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August 28, 2002

BY HAND

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Re: *Methanex Corporation v. United States of America*

NOTICE OF CHALLENGE

Gentlemen:

Pursuant to Article 11 of the UNCITRAL Arbitration Rules, Methanex Corporation gives notice of its challenge to Warren Christopher, the arbitrator appointed by the United States in this matter. Methanex recently become aware of a specific relationship between Mr. Christopher and his law firm, O'Melveny & Myers, and California Governor Gray Davis, which gives rise to this challenge. On its face and in light of the Tribunal's indication that the intent of Governor Davis will likely be a central issue in this case, this relationship and its attendant circumstances give rise to justifiable doubts as to Mr. Christopher's impartiality or independence under Articles 9 and 10 of the UNCITRAL Arbitration Rules. As a result, Methanex respectfully seeks his disqualification as an arbitrator in this case.

I. BACKGROUND

After receiving the Tribunal's decision of August 7, 2002, Methanex's counsel began additional factual research to comply with the Tribunal's order. On August 13, 2002, while researching Governor Davis' activities for use in developing Methanex's evidential case, counsel

became aware of the enclosed article from the *LA Weekly* (Tab 1) describing how Governor Davis personally, and over the objections of his Attorney General, selected O'Melveny & Myers to represent his interests and those of the State of California in litigation initiated by the American Civil Liberties Union (ACLU) concerning the California school system. (Although not technically a defendant in the ACLU lawsuit, Governor Davis was in fact the principal target of the litigation.) Methanex and its counsel were unaware of these facts prior to that date.

While the *LA Weekly* article is clearly a statement of opinion, further research by Methanex indicates that the critical facts set forth in the article have been confirmed in numerous other publications and even by statements of members of the California government. *See, e.g.*, Nanette Asimov & Lance Williams, *Gov. Davis v. Schoolkids; High Priced Legal Team Browbeats Youths About Shoddy Schools*, S.F. CHRON., Sept. 2, 2001, at A1 ("State Deputy Attorney General Rick Tullis said he expects the hiring of O'Melveny & Myers will result in 'gigantic' legal fees. . . . Tullis, who noted he conferred with [the State Attorney General] and aides to the governor about hiring a private firm, said he was told that Davis' office had selected O'Melveny after a pitch from [Warren] Christopher."); *see also* Alan Bonsteel, *Children are Waiting: State Won't Admit Blame for Schools*, THE DAILY NEWS OF L.A., Dec. 16, 2001, at V1 ("At the direction of Gray Davis, the state struck back by hiring $325-per-hour lawyers of the Los Angeles firm O'Melveny & Myers. . ."); Peter J. Eliasberg, Editorial, *State Abandons Students*, SAN JOSE MERCURY NEWS, Mar. 14, 2001, at 7B ("[T]he governor has hired O'Melveny & Myers, a large private law firm, to represent the state. Conservative estimates are that the state will pay over $10 million to O'Melveny & Myers. . ."); Timothy Noah, *Warren*

Christopher v. Taxpayers, Schoolchildren, et al., SLATE MAGAZINE (Sept. 5, 2001) *available at* http://slate.msn.com/?id=1008227 (last visited Aug. 27, 2002); *Hello Books, Goodbye Rats*, L.A. TIMES, Oct. 6, 2001, Part 2; Page 20 ("[The governor] can direct the outside lawyers who represent the state to settle the ACLU suit. . . The state hired O'Melveny & Myers, the prominent Los Angeles law firm. . .") (Articles attached at Tab 2).

In particular, the sources attached at Tab 2 demonstrate that:

1. Well after this case, which characterizes Governor Davis' actions as improper under international law, was filed, Governor Davis *personally* made the decision to select and retain the law firm of O'Melveny & Myers to represent his interests and those of the State of California in the ACLU litigation;

2. The Governor chose to hire O'Melveny & Myers over the express objection of California's Attorney General, who was prepared to represent Governor Davis and the State of California as part of his official duties and at a fraction of the cost that would be incurred in retaining a private law firm;

3. The Governor reportedly hired O'Melveny & Myers "after a pitch from [Mr.] Christopher," who was described by a member of the State Attorney General's office as "the contact" with the Davis Administration on this matter;

4. As a result of Governor Davis' decision to hire O'Melveny & Myers over his Attorney General's objection, O'Melveny & Myers has earned over six million dollars in legal fees in connection with the ACLU litigation alone through the end of 2001; and

5. The representation of Governor Davis and agencies of the State of California is of considerable financial and professional importance to O'Melveny & Myers.

