COPY

Court of Appeal No. H036540

Santa Clara Superior Court No. CV 788657

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**
**SIXTH APPELLATE DISTRICT**

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**COUNTY OF SANTA CLARA, COUNTY OF SOLANO, COUNTY OF ALAMEDA, COUNTY OF LOS ANGELES, COUNTY OF MONTEREY, COUNTY OF SAN MATEO, CITY AND COUNTY OF SAN FRANCISCO, CITY OF OAKLAND, CITY OF SAN DIEGO, and CITY OF LOS ANGELES,**

Petitioners

vs.

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

Respondent.

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**ATLANTIC RICHFIELD COMPANY, AMERICAN CYANAMID COMPANY, CONAGRA GROCERY PRODUCTS COMPANY, E.I. DU PONT DE NEMOURS AND COMPANY; NL INDUSTRIES, INC., THE SHERWIN-WILLIAMS COMPANY; ARMSTRONG CONTAINERS, and CYTEC INDUSTRIES, INC.,**

Real Parties in Interest.

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# PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI OR OTHER APPROPRIATE RELIEF

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## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

☐ Interested entities or persons are listed below:

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| 1. | |
| 2. | |
| 3. | |
| 4. | |

Please attach additional sheets with person or entity information if necessary.

Dated: May 9, 2007

ANN MILLER RAVEL
Santa Clara County Counsel

By:_____

Printed Name: ANN MILLER RAVEL
Santa Clara County Counsel

Address: 70 West Hedding, 9th Floor

State Bar # 62139

Party Represented: Petitioner County of Santa Clara

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**TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES:**

Petitioners respectfully submit this Petition and Memorandum of Points and Authorities in Support of their Petition for Writ of Mandate.

## INTRODUCTION

This writ arises out of a civil action to abate a public nuisance. Plaintiffs below are a number of California counties (**Santa Clara County, San Mateo County, Monterey County, Solano County, Los Angeles County**[1] **and Alameda County**) and cities (**San Francisco, Oakland, Los Angeles and San Diego**) who are suing the manufacturers of lead pigment for use in paint. Plaintiffs allege that Defendants created a public nuisance by concealing the dangers of lead and promoting lead paint for interior use, despite Defendants' knowledge of the health hazards associated with lead paint. This Court reviewed Plaintiffs' allegations as a result of a previous appeal, and held that Plaintiffs have stated a valid claim against Defendants for abatement of this public nuisance. *County of Santa Clara v. Atlantic Richfield* (2006) 137 Cal.App.4th 292, 306.

This writ is from an order of the Superior Court that absolutely prohibits California's public entities from retaining private counsel on a contingent fee basis to assist in litigating civil actions to abate public nuisances. If allowed to stand, the order will effectively prevent public entities from retaining private counsel to pursue any civil public nuisance claim where the public health and safety are at risk, even where there is no

[1] The County of Los Angeles joined the motion for leave to file the proposed Fourth Amended Complaint in March 2007, after the motion was filed on January 3, 2007.

risk of criminal penalties to the Defendants, and no risk of violation of any of their constitutional rights. The issue is of widespread public interest because this public nuisance claim is critical to abate this serious health hazard. The ruling below will effectively stymie this litigation, and with it any hope of abating the lead paint hazard from public and private buildings in Plaintiff cities and counties. It will also jeopardize the ability of Plaintiffs and other public entities to remedy large-scale, serious and ongoing public health and environmental hazards and give the creators of those hazards a free pass for their misconduct.

The Superior Court's ruling was based on *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740. The Superior Court misread *Clancy* as imposing a blanket ban on any use of contingent fee counsel in any public nuisance case. *Clancy* adopted no such blanket rule but instead based its holding on analysis of important public policy concerns that are not present in every case. *Clancy* disallowed a contingent fee agreement through which a city delegated complete control to outside counsel over the litigation of a case that had both criminal and constitutional aspects. The criminal and constitutional aspects of that case required the neutrality of a public attorney, who was entirely absent from that litigation.

Here, the Superior Court ignored the reasoning of the *Clancy* Court, including the concerns it articulated as the basis for its decision and the circumstances that gave rise to those concerns. Without analysis, the Superior Court adopted a blanket ban on contingent fee contracts and then applied that blanket ban to this case. It ignored the fact that this case does not raise or implicate criminal or constitutional issues. Moreover, private counsel are merely assisting, rather than replacing, the public attorneys who are counsel of record in this case. These public attorneys are the decision

makers here. This fact alone distinguishes this case from *Clancy*, and ensures that Defendants will not be subjected to an overzealous private prosecution pursued for personal gain. The *Clancy* decision itself indicates that contingent fee agreements may be appropriate in these circumstances. Since *Clancy* was decided, other courts that have considered this issue have held contingent fee agreements like the one in this case valid. The blanket rule the Superior Court adopted is not only inconsistent with *Clancy* and subsequent cases, its effect would be devastating. It would prevent public entities from accessing the resources they need to conduct litigation that is vitally important to protect public health and safety.

For these reasons, Petitioners respectfully request that this Court grant their petition and issue a writ of mandate or prohibition reversing the ruling of the trial court.

## NATURE OF THE CASE

The case below is a civil action by numerous public entities seeking abatement of a public nuisance: the lead paint currently present in numerous homes, schools, hospitals, and other public and private buildings. Only one remedy is presently sought: abatement. *See* Fourth Amended Complaint for: Public Nuisance ("FAC") ¶¶98-111, Exhibit 2 at pp. 108-110. This court has already recognized that Plaintiffs have stated a valid public nuisance claim arising from the dangers of lead paint:

> Here, Santa Clara, SF, and Oakland alleged that defendants assisted in the creation of this nuisance by concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use even though defendants had known for nearly a century that such a use of lead paint was hazardous to human beings. Defendants "[e]ngage[ed] in a massive campaign to promote the use of Lead on

> the interiors and exteriors of private residences and public and private buildings and for use on furniture and toys." Had defendants not done so, lead paint would not have been incorporated into the interiors of such a large number of buildings and would not have created the enormous public health hazard that now exists. Santa Clara, SF, and Oakland have adequately alleged that defendants are liable for the abatement of this public nuisance.

*County of Santa Clara, supra*, 137 Cal.App.4th at 306.

The continuing presence of lead paint undeniably creates a serious public health problem. The California Legislature has found that "[l]ead poisoning poses a serious health threat for significant numbers of California children" and that "[l]evels of lead found in soil and paint around and on housing constitutes a health hazard to children living in the housing." Calif. Health & Safety Code § 124150(c) and (e).

The Fourth Amended Complaint alleges that although lead was banned for residential use in 1978, lead is still present in and on many homes, schools, hospitals and other public and private buildings within the jurisdiction of the public entity plaintiffs. FAC ¶34, Exhibit 2 at pg. 95; Third Amended Complaint ("TAC") ¶¶92, 175, Exhibit 1 at pp. 34, 57.[2] The Complaint further alleges that lead paint is the primary source of lead poisoning in California's children, causing acute and chronic damage to the renal system and red blood cells as well as having serious negative effects on the development of the brain and nervous system in the unborn and in children under age six. FAC ¶¶32; 35-37, Exhibit 2 at pp. 94-96; TAC

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[2] Although the operative complaint in the Third Amended Complaint, references are also made to the proposed Fourth Amended Complaint. Plaintiffs filed a motion for leave to file the proposed Fourth Amended Complaint on January 3, 2007. The Fourth Amended Complaint was prepared in response to this Court's ruling in *County of Santa Clara v. Atlantic Richfield, supra.*

¶¶107-109, Exhibit 1 at pg. 43. Scientific studies are cited to show that in utero and childhood exposure to lead causes difficulty in learning and behavioral problems that can persist for life, and that even low levels of lead exposure can also affect adults, causing heart damage, high blood pressure, and other ills. FAC ¶¶32-40, Exhibit 2 at pp. 94-96; TAC ¶¶107-109, Exhibit 1 at pg. 43. Abatement of this public nuisance is essential to the health and welfare of California's citizens, both children and adults. FAC ¶¶100, 102, Exhibit 1 at pp. 108-109; TAC ¶¶168-170, Exhibit 2 at pg. 56.

This writ is from an order of the Superior Court precluding Plaintiffs from retaining outside counsel to help with the litigation of this public nuisance case under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation. The trial court based its decision on a single case, and on a single argument: that outside co-counsel retained under a contingent fee contract are *always and inherently* not "neutral," and that this lack of "neutrality" creates an absolute bar to public entities hiring outside counsel to assist them in public nuisance actions on a contingent fee basis. Its decision effectively disqualifies outside counsel, who were retained by the public entities over six years ago to assist them in handling this public nuisance mega-case. The order is subject to reversal in a writ action for the reasons set forth herein.

