

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND,)
by and through PATRICK LYNCH,)
ATTORNEY GENERAL,)
Plaintiff,)
v.)
LEAD INDUSTRIES ASSOCIATION, INC.,)
et al.,)
Defendants and)
Third-Party Plaintiffs,)
v.)
RHODE ISLAND HOUSING AND)
MORTGAGE FINANCE CORPORATION, et)
al.,)
Third-Party Defendants.)

Civil Action No. 99-5226

**DEFENDANTS' MOTION TO
DISCHARGE CO-EXAMINERS AND FOR FINAL DETERMINATION OF
COMPENSATION TO CO-EXAMINERS**

Following trial, the State urged this Court to enter an order appointing a Special Master to assist in implementation of the jury's verdict. Despite the pendency of an appeal to the Rhode Island Supreme Court regarding numerous trial court orders and the verdict of abatement entered by the jury, the State requested immediate appointment of the Special Master and that the Special Master conduct proceedings including "solicit[ing] factual information and professional opinions on the manner, method, timing, cost and sequencing of the abatement of the nuisance." *See* Plaintiff's Position Paper Concerning Hiring of a Special Master to Assist in the Implementation of the Jury Verdict Ordering Abatement at 2.

In response, the Defendants moved this Court for a stay of proceedings, including any reference to a Special Master. As Defendants argued, "[t]he Defendants' appeal presents complex liability issues of first impression and serious constitutional concerns that deserve appellate review before this Court moves forward with costly and potentially time-consuming remedial proceedings." Defendants' Memorandum In Support of Motion to Stay Abatement Proceeding Pending Appeal at 1.

At the hearing on the Motion To Stay, Defendants argued that the appointment of a special master and conducting fact-finding proceedings while the appeal was ongoing would "take an incredible amount of time and effort." 5/1/07 Hearing Tr. at 10. The Court delved into the issue of cost and compensation of the Special Master, and, apparently concerned with the issue of cost allocation, asked the State about what would occur "in the event that the Supreme Court were to reverse my decision." *Id.* at 30. The State argued that, "[i]n the first instance, certainly that special master's fees should be paid by the defendants." The State reasoned that such expenses should be borne by the party that lost at trial. *Id.* In the event of reversal, the State suggested that the Defendants "could seek reimbursement" associated with the process that followed the appeal. *Id.* at 31.

In the Court's order appointing the Special Master, the Court declined to make a final ruling regarding responsibility for the fees of the Special Master. Instead, the Court ordered that "[t]he Defendants shall *initially* be jointly responsible for payment of all fees, costs, and expenses associated with the Master, and shall divide those costs in equal shares unless they agree or have agreed otherwise. Final determination of the responsibility for such costs shall be determined by the Court." Supplemental Order, ¶ 13(a) (March 3, 2008). The time for final determination has now come.

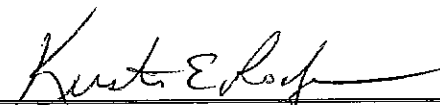
In light of the Supreme Court's reversal of the verdict, Defendants' concern about the now needless expenditure of time and money in the abatement process was well founded. Defendants incurred hundreds of thousands of dollars of expenses associated with that process. Among these costs were the fees and expenses of the two Co-Examiners and their assistants, the duties of whom should now be discharged by this Court in accordance with ¶ 14(b) of the Supplemental Order. Given that the State urged the appointment of the Co-Examiners, resisted any efforts by the Defendants to stay the process during the appeal period and, as a result, caused the Co-Examiners and their assistants to incur, to date, in excess of \$218,000 in fees and expenses, *see generally Affidavit of Kristin E. Rodgers* (attached as Exhibit A), the Defendants request that this Court issue a final determination as to compensation of the Co-Examiners pursuant to ¶ 13(a) of the Supplemental Order and order that the State reimburse to Defendants the amount of \$ 218,270.64 already paid by Defendants to the Co-Examiners and their assistants, as well as \$ 15,554.75 in transcript fees and \$ 8,295.82 in conference call fees associated with all of the interviews conducted by the Co-Examiners.¹ The State understood from the outset that in the event of reversal, it could be asked to compensate the Co-Examiners and their assistants for the work it advocated they undertake. It was well within the State's discretion to agree to a temporary halt to proceedings after the verdict until such time as the Supreme Court decided the

¹ Defendants believe that this amount, which reflects payment for services and expenses through June 30, 2008, constitutes full and final payment for all services rendered by and disbursements incurred by Co-Examiners and their assistants, given that the Supreme Court decision was issued on July 1, 2008, of which Co-Examiners were aware on that day. Defendants submit that any additional invoices that may be issued by Co-Examiners or their assistants for services, fees or disbursements that were justifiably incurred before the issuance of the Supreme Court decision but not invoiced until after that date should be paid by the State. In any event, the reimbursement to Defendants would hardly make Defendants whole for the time, expense and counsel fees they spent in participating in the process.

appeal. Instead, the State elected to continue. A consequence of its advocacy was that certain costs and fees were incurred that the State (or its counsel) should now rightfully bear.²

For all of these reasons, Defendants request this Court to issue an order (1) discharging the Co-Examiners from their duties and appointment, and (2) requiring the State to reimburse Defendants for (a) \$218,270.64 in compensation and expenses paid to the Co-Examiners and their assistants and for any additional amounts due which have not yet been invoiced to and paid by Defendants to the Co-Examiners, (b) \$15,554.75 in transcript fees, and (c) \$8,295.82 in conference call fees incurred during the Co-Examiners' proceedings.