Indeed, in connection with the last point, the firm's website describes its Los Angeles office as follows:

> O'Melveny & Myers is "ground zero" in the public, as well as the legal, affairs of . . . the State of California. . . . Governor Davis

> also selected O'Melveny to represent the state in a landmark law suit challenging the state government's role in public education.

O'Melveny & Myers official website, *available at* http://www.omm.com/webcode /navigate.asp?nodeHandle=493 (last visited Aug. 26, 2002).

II. GROUNDS FOR THE CHALLENGE

The UNCITRAL Arbitration Rules govern this inquiry. The relevant provisions are reprinted below:

> Article 9
>
> A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.
>
> Article 10
>
> 1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence. . . .
>
> Article 11
>
> 1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.

The standard set forth in UNCITRAL Article 10 requires recusal not only in cases of actual partiality, but also where "justifiable doubts" exist as to the arbitrator's impartiality or independence. The UNCITRAL standard is in keeping with the rules of nearly all of the

principal arbitration regimes, which require that arbitrators avoid even the appearance of bias or partiality. See, e.g., London Court of International Arbitration Rules art. 5(2), 10(3); American Arbitration Ass'n International Rules art. 8(1); International Bar Ass'n, Ethics for International Arbitrators, § 3.3, *reprinted in* 26 I.L.M. 583, 584-89 (1987). Under international practice and the major common-law systems, an arbitrator is considered to lack the appearance of independence and impartiality whenever that arbitrator has a conflict of interest. *Szilard v. Szaz*, [1955] S.C.R. 3, 3 (Supreme Ct. of Canada) (arbitrators "must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to"); *Metropolitan Properties Co. Ltd. v. Lannon*, [1969] 1 Q.B. 577, 599 (England Ct. of Appeal) (when reviewing a challenge to an arbitrator, "[t]he court looks at the impression which would be given to other people. Even if [the arbitrator] was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.") *See also* Doak Bishop and Lucy Reed, *Practical Guidelines for Interviewing, Selecting, and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 Arb. Int'l 395, 408-09 (1998); W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L.Q. 26, 50 (1989); W. Lawrence Craig, William W. Park, and Jan Paulsson, *Int'l Chamber of Commerce Arbitration* 230 (1990); Martin Hunter and Jan Paulsson, *A Code of Ethics for Arbitrators in International Commercial Arbitration*, 13 Int'l Bus. Law. 153, 155 (1985).

Although the typical disqualification case involves a past or present attorney-client relationship between the arbitrator and a party, the rules are by no means limited to potential conflicts involving a party. According to the drafters of the UNCITRAL Rules, *any* commercial tie with either party, or with a party's *agent*, can raise justifiable doubts requiring the arbitrator's disqualification. *See* Report of the Secretary General: *Preliminary Draft Set of Arbitration Rules*, 6 UNCITRAL Ybk. 163, 171 (1975), U.N. Doc. A/CN. 9/97 (1974) (noting that any such ties are sufficient to raise justifiable doubts) (emphasis added); Stewart Abercrombie Baker and Mark David Davis, *The UNCITRAL Arbitration Rules in Practice* 48 (1992) (same). Michael Hoellering states the principle succinctly:

> An arbitrator will generally be excused from serving whenever the disclosure reflects a significant relationship with an interested party, its counsel, or *an important witness in the arbitration*.

Michael F. Hoellering, *The Role of the Arbitrator: An AAA Perspective* at 11, *presented at* 12th Joint Colloquium on International Arbitration: The Status of the Arbitrator (Paris Nov. 17, 1995) (emphasis added); *see also* International Bar Ass'n, Ethics for International Arbitrators § 3.1 (defining "dependence" — a ground for disqualification — as arising from "relationships between an arbitrator and one of the parties, *or with someone closely connected with one of the parties*") (emphasis added); *id.* at § 3.5 ("justifiable doubts" [the precise UNCITRAL disqualification standard] arise from "continuous and substantial social or professional relationships with a party or . . . *a potentially important witness*") (emphasis added). It is undisputed that Governor Davis is, at a minimum, "closely connected" to the United States for purposes of this proceeding under NAFTA, and is also likely to be "a potentially important

witness." It is similarly undisputed that under NAFTA, a measure taken by a political subdivision is imputed to the sovereign, and the sovereign is internationally responsible for the actions taken by its component parts. *See Metalclad Corp. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000), ¶ 73 ("[t]he conduct of an organ of a State, or a territorial government entity or of an entity empowered to exercise elements of the Governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law. . . ."); *see also* NAFTA Article 201(2). Moreover, the political subdivision acts through its executive branch, and Gray Davis, as Governor, is the personification of that executive power. *See* CAL. CONST. art. V, § 1 ("The supreme executive power of this State is vested in the Governor."); *see also The Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, Jurisdictional Award, ICSID Case No. ARB(AF)/98/3, (Jan. 9, 2001), ¶ 70 (holding that the United States could be held liable for the acts of the Mississippi state courts because "[t]he modern view is that conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive, or judicial, whatever position it holds in the organisation of the State."). Accordingly, Mr. Christopher's ongoing connection to California and Governor Davis disqualifies him from continuing to serve on the Tribunal.

III. THE NEW CIRCUMSTANCES LEADING TO THIS CHALLENGE

When the Arbitral Tribunal was being constituted, Methanex's counsel and the government discussed potential conflicts of interest that might affect the appointment of Mr. Christopher by the United States. The correspondence relating to that matter (attached at Tab 3)

dealt almost entirely with routine institutional issues arising from the extensive practice and client base of O'Melveny & Myers, a large law firm; counsel for the United States emphasized that the work Mr. Christopher was engaged in for the State of California at that time was strictly on a *pro bono publico* basis and presented no issue of conflict of interest. At the time, however, the circumstances described in this letter with respect to the ACLU litigation did not exist — the ACLU lawsuit was filed two and a half months after the United States' letter stating that no conflict of interest existed. More importantly, the circumstances described herein differ both in *kind* and in *degree* from the ordinary institutional relationships that were the subject of the earlier correspondence.

The circumstances described in this letter, moreover, take on critical significance in light of the present posture of this case, in which the actions and intentions not only of Governor Davis but of the "entire government" he leads are now central issues in this claim. (August 7, 2002 Award ¶ 158; *see also id.* ¶¶ 153-157.) Indeed, a fair reading of that Award and the views expressed by the Tribunal in the Award makes clear that Governor Davis and members of his Administration may have become central — perhaps *vital* — potential witnesses in this proceeding, especially concerning the issue of Governor Davis' intent to engage in an act of improper discrimination.

The facts described in this letter and the accepted legal standards for disqualification indicate that, by force of circumstance, there are at a minimum justifiable doubts as to Mr. Christopher's impartiality and independent judgment in this case. Indeed, as Christoph Schreuer has written concerning the comparable ICSID rules, "even a person of high moral

character who is competent and generally reliable to exercise independent judgment would be subject to disqualification if it can be shown that the person has a personal interest in the dispute." C. Schreuer, *The ICSID Convention: A Commentary* 1200 (2001).

The numerous articles concerning the nature and propinquity of the relationship between California, Governor Davis, and the O'Melveny & Myers firm underscore and confirm that O'Melveny & Myers is indeed, as that firm declares on its website, " 'ground zero' in the *public, as well as the legal*, affairs of . . . the State of California." More importantly, the articles underscore and confirm that the decision to select and retain O'Melveny & Myers in the ACLU litigation was a decision made by Governor Davis *personally*, and there is at least some suggestion in press reports that Mr. Christopher himself, as Senior Partner of O'Melveny & Myers, was "the contact" with the Davis Administration who made the successful "pitch" for that business on behalf of the law firm.

Given the centrality of Governor Davis and his Administration to Methanex's NAFTA claim, it cannot seriously be disputed that the disqualification standards set forth in Articles 9 and 10 of the UNCITRAL Arbitration Rules have been satisfied. The circumstances described herein do not present a mundane issue of imputed disqualification within the extended walls of a large, multi-office, multi-client law firm; or a *pro bono publico* appointment of a former government official to a state body; nor do they raise the simple issue of Mr. Christopher's personal involvement (or lack thereof) in the ACLU litigation. Indeed, Methanex assumes that Mr. Christopher is *not* currently involved personally in that litigation or in any other work by O'Melveny & Myers for Governor Davis or other units of the California state government.

In a recent proposal to disqualify an arbitrator in the *Loewen* case, another NAFTA Chapter 11 proceeding, the United States argued that *public perceptions* are relevant in considering issues of disqualification. Letter of Respondent the United States of America to Mr. Ko-Yung Tung, Secretary-General of ICSID at 8, 10 (Aug. 9, 2001) (hereinafter cited as "*Loewen* letter"). In that case, the challenged arbitrator — an esteemed and highly qualified individual — resigned. In this case, the perception problems are daunting: the importance of O'Melveny & Myers' representation of the State of California and its relationship with Governor Davis is affirmed by the law firm itself, and publicized on its own website. Mr. Christopher is the Senior Partner of O'Melveny & Myers; he has served as its Chairman; he has been associated with that law firm since 1950; and he is routinely, and understandably, associated in the public mind with that firm. *See* Letter of Ronald Bettauer to J. Brian Casey, Esq. transmitting the *curriculum vitae* of Warren Christopher (Jan. 28, 2000). As in the *Loewen* case, the arbitrator here, Mr. Christopher, "will be perceived by the public as linked to the representation" of Governor Davis and the State of California. *Loewen* letter at 8.

If these proceedings go forward in the manner envisioned by the Tribunal in its August 7, 2002 Award, Mr. Christopher will necessarily sit in judgment on the activities and intentions of Governor Davis and his Administration — and those judgments will have potentially significant consequences on the public, as well as the legal, affairs of the State of California and the political future of Governor Davis. Put most starkly, an objective outside observer would have highly "justifiable doubts" about Mr. Christopher's ability to impartially and independently render an award which called into question Governor Davis' intent (or the propriety of his actions under

international law), when doing so could have a profound effect on the political fortunes of Governor Davis, who has been personally responsible for sending, after a reported "pitch" from Mr. Christopher, O'Melveny & Myers at least one high-profile case worth millions of dollars in legal fees, and more than that in professional pride and publicity. "Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'" *Metro. Prop. Co.* [1969] 1 QB 577 at 599.

Under the circumstances, Methanex sees no alternative to the disqualification (or, of course, the resignation) of Mr. Christopher. In *Loewen*, the challenged arbitrator's law firm was likely to have an *imputed* client relationship with one of the parties to the arbitration, subsequent to and solely by virtue of an *anticipated* merger with another law firm. But citing, *inter alia*, the arbitrator's prominence and public identification with his law firm, *Loewen* letter at 8, — a situation strikingly similar to the position held by Mr. Christopher as Senior Partner of O'Melveny & Myers — and the prominence of the challenged representation on the law firm's website, counsel for the United States argued that even an "ethical wall" would not remove the "necessary link[age]" between the arbitrator and the firm's representation:

> Installing such an ethical wall would not remove [the arbitrator's] financial conflict of interest. Nor would such a wall change the fact that, by virtue of being a partner and, indeed, Chairman of the firm, [the arbitrator] will be necessarily linked to the firm's representation . . . in a matter directly relevant to this arbitration.

Loewen letter at 9-10. The United States concluded that the arbitrator's lack of independence was "irremediable," adding that:

> Even if [the arbitrator] effected an arrangement whereby he did not receive any direct financial benefit from the firm's representation . . . [he] would still benefit financially insofar as the firm's overall prospects were enhanced as a result of the firm's representation . . ..

Id. at 8 n.22. *Loewen* letter at 3, 8-10. The same is true here.

In the past, when faced with similar circumstances, arbitrators have recognized their duty to resign from the Tribunal to avoid jeopardizing the arbitration process. For instance, Judge Briner resigned from one arbitral panel and offered to resign from another when faced with challenges that raised considerably less doubt regarding his connections to key witnesses. *See* Stewart Abercrombie Baker & Mark David Davis, *The UNCITRAL Arbitration Rules in Practice* 42-43 (1992) (noting Judge Briner's resignation from the *Amoco Iran v. NIOC* arbitration and his announced intention to withdraw from the *Combustion Engineering, Inc. v. Iran* panel). The challenge in the *Amoco* case arose because Judge Briner was a former director and member of the board of a Morgan Stanley subsidiary; and Morgan Stanley employees had been important witnesses for the claimant. *See id.* at 42. Similarly, in *Combustion Engineering* Judge Briner was a director of a Swiss affiliate of the U.S. accounting firm that prepared a number of evidentiary documents in support of the claim. *See id.* at 43. While Judge Briner maintained that he had no contact with Morgan Stanley or any of the testifying employees, he nevertheless resigned in the *Amoco* case "'in order not to disturb the proper functioning of the Tribunal . . . .'" *Id.* at 42-43. Likewise, he offered to resign in *Combustion Engineering* rather than leave open "'the possibility of a challenge.'" *Id.* at 43.

It is of particular importance that there be no doubt as to the independence and impartiality of members of the Tribunal that renders an Award in this arbitration, one of the first NAFTA Chapter 11 claims against the United States and one addressing issues of great public significance. It is equally important that any such Award not be subject to challenge by virtue of the qualifications of any member of the Tribunal rendering the Award. For all these reasons, Methanex respectfully submits that Mr. Christopher must be disqualified from continuing to serve as an arbitrator in this proceeding.

Sincerely,

Christopher F. Dugan

James A. Wilderotter

cc: V.V. Veeder, Q.C.
Warren Christopher, Esq.
J. William Rowley, Q.C.
Margrete L. Stevens, Esq.

LA WEEKLY
JUNE 28 - JULY 4, 2002

Dissonance

The Gray Rat

Blame the governor for no books, no desks, no toilet paper
by Marc Cooper

NOW THAT SUMMER VACATION HAS BEGUN, YOU can bet students from Jefferson High in South-Central L.A. are pleased to be back home. No more prolonged stints of sitting on counters or standing in classrooms without enough chairs. No more humiliating "service classes" — doing menial work for teachers who show up (and not being able to take necessary academic classes because so many teachers do not). And while we're on humiliation, no more having to crowd into too few bathrooms regularly devoid of soap, toilet-seat covers and, yes, toilet paper.


A Classroom fit for a Governor

But Jefferson isn't much of an exception when it comes to California's poorer public schools. Four years after Gray Davis made education his "first, second and third priorities," many of our schools remain in an appalling and embarrassing state. From now until November, Davis is going to spend millions trying to convince us that if he's beaten by Bill Simon, the world will come to an end and the apocalypse will first consume our schools.

I've got no confidence in Simon to do anything — the man has a hard enough time just reading his stump script. But, when it comes to schools, he could hardly do worse than our current governor. Two years ago the ACLU initiated a class-action lawsuit on behalf of poor and minority students against the state for its refusal to provide adequate textbooks and teachers and to repair the decrepit, overheated and undercooled, rat-infested classrooms that too many of our kids must endure.

The suit really stands the beloved political issue of "accountability" back on its feet. It asked the state of California and its governor to be accountable to its schoolchildren, rather than continuing to hold the kids and schools accountable to *them*. Davis' school reforms have imposed a slew of meaningless and burdensome standardized tests on the schools while the governor publicly gloats over this or that 2 percent fluctuation upward in achievement scores.

But on the moral test of his own administration, the governor simply flunks out. Davis' response to the lawsuit has been to stonewall the issue, prolong the case, run up a gigantic legal tab to the benefit of some of his powerhouse campaign contributors, and allow little Johnny to twist slowly, slowly in the wind.

For anyone who doubts the state of our schools, I recommend a review of a recent Harris survey of California public school teachers, which can be found on the Web at *www.publicadvocates.org*. Of 6 million public school students in the state, 19 percent attend schools where at least a fifth of the teachers are uncredentialed, 32 percent go to schools without enough textbooks to be taken home for study, and 32 percent find classrooms either uncomfortably hot or cold. A million students deal with closed or non-working bathrooms, and nearly 2 million California students share classrooms with roaches, mice or rats.

Let's be clear. Gray Davis didn't create this situation. California schools began to sink 20 years ago when the same nimrods who now want to chop up L.A. brought us Proposition 13, thinking money is better spent on kitchen remodeling than on public education.

What is Davis' fault is his refusal to remedy this mess. Frankly, the sort of civil rights suit the ACLU is pressing is not intended to ever really get to trial. Rather, it's a pointed invitation to the state to sit down and settle the complaint. Davis could easily find money to at least fix the toilets, install air conditioning, fumigate the classrooms and buy the textbooks. Somehow, the state found $95 million for software it didn't need from the gov's pals over at Oracle.

BUT THE GOVERNOR IS MUCH MORE A putz than a mensch. Instead of working this problem out, the notoriously vindictive Gray Davis actually countersued local school districts, trying to scapegoat them (a strategy thrown out by the judge). Worse, Davis overruled the advice of his own attorney general, who offered to thriftily represent the state, and instead hired his overpaid hack cronies over at O'Melveny & Myers -- a rest home for retired and failed Democrats (from Warren Christopher on down to Kathleen Brown) and a firm that has pumped thousands of bucks over the years into Davis' political campaigns.

Charging $345 an hour for its attorneys and $140 for its paralegals, O'Melveny's crew ran up $6 million in legal fees by the beginning of this year (when Davis' office stopped publicly reporting the scandalous costs of their services). By my calculation, if Davis had spent the $6 million on textbooks alone, he would have reduced the shortage by 50 percent. Some legal experts predict that when this is all over, the state will have spent "tens of millions" of taxpayer funds on these private lawyers to defend itself against the indefensible.

And what have "we the people" gotten for our millions? A classic corporate legal strategy nakedly aimed at dragging out the legal battle until 2006, when Davis will be safely gone from the governor's chair and some other chump can inherit the problem. Indeed, the lead lawyer representing Davis is the noble soul who flacked for Exxon Corp. after it blackened Alaska's coastline in the *Valdez* disaster.

A brief rush of new stories last fall detailed the delaying and thuggish tactics used by the governor's contract *consigliere*. A gaggle of young students -- all of them plaintiffs against the state -- were dragged into intimidating depositions with the governor's hired lawyers. Most dramatic was the case of 11-year-old Carlos Ramirez of the Bay Area. The ACLU included him in the case because he had once passed out in a classroom where the temperature had risen above 90 degrees.

Carlos then became one of 13 students who, over a mind-boggling period of 24 days, were further roasted in browbeating depositions by Governor Davis' gentlemen lawyers. Carlos had asked to be excused from this ordeal because his mother had been killed a few weeks earlier in a drive-by shooting. But no dice. Some guy named Michael Rosenthal subjected Carlos to four days of questioning and -- according to the *San Francisco Chronicle* -- at one point asked the

child some 20 questions just about the school-cafeteria milk. When another teenage student witness told attorney Rosenthal of the pestilence in her classroom, he asked sarcastically, "Did the mouse droppings you saw on the floor affect your ability to learn in U.S. history?"

The student answered, "No." She should have added: "No, sir. Just the way a brain, a heart and a soul apparently didn't affect your ability to become a scumbag attorney." (Memo to Mr. Rosenthal: Please write a protest letter to the editor so I can get another chance to trash you in my reply. Pretty please.)

Davis took some heat over this episode of nauseating gangsterism carried out at extravagant public expense. The Northern California papers – which tend to pay more attention to Sacramento – skewered him. The *L.A. Times*, meanwhile, mildly chided Davis on this issue nine months ago and then briefly mentioned the ACLU suit in a December article but has since, for some reason, decided this issue is no longer newsworthy (even though the now-campaigning Davis blabbers on about education almost daily).

Currently, both sides in the lawsuit are engaged in routine pretrial mediation. But sources familiar with the talks say the Governor's Office remains intransigent. It doesn't have to be that way. Davis has myriad resources and recourses available to him to reach an honorable settlement and even capitalize on it for his own electoral benefit. But it seems his first, second and third priorities are to continue to delay while further enriching the besuited goons over at O'Melveny & Myers.

When the kids come back to school in September, chances are there still won't be enough textbooks to go around. But not to worry. Those curious few who wish to learn more about the inner workings of state government will require no special readings. It'll be enough to look at the rat droppings on the classroom floor to drive home the lesson of – when it comes to the poor and the powerful – just who is accountable to whom.

The San Francisco Chronicle SEPTEMBER 2, 2001, SUNDAY;

SEPTEMBER 2, 2001, SUNDAY, FINAL EDITION
Correction Appended

SECTION: NEWS; Pg. A1

LENGTH: 1561 words

HEADLINE: Gov. Davis vs. schoolkids;

High-priced legal team browbeats youths about shoddy schools

SOURCE: Chronicle Staff Writers

BYLINE: Nanette Asimov, Lance Williams

BODY:
For 24 days this summer, high-priced attorneys from a politically connected law firm grilled 13 witnesses, trying to topple their testimony that California students don't have enough textbooks and that too many classrooms are vermin-infested, overcrowded, sweltering or cold.

The lawyers hired by Gov. **Gray Davis** -- in a case that has cost taxpayers $2.5 million so far -- exhaustively combed through each claim. Some witnesses cried. Others became frightened when the questioning took on the tone of an interrogation. And some were defiant, angry at suggestions that they had lied or exaggerated.

The witnesses ranged in age from 8 to 17. Eleven-year-old Carlos Ramirez of San Francisco had once fainted in a 90-degree classroom with a perennially broken air conditioner. He asked to have a substitute testify on his behalf because his mother had been shot to death weeks before. The state's lawyers said no.

Carlos and the dozen other students deposed were among numerous children and parents across the state who sued California in San Francisco Superior Court in May 2000. They asked the state to set minimum standards for "basic educational necessities," such as up-to-date books and schools free of mice and rats.

"We're just trying to get the state to give us an equal opportunity to learn," said Manuel Ortiz, deposed a few days after graduating from Watsonville High. "In my government class, the book was from the 1980s. The other Bush was president."

In the past few years, Davis has directed the state Board of Education to set minimum standards for English, math and other subjects. His campaign promise to make education his "first, second and third priorities" is viewed with skepticism by students and parents because of his reluctance to extend the standards to clean facilities and sufficient textbooks.

However, Davis has said that addressing problems at individual schools is not the state's

responsibility.

"We've got health and safety codes and local school districts" to handle those problems at schools, said Hilary McLean, the governor's spokeswoman, in an interview Friday. McLean added that Davis has been boosting funding to schools.

The case, Williams vs. California, pits the state and its self-styled education governor against the students they're aiming to educate. Davis hired the pricey, high-powered O'Melveny & Myers of Los Angeles to defend the state. The students and parents are represented without charge by the American Civil Liberties Union and the big-hitting Bay Area firm Morrison & Foerster.

THE DEPOSITIONS

Lawyers from O'Melveny & Myers started deposing students in May. Almost immediately, a dispute arose between the firm and the ACLU.

O'Melveny attorneys refused a request by the ACLU to let an aunt sit in for the Ramirez boys: Richard, 8, and Carlos, 11.

Their mother had been killed on their doorstep just weeks before, the victim of a drive-by shooting. Their father had died in a car accident a year earlier.

But because the aunt was not named in the original suit, the lawyers said she was not qualified to represent the boys.

Richard dropped out, but Carlos remained.

"The case was really important to their mom," said Ana Araya, the boys' aunt. "Carlos knew that."

Attorney Michael Rosenthal questioned the child over four days, at one point asking 20 questions about the milk in the cafeteria at Bryant Elementary in San Francisco. Carlos responded in monosyllables, occasionally laying his head on the table.

"He was tired, thinking of other things," Araya said.

What did emerge from the interview was that the air conditioner functioned so poorly at Bryant that the summer school teacher had to keep a bottle of water to spray on her sweaty children. One was Carlos, who fainted from the heat one day. Rosenthal asked what happened.

"I felt like I wasn't there anymore," he said.

"Is there a nurse at school?" Rosenthal asked.

"No," Carlos said.

Rosenthal moved on.

O'Melveny attorneys referred questions about the case to the governor's office.

However, transcripts illuminate a meticulous approach by the attorneys, who questioned student about each alleged condition in each class in each grade, one by one.

A pattern emerged, as the state's lawyers repeatedly hinted that the problems described

were not so bad.

"Did the mouse droppings you saw on the floor affect your ability to learn in U.S. history at all?" Rosenthal asked Alondra Jones, 17, of Balboa High in San Francisco.

"No," Alondra said.

"Did (teacher) Ms. Safir ever tell you why you had to share the 'American Odyssey' textbook in class?"

"She didn't have to. We saw that there weren't that many."

". . . You got an A, even though there were a number of unfair conditions in this class, right?" asked Rosenthal.

"Just because the state failed doesn't mean I have to," said Alondra. "It didn't impede my ability to learn, but I'm pretty sure you didn't have mouse droppings in your classrooms. . . . Why do I have to?"

Cindy Diego of South Central Los Angeles, showed her mettle, returning for three more days of deposition, even after breaking down on the first day.

It was a Saturday. After going several hours, the 17-year-old said she was too tired to continue. "I got home at 3 in the morning," she said.

"Where were you last night?" Attorney Ben Rozwood asked.

Attorney Catherine Lhamon of the ACLU told Cindy not to answer.

But Rozwood persisted.

"Why were you out so late?" he said, his voice rising. "Did you know you had a deposition today?' "

He slammed his palm on the table and Cindy began to weep.

"Was it a social event?" he asked. "I certainly wasn't out last night. . . . What were you doing last night?"

"I went to a prom," she said.

"To a prom. To your senior prom?"

"Yes," she said.

HIGH-POWERED LEGAL FIRMS

O'Melveny & Myers has donated $13,800 to Gov. Davis since 1997. John Daum, lead attorney in the Williams case, is married to Mary Nichols, Davis' secretary of resources.

The firm's attorneys charge $325 an hour, and its paralegals are paid $140 per hour. When O'Melveny attorneys visit San Francisco for hearings every few months, they have stayed at the Park Hyatt, where the lowest corporate rate is $285 per night.

The cost of depositions is estimated at $1,000 per day for court reporters and transcribers.

More legal costs have been racked up by 18 school districts that Davis countersued last December, saying the problem of infestations and inadequate supplies was theirs to fix. Judge Peter Busch back-burnered the suit last winter.

The governor hired O'Melveny against the advice of state Attorney General Bill Lockyer. In a memo to the governor's office dated June 22, 2000, he advised against hiring a private firm, estimating that a defense by his office would cost "up to $6 million of state resources over the life of the suit."

The state has paid $2.5 million to O'Melveny in the first year and no trial date has been set. Although the attorney general's rate is less than a third of O'Melveny's, Lockyer would have had fewer lawyers on the case.

POLITICAL TIES

The O'Melveny firm has strong connections to the state and the national Democratic Party. Senior partner **Warren Christopher** served as secretary of State under President Bill Clinton and was former Vice President Al Gore's lawyer in the Florida vote count dispute.

Other former lawyers at the firm include: Kathleen Brown, onetime state treasurer; Louis Caldera, former state lawmaker and secretary of the Army under Clinton; and U.S. District Judge Kim Wardlow, a Clinton confidante.

Records show that in the past four years, O'Melveny's senior partners and the firm's political action committee have donated more than $432,000 to political campaigns around the country, including $206,000 to Republicans and $155,000 to Democrats. President Bush is the top single beneficiary, at $17,250.

State Deputy Attorney General Rick Tullis said he expects the hiring of O'Melveny & Myers will result in "gigantic" legal fees.

Tullis, who noted he conferred with Lockyer and aides to the governor about hiring a private firm, said he was told that Davis' office had selected O'Melveny after a pitch from Christopher.

"It was my understanding that **Warren Christopher** was the contact," said Tullis.

WINDING THROUGH THE COURT

The state's lawyers have listed 176 more students for deposition this fall, though the number may drop to 44.

Mark Rosenbaum, lead attorney for the ACLU, said the O'Melveny lawyers told him they needed to depose students to oppose his efforts to make the case a class-action suit on behalf of all 6.2 million California public school students. The class action hearing is scheduled for Sept. 13.

Although the O'Melveny lawyers did not include the depositions in their arguments, they did give the judge a 33-page summary.

"But they didn't use the depositions," Rosenbaum said. "That was the pretense. They did it to harass and intimidate these kids, to get them to pull out of the suit and send a message to kids throughout the state: If you complain about rats and no books, the price you have to pay is four days of deposition and humiliation from the very government entity that is supposed to be assuring you equal education."

CORRECTION-DATE: September 30, 2001

CORRECTION:
A story on Sunday, Sept. 2, about students suing California over public school conditions incompletely identified Rick Tullis, a union official who questioned Gov. **Gray Davis'** decision to hire a private law firm to defend the state. Tullis was speaking in his capacity as president of California Attorneys in State Employment. The story should have said that lawyers for the state deposed student Carlos Ramirez over three days. The Sept. 2 story and a related story Sept. 6 should have said that the state may depose up to 64 students this fall. (09/30/2001, P. A2)

GRAPHIC: PHOTO, Manuel Ortiz, a Watsonville High School graduate, told lawyers that the textbook used in his government class was published in the '80s. / Michael Macor / The Chronicle

LOAD-DATE: February 8, 2002