrews, Esq. Melanie.andrews@usdoj.gov	Attorney for U.S. Navy <b>Served via email</b>
David Barrett, Esq. dbarrett@sempra.com	Attorney for Sempra Energy and San Diego Gas & Electric Company <b>Served via email</b>
Matthew Dart, Esq. Matthew.dart@dlapiper.com	Attorney for BAE Systems Ship Repair <b>Served via</b>
Gabe Solmer, Esq. Gabe@sdcoastkeeper.org	Attorney for San Diego Coastkeeper <b>Served via email</b>
Tom Stahl, Esq. Thomas.stahl@usdoj.gov	Attorney for U.S. Navy <b>Served via email</b>
Kelly E. Richardson, Esq. Kelly.richardson@lw.com	Attorney for NASSCO <b>Served via email</b>

1	Mike Tracy, Esq. Mike.tracy@dlapiper.com	Attorney for BAE Systems Ship Repair, Inc. <b>Served via email</b>
3	James Dragna, Esq. Jim.dragna@bingham.com	Attorney for BP West Coast Products <b>Served via email</b>
5	Steven Goldberg, Esq. sgoldberg@downeybrand.com	Attorney for BAE Systems Ship Repair, Inc. <b>Served via email</b>
6	Vincent Gonzales, Esq. vgonzales@sempra.com	Attorney for Sempra Energy <b>Served via email</b>
8	Jennifer Lucchesi, Esq. Jennifer.lucchesi@slc.ca.gov	Attorney for CA State Lands Comm. <b>Served via email</b>
9	Matthew Luxton, Esq. Matthew.luxton@nassco.com	Attorney for NASSCO <b>Served via email</b>
11	Karl Lytz, Esq. Karl.lytz@lw.com	Attorney for NASSCO <b>Served via email</b>
12	David Mulliken, Esq. David.mulliken@lw.com	Attorney for NASSCO <b>Served via email</b>
14	Frederick Ortlieb, Esq. fortlieb@sandiego.gov	Attorney for City of San Diego <b>Served via email</b>
15	Douglas Reinhart, Esq. Douglas.reinhart@bp.com	Attorney for BP <b>Served via email</b>
17	Miles Scully, Esq mscully@gordonrees.com	Attorney for City of San Diego <b>Served via email</b>
18	David Silverstein, Esq. David.silverstein@navy.mil	Attorney for U.S. Navy <b>Served via email</b>
20	Jill Tracy, Esq. jtracy@semprautilities.com	Attorney for Sempra Energy and San Diego Gas & Electric Company <b>Served via email</b>
22	Roslyn Tobe, Esq Roslyn.tobe@navy.mil	Attorney for U.S. Navy <b>Served via email</b>
23	Brian Wall, Esq. bwall@chevron.com	Attorney for Chevron <b>Served via email</b>
25	Jill Witkowski, Esq. jill@sdcoastkeeper.org	Attorney for San Diego Coastkeeper and Environmental Health Coalition <b>Served via email</b>
27	Sarah Brite Evans, Esq. sarah@sshbclaw.com	Attorney for Star & Crescent Boat Company <b>Served via email</b>
28	Scott Spear, Esq. Scott.spear@usdoj.gov	Attorney for U.S. Navy <b>Served via email</b>



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Sharon Cloward  
Sharon@sdpta.com

Representative of Port Tenants Association  
**Served via email**

William D. Brown, Esq.  
bbrown@brownandwinters.com

Attorney for San Diego Unified Port District  
**Served via email**



Hon. Ann Kough (Ret.)

Hon. Ann Kough (Ret.) most recently served in the Los Angeles Superior Court as one of seven complex litigation judges and has earned a reputation for fairness, efficiency, and thoroughness in handling the most difficult and contentious cases.