## PETITION FOR WRIT AND AUTHENTICATION OF EXHIBITS

### I. AUTHENTICITY OF EXHIBITS

1. All exhibits accompanying this Petition are true and correct copies of original documents on file with respondent court, except for Exhibit 26, which is a true copy of the original reporter's transcript of the hearing on April 3, 2007, on Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys. The exhibits are incorporated by reference as though fully set forth in this Petition. The exhibits are paginated consecutively from page 1 through page 823, and page references in this Petition are to the consecutive pagination.

### II. BENEFICIAL INTEREST OF PETITIONERS; CAPACITIES OF RESPONDENT AND REAL PARTIES IN INTEREST

2. Petitioners are the Plaintiffs and putative 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 County Superior Court CV 788657. The following Defendants are named herein as the real parties in interest:

- ATLANTIC RICHFIELD COMPANY, successor-in-interest to International Smelting and Refining Company and Anaconda Lead Products Company, a corporation;
- CONAGRA GROCERY PRODUCTS COMPANY, successor-in-interest to W.P. Fuller Company, the W.P. Fuller Paint Company, and WPF, Inc., a corporation;
- E.I. DU PONT DE NEMOURS AND COMPANY, a corporation;
- NL INDUSTRIES, INC., formerly known as the National Lead Company, a corporation

- THE SHERWIN-WILLIAMS COMPANY, a corporation;
- ARMSTRONG CONTAINERS, successor-in-interest to the John R. MacGregor Co. and The MacGregor Lead Company, a corporation; and
- CYTEC INDUSTRIES, INC., successor-in-interest to AMERICAN CYANAMID COMPANY, a corporation.

## III. CHRONOLOGY OF PERTINENT EVENTS

3. On February 14, 2000, the Santa Clara County Board of Supervisors unanimously authorized the County Counsel to file a class action lawsuit against the manufacturers of lead pigment for use in paint for the harm caused by lead paint contamination. Exhibit 12 at pg. 428:28-429:4.

4. Facing limited resources and a lack of specialized skills needed for the litigation, the County of Santa Clara ("Santa Clara") simultaneously sought the assistance of private counsel to help litigate the case on a contingent fee basis. Exhibit 12 at pg. 429:5-10. Accordingly, Santa Clara entered into a legal services agreement with the law firm now known as Cotchett, Pitre & McCarthy ("CPM"). *Id.* The agreement provided that CPM would advise and assist Santa Clara in prosecuting the action. Santa Clara Agreement at ¶1.B of Exhibit 7 at pg. 242. Any attorney fees payable to CPM would be awarded by the court. *Id.* at ¶3 at pg. 243. In light of the public policy ramifications of the litigation, CPM agreed that it would not seek more than 17% of the net recovery. *Id.* at ¶3.A at pg. 243. Further, the parties agreed that they would negotiate a new contingent fee agreement if it was decided that the litigation would proceed on other than a class basis. *Id.* at ¶11 at pg. 246-247. The Santa Clara agreement was limited to helping Santa Clara prosecute this action against specific, identified Defendants. *Id.* at ¶10 at pg. 246; Exhibit 12 at pg.

249:11-16. The fee agreements between CPM and the other public entities it represents were mostly modeled on the Santa Clara agreement.

5. In March 2000, the Santa Clara County Counsel and CPM filed a complaint in Santa Clara Superior Court alleging causes of action for strict liability, negligence, fraud and concealment, unjust enrichment, indemnity, and unfair business practices. *County of Santa Clara*, 137 Cal.App.4th at 299.

6. Later in 2000, the Counties of Santa Cruz, Solano, and Alameda joined Santa Clara in filing an amended complaint. The amended complaint deleted the unfair business practices cause of action and added causes of action for civil conspiracy and nuisance. Defendants demurred. The trial court overruled the demurrer as to the fraud and concealment cause of action, and sustained the demurrer as to the conspiracy cause of action and with leave to amend as to the other causes of action. *Id.*

7. In January 2001, several other public entities, including the City and County of San Francisco[3] ("San Francisco") and the City of Oakland, decided to join the class action in filing a second amended complaint because of the public health hazard caused by lead paint. The second amended complaint alleged fraud and concealment, strict liability, negligence, negligent breach of special duty, public nuisance, private nuisance, unfair business practices, and false advertisement. Defendants demurred, and the court overruled the demurrer as to negligent breach of

[3] To assist in this litigation, San Francisco entered into a contingent fee agreement with Mary Alexander & Associates; Thornton Naumes; and Motley Rice LLC. Exhibit 7 at pp. 230-240. CPM has not entered into any fee agreement with the City and County of San Francisco in this case.

special duty. The court sustained the demurrer as to the nuisance causes of action, and sustained the demurrer to the false advertising cause of action with leave to amend. *Id.*

8. The fee agreement between San Francisco and its outside counsel (presently Mary Alexander & Associates, Thornton & Naumes, and Motley Rice LLC) specifies that this case will at all times be controlled by public attorneys, rather than outside counsel from private firms:

> The San Francisco City Attorney, as the chief legal officer of the City and County of San Francisco, who is charged with representing it in legal proceedings with respect to which it has an interest and who is authorized to bring certain actions on behalf of the People of the State of California, together with the county counsel and city attorneys of any other counties and cities that join in the prosecution of the Litigation and retain Special Attorneys ("the Prosecuting Entities"), retain final authority over all aspects of the Litigation. San Francisco Agreement, Exhibit 7, ¶I.B at pg. 230.

Paragraph I.C. of the San Francisco Agreement specifies that:

> The Special Attorneys shall consult in advance with, and obtain the prior approval of, the San Francisco City Attorney concerning all substantive matters related to the Litigation, including, but not limited to, the pleadings and dispositive motions, discovery, selection of consultants and experts, and whether the Special Attorneys may represent additional co-plaintiffs in the Litigation. Regular status meetings shall be held as requested by either the San Francisco City Attorney or the Special Attorneys.

*Id.* at pg. 231. The sole contingency upon which San Francisco shall pay compensation to outside counsel is the recovery and collection by outside counsel of monies on behalf of San Francisco in the litigation. *Id.* at ¶II.B. at pg. 232. The compensation on the foregoing contingency shall be the outside counsel's reasonable disbursements plus 17% of any recovery. *Id.* at ¶II.C. at pg. 232. Disbursements shall include expenditures reasonably incurred in the litigation. *Id.* at ¶II.E. at pg. 233.

9. On June 21, 2001, Plaintiffs filed a third amended complaint that alleged fraud and concealment, strict liability, negligence, negligence breach of special duty, unfair business practices causes of action, and public nuisance. Exhibit 1 at pp. 1-84. Defendants demurred to the public nuisance cause of action, which the court sustained without leave to amend.

10. In November 2002, Plaintiffs requested leave to file a fourth amended complaint that added a cause of action for continuing trespass to real property and amended the unfair business practices claim to include Santa Clara. The trial court denied the request for leave to amend on the grounds that the amended complaint failed to state facts sufficient to constitute an action for continuing trespass. *County of Santa Clara*, 137 Cal.App.4th at 301.

11. In February 2003, Defendants moved for summary judgment or adjudication of the fraud, strict liability, negligence, and unfair business practices causes of action based solely on the statute of limitations. In August 2003, the trial court entered an order granting Defendants' summary judgment motion and finding that all of Plaintiffs' remaining causes of action (fraud, strict liability, negligence and unfair business practices) were barred by the statute of limitations. A judgment of dismissal was entered in October 2003. *Id.* at 301-303.

12. Plaintiffs appealed. The Court of Appeal filed its ruling in March 2006 and the remittitur was filed in the superior court in June 2006. The Court of Appeal reversed the trial court's order sustaining the Defendants' demurrer as to the representative public nuisance cause of action in the third amended complaint, reversed the order granting summary judgment and ordered the entry of a new order granting summary adjudication on the Unfair Competition Law ("UCL") cause of action, and

denied summary adjudication on the negligence, strict liability and fraud causes of action. *County of Santa Clara*, 137 Cal.App.4th at 333.

13. The public entities deleted the class allegation from the proposed Fourth Amended Complaint, and filed a motion for leave to file the proposed Fourth Amended Complaint on January 3, 2007. The proposed Fourth Amended Complaint includes one cause of action for representative public nuisance. The public entities seeking leave to file the proposed Fourth Amended Complaint on behalf of the People are: County of Santa Clara, City and County of San Francisco, City of Oakland, County of Alameda, County of Solano, City of San Diego, County of Monterey, County of San Mateo, City of Los Angeles, and County of Los Angeles. Exhibit 2 at pp. 85-113.

14. In February 2007, Defendants filed a motion to bar payment of contingent fees to private attorneys based on *Clancy v. Superior Court* (1985) 39 Cal.3d 740. Exhibits 3-7 at pp. 114-385.

15. As a result of the Court of Appeal decision in this action, and as provided by the original fee agreement, Santa Clara entered into a new contingent fee agreement with CPM in February 2007. Exhibit 12 at pg. 429:17-23; Exhibit 13 at pg. 448:15-20. The new agreement memorializes the fact that the public entity attorneys retain final authority over all aspects of the litigation. New Santa Clara Agreement at ¶I.B of Exhibit 12 at pg. 434. In addition, the public entities reserve the right to establish a Litigation Steering Committee to coordinate of the litigation. *Id.* CPM is to consult in advance with, and obtain the approval of, Santa Clara County Counsel and the other government lawyers prior to taking any substantive actions, including the filing of pleadings and motions and discovery. *Id.* at ¶I.C at pp. 434-435. Under the new agreement, Santa Clara will

compensate CPM only if CPM recovers and collects monies on behalf of Santa Clara in the litigation. *Id.* at ¶II.B at pg. 437. Compensation shall be CPM's reasonable disbursements, plus 17% of any recovery in this litigation. *Id.* at ¶¶II.B and II.C at pp. 437-438. Reasonable disbursements means out-of-pocket costs that are not reimbursed under ¶III.A., which defines out-of-pocket costs as including, but not limited to, filing fees, copying charges for copies made by an outside copying service, travel costs and internal copying costs, and expert witness consulting fees. *Id.* at pg. 436.

16. Revised fee agreements between CPM and the public entity Plaintiffs accurately reflect that the public entity attorneys retain authority over the litigation. *See, e.g.*, ¶3.D. of Legal Services Agreement attached to Declaration of Raymond L. MacKay, Deputy County Counsel for County of Alameda, Exhibit 10 at pg. 416. Further, the revised agreements accurately reflect that CPM does not have absolute discretion in the decision of who to sue and who not to sue, and what theories to plead and what evidence to present. *Id.* at ¶11, Exhibit 10 at pg. 419; *compare* to superceded ¶11 of Exhibit 7 at pg. 276.

17. The record in this case is uncontroverted that government lawyers have not at any time delegated their prosecutorial responsibilities to private counsel. *See, e.g.*, Declaration of Ann Miller Ravel, County Counsel for the County of Santa Clara, Exhibit 12 at pg. 429:28-430:2 ("However, this Office has retained and continues to retain complete control of the litigation and is actively involved in and directs all decisions related to the litigation, and this Office has direct oversight over the work of outside counsel."); Declaration of Owen J. Clements, Chief of Special Litigation for the City and County of San Francisco, Exhibit 14 at

pg. 452:11-12 ("The San Francisco City Attorney's Office has in fact retained control over all significant decisions relating to the prosecution of San Francisco's case"); Declaration of Raymond L. MacKay, Deputy County Counsel for the County of Alameda, Exhibit 10 at 410:24-28 ("Except for ministerial or administrative decisions (such as organizing documents for discovery), no action on this matter is taken by outside counsel without my direction after I have reported and/or discussed the proposed action with my supervisor and the County Counsel and received their input and direction."); Declaration of Christopher Kee, Deputy City Attorney for the City of Oakland, Exhibit 9 at pg. 407:18-21 ("Notwithstanding any documents suggesting the contrary, the Office of the City Attorney has retained complete control over the prosecution of the public nuisance cause of action in this case as it relates to the interests of the People of the City of Oakland."); and Declaration of William L. Litt, Deputy County Counsel for the County of Monterey, Exhibit 11 at pg. 427:15-18 ("The activities of the Cotchett, Pitre firm are constantly reviewed by this Office and the attorneys employed by the other public entity Plaintiffs, and the firm has never, to my knowledge, been given discretion to make decisions regarding this case without the advice, input, and consent of the Plaintiffs."). The government lawyers have maintained control and final authority over all aspects of the litigation. Throughout the litigation, the public entities have been and will continue to be the lead counsel in litigating the action. For instance, the government lawyers have argued before the trial court and the appellate court and drafted the proposed Fourth Amended Complaint and the opposition to Defendants' motion to bar payment of contingent fees to private attorneys. *See, e.g.*, Declaration of Ann Miller Ravel, Exhibit 12 at pg. 430:8-17.

18. The Superior Court granted Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys by order dated April 4, 2007. The Superior Court ruled that:

> Defendants' motion for an 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 is GRANTED. Plaintiffs shall have 30 days to file with the court new fee agreements in accordance with this order. In lieu of filing the actual agreements, Plaintiffs may provide declarations detailing the fee arrangements with outside counsel.

See Order, Exhibit 25 at pg. 795:21-25.

19. On May 2, 2007, Plaintiffs filed a motion in the Superior Court for a stay pending the determination of this writ. By Minute Order dated May 2, 2007, the Superior Court scheduled a hearing on that stay motion for May 22, 2007. As part of that minute order, the Superior Court extended the time for Plaintiffs to file their fourth amended complaint and provide information regarding new fee agreements until May 24, 2007 (unless Plaintiffs' stay motion is granted).

20. Plaintiffs will be irreparably harmed unless this writ is granted and the Superior Court's order is reversed. The order effectively disqualifies Plaintiffs' outside counsel. Most if not all of the Plaintiffs lack the resources to retain outside counsel on an hourly basis, or to pursue this case effectively without outside counsel.

## IV. BASIS FOR RELIEF

21. As set out more fully in the attached Memorandum of Points and Authorities, which is incorporated herein by reference, the trial court erred for several reasons. Among them are that the trial court misconstrued the single case it relied on, applying it far too broadly to a unique situation

that is clearly distinguishable from the facts of that case. The trial court also failed to engage in the balancing of interests required by California law, including failing to take into account fundamental public policy concerns, and went so far as to effectively tell elected officials how to allocate their resources. In addition, the trial court made a ruling that is directly contrary to the uncontroverted record in this case. Additional reasons why the trial court erred will also be discussed below.

## V. ABSENCE OF OTHER REMEDIES

22. As set forth more fully in the attached Memorandum of Points and Authorities, which is incorporated herein by reference, this writ is necessary because there is no other adequate legal remedy. The order for the Plaintiffs to substitute non-contingent fee agreements for the current contingent fee agreements may not be immediately appealable. Unless overturned, that order will effectively stymie the current litigation–and all hope of abatement of the lead paint public nuisance–by depriving the public entities of the resources they need to prosecute this case, while giving the Defendants and their armies of lawyers a huge and unfair advantage.

## VI. PRAYER

WHEREFORE, Petitioners pray that this Court:

1. Issue a preemptory writ in the first instance, directing Respondent Superior Court to set aside and vacate its order of April 4, 2007, granting Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, and to enter a new and different order denying the motion; or

2. Issue an alternative writ directing responding superior court to set aside and vacate its order of April 4, 2007, granting Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandate and/or prohibition or such other extraordinary relief as is warranted, directing respondent superior court to set aside and vacate its order of April 4, 2007, granting Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, and to enter a new and different order denying the motion.

3. Award Petitioners their costs pursuant to rule 8.490(m) of the California Rules of Court; and

4. Grant such other relief as may be just and proper.

Dated: May 9, 2007

SANTA CLARA COUNTY COUNSEL

By: _____
Ann Miller Ravel
County Counsel

SAN FRANCISCO CITY ATTORNEY
OAKLAND CITY ATTORNEY
ALAMEDA COUNTY COUNSEL
SOLANO COUNTY COUNSEL
SAN DIEGO CITY ATTORNEY
MONTEREY COUNTY COUNSEL
SAN MATEO COUNTY COUNSEL
LOS ANGELES CITY ATTORNEY
LOS ANGELES COUNTY COUNSEL
COTCHETT PITRE & McCARTHY
THORNTON & NAUMES'
MOTLEY RICE LLC
MARY ALEXANDER & ASSOCIATES

## VERIFICATION

I, ANN MILLER RAVEL, declare as follows:

I am the County Counsel for the County of Santa Clara, one of the Plaintiffs/Petitioners in this case. I have read the foregoing Petition for Writ of Mandate, Prohibition, Certiorari or Other Appropriate Relief, and know its contents. The facts alleged are within my knowledge and I know those facts to be true. I am familiar with the relevant facts pertaining to the proceedings in the trial court and for that reason I verify this Petition.

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

Executed this 9 day of May, 2007 at Santa Clara, California.

By: Ann Miller Ravel
Ann Miller Ravel

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. WRIT RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM TO BOTH THE PLAINTIFFS AND THE PUBLIC AND TO RESOLVE AN ISSUE OF GREAT PUBLIC IMPORTANCE.

Relying solely on *Clancy*, the trial court established a bright-line rule: no government entity may enter into a contingent fee arrangement with outside counsel to pursue a public nuisance claim on behalf of the People regardless of the nature of that claim or the terms of the arrangement. As a result, the court barred "Plaintiffs from retaining outside counsel *under any agreement* in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." Exhibit 25 at pg. 795:21-23 (emphasis added). Although the court gave Plaintiffs 30 days to enter into new contractual agreements with outside counsel, its order, as a practical matter, will likely disqualify counsel because Plaintiffs cannot otherwise afford to retain them. And the disqualification of outside counsel will likely prevent many, if not all, Plaintiffs from pursuing this action for the public benefit. As explained below, in light of these consequences, writ review of the trial court's erroneous ruling is essential here.

#### A. Absent Writ Review, Plaintiffs Have No Adequate Remedy At Law.

Plaintiff cities and counties filed this action to remedy a hazardous condition created by Defendants that poses a serious threat to the health of their citizens: the presence of lead-based paint in public and private buildings within Plaintiffs' jurisdictions. Exposure to lead-based paint causes serious and irreversible harm, both physical and developmental, especially to young children. Despite Defendants' enormous lobbying efforts, Congress passed legislation banning future interior use of lead paint

in 1978. For many decades before that, however, Defendants had developed and marketed lead paint, despite knowledge of its hazardous nature and the availability of safer alternatives. The paint Defendants sold during these years remains as a ticking time bomb in many private and public buildings throughout the state. Lead paint continues to be an enormous public health hazard, and Plaintiffs filed this case to abate it.

Because of the extraordinary scope of this case, the public entity Plaintiffs correctly anticipated that they would need the assistance of outside counsel experienced in managing and trying complex civil cases. Plaintiffs also correctly anticipated that this litigation could last for many years and require vast amounts of attorney time and out-of-pocket expenses. In light of their limited resources, it was essential for Plaintiffs to retain outside counsel on a contingency fee basis in order to bring this action.[4]

By precluding Plaintiffs from entering into *any* contingent fee agreements with outside counsel, the trial court, as a practical matter,

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[4] *See* Declaration of Ann Miller Ravel, County Counsel for the County of Santa Clara, Exhibit 12 at pp. 430:27-431:3; Declaration of Cheryl A. Stevens, Deputy County Counsel for the County of Santa Clara, Exhibit 13 at pg. 448:21-24; Declaration of Owen J. Clements, Chief of Special Litigation for the City and County of San Francisco, Exhibit 14 at pg. 453:1-10; Declaration of Raymond L. MacKay, Deputy County Counsel for the County of Alameda, Exhibit 10 at pg. 411:14-20; Declaration of Christopher Kee, Deputy City Attorney for the City of Oakland, Exhibit 9 at pg. 407:11-17; Declaration of William L. Litt, Deputy County Counsel for the County of Monterey, Exhibit 11 at page 427:6-11; Declaration of Rebecca M. Archer, Deputy County Counsel for the County of San Mateo, Exhibit 15 at pg. 456:1-5; Declaration of Michael J. Aguirre, City Attorney for the City of San Diego, Exhibit 16 at pg. 459:6-13; and Declaration of Patricia Bilgin, Assistant City Attorney for the City of Los Angeles, Exhibit 17 at pg. 475:8-12.

disqualified that counsel. Nonetheless, the court's order did not expressly disqualify outside counsel and gave Plaintiffs "30 days to file with the court new fee agreements in accordance with" its order. Exhibit 25 at pg. 795:21-25. Consequently, it is not clear whether the trial court's order is appealable.[5] See *State Water Resources Control Bd. v. Superior Court* (2002) 97 Cal.App.4th 907, 913 ("an order disqualifying an attorney is appealable"). If the order is not appealable, then Plaintiffs undoubtedly lack an adequate remedy at law.

In any event, even if the trial court's order is appealable, writ relief is still necessary. Where, as here, the trial court has effectively disqualified Plaintiffs' outside counsel, writ relief "is preferable, because generally extraordinary writs are determined more speedily than appeals." *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 455. Indeed, "[t]he specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal." *Id.* This is especially true in this case which has already been delayed considerably by a previous appeal. *See Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 897 (holding that writ relief is appropriate because plaintiff is "entitled to have counsel of choice" and "should not be subjected to unnecessary further delays"). Accordingly, writ relief is especially warranted here.

**B. Because Many, If Not All, Plaintiffs Will No Longer Be Able To Pursue This Action If The Trial Court's Order Stands, Writ Relief Is Essential To Prevent Irreparable Harm Not Only To Plaintiffs But To The Public At Large.**

Plaintiffs retained outside counsel because they lacked sufficient resources and expertise to pursue this representative public nuisance action

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[5] Out of an abundance of caution, Plaintiffs have also filed a Notice of Appeal from the trial court's order.

against Defendants – who are large and well-funded corporations with more than enough resources to litigate this case to the hilt. Without outside counsel, most, if not all, Plaintiffs will be unable to pursue this action. Thus, the trial court's order, if allowed to stand, will not only cause irreparable harm to Plaintiffs in this action, it will cause irreparable harm to the public at large who will continue to be exposed to the serious health hazard caused by Defendants' misconduct.

As this Court has previously recognized, Plaintiffs allege that lead paint "causes grave harm, is injurious to health, and interferes with the comfortable enjoyment of life and property." *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 305-306. They further allege "that [D]efendants assisted in the creation of this nuisance by concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use even though [D]efendants had known for nearly a century that such a use of lead paint was hazardous to human beings." *Id.* at 306. Thus, Plaintiffs, through this action, seek to remedy a serious hazard created by Defendants' egregious misconduct that jeopardizes the health and safety of many of their citizens.

The trial court's order effectively prevents many, if not all, Plaintiffs from pursuing this action and remedying the lead paint problem in their jurisdictions. *See id.* at 304, n.5 (noting that each Plaintiff may only seek abatement of lead hazards within its own boundaries). Such an outcome would not merely give Defendants a free pass for their egregious misconduct, it would jeopardize the health and safety of the public at large. Plaintiffs and their private citizens will continue to suffer from the serious health hazard created by Defendants' misconduct. And in light of the extent of the hazard and the expense of remedying it, any alternative solution will

likely be delayed and piecemeal at best. Writ relief is therefore essential to give Plaintiffs an opportunity to hold Defendants accountable for their misconduct, *see People v. Parmar* (2001) 86 Cal.App.4th 781, 800 ("Defendants have no right to expect their alleged violations to go unpunished for lack of public funds"), and to remedy the serious health hazard created by that misconduct. *See Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273 (explaining that writ relief is appropriate if the issue presented in the writ petition "is of widespread interest").

### C. Writ Relief Is Necessary To Preserve The Ability Of Public Entities To Pursue Representative Public Nuisance Actions That Address Large-Scale, Serious, And Ongoing Harms To Public Health And The Environment.

According to the trial court, *Clancy* bars *all* public entities from entering into contingent fee arrangements with outside counsel in order to pursue representative public nuisance actions. But many such actions cannot be pursued without the assistance of outside counsel and the use of contingent fee agreements. As exemplified by this case and other recent public nuisance actions including the government suits against tobacco companies, representative public nuisance claims are an important tool for addressing large-scale, serious, and ongoing harms to the public health and environment. However, litigation of those actions often requires massive resources and specialized expertise – resources and expertise that most public entities lack. Because of this lack of resources and expertise as well as the many other responsibilities public entities have, retention of outside counsel is often the only way for public entities to pursue public nuisance actions for the public benefit. And for similar reasons, public entities typically can retain such counsel *only* through contingent fee arrangements.

Such arrangements are therefore critical for the pursuit of many representative public nuisance actions that could not otherwise be brought due to limited resources and expertise. Indeed, courts have long recognized the importance of contingent fee arrangements for this very reason:

> the contingent fee serves the socially beneficial purpose of allowing many persons to pursue meritorious legal claims who would otherwise be unable to afford their day in court. *Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 279, disapproved on other grounds by *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447-448.

The trial court's interpretation of *Clancy* therefore threatens the ability of public entities to pursue these public nuisance actions -- which are often the only means for local governments to remedy large-scale, serious, and ongoing harms to the public health and environment. Consequently, this issue is of vital importance not only to public entities but to the public at large. Accordingly, writ relief is both appropriate and necessary here. See *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 657 ("a writ of mandate *should* not be denied when 'the issues presented are of great public importance and must be resolved promptly' " [quoting *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845].)

## II. STANDARD OF REVIEW.

Since this writ presents the issue of the application of *Clancy, supra,* 39 Cal.3d at 740, to the undisputed facts, and the trial court made a blanket prohibition on contingent fee attorneys representing public entities in any representative public nuisance claim, this Court reviews the trial court's decision de novo. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.

## III. THE TRIAL COURT'S ORDER PROHIBITING THE RETENTION OF PRIVATE COUNSEL ON A CONTINGENCY FEE BASIS SHOULD BE OVERTURNED.

### A. The Trial Court Misconstrued *Clancy*, Which Is Inapposite To The Issues Presented In This Case.

Preliminarily, Petitioners wish to make clear that the sole issue in this case is whether a public entity can hire private counsel on a contingent fee basis to assist it with pursuing a representative public nuisance action where the public health is at risk and the Defendants face no risk of criminal penalties or violation of any of their constitutional rights. Contingent fee contracts in other situations are simply not at issue here.

In effectively disqualifying contingent fee counsel in this case, the trial court relied solely on a single case and on a single proposition that it gleaned from that case: that contingent fee counsel are always and inherently "not neutral," and that this lack of "neutrality" absolutely bars public entities from ever hiring contingent fee counsel to help them with public nuisance cases. A close examination of that case, *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, reveals that it does not stand for this broad proposition and that it is distinguishable from the case at bar in several important respects. The trial court erred in applying a blanket rule to disqualify outside counsel in this case.

#### 1. Unlike *Clancy*, This Case Does Not Involve Potential Criminal Liability, First Amendment Concerns, Or Interference With Possibly Legitimate Business Operations.

Contrary to the trial court's interpretation, the California Supreme Court in *Clancy* did not create a blanket rule that disqualifies all contingent fee agreements between public entities and outside counsel in representative public nuisance actions. Instead, the Supreme Court focused

on public policy interests implicated by the public nuisance actions at issue in *Clancy* and, in light of those interests, required that counsel adhere to a "greater" standard of "neutrality" than is required in other kinds of cases. *Clancy*, 39 Cal.3d at 747. Because none of those interests are implicated by the public nuisance action asserted by Plaintiffs here, *Clancy* does not require the invalidation of Plaintiffs' contingent fee agreements with outside counsel.

In *Clancy*, shortly after an adult book store and video arcade opened, the City of Corona passed ordinances regulating the sale of "sex oriented material," which would have required the new store to move. A federal court found those ordinances unconstitutional and granted a permanent injunction, which was affirmed on appeal. "Frustrated by its defeats in federal court on the constitutional issues, the City retained the services of Attorney James J. Clancy to abate nuisances under a new ordinance proposed on the same day. The ordinance defined a public nuisance as 'Any and every place of business in the City...in which obscene publications constitute all of the stock in trade, or a principal part thereof....'" *Id.* at 743.

Corona retained Clancy to prosecute nuisance cases under a contingent fee contract, pursuant to which he would be paid $30 per hour in unsuccessful cases and $60 per hour in successful cases. *Id.* at 745. Clancy, acting as "special attorney" for the City, then filed a complaint alleging the book store was a public nuisance. Police raided the store and photographed 262 publications and videos, and a store clerk was ordered to appear in court and produce all 262 publications so the court could determine if they were obscene. The book store moved to prevent production of the publications based on the clerk's Fifth Amendment right to avoid self-incrimination, and the trial court granted the motion. Acting

on the City's behalf, Clancy then petitioned for a writ of mandate to vacate the order. The book store cross-petitioned to vacate a separate order denying its motion to disqualify Clancy as the attorney for the City. *Id.* at 743-44.

The Supreme Court held that Clancy should have been disqualified because "the contingent fee arrangement prejudice[d]" the defendant book store. *Id.* Drawing an analogy to criminal prosecutions, the Court identified the need for "neutrality" when "the public prosecutor" exercises his or her "duty to seek justice." 39 Cal. 3d at 746. That duty stemmed, in the Court's view, from the facts that a public prosecutor, in making decisions, acts as "a representative of the sovereign" and that he or she "has the vast power of the government available to him [or her]." *Id.* In certain civil and administrative actions, the Court opined, this translates into a responsibility "'to seek justice and to develop a full and fair record'" and to avoid using "'the economic power of the government to harass parties or to bring about unjust settlements or results.'" *Id.* (quoting former ABA ethical canon). These obligations ultimately serve both an interest in achieving justice in particular disputes and ensuring public confidence in the fairness of the judicial process. *Id.*

The Court's discussion focused primarily on criminal cases addressing the duties of a criminal prosecutor, in which the duty to seek justice is at its zenith because our entire system of criminal justice rests on the presumption of innocence and the unacceptability of imprisoning (or even executing) innocent persons. *See id.* at 746-47, 748. It then extended that duty to some civil cases in which other analogous and important public policy interests must be weighed and considered by a public attorney, both

in deciding whether to file a case in the first instance and later on, for example, in connection with any settlement. *See id.* at 748-49.

In *Clancy*, those interests included the defendant's first amendment interests, because the public nuisance the government sought to eradicate was the operation of a book store and the sale of material deemed offensive to public morals. *Id.* at 749. The government's action also involved potential criminal prosecution against the defendant. As the Court observed, in many public nuisance cases, the abatement action "can trigger a criminal prosecution of the owner of the property" and indeed, the store clerk was "potentially subject to prosecution under Penal Code §311.2, which prohibits the sale of obscene materials." *Id.* at 744. The overlap between criminal and civil prosecution in that case was not merely theoretical but real, as evidenced by the police raid on the store to find evidence and the clerk's invocation of his Fifth Amendment rights. In light of the criminal and constitutional dimensions of the case and of the government's actions in prosecuting it, the Court held that "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 750.

But in reaching this holding, the Supreme Court carefully limited the scope of its decision. It first noted that nothing in its decision "should be construed as preventing the government, under appropriate circumstances from engaging private counsel." *Id.* at 748. It further acknowledged that "there are cases in which a government may hire an attorney on a contingent fee to try a civil case." *Id.* Thus, the Court carefully limited its holding to the "class of civil actions" that implicate the public policy interests presented by the public nuisance action at issue there.

By contrast, the public policy concerns that led to the disqualification of Clancy do not exist here. First, there is no threat of criminal prosecution or other criminal aspect to this case. While the public nuisance at issue in this case is on-going, the conduct of Defendants that created the public nuisance occurred decades ago. Any potential criminal liability is therefore barred by the statute of limitations. Penal Code §§ 800-802. The police have played no role in this case; there is none for them to play. Nor have Defendants asserted or had any reason to assert their Fifth Amendment rights. Also unlike *Clancy*, this case does not involve any First Amendment interests or other weighty interests such as Defendants' ability to use their own property or operate their businesses. The public entity Plaintiffs in this case do not seek to imprison Defendants, control their use of their own property, prevent them from speaking or publishing, or shut down any part of their businesses.

The sole remedy sought in this action is financial in nature: the public entities seek to require the Defendants to expend the funds necessary to abate the nuisance—a serious health hazard that they created. Thus, there is no need for the kind of delicate balancing of important interests that distinguish certain public actions from private ones—such as a defendant's interest in liberty and freedom from self-incrimination or a defendant's and the public's First Amendment rights, all of which were involved in *Clancy*. Thus unlike *Clancy*, giving private counsel a financial stake in the outcome of this case, which simply seeks funds to remedy a serious public health hazard created by Defendants, does not conflict with special duties of public counsel in criminal and constitutional cases to achieve justice and ensure public confidence in the judicial process.

### 2. Unlike *Clancy*, Private Counsel Here Are Assisting Neutral Public Attorneys, Not Replacing Them.

Even if this case did involve potential criminal liability or issues of constitutional dimension, Plaintiffs' contingent fee arrangements establish sufficient neutrality on the part of Plaintiffs to insure that Defendants are treated fairly and impartially and that justice will be achieved. Under these agreements and throughout the litigation, responsibility for the conduct of the litigation, including any required balancing of public and private interests, has resided with the public attorneys who are counsel of record in this case. These public attorneys have not abdicated their responsibilities. Since these neutral public attorneys have always remained in control of the decision-making in this case, the concerns expressed in *Clancy* do not apply.

In *Clancy*, Corona had delegated to private contingent fee counsel the authority to prosecute public nuisance actions against bookstores selling obscene materials. Both the anti-obscenity ordinance and the contingency fee contract explicitly contemplated that Clancy might bring multiple public nuisance suits on behalf of Corona. Although Clancy apparently could not bring such actions without the city council's approval, *id.* at 749 n. 4, once he filed an action he had full discretion to litigate the case as he pleased. *Id.* at 743-44. Clancy was named in the amended complaint as the "City Attorney of Corona" and appeared "*instead of* the regular City Attorney of Corona." *Id.* at 744 (emphasis added). The Supreme Court distinguished an Indiana case, cited by Clancy, that "approved the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" *Id.* at 749 n.3. Unlike that case, the free rein given Clancy to litigate against the book store created a real risk, in the Court's view, that he would not seek "impartial justice." *Id.* at 749.

The same is not true here. Contingent fee counsel has in no sense replaced or been substituted for the public attorneys. Unlike outside counsel in *Clancy*, all of the contingent fee counsel employed in this case are merely assisting the public attorneys and are not vested with any independent decision-making authority over any aspect of the litigation. All substantive decisions in the litigation are made by or approved by the public attorneys involved in this case as counsel of record.[6] Thus, the public attorneys retain absolute control over all aspects of the litigation, and there is no risk that the government's duty to do justice will be compromised. These facts clearly establish that there is simply no risk in this case that the kind of neutrality expected of public entity attorneys will not be exercised as appropriate in the control of all aspects of the litigation.

Indeed, *Clancy* itself impliedly approved of contingent fee agreements which, like Plaintiffs' agreements with outside counsel, insure public control over the litigation. As an example of a proper contingent fee

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[6] See Declaration of Ann Miller Ravel, County Counsel for the County of Santa Clara, Exhibit 12 at pp. 429:28-430:2; 430:15-17; Declaration of Cheryl A. Stevens, Deputy County Counsel for the County of Santa Clara, Exhibit 13 at pg. 448:15-20; Declaration of Owen J. Clements, Chief of Special Litigation for the City and County of San Francisco, Exhibit 14 at pg. 452:11-13; Declaration of Raymond L. MacKay, Deputy County Counsel for the County of Alameda, Exhibit 10 at pg. 410:24-28; Declaration of Christopher Kee, Deputy City Attorney for the City of Oakland, Exhibit 9 at pg. 407:18-24; Declaration of William L. Litt, Deputy County Counsel for the County of Monterey, Exhibit 10 at pp. 426:15-16; 427:15-18; Declaration of Rebecca M. Archer, Deputy County Counsel for the County of San Mateo, Exhibit 15 at pg. 455:9-10; 455:15-18; Declaration of Michael J. Aguirre, City Attorney for the City of San Diego, Exhibit 16 at pp. 458:21-459:1; and Declaration of Patricia Bilgin, Assistant City Attorney for the City of Los Angeles, Exhibit 17 at pg. 475:13-15.

arrangement between a public entity and outside counsel, *Clancy* cited *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580. In *Denio*, the City of Huntington Beach entered into a contingent fee agreement which specified that the "City Attorney will be in charge of all litigation." *Id.* at 584. Plaintiffs' contingent fee agreements with outside counsel do the same. In fact, Plaintiffs' agreements are even clearer and more explicit about the absolute control exercised by the public attorneys over the litigation than the *Denio* agreement. These agreements should therefore be upheld.

In this respect, this case is analogous to *Hambarian v. Superior Court (the People)* (2002) 27 Cal.4th 826. *Hambarian* involved a complex criminal fraud prosecution in connection with a garbage disposal contract. The alleged victim of the fraud, the City of Orange, retained a forensic accountant to investigate the matter. That retained accountant later became "a full member of the prosecution team." *Id.* at 839. During the course of the prosecution, the City paid over $300,000 for the accountant's work on the matter. Defendants brought a motion to recuse the District Attorney's Office for lack of neutrality. The California Supreme Court affirmed the denial of that motion, despite the obvious bias of the accountant in favor of the City of Orange. The Court held that the accountant's "lack of control over the investigation distinguishes this case" from cases where recusal was justified. *Id.* at 839. The fact that the accountant's analysis was presented to the staff of the District Attorney's Office, who retained control of the investigation, provided a sufficient guarantee that the prosecution was being conducted in a fair manner. The active and absolute control of this case by county counsels and city attorneys likewise provides a sufficient guarantee of neutrality.

Finally, Defendants presented no evidence whatsoever that the public attorneys who are counsel of record in this case are not neutral in the sense required by *Clancy*, or that they have abandoned control of the case to outside counsel. The record was uncontroverted on this point, and there is no foundation in the record for any contrary finding. As a result, this Court should and must presume that the public attorneys will act in good faith and exercise the requisite control over the litigation necessary to insure fairness and achieve justice. *See generally*, *Crowe v. Boyle* (1920) 184 Cal. 117, 156 ("All presumptions of [the] law are in favor of the good faith of public officials . . .")

In a footnote to its Order, the trial court did quote from "some of the [fee] agreements" a provision that appears to give certain outside counsel great discretion in the conduct of the litigation. However, the footnote refers to an outdated contract with Santa Clara that applied when the case was pled as a class action to recover damages. It is undisputed that the contract was subsequently modified to clarify that the public entities have retained exclusive decision making authority.[7] The San Francisco contract has always been explicit on this point, providing that the San Francisco City Attorney and other public counsel "retain final authority over all aspects of the Litigation." Exhibit 7 at pg. 230. Moreover, the declarations submitted by the public entities, cited above, establish that the public attorneys have in fact retained control of this case from its very beginning. Thus, even if *Clancy* were applicable to the facts as described in the trial

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[7] During the hearing, counsel for Santa Clara requested that the trial court review the revised fee agreement between CPM and Santa Clara which, given its subsequent order, the trial court apparently did not do. Hearing Transcript, Exhibit 26 at pg. 813:14-15.

court's order, those facts that the trial court relied on were simply and demonstrably wrong. Under the actual facts and circumstances presented in this case, *Clancy* does not apply, and the trial court therefore erred in effectively disqualifying outside counsel.

### B. Other Courts Have Recognized The Limited Scope Of *Clancy's* Holding And Have Upheld Contingent Fee Contracts In Appropriate Cases.

Although no published California decisions have addressed the scope of *Clancy*, several courts in other jurisdictions have addressed the propriety of contingent fee arrangements between public entities and outside counsel. Consistent with *Clancy*'s admonishment that its holding should be carefully limited to the facts of that case, the decisions from these courts clarify that, under the circumstances of this case, Plaintiffs' contingent fee arrangement with outside counsel is proper and does not violate any applicable standard of neutrality.

In *Clancy*, the Supreme Court stated that "[c]ertainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case." *Clancy*, 39 Cal.3d at 748. *Clancy* itself made clear the distinguishing facts of such cases. Defendants' motion in *Clancy* was to "bar the People from proceeding with Clancy *instead of* the regular City Attorney of Corona as its representative. . ." *Id.* at 744 (emphasis added). In a footnote, the *Clancy* court dismissed Mr. Clancy's argument that he could bring the public nuisance actions "in the name of the People," stating: "Clancy relies on an Indiana authority, *Sedelbauer v. State* (Ind. App. 1983) 455 N.E. 2d 1159. In that case, however, the court approved the *assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'*" *Clancy*, 39 Cal.3d at 749 n. 3 (emphasis added).

In *Sedelbauer*, an attorney for a private organization, the Citizens for Decency Through Law, was allowed to aid in a *criminal* obscenity prosecution specifically because he did not serve as sole prosecutor but served as *co-counsel*, appearing *with* rather than *in place of* a deputy prosecuting attorney. *Sedelbauer*, 455 N.E.2d at 1164.

By distinguishing *Sedelbauer* on its facts, the Supreme Court confirmed that *Clancy* did not create a blanket rule against contingent fee counsel in all representative public nuisance cases. Instead, it strongly suggested that the retention of contingent fee counsel may be appropriate if that counsel merely assists, rather than replaces, the public attorneys. Because the uncontroverted record here establishes that contingent fee counsel merely assist – and do not replace – the public attorneys named as counsel in this case, and that the latter control all aspects of the litigation, *Clancy* does not apply.

Decisions from several other jurisdictions have distinguished *Clancy*, on the grounds suggested by footnote 3 of *Clancy* itself, and upheld contingent fee contracts in situations similar to the one presented here. For example, in *Phillip Morris Inc. v. Glendening* (1988) 349 Md. 660, 709 A.2d 1230, the Maryland Court of Appeals upheld a contingent fee contract between the Attorney General and a private law firm assisting the state in major tobacco litigation. In distinguishing *Clancy*, the Maryland court correctly concluded that *Clancy* had invalidated the contingent fee contract because the nature of the litigation had required the public entity to balance the public's interest in ridding the city of the nuisance against the landowner's property rights, the landowner's First Amendment's rights, and the public's First Amendment rights. *Id.* at 1242. That court further noted that *Clancy* involved both the civil and criminal aspects of public

nuisance. *Id.* Also "important" the Court opined, was the fact that in *Clancy* there was absent "the oversight of an elected State official, who 'shall have the authority to control all aspects of the [outside counsel's] handling of the litigation' and whose 'authority shall be final, sole and unreviewable.'" *Id.* Because, as in the case at bar, no constitutional or criminal violations were implicated and the contract provided that the contingent fee counsel would assist but that the Attorney General would retain the authority to control the litigation, the Maryland Court of Appeals found *Clancy* distinguishable and upheld the contingent fee contract. *Id.* at 1242-44. In so holding, the Court observed that the principle of impartiality, while generally applicable in cases concerning public officials, does not prevent use of outside contingent fee counsel in all cases, and that "whether, in a particular case, a disqualifying interest exists, is a factual question and is governed by the circumstances of that case." *Id.* [internal quotations and citation omitted].[8]

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[8] Interestingly, the Maryland Court of Appeals also cited *Marshall v. Jerrico* (1980) 446 U.S. 238, for the proposition that even criminal prosecutors are not constitutionally precluded from having a personal or financial interest in the outcome of a case seeking civil penalties, and that prosecutors need not always be entirely "neutral and detached." *Id.* at 1243. This is consistent with California law, under which district attorneys will not be recused "unless it is shown by the evidence that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial." Penal Code § 1424. Section 1424 was enacted in 1980 "in response to the substantial increase in the number of unnecessary prosecutorial recusals under the 'appearance of conflict' standard set forth in *People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255." *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578. Therefore, even in criminal prosecutions, the standard of neutrality is not absolute. Defendants' argument below that *Greer* supported the need for absolute neutrality here fails to properly take into account this subsequent precedent. Hearing transcript, Exhibit 26 at pp. 815:23-826:23.

Even more on point is *State of Rhode Island v. Lead Industries Ass'n, Inc.*, which also involved these same Defendants. As in this case, Defendants tried to disqualify outside contingent fee counsel based on *Clancy*. The trial court in Rhode Island at first denied the motion, observing that:

> "to preclude this type of fee arrangement would be unnecessarily to tie the hands of the Attorney General in the proper performance of his duties, because it's clear to this Court that the costs of this litigation extends into the millions and perhaps the multi-millions of dollars, just the costs of litigation. It would be preclusive for any Attorney General to undertake this type of a litigation predicated either on his own budget or even with special appropriations from the General Assembly."

*State of Rhode Island v. Lead Industries Ass'n, Inc.*, 2003 R.I. Super. LEXIS 109, *2.

Subsequently, Defendants presented new evidence that the contingency fee agreement gave outside counsel full authority to sue whomever they wished and to control case management, trial strategy and other decisions necessary or incident to the prosecution of the claims. *Id.* at *3. The trial court then held that the Attorney General could not cede total control over the litigation to contingent fee counsel, and conditionally granted the motion. In doing so, however, the court stated that "nothing in the jurisprudence of this jurisdiction precludes that method of compensation [contingent fees] in matters of this nature." *Id.* at *8. Indeed, the trial court's decision simply required that the Rhode Island Attorney General amend the contingent fee agreement to avoid ceding such unlimited authority to contingent fee counsel, and affirm that the Attorney General, rather than contingency fee counsel, determined which Defendants to sue and what causes of action to assert. *Id.* Once the Attorney General

satisfied those conditions, the trial court approved the contingency fee arrangement. Undeterred, Defendants sought a writ in the Rhode Island Supreme Court. *State of Rhode Island v. Lead Industries Ass'n, Inc., et al.* (2006) 898 A.2d 1234. That court denied the writ on ripeness grounds.[9]

In *City and County of San Francisco v. Phillip Morris* (N.D. Cal. 1997) 957 F.Supp. 1130, the federal district court rejected the defendants' contention, based on *Clancy*, that public entities could not engage private counsel on a contingent fee basis to help litigate a large tobacco case. Noting that "under appropriate circumstances, the government may engage private counsel," *id.* at 1135, the court distinguished *Clancy* because contingency fee counsel was:

> "acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed by the arrangement between [contingent fee counsel] and the plaintiffs [public entities]."

*Id.* The same is true here.

Together, the decisions discussed in this section – which either construed *Clancy* or were cited by *Clancy* – strongly support the rejection of the trial court's overbroad interpretation. As these decisions explain, the standard of neutrality imposed by *Clancy* merely requires public control over the litigation. If the public entity maintains that control, then retention of contingent fee counsel to assist in the litigation will not render the

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[9] Consistent with the decision in *State of Rhode Island, supra,* Plaintiffs argued at the April 3, 2007 hearing that the Defendants' motion was not ripe for consideration by the trial court. Hearing Transcript, Exhibit 26 at pp. 806:8-807:8.

process unfair or lead to injustice. Because the public lawyers in this case have, at all times, retained total and complete control over the litigation – including all important decisions made in the case – *Clancy* permits the retention of outside counsel on a contingent fee basis.

### C. Important Public Policy Considerations Support The Reversal Of The Trial Court's Order Invaliding *All* Contingent Fee Arrangements In Representative Public Nuisance Actions.

As noted above, the factors weighing in favor of disqualification in *Clancy* simply are not present in the case at bar. On the other hand, other important legal, practical and policy considerations are implicated that weigh heavily in favor of Plaintiffs' right to choose their own counsel.

First, the public entity Plaintiffs plainly need outside counsel's help. As discussed above, these public entities lack the resources and certain skills and experience needed to successfully pursue this massive litigation. (See section I.A above, and footnote 4.) Without the help of outside counsel, this litigation will be effectively stymied because of the huge imbalance of resources between the public entities' counsel and the Defendants' counsel.[10]

Second, the case at bar is meant to protect the public health and safety, and in particularly the health and safety of children, against a threat

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[10] Defense counsel includes such mega firms as Arnold & Porter, Orrick, Herrington & Sutcliffe, LLP and Jones Day as well as numerous other law firms located throughout the country. The private counsel, Cotchett, Pitre & McCarthy, Mary Alexander & Associates, Thornton Naumes and Motley Rice LLC are firms with extensive experience in litigating complex nuisance cases such as this one. *See*, www.cpmlegal.com, www.maryalexanderlaw.com, www.tenlaw.com, www.motleyrice.com. In addition, Thornton Naumes and Motley Rice LLC have extensive experience in lead paint litigation.

that the Legislature, the Congress, and numerous medical and scientific sources agree is extremely dangerous.

Third, public policy weighs heavily in favor of allowing the public entities to employ counsel of their choice to help with specialized cases which they have neither the resources nor the experience and expertise to conduct on their own. By barring all contingent fee arrangements in representative public nuisance actions, the trial court has improperly restricted the ability of government entities to allocate their resources for the public's benefit. In essence, the court has told public entities that if they want to use the legal system to remedy the most serious dangers to the public health and environment, they have to either raise taxes or cut other important and necessary programs to pay for the manpower and expertise necessary to litigate public nuisance actions against large, wealthy corporate defendants. (Needless to say, hiring private counsel on an hourly basis would be even more expensive than hiring an army of public lawyers, and even more out of reach of the public entities). Requiring public entities to muster such resources in order to pursue a public nuisance action for the public benefit improperly interferes with political and fiscal matters entrusted by the Constitution to elected legislative and executive officials. *See State of Rhode Island v. Lead Industries Ass'n, Inc.* (2006) 898 A.2d 1234, 1239 (noting that "petitioners' contention that the [contingent fee] agreement violated the laws of this state necessarily implicates sensitive questions regarding the separation of powers in this state . . . .")

