

000997

REQUEST FOR COUNCIL ACTION
CITY OF SAN DIEGO

1. CERTIFICATE NUMBER (FOR AUDITOR'S USE OF) 114
2800627 04/15

TO: CITY COUNCIL

2. FROM (ORIGINATING DEPARTMENT): CITY ATTORNEY

3. DATE: February 4, 2008

4. SUBJECT: Authorizing the continued retention of Latham & Watkins and Harvey Levine, Levine Steinberg, et al, as co-counsel to prosecute bad faith case in *Insurance Company of the State of Pennsylvania vs. City of San Diego*, U.S. District Court Case No. 02-CV-0693.

5. PRIMARY CONTACT (NAME, PHONE, & MAIL STA.)
Todd Bradley, 619/533-6173

6. SECONDARY CONTACT (NAME, PHONE, & MAIL STA.)
Lawrence Tomanek 236-6220

7. CHECK BOX IF REPORT TO COUNCIL IS ATTACHED

8. COMPLETE FOR ACCOUNTING PURPOSES

FUND	See Attached	81140			9. ADDITIONAL INFORMATION / ESTIMATED COST:
DEPT.		82240			
ORGANIZATION					
OBJECT ACCOUNT		4151			
JOB ORDER					
C.I.P. NUMBER					
AMOUNT	\$300,000	→			

10. ROUTING AND APPROVALS

ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED	ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
1	ORIG. DEPT	<i>[Signature]</i>	3/3/08	8	LIAISON	ELP	3/10
2	CFD	<i>[Signature]</i>	3-13-08	9	COO		3/14/08
3	AUDITOR	<i>[Signature]</i>	3/12/08	10			
4	FINANCIAL MGMNT	<i>[Signature]</i>	3/10/08	11	ORIG. DEPT	<i>[Signature]</i>	3/3/08
5	RISK MGMNT	<i>[Signature]</i>	3-6-08		DOCKET COORD:	COUNCIL LIAISON	3/20/08
6				✓	COUNCIL PRESIDENT	<input type="checkbox"/> SPOB <input checked="" type="checkbox"/> CONSENT <input type="checkbox"/> ADOPTION	
7					REFER TO:	COUNCIL DATE: 4/15/08	

11. PREPARATION OF: RESOLUTIONS ORDINANCE(S) AGREEMENT(S) DEED(S)

1. Authorizing the continued retention of Latham & Watkins and Harvey Levine, Levine Steinberg, et al, as co-counsel to prosecute bad faith case in *Insurance Company of the State of Pennsylvania vs. City of San Diego*, U.S. District Court Case No. 02-CV-0693.
2. Authorizing the City Auditor and Comptroller to allocate and expend up to \$300,000 from the Public Liability Fund for the coverage of Latham & Watkins' and Harvey Levine, Levine Steinberg legal fees and costs related to this matter.
3. The City Council voted in Closed Session on December 4, 2007 on item CS-2, to authorize \$300,000 for outside counsel. The motion was made by Councilmember Madaffer and the second by Council President Peters. The item passed unanimously 8 to 0.

11A. STAFF RECOMMENDATIONS: ADOPT THE RESOLUTION.

12. SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION.)

COUNCIL DISTRICT(S): 8

COMMUNITY AREA(S): OTAY MESA

ENVIRONMENTAL IMPACT:

HOUSING IMPACT: This matter is exempt from CEQA pursuant to State CEQA Guidelines 15061(b)(3).

OTHER ISSUES: City Clerk requested to provide certified copy of final documents to Chief Deputy City Attorney Todd Bradley, 619/533-6173.

EXECUTIVE SUMMARY SHEET

DATE ISSUED: February 4, 2008 **REPORT NO.:**

ATTENTION: COUNCIL PRESIDENT AND COUNCILMEMBERS

ORIGINATING DEPARTMENT: CITY ATTORNEY

SUBJECT: Authorizing the continued retention of Latham & Watkins and Harvey Levine, Levine Steinberg, et al, as co-counsel to prosecute bad faith case in *Insurance Company of the State of Pennsylvania vs. City of San Diego*, U.S. District Court Case No. 02-CV-0693

COUNCIL DISTRICT(S): 8

CONTACT/PHONE NUMBER: Todd Bradley, 619/533-6173

REQUESTED ACTION:

Authorize the continued retention of Latham & Watkins and Harvey Levine, Levine Steinberg, et al, as co-counsel to prosecute bad faith case in *Insurance Company of the State of Pennsylvania vs. City of San Diego*, U.S. District Court Case No. 02-CV-0693;

Authorizing the City Auditor and Comptroller to allocate and expend up to \$300,000 from the Public Liability Fund for Latham & Watkins' LLP and Harvey Levine, Levine Steinberg legal fees and costs related to this matter.

STAFF RECOMMENDATION: Approve the Resolution

EXECUTIVE SUMMARY:

The City's insurers, Insurance Company of the State of Pennsylvania ("ISOP"), and other AIG insurers, sued the City in federal court in 2002, seeking a finding of no coverage for the City's defense (attorneys' fees) and indemnity (damages) in the De La Fuente cases (*Otay Acquisitions v. City*, S.D.S.C. Case No. GIC 753247; *National Enterprises v. City*, S.D.S.C. Case No. GIC 730011; and *Border Business Park, Inc. v. City*, S.D.S.C. Case No. GIC 692794). The City counter-claimed to establish its right to a defense and for bad faith.

In March 2005, the Ninth Circuit Court of Appeals reversed the District Court and held ISOP has a duty to defend the City. Despite that ruling, ISOP has continued to file motions in the District Court disputing its duty to defend and the amount of fees it must reimburse to the City. In March 2006, the District Court issued a judgment that ISOP must pay the City's defense costs, subject to statutory limits (for now).

The District Court has also lifted a stay order and is allowing the City to pursue its bad faith claim against ISOP for its failure to defend.

As a result of this successful litigation against the City's insurance carriers, approximately \$5,637,427 of insurance proceeds already have been received to help defray the costs of the representation for defense of the De La Fuente cases and for payment of damages (if any). Unlike the AIG insurers, another City insurer, United National, without litigation has paid one occurrence policy limit (\$2 million), which the City can use to fund any settlement or liability in the De La Fuente cases. This amount is included in the total above.

In order for the City to recover damages from ISOP, the City has been pursuing its bad faith claim. This has required extensive discovery, motion practice and trial preparation. It is the view of outside counsel (Latham and co-counsel, Harvey Levine) that, while there can be no guarantees of recovery, the City's duty to defend bad faith case is a strong one because (1) ISOP's own personnel recognized their duty to defend in the claims files; (2) ISOP agreed in writing to defend in 2001; (3) ISOP nonetheless delayed (for months and years at a time) payment of the City's defense costs, and repeatedly stopped all payment for months and years. Among other things, damages recoverable by the City may consist of (1) unpaid defense costs; (2) the shortfall between ISOP's partially paid defense costs and defense counsels' actual fees; (3) interest on these amounts; (4) the cost of the coverage litigation; and (5) punitive damages.

FISCAL CONSIDERATIONS:

With this action the Council will authorize the City Auditor and Comptroller to expend up to \$300,000 from the Public Liability Fund to cover the portion of the Latham & Watkins and Harvey Levine, Levine Steinberg representation in the bad faith case.

Latham & Watkins will proceed with the case on an hourly billing basis. In addition, co-counsel Harvey Levine of Levine Steinberg, et al will continue to be reimbursed under a contingent basis and will be paid at the conclusion of the case pursuant to the terms of his retainer agreement.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

The City Council voted in Closed Session on December 4, 2007, on Item CS-2. The motion was made by Councilmember Madaffer and the second by Council President Peters. The item passed unanimously 8 to 0.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

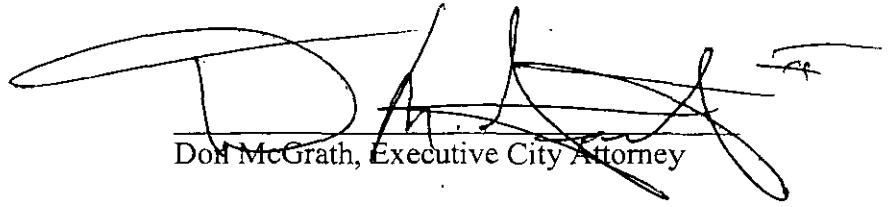
N.A.

001001

KEY STAKEHOLDERS & PROJECTED IMPACTS (if applicable):

Law firm of Latham & Watkins, Kristine Wilkes, lead partner
Law firm of Levine Steinberg et al, Harvey Levine

Originating Department



Don McGrath, Executive City Attorney

The City of San Diego
CERTIFICATE OF CITY AUDITOR AND COMPTROLLER

001003

CERTIFICATE OF UNALLOTTED BALANCE
ORIGINATING

AC 2800627
 DEPT. _____
 NO.: 45

I HEREBY CERTIFY that the money required for the allotment of funds for the purpose set forth in the foregoing resolution is available in the Treasury, or is anticipated to come into the Treasury, and is otherwise unallotted.

Amount: _____ Fund: _____

Purpose: _____

Date: _____ By: _____
AUDITOR AND COMPTROLLER'S DEPARTMENT

ACCOUNTING DATA										
ACCTG. LINE	CY PY	FUND	DEPT	ORG.	ACCOUNT	JOB ORDER	OPERATION ACCOUNT	BENF/ EQUIP	FACILITY	AMOUNT
TOTAL AMOUNT										

FUND OVERRIDE

CERTIFICATION OF UNENCUMBERED BALANCE

I HEREBY CERTIFY that the indebtedness and obligation to be incurred by the contract or agreement authorized by the hereto attached resolution, can be incurred without the violation of any of the provisions of the Charter of the City of San Diego; and I do hereby further certify, in conformity with the requirements of the Charter of the City of San Diego, that sufficient moneys have been appropriated for the purpose of said contract, that sufficient moneys to meet the obligations of said contract are actually in the Treasury, or are anticipated to come into the Treasury, to the credit of the appropriation from which the same are to be drawn, and that the said money now actually in the Treasury, together with the moneys anticipated to come into the Treasury, to the credit of said appropriation, are otherwise unencumbered.

Not to Exceed: \$300,000.00

Vendor: Latham & Watkins, LLP

Purpose: Authorize the continued retention of Latham & Watkins and Harvy Levine, Levine Steinberg , et al, as co-counsel to prosecute bad faith case in Insurance Co of the State of Pennsylvania v. City of San Diego. Authorize the City Auditor & Comptroller to allocate and expend up to \$300,000 from the Public Liability Fund (81140) for legal costs and related fees.

Date: March 12, 2008 By: *Pam Walbert* 3/12/08
AUDITOR AND COMPTROLLER'S DEPARTMENT

ACCOUNTING DATA										
ACCTG. LINE	CY PY	FUND	DEPT	ORG.	ACCOUNT	JOB ORDER	OPERATION ACCOUNT	BENF/ EQUIP	FACILITY	AMOUNT
001	0	81140	82240		4151					\$300,000.00
TOTAL AMOUNT										\$300,000.00

FUND OVERRIDE

001005

RESOLUTION NUMBER R-_____

DATE OF FINAL PASSAGE _____

A RESOLUTION AUTHORIZING THE CITY ATTORNEY TO CONTINUE THE AGREEMENT WITH LATHAM & WATKINS LLP AND LEVINE STEINBERG, AS CO-COUNSEL IN AN ADDITIONAL AMOUNT UP TO \$300,000 TO PROVIDE LEGAL SERVICES IN CONNECTION WITH THE PROSECUTION OF THE BAD FAITH CASE OF INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA V CITY OF SAN DIEGO AND AUTHORIZING THE AUDITOR AND COMPTROLLER TO EXPEND RELATED FUNDS

WHEREAS, Since 2002, the De La Fuente cases have been compounded by insurance coverage litigation, *Insurance Company of the State of Pennsylvania, et al. v. City of San Diego*, USDC Case No. 02CV0693; and

WHEREAS, the defense of the aforementioned case involves a highly specialized area of law; and

WHEREAS, the firms of Latham & Watkins and Levine Steinberg have the necessary skills and experience to assist the City in defense of this matter; and

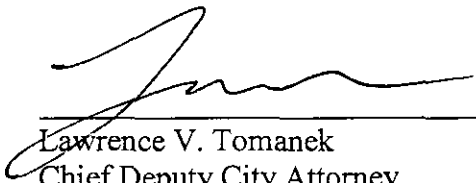
WHEREAS, the Council of the City of San Diego has been briefed on the status of this matter in duly-noticed Closed Session on December 4, 2007; and

WHEREAS, the Council determined to continue retention of Latham & Watkins and Levine Steinberg to assist the City Attorney in defense of this matter; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the City Attorney is authorized to continue retention of Latham & Watkins and Levine Steinberg for the provision of legal services in *Insurance Company of the State of Pennsylvania, et al. v. City of San Diego*, USDC Case No. 02CV0693, in an additional amount not to exceed \$300,000.

BE IT FURTHER RESOLVED, that the Auditor and Comptroller is authorized to expend up to \$300,000 from the Public Liability Fund.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By 
Lawrence V. Tomanek
Chief Deputy City Attorney

LVT:jdf
03/24/2008
Or.Dept:ATTY
R-2008-805

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor