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FAX COVER SHEET

TO: Paul Merrill FROM: Em Rith
DATE: 3/10/94 TIME: 5:25 A.M. OR P.M.
RE: Baffey v. Montoya
SENT BY: _____
NO. OF PAGES: 19 (Including cover sheet)
COMMENTS: _____

Privileged Attorney/Client Communication

Draft--March 10, 1994

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM R. GAFFEY,

Plaintiff,

vs.

PETER G. MONTAGUE and
ENVIRONMENTAL RESEARCH
FOUNDATION,

Defendants.

No. 91-1938-C-7 CAS

AFFIDAVIT OF PETER G. MONTAGUE IN SUPPORT
OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PETER G. MONTAGUE, first being duly sworn upon his oath,
deposes and says:

1. I am the publisher of "Rachel's Hazardous Waste News" and the executive director of the Environmental Research Foundation ("ERF"). Both ERF and I are defendants in this lawsuit.

2. I make this affidavit in support of the Motion for Summary Judgment filed on my and ERF's behalf and, by this affidavit, wish to inform the Court of the facts and circumstances which surrounded and led to my writing and publishing an article in the March 7, 1990 issue of "Rachel's Hazardous Waste News" (No. 171) entitled "Dioxin and Cancer: Fraudulent Studies" (hereafter "Fraudulent Studies"). A copy of the article is attached as Exhibit "A".

3. Unless otherwise indicated, all matters stated in this affidavit are made on my personal knowledge.

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4. ERF is a not-for-profit corporation funded primarily by philanthropies such as the Rockefeller Family Fund, the Geraldine R. Dodge Foundation, the Pew Charitable Trusts, and the Public Welfare Foundation. ERF provides information and advice to private citizens and organizations, as well ^{as} government public health and environmental protection agencies, on many environmental topics. ERF's newsletter "Rachel's Hazardous Waste News" has as its mission statement: "Providing news and resources to the Movement for Environmental Justice." The newsletter had a circulation of approximately 1,500 at the time the Fraudulent Studies article was published.

5. In addition to being a founder and the Executive Director of ERF since 1983, I was for a decade on the technical and professional staff of Princeton University's School of Engineering and Applied Science, including as Project Administrator for the Chemical Engineering Department's hazardous waste research program. I have served as an advisor to the President's Council on Environmental Quality, the President's Office of Science and Technology Policy, and the Congressional Office of Technology Assessment, have testified before Congressional committees on Superfund legislation and radioactive waste burial and have served as consultant to the cities of Baltimore, Maryland, and Charlottesville, Virginia on issues of hazardous waste disposal.

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6. For twenty years prior to publication of the Fraudulent Studies article, I had ^{also} been an active journalist in the area of environmental affairs. A substantially complete bibliography of articles I had authored or co-authored ^{is} attached as Exhibit "B". I was the sole author of the Fraudulent Studies article (except to the extent that I quoted other material) and the editorial decision to publish it in "Rachel's Hazardous Waste News" was mine alone. What follows are the events which led to the article's preparation and publication.

7. Dioxin and public health ^{were} just ^{two} of many environmental issues ⁱⁿ concerning which I had a personal and journalistic interest. For years prior to publication, I understood that there was an unresolved paradox concerning the chemical dioxin. On the one hand, it was undisputed that animal studies demonstrated ^{the form of} chemical dioxin ^{known as 2,3,7,8-TCDF} to be among the world's most potent toxins; cancer was found in laboratory animals exposed to exceedingly low levels of dioxin measured in parts per ^{trillion.} ~~billion.~~ On the other hand, human data on exposure to dioxin was characterized by government and industry as "inconclusive."

^{toxic and municipal waste} 8. Citizen efforts to fight the construction of incinerators also was (and remains) a subject of personal and journalistic interest for me. In my experience, incinerators were typically proposed to be built in areas populated by working poor people. Those potentially affected have understandable concerns about how an incinerator will affect their health and

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property values. One of the functions of ERF is to serve as an information clearinghouse for lay people and citizen activists on technical matters relating to toxic substances and public health.

9. Among the identified hazards of incinerators is the chemical dioxin. Prior to the publication of the Fraudulent Studies piece, I was generally aware that developers of incinerator projects used industry studies which found no adverse human-health consequences from dioxin exposure as part of their public-relations campaigns to diffuse opposition.

10. My recollection is that the message from the developers to affected people was: "You are not scientists. Leave it to the scientists." Because of the potential human-health stakes involved and industry control of scientific information, the subject of dioxin and health was a matter that I increasingly followed.

11. Some weeks prior to the publication of the Fraudulent Studies article I received from ~~Dr.~~ Paul Connett, a chemist at St. Lawrence University in New York, a copy of a paper prepared by a German epidemiologist named Friedemann Rohleder entitled "Dioxins and Cancer Mortality - - Reanalysis of the BASF Cohort." ("Rohleder Paper"). A copy is attached as Exhibit "C".

12. I spoke with Professor Connett - - whom I knew to be a dioxin researcher who attended scientific conferences on the subject - - about the significance of the Rohleder Paper. Based on my conversation with Professor Connett, and my review of the

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Rohleder Paper and a related article published in the British technical journal New Scientist entitled "New Analysis links dioxin to cancer" (copy attached as Exhibit "D"), I understood that German industry-sponsored epidemiological studies on human-health consequences of dioxin contained grossly flawed data.

13. Rohleder reviewed the data, which was based on a study of workers put at risk of dioxin exposure as a result of an industrial accident. He found that some workers who had experienced high-level exposure to dioxin were erroneously placed in the study's "low level" or "non-exposed" group and that the affected plant's supervisory staff, whom Rohleder concluded had not been exposed, were placed in the "exposed" group. The effect of the first error was to inflate falsely the "low" or "non" exposed group with people who had been exposed and ~~was~~ subsequently experienced dioxin-linked adverse health conditions. The effect of the second error was to dilute falsely the "exposed" group's truly exposed people, who had experienced adverse health effects, with non-exposed people, who had not.

14. The consequence of both errors, to my understanding, was that the flawed German studies showed little difference in the incidence of dioxin-linked cancers between the exposed and non-exposed groups. This information was then used to deny compensation to workers exposed to dioxin. When Rohleder corrected the errors by placing exposed people in the "exposed" group and unexposed people in the "unexposed" group he found

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statistically significant increases in cancers of the respiratory organs and digestive tract among the exposed group when compared with the unexposed group.

15. Several weeks after I received and analyzed the Rohleder information and approximately one week before publication of the Fraudulent Studies Article, I received at ERF's offices a copy of a memorandum ostensibly authored by a chemist at the Environmental Protection Agency ("EPA") named Cate Jenkins. ("Jenkins Memorandum").

16. At the time I received the Memorandum, I was working full time for Princeton University in the Department of Computing and Information Technology; I volunteered my services as ERF's director and as Editor and Publisher of Rachel's Hazardous Waste News. During my lunch hour (either on February 28th, or March 1st or March 2nd of 1990), as was my custom, I went to ERF's offices (which were only a short walk from the Princeton campus) to open the mail. There I found the Jenkins Memorandum.

17. The Jenkins Memorandum - - entitled "Newly Revealed Fraud by Monsanto in an Epidemiological Study Used by EPA to Assess Human Health Effects from Dioxins" - - was directed to Raymond Loehr in his capacity as Chairperson of the Executive Committee of the EPA's Scientific Advisory Board. Attached to the Jenkins Memorandum was a portion of a legal brief filed in Illinois state court by attorneys for the claimants in a dioxin-

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related case entitled Kemner v. Monsanto Company. ("Kemner Brief"). A copy of the Jenkins Memorandum and attached Kemner Brief are appended to this Affidavit as Exhibit "E".