**ADR Experience and Qualifications**

- Presided over virtually every substantive area of law, including:
  - Business/Commercial
  - Toxic Tort
  - Environmental
  - Construction Defect
  - Insurance
  - Employment
  - Legal Malpractice
  - Medical Malpractice
  - Personal Injury

**Representative Matters**

- Special master in federal court action involving television industry
- Discovery referee in multi-million dollar dispute over business interference involving major shopping malls
- Discovery referee for toxic cleanup dispute between the City of Santa Monica and numerous oil companies regarding MTBE in groundwater
- Discovery referee for class action product liability lawsuit regarding dental bonding agent
- Arbitrator in multi-million dollar construction defect matter involving resort
- Trial judge by reference for eminent domain action between oil pipeline and railroad
- Dispute over construction of the Belmont high school complex, including related legal malpractice action. Included claims by the School Board of False Claims Act violations by the general contractor and subcontractors and improper environmental analysis by legal counsel
- Related class actions and individual disputes between approximately 100 homeowners associations, as well as individual homeowners, and their insurance carriers over damages incurred in the 1994 Northridge Earthquake
- Related class action lawsuits concerning the timing of payments of wages in the entertainment industry, involving more than 30 parties
- All class actions and individual suits in the state of California over injuries alleged to have been caused by the drug Rezulin, involving more than 100 parties and the use of a website for case management
- Judicial Council Coordinated consumer action against various hotels over compliance with environmental laws re: cigar smoke, involving more than 50 parties
- Related class actions and individual lawsuits over fax advertising, commonly referred to as "blast faxes," including legal issue of first impression concerning interplay of state law and the federal TCPA
- Consumer dispute over compliance with environmental laws concerning the transportation, storage, and loading of coal products in the ports of Los Angeles and Long Beach, CA
- Disputes over mold and other toxic substances allegedly found in large apartment complexes
- Numerous construction defect actions involving large developments with hundreds of subcontractors
- Investment fraud matter involving large law firm and large accounting firm that allegedly induced international investors to invest in undercapitalized company

**Honors, Memberships, and Professional Activities**



T: 213-620-1133  
F: 213-620-0100

*"My job as a neutral is to assist the parties in resolving their dispute in the most efficient, cost effective, and fair manner so that they can return to their day-to-day matters."*

**Case Manager**

Geri Yulo  
JAMS  
707 Wilshire Blvd.  
46th Floor  
Los Angeles, CA  
90017  
213-253-9711 Phone  
213-620-0100 Fax  
Email:  
gyulo@jamsadr.com

- Distinguished Service Award, San Fernando Valley Bar Association, 1997
- Member, Academy of Court Appointed Masters, 2006-present
- Member, California Judges Association (Executive Board Member, 1995-1997), 1989-present
- Member, National Association of Women Judges (Chair, 2000 Annual Conference Committee), 1989-present
- Frequent speaker at numerous legal seminars, including:
  - Los Angeles County Bar Environmental Law Super Symposium, 2005
  - ABA Corporate Counsel Section Seminar, 2002
  - West Coast Casualty's Construction Defect Seminar, 2001
  - Women's Forum Focus, 2000, 1995
  - Consumer Attorneys Association of Los Angeles seminar, 1996, 1997
  - Barrister's Walk Thru Program, San Fernando Valley Bar Association, 1997
  - California Judges' Association Annual Conference, 1993
- Faculty, California Center for Judicial Education and Research, 1992-1998
- Faculty, Continuing Judicial Studies Program, 1992-1996

**Background and Education**

- Judge, Superior Court (Complex Litigation program and "fast track" civil), 1997-2002
  - Judge, Municipal Court, Los Angeles Judicial District, 1989-1997
  - General Counsel, Pacific Triangle Management Corporation, 1986-1988
  - Partner, O'Loughlin, Kough & Katz, 1983-1986
  - Associate, Loeb & Loeb LLP, 1982-1983
  - Deputy City Attorney, City of Los Angeles, 1979-1982
  - J.D., University of California, Los Angeles School of Law, 1978
  - M.A., Sociology, California State University, Fullerton, 1977
  - B.A., Sociology, *magna cum laude*, Whitworth College, Spokane, WA, 1973
-



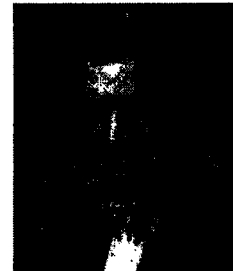
Results Beyond Dispute

PH: 619.438.8800  
LX: 619.438.8800  
www.judicatenwest.com

NEUTRAL BIO

## HON. JAMES R. MILLIKEN, RET.

After his retirement from the San Diego County Superior court in 2003, Hon. James R. Milliken began to focus his attention to private judging. Prior to his distinguished career on the bench, Judge Milliken was a partner at one of San Diego's most prestigious law firms, McGinnes, Fitzgerald, Rees, Sharkey & McIntyre for over 16 years. While in practice, he tried several types of cases including, but not limited to, professional malpractice, both medical and legal, securities, products liability, aviation, wrongful death, insurance coverage and all types of personal injury cases. While in practice, Judge Milliken served as an arbitrator for the San Diego County Superior Court's Arbitration panel. Many clients have commented on Judge Milliken's very kind demeanor as well as his extensive knowledge of the law. Clients have also commented that as a mediator "Judge Milliken grasps the issues at hand very quickly and communicates well with the parties in order to facilitate a settlement that is agreeable to all involved." As an arbitrator, one client commented that "You will always get a fair shot with Judge Milliken and that's all you can ask for."



### LEGAL CAREER & PRIOR EXPERIENCE

- Arbitrator, Mediator and Private Judge (2003-Present)
- Supervising Judge of Family Court, San Diego (2001-03)
- Presiding Judge of Juvenile Court, San Diego (1996-03)
- Presiding Judge, San Diego Superior Court (1994-95)
- Assistant Presiding Judge, San Diego Superior Court (1992-93)
- Judge, San Diego Superior Court, assignments included Law and Motion, civil and criminal trials (1998-03)
- Partner, Private Practice: McInnis, Fitzgerald, Rees, Sharkey & McIntyre; Managing Shareholder and Chairman of the Executive Committee specializing in Product Liability, Medical Malpractice, Real Property, Personal Injury, Aviation, and Tort Matters with over 100 trials going to verdict (1971-88)
- Deputy City Attorney (1970-71)

### EDUCATION & PROFESSIONAL AFFILIATIONS

- President, Inn of Court, San Diego (1983-84)
- Director, San Diego Bar Association (1980-83)
- Director, Inn of Court, San Diego (1978-84)
- Member, American Board of Trial Advocates (1976-Present)
- J.D., California Western School of Law (1970)
- B.A., Occidental College (1965)
- Former member, Association of Trial Lawyers in America, and Southern California Association of Defense Counsel

### ADR EXPERIENCE & SPECIALTIES

- Insurance Bad Faith
- Professional Negligence
- Real Estate
- Family Law
- Personal Injury Matters

### ACHIEVEMENTS & AWARDS

- Judge of the Year by the San Diego Trial Lawyers Association in 1990 and by Consumer Attorneys of San Diego 1995, and 1999;
- National Court Appointed Special Advocates Association 2002;
- Legal Professional of the Year, San Diego County Bar Association 1999 and many other awards.

- Judge Milliken was responsible for initiating noted reforms including the Substance Abuse Recovery System for foster children.

**HOBBIES & INTERESTS**

- His Hobbies include working with the county and state government to facilitate policy change and reform. Enjoys golfing, fishing and spending time with his family.

**LOCATIONS**

- Los Angeles County
- San Diego County
- Orange County



*Results Beyond Dispute*

THE ASSOCIATION  
OF MEDIATORS  
OF CALIFORNIA WESTERN

NEUTRAL BIO

## HON. LEO S. PAPAS, RET.

Retired Federal Magistrate Judge

Judge Papas was appointed a Federal Magistrate Judge for The Southern District of California in 1991. After 18 years of service, he has left the bench to pursue his passion for mediation as a full time neutral. During his tenure on the bench, Judge Papas mediated more than 3,800 cases ranging from simple to multi-issue complex matters with national implications. A prime example of his capacity as a mediator is the successful settlement of the Chapter 11 Roman Catholic Diocese of San Diego priest abuse litigation. All 144 claims were resolved, over and above his normal courthouse duties, in three months for \$200 million. Judge Papas has also devoted substantial time to projects for at risk children and a variety of ADR related projects including mediation advocacy, legal ethics and intellectual property. His mediation skills were utilized in India and Turkey where he consulted with courts and governmental agencies to establish mediation programs and taught, advised and mentored students and mediators. He was rewarded for his judicial and other civic contributions by being named Judge of the Year in 2003 by the San Diego County Bar Association and Co-Judge of the Year in 2007 by the Consumer Attorneys of San Diego. His aptitude for technology also earned him District Court and 9th Circuit committee memberships involving evaluation and selection of hardware and software systems. After experiencing his warm and engaging personality, you will understand why he is such a sought after mediator. Judge Papas' unpretentious nature, unwavering work ethic, and his ability to be steadily persistent, generate trust and pave the way to settlement. He is an eternal optimist and believes that every case can settle.



### MEDIATION ONLY

- This neutral is available only for cases involving Mediation.

### LEGAL CAREER & PRIOR EXPERIENCE

- United States Magistrate Judge, Southern District of California (1991-2009), Presiding Judge (2002-2007)
- Law Offices of Leo S. Papas, APC, General Civil Litigation (1977-1991)
- Hervey, Mitchell, Ashworth & Keeney, General Civil Litigation (1974-1977)
- US Marine Corps (1969-1975), Captain, Office of Staff Judge Advocate (1969-1973)

### EDUCATION & PROFESSIONAL AFFILIATIONS

- National College of District Attorneys (1971), Naval Justice School (1970)
- JD Drake University Law School (1969)
- BA University of Nebraska & Northwest Missouri State University (1966)
- Federal Judicial Center Mediation Skills Program for U.S. Magistrate Judges (1999)
- Admitted to practice law, Iowa (1969), California (1972), Southern District of CA (1972), Central District (1976)
- Intellectual Property Program, Univ. of CA, Berkeley, Berkeley Center for Law & Technology (2008)
- San Diego Inn of Court Board of Directors (2007-Present)
- San Diego County Bar Association, Judicial Advisor to Ethics Committee (2003-Present)
- San Diego County Board of Directors (1989-91), Secretary (1989-1990)
- San Diego Lawyer Magazine Advisory Board (2006-Present)
- San Diego County Bar Foundation Board of Directors (1989-1991)
- San Diego Trial Lawyers Association, Board of Directors (1987-1989), Vice President (1989-1991)
- San Diego County Superior Court Judge Pro Tem, Arbitrator, Mediator (1988-1991), Three Judge Settlement Panel (1988-1991)
- Director, Judges in the Classroom, U.S. District Court, San Diego Unified School District (1995-2009)
- Member, San Diego County Bar Association Children at Risk Committee (2000-Present)

- Member, 9th Circuit Public Information and Community Outreach Committee (2003-2006)
- Board Member, Association of Business and Trial Lawyers (2003-2004)
- Member, U.S. District Court Forms Task Force (2005-2009)
- Member, San Diego County Bar Association Civility, Integrity and Professionalism Committee (2007-2008)
- Member/Arbitrator, San Diego County Bar Association Client Relations Committee (1974-1991)
- Founder/Creator, Reader Program, Porter Elementary (2004-Present)
- Speaker, "Discussion of Settlement Techniques", Federal Bar Association and Pan Asian Bar Association (2006)
- Speaker, "Mediation Advocacy-Beyond the Basics", San Diego Bar Association (2009)
- Speaker, "Local Rules and Best Practices", San Diego Intellectual Property Lawyers Association (2009)
- Advisor, Local Chapter of Federal Bar Association, ADR Section, (2010)
- Speaker, Consumer Attorneys of San Diego, 2nd Annual Class Action Symposium (2009)
- Speaker, San Diego Bar Assoc. Legal Ethics Committee, Future Shock: An Interactive Legal Ethics Program (2010)
- Member, Enright Inn of Court (2010-present)
- Advisor, Association of Business Trial Lawyers (2010-present)

#### **ADR EXPERIENCE & SPECIALTIES**

- Intellectual Property
- Class Actions
- Securities
- Shareholder Suits
- ERISA
- Highly Sensitive and/or Catastrophic Personal Injury
- Employment
- Wage and Hour
- Americans with Disability Act (ADA)
- Business Commercial
- Jones Act/Maritime
- Mortgage/Foreclosure
- Franchise
- Professional Liability
- Bankruptcy Adversary Proceedings
- Federal Tort Claims Act (FTCA)
- Government/Agency Condemnation

#### **ACHIEVEMENTS & AWARDS**

- Traveled to India and Turkey consulting to establish mediation programs in courts and with governmental agencies
- United States Marine Corps Officer Leadership Award (1970)
- San Diego County Bar Association, Outstanding Jurist of the Year (2003)
- Inducted into Washington High School Athletic Hall of Fame (2006)
- Consumer Attorneys of San Diego Co-Judge of the Year (2007)
- Panelist, San Diego County Bar Association Ethics Committee presentation 'Navigating Waivers' (2010)
- In 2010 Judge Papas was selected by the Daily Journal as a Top Neutral in the state of California.

#### **HOBBIES & INTERESTS**

- Judge Papas and his wife travel frequently, visiting their son in New York and daughter and grandchildren in San Francisco. He enjoys volunteer work and is involved in many outreach programs for the SDCBA, Courts, and schools. He plays a lot of golf and is developing an interest in xeriscape gardening.

#### **LOCATIONS**

- Los Angeles County
- Ventura / SB Counties
- San Diego County
- Inland Empire
- Orange County
- Northern California

#### **RECENT ARTICLES**

- **Setting the Stage - Making the Most of Pre-Mediation Communications**





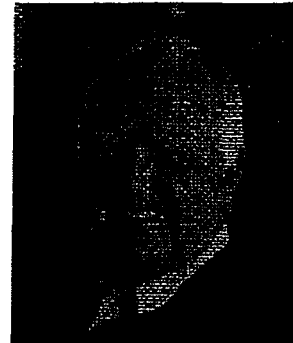
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PH: 800.855.8805  
FAX: 714.534.1544  
www.JudicateWest.com

NEUTRAL BIO

## HON. WILLIAM SHEFFIELD

Since 1993 Judge Sheffield has been a full-time Neutral and has conducted over 5000 arbitrations and mediations. While distinguishing himself as a noted speaker on Alternative Dispute Resolution domestically and internationally, he serves as an Arbitrator, Mediator, Discovery Referee and Private Judge on cases involving Catastrophic Injury, Construction Defect, Toxic Mold, Business Contracts, Insurance Coverage, Entertainment and all types of Employment/Workplace disputes. Judge Sheffield enjoys the challenge of settling difficult and complex cases, especially those requiring energy, tenacity and creativity. In 2002, 2003, 2006, 2007 and 2009, he was selected by the Daily Journal as one of California's Top Neutrals. As an Arbitrator, our clients, both plaintiffs and defendants, respect Judge Sheffield's superior intelligence and insight, his independent approach to making difficult, tough calls and his unique insight into the credibility of witnesses. As a Mediator, he is widely commended by counsel for his innovative solutions in resolving disputes, his exceptional patience, his especially sensitive manner with clients and his ability to settle even the most difficult cases. "For cases I absolutely must settle, I trust Judge Sheffield over anyone," one client remarked—many others concur.



  
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### LEGAL CAREER & PRIOR EXPERIENCE

- Associate Justice, Court of Appeal, assigned by Chief Justice of California (1984)
- Judge, Superior Court of California, Orange County (1983-84)
- Private Practice: sole practitioner, trial attorney, emphasizing Complex Civil Matters, Business, Personal Injury and Real Property (1972-83)
- General Counsel (Orient): Church of Jesus Christ of Latter-Day Saints (1987-89)
- Former instructor in Law, Western State University, Fullerton
- ADR Consultant to the Government of India (1993-97)

### EDUCATION & PROFESSIONAL AFFILIATIONS

- M.A.R., Yale University, New Haven, Connecticut (1967)
- J.D., University of California at Berkeley, Boalt Hall (1971)
- B.A. (Philosophy), California State University at Long Beach (1968)
- Member, American Bar Association, Intellectual Property Law section
- Member, Los Angeles County Bar Association, Intellectual Property & Entertainment Law sections
- Member, Century City Bar Association, Entertainment Law section
- Member, California State Bar, Intellectual Property Law section
- Member, National Association of Television Program Executives

### ADR EXPERIENCE & SPECIALTIES

- Personal Injury
- Real Property
- Construction
- Employment/Labor
- Insurance Coverage/Bad Faith
- Complex Business
- Commercial Disputes

### ACHIEVEMENTS & AWARDS

- Judge Sheffield is AV rated by Martindale-Hubbell.

- He was also ranked among the "Best Lawyers in America" in both 2006 & 2007 ([www.bestlawyers.com](http://www.bestlawyers.com)).
- Judge Sheffield was selected as a "Top Neutral in the State" by the Daily Journal in 2002, 2003, 2006, 2007, 2009 & 2010.

### **HOBBIES & INTERESTS**

- In his free time, Judge Sheffield enjoys traveling, racquetball, photography and being an author and inventor.

### **LOCATIONS**

- Los Angeles County
- Ventura / SB Counties
- San Diego County.
- Inland Empire
- Orange County
- Northern California

### **REPRESENTATIVE CASES**

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- JW Spotlight - Daily Journal
- Daily Journal 2009 Top Neutral Profile

# **EXHIBIT B**



DLA Piper LLP (US)  
401 B Street, Suite 1700  
San Diego, California 92101-4297  
www.dlapiper.com

Matthew B. Dart  
matthew.dart@dlapiper.com  
T 619.699.2628  
F 619.764.6728

November 8, 2010  
*Via email*

Counsel for all Designated Parties

**Re: In the Matter of Tentative Cleanup and Abatement Order No. R9-2011-0001**

Dear Counsel:

Pursuant to Section IV of the Acting Chair/Presiding Officer's October 27, 2010 discovery order, designated parties BAE Systems San Diego Ship Repair Inc. and Southwest Marine, Inc. (collectively "BAE Systems") submit this letter to meet and confer regarding whether to continue to engage a discovery referee for purposes of resolving discovery disputes in these proceedings.

BAE Systems proposes the designated parties continue to engage Timothy Gallagher as discovery referee to resolve discovery disputes in these proceedings. For several reasons, BAE submits that Mr. Gallagher is the appropriate choice for this role.

First, as noted by Acting Chair/Presiding Officer Destache, and as all designated parties are aware, Mr. Gallagher has acted as mediator and discovery referee during a substantial portion of these proceedings. (Oct. 27, 2010 Order, at § II.) His experience with and understanding of the matters at issue, the parties, the facts, and the procedural history of these proceedings, is unmatched. That experience has served and will continue to serve the interests of all parties and the integrity of the proceedings.

Second, following the expiration of Mr. Gallagher's formal appointment as discovery referee in the Presiding Officer's February 18, 2010 Final Discovery Plan, the designated parties met and conferred regarding discovery and ultimately entered in the August 9, 2010 stipulation. That stipulation, in relevant part, provides:

6. Timothy Gallagher, Esq., the appointed Discovery Referee in the Final Discovery Plan, is authorized to resolve any discovery disputes that may arise during the extended discovery period provided by this stipulation. Any decision by Mr. Gallagher regarding a discovery dispute may be appealed to the Presiding Officer, but Mr. Gallagher's decision will be final absent an appeal and final ruling by the Presiding Officer.

Thus, *all parties* voluntarily re-affirmed their confidence in Mr. Gallagher's ability to serve as discovery referee by stipulating amongst themselves to designate Mr. Gallagher as the arbiter of discovery disputes arising during the extended period covered by the August 9, 2010 stipulation.



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Third, in the parallel federal action (*City of San Diego v. National Steel and Shipbuilding Company, et al.*, 09-CV-2275 W (BGS)), all parties, including the Port District, submitted a Joint Motion for Adoption of Preliminary Discovery Plan on July 7, 2010. That joint motion specifically proposed that “[u]nresolved disputes shall be resolved by Timothy Gallagher, as the Phase I Discovery Referee (“Discovery Referee”).” Joint Motion, at 6:19-20. United States Magistrate Judge Hon. Bernard G. Skomal subsequently approved that request and it became an express provision of his July 15, 2010 Order granting the joint motion and setting the discovery schedule. Judge Skomal added a provision that the “parties may appeal discovery rulings to Judge Skomal by following his Chamber’s Rules regarding Discovery Disputes.” *Id.* at 5:9-10. That procedure is analogous to the process encouraged by the Acting Chair/Presiding Officer Destache in his October 27, 2010 Order (discovery referee’s ruling subject to final resolution by Presiding Officer). Notably, in the federal action neither the Port District nor any other party have suggested that Mr. Gallagher is unfit to serve as discovery referee. BAE Systems’ position is that Mr. Gallagher should continue as discovery referee in these proceedings, with his rulings subject to appeal to the Presiding Officer, consistent with the stipulated and Court-approved procedure in place in the federal action.

Fourth, with respect to the Port District’s suggestion of the opportunity for, if not the occurrence of, *ex parte* communications by parties who continue to meet with Mr. Gallagher as part of the voluntary mediation, BAE Systems strongly disagrees. Voluntary mediations sessions have not been held for several weeks, nor are any currently planned, thus the asserted opportunity for such improper communications is lacking. Moreover, aside from the lack of opportunity, the parties participating in that process have maintained, and would continue to maintain, a segregation of issues. Mediation sessions relate to mediation issues, not discovery disputes. Discovery issues have not been discussed *ex parte* with Mr. Gallagher, consistent with the ethical duties of the parties and Mr. Gallagher. For example, designated party NASSCO recently raised certain issues related to discovery propounded to Environmental Health Coalition and San Diego Coastkeeper. Following party-to-party communications, NASSCO brought the issues to the attention of discovery referee Mr. Gallagher via letter dated October 26, 2010, *copying all parties*. Thus, BAE Systems finds the suggestion of actual or potential *ex parte* communications with Mr. Gallagher to be unfounded and an insufficient reason to remove Mr. Gallagher from consideration for the position of discovery referee.

Fifth, as all the parties realize, these proceedings are complex. Mr. Gallagher brings a truly unique skill set to deciding discovery disputes in this matter. Many of the disputes likely will involve aspects of the Cleanup and Abatement Order and/or Draft Technical Report. Mr. Gallagher has direct first-hand experience with both documents having been present when



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significant portions of both documents were created. His experience and understanding of the documents is truly unique which no amount of money can replicate. Furthermore, while disputes likely will be adjudicated via the California Code of Civil Procedure, much of what governs the parties' interactions as well as liability revolves around administrative law concepts. The individuals suggested by the Port District in its November 4, 2010 letter to serve as replacement discovery referee all appear to lack Mr. Gallagher's extensive administrative law experience and background.

Selecting and appointing a person unfamiliar with the current proceedings to serve as discovery referee would likely require significant costs to the parties in the form of time necessarily incurred becoming sufficiently familiar with the facts, parties and proceedings to effectively and fairly rule on discrete discovery issues. No such costs would be associated with the re-appointment of Mr. Gallagher as discovery referee.

For all of these reasons, BAE Systems proposes retaining Mr. Gallagher to continue serving as discovery referee in these proceedings. We will, however, be prepared to discuss the issue further with you tomorrow.

Very truly yours,

**DLA Piper LLP (US)**

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Matthew B. Dart, Esq.

Admitted to practice in California

cc: Distribution

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