

**STATEMENT OF FACTS AND OPINIONS:**  
**MICHAEL S. POLES, GC, CM, RCI, DABFET, ACFE**

Raymond Plaintiff, et al. v. Defendant U.S.A., et al  
LACSC Case No. BC3000XYZ

April 4, 2011

***NOTE: This Statement of Facts and Opinions has been altered in order to preserve attorney-client confidentiality and protect the identities of all persons connected with the actual case. It is intended to be used as an exemplar of recent work product – Michael S. Poles***

I, Michael S. Poles, hereby declare as follows: I have been retained by Unnamed, Law Firm, LLP, and attorneys of record for Defendants, as an expert witness in the matter entitled *Raymond Plaintiffs, et al. v. Defendant, U.S.A.*, Los Angeles Superior Court Case No. BC3000XYZ. Unless otherwise stated, I have personal knowledge of the facts set forth in this Statement of Facts and Opinions, and if called upon to testify as an expert witness, I could and would competently testify to these facts and opinions.

**1. RELEVANT EXPERIENCE**

1.1. I have more than 45 years of “hands-on” construction experience. I am a licensed general building contractor, certified construction manager, registered construction inspector, Diplomat of the American Board of Forensic Engineering and Technology, and a member of the American College of Forensic Examiners, among other professional associations.

1.2. I have personally constructed, managed, inspected and certified all architectural, structural, electrical, mechanical and plumbing systems during construction of new, major remodeling and tenant improvements of industrial, commercial, residential and hospital buildings including spray applied fireproofing on structural steel members, as a general contractor, construction manager and as the “*Inspector of Record*” for the California Division of the State Architect (*DSA*) for essential services facilities and the Office of Statewide Health Planning and Development (*OSHPD*) for hospitals.

1.3 I have personally inspected and certified the construction conformance to applicable “codes” as a “Deputy Building Inspector,” licensed by both the City of Los Angeles and County of Los Angeles Department of Building & Safety for continuous inspection of reinforced concrete and reinforced masonry during the course of construction.

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1.4 I have provided construction consulting, forensic expert witness and litigation support for more than 38 years. I have written numerous articles and two technical manuals regarding construction management procedures. I have been retained by more than 130 law firms as an expert witness on construction-related matters, including actions regarding defective construction.

**2. DOCUMENTS REVIEWED**

2.1 In furtherance of my forming opinions and subsequent testimony, I have reviewed and relied upon the following documents:

- 2.1.1. Designation of Experts & Notice of Deposition;
- 2.1.2. 2nd Amended Complaint;
- 2.1.3. General Contract – October 1986;
- 2.1.4. Owner Letter to GC - 5/26/89;
- 2.1.5. Plaintiff's Response to Defendants' Interrogatories;
- 2.1.6. Plaintiffs' Case Report, Supplemental Case Report, Amended Case Report;
- 2.1.7. DEPOSITION: Raymond Plaintiff – VOL. 1, March 26, 2009;
- 2.1.8. DEPOSITION: Raymond Plaintiff – VOL. 2, March 27, 2009;
- 2.1.9. DEPOSITION: Raymond Plaintiff – VOL. 3, December 15, 2010;
- 2.1.10. DEPOSITION: Lisa Ann, March 10, 2009;
- 2.1.11. DEPOSITION: Charles No Last-Name, September 14, 2010;
- 2.1.12. DEPOSITION: Earl No Last-Name, September 1, 2010;
- 2.1.13. DEPOSITION: John No Last-Name, February 23, 2010;
- 2.1.14. DEPOSITION: William No Last-Name VOL. 1, March 16, 2011;
- 2.1.15. DEPOSITION EXHIBITS: William No-last-name VOL. 1, March 16, 2011;
- 2.1.16. DEPOSITION: Michael No Last-Name, March 22, 2011;
- 2.1.17. FILE: (02466-1075072011-03-29 16-03-50.pdf) Sample Owner Correspondence;
- 2.1.18. DECLARATION: Charles No Last-Name`, dated December 28, 2010;
- 2.1.19. Cal-OSHA Guide for the Construction Industry, published December, 1986;
- 2.1.20. Cal-OSHA Construction Safety Orders, Title 8, Article 4, 1993 ED;
- 2.1.21. Uniform Building Code, 1961 ED;

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- 2.1.22. City of Los Angeles Building Code, 1976 ED.;
- 2.1.23. Miscellaneous Internet Articles pertaining to: Vermiculite, Asbestos, Monokote™, and W.R. Grace & Company.'

**3. HISTORICAL FACTS:  
Construction Materials and Building Codes**

3.1 The Owner's buildings were designed by Gin D. Wong / Pereira Architects and constructed in 1963. The materials utilized in the construction of these buildings were consistent with those materials commonly available to the industry and approved by the Building Code Standards and the City of Los Angeles for that period.

3.2 The buildings were constructed utilizing a structural steel high-rise framework which required specific fire resistance (*fire ratings*) for the safety of occupants and for the protection of the structural integrity from the high temperatures produced by fire.

3.3 The Building Code in effect during the design and construction phase was the 1961 Edition of the Uniform Building Code, with the City of Los Angeles Code Amendments. One of the constituents mandated by the Code to be incorporated into the fireproofing material for structural steel was a mineral known as "*Vermiculite*." Vermiculite, a mineral similar to mica expands when heated into featherweight pieces that have been used commercially for decades in attic and wall insulation, wallboard, fireproofing, and numerous other products.

3.4 The common methods utilized to provide fire resistance (*fire ratings*) for structural steel was to apply specified thicknesses to the structural steel and decking with a "*Spray Applied (Cementitious) Fireproofing*" material known as "*MONOKOTE™*" which was then and is to this day manufactured by W.R. Grace & Company.

3.5 Opened in 1913, a mine located six miles from Libby, Montana, was a primary source of vermiculite. W.R. Grace bought the mine in 1963 and closed it in 1990. In its prime, the mine produced 80 percent of the world's vermiculite. The company still operates smaller vermiculite mines in South Carolina. The

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vermiculite from the Libby mine was discovered to contain asbestos and was the basis for litigation that continues to this day<sup>1</sup>.

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(<sup>1</sup> Source: *Seattle Post-Intelligencer* - By Andrew Schneider, *ST. Louis Post-Dispatch*, Published February 7, 2005 - [://www.seattlepi.com/national/211169\\_libby08.html](http://www.seattlepi.com/national/211169_libby08.html) )

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**4. HISTORICAL FACTS:**  
**The Division of Occupational Safety and Health (Cal/OSHA)**  
**Construction Safety Orders**

4.1 The history of industrial safety regulations in California dates back to 1914, when the Safety Department was created within the Industrial Accident Commission. In 1927, the Industrial Accident Commission became the Division of Industrial Accidents and Safety. With the reorganization of the Department of Industrial Relations in 1945, that division was divided into the Division of Industrial Safety, Division of Industrial Accidents, and the State Compensation Insurance Fund.

4.2 Over the years, the Division of Industrial Safety has developed and enforced Statewide Safety Orders, including a considerable body of Construction Safety Orders for the protection of construction workers.

4.3 In accordance with the regulations, all employers must comply with all Cal/OSHA safety orders that apply to their type of business. All employers must meet reporting requirements, and employers with eleven or more employees must meet recordkeeping requirements.

4.4 In accordance with the regulations, employers are responsible for providing safe and healthful places of employment and working conditions for their employees. Employers must inform employees of known hazards, employees rights and obligations under the Cal/OSHA Program and post the Cal/OSHA poster "SAFETY AND HEALTH PROTECTION ON THE JOB" which are available from offices of the Division of Occupational Safety and Health.

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4.5 The Construction Safety Orders were originally printed in 1945 with revisions filed in successive years thereafter, as the hazards and hazard mitigation knowledge base grew.

4.6 In accordance with the regulations, all employers are required to have implemented a written “*Accident and Illness Prevention Program*.” Incorporated into the program are the continuous training and education requirements of all employees pertaining to conditions applicable to the nature of specific hazards within the environment(s) in which all personnel will be working, along with the safety procedures and proper use of safety equipment, accordingly.

**5. TENANT IMPROVEMENT WORK AND ASBESTOS MITIGATION PROGRAMS**

5.1 Involved with the process of moving their personnel within the buildings, expanding and improving the office spaces as the company continued to grow, the Owner contracted for designated services with licensed design professionals, contractors and consultants for the needed improvement work.

5.2 The services of Industrial Hygienists were contracted to survey each of the buildings to determine whether asbestos containing building materials were a factor of concern. The investigation determined that asbestos was found in some materials, and in particular within the spray applied fireproofing (Monokote™) on the structural steel and on the steel decking.

5.3 As the planning for the “tenant improvement” work determined the “*what, where, how and when,*” for the demolition and construction work, an asbestos mitigation program was established in three (3) phases: (1) The first phase was to determine the locations for installation of new office partitions and the removal of the existing office partitions as required per the plans. Initially, the demolition and reconstruction work for the office partitions was comprised of a prefabricated movable interior wall partition system developed in the late 1950’s by Wayne Vaughan known as “*Vaughn Walls™*.” The Vaughn Wall System consisted of modular gypsum drywall panels of specific widths that joined into each other end-to-end and was held in place by top and bottom “U” shaped metal tracks which

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were attached to the floor and finish acoustical ceiling structure above. The system also included prefabricated doors and windows to suit the design layout.

5.4 As long as the “Vaughn Wall” system was removed and installed into the new configuration *WITHOUT* having to access the space between the ceiling and the floor structure above (*plenum space*) there was no need for mitigating the fireproofing containing asbestos, as it was controlled above the finish acoustical ceilings and was not deemed to be a hazard to health.

5.5 When it became necessary to access the “plenum space” in order to facilitate the tenant improvement work, a second phase was incorporated to perform “*spot mitigation*” of the asbestos: (2) The second phase consisted of Owner contracting with licensed abatement contractors that had obtained hazardous substance certifications from the Contractors State License Board to perform their mitigation work under very tightly controlled containment of the area(s) affected and provide the systematic removal and disposal of the materials containing asbestos and decontamination of all residual dust and particles thereof. After the decontamination and asbestos mitigation work was completed, the affected area(s) were then certified to be free from asbestos particles by the Industrial Hygienists, by the laboratory testing of air samples having met specific requirements.

5.6 The third phase (3) came into effect when it became evident that in addition to the “Vaughn Wall™” partitions and the leasing of floor space to tenants other than the Owner’s staff, the asbestos mitigation process closed off entire floor spaces by locking elevators off and blocking access to all persons other than the licensed abatement contractors’ personnel who had been skillfully trained for working within *containment areas* ventilated with high efficiency particulate air “*hepa filtration*” systems while wearing Cal/OSHA and National Institute for Occupational Safety and Health (NIOSH) approved protective suits and respiratory equipment.

5.7 As a condition precedent to the tenant improvement and all construction activities within the Owners’ buildings, the Owner in concert with their industrial hygienist consultants conducted specific training seminars for the contractors and their employees pertaining to the hazards of working with materials containing asbestos and the proper use of respiratory equipment. One particular seminar was

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entitled “*Asbestos Presentation and Fit Testing*” was conducted on June 28, 1989. All persons in attendance signed an attendance sheet listing their names, social security number and name of the employer to document their attendance.

**6. OPINIONS**

6.1 Opinion: The Owner acted responsibly by maintaining a strict protocol by virtue of their tight security procedures by monitoring all persons entering and exiting their facility.

6.2 Opinion: The Owner acted responsibly by establishing and maintaining an education and training protocol concerning the known locations of building materials which contained asbestos and for scheduling and coordinating the safe removal and disposal by contracting highly trained, certified and licensed contractors; and the certification for safe re-occupancy of the areas abated by their industrial hygienist consultants.

6.3 Opinion: The Owner acted responsibly by insuring that all contaminated fireproofing which had been removed from the premises was reinstalled using new materials free from asbestos, in accordance with the requirements of the City of Los Angeles Department of Building & Safety and Cal/OSHA.

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