Case No. H031540

IN THE CALIFORNIA COURT OF APPEAL

SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA, ET AL.,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA,

Respondent.

ATLANTIC RICHFIELD COMPANY, AMERICAN CYANAMID COMPANY, CONAGRA GROCERY PRODUCTS COMPANY, E.I. DU PONT DE NEMOURS AND COMPANY, NL INDUSTRIES, INC., MILLENNIUM HOLDINGS LLC, and THE SHERWIN-WILLIAMS COMPANY,

Real Parties in Interest.

From the Superior Court for the State of California
County of Santa Clara, Honorable Jack Komar
Superior Court Case No. CV 788657

RETURN BY REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI OR OTHER ALTERNATIVE RELIEF

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Real Parties in Interest Atlantic Richfield Company, American Cyanamid Company, Conagra Grocery Products Company, E.I. du Pont de Nemours and Company, Millennium Holdings LLC, NL Industries, Inc., and The Sherwin-Williams Company ("Defendants"),[1] respectfully submit this Return in response to the Petition for Writ of Mandate, Prohibition, Certiorari or Other Alternative Relief filed by Plaintiffs to set aside the order issued by the Superior Court for the County of Santa Clara on April 4, 2007 (the "Order").[2]

INTRODUCTION

Long-settled constitutional and ethical principles hold that the individuals enforcing the government's police power must be, and appear to the public to be, free from any prospect of personal gain. Government officials must not have any substantial personal financial interest in the outcome of the cases they adjudicate or prosecute. Where private counsel are retained to represent the government in enforcing its police power against citizens, those attorneys must adhere to the same rule of personal neutrality.

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[1] Although Plaintiffs identify Armstrong Containers and Cytec Industries, Inc. as Real Parties in Interest, these entities have not been named in any complaint that has been filed, and, accordingly, these two entities are not Real Parties in Interest.

[2] In this Return, Defendants also address the arguments raised by the amicus curiae brief filed by the California State Association of Counties and the League of California Cities (the "Amici") in support of the Petition.

Government suits for public nuisance -- like criminal and eminent domain actions -- are an exercise of the state's police power. Because such claims inevitably involve a balancing of public interests against private interests, any attorney representing the government in such cases cannot be permitted to have a financial stake in the outcome of the litigation. Contingent fee arrangements create an improper conflict of interest between the private attorney's financial motives and the neutrality the law requires. Unlike salaried government counsel or outside counsel retained on a non-contingent fee basis, lawyers hired on a contingent fee basis to represent the government stand to profit personally from a successful prosecution and have an incentive to maximize a monetary award by any means possible, regardless of whether it is in the public interest.

The California Supreme Court, recognizing these principles, has expressly held that contingent fee agreements are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 750 (1985) ("*Clancy*"). This standard of neutrality is "essential to the proper function of the judicial process as a whole," without which "the concept of the rule of law cannot survive." *Id.* at 746. The law thus "precludes the use in such [public nuisance] cases of a contingent fee arrangement." *Id.* at 748.

Here, the governmental entity Plaintiffs engaged private attorneys to prosecute public nuisance claims against Defendants. Pursuant to the retainer agreements, these private attorneys would not have received legal fees unless they were successful in the litigation. Finding that "*Clancy* is applicable to the instant [public nuisance] case," the trial court issued its Order precluding Plaintiffs "from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." (Petitioners' Appx. pp. 794-795 (Order 3:1, 4:21-23).)

Trust in government can be assured only if all citizens -- from the public-at-large to the specific individuals whose liberty or property are at issue in a particular case -- believe that the people exercising the government's enforcement power against citizens are not using it for personal financial gain. The categorical rule against contingent fee counsel in cases involving the police power of the state avoids the need to pursue unseemly collateral inquiry into the personal circumstances and motives of an attorney, and assures that actions brought by the government on behalf of the public and in pursuit of the public interest remain untainted by attorneys motivated by private gain.

Notwithstanding the absolute nature of the neutrality rule, Plaintiffs' contingency fee counsel argue that their lack of neutrality is somehow cured if they are adequately "supervised" by other government counsel.

However, the due process, ethical, and policy issues raised by contingent fee agreements here cannot be resolved by any purported "supervision." *Any* attorney representing the government in a public nuisance action must meet the required neutrality standard. If mere supervision by an impartial attorney working on a case overcame the conflicts that exist when attorneys with profit motives represent the government in the exercise of its police power, then the government could hire out for profit even criminal matters so long as at least one neutral attorney purported to retain "control." The proper role of government cannot be maintained in such circumstances.

The purported policy considerations advanced by Plaintiffs also do not justify abandonment of the neutrality principle articulated in *Clancy*. Plaintiffs assert that precluding their use of contingent fee agreements in cases such as this will inhibit their ability to protect the public. Such an argument does not justify violating due process and ethical standards, and is incorrect in any event. Plaintiffs could, if they chose, pursue this litigation without unlawful contingent fee agreements. Moreover, Plaintiffs' suggestion that government agencies would be defenseless against the threat of lead without their contingent fee counsel ignores their own substantial resources, including those provided by the Legislature, to remedy lead hazards. Plaintiffs' arrangements with private contingent fee counsel in this case constitute an impermissible choice of expediency.

Plaintiffs seek to set aside an order that simply requires them to comply with clear and fundamental principles of law and ethics and the holding of the Supreme Court in *Clancy*. Accordingly, the Order was proper, and the Petition should be denied.

RESPONSE TO PETITION FOR WRIT OF MANDATE

By this verified Response, Real Parties in Interest respond to and oppose the Petition as follows:

1. Defendants admit the allegations of paragraph 1 of the Petition.

2. In response to paragraph 2 of the Petition, Defendants admit that County of Santa Clara, County of Solano, County of Alameda, City and County of San Francisco, and City of Oakland are Plaintiffs in an action now pending in respondent superior court, entitled *County of Santa Clara, et al. v. Atlantic Richfield Company, et al.*, Santa Clara Superior Court (CV 788657) (the "*County of Santa Clara*" matter). Defendants further admit that the following Defendants are the Real Parties in Interest: Atlantic Richfield Company, Conagra Grocery Products Company, E.I. Du Pont de Nemours and Company, NL Industries, Inc., The Sherwin-Williams Company, and American Cyanamid Company. Except as expressly admitted, Defendants deny the allegations of paragraph 2 of the Petition, and further specifically deny that Armstrong Containers or Cytec Industries, Inc. are defendants in the *County of Santa Clara* matter or Real Parties in Interest in this matter.

3. Defendants lack information or belief sufficient to enable them to answer the allegations contained in paragraph 3.

4. In response to paragraph 4 of the Petition, Defendants deny the allegations contained therein and state that the agreement for legal services between the County of Santa Clara and the Cotchett firm is a writing and speaks for itself.

5. In response to paragraph 5 of the Petition, Defendants admit that a complaint was filed in Santa Clara Superior Court in March 2000 in the *County of Santa Clara* matter and state that the complaint is a writing and speaks for itself. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 5.

6. In response to paragraph 6 of the Petition, Defendants admit that an amended complaint was filed in the *County of Santa Clara* matter in September 2000, that Defendants filed a demurrer to the amended complaint, and that the Superior Court issued an order ruling on the demurrer. Defendants further state that the amended complaint, demurrer and order are writings and speak for themselves. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 6.

7. In response to paragraph 7 of the Petition, Defendants admit that a second amended complaint was filed in the *County of Santa Clara* matter in January 2001, that Defendants filed a demurrer to the second amended complaint, and that the Superior Court issued an order ruling on the demurrer. Defendants further state that the second amended complaint,

demurrer and order are writings and speak for themselves. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 7.

8. In response to paragraph 8 of the Petition, Defendants admit that Plaintiffs quoted accurately from two portions of the agreement in Exhibit 7, and state that the agreement is a writing and speaks for itself. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 8.

9. In response to paragraph 9 of the Petition, Defendants admit that a third amended complaint was filed in the *County of Santa Clara* matter on June 21, 2001, that Defendants filed a demurrer to the third amended complaint, and that the Superior Court issued an order ruling on the demurrer. Defendants further state that the third amended complaint, demurrer and order are writings and speak for themselves. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 9.

10. In response to paragraph 10 of the Petition, Defendants admit that Plaintiffs requested leave to file a fourth amended complaint in the *County of Santa Clara* matter in November 2002 and that the Superior Court issued an order denying the motion for leave to file a fourth amended complaint. Defendants further state that the proposed fourth amended complaint and order are writings and speak for themselves. Except as

expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 10.

11. In response to paragraph 11 of the Petition, Defendants admit that they moved for summary judgment in February 2003, that the Superior Court entered an order regarding the summary judgment motion in August 2003, and that a judgment of dismissal was entered in October 2003. Defendants further state that the summary judgment motion, Superior Court order and judgment of dismissal are writings and speak for themselves. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 11.

12. In response to paragraph 12 of the Petition, Defendants admit that Plaintiffs appealed the Superior Court's judgment of dismissal, that the Court of Appeal filed its ruling in March 2006, and that the remittitur was filed in the Superior Court in June 2006. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 12.

13. In response to paragraph 13 of the Petition, Defendants admit that Plaintiffs filed a motion for leave to file another proposed fourth amended complaint on January 3, 2007. Defendants further state that the proposed amended complaint is a writing and speaks for itself. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 13.

14. In response to paragraph 14 of the Petition, Defendants admit they filed a motion to bar payment of contingent fees to private attorneys in February 2007. Defendants further state that the motion is a writing and speaks for itself. Except as expressly admitted or alleged herein, Defendants deny the allegations and legal contentions of paragraph 14.

15. In response to paragraph 15 of the Petition, Defendants deny the allegations and legal contentions therein, but state that the February 2007 contingent fee agreement is a writing and speaks for itself.

16. In response to paragraph 16 of the Petition, Defendants deny the allegations and legal contentions therein, but state that the fee agreements discussed in paragraph 16 are writings and speak for themselves.

17. In response to paragraph 17 of the Petition, Defendants deny the allegations and legal contentions therein.

18. Defendants admit the allegations in paragraph 18, and further state that the April 4, 2007, order issued by the trial court is a writing and speaks for itself.

19. Defendants admit the allegations in paragraph 19, and further state that the minute order issued by the trial court is a writing and speaks for itself.

20. In response to paragraph 20 of the Petition, Defendants deny the allegations and legal contentions therein.

21. In response to paragraph 21 of the Petition, Defendants deny the allegations and legal contentions therein.

22. In response to paragraph 22 of the Petition, Defendants deny the allegations and legal contentions therein.

FIRST AFFIRMATIVE DEFENSE

23. The Petition does not state a basis upon which a writ of mandate may be granted.

SECOND AFFIRMATIVE DEFENSE

24. Plaintiffs are not entitled to any relief because the Superior Court did not err in issuing an order barring payment of contingent fees to attorneys in the *County of Santa Clara* matter.

THIRD AFFIRMATIVE DEFENSE

25. County Counsel, with the exception of Solano County, lack standing to pursue the asserted claims in this litigation or the Writ of Mandate. Standing in this action pursuant to California Code of Civil Procedure § 731 belongs exclusively to District Attorneys and City Attorneys, not County Counsel.

PRAYER FOR RELIEF

WHEREFORE, Defendants pray for relief as follows:

1. That this Court deny the Petition;

2. That Plaintiffs take nothing by these writ proceedings;

3. That this Court award Defendants their costs of these writ proceedings; and

4. That this Court grant any other relief as it deems just.

Dated: July 20, 2007 By: _____

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Attorneys for defendant Atlantic Richfield Company

[Other parties listed below]

VERIFICATION

I, Sean Morris, declare as follows:

I am one of the attorneys for Atlantic Richfield Company, one of the Real Parties in Interest in these writ proceedings. I have read the foregoing Response to the Petition for Writ of Mandate and know its contents. The facts alleged in the Response are within my own knowledge and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Real Party in Interest, verify this Response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 20, 2007
Los Angeles, California

Sean Morris

VERIFICATION

I, Peter A. Strotz, declare as follows:

I am one of the attorneys for American Cyanamid Company, one of the Real Parties in Interest in these writ proceedings. I have read the foregoing Response to the Petition for Writ of Mandate and know its contents. The facts alleged in the Response are within my own knowledge and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Real Party in Interest, verify this Response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 23, 2007
Oakland, California

Peter A. Strotz

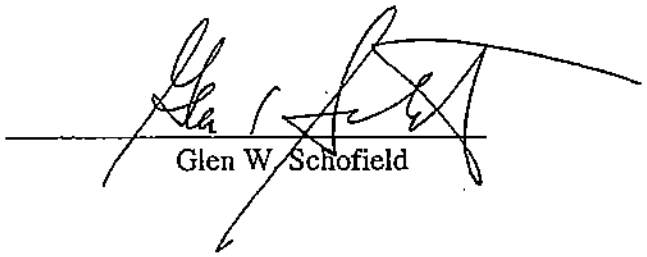
VERIFICATION

I, Glen W. Schofield, declare as follows:

I am one of the attorneys for Conagra Grocery Products Company, one of the Real Parties in Interest in these writ proceedings. I have read the foregoing Response to the Petition for Writ of Mandate and know its contents. The facts alleged in the Response are within my own knowledge and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Real Party in Interest, verify this Response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 25, 2007
San Jose, California



Glen W. Schofield

VERIFICATION

I, Patricia L. Bonheyo, declare as follows:

I am one of the attorneys for E.I. du Pont de Nemours and Company, one of the Real Parties in Interest in these writ proceedings. I have read the foregoing Response to the Petition for Writ of Mandate and know its contents. The facts alleged in the Response are within my own knowledge and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Real Party in Interest, verify this Response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 24, 2007

Patricia L. Bonheyo
Walnut Creek, CA

VERIFICATION

I, James C. Hyde, declare as follows:

I am one of the attorneys for MILLENNIUM HOLDINGS, LLC, one of the Real Parties in Interest in these writ proceedings. I have read the foregoing Response to the Petition for Writ of Mandate and know its contents. The facts alleged in the Response are within my own knowledge and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Real Party in Interest, verify this Response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 23, 2007
San Jose, CA

James C. Hyde

SJ/396962 1/JH4

VERIFICATION

I, William Faulkner, declare as follows:

I am one of the attorneys for NL Industries, Inc., one of the Real Parties in Interest in these writ proceedings. I have read the foregoing Response to the Petition for Writ of Mandate and know its contents. The facts alleged in the Response are within my own knowledge and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Real Party in Interest, verify this Response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 23, 2007
San Jose, CA

William Faulkner
WILLIAM FAULKNER

VERIFICATION

I, John W. Edwards II, declare as follows:

I am one of the attorneys for The Sherwin-Williams Company, one of the Real Parties in Interest in these writ proceedings. I have read the foregoing Response to the Petition for Writ of Mandate and know its contents. The facts alleged in the Response are within my own knowledge, and I know those facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Real Party in Interest, verify this Response.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: July 26, 2007
Palo Alto, California

John W. Edwards II

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND FACTS

A. Procedural History

The original class action complaint in this case was filed on March 23, 2000. (Respondents' Supplemental Appendix of Exhibits p. 824, filed concurrently herewith ("Supp. Appx.").) Defendants (or their alleged predecessors) lawfully made and sold lead pigment many decades ago. The complaint sought recovery of damages purportedly caused by lead-based paint and allegedly suffered directly by plaintiff County of Santa Clara and other government entities throughout California as putative class members. It asserted causes of action for, among other things, strict products liability, negligence, fraud, and unfair business practices. The original complaint did not contain a public nuisance cause of action.

In a series of subsequently filed complaints, other government entities joined as plaintiffs. In both the Second and Third Amended Complaints, three plaintiffs (Santa Clara, San Francisco, and Oakland) added a cause of action for public nuisance in their alleged capacity as "representatives of the People of the State of California pursuant to California Code of Civil Procedure section 731." (*See* Petitioners' Appx. p. 5 (Third Am. Compl. ¶ 2a).) Those plaintiffs alleged that the mere presence of lead-based paint on homes and other buildings in California constitutes a public nuisance. (*Id.* at 56 (¶ 168).) They sought to hold

Defendants liable for this alleged public nuisance based on conduct consisting primarily of advertising and selling products for lawful purposes, engaging in public debate regarding science and policy, and exercising the right to petition government. (*Id.* at 56 (¶ 173).) Plaintiffs requested an order requiring abatement of all lead-based paint from private and public buildings within their jurisdictions. (*Id.* at 56, 57 (¶¶ 172, 178).)

On September 11, 2001, the trial court sustained Defendants' demurrer to this public nuisance claim without leave to amend. (Supp. Appx. p. 864.) Final judgment in favor of Defendants on all other remaining claims was entered on October 27, 2003, following the trial court's granting of Defendants' statute of limitations summary judgment motion. Plaintiffs then appealed.

On appeal, with respect to the public nuisance claims seeking abatement on behalf of "the People," this Court overturned the demurrer on the ground that -- at the pleading stage -- Plaintiffs' allegations that defendants "*promot[ed] lead paint for interior use* with knowledge of the hazard that such use would create" could provide a basis for a public nuisance claim. *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 309 (2006) (emphasis original). This Court distinguished this type of public nuisance action from other public nuisance claims, noting that a public nuisance action brought on behalf of the People by the

government "does not seek damages but rather abatement . . . ." *Id.*; *see also id.* at 311.

Following remand, on January 3, 2007, Plaintiffs requested -- and the trial court subsequently granted -- leave to file a fourth amended complaint that would eliminate all claims in this case except for the remanded public nuisance claims. (Petitioners' Appx. p. 86.) Plaintiffs identified in connection with the proposed fourth amended complaint are ten cities and counties: (*i*) the City and County of San Francisco ("San Francisco"); and (*ii*) the Counties of Santa Clara, Solano, Alameda, Monterey, San Mateo, and Los Angeles, and the Cities of Oakland, San Diego, and Los Angeles (the "non-San Francisco Plaintiffs").

On February 2, 2007, one month after Plaintiffs had informed the trial court of their decision to eliminate all claims in this case except for the newly revived public nuisance claims, Defendants filed a motion to bar payment to government-retained lawyers of contingent fees upon a successful prosecution by the government of the public nuisance claims. (Petitioners' Appx. p. 114.) On April 4, 2007, the trial court granted that motion, ruling that Plaintiffs are precluded in this public nuisance action "from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." (Petitioners' Appx. p. 795 (Order 4:21-23).)

The Order did not dismiss or otherwise end the action. Rather, the trial court gave Plaintiffs "30 days to file with the court new fee agreements in accordance with this order." (*Id.*) No new fee agreements were submitted. Instead, staff counsel for Plaintiffs submitted declarations asserting without support that without contingent fee counsel, the government entities cannot prosecute this matter effectively, if at all.[3]

B. Government Contingent Fee Counsel

Three law firms represent San Francisco in this lawsuit: Motley Rice LLC, Thornton & Naumes, and Mary Alexander and Associates. These firms have been retained pursuant to a written agreement that makes payment of any fees and costs contingent on Plaintiffs' monetary recovery in the action. (Petitioners' Appx. pp. 232-33 (Lawless Decl., Exh. A at 3-4).) San Francisco pays no "out-of-pocket" litigation costs or attorneys' fees; all costs and fees are advanced by the private attorneys, referred to as the "Special Attorneys." (*Id.*) The contingent fee is set at "17% of any recovery." (*Id.*)

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[3] In contrast to the rhetoric in their brief, the staff attorneys did not present any evidence that the legislative bodies for the Plaintiffs considered the effect of the court's Order at all. Instead, the declarants offered unsubstantiated speculation about what might occur if the government entities are required to follow the law regarding contingent fee agreements. *See* n.16, *infra.* The legislative body of a particular government entity, not its staff attorneys, determines how to allocate available resources. *See County of Butte v. Superior Court (Brooks)*, 176 Cal. App. 3d 693, 699 (1985).

The non-San Francisco Plaintiffs have retained Cotchett, Pitre & McCarthy as government counsel on a contingent fee basis. (Petitioners' Appx. p. 437 (Santa Clara), pp. 272-73 (Alameda), p. 284 (Santa Cruz), p. 290 (Oakland), p. 303 (Solano), pp. 310-11 (Monterey), pp. 336-37 (San Diego).)

All private counsel retained by Plaintiffs are from well-known plaintiffs' firms with high reputational and financial stakes in this and related litigation. For example, Motley Rice has received hundreds of millions of dollars for its work in litigation against tobacco companies. An October 1999 story in the Dallas Morning News reported an interview with the firm's senior partner, Ronald Motley. (*See* Request for Judicial Notice, Exh. A, filed concurrently herewith ("RJN").) It described Mr. Motley's intention to reinvest part of his newfound money to finance lawsuits against the makers of lead paint. Mr. Motley was quoted as stating his intention to "bring the entire lead paint industry to its knees."

In 1999, lawyers from Motley Rice approached then-Attorney General Sheldon Whitehouse of Rhode Island with a plan they had devised to use the State's police power to extract money from a subset of companies that once manufactured lead pigments for use in paint, or their alleged successors. (RJN, Exh. B (Whitehouse Tr. at 150, 154) (Mr. Whitehouse testifying that Motley Rice (then known as Ness Motley) approached him about bringing the lawsuit).) Following these discussions, Rhode Island filed the lawsuit

with Motley Rice acting as counsel. The suit alleged various claims, including public nuisance, against most of the same defendants at issue here. *See State of Rhode Island v. Lead Indus. Ass'n, Inc., et al.*, 2001 WL 345830, at *1, *6 (R.I. Super. Ct., Apr. 2, 2001). The case included (1) claims that the mere presence of lead paint in buildings throughout the State constituted a public health hazard, regardless of the paint's condition or location, (2) assertions that total removal of all lead paint was required, (3) demands that some former manufacturers of lead pigment pay the cost of removing all lead paint, on the ground that their long-past sale of lawful products to paint manufacturers had "caused" the hazard, and (4) a fee structure providing the private lawyers with a percentage of whatever sums the State could compel the companies to pay. *See, e.g., id.* at *6-8; *see also* (Petitioners' Appx. p. 513 (*State of Rhode Island v. Lead Indus. Ass'n, Inc., et al.*, 829 A.2d 1234, 1235 n.4 (R.I. 2006)) (describing Rhode Island contingent fee agreements with Motley Rice)).

When the County Counsel for Santa Clara learned of the Rhode Island litigation that Motley Rice had suggested, she "thought Santa Clara might have similar claims against the lead industry." (Petitioners' Appx. p. 428.) This litigation, and the contingent fee agreements at issue, followed.

STANDARD OF REVIEW

Questions of law that do not involve the resolution of disputed facts are subject to *de novo* review. *Ghirado v. Antonioli*, 8 Cal. App. 4th 791,

799 (1994); *Topanga & Victory Partners, LLP v. Toghia*, 103 Cal. App. 4th 775, 780-781 (2002) (appeal subject to *de novo* review when "[t]here are no relevant evidentiary disputes and the determination of the trial court did not require an exercise of discretion"). No factual dispute underlies the Order below. The court ruled that the Plaintiff governments were precluded from giving counsel a profit stake in the governments' prosecution of this public nuisance action by retaining counsel on a contingent fee basis. Because there is no dispute that Plaintiffs hired the private counsel on a contingent fee basis, the standard of review is *de novo*.

ARGUMENT

A. Due Process Of Law And Ethics Preclude Government Counsel From Having A Substantial Personal Pecuniary Interest In Successful Enforcement Of The Government's Police Power

Where the government's police power is used to seek to deprive a defendant of liberty or property, government officers exercising that power must be, and appear to be, personally neutral. When the officer has a substantial personal pecuniary interest in one outcome rather than the other, the principle of neutrality is violated. The constitutional guarantee of due process precludes vesting the judicial or prosecutorial function in someone who has a personal financial interest in using the government's police power to extract money from a defendant.

The California Supreme Court's holding in *Clancy* is built upon this fundamental principle. *Clancy*, 39 Cal. 3d at 746. As noted by *Clancy*, this neutrality requirement traces back to the United States Supreme Court's decision in *Tumey v. Ohio*, 273 U.S. 510 (1927).

In *Tumey*, the Court considered whether it was proper for a mayor of a town to act also as the judge of the local "liquor court" in which individuals were tried for violations of the prohibition laws. 273 U.S. at 521. For every individual convicted, the mayor/judge would receive in payment his fees and costs from the fine imposed. In the particular case before the Court, the judge received $12 of the $100 fine imposed following conviction. *Id.* at 520, 531.

While "[a]ll questions of judicial qualification may not involve constitutional validity," the Court concluded that the payment of money to a judge based on the outcome of a case did. *Id.* at 523. "[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523.

Indicative of the uncompromising nature of the neutrality principle, the Court applied it even though the "substantial pecuniary interest" in issue was a mere $12.

> There are doubtless mayors [the judicial officer] who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id. at 532 (emphasis added).

The *Tumey* principle has been repeatedly affirmed. A governmental entity cannot constitutionally permit a case to be decided by a judge with a substantial pecuniary stake in one outcome rather than the other. *See, e.g., Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 58-60 (1972) (finding a denial of due process where mayor with "responsibilities for revenue production" of town also presided over cases in which defendants' fines were paid into -- and constituted a "major part of" -- the municipal treasury); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-24 (1986) (holding that due

process was violated where a judge participated in drafting and issuing an opinion that affected the outcome of the judge's own civil lawsuit in which the judge received a $30,000 monetary settlement).

The neutrality principle of *Tumey* and its progeny applies as well to the counsel through whom a governmental entity prosecutes a case. If such counsel has a substantial personal pecuniary interest in successful prosecution as opposed to exoneration of a defendant, the public confidence in the impartiality of government action will be cast in doubt. Moreover, the "possible temptation to the average man" stated by the *Tumey* Court applies equally to government counsel and judges. If the persons through whom the state asserts its police power through prosecution can enrich themselves by seizing a defendant's property in the state's name, the defendant is denied due process just as it would be if the judge had a similar personal interest.

The Supreme Court made clear that this neutrality principle applies to representatives through whom the state prosecutes a case in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). In *Marshall*, the Court considered the propriety of permitting administrators who worked for the federal Employment Standards Administration (ESA) first to determine, and then to enforce through prosecution, penalties assessed under the Fair Labor Standards Act when those penalties were paid to the ESA itself. Examining the ESA administrator's role in essentially taking on "functions [that]

resemble those of a prosecutor," the Court began its analysis by reiterating that the "neutrality requirement" of the due process clause "has been jealously guarded by this Court" and "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.* at 242-43.

Although prosecutors, "need not be entirely 'neutral and detached,'" the Court expressly found that due process does preclude prosecutors from maintaining improper financial incentives to obtain convictions:

> Prosecutors are also public officials; they too must serve the public interest. *Berger v. United States*, 295 U.S. 78, 88 (1935). In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. [citations omitted.] Moreover, the decision to enforce -- or not to enforce -- may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. [citation omitted.] A scheme injecting a personal interest, financial or

> otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.

Id. at 249-50 (emphasis added).

While the case did not require that the Court state "with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," the Court left no doubt that it would violate constitutional principles for a prosecutor to have a direct and substantial financial interest in the outcome of the litigation.[4] *Id.* at 250; *see also Young v. United States ex rel. Vuitton*, 481 U.S. 787, 807 n.18, 814 (1987) (plurality) (once it is determined that there is an "actual conflict of interest," it is "fundamental" error to appoint an attorney to prosecute a criminal contempt action on behalf of the government; "we establish a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment"); *Ganger v.*

[4] In *Marshall*, the amount of fines at issue constituted less than 1% of the agency's entire budget, the ESA traditionally returned more money to the federal government for use in the general treasury than it took in, and the salary of the administrator/prosecutor at issue was "fixed by law." *Id.* at 245, 250. It thus was "plain that no official's salary is affected by the levels of the penalties," and "[n]o government official stands to profit economically from vigorous enforcement of" the labor act. *Id.* The Court therefore held that any improper incentive for the prosecutor was "too remote" and thus there was no due process violation. *Id.* at 250-51.

Peyton, 379 F.2d 709, 713 (4th Cir. 1967) (violation of the Due Process Clause where private attorney acting as criminal prosecutor also acted as attorney for the wife of the defendant in a divorce action and thus had a conflict of interest caused by the "possibility that the size of his fee [in the civil action] would be determined by what could be extracted from defendant").[5]

B. The California Supreme Court Applied Well-Established Constitutional And Ethical Principles To Prohibit Government Entities From Retaining Counsel In A Public Nuisance Case On A Contingent Fee Basis

Following the well-established neutrality requirement for attorneys representing the government in its exercise of police power, *Clancy* set forth a categorical rule prohibiting fee agreements for government counsel in public nuisance cases. In *Clancy*, a city hired an attorney on a contingent fee basis to bring a public nuisance abatement action against the operator of

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[5] Recognizing the corrosive effect contingent fee arrangements entered into by the government can have on the integrity of the judicial system, the federal government recently voluntarily expanded the prohibition against the use of contingent fee arrangements to all of its cases. (*See* RJN, Exh. C (Executive Order, May 16, 2007, at Section 1 ("[t]o help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States," attorneys "shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation")).) Accordingly, the federal government now not only avoids contingent fee agreements in cases in which those agreements are precluded on constitutional and ethical grounds (such as criminal and public nuisance actions), but it also will not pay contingent fees to attorneys in cases in which the government is asserting a proprietary claim.

an adult bookstore; he was to receive $60 per hour for successful prosecution of a public nuisance, but only $30 per hour if unsuccessful. *Clancy,* 39 Cal. 3d at 745. The attorney thus had "an interest in the result of the case: his hourly rate [would] double if the City [was] successful in the litigation" and attorneys' fees were recovered. *Id.* at 747-48. Because that arrangement gave the attorney "an interest extraneous to his official function in the actions he prosecutes on behalf of the City," the Court held that this arrangement was unlawful. *Id.* at 748.

The Court began its analysis by acknowledging the long-standing rule prohibiting the government from vesting judicial or prosecutorial functions in individuals with a personal financial interest in the outcome of an action. *Clancy*, 39 Cal. 3d at 747 (citing, e.g., *Tumey* and *Village of Monroeville*, *supra.*). With respect to the need for prosecutors to remain impartial, the Court reiterated its prior holding that a government prosecutor "'is the representative not of any [sic] ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Clancy*, 39 Cal. 3d at 746 (quoting *People v.*

Superior Court (Greer), 19 Cal. 3d 255, 266 (1977) (citing, among others, *Ganger, supra.*)).[6]

The Court recognized that the duty of neutrality is critical to more than simply the "fair outcome for the litigants" in the particular case. The requirement that the prosecutor remain impartial,

> is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. [citation omitted.]
>
> When a government attorney has a personal interest in the litigation, the neutrality so essential

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[6] The Court's holding is consistent with various American Bar Association rules of professional responsibility and legal ethics concerning government prosecutions, which the Court cited with approval. Those rules have imposed upon attorneys wielding police power an affirmative ethical obligation to pursue justice, not victory. *See, e.g.,* ABA Model Code of Prof. Responsibility, EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict") (cited by *Clancy*); *see also* ABA Standards Relating to the Prosecution Function, 1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict"). Where such attorneys' compensation is contingent on monetary recovery, the resulting financial incentive to pursue victory is inconsistent with these ethical principles. *E.g.*, ABA Standards Relating to the Prosecution Function, 1.3(f) ("A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests").

to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function.

Clancy, 39 Cal. 3d at 746.

The Court reasoned that the requirement of prosecutorial neutrality extends to attorneys litigating claims brought by the government to abate a public nuisance. In such cases, the government is pursuing a distinctly sovereign interest. Echoing *Tumey*'s admonition that government officers must be free of temptation, the Court concluded that any arrangement in which the attorney has a personal financial interest in the outcome violates that impartiality:

> [T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes . . . . Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the

> government attorney to tip the scale cannot be tolerated.

Id. at 749 (emphasis added).

The Court emphasized that the requirement that the attorney representing the government in a public nuisance case must be free of any personal profit motive attaches at every stage of the litigation:

> [T]he prosecutor's discretionary functions are not confined to the period before the filing of charges . . . [The government's attorney] possesses the advocate's traditional ability to conduct his case in the manner he elects. [citations.] [The government's attorney] may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case.

Id. at 749 n.4 (quoting *Greer*, 19 Cal. 3d at 267). While the "delicate weighing of values" in a public nuisance case thus begins when considering whether to bring a lawsuit at all, the weighing continues as the case progresses.

After reviewing all of the background principles and considerations, the Court concluded that any contingent fee arrangement in a public nuisance action is prohibited as "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 750.[7]

C. The Principle Articulated In *Clancy* Is Not Limited To Actions Involving Only Particular Types Of Public Nuisances

The *Clancy* Court addressed the fundamentals of fairness in the context of a government-prosecuted public nuisance case and categorically prohibited retaining counsel on a contingent fee basis. Disregarding this,

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[7] The California Supreme Court recently confirmed the fundamental impropriety of permitting a government lawyer who is exercising the state's police power to have a substantial pecuniary interest in the outcome of the litigation. In *People v. Vasquez*, 39 Cal. 4th 47 (2006), the Court addressed whether an assistant district attorney could prosecute a case against the son of another employee in the office. As in *Clancy*, the Court reviewed the historical background of judicial and prosecutorial conflicts addressed by the United States Supreme Court (including *Tumey*, *Marshall*, and *Vuitton*) and other courts. The Court noted the contrast between conflicts generated by personal relationships (which might not give rise to constitutional violations) and direct "pecuniary conflicts of interest on a judge's or prosecutor's part [that] pose a constitutionally more significant threat to a fair trial . . . ." *Vasquez*, 39 Cal. 4th at 64 (emphasis added). Because the case before it only involved government attorneys with a potential "indirect personal link between the prosecutor and defendant" rather than a "direct, substantial interest in the outcome or conduct of the case separate from their proper interest in seeing justice done," the Court determined that the "conflict" did not deprive the defendants of "fundamental fairness in the proceedings." *Id.* at 64-65. The Court distinguished *Vasquez* from cases raising constitutional violations caused by "the prosecutors' simultaneous representation of directly conflicting interests" such as in *Ganger*, 379 F.2d 709, *supra*. and others. *Id.* at 65.

Plaintiffs and Amici argue that the principle and policy articulated in *Clancy* does not apply to all such cases, but is instead limited only to special situations, such as when the public nuisance claim triggers a defendant's First Amendment rights, involves the immediate threat of criminal sanctions, or directly interferes with a defendant's use of property. (*E.g.*, Petition at 24-28.) This argument misconstrues *Clancy* and is, in any event, inapplicable here.

Clancy identifies categories of cases where neutrality is essential. The reasoning in *Clancy* is predicated on the recognition that all public nuisance claims involve "balancing [the] interests" of the public at large and the persons with a direct interest in the outcome of the case. *Clancy*, 39 Cal. 3d at 749. *Clancy* does not permit, let alone require, distinctions within those categories in which government is prohibited from paying its counsel contingent fees. Due process is not so narrow.

Plaintiffs' contention that the *Clancy* Court's prohibition on contingent fees in public nuisance cases depends on the presence of First Amendment implications is fallacious. The *Clancy* Court noted that where First Amendment issues are present, "something more is added to the balance." *Id.* at 749. Nothing about this language implies that the holding in *Clancy* depends on the presence of First Amendment issues. Indeed, the *Clancy* Court's language that First Amendment issues add "something more" to the balance shows that the "sober inquiry into values" requiring

government neutrality began before the First Amendment issues were contemplated. *Id.*[8]

Plaintiffs' argument that the prohibition on contingent fees depends on the remedy sought by the government and requires an intent to file criminal charges or a potential risk to an individual's personal freedom is equally flawed. Eminent domain cases have no criminal implications, yet the California Supreme Court barred contingent fees in that category of cases. *See Clancy*, 39 Cal. 3d at 748-49 (discussing *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 871 (1977)). While public nuisance cases may "often coincide" with criminal prosecutions, they do not always do so. *Clancy*, 39 Cal. 3d at 749. Nevertheless, *Clancy* held that the requirement of neutrality "precludes the use in [public nuisance cases] of a contingent fee arrangement." *Id.* at 748.[9]

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[8] In any event, this case does raise substantial First Amendment issues. Plaintiffs apparently intend to predicate Defendants' liability, in part, upon statements they and others allegedly made to the government concerning lead. (*E.g.*, Petitioners' Appx. pp. 86-113 (Fourth Amended Complaint [Proposed] at p. 20 (allegations that "Defendants Engaged In A Concerted Campaign Against Government Regulations")).) These allegations constitute a substantial intrusion on Defendants' exercise of their First Amendment rights, including the rights to petition the government, and to speak and associate freely. *See, e.g., United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[9] Moreover, despite Plaintiffs' erroneous assertions that the "sole remedy sought in this action is financial in nature," there is no meaningful difference between the remedy sought in *Clancy* and the remedy sought here. (Petition at 28.) The remedy is precisely the same: public nuisance

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This public nuisance case indisputably requires the type of delicate weighing of values and balancing of interests recognized in *Clancy*. This Court itself previously recognized the significant and conflicting interests that must be balanced in this action.

> [P]ublic nuisances are offenses against, or interferences with, the exercise of *rights common to the public.* [Citations] Of course, not every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoinable [or abatable], the interference must be both *substantial* and *unreasonable.* [Citations] It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted. [Citations].

County of Santa Clara, 137 Cal. App. 4th at 305 (quoting *People ex rel. Gallo v. Acuna,* 14 Cal. 4th 1090, 1103-05 (1997)). Indeed, Plaintiffs themselves emphasize the public policy ramifications of this litigation in

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abatement. Plaintiffs claim that the remedy they request in this case "simply seeks funds" to abate a public nuisance, but they cannot avoid this Court's holding that they "may not recover damages or reimbursement for past remediation" of the alleged public nuisance. *County of Santa Clara*, 137 Cal. App. 4th at 329.

their Petition, acknowledging that this action invokes "the government's duty to do justice." (Petition at 30.)[10]

The need for appropriately neutral counsel is particularly compelling in this case. Plaintiffs seek to have declared as public nuisances potentially millions of buildings within Plaintiffs' jurisdictions that contain lead paint, without regard to whether these buildings contain only intact, well-maintained lead-based paint. Plaintiffs' effort to have all of these buildings abated by Defendants could have serious consequences for millions of property owners. It may affect their properties' market value and their ability to obtain rent, financing and insurance on their properties. It may require owners to leave or close their homes and businesses for extended periods of time during lead abatement procedures. Moreover, it may trigger criminal liability against those owners as the persons who have maintained the nuisance. *See* Cal. Penal Code § 372 ("Every person who maintains or commits any public nuisance . . . or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor"); *see also Clancy*, 39 Cal. 3d at 749 ("A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property").

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[10] *See also id.* at 7 ("In light of the public policy ramifications of the litigation, [outside counsel] agreed that it would not seek more than 17% of the net recovery"); *id.* at 23 ("this issue is of vital importance not only to public entities but to the public at large").

Plaintiffs' attorneys in this case will be called upon to engage in a "delicate weighing of values" far more complicated than what was required in *Clancy*. Here, the issue is not whether the adult book stores in one particular city should be shut down, but whether the Defendants should have to remove or otherwise abate lead-based paint from every building in the major cities and counties in the State. In light of a statutory framework that does not define intact lead paint to be a health hazard,[11] a "just balance" will have to be struck among the interests of the Defendants, who have not sold lead pigment or lead-based paint for architectural use for decades; the owners of affected buildings; and the general public in an era of steadily-declining blood lead levels in the children of this State.

The large scale of the financial interests at stake in this litigation also render the present case even more compelling than *Clancy*. Mr. Clancy's modest contingency fee pales in comparison to the potential private financial gain for Plaintiffs' outside counsel in this case. The California Supreme Court regarded Mr. Clancy's $30 per hour contingent fee

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[11] Legislative and administrative bodies that have considered the issue, including in California, do not define the mere presence of lead paint as a hazard to be abated. *See, e.g.*, 15 U.S.C. § 2681 ("Lead-based paint hazard" defined as "lead-contaminated *paint that is deteriorated* or present in accessible surfaces, friction surfaces, or impact surfaces . . .") (emphasis added); Cal. Health & Safety Code § 17920.10 ("For purposes of this part, 'lead hazards' means *deteriorated* lead-based paint [of a specified size] . . .") (emphasis added); Cal. Health & Safety Code § 105251, adopting 17 C.C.R. § 35037 ("'Lead hazard' means *deteriorated* lead based paint . . .") (emphasis added).

arrangement as so troublesome that it reviewed the case and required the arrangement to end. If the Supreme Court required neutrality of government counsel in *Clancy*, where the interest to be weighed involved the public and the owners of a few adult bookstores in Corona; surely no less is demanded in this case.

D. Purported "Control" By Government Staff Attorneys Does Not Cleanse Contingent Fee Counsel's Substantial Pecuniary Interest In The Outcome

1. Alleged oversight of contingent fee attorneys by government staff does not rectify due process and ethical violations.

Plaintiffs and Amici contend that *Clancy*'s categorical rule against contingent fees in public cases can be sidestepped if the government's staff attorneys maintain sufficient control over the litigation. (*E.g.*, Petition at 29-33.) They are wrong.

The issue in *Clancy* was not under what circumstances a contingent fee agreement could be permissible in a public nuisance case prosecuted by the government. Instead, the issue was what category such public nuisance cases fell into: (*i*) cases in which contingent fees were barred (such as criminal and eminent domain cases); or (*ii*) cases in which contingent fees could be allowed. The Court's conclusion was clear; public nuisance actions brought by the government fall into that "class of civil actions" that preclude contingent fee agreements. *Clancy*, 39 Cal. 3d at 748.

If the Court in *Clancy* had intended to permit contingent fee agreements under circumstances where the government maintained adequate control over the litigation, the Court would have remanded that case with instructions that Mr. Clancy could continue under a contingent fee arrangement if sufficient control were maintained. Instead, the Court *precluded* Mr. Clancy from representing the government under a contingent fee agreement but stated that the government "may hire Clancy" back under a non-contingent fee agreement. *Clancy*, 39 Cal. 3d at 750 n.5.

The Court's analysis of the contingent fee issue was based on considering what level of "neutrality so essential to the system" must be maintained by any government attorneys involved in a case. Nothing in the Court's opinion holds that -- once it is determined that the required neutrality is absent -- that lack of neutrality can be "corrected" through the control of purportedly neutral attorneys.

In fact, *Clancy* holds just the opposite; the neutrality requirement for an attorney representing the government "follows the job: if [the attorney] is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." *Id.* at 747. If the rule were as Plaintiffs and Amici assert, local governments arguably could employ a single "controlling" counsel and then hire all other counsel on a contingent fee basis to pursue all criminal and civil enforcement actions.

The cases upon which the *Clancy* Court relied further emphasize that the relevant issue is the required level of neutrality for every attorney representing the government, not potential correction of a lack of neutrality through "control." *Id.* at 746-47. In *Conner*, the entire District Attorney office was recused from prosecuting a case in which a member of the office was a witness to (and possible victim of) the crime. *People v. Conner*, 34 Cal. 3d 141 (1983). In *Greer*, a prosecutor was disqualified from a case because a person working in his office was related to the victim and had a personal interest in the outcome of the case. *Greer*, 19 Cal. 3d 255.

In both *Conner* and *Greer*, the individual prosecutor responsible for prosecuting the action had no direct interest in the matter at issue. Nevertheless, in neither case did the Court consider it sufficient that such a prosecutor might overcome the source of the potential bias by maintaining control over the litigation. The issue thus was adequate neutrality, not control. *See also Vuitton*, 481 U.S. at 810-11 (plurality) (the relevant question is "*whether* a conflict is found, however, not to its gravity once identified . . . . Once we have drawn that conclusion [that a conflict of interest exists], . . . we have deemed the prosecutor subject to influences that undermine confidence that a prosecution can be conducted in a disinterested fashion"); July 19, 2002 Order, *People v. Atlantic Richfield Co.*, Cal. Super. Ct. Orange Cty. No. 804030 (Petitioners' Appx. p. 370, RJN at ¶ 15 (Decl. of John R. Lawless in Support of Defendants' Motion to

Bar Payment of Contingent Fees to Private Attorneys, Exh. J) (even when the government "retains control over the litigation and retains its enforcement discretion," private attorneys cannot be hired on a contingent fee basis, because they are held to a higher degree of neutrality and those standards "cannot be shed by arranging for a 'neutral watchdog'").)

Moreover, the exception Plaintiffs seek to create would be impossible for a court to monitor or to enforce. If the prohibition against contingent fee agreements could be overcome by a determination that a government staff attorney was exercising "absolute control" over the litigation, a court would be required to constantly monitor the government's staff attorney's actual role in the litigation and ensure that the government was not ceding any substantive decisions to outside counsel.

Attorneys are retained not merely to perform ministerial functions, but to advise on strategy and tactics. Plaintiffs assert that their outside counsel have expertise they lack, and they were willing to pay them 17% of any recovery for that expertise. Whether outside counsel's advice on how staff counsel's "control" should be exercised has been shaded by self-interest would be difficult to determine, particularly in light of attorney-client privilege issues, and the inquiry itself would be intrusive, disruptive and costly.

The United States Supreme Court has recognized the impossibility of attempting to review or monitor a conflict of interest once it is found.

> Appointment of an interested prosecutor is also error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision [such as would be reviewed in a "harmless-error" analysis]. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

Vuitton, 481 U.S. at 812-13 (plurality).

In its Order, the trial court here echoed these practical problems:

> [A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel be [sic] permissible, (b) what types of decisions the government attorneys must retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth,

and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel.

(Petitioners' Appx. p. 794 (Order 3:11-17).)

These issues already have been highlighted in this case. When Defendants attempted to obtain information from Plaintiffs regarding their purported "control" over the private counsel, Plaintiffs refused to produce any information, claiming such information is privileged. (*See* Petitioners' Appx. pp. 384-85 (Lawless Decl., Exh. K at pp. 1-2 (meet-and-confer letter from plaintiff stating that any "correspondence that does not directly relate to the Engagement and Contingency Fee Agreement is categorically exempt from discovery pursuant to the attorney client privilege and the attorney work product doctrine")).)

In response to Defendants' motion in the trial court, however, Plaintiffs submitted numerous self-serving declarations purporting to describe the relationship between Plaintiffs and their counsel. Such generalities in declarations are no substitute for evidence when the issue is whether Plaintiffs' sophisticated outside counsel have influenced the direction of the litigation to serve their own financial interests.

A governmental entity cannot have it both ways. It cannot argue that its "absolute control" over the litigation creates an exception to *Clancy*, submit declarations as purported evidence of that alleged control, but refuse to respond to discovery on the issue.

Plaintiffs' mutually inconsistent arguments within their own briefing reflect the impossibility of their control theory. On the one hand, Plaintiffs claim that, notwithstanding their own substantial legal staffs, they need outside counsel with "massive resources and specialized expertise" in public nuisance cases. (Petition at 22.) On the other, they seek to convince the Court that, notwithstanding their lack of time and expertise, they "retain absolute control over all aspects of the litigation . . . ." (*Id.* at 30.) Plaintiffs' latter argument is not only irrelevant under *Clancy*, but untenable if their first argument that they lack expertise in this field of litigation is true.

2. Plaintiffs' "control" exception is unsupported by any legal authority.

Plaintiffs attempt to justify their purported "control" exception to *Clancy* with cases from other jurisdictions, involving different facts and underlying claims. None of those cases involves contingent fee agreements in public nuisance actions (or other actions involving the exercise of police power), and all therefore are inapposite.

Plaintiffs argue that the *Clancy* Court's reference to *Sedelbauer v. State*, 455 N.E. 2d 1159 (Ind. Ct. App. 1983), opens the possibility that

contingent fee agreements are not precluded if the government staff lawyers retain control of the litigation. However, *Sedelbauer* did not involve an attorney hired on a contingent fee basis. In that case, a defendant convicted of distributing obscene material challenged the conviction, in part, on the ground that it was improper for a private attorney from an anti-obscenity group to have assisted the public prosecutor in the litigation at all. *Id.* at 1164. The court held that Indiana law did not prohibit a private attorney from assisting a public prosecutor, although it apparently would have precluded the private attorney from acting as the only prosecutor. *Id.*

As *Clancy* acknowledged, *Sedelbauer* did not consider the question of whether the same private attorney "assistant" prosecutor would have been precluded from that role if he had been paid on a contingent fee basis. *Clancy*, 39 Cal. 3d at 749 n.3. The *Sedelbauer* opinion was limited to approving "the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" *Id.* (quoting *Sedelbauer*). Thus, the case was of no help to the city or Mr. Clancy in arguing that a contingent fee agreement in a public nuisance case should be permissible. *Id.*

Plaintiffs also cite two other cases that did not involve attorneys representing the government on a contingent fee basis. *Hambarian v. Superior Court (People)*, 27 Cal. 4th 826 (2002); *Marshall*, 446 U.S. 238,

supra. In *Hambarian*, the Court considered whether the fact that an accountant who assisted the prosecuting district attorney but who was paid "by hourly billing" from the City of Orange, required recusal of the district attorneys' office. 27 Cal. 4th at 843. The Court concluded that there was no need for recusal due to the accountant's assistance. Although the accountant considered himself a "full member of the prosecution team," he in fact was merely a witness -- subject to cross examination -- to whom the requirement of prosecutorial impartiality did not apply. *Id.* at 839-40. The Court noted that petitioner could "not identif[y] a single case in which a prosecutor's office was disqualified because of the influence of a nonattorney participant in the investigation." *Id.* at 840. The Court also reasoned that hourly billing arrangements for those assisting in criminal prosecutions are not improper. *Id.* at 843.

As discussed above (*see* Section A, *supra.*), *Marshall* actually confirms that arrangements providing attorneys representing the government with a substantial financial stake in the outcome of a prosecution are fundamentally improper. The question faced by the Court was whether an administrative prosecutor charged with assessing civil penalties under the Fair Labor Standards Act was insufficiently neutral because the penalties collected were used to reimburse the agency whose budget ultimately paid the administrator's salary. The Court concluded that the neutrality requirements had not been violated based on the particular facts of the case,

because it "is plain that no official's salary is affected by the levels of penalties," and "no governmental official stands to profit economically from vigorous enforcement of the [Act]." *Marshall*, 446 U.S. at 245, 250.

Plaintiffs cite two additional cases that did not include public nuisance claims, or any other type of claim for which the *Clancy* principles require neutrality by the government. Instead, the cases involve proprietary claims brought on behalf of government plaintiffs as direct tort victims. *Clancy* permits contingent fee arrangements in that category of civil action, which does not require a similar balancing of competing public policies. *See* 39 Cal. 3d at 748 (citing *Denio v. City of Huntington Beach*, 22 Cal. 2d 580 (1943) (contingent fee agreement acceptable where private firm represented city in matters relating to protection of its own oil rights)); *see also Law Offices of Cary S. Lapidus v. City of Wasco*, 114 Cal. App. 4th 1361 (2004) (contingent fee agreement with private attorney appropriate where city hired attorney to litigate city's proprietary claims against underwriter concerning improper financial advice and breach of contract).

In *City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997), counties in California entered into a contingent fee agreement with a private attorney to handle a case in which the counties asserted federal and civil tort claims against tobacco industry defendants. All of the counties' claims were predicated on the allegation that the defendants' alleged misrepresentations regarding the hazards of

smoking caused plaintiffs direct financial injury in the form of health care costs that plaintiffs incurred for the treatment of smokers. *Id.* at 1134. The counties did not allege a public nuisance claim or otherwise attempt to assert their police powers as representatives of the People.

The court held that a contingent fee agreement in such a circumstance was permissible, because the underlying claim involved "does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*." *Id.* at 1135. Instead, "[p]laintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers." *Id.*

Similarly, in *Philip Morris, Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998), the state of Maryland retained private attorneys to act as counsel "in a major tort litigation" to recover costs that state allegedly incurred to pay for tobacco-related illnesses. *Id.* at 1231. This case also did not involve any claims of public nuisance.

Accordingly, both *City and County of San Francisco* and *Glendening* stand for the proposition that, when a public entity asserts a proprietary claim of the type that also could be asserted by a private plaintiff, it may retain counsel in the same way a private plaintiff could. To the extent these two cases include language implying that the contingent fee agreements also are acceptable because the governmental entities indicated they would retain some degree of control over the activities of private counsel, such language

is contrary to the holding and principles of *Clancy*.

Finally, Plaintiffs refer to the trial judge in the Rhode Island lead pigment case who allowed a contingent fee arrangement with outside counsel after the agreement was revised to include language that the government would "retain full control of the litigation." However, that judge did so only after expressly acknowledging that he was ruling in a manner contrary to *Clancy*. (*See* RJN, Exh. D (Sept. 3, 2002, RI Tr. 175:7-10) ("this Court does not believe that a declaration of public policy in our sister state of California of necessity must be determinative of this issue before this Court at this time"); *see also* RJN, Exh. E (June 19, 2003, RI Tr. 29:7-12) (Rhode Island Court describing its September 3 ruling, as one "differentiating or taking a position contrary to that taken by the California Supreme Court").)[12]

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[12] Another trial judge in a different jurisdiction (Ohio) also recently ruled -- contrary to *Clancy* -- that contingent fee agreements might be permissible in a public nuisance action. *Sherwin-Williams Co. v. City of Columbus, Ohio*, Case No. 2:06-cv-00829 (S.D. Ohio). That court heard a motion for preliminary injunction by Sherwin-Williams seeking to void on federal constitutional grounds contingent fee agreements entered into by five Ohio cities. The court's ruling at this early stage of the case is contained in remarks in a transcript following oral argument on June 19, 2007, and in a July 18, 2007, opinion and order on a renewed preliminary injunction motion. (RJN, Exhs. F, G.) The federal district court recognized a federal due process limitation for such contingent fee agreements, but then concluded that two of the agreements passed muster under the United States Constitution, whereas three other agreements violated the federal Constitution unless amended to make clear that the cities retained "control" of the litigation. The court subsequently concluded that two amended

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None of the cases cited by Plaintiffs diminishes the absolute rule articulated in *Clancy* that private attorneys may not be retained to represent the government in public nuisance actions on a contingent fee basis, regardless of the amount of "control" purportedly retained by the government's staff attorneys.[13]

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agreements complied with its order and one did not. The court did not address any Ohio state law issues and did not consider whether such law or ethical canons imposed any obligations beyond the floor set by federal constitutional requirements. The court's analysis is erroneous in that it characterized as the "key issue" in the case, "does the city retain control?" and "may the city settle without counsel's approval, private counsel's approval?" (RJN, Exh. F (6/19/07 Tr. at 84).) Asking whether the city "controls" the litigation is the wrong question and irrelevant under the neutrality principle articulated in *Clancy*, as discussed above.

[13] Plaintiffs also assert that Defendants' motion in the trial court and the Order failed to take into account the "subsequent precedent" of Penal Code § 1424, which Plaintiffs imply changed the rules regarding neutrality and contingent fee agreements. (*See* Petition at 35 n.8.) However, Section 1424 is not "subsequent precedent" at all; the section was enacted prior to *Clancy*. Indeed, the Court in *Clancy* cites to and relies upon its own prior holding in *Conner*, which carefully examined Section 1424. In *Conner*, the Supreme Court recognized that, under Section 1424, not every theoretical conflict requires recusal of a prosecutor. *See Conner*, 34 Cal. 3d at 148 (the type of potential conflict that requires recusal of a prosecutor "exists whenever the circumstances of a case evidence a reasonable possibility that the [prosecutor's] office may not exercise its discretionary function in an evenhanded manner"); *see also People v. Eubanks*, 14 Cal. 4th 580, 599 (1997) (when a victim of a crime has provided financial assistance to the prosecutor, the court should consider the "facts surrounding the conflict to determine whether the conflict makes fair and impartial treatment of the defendant unlikely"). Two years after its consideration of Section 1424 in *Conner*, the Court determined as a matter of law that a contingent fee agreement with private counsel providing a direct profit stake in the outcome of the litigation "is antithetical to the standard of neutrality that an

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E. Plaintiffs' Purported Limited Resources Do Not Justify Abandoning Constitutional And Ethical Requirements

Plaintiffs and Amici also argue that the holding in *Clancy* should be abandoned when the governmental plaintiff contends that its limited financial resources require retaining private counsel under a contingent fee agreement, in the interest of public health. (Petition at 38-44; Amici Brief at 9-12.) This argument is meritless.

All of the Plaintiffs are large public entities, many of which operate with multi-billion dollar annual budgets.[14] And, although Plaintiffs and Amici attempt to paint the governmental entities as lacking legal resources,

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attorney representing the government must meet when prosecuting a public nuisance abatement action." *Clancy*, 39 Cal. 3d at 750.

[14] Plaintiffs' total operating budgets for fiscal year 2006-07 are (Petitioners' Appx., pp. 734-35; RJN at ¶ 16):

Petitioners	Total Budget (Billions)
Alameda	$2.2
Los Angeles (City)	6.7
Monterey	0.9
Oakland	1.0
San Diego (City)	2.5
San Francisco	5.7
San Mateo	1.6
Santa Clara	3.7
Solano	0.9

the governmental entities involved in fact have large legal staffs.[15]

Plaintiffs thus have ample resources to fund and to staff this litigation if they choose to do so. Instead, Plaintiffs thus far have made the political decision not to devote their resources to this litigation. The due process, ethical, and policy principles expressed in *Clancy* cannot be cast aside merely because a particular government entity has made a choice not to allocate its considerable resources to pursue a claim.

The budgetary process "entails a complex balancing of public needs" involving "interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation." *County of*

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[15] According to the declarations and websites of the various entities, the governmental entities' staff attorney resources include: City of Los Angeles -- "over 500" city attorneys (RJN, Exh. H (Los Angeles City Attorney website)); County of Los Angeles -- 270 county counsel (RJN, Exh. I (Los Angeles County Counsel website)); Santa Clara -- 57 county counsel (Petitioners' Appx. p. 430 (Ravel Decl. ¶ 9)); Oakland -- 42 city attorneys (RJN, Exh. J (Oakland City Attorney website)); Alameda -- 30 county counsel (Petitioners' Appx. p. 411 (MacKay Decl. ¶ 7)); San Mateo -- 24 county counsel (Petitioners' Appx. p. 455 (Archer Decl. ¶ 7)); Monterey -- 18 county counsel (Petitioners' Appx. p. 426 (Litt Decl. ¶ 5)). These resources are even larger when considering the number of attorneys in the offices of the county district attorneys, which are the offices actually charged with bringing a public nuisance action. *See* Cal. Civ. Proc. Code § 731 (public nuisance action must be brought "by the *district attorney* of any county in which such nuisance exists, or by the *city attorney* of any town or city in which such nuisance exists") (emphasis added). The resources of the offices of the district attorneys include: County of Los Angeles -- 1017 district attorneys (RJN, Exh. K (Los Angeles County District Attorney website)); Santa Clara -- 187 district attorneys (RJN, Exh. L (Santa Clara County District Attorney website)); Alameda -- 149 district attorneys (RJN, Exh. M (Alameda County District Attorney website)).

Butte, 176 Cal. App. 3d at 699. It is the "responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available." *Id.*

The legislative body of a particular government entity -- and not its staff attorneys or other agency employees -- must make choices regarding how to allocate money. However, the fact remains that these are choices; a decision by a legislative body reflecting the priorities for spending cannot be permitted to justify a violation of due process in the judicial system.[16]

One of the principal cases cited by Plaintiffs recognizes this point. An argument that an allegedly "financially strapped" government needs to "match resources with the wealthy . . . defendants" is simply not "convincing in light of the concerns expressed in *Clancy*." *See City and County of San Francisco*, 957 F. Supp. at 1136 n.3; *see also* July 19, 2002 Order, *People v. Atlantic Richfield Co.*, Cal. Super. Ct. Orange Cty. No.

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[16] In the trial court, Plaintiffs submitted declarations that contained statements by staff attorneys speculating about what the government entities might choose to do following the trial court's Order. The declarations provided no evidence that the governmental entities -- as opposed to staff attorneys -- actually considered the contingent fee issue or the potential allocation of resources to this case following entry of the Order. (*See, e.g.*, Order Regarding Plaintiffs' Motion for Stay, *County of Santa Clara, et al., v. Atlantic Richfield Co., et al.*, Case No. CV 788657 (Cal. Super. Ct., May 22, 2007), filed as Exhibit A to May 22, 2007, Letter from Cheryl Stevens to this Court (finding at 3:19-20 that "no evidence has been submitted establishing that [Plaintiffs] have considered their duty with regard to the issues reflected in the Court's order [granting Defendants' motion to bar payment of contingent fees]").)

804030 at 6-7, (Petitioners' Appx. pp. 371-72, RJN at ¶ 15 (Decl. of John R. Lawless in Support of Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, Exh. J) (the political process through which determinations are made by the government to expend resources on issues other than litigation "cannot be the basis by which justice is assured to all who come before the courts").) [17]

Plaintiffs' arguments regarding their alleged financial shortcomings are particularly disingenuous in light of the fact that this litigation is itself an unnecessary creation of the Plaintiffs. The California Legislature has provided Plaintiffs with numerous statutory procedures to address public health concerns regarding lead hazards.[18] This comprehensive regulatory

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[17] Plaintiffs' and Amici's reliance on *People ex rel. Dep't of Fish and Game v. Attransco, Inc.*, 50 Cal. App. 4th 1926 (1996), in support of an argument that public policy supports permitting contingent fees in public nuisance cases is misplaced. *Attransco* did not involve contingent fee counsel or fundamental issues of due process raised by such fee arrangements. In that case, the Court found that Plaintiff attempted to play "ludicrous" word games with statutory language to preclude a state agency from "*ever* employ[ing] any legal counsel other than the Attorney General." *Id.* at 1932. The Court noted that the "overall theme of [defendant's] appeal is that it is a waste of tax dollars for the Department of Fish and Game to hire a private law firm to help it litigate th[e] action." *Id.* at 1937. Here, the issue is quite different. There is no dispute that the governmental entities are free to make the policy and financial decision that they need outside counsel to assist them in this litigation. However, the governmental entities cannot retain such attorneys through contingent fee agreements that would violate due process and ethical principles.

[18] For example, Plaintiffs' enforcement powers against "lead hazards" were significantly enhanced when the Legislature passed S.B. 460. *See, e.g.*, Cal. Health & Safety Code §§ 105255(c) & 105256(a) (empowering "a local

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scheme complements federal regulations that have been enacted to control the adverse effects of environmental lead. Rather than pursuing the statutory remedies that were enacted by the Legislature for the specific purpose of providing cost-effective relief against "lead hazards," Plaintiffs instead have elected to initiate and pursue large-scale, complex litigation involving multiple Defendants, none of which owns or controls any property with lead hazards.

California also has for years funded a state-wide Childhood Lead Poisoning Prevention Program ("CLPPP") entirely with fees levied upon past and current lead producers. *See* Cal. Health & Safety Code §§ 105305, 105310. In *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 870 (1997), the California Supreme Court noted that "the Legislature imposed the [CLPPP] fees to mitigate the actual or anticipated adverse effects of the fee payers' operations, and under the Act the amount of the fees must bear a reasonable relationship to those adverse effects."

The data maintained by the United States Centers for Disease Control ("CDC") Childhood Blood Lead Surveillance Program confirms the success of regulatory programs such as the CLPPP. The CDC reports

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enforcement agency" to order property owners to abate "lead hazards"); §§ 17920.10(a); 17980-17980.10 (authorizing enforcement agencies to order abatement of nuisances in housing, including "deteriorated lead-based paint," to abate the nuisance themselves if the owner refuses and assess the costs of abatement as liens against the property); *see also* n.11, *supra.*

that, in 1997, 18.33% of California children tested had elevated blood lead levels ("EBLLs") (>10 ug/dL); by 2005, when the number of California children tested had increased by 42 times over 1997, the EBLL rate had fallen to 1.07%. This decline in EBLLs among California children mirrors the progress on the national level. Between 1997 and 2005, the number of U.S. children tested annually increased by 1.3 million, which confirmed EBBL cases dropped from 7.61% of those tested to 1.59%.[19]

Plaintiffs and Amici also assert that "many" current cases involving other public health and environmental issues will be jeopardized if the Order is not overturned. (*E.g.*, Petition at 42.) They fail, however, to identify any such cases at risk. In any event, the payment of contingent fees to attorneys representing the government in public nuisance cases has been expressly precluded for decades under the principles articulated in *Clancy*. Plaintiffs' and Amici's rhetoric that the trial court's ruling here will suddenly change the government's ability to protect the public is completely unfounded. The neutrality required for government attorneys in public nuisance cases cannot be abandoned based on an assertion by the government that alleged limited resources necessitate the use of contingent fees.

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[19] *See* RJN, Exh. N (Excerpt of data from the Centers for Disease Control website).

F. The Order Should Not Be Set Aside On "Ripeness" Grounds

Plaintiffs' suggestion that the trial court should have left the contingent fee issue unresolved until the case is over ignores the fact that the agreements violate fundamental due process. (Petition at 37 n.9.) Violations of due process cannot be "fixed" later in the case; rather, they must be resolved as soon as possible in the litigation. Indeed, the issue in *Clancy* arose and was resolved during the early stages of the case -- at the same time discovery was proceeding and the parties were disputing a subpoena *duces tecum*. *See Clancy*, 39 Cal. 3d at 744.

The U.S. Supreme Court recognizes this principle. In *Village of Monroeville*, 409 U.S. 57, the Court held unconstitutional an Ohio statute authorizing mayors to sit as judges in ordinance violation cases where the fines from the violations would go to into the municipality's coffers controlled by the mayor.

The Court noted that the due process violation needed to be resolved prior to any appeal that might later "correct" the problem. In such circumstances, an appeal as a

> "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on

> appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Id. at 61-62 (emphasis added).

The trial court correctly ruled on Defendants' motion at this stage of the litigation, and the Order should not be set aside as "premature."

CONCLUSION

The trial court properly concluded that *Clancy* and the principles upon which it is based precludes Plaintiffs from retaining private counsel under any agreement in which payment of fees and costs is contingent on the outcome of this litigation. Accordingly, this Court should deny Plaintiffs' writ petition and dismiss the order to show cause.

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STATEMENT OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I certify that this brief, exclusive of the Tables and this Statement, contains 13,074 words. This certification is based on the word count generated by the computer program used to prepare this brief.

Dated: July 30, 2007

Sean Morris

Case No. H031540

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. I a readily familiar with Arnold & Porter's practices for the service of documents. On **July 30, 2007** I served or caused to be served a true copy of the following document(s) in the manner listed below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on **July 30, 2007**.

V Apodaca

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