OFFICE OF THE
DISTRICT ATTORNEY
COUNTY OF HUMBOLDT

PAUL V. GALLEGOS
District Attorney

WES KEAT
Assistant District Attorney

JEANNIE Y. DUNCAN
Legal Business Manager

MICHAEL R. HISLOP
Chief Investigator

February 15, 2008

Clerk of the Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *The People, ex rel. Paul V. Gallegos vs. The Pacific Lumber Co.*
Court of Appeal Case No.
Humboldt County District Attorney's Request for Depublication of Appeal Decision
(Rule 8.1125)

Dear Justices of the Supreme Court:

Pursuant to Rule 8.11256, on behalf of the People of the State of California and the County of Humboldt I request that the Supreme Court order depublication of the above opinion of the Court of Appeal.

An Environmental Impact Report is required for a project "which may have a significant effect on the environment."[1] Yet, the clear errors that the trial court committed and the appellate court affirmed obstruct not only the sanctity of 211,000 acres of Humboldt Forest timberland, but also the very "paths which to lead to the ascertainment of truth," which the United States Supreme Court maintains must remain "as free and unobstructed as possible."[2]

There is clear error, where a party can use the shield of the litigation privilege under Civil Code section 47, subdivision (b), as a weapon against the very truth-seeking process that it is designed to protect. There is clear error, when a party can apply the *Noerr-Pennington* doctrine, which provides a safe harbor from civil liability for "lobbying efforts," as a pretext to perpetrate the ongoing consequences of past fraud. There is also a clear error of statutory construction, where there are two co-equal state laws, and an appellate court does not permit the particular provision to prevail over the general.

The application of the litigation privilege and the *Noerr-Pennington* doctrine to a collateral action under the UCL by a government prosecutor has the practical effect of denying the government

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Pub. Resources Code §21151; *see also* §§21100, 21101, 21102, 21150.

Eriscoe v. LaHue (1983) 460 U.S. 325, 333 (citations omitted).

CRIMINAL DIVISION
825 5TH Street
Eureka CA 95501
(707) 445-7411
(707) 445-7416 Fax

VICTIM WITNESS ASSISTANCE
712 4th Street
Eureka Ca 95501
(707) 445-7417
(707) 445-7490 Fax

prosecution a platform to prosecute unfair competition in cases where the underlying administrative proceedings were corrupt.

In doing so, these clear errors render the appellate decision directly inconsistent with *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921 on the issue of concurrent regulatory authority. Securing uniformity of decision is a stated ground for granting review, per California Rule of court 8.500 (b).

These clear errors also violate the "ecology ethic," as recognized by the Court in *Sierra Club v. Morton* (1972) 405 U.S. 727, 752[3], and later codified by Congress into the citizens' suit provision,[4] which enabled private citizens to bring suit, even where those citizens could demonstrate only injury in fact that was non-economic. The scope of litigant at issue here, however, is much narrower; it concerns only an action by the Attorney General, District Attorney, County Counsel, or City Attorney to bring a collateral action under California's Unfair Competition Law (UCL) against a permit applicant who competed unfairly, and thereby rendered an entire permit approval process fraudulent.

However, the ramifications of these clear errors extend beyond violations of the ecological ethic and undermine the efficient administration of justice. If prosecutors cannot prosecute a collateral action under the UCL, those same prosecutors must monitor every original administrative proceeding for fraud. State governments will be compelled to waste finite economic resources so that prosecutors and other regulatory agents can monitor each and every administrative process in their respective jurisdictions, all because an administrative proceeding is not open to collateral government action under the UCL.

This outcome is inimical to the purposes of California's Environmental Quality Act (CEQA), which states that "[i]t is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage."[5] In an era of commercial and industrial expansion in which the environment has been repeatedly violated by those who are oblivious to the ecological well-being of society, the significance of this decision cannot be understated.

These clear errors also carry with them broad, negative procedural ramifications for pleading a Complaint past the point of Demurrer. The particularized provisions of the UCL granting government regulators standing to obtain relief[6] preempt the more general provisions of the

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(1972) 405 U.S. 727, 752.

33 U.S.C. § 1365.

Friends of Mammoth v. Bd. of Supervisors (1972) 8 Cal. 3d 247, 254, *quoting* Cal. Pub. Res. Code § 1000(g).

Bus. & Prof. Code, § 17204 *et seq.*

litigation privilege. The lobbying efforts protected under the *Noerr-Pennington* doctrine do not cover the entire scope of an administrative proceeding to which those lobbying efforts are but a part. Yet, the trial court shielded the facts of the administrative proceedings from the pleadings even though those facts as pled showed clear admissions of fraud.

It is true that the shields to derivative litigation are by necessity absolute. The evils inherent in permitting derivative tort actions based on communications during the trial of a previous action are generally far more destructive than the occasional "unfair" result. Litigants and witnesses must have the utmost freedom of access to the courts, or, as in this case, administrative process. The "paths which to lead to the ascertainment of truth . . . [must remain] . . ."as free and unobstructed as possible."[7]

Yet, the reasons why courts must shield litigants from derivative litigation are the very same reasons why courts must allow an exception to these evidentiary shields when *the path to truth* was muddied beyond the point of recourse. In such an instance, a collateral attack under the UCL is the only form of equitable relief through which the government can stop an ongoing fraud.

In these rare cases, a collateral action by a government prosecutor under the UCL is the only way to free and unfetter that very same path to truth. The litigation privilege, which has its roots in the law of libel, must not provide safe harbor to a process that defrauds courts of collateral, truth-seeking litigation. The *Noerr-Pennington* doctrine, which has its roots in the law of antitrust, must not provide a shield for an entire adjudicative proceeding where false statements admittedly occurred, all under the pretext of "lobbying efforts." Justice requires nothing less.

The Court of Appeal's opinion erroneously applies the litigation privilege and *Noerr-Pennington* doctrine to a collateral action under the UCL by a government prosecutor has the practical effect of denying the government prosecution a platform to prosecute unfair competition in cases where the underlying administrative proceedings were corrupt. Therefore, we respectfully request that this Court order depublication of the opinion. Thank you for your attention to this matter.

Respectfully,

Paul V. Gallegos
District Attorney

Eriscoe, 460 U.S. at 333 (citations omitted).

SERVICE LIST

Counsel for Respondent, The Pacific Lumber Company, Scotia Pacific Company LLC and Salmon Creek LLC	Edgar B. Washburn, Christopher J. Carr, William M. Sloan, Shaye Diveley MORRISON & FOERSTER LLP 425 Market Street San Francisco, CA 94105-2482
Counsel for Amicus Curiae The City of San Francisco, in support of Appellant	Dennis J. Herrera, City Attorney, Danny Chou, Chief of Appellate Litigation City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102-4682
The Honorable Richard L. Freeborn	Humboldt County Superior Court 825 Fifth Street Eureka, CA 95501
The California Court of Appeal First Appellate District Division 3	350 McAllister Street San Francisco, CA 94102-3600