Respectfully submitted,



Paul M. Pohl
Charles H. Moellenberg, Jr.
Laura E. Ellsworth
Bryan D. Kocher
JONES DAY
One Mellon Center
31st Floor
500 Grant Street
Pittsburgh, PA 15219
(412) 391-3939

Joseph V. Cavanagh, Jr. (#1139)
Kristin E. Rodgers (#4842)
BLISH & CAVANAGH LLP
Commerce Center
30 Exchange Terrace
Providence, RI 02903
(401) 831-8900

**Attorneys for Defendant
The Sherwin-Williams Company**

² The contingency fee agreement between the State and its counsel obligates its counsel to pay "all costs and expenses of prosecuting such action . . ." Retainer agreement dated October 8, 1999. Although the State, as the party, is initially liable for such costs, it appears that by virtue of this provision, counsel too is responsible.

Donald E. Scott
Andre M. Pauka
BARTLIT BECK HERMAN
PALENCHAR & SCOTT
1899 Wynkopp Street, 8th Floor
Denver, CO 80202
(303) 592-3100

Joseph A. Kelly (#1231)
CARROLL, KELLY & MURPHY
Turks Head Building, Suite 400
Providence, RI 02903
(401) 331-7272

**Attorneys for Defendant
NL Industries, Inc.**

Michael T. Nilan
Courtney Ward-Reichard
HALLELAND, LEWIS, NILAN, &
JOHNSON, P.A.
220 US Bank Plaza South
Minneapolis, MN 55402
(612) 338-1838

Gerald C. DeMaria (#0637)
HIGGINS, CAVANAGH & COONEY
The Hay Building
123 Dyer Street, 4th Floor
Providence, RI 02903
(401) 272-3500

**Attorneys for Defendant Millennium
Holdings LLC**

Date: July 24, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served by the method indicated below upon the following counsel of record on

July 24, 2008.

BY HAND DELIVERY:

Attorneys for Plaintiff

Attorney General Patrick C. Lynch Neil F. X. Kelly, Assistant Attorney General Office of the Attorney General 150 South Main Street Providence, RI 02903	John J. McConnell, Jr. Fidelma L. Fitzpatrick Motley Rice LLC P.O. Box 6067 321 South Main Street Providence, RI 02940-6067
--	--

BY UNITED STATES FIRST CLASS MAIL, POSTAGE PREPAID:

Attorneys for Plaintiff

Neil T. Leifer Thornton & Naumes LLP 100 Summer Street, 30 th Floor Boston, MA 02110
--

Attorneys for American Cyanamid Company

Gerald J. Petros Alexandra K. Callam Hinckley, Allen & Snyder LLP 1500 Fleet Center Providence, RI 02903-2393	Richard W. Mark Elyse D. Echtman Orrick, Herrington & Sutcliffe LLP 666 Fifth Avenue New York, NY 10103-0001
---	--

Attorneys for Atlantic Richfield Company

John A. Tarantino David A. Wollin Adler Pollock & Sheehan, P.C. One Citizens Plaza, 8th Floor Providence, RI 02903-1345	Philip H. Curtis Nancy G. Milburn Arnold & Porter LLP 399 Park Avenue New York, NY 10022
---	--

Attorneys for NL Industries, Inc.

Joseph A. Kelly Scott D. Levesque Carroll, Kelly & Murphy Turks Head Building Suite 400 Providence, RI 02903	Timothy S. Hardy Suite 4300 1999 Broadway Denver, CO 80202	Donald E. Scott Andre M. Pauka Bartlit Beck Herman Palenchar & Scott 1899 Wynkoop, Suite 800 Denver, CO 80202
---	---	---

Attorneys for Millennium Holdings LLC

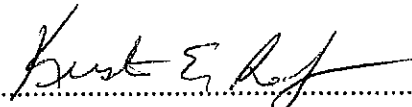
Gerald C. DeMaria Higgins, Cavanagh & Cooney The Hay Building 123 Dyer Street, 4 th Floor Providence, RI 02903	Michael T. Nilan Courtney E. Ward-Reichard Scott Smith Halleland, Lewis, Nilan, & Johnson, P.A. 600 US Bank Plaza South 220 South Sixth Street Minneapolis, MN 55402
---	--

Attorneys for ConAgra Grocery Products Company, Inc.

Joseph J. McGair Petraça and McGair, Inc. 797 Bald Hill Road Warwick, RI 02886	James P. Fitzgerald James J. Frost McGrath, North, Mullin & Kratz, PC 3700 First National Tower 1601 Dodge Street Omaha, NE 68102
---	--

Attorney for Rhode Island Housing and Mortgage Finance Corporation

Melissa M. Home Winograd, Shine & Zacks, PC 123 Dyer Street Providence, RI 02903


.....
Counsel for The Sherwin-Williams Company