SUPREME COURT OF NEW JERSEY
DOCKET NO. 80,859

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff/ Respondent, v. EXXON MOBIL CORPORATION, Defendant/ Respondent.	Civil Action On Petitions for Certification to the Superior Court, Appellate Division Sat Below: Hon. Carmen Messano, P.J.A.D. Hon. Amy O'Connor, J.A.D. Hon. Francis J. Vernoia, J.A.D.

CONSOLIDATED BRIEF OF RESPONDENT DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION TO PETITIONS FOR CERTIFICATION BY NEW JERSEY SIERRA CLUB, CLEAN WATER ACTION, ENVIRONMENT NEW JERSEY, AND DELAWARE RIVERKEEPER, AND BY RAYMOND J. LESNIAK.

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PRELIMINARY STATEMENT

This Court should deny both Petitioners' requests for certification for one simple reason: their primary challenge makes no real-world difference in this case. While Petitioners urge this Court to address their ability to intervene to contest a particular settlement the New Jersey Department of Environmental Protection ("DEP") and Exxon Mobil Corporation struck years ago, the lower courts *allowed* them to challenge this settlement and simply ruled against them on the merits. The merits challenges to the settlement, which only one Petitioner raises, are case-specific issues that fail in light of the deference afforded DEP, as the lower courts found.

Petitioners New Jersey Sierra Club, Clean Water Action, Environment New Jersey, and Delaware Riverkeeper (the "Environmental Groups") and Petitioner former Senator Raymond Lesniak would unravel a $225 million settlement of Exxon's liability for natural resource damages ("NRD") for hazardous discharges at certain New Jersey industrial sites and retail gas stations. DEP and Exxon settled after a 66-day bench trial in 2014 over Exxon's NRD liability at the two largest sites. The judge who presided over the bench trial of the parties' complex claims and defenses examined and ultimately approved the settlement as fair, reasonable, in the public interest, and

consistent with state statutory policy. The Appellate Division affirmed his decision.

The primary issue raised in the petitions-indeed, for the Environmental Groups, the *only* issue-is Petitioners' rights to intervene to attack the settlement. But no matter the merits of that issue, it does not call for further review. Most fundamentally, a decision in Petitioners' favor on that score would have no effect on the ultimate outcome of this case. Although prevented from intervening as parties, Petitioners had ample opportunity in the trial court and the Appellate Division to argue against approval of the proposed settlement. To further emphasize why this case is a poor vehicle for this question, the Appellate Division found the Environmental Groups had appellate standing, so they have no basis to petition for certification of this ruling in their favor. Still more, the Appellate Division, like the trial court before it, agreed with DEP on the merits. In other words, victory for Petitioners on intervention at this stage would be pyrrhic. Because they had the chance to air their grievances and the courts rejected their position, the outcome would be the same no matter what this Court decides on intervention.

The Court should also deny Lesniak's petition to challenge certain terms of the settlement agreement. Lesniak cannot carry his heavy burden to overcome the deference owed to

the DEP's judgment to settle enforcement actions, particularly where (1) the settlement involves complex issues within DEP's unique expertise; (2) the trial judge who heard all the evidence and legal arguments in the case approved the decision; and (3) the Appellate Division agreed as well. As a legal matter, Lesniak cannot seriously contest the standard of judicial review of settlements like this one, on which both state and federal caselaw is consistent. Lesniak's arguments why various provisions of the settlement are improper simply repeat claims that were soundly rejected by the trial court, whose decision was then affirmed by the Appellate Division. For all these reasons, the respective petitions should be denied.

PROCEDURAL HISTORY AND COUNTERSTATMENT OF FACTS[1]

The contested settlement was the culmination of 11 years of litigation between DEP and Exxon. In 2004, DEP filed two suits to recover damages for contamination of wetlands, wildlife habitat, and State waters from hazardous discharges at petroleum refineries and petrochemical plants formerly operated by Exxon in Linden and in Bayonne. La55.[2] Although Exxon had

[1] Because the facts and procedural history are inextricably intertwined, they are combined to avoid repetition and for the Court's convenience.

[2] "La" refers to the Appendix of Appellant Raymond Lesniak; "Lb" refers to the brief in support of Lesniak's Petition for Certification; "Ga" refers to the Appendix of Appellants Environmental Groups; and "T" refers to the July 30, 2015,

agreed in 1991 to fund the cleanup of hazardous materials at both sites, La55, the Spill Compensation and Control Act ("Spill Act") also makes dischargers strictly liable to pay for "damage" to the "natural resources" of the state, such as "shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife." N.J.S.A. 58:10-23.11b (defining "cleanup and removal costs"); DEP v. Exxon Mobil Corp. (Exxon I), 393 N.J. Super. 388, 401-02 (App. Div. 2007). The cases were consolidated for pre-trial proceedings in Union County. La55 n.30.

Early in the case, DEP's experts opined that the State should recover $8.9 billion for the costs of restoring the State's natural resources to their pre-discharge condition, and as compensation for the lost value, use, and benefit of the natural resources over the decades-long period between when the contamination began and when the cleanup would be complete. La57. Exxon contested its liability for NRD, and its experts opined that, in any event, damages were no more than $3 million. La62-63.

In the first of multiple pre-trial interlocutory appeals, the Appellate Division reversed partial summary judgment dismissing DEP's claims for compensatory NRD. The

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Transcript of Oral Argument on DEP's Motion to Approve the Settlement.

court held that the Spill Act allows DEP to recover damages in compensation for lost use and benefit of natural resources over time, in addition to requiring remediation of discharges and restoration of damaged sites. Exxon I, 393 N.J. Super. at 401-10. Then, in DEP v. Exxon Mobil Corp. (Exxon II), 420 N.J. Super. 395, 405-07 (App. Div. 2011), the Appellate Division reversed summary judgment dismissing DEP's common law strict liability claims as time-barred. Notably, neither of these interlocutory decisions reached DEP's ultimate proofs or provided guidance on how damages should be calculated in the case.

While these pre-trial battles played out in court, the parties began seven years of settlement talks. During a 2008 mediation with retired Supreme Court Justice Daniel O'Hern, DEP proposed a settlement of $350 million. La79. The offer included off-site remediation projects valued at $200 million, a $95 million cash payment to the State, and the balance for attorneys' fees and litigation expenses. Ibid. "Exxon immediately rebuffed this proposal, and Justice O'Hern concluded that further negotiations at that time would be useless." Ibid.

Negotiations began again in 2012, shortly after DEP was awarded zero dollars in both of the only two NRD cases to be

litigated to verdict.[3] Although factually distinguishable, those cases showed the risks of litigating NRD cases despite the favorable legal ruling in Exxon I, a factor DEP necessarily considered in evaluating its settlement position in this case. DEP dropped its proposed settlement offer to $325 million, but when Exxon countered at only $20 million, DEP concluded "the only way to force Exxon into a reasonable settlement posture was to aggressively push [its] case at trial." La78.

As the 2014 bench trial neared, Exxon moved to exclude seven of DEP's eight expert reports and to bar the experts' testimony as unproven and unreliable, citing the two recent decisions. La60-61. DEP likewise moved to exclude all six of Exxon's experts. La59. In this complex, specialist-driven case where each party's valuation proofs rested on the cumulative evidence of interrelated expert opinions, both parties and the court recognized that the in limine motions would likely be largely dispositive. See La59. The parties agreed with the court to allow the judge to hear from the experts during the bench trial and to delay rulings on admissibility until the trial's end. Ibid. The trial ran for 66 days between January and September 2014. La64. After post-trial briefing, the trial

[3] DEP v. Essex Chem. Corp., No. MID-L-5685-07 (Law Div. Aug. 6, 2010), aff'd, No. A-0367-10 (App. Div. Mar. 20, 2012), Pa5-Pa14; DEP v. Union Carbide Corp., No. MID-L-5632-07 (Law Div. Mar. 29, 2011), Pa15-Pa27.

court advised it would issue its written opinion in spring of 2015. Ibid.

Settlement negotiations continued during the trial. Exxon offered $100 million in early 2014, which DEP rejected, and "protracted and arduous" negotiations continued through the end of trial and into winter. La79. Then, in February 2015, the parties reached an agreement. Exxon would pay $225 million in exchange for release of the State's NRD and other asserted claims at the Bayonne and Linden sites, as well as a release of NRD claims at certain Exxon gas stations and 16 other sites in New Jersey.[4] La64. The settlement would be explicit that the 1991 cleanup agreement with DEP remains in full force, except that Exxon could defer cleanup of Morses Creek until cessation of refining operations at the Linden site.[5] La64-65. The settlement in no way relieved Exxon of its obligation to fully remediate hazardous discharges at the Bayonne and Linden sites. La65.

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[4] The settlement excepts New Jersey's claims against Exxon in the ongoing multi-district litigation in federal district court for the Southern District of New York over alleged discharges of the gasoline additive methyl tertiary butyl ether ("MTBE") at certain of these sites.

[5] Morses Creek is the approved surface-water discharge location for non-contact cooling water used by the refinery now operated by Phillips 66, a company unrelated to Exxon, under a DEP water pollution control permit. The refinery cannot operate as currently constructed without this source of cooling water. Exxon argued at trial that remediation of the Creek would require the refinery's closure and the loss of over 800 jobs.

As required by the Spill Act, DEP published the proposed settlement for public notice and comment on April 6, 2015. La66; see N.J.S.A. 58:10-23.11e2. DEP considered and responded to public comments, La67, before applying to the trial court for approval of the settlement. On June 9th, the Environmental Groups (as well as three other groups no longer in the case) moved to intervene in the trial court. La67. Then-Senator Lesniak moved to intervene ten days later. Lesniak and the Environmental Groups asked for party status limited to opposing entry of a consent judgment and to preserve their appeal rights should the settlement be approved. Ibid. Although the court denied intervention, it allowed Petitioners to participate as amici, La67-68, to file lengthy briefs opposing the settlement, and to argue without limit at the fairness hearing on July 30th. See T121-15 to 190-15.

The trial court approved the settlement on August 25, 2015, in a detailed 81-page opinion. La52. The court found the settlement "fair, reasonable, in the public interest, and consistent with the goals" of the Spill Act. Ibid. The court rejected Petitioners' objection that the $225 million settlement was an unwarranted discount from DEP's experts' NRD valuation and that DEP had over-stated its litigation risks. La98-112. The court reviewed the entire record, including the dueling expert admissibility motions, and "presided over this [66-day]

trial and underst[ood] the legal and factual risks the State and Exxon faced." La112. "In light of these risks," the court concluded that the settlement "is an accurate reflection of the strength of DEP's case." Ibid. The court filed an executed consent judgment on August 31, 2015, La52, and Exxon paid the settlement amount a few weeks later. Under the parties' agreement, the funds are being held by the State in a segregated interest-bearing account until the consent judgment "becomes final and non-appealable." La64. In October 2015, Lesniak and the Environmental Groups separately appealed from the trial court's orders denying intervention and approving the settlement. La1-3; G1-2.

The Appellate Division affirmed in a published decision on February 12, 2018. DEP v. Exxon Mobil Corp. (Exxon III), __ N.J. Super. __ (App. Div. 2018). Petitioners argued the trial court was wrong to hold that standing is a prerequisite to both mandatory and permissive intervention under Rules 4:33-1 and -2. The Appellate Division disagreed, explaining that intervention in the trial court is "premised" on standing, as reflected in the express requirements of Rules 4:33-2 and 4:33-3 that intervenors plead a "claim or defense," and that it would be "illogical" not also to require standing in order to intervene under Rule 4:33-1. Exxon III, __ N.J. Super. __ (slip op. at 10-19). The Appellate Division found additional

support in federal caselaw requiring intervenors to show Article III standing in order to intervene under the "nearly identical" language of the Federal Rules of Civil Procedure, the "source" for the state Rules. Id. (slip op. at 14-17). Ultimately, in the trial court, "the intervenor's status is comparable to" and "on the same footing" as a party, so he must clear the same standing hurdles as a party. Id. (slip op. at 14-16). Here, Petitioners lacked standing because only DEP can sue to recover NRD under the Spill Act, id. (slip op. at 22-23), and Petitioners had no viable cause of action under the Environmental Rights Act, N.J.S.A. 2A:35A-1 to -14, (slip op. at 24-25), or the common law, (slip op. at 25 n.4).

Nonetheless, the Appellate Division ruled that the Environmental Groups could appeal the consent judgment because they are "affected by" the trial court's order; their interests diverged from DEP's from the time the settlement was reached; neither of the settling parties would have appealed the consent judgment; the judgment raised new issues not addressed in the litigation; and in consideration of "their broad representation of citizen interests." Exxon III, __ N.J. Super. __ (slip op. at 28-29, 31, 35). On the other hand, the Appellate Division found that Lesniak "lacks sufficient personal or pecuniary interest or property right adversely affected by the judgment" to pursue an appeal. Id. at 35. After considering the merits

of the Environmental Groups' objections to the settlement, the Appellate Division found "no mistaken exercise of the judge's discretion" in approving the settlement as "fair, reasonable, consistent with the Spill Act's goals, and in the public interest," id. at 44, and affirmed the trial court's orders.

ARGUMENT

POINT I

THIS IS NOT THE APPROPRIATE CASE TO RECONSIDER THE STANDARDS FOR INTERVENTION BECAUSE PETITIONERS PARTICIPATED EXTENSIVELY AS AMICI AND APPELLANTS IN THE PROCEEDINGS BELOW AND A DECISION WOULD HAVE NO EFFECT ON THE OUTCOME OF THIS CASE.

This Court should not reconsider the Appellant Division's intervention analysis in this case for three reasons. First, the Environmental Groups won much of this issue below; second, the Petitioners were all able to (and did) participate extensively below, so the intervention decision made little difference; and third, the intervention issue will not change the outcome in this case, as the lower courts also approved the settlement on the merits (a decision the Environmental Groups do not challenge in their petition). So even if the question warranted review in some future case, this Petition is not the vehicle for addressing it.

First, the Environmental Groups already won much of what they were seeking below. It is black letter law that "a

litigant may not appeal from a judgment or so much of a judgment which is in that party's favor." Popow v. Wink Assocs., 269 N.J. Super. 518, 528 (App. Div. 1993). "[I]t is well settled that appeals are taken from orders and judgments and not from . . . reasons given for the ultimate conclusion." Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001); Price v. Hudson Heights Dev., LLC, 417 N.J. Super. 462, 467 (App. Div. 2011) ("[B]ecause an appeal questions the propriety of action below, the rationale underlying the action is not independently appealable."). The Appellate Division's ruling vindicated the Environmental Groups' right to challenge the settlement in court. The Environmental Groups ask this Court to reach the same result for other reasons—i.e., that they do not need to prove standing, even though the lower court found they had met the standing test here. Because the Environmental Groups are challenging a rationale rather than an outcome, their petition should be denied.

Second, a ruling on intervention under Rule 4:33 would matter little here because Petitioners were afforded an opportunity to participate in the very manner they requested, though not under their preferred label. The trial court gave the Environmental Groups and Lesniak wide latitude as amici to file briefs and argue without limit at the fairness hearing, and then ruled in a thoughtful and thorough manner on their

objections. The Environmental Groups were again heard on the merits in the Appellate Division. Further, although he was ultimately denied the right to appeal, Lesniak also filed a merits brief and a reply in the Appellate Division, which is one more brief than he was entitled to file as amicus. The Appellate Division accepted, filed, and considered Lesniak's briefs. See Exxon III (slip op. at 27, 35). Lesniak was also heard at oral argument, to which amici are not entitled except by leave. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 1:13-9 (2018). Still more, the Environmental Groups' "broad representation of citizen interests," Exxon III, __ N.J. Super. __ (slip op. at 35), and the alignment of the Environmental Groups' substantive arguments with Lesniak's, ensured that his interests were also represented on appeal. Petitioners cannot point to any added benefit that participating as intervenors, rather than as amici or appellants, would have conferred that justifies this Court hearing this case and granting relief.

Third, a decision on the intervention standard would not affect the ultimate outcome of this case. As explained in Point II below, the trial court was right to affirm DEP's expert judgment that this settlement was fair and proper (which, again, the Environmental Groups do not challenge at this stage). It follows inexorably that the trial court's failure to permit

Petitioners to participate as intervenors rather than amici was, at most, harmless and does not warrant reversal, given that the same result would obtain. Exxon III, __ N.J. Super. __ (slip op. at 25). Similarly, the Appellate Division's refusal to allow Lesniak to pursue his individual appeal alongside the Environmental Groups could not have been prejudicial and did not bring about an unjust or even different result. Lesniak was heard in the trial court, the Environmental Groups adequately represented his interests in the Appellate Division, and his objections lack merit.

POINT II

THE COURT SHOULD DENY CERTIFICATION OF LESNIAK'S PETITION TO RECONSIDER THE TERMS OF THE CONSENT JUDGMENT BECAUSE THE LOWER COURTS APPLIED THE CORRECT LEGAL STANDARD AND THERE ARE NO SPECIAL REASONS FOR THIS COURT TO REVIEW THE FINDINGS.

Petitioners must carry the heavy burden of showing "special reasons" for this Court to certify a challenge to settlement terms negotiated by an administrative agency within the specialized area of its expertise, approved as fair and reasonable by a trial judge who heard all the evidence in the case, and whose decision was affirmed under the deferential mistaken-exercise-of-discretion standard by the Appellate Division. R. 2:12-4; Exxon III, __ N.J. Super. __ (slip op. at

44). The Environmental Groups do not even attempt this, and for the reasons that follow, Lesniak's petition does not succeed.

Initially, Lesniak contends that the trial court applied the wrong standard of review to the proposed settlement. Lb 16-18. He cherry-picks language from a single federal case to argue the trial court was required to conduct an even more thorough, searching analysis than the 81-page decision it issued. In fact, state and federal caselaw amply supports the standard applied by the trial court and affirmed by the Appellate Division. Although there is apparently no other published state court decision describing the standard for review of Spill Act settlements in particular, the Appellate Division had no difficulty analogizing this case to published decisions describing the standard for judicial review of settlements involving other matters of public significance. Exxon III, __ N.J. Super. __ (slip op. at 38-40). In particular, it quoted Judge Skillman's decision in Warner Co. v. Sutton, 274 N.J. Super. 464, 480 (App. Div. 1994), reviewing a land use rezoning settlement, that courts should probe whether agreements are "fair and reasonable" and "adequately protect" the public's interest. Exxon III, __ N.J. Super. __ (slip op. at 38-39). And, like the trial court, the Appellate Division was also convinced that the many federal district and circuit court decisions describing how hazardous waste discharge

enforcement settlements are reviewed under the Spill Act's federal analogue, the Comprehensive Environmental Response, Compensation, and Liability Act, are on-point. Id. at 40, 43-44. From both lines of cases, the lower courts derived a common set of factors for review of Spill Act settlements. The court should inquire whether the settlement is fair and reasonable, whether it adequately protects the parties and the public, and whether it is within the limits of, and consistent with, the legal authority of the State agency plaintiff. Id. at 38-40.

Lesniak acknowledges that the trial court was uniquely suited to evaluate the settlement given its "great familiarity" with the evidence developed for the Bayway and Linden sites. Lb18. The trial court, of course, was also acutely aware of the legal strengths and shortcomings of the parties' claims and defenses, having already drafted 300-plus pages of its opinion by the time the settlement was announced. La75-76. Nor was the record "empty" on any "critical aspect of settlement evaluation," as Lesniak contends. Lb17. In addition to the overwhelming evidence from the trial on Bayonne and Linden, the court reviewed "sixteen certifications from [DEP's] professional staff describing the size of groundwater plumes" at the other sites included in the settlement and explaining DEP's valuation of potential NRD claims. La86. DEP attested to and submitted extensive evidence supporting the fact that none of the other

sites "have groundwater or other contamination that would make it cost effective for [DEP] Commissioner Martin to recommend that suit be filed" for NRD. Ibid. The settlement of un-asserted NRD claims was also appropriate in the trial court's view because Exxon remains responsible for whatever remediation is required at the other sites and the settlement has no effect on the State's valuable MTBE claims against Exxon at 716 retail gas stations. See La88. Lesniak has not credibly challenged the standard of review applied by the trial court and approved by the Appellate Division, and his criticisms of the court's fairness review finds no support in the record. For these reasons, certification should be denied on this question.

Lesniak's challenge to the deferral of the Morses Creek cleanup presents a narrow, fact-specific question unique to this case where judicial review is most deferential to DEP's discretion and expertise. See Lb12-14. The Bayway refinery operated by Phillips 66 relies on at least 30 million gallons per day of non-contact cooling water that is discharged back into the Creek under a water pollution control permit from DEP. T117-20 to 118-4. The refinery, which employs 800 workers, cannot operate as currently configured without this cooling water, but nor can the remediation proceed while the Creek is used for discharge of cooling water. T214-4 to 215-5. The consent judgment therefore defers cleanup until such time as the

refinery operations cease or the Creek is no longer needed for cooling water purposes. La125.

Balancing the competing regulatory interests is quintessentially within DEP's discretion under the Water Pollution Control Act and the Spill Act. Both statutes accord DEP substantial discretion to approve and condition discharge permits for industrial activities on the one hand, N.J.S.A. 58:10A-6(b) and (c), and to direct the manner of remediation of contaminated sites on the other. N.J.S.A. 58:10-23.11f(a)(1). A court should not "second-guess" an agency's decisions "which fall squarely within the agency's expertise," nor "'substitute its own judgment for the agency's even though the court might have reached a different result.'" In re Stream Encroachment Permit, 402 N.J. Super. 587, 597 (App. Div. 2008) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). The trial court properly deferred to DEP's judgment that the extension of time to remediate Morses Creek was reasonable under the circumstances, and the Appellate Division did not disturb this finding. The consent judgment also preserves DEP's discretion to end the cooling water discharge permit, and thereby the remediation deferral, based on a change in circumstances, for example if new technology renders the use of non-contact cooling water obsolete in the future. This fact-sensitive, case-specific decision, reviewed and approved by two

courts under well-settled principles of administrative law, does not merit certification.

The inclusion of additional sites within the scope of the consent judgment was also legally appropriate and factually supported. Initially, Lesniak concedes that a consent judgment may encompass claims beyond those previously raised in the litigation so long as the relief is otherwise within the court's jurisdiction. Lb15. In New Jersey, a consent judgment "is not strictly a judicial decree" and is more akin to "a contract entered into with the solemn sanction of the court" or "an agreement of the parties under the sanction of the court as to what the decision shall be." Cmty. Realty Mgmt. Inc. v. Harris, 155 N.J. 212, 226 (1998). Lesniak has not cited any New Jersey case or Court Rule that prohibits the Superior Court from approving an otherwise legal settlement term simply because the provision is part of an agreement reached in the course of litigation. To limit consent judgments to the four corners of the pleadings would undermine New Jersey's "strong public policy favoring settlements." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990).

The decision to resolve non-MTBE NRD claims for 16 additional facilities and for the retail gas stations is, like the Morses Creek decision, fact-sensitive and case-specific and does not vault the Court's high threshold for the exceptional

relief of certification. In his petition, Lesniak repeats his original criticism of these settlement terms without identifying any error in the trial court's comprehensive fairness decision. See Lb14-16. DEP submitted extensive evidence to the trial court valuing all of these non-litigated claims at roughly $5 million of the $225 million total settlement payment. The trial court found that DEP had submitted credible evidence in support of its valuations for the sites and explaining how it had determined that separate litigation to recover NRD for the additional sites would not be cost-effective. La86. "[T]hese sites are not worth the litigation costs," the court ruled, and the DEP's valuation of aggregate NRD at the sites and the retail stations was reasonable. La86-87. The trial court reasoned that "when the DEP has performed a rational analysis after reviewing the evidence, [more] detailed investigations are not required," La87, and that "trustees must be given flexibility and trial courts 'should give the DEP's expertise the benefit of the doubt when weighing substantive fairness.'" La85 (quoting United States v. Cannons Eng'g Corp., 899 F.2d 79, 88 (1st Cir. 1990)). The Appellate Division's determination not to disturb the trial court's findings does not merit certification.

CONCLUSION

For these reasons, both petitions for certification should be denied.

Respectfully submitted,

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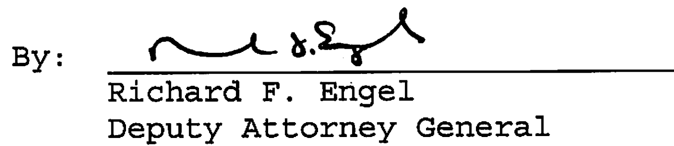
By:



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Dated: March 29, 2018