18. The Memorandum, which relied in large part on the Kemner Brief, concluded that Monsanto epidemiological studies mischaracterized worker exposure to dioxin at Monsanto's Nitro, West Virginia plant. The Nitro, West Virginia plant had experienced an explosion in 1949, which explosion and subsequent clean-up had exposed workers to dioxin laden substances. The Monsanto investigators, Jenkins reported, had erroneously understated adverse human-health effects of dioxin exposure and this misinformation, in turn, had been relied on by the EPA in concluding that "existing epidemiologic studies were conflicting and did not provide definitive data on human health effects of dioxins." Jenkins concluded that the Monsanto research "has now been shown to be a fraud."

19. The Kemner Brief appended to the Jenkins Memorandum described what Monsanto knew about dioxin in their products and when they knew it and explained in considerable detail how the epidemiological studies performed by Monsanto investigators named Zack, Gaffey and Suskind grossly and misleadingly understated the incidence of cancer and other disease resulting from human exposure to dioxin.

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20. As concerns the work of the Monsanto investigators Zack and Gaffey, the Brief explained:

Zack and Gaffey, two Monsanto employees, published a mortality study purporting to compare the cancer death rate amongst the Nitro workers who were exposed to Dioxin in the 1949 explosion with the cancer death rate of unexposed workers. The published study concluded that the death rate of the exposed workers was exactly the same as the death rate of the unexposed workers. However, Zack and Gaffey deliberately and knowingly omitted 5 deaths from the exposed group and took 4 workers who had been exposed and put these workers in the unexposed group, serving, of course, to decrease the death rate in the exposed group and increase the death rate in the unexposed group. The exposed group, in fact, had 18 cancer deaths instead of the reported 9 deaths (Pl. Ex. 1464), with the result that the death rate in the exposed group was 65% higher than expected (emphasis in original).

21. The Jenkins Memorandum, Kemner Brief and Rohleder Paper, in my journalistic judgment, were powerful evidence that helped to resolve what I had long understood to be the unexplained paradox between animal studies (which found dioxin to be *an exquisitely* ~~a most~~ dangerous toxin and carcinogen) and the human epidemiological studies performed by industry (labeled as "inconclusive").

22. The conclusions reported by Jenkins and in the Kemner Brief that epidemiological evidence had been manipulated by Monsanto investigators rang true to me both logically and intuitively: it seemed intuitively true that a substance that is toxic to animal and plant life to an extent that almost defies description would be toxic to human life as well; it seemed logically true that *only* through statistical manipulation *could*

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an industry with a vested interest keep dioxin's toxic effect on humans an "open question." But, for me, more than logic and intuition supported the reliability of what I had received and read.

23. The Jenkins Memorandum with the attached Kemner Brief was first sent to me by a physicist named William Sanjour. I had been personally acquainted with Mr. Sanjour for approximately five years and knew that he had been associated with the E.P.A. for approximately 20 years, virtually since the E.P.A.'s inception. Over the years before he sent me the Jenkins Memorandum, I had spoken with Mr. Sanjour as many as fifty times on a wide variety of topics and invariably found him to be professional, thoughtful, realistic, and reliable.

24. Some years prior to sending me the Jenkins Memorandum, Mr. Sanjour had blown the whistle on official misconduct at E.P.A. I had dealt with many whistleblowers before and, based on my experience as a journalist, typically found them to be men and women of integrity and personal courage. I believed Mr. Sanjour had these qualities.

25. Mr. Sanjour's reliability as a source was further corroborated by the fact that, notwithstanding his "whistleblowing" activity, Mr. Sanjour "survived" and remained employed at the E.P.A. I considered it likely that he was under close scrutiny at the E.P.A. and, therefore, generally would be inclined to proceed carefully in his activities. In sum, based

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on my long-term personal dealings with Mr. Sanjour, my understanding of his history at E.P.A., and my knowledge of "whistleblowers" generally, I considered Mr. Sanjour a highly reliable source who would relay to me only the most substantial, legitimate information. } *Dangerous*

26. I also considered the Jenkins Memorandum, on its face, to be reliable. Sent to me by Sanjour, a long-standing E.P.A. scientist, the Memorandum itself appeared on E.P.A. letterhead, was authored and signed by a fully credentialed scientist, was directed to senior officials at E.P.A. and appeared well organized and contained what were, to me, reasoned prose. While I do not recall having had any regular dealings with Ms. Jenkins, I do recall knowing that, like Mr. Sanjour, she was a whistle-blower who had survived at E.P.A. The reliability I ascribed to whistleblowers generally, applied to Ms. Jenkins as well. } *Dangerous*

27. I also found the Kemner Brief, on which the Jenkins Memorandum relied, to be credible. First, it was logically and lucidly written and was replete with evidence citations in support of its conclusions. Second, although I had little experience with the judicial process, it was my understanding that lawyers -- even when acting as advocates -- have a professional and ethical obligation to be truthful in their representations to the Court. Moreover, to my mind, a lawyer's credibility with the judge deciding his or her case } *Dangerous*

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created a practical incentive to the claimants' lawyers in Kemner (a case which evidently involved millions of dollars in damages) to be scrupulous in describing the facts of a case.

28. I considered and was satisfied semantically with the Jenkins Memorandum's and the Kemner Brief's use of the term "fraud" in describing the Monsanto investigators' work. The facts, as outlined in both, and placed in the context of the controversy over human health effects of dioxin exposure, justified its use. "Fraud", to me, referred to a purposeful misstatement (or even "fudging") of facts on some important subject with the expectation or knowledge that others ~~may~~ ^{would} rely on and, hence, be misled by those misstated facts ^{to their detriment.}

29. Based on what I had read in the Kemner Brief and Jenkins Memorandum about what had precipitated the Monsanto epidemiological investigation (the "monkey's on Monsanto's back to show Dioxin is acceptable"), about how obvious and egregious were the mischaracterization of "exposed" and "unexposed" workers, about what were, to the sponsoring company, the stakes involved (agent orange litigation, among other things), and about how the erroneous data was known to be relied on by the E.P.A. to [←] ^{) - dangers} set public health regulations, I considered the Jenkins Memorandum's and the Kemner Brief's inference of "fraud" to be fair, factual and, from a journalistic point of view, compellingly reportable.

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30. The Jenkins Memorandum and the Kemner Brief were not without minor discrepancies. But, as described below, none of the three discrepancies I found were related to the Jenkins Memorandum's and Kemner Brief's central thesis that ^{the} Monsanto investigators' work purposefully misstated the health consequences of dioxin exposure. Moreover, further pre-publication investigation by me permitted me to readily reconcile the discrepancies I found.

31. One of Rachel's Hazardous Waste News's editorial policies was (and is) to provide its readership with extensive citations to source material both to facilitate the readership's own investigation into topics discussed and to enable the readership to render its own judgments on the editorial position taken in Rachel's Hazardous Waste News.

32. Prior to the publication of the Fraudulent Studies article, I conducted an on-line computer search through the "Dialog" service of the names of all of the relevant Monsanto investigators identified in the Jenkins Memorandum and Kemner Brief (i.e. Zack, Gaffey, and Suskind) against the on-line catalogue of the National Library of Medicine so that I could provide the readers with citations to relevant source material. The citations I obtained revealed that there had been three, related papers by the Monsanto investigators arising out of worker exposure to dioxin at Monsanto's Nitro, West Virginia plant: A 1980 report by Zack and Suskind ("Zack-Suskind")

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published in the Journal of Occupational Medicine, a 1983 report by Zack and Gaffey ("Zack-Gaffey") published in a compendium called "Environmental Research," and a 1984 report by Suskind *and Hertzberg* published in the Journal of the American Medical Association ("Suskind").

33. I compared the citations, the Jenkins Memorandum, and the Kemner Brief with one another, and found three discrepancies. The discrepancies consisted of Jenkins, when describing the Kemner Brief, reversing the chronology of the Zack-Suskind and Zack-Gaffey papers and misidentifying the journal in which the Zack-Suskind paper was published as the Journal of the American Medical Association rather than the Journal of Occupational Safety. Also, it appeared that Jenkins attributed the Zack-Gaffey report to Zack alone, although her description ^{of} the work conformed with the Kemner Brief's criticism of Zack-Gaffey.

34. On March 6, 1990, to confirm that I had correctly reconciled the discrepancies, I traveled with citations in hand to the Rutgers University Medical Library and reviewed and photocopied the relevant articles, including Zack-Gaffey, (Zack, J.A. & W.R. Gaffey, "A Mortality Study of Workers Employed at the Monsanto Company Plant in Nitro, West Virginia," Environmental Science Research, Vol. 26 (1983), pgs. 575-591). A copy of Zack-Gaffey is attached to the Affidavit as Exhibit "F".

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35. My review of the source material against the Kemner Brief and Jenkins Memorandum, permitted me to reconcile and confirm to my satisfaction that, as the soon-to-be published Rachel's would report, the Jenkins Memorandum and the Kemner Brief each criticized as fraudulent the Zack-Gaffey Study.

36. I included in the Fraudulent Studies article footnotes: (a) Ms. Jenkins name, title, and address, (b) the name, title and address of the E.P.A.'s Science Advisory Board Director to whom the Memorandum was directed, (c) the name, address and phone number of ^{Mr.} Rex Carr, the chief attorney on the Kemner brief, (d) a disclosure of Mr. Sanjour as the person who had sent me a copy of the Jenkins Memorandum as well as the name of Margo Blackwell who had independently sent me a copy, (e) a full citation to the Zack-Gaffey Study as well as citations to related Monsanto-based research, the Rohleder Paper and the related article published in New Scientist, (f) a disclosure of Professor Connett as the person who had sent me the Rohleder Paper, and (g) an offer to send to any interested person a copy of the Jenkins Memorandum with attached Kemner Brief and/or Rohleder Paper for copying and handling costs.

37. On March 7, 1990, I reviewed and proofread the Fraudulent Studies piece after it had been printed but before it was published, and found only two items which invited editorial attention: (a) while Mr. Gaffey's name is correctly stated in the footnote citation to the Zack-Gaffey report, his initials are

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transposed as "R.W." rather than "W.R." in the text and (b) I had not included a citation of the Zack-Suskind Study. I was dissatisfied with the typographical error and believed that, ideally, the Rachel's readership would be best served with Zack-Suskind citation but I determined to proceed with publication as written that day.

38. Nothing in the Fraudulent Studies article itself or in any of the materials I reviewed before its publication caused me to believe or even suspect - - nor to this day do I believe - - that the criticisms of the Zack-Gaffey study and attribution of fraud made by the Jenkins Memorandum and Kemner Brief and reported in Rachel's Hazardous Waste News were even remotely incorrect. The Jenkins Memorandum and Kemner Brief provided reliable, independent evidence of purposeful manipulation and mischaracterization of data by industry investigators in relation to a critically important public health issue.

Dangerous

39. After publication of the Fraudulent Studies article, I received a letter from ~~Dr.~~ ^{Dr.} Gaffey dated April 23, 1990 in which he claimed that the Fraudulent Studies article contained defamatory falsehoods about him. He threatened that "[i]n order to avoid litigation which could be both embarrassing and expensive, I suggest that you retract the allegation and also the false statements about what Zack and I did." A copy of ~~Dr.~~ ^{Dr.} Gaffey's letter is attached as Exhibit "G".

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40. I responded to ^{Dr.}~~Mr.~~ Gaffey by a letter dated April 29, 1990, which, in light of ^{Dr.}~~Mr.~~ Gaffey's claims, posed additional questions about his study and requested clarification of points he had made in his April 23, 1990 letter. A copy of my letter dated April 29, 1990 is attached as Exhibit "H".

41. ^{Dr.}~~Mr.~~ Gaffey responded by letter dated May 11, 1990 with a defense of the Zack-Gaffey paper and copies of excerpts from transcripts of trial testimony in the Kemner case. As I reviewed ^{and} digested this material and sought further information on the subject, ^{Dr.}~~Mr.~~ Gaffey had a lawyer write to me twice about printing an unspecified retraction of the Fraudulent Studies article. ^{Dr.}~~Mr.~~ Gaffey's May 11, 1990 letter (without the enclosures) and the two letters to me from his lawyer are attached as Exhibit "I".

42. I considered ^{Dr.}~~Mr.~~ Gaffey's grievance to be an extremely serious matter. If ^{Dr.}~~Mr.~~ Gaffey was, as he claimed, erroneously imputed with scientific fraud, I had an obligation to him, to Rachel's readership and to myself to ensure that the error was corrected. I thoroughly analyzed the material ^{Dr.}~~Mr.~~ Gaffey sent to me as well as material I had collected independently. But, far from debunking what Jenkins and the Kemner Brief had claimed and I had reported, my review confirmed for me the accuracy of what the Jenkins Memorandum and the Kemner Brief had concluded: that the Zack-Gaffey ^{study} knowingly and deliberately sought to mislead ^{its} ~~the~~ readers.

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43. I wrote to ~~Mr.~~^{Dr.} Gaffey's lawyer and took great pains to explain to her what my reevaluation thus far had yielded. A complete copy is attached as Exhibit "J" and a portion is excerpted below:

Regarding [the Kemner Brief's] first point, I believe Zack/Gaffey did omit five deaths from the exposed group but I am not yet sure in my own mind whether this omission was justified or not. I am continuing to gather material about this matter and will reach a conclusion when more information becomes available to me.

Regarding [the Kemner Brief's] second point, I believe [it] is correct in stating that 4 individuals who were labeled "not exposed to 2,4,5-T" by Zack/Gaffey had, in fact, been heavily exposed to 2,4,5-T during the 1949 accident at the Nitro plant. I believe Zack/Gaffey knew these individuals had been heavily exposed because they used the term "TCDD exposure" to describe the condition of those four individuals (and others who lived through the accident)

* * *

Zack/Gaffey did not mention anywhere in their published article that they were including four workers with "presumed TCDD exposure" (pg. 590) in Table 11, which is a table labeled "not exposed to 2,4,5-T" (pg. 589).

I therefore conclude that Zack/Gaffey deliberately and knowingly took four workers who had been heavily exposed and put these workers in the "unexposed" group, serving to decrease the death rate in the exposed group and increase the death rate in the unexposed group, which is precisely what Mr. Carr accused them of doing in the sentence I quoted in #171. I believe that Zack/Gaffey had every opportunity to tell their readers that they had done this, and to include whatever justification they might have offered for doing this, but instead they chose to remain silent on the matter and thus they chose to allow their readers to form the impression that Zack/Gaffey had no reason to believe that anyone in Table 11 had suffered substantial exposure to 2,4,5-T. This causes me to believe firmly that Zack/Gaffey tried to make their readers believe that something was true when it was actually untrue and they knew it was untrue; in short, I believe they willfully tried to deceive and mislead their readers, constituting a fraud.

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44. I attempted to explain to ^{Dr.} ~~Mr.~~ Gaffey, through his lawyer, why I was duty-bound to ignore his threats of litigation and personal "embarrassment":

This is clearly an unwarranted attempt to restrict my first amendment rights, and to frighten me away from pursuing my obligation as a journalist to print allegations of scientific fraud. I am not easily frightened. I believe that exposure of fraud in science is an important service that journalists must provide their readers, since the public health consequences of scientific fraud can be very great indeed (and, in this particular case, appear to be ^{the?} ← extraordinarily so, since U.S. Environmental Protection Agency says it has relied upon the Zack/Gaffey study to establish standards for human exposure to dioxin). . . .

As for embarrassing me, Mr. Gaffey will be disappointed on that count as well; far from being embarrassed, I am proud of the small part I have played in bringing this matter to light. My readers, and my journalistic and scientific colleagues across the country, will follow the proceedings with abiding interest if Mr. Gaffey initiates a lawsuit, and I will take pains to keep them all apprised. After all, it is Mr. Gaffey who has invented a new meaning ("not exposed") for a common English word ("exposed"); I am not embarrassed to label this invention a fraud.

Peter G. Montague

Signed and sworn to before me, a notary public, this ____ day
of _____, 1994.

Notary Public

My commission expires: