



**CITY OF LODI  
COUNCIL COMMUNICATION**

**AGENDA TITLE:** Approve Contract for Independent Contractor Serving in the Capacity of a Public Officer or Employee in Regard to the Environmental Abatement Program Litigation

**MEETING DATE:** May 21, 2004

**PREPARED BY:** City Attorney

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**RECOMMENDED ACTION:** That Council, by motion action, approve a contract hiring outside counsel in the Environmental Abatement Program litigation.

**BACKGROUND INFORMATION:** Presented for your approval is a draft contract to represent the City of Lodi in the ongoing Environmental Abatement Program litigation.

**FUNDING:** None required at this time.

A handwritten signature in black ink, appearing to read "D. Schwabauer", written over a horizontal line.

D. Stephen Schwabauer  
Interim City Attorney

DSS

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**APPROVED:** \_\_\_\_\_  
H. Dixon Flynn, City Manager

filed 5-21-04

**AGREEMENT TO ENGAGE OUTSIDE LEGAL COUNSEL  
BETWEEN THE CITY OF LODI AND FOLGER LEVIN & KAHN, LLP**

THIS AGREEMENT TO ENGAGE OUTSIDE COUNSEL (the "Agreement") is made and entered into on May 21, 2004 by and between the City of Lodi and the Lodi Financing Corporation (referred to collectively as the "City") and Folger Levin & Kahn LLP ("Folger Levin & Kahn).

The City and Folger Levin & Kahn agree as follows:

**1. SCOPE OF REPRESENTATION**

Folger Levin & Kahn, LLP agrees to represent the City of Lodi and the Lodi Financing Corporation in connection with the pending environmental contamination litigations, related insurance coverage actions, regulatory agency proceedings, litigations arising from the City's financing arrangements for environmental abatement and other related actions by or against the City, including the actions listed in Attachment 1.

Folger Levin & Kahn will act in accordance with the City's instructions or the instructions of the City's designated contact person. The representation will include, among other things, handling the referenced litigations and proceedings, preparing appropriate court filings, making required appearances on behalf of the City, participating in mediation sessions, assisting the City as appropriate with communications with insurance carriers and others, and providing such other assistance as may be appropriate or as the City may request.

**2. CHARGES FOR ATTORNEY SERVICES**

For services performed by Folger Levin & Kahn attorneys, the City agrees to pay, and Folger Levin & Kahn agrees to accept, compensation for time expended by attorneys at the blended rate of \$325 per hour. Alternatively, the parties agree to the same payment arrangement, except that the applicable billing rates are \$395 per hour for partners and \$235 per hour for associates. The City agrees to pay whichever alternative is less.

**3. CHARGES FOR LEGAL ASSISTANTS AND OTHER STAFF**

For services rendered by Folger Levin & Kahn legal assistants and non-attorney staff, the City agrees to pay, and Folger Levin & Kahn agrees to accept compensation at the rate of \$150 per hour for law clerks and summer associates, and \$110 to \$120 per hour for legal assistants. Folger Levin & Kahn agrees not to bill for word processing or regular secretarial time. Folger Levin & Kahn agrees to abide by the City's "Billing Guidelines" for outside counsel dated February 23, 2004, except as otherwise provided in this Agreement.

#### 4. INITIAL ASSESMENT TASK

At the outset of the engagement, Folger Levin & Kahn will undertake the specific task of preparing a focused budget and timeline for the City's environmental litigations and other related matters. This task will involve the following sub-tasks:

- a. An assessment of each of the City's litigation matters;
- b. An assessment of the City's litigation positions in its various matters and proceedings;
- c. Presentation of recommendations regarding specific litigation activities;
- d. Consideration of alternatives in terms of strategy and level of effort;
- e. Consideration of alternative billing arrangements where applicable;
- f. Consideration of fixed monthly billing targets;
- g. Preparation of proposed budgets.

It is anticipated that this initial task will be completed in 30 days. Representatives of the City and Folger Levin & Kahn will then meet to discuss the results of the assessments and to make decisions with regard to the recommendations. The fee for this task is not to exceed \$150,000.

#### 5. USE OF BUDGETS

After the completion of the initial assessment task, Folger Levin & Kahn will provide the City one or more budgets for the following 6-month period reasonably anticipating expenses for professional fees and costs. Such budgets will be provided to the City's contact person for review and approval. Folger Levin & Kahn agrees not to bill for incurred expenses and costs in excess of an approved budget without obtaining prior approval. Folger, Levin and Kahn agrees to provide continuous six month budgets during the term of the representation on the terms set forth above. Each successive budget shall be presented to the City in the fourth month of the then current budget cycle and subject to appropriate modification, approved by the City Council in the fifth month of the then current budget cycle.

#### 6. COMMUNICATIONS AND POINTS OF CONTACT

The City has designated Interim City Attorney Stephen Schwabauer as its primary point of contact for purposes of this Agreement. Margaret Dollbaum of Folger Levin & Kahn will serve as the primary point of contact with Folger Levin & Kahn. In addition, both Greg Call and Kay Martin, who are partners in the law firm, will be familiar with the City's matters and can assist the City. Folger Levin & Kahn will provide one copy of all written communications to the City Clerk. All documents and other materials obtained, prepared, or created by Folger Levin & Kahn shall be owned by the City. Folger Levin & Kahn has the right to retain copies of such materials. Folger Levin & Kahn will act in accordance with the instructions it receives from Mr. Schwabauer in connection with this Agreement. While Folger Levin & Kahn will be prepared to

discuss any aspect of this engagement with the members of the City Council and Mr. Schwabauer, the designation of a primary point of contact will create efficiencies in the course of the litigations for the City and for Folger Levin & Kahn.

Folger Levin & Kahn will prepare regular status reports for the City and will use its best efforts to comply with the guidelines for outside counsel provided by the City in its memorandum dated February 23, 2004.

#### 7. BILLING FORMAT AND FREQUENCY

Folger Levin & Kahn will bill the City monthly for services rendered at the agreed rates. The monthly statements will include any costs Folger Levin & Kahn incurs on the City's behalf, such as photocopying, postage, long distance telephone, courier services, and computerized legal services for legal research or document management. Costs will be charged at the firm's prevailing rates reflecting actual expense, and statements will be due and payable upon receipt. Consistent with the City's billing guidelines for outside counsel,

a. Regarding reimbursement of overhead charges, photocopy charges in excess of \$.10 (ten cents) per page will not be reimbursed; auto mileage rates in excess of the rate approved by the Internal Revenue Service for income tax purposes will not be reimbursed; charges for storage of open or closed files, rent, electricity, and local telephone service will not be reimbursed.

b. Time will be billed in no greater than 1/10 hour increments;

c. Statements will be directed to the Lodi City Attorney, electronically and in hard copy;

d. Disbursements will be separately identified on the monthly statements;

e. Folger Levin & Kahn will comply with the limitations applicable to travel expenses and for meals and entertainment in the City's billing guidelines.

f. Travel shall be separately stated and in no event exceed eight hours per trip. Folger, Levin and Kahn will be expected to perform work during the travel time to the extent feasible. Folger, Levin and Kahn shall not double bill for travel time and such work. Folger, Levin and Kahn will not bill for travel to or return from San Joaquin County.

As directed by the City, Folger Levin & Kahn will prepare separate bills for individual litigations and other proceedings.

#### 8. FINANCE CHARGE

Folger Levin & Kahn reserves the right to impose a charge of one percent (1%) per month on any portion of its invoices which remain outstanding more than ninety (90) days after the billing date. This charge is intended to cover, at least in part, the additional cost imposed on Folger Levin & Kahn by over due accounts.

9. RETENTION OF EXPERT WITNESSES AND LITIGATION CONSULTANTS;  
DIRECT PAYMENT OF MAJOR EXPENSES

Upon prior approval of the City, Folger Levin & Kahn may enter into agreements with other parties for purposes of providing expert witness services or litigation support and consulting services for matters covered by this Agreement. The City agrees to provide compensation directly to such parties. Examples of such services may include photocopying of documents in excess of \$250, document management services, preparation of trial graphics and presentation aids, mock trial consulting services, and court reporter fees and videographer fees for depositions.

10. OFFICE SPACE

The City will provide without charge one (1) office within the Civic Center Campus for use by Folger Levin & Kahn for matters relating to this Agreement.

11. NOTICES

Any notice to a party to this Agreement must be in writing and addressed to the party at the address set forth below or at such other addresses about which the parties may notify each other from time to time.

TO THE CITY:

City of Lodi  
Lodi Financing Corporation  
221 W. Pine Street  
Lodi, CA 95240

D. Stephen Schwabauer  
Interim City Attorney  
221 W. Pine Street  
Lodi, CA 95240

Copy to:

Susan Blackston  
City Clerk  
221 W. Pine St.  
Lodi, Ca 95240

TO FOLGER LEVIN & KAHN:

Margaret R. Dollbaum  
Folger Levin & Kahn, LLP  
275 Battery Street, 23rd Floor  
San Francisco, CA 94111

12. JURISDICTION

This Agreement shall be administered and interpreted under the laws of the State of California. Jurisdiction of litigation arising from this Agreement shall be in that state. If any part of this Agreement is found to conflict with applicable laws, such part shall be inoperative, null, and void insofar as it is in conflict with applicable laws, but the remainder of this Agreement shall be in full force and effect.

No provision of this Agreement shall be construed for or against any party on the basis of its contribution, or lack of contribution, to the drafting of such provision, and the provisions of Section 1654 of the California Civil Code shall have no application to this Agreement. The failure of any party to enforce any provision of this Agreement shall not in any way be construed as a waiver of any such provision and shall not prevent that party from thereafter enforcing such or any other provision of this Agreement.

13. INTEGRATION

This Agreement represents the entire understanding of the City and Folger Levin & Kahn as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may not be modified or altered except in writing, signed by both parties.

CITY OF LODI

LODI FINANCING CORPORATION

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

APPROVED AS TO FORM:

APPROVED AS TO FORM:

\_\_\_\_\_  
D. Stephen Schwabauer  
Interim City Attorney

\_\_\_\_\_  
D. Stephen Schwabauer  
Interim General Counsel

ATTEST:

ATTEST:

\_\_\_\_\_  
Susan L. Blackston

\_\_\_\_\_  
Susan L. Blackston

City Clerk

Secretary

FOLGER LEVIN & KAHN, LLP

Margaret R. Dollbaum  
Signature

Margaret R. Dollbaum  
Printed Name

Partner  
Title

May 20, 2004  
Date

350034000395112.1

## ATTACHMENT 1

### City of Lodi Pending Actions

1. *People v. M & P Investments*, Case No. 00-2441 FCD JFM, USDC, E.D. Cal, Sacramento.
2. *City of Lodi v. Lehman Bros.*, Case No. 04-0606 FCD JFM, USDC, E.D. Cal., Sacramento.
3. *Lehman Bros v. City of Lodi*, Case No. 04-0850 FCD JFM, USDC, E.D. Cal, Sacramento..
4. *Hartford Action*, Case No. CGC-01-323658, San Francisco Superior Court
5. *Firemans Fund/Unigard – Appeal*, Case Nos. 03-15458, 04-15136, 04-15139, 9th Cir.
6. *Fireman's Fund Insurance. v. City of Lodi.*, Case No. 98-1489 FCD JFM, USDC, E.D. Cal, Sacramento.
7. *Unigard Insurance Company v. City of Lodi.*, Case No. 98-20540 FCD JFM, USDC, E.D. Cal, Sacramento.
8. *City of Lodi v. Unigard Insurance. Company*, Case No. 01-1718 FCD JFM, USDC, E.D. Cal, Sacramento.
9. *City of Lodi v. Unigard Insurance Company*, Case No. 99AS01074, Sacramento Superior Ct.
10. *People v. Randtron*, Case No. 99AS02335, Sacramento Superior Ct.
11. *Travelers Indemnity v. Lucky Stores, Inc.*, Case No. 02AS02008, Sacramento Superior Ct.
12. *RWQCB Enforcement and related DTSC issues.*

## CONSIDERATIONS ARISING FROM JOINT REPRESENTATION

Rule 3-310 of the California Rules of Professional Conduct prohibits an attorney from entering into any representation of more than one client if the clients' interests potentially conflict, unless the clients have consented in writing after being advised of the "actual and reasonably foreseeable adverse consequences" of such conflict. (For reference, a copy of Rule 3-310 is attached hereto.) This document describes the issues implicated by Folger Levin & Kahn's LLP's joint representation of the City of Lodi ("City") and the Lodi Financing Corporation ("LFC"); these issues consist primarily of (1) the shared duty of loyalty; (2) the effect of the joint representation on confidential communications; and (3) the potential conflicts of interest.

1. Shared Duty of Loyalty. While each client is owed a duty of loyalty, that loyalty in a joint representation is shared. Therefore, it may not be appropriate for Folger Levin & Kahn to vigorously assert individual interests of a particular party on issues that arise when those interests conflict with the interests of the other party. As described in paragraph 3 below, if a situation arises in which Folger Levin & Kahn believes the parties' interests actively conflict, Folger Levin & Kahn will discuss with the affected party the methods to resolve the issues at hand, and the respective advantages and disadvantages of each method. The affected parties will then be responsible for determining among themselves how to proceed. The City and LFC should also consider the possibility that advocacy through separate counsel could result in more favorable treatment for the parties than they may receive under the more even-handed approach just described.

2. Confidentiality of Communications. Folger Levin & Kahn's representation of multiple parties will affect the level of confidentiality that attaches to the respective parties' communications with the firm. Communications between Folger Levin & Kahn and any of the parties relating to the subject matter of this representation may be disclosed to the other party if Folger Levin & Kahn believes that such disclosure is relevant and appropriate. While the attorney-client privilege will shield such communications against disclosure to third parties, it will not shield the communications from the other party. Similar rules will apply to materials protected against discovery by third parties due to the work product doctrine.

These rules, however, do not require the disclosure of communications between Folger Levin & Kahn and one of its clients to the other jointly represented client when those communications are not related to the subject of the joint representation. Thus, Folger Levin & Kahn would not be required to disclose information regarding other unrelated matters that it might handle for the City or any other party in the future.

3. Potential Conflicts of Interest. Joint representation may result in problems stemming from future conflicts of interest between the parties. Folger Levin & Kahn currently is unaware of any actual conflicts among the parties. There are, however, potential conflicts arising from the potentially differing interests of or different facts that apply to different parties. For example, different parties may disagree whether it is appropriate to adopt a particular strategy in pursuing certain claims. If Folger Levin & Kahn becomes aware of an actual conflict, Folger Levin & Kahn will attempt to advise the parties of it as quickly as possible. Folger Levin

& Kahn requests that the parties do likewise. If conflicts are identified, Folger Levin & Kahn will discuss possible ways of resolving the conflicts, and the advantages and disadvantages of the potential solutions. Folger Levin & Kahn will then ask the appropriate parties to work together to resolve the matter, and give Folger Levin & Kahn joint directions as to how to proceed.

The City and LFC should know that if a conflict among the parties is not resolved, it may be inappropriate for Folger Levin & Kahn (or any other law firm or lawyer) to continue to simultaneously represent the parties whose interests conflict. The City and LFC have, however, agreed not to assert any conflict of interest between the City and any other party as a basis for attempting to disqualify Folger Levin & Kahn from representing any party with respect to the matters covered by this engagement.

In addition to the need for the parties to agree regarding the prosecution of claims, the parties will also need to agree on any aggregate settlement of the matters. The Rules of Professional Conduct prohibit an attorney from entering into an aggregate settlement of claims of the attorney's clients without the informed written consent of all of the clients. This prohibition does not, however, prevent an attorney from entering into a separate settlement of one client's claims without the consent of the non-settling clients.

4. Consent Required by California Rules. As required by the California Rules of Professional Conduct, Folger Levin & Kahn requests that the City of Lodi and Lodi Financing Corporation sign the consent forms attached. By signing this form, the parties are acknowledging that they have been advised of potential conflicts arising out of Folger Levin & Kahn's representation of the them in this matter, and that the City and LFC desire to have Folger Levin & Kahn represent the City and LFC on the terms set forth in this document.

CONSENT

On behalf of the City of Lodi, I have read and understood the foregoing terms regarding the representation of multiple parties. I understand that the City of Lodi may seek independent counsel before signing this consent, and I represent that it has exercised this right to its satisfaction. I have been duly authorized by the City of Lodi to execute this consent on behalf of the City of Lodi. Pursuant to that authority and on behalf of the City of Lodi, I hereby agree (a) to Folger Levin & Kahn's representation of the City of Lodi on the terms set forth above notwithstanding the effects of Folger Levin & Kahn's representation of multiple parties as discussed therein, and (b) to the waiver of certain potential or future conflicts of interest as set forth above.

City of Lodi

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
D. Stephen Schwabauer  
Interim City Attorney

ATTEST:

\_\_\_\_\_  
Susan L. Blackston  
City Clerk

CONSENT

On behalf of the Lodi Financing Corporation, I have read and understood the foregoing terms regarding the representation of multiple parties. I understand that the Lodi Financing Corporation may seek independent counsel before signing this consent, and I represent that it has exercised this right to its satisfaction. I have been duly authorized by the Lodi Financing Corporation to execute this consent on behalf of the Lodi Financing Corporation. Pursuant to that authority and on behalf of the Lodi Financing Corporation, I hereby agree (a) to Folger Levin & Kahn's representation of the Lodi Financing Corporation on the terms set forth above notwithstanding the effects of Folger Levin & Kahn's representation of multiple parties as discussed therein, and (b) to the waiver of certain potential or future conflicts of interest as set forth above.

Lodi Financing Corporation

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
D. Stephen Schwabauer  
Interim General Counsel

ATTEST:

\_\_\_\_\_  
Susan L. Blackston  
Secretary

RESOLUTION NO. 2004-102

A RESOLUTION OF THE LODI CITY COUNCIL  
APPROVING SECTION 4, INITIAL ASSESSMENT TASK,  
OF THE AGREEMENT TO ENGAGE OUTSIDE LEGAL  
COUNSEL BETWEEN THE CITY OF LODI AND FOLGER  
LEVIN & KAHN, AND FURTHER APPROPRIATING  
FUNDS NOT TO EXCEED \$150,000

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NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council hereby approves Section 4, Initial Assessment Task, of the agreement to engage outside legal counsel between the City of Lodi and Folger Levin & Kahn, to be completed in 30 days; and

BE IT FURTHER RESOLVED that funds not to exceed \$150,000 be appropriated from the Water Fund for this Initial Assessment Task.

Dated: May 21, 2004

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I hereby certify that Resolution No. 2004-102 was passed and adopted by the Lodi City Council in a special meeting held May 21, 2004, by the following vote:

AYES: COUNCIL MEMBERS – Hitchcock, Howard, and Mayor Hansen  
NOES: COUNCIL MEMBERS – None  
ABSENT: COUNCIL MEMBERS – Beckman and Land  
ABSTAIN: COUNCIL MEMBERS – None



SUSAN J. BLACKSTON  
City Clerk