IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

SAVE THE PLASTIC BAG COALITION, Petitioner and Respondent, v. CITY OF MANHATTAN BEACH, Respondent and Appellant.	)	CASE NO. S180720 Court of Appeal, 2d Appellate District, Division 5 Case No. B215788 (Los Angeles County Superior Court Case No. BS116362)

CITY OF MANHATTAN BEACH'S ANSWER TO AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION

OF THE DECISION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE

ROBERT V. WADDEN, JR. [SBN 108865]
CITY ATTORNEY
CITY OF MANHATTAN BEACH
1400 Highland Avenue
Manhattan Beach, CA 90266
Tel: (310) 802-5061
Fax: (310) 802-5251
Attorney for Appellant City of Manhattan Beach

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 2

a.) *Respondent Does Not Have Standing Under Code of Civil Procedure Section 1086* 2

b.) *Citizen's Actions Are For Actual Citizens* 3

c.) *Respondent Is Not A "Citizen" For Purposes of Environmental Litigation* 4

d.) *Existing Law Implies A "Zone Of Interest" Test Similar To Federal Law For Non-Human Entities Filing Citizens Actions* 8

III. CONCLUSION 10

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

PAGE(S)

CASES

Waste Management of Alameda County Inc. v. County of Alameda
(2000) 79 Cal.App.4th 1223 ..... 1, 3 - 12

Santiago Water Dist. v. County of Orange
(1981) 118 Cal.App.3rd 818, 832. 2

Mission Hospital Regional Medical Center v. Shewry
(2008) 168 Cal.App.4th 460, 479 2

Board of Social Welfare v. County of L.A.
(1945) 27 Cal.2nd 98 3

Green v. Obledo
(1981) 29 Cal.3rd 126, 144 ..... 3, 4

Carsten v. Psychology Examining Comm. Of the Bd. Of Med. Quality Assurance
(1980) 27 Cal.3rd 793 ..... 4, 5, 7

Laidlaw Environmental Services, Inc. v. County of Kern
(1996) 44 Cal.App.4th 346 ..... 5, 7

Regency Outdoor Advertising Inc. v. City of West Hollywood
(2007) 153 Cal.App4th 825 ..... 5, 10

Marshall v. Pasadena Unified School Dist.,
(2004) 119 Cal.App.4th 1241 7

STATUTES

Code of Civil Procedure Section 1086 2

Public Resources Code, § 21003, subd. (f). 11

MEMORANDUM OF POINTS & AUTHORITIES

I.

INTRODUCTION

The amicus brief of Pacific Legal Foundation ("PLF") touches on some interesting issues which are not unique to the instant case. PLF urges a standing doctrine which negates the traditional "beneficial interest" test imposed by the legislature and proposes a standing formula for the citizen action exception to the "beneficial interest" rule so liberal that virtually any one wishing to sue a public entity for any reason would have standing. PLF's arguments actually eclipse the very notion of standing permitting any one the right to sue as a "citizen" even in the absence of anything like a "beneficial interest" in the subject matter of the statute or right being litigated.

PLF's brief does acknowledge the precedential value of *Waste Management of Alameda County Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223 to appellant's objection to respondent's standing in this case (something respondent has steadfastly refused to accept throughout these proceedings) but urges this court to ignore it. PLF asks the court to ignore a litigant's clear economic interest in a CEQA case so long as that party articulates an environmental argument.

Appellant argues that if the legislature's "beneficial interest" requirement is to be meaningful, and sham litigation in the name of environmental interests is to be avoided, standing must be based on legitimate environmental impacts not economic interests.

II.

ARGUMENT

a.) *Respondent Does Not Have Standing Under Code of Civil Procedure Section 1086.*

CEQA itself lacks a specific standing requirement. However, PLF admits in its brief that a petitioner in a writ of mandate case must be "beneficially interested" pursuant to Code of Civil Procedure Section 1086. This must be the starting point for any discussion of CEQA standing requirements. (*Santiago Water Dist. v. County of Orange* (1981) 118 Cal.App.3rd 818, 832.) Clearly, if the term "beneficial interest" is to have any meaning at all, the legislature in enacting Section 1086 must have envisioned some limitation on the right to bring a writ of mandate and was not conferring universal standing.

A special interest has generally been defined to mean that a petitioner has some special interest to be served or a particular right to be preserved or protected " . . .over and above the interest held in common with the public at large." (*Mission Hospital Regional Medical Center v. Shewry* (2008) 168 Cal.App.4th 460, 479.) In the instant case respondent has no such interest and has never argued that it did. Therefore the only way respondent can possibly have standing is through the filing of a "citizen" lawsuit.

b.) *Citizen's Actions Are For Actual Citizens.*

The courts have expanded standing beyond the statutory "beneficial interest" test by conferring a broad right to bring citizens suits. (*Board of Social Welfare v. County of L.A.* (1945) 27 Cal.2nd 98.) This court has characterized such actions as "exceptions" to the "beneficial interest" rule justified by the existence of a public duty and the interest of the citizen in having that duty enforced. (*Green v. Obledo* (1981) 29 Cal.3rd 126, 144.) The *Waste Management* court drew a distinction between citizens suits brought by actual flesh and blood citizens and those brought by non-human entities noting that traditionally under California law such entities had not been considered "citizens." (*Waste Management* 79 Cal.App.4th at 1237.) The court did not, however, completely preclude citizens actions brought by non-human entities but required that:

> ". . .it is appropriate to require the corporation to demonstrate it should be accorded the attributes of a citizen litigant, since it generally is to be expected that a corporation will act out of a concern for what is expedient for the attainment of corporate purposes [citations], rather than by virtue of the neutrality of citizenship." (*Id*, at 1238.)

This distinction is simply a recognition of the practical reality that non-human entities are often formed for discrete purposes which are inconsistent with or irrelevant to the right being sought to be enforced in the proposed action. A commercial entity, formed for the express purpose of making a profit by engaging in a commercial activity, is not the same as a non profit formed expressly for a public purpose such as protecting Second Amendment gun ownership rights or protecting the environment.

PLF characterizes the *Waste Management* rule as a "new rule for citizen standing." Yet, PLF acknowledges that the citizen standing exception was only first squarely articulated by the California Supreme Court in 1963 (*see Green, Supra*), and has since evolved over the years. But citizen standing is an exception to what is normally required – a beneficial interest – and the Coalition and PLF have asked this Court to extend that exception beyond its previous limits. In fact, the *Waste Management* court was not articulating a "new rule" but was summarizing and applying past decisions addressing standing.

c.) *Respondent Is Not A "Citizen" For Purposes of Environmental Litigation.*

PLF seems to acknowledge that the Waste Management decision was right (albeit for the wrong reasons) due to plaintiff's "lack of any interest in effectuating the public duty or public right" in that instance. (Amicus Brief, at 18.) Based on those circumstances, PLF suggests that such plaintiffs should not be allowed to "proceed under a citizen suit." (*Id.*) That is precisely the issue here. While respondent has argued in court that it has an altruistic interest in the environment, the facts do not bear this out. The appeals court should not have taken the respondent's claims at face value, and should have scrutinized the record to determine whether respondent had a sufficient interest in CEQA to pursue the lawsuit.

PLF suggests that so long as a plaintiff in a CEQA case raises CEQA concerns, then that plaintiff should be allowed to proceed under citizen standing. Under that theory, any plaintiff, even plaintiffs previously ruled not to have standing (e.g., in *Carsten v. Psychology Examining Comm. Of the Bd. Of Med. Quality Assurance* (1980) 27 Cal.3rd

793 and *Laidlaw Environmental Services, Inc. v. County of Kern* (1996) 44 Cal.App.4th 346), could have satisfied the citizen standing requirements by cleverly crafting their complaint. This cannot be the rule.

The ruling in the *Waste Management* case regarding corporations and "citizen standing" was followed in *Regency Outdoor Advertising Inc. v. City of West Hollywood* (2007) 153 Cal.App4th 825. In that case a corporation engaged in the business of owning billboards and wall signs sought to challenge a City ordinance regulating tall wall signs on the grounds the City had failed to comply with CEQA. The trial court and appellate court denied the petitioner standing under CEQA holding that its primary interest in the case was commercial. The petitioner asserted that it had standing to bring a citizens action. However, the appellate court, citing *Waste Management* ruled that a corporation is not automatically eligible for citizen standing because "they are not citizens" and must pass a multi-prong test to determine if they have an actual noncommercial interest in the subject matter of the lawsuit. (*Regency Outdoor Advertising,* 153 Cal.App.4th at 832-833.) The court commented that:

> "Bearing those criteria in mind, we can envision a prototypical corporation with citizen standing would likely be a nonprofit public interest group such as the Sierra Club. The criteria do not, however, apply to Regency, a for profit corporation whose principal activity is owning billboards and tall wall signs."(*Regency Outdoor Advertising,* 153 Cal.App.4th at 833.)

The test for non-human entities required by the *Waste Management* court does not, as suggested by PLF "impute" the intent of the petitioner or require an "ideology test."

In the instant case it is sufficient to look at the self proclaimed purpose of respondent to discern their purpose in bringing this action. The very name used by respondent proclaims its purpose as to "save the plastic bag." Respondent's web site says that "[t]he sole purpose of the coalition is to respond to the environmental misinformation campaign about plastic bags." (http://www.savetheplasticbag.com.) Thus, by its own admission, the dedicated purpose of the "Save The Plastic Bag Coalition" is to preserve the commercial viability of a product which is manufactured or sold by its members. Respondent is, essentially, a trade organization formed to promote and preserve a product which commercially benefits its members. It is not a group created or dedicated to a matter of public policy or concern it is a group created to promote the commercial interests of its members. In that sense it is entirely different than the Sierra Club or the National Rifle Association which are groups dedicated to public issues reflective of the concerns and policy issues of their citizen members and not of commercial objectives. Respondent's status as a petitioner in this case is no different than that of a manufacturer or wholesaler of plastic bags would be.

While business entities may have a slightly higher bar to prove citizen standing, the test is the same for business entities and non-business entities to establish beneficial interest standing.

> "Judicial recognition of citizen standing is an exception to, rather than repudiation of, the usual requirement of a beneficial interest. The policy underlying the exception may be outweighed by competing considerations of a more urgent nature. [Citations.] [¶] ... [T]he propriety of a citizen's suit requires a judicial balancing of interests, and the interest of a citizen may be considered sufficient when the public duty is sharp and the public need weighty. [Citation.]" (*Marshall v. Pasadena Unified School Dist.*, 119 Cal.App.4th 1241, citing *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1236–1237.)

PLF argues that the Court, in fashioning a rule for standing, does not look, and should not **look**, to the "status of petitioners" to determine whether they can proceed under a citizen **theory** of standing. But that is precisely what the Court did in *Carsten v. Psychology Examining Com* ., a case cited by amicus, when it held that the public interest exception did not exist in that case because the plaintiff's "interest in the subject matter was piqued by service on the board, *not by virtue of the neutrality of citizenship.*" (*Carsten*, 27 Cal.3rd at 799, emphasis added.) Similarly here, the Coalition's interest in this litigation was piqued by its economic interests, *and not by virtue of the neutrality of citizenship.* (*See also: Laidlaw,* 44 Cal.App.4th at 354 (members of advisory committee did not have standing to challenge a use permit for a hazardous waste facility under the "public

interest exception" because their interest in the subject matter was not motivated by the neutrality of citizenship).)

While respondent may make arguments which are technically related to CEQA the plain reality is that the environmental law is a vehicle being used to promote the purpose of respondent's existence which is to save the plastic bag. Respondent will not be environmentally harmed in any way by the banning of plastic bags but its members will be significantly harmed commercially by having their primary product banned from sale. In the present case the litigation is directly related to the openly admitted purpose of the existence of the nonhuman entity which is clearly and discretely commercial in nature.

d.) *Existing Law Implies A "Zone Of Interest" Test Similar To Federal Law For Non-Human Entities Filing Citizens Actions.*

The *Waste Management* court relied heavily on Federal rules for determining standing:

> ". . .we do not refer to the federal 'zone of interest' standard as authority. Rather, we cite it because it aptly states a qualification that is implicit in our rules of standing, i.e., the plaintiff's interest in the legal duty asserted must be direct rather than indirect or attenuated. [citations] An interest, including a financial or commercial interest, which is not within the zone of interests to be protected or regulated by the asserted legal duty, can only

be an indirect interest from the standpoint of the law." (*Id.* at 1234.)

The *Waste Management* court was not creating a new standing rule but attempting to articulate the application of California law to a new situation where there was no direct precedent. The trial and appellate courts in the instant case attempted to distinguish or ignore *Waste Management* and made no attempt to apply its rule or to analyze the facts to determine how or whether it applied.

The purpose of CEQA and the purpose of the EIR requirement in CEQA are entirely unrelated to the preservation of a particular commercial product and the interests of those who profit from it. One whose express purpose is to preserve the commercial viability of a specific product through whatever viable means are available is not within the zone of interest of CEQA even though they say they are.

The Federal "zone of interest" rule has the virtue of pragmatically tying the interests of the petitioner with the legislative purpose of the right being enforced a goal which is implicit in the California case law on standing if not always clearly articulated. The key to applying it is to look, not at the arguments propounded by the petitioner, but on the practical purpose of the lawsuit as related to the clearly evinced interests of the party initiating it.

III.

CONCLUSION

The biggest problem with PLF's argument on standing is that it eviscerates the very notion of standing and permits almost any one to file a writ of mandate for any reason. If PLF's arguments are a correct reading of the law why have standing requirements at all?

Clearly the courts in *Waste Management* and *Regency Outdoor Advertising* were conscious of the fact that, as in the instant case, CEQA has become a tool for the private sector to protect its commercial interests. Because CEQA is highly procedural a meritorious action may be blocked or delayed by incorrect compliance with the CEQA process. Indeed there are areas of CEQA process, such as the requirement of an EIR, which are far from clear in their application to specific facts. Often the mere delay caused by a CEQA lawsuit can change the outcome or effectively veto a decision or project regardless of the underlying merits of the project or decision or even the CEQA challenge itself. CEQA litigation is therefore a powerful and frequently used tool. As such it should be relegated to the purposes for which the CEQA statute was intended. As the *Waste Management* court noted:

> ". . . to permit a for-profit corporation to maintain a citizen's action for personal economic and competitive purposes, rather than out of demonstrable environmental concerns, would conflict with the legislatively declared

> policy that environmental review be carried out in the most efficient and expeditious manner in order to conserve financial, governmental, physical, and social resources for application toward mitigation of actual significant effects on the environment. (Pub. Resources Code, § 21003, subd. (f).)" (*Waste Management*, at 1238-1239.)

Finally, in determining standing a court should look at the underlying facts and circumstances and not simply take the statement of purpose by the petitioner at face value as occurred in this case. On the one hand respondent declared itself interested in compliance with CEQA and ensuring environmental review. On the other hand respondent's openly stated *raison d'etre* was the preservation of the product its members depend upon for their financial well being which the City's action being challenged threatened to ban. PLF says: "First, the Coalition is relying on its public interest as a citizen group, and not on any private economic interest, to bring its suit. ... Accordingly, the Coalition has standing to pursue its claim in mandamus under a citizen theory, and this Court should proceed to the merits of its petition." (PLF at 12) PLF admits that whether respondent has standing turns on whether it is pursuing its private economic interest in bringing this suit. (PLF at 12.) PLF asserts that it is not, but does not provide any facts leading to that conclusion. The trial and appellate courts needed to do more to evaluate standing, and review the record to determine whether or not respondent had an ongoing interest in the subject matter in the suit beyond its self serving statement that it

championed CEQA review since it does not appear that the Coalition pursued this action "by virtue of the neutrality of citizenship."

In summary we request that this Court apply the *Waste Management* analysis to the instant case and rule that respondent, by virtue of the fact that it was pursuing the commercial interest for which it was expressly formed in filing this case, lacked standing under CEQA.

August 26, 2010

Robert V. Wadden Jr.,
City Attorney

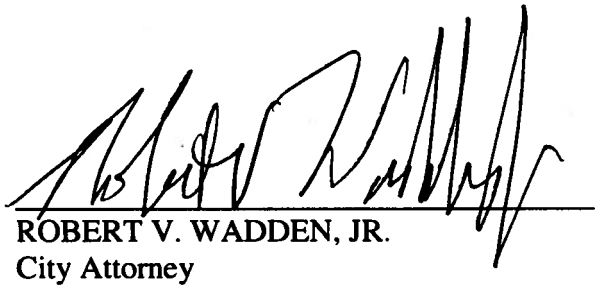
By _____
Attorneys for Appellant,
City of Manhattan Beach

CERTIFICATE OF COMPLIANCE

The word count on the word processor indicates that there were 2,945 words in the document including this certificate of compliance.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and corrected.

Dated: August 26, 2010



ROBERT V. WADDEN, JR.
City Attorney
Attorneys for Respondent,
City of Manhattan Beach

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to the within action; my business address is 1400 Highland Avenue, Manhattan Beach, California 90266. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On August 27, 2010, following ordinary business practice, I served the within **CITY OF MANHATTAN BEACH'S ANSWER TO AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION;** on the party or parties named below, by U.S. Mail, addressed as follows:

STEPHEN L. JOSEPH, ESQ.
350 Bay Street, Suite 100-328
San Francisco, CA 94133
VIA FEDERAL EXPRESS

AFSHIN DAVID YOUSSEFYEH
1875 Century Park East, Suite 1490
Los Angeles, CA 90067

Hon. David P. Yaffe
111 N. Hill Street Dept. 86
Los Angeles, CA 90012

Clerk Court of Appeals
Second Appellate District
300 S. Spring, North Tower
Los Angeles, California 90013-1213

California Supreme Court (Orig + 13 copies)
San Francisco Office
350 McAllister Street
San Francisco, CA 94102-7303
VIA MESSENGER

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 August 27, 2010, at Manhattan Beach, California.

WENDY PICKERING
Printed Name

Wendy Pickering
Signature