Invalidation of the contingency fee contracts here would frustrate public policy decisions that have been made by the People's elected representatives. Many of the contingent fee agreements in this case were specifically authorized by legislative enactments of Plaintiffs' governing

bodies. *See, e.g.*, Declaration of San Francisco Chief of Special Litigation for the City and County of San Francisco Owen J. Clements, Exhibit 14 at pg. 451:11-14 ("On March 5, 2001, the San Francisco Board of Supervisors adopted a Resolution approving an Engagement and Contingency Agreement ('the Agreement') between the City and County of San Francisco and its special attorneys in the case. The Mayor of San Francisco signed the Resolution on March 16, 2001"); Declaration of Santa Clara County Counsel Ann Miller Ravel, Exhibit 12 at pg. 429:7-10 ("the Board [of Supervisors of Santa Clara County] authorized the County Counsel's office to execute an agreement for legal services with the law firm of Cotchett, Pitre & Simon (now Cotchett, Pitre & McCarthy) to assist the County Counsel's Office where needed in the prosecution of this action"). These procedures for formal authorization by local legislative bodies and executives provide yet another layer of oversight to ensure that the fee agreements are fair and do not result in private counsel taking over the roles of public attorneys answerable to those same public authorities.

Moreover, the trial court's decision ignores the other legally mandated duties required of the public attorneys. For example:

> Presently, [the] Office [of Santa Clara County Counsel] has 53 Deputies and 4 Assistant County Counsel serving a County of approximately 1,312 square miles and a population approaching 1.7 million people. The Office is responsible for providing legal representation and advice, much of which is legally mandated, to the County and its Departments, officers, Board, commissions and districts and advancing and protecting the myriad and diverse needs of the County, including Santa Clara Valley Medical Center and the County's Public Health and Mental Health System, the Department of Correction, the Sheriff's Office, Social Service including Child Abuse and Neglect Services, Conservatorships and Decedent's Estates, Tax Collections and Assessor.

Declaration of Ann Miller Ravel, Exhibit 12 at pg. 430:18-26. *See also* Declaration of Oakland Deputy City Attorney Christopher Kee, Exhibit 9 at pg. 406:19-25; Declaration of San Mateo County Deputy Counsel Rebecca M. Archer, Exhibit 15 at pg. 456:19-27.

Public attorneys have numerous other duties that must be fulfilled in order for the government to function. In performing those many duties, public attorneys must carefully allocate their limited resources. By preventing public entities from entering into contingent fee arrangements, the trial court's decision makes it impossible for public attorneys to perform all of their duties and still pursue representative public nuisance actions for the public good. Given the importance of their duties, this infringement on the authority of public entities to allocate their resources should only be allowed in limited circumstances like those present in *Clancy*. It should not be allowed here.

Fourth, contingent fee contracts are a long-established method to pay attorneys. *See, e.g., General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1174. Public policy generally favors contingent fee arrangements. *See*, Vapnek, Tuft, Peck and Weiner, *California Practice Guide: Professional Responsibility*, at § 5.84 (2006). The California Supreme Court has explained that contingent fee agreements are essential to allow access to justice: "The client may and often is very likely to be a person of limited means for whom the contingent fee arrangement offers the only realistic hope of establishing a legal claim." *Fracasse v. Brent* (1972) 6 Cal.3d 784, 792.

Finally, over the last two decades, representative public nuisance actions have become an increasingly important tool for local governments trying to remedy serious and ongoing public health and environmental

hazards created by industry. In order to pursue these actions – which often require massive resources and specialized expertise – public entities have needed the assistance of outside counsel. Yet, while taxes and other sources of local government revenue are limited and the costs of providing vital health and welfare services have increased, hourly rates for outside counsel, along with expert fees and other litigation-related costs, have risen dramatically. Thus, retaining experienced outside counsel with the resources and expertise needed to prosecute cases like this one on an hourly basis is simply infeasible. Local public entities are able to retain such law firms only through contingent fee arrangements. Without the ability to enter into such arrangements, many public entities will no longer be able to pursue these actions. As a result, those actually responsible for the serious health and environmental hazards will escape scot-free to the detriment of not only the public entities but also to their citizens who must live with those hazards. Indeed, the irony of the trial court's decision is that the worst offenders who cause the greatest damage to the public health and environment benefit the most, because public entities often lack the resources and expertise to pursue the biggest violators without the assistance of contingent fee counsel.

This is made crystal clear by this case. As Congress, the Legislature, and numerous medical and scientific sources have acknowledged, lead paint is a serious and ongoing public health hazard. And, as alleged by Plaintiffs, this serious and ongoing health hazard was created by Defendants who concealed "the dangers of lead," mounted "a campaign against regulation of lead," and promoted the use of lead paint "even though" they "had known for nearly a century that such a use of lead paint was hazardous to human beings." *County of Santa Clara, supra,* 137

Cal.App.4th at 306. To remedy this health hazard created by Defendants, Plaintiffs filed this representative public nuisance action and sought the assistance of outside counsel who had the resources and expertise that they lacked. By effectively disqualifying that outside counsel, the trial court has, as a practical matter, barred many, if not all, Plaintiffs from pursuing this action. As a result, the public suffers and Defendants, by virtue of the magnitude of their misconduct, prevail.

Thus, the trial court's broad interpretation of *Clancy* makes little sense as a matter of public policy. And it makes even less sense when the actual facts of *Clancy* are considered. Unlike this case, which involves a massive public health hazard, *Clancy* involved a public nuisance action against a single book store that allegedly sold obscene materials. *Clancy* presented a clear threat that an unsupervised, overzealous private attorney might utilize the apparatus of the criminal justice system to overmatch an unpopular small business and threaten its employees with jail time. In those circumstances, which implicated first amendment interests as well as a possible criminal prosecution, the Supreme Court understandably rejected a contingent fee arrangement that gave a private attorney almost total control of the litigation. But there is nothing to suggest that the Supreme Court intended to extend *Clancy* to public nuisance actions that had no criminal or constitutional component or to contingent fee arrangements in which the public attorney retained total control over the litigation. In fact, at the time *Clancy* was decided, representative public nuisance actions were largely restricted to obstruction of highways or offenses against public morals like obscenity, prostitution, and gambling. Extending *Clancy* to bar the contingent fee arrangements in this case therefore makes no sense.

In short, a balancing of the interests of the public entities and the Defendants shows that the balance tips heavily in favor of the public entities' right to choose their own counsel, especially when trying to protect the health and safety of their citizens.

### D. Defendants Should Not Be Allowed To Obtain A Tactical Advantage Over Plaintiffs Through An Unwarranted Extension of *Clancy*.

The trial court's order effectively precludes Plaintiffs from retaining outside counsel with the resources and expertise necessary to pursue this action. Without the aid of that counsel, resource-strapped public entities cannot meet the Defendants on equal terms in this massive litigation. Under these circumstances, broadly construing *Clancy* to give Defendants an unfair litigation advantage should not be permitted.

The Court of Appeal in *People ex rel. Dept. of Fish and Game v. Attransco, Inc.* (1996) 50 Cal.App.4th 1926 reached a similar conclusion in a strikingly similar situation. There, a corporate defendant in a major pollution case tried to use civil service rules to disqualify outside counsel retained to assist a state agency in prosecuting a civil case to recover cleanup costs. That court saw through Defendants' litigation tactics, which it described as follows:

> After the American Trader ran aground off Huntington Beach and released thousands of gallons of crude oil, several state agencies represented by the Attorney General sued the owner of the ship to recover cleanup costs. Then commenced a paper war—or, more precisely, a war by paper. Instead of oil, now it was paper that gushed. Tens of thousands of pages of documents were produced in discovery; numerous motions were fought. The private lawyers for the shipowner deluged their civil servant opponents with successive court proceedings.
>
> One of the state agency plaintiffs, the Department of Fish and Game, sought reinforcements.

After receiving written permission from the Attorney General, the department employed an outside law firm to help it counter the shipowner's oppressive litigation tactics. Eighteen months later, the shipowner launched a strike at the department's new troops by moving to disqualify them.

. . .

It is evident from the record, considered as a whole, that the special counsel employed by the Department of Fish and Game was in response to the urgent need generated by the exigencies of battle. Litigation is full of short deadlines which need urgent, often intensive responses, and every lawyer knows that it is a fact of life that a lawsuit can be won or favorably settled if the opposition cannot respond quickly enough to a hefty motion.... Response time can be as important in litigation as it is in war, and response time in litigation is (unfortunately) too often a simple function of the number of lawyers who can be directed to work on a particular matter.

"In tactics," said von Clausewitz, "as in strategy, superiority in numbers is the most common element in victory."... We are not unmindful of the realities of modern litigation, in which parties in complex litigation can be overwhelmed by the sheer volume of what discovery entails. Litigation by its nature is labor intensive, and there will be times when the Attorney General's office will simply be unable to commit sufficient numbers of lawyers to a given case. It would clearly frustrate the Department of Fish and Game's very purpose in bringing the case in the first place if civil service rules could be used against it to cut off the agency's ability to enlist reinforcements in the battle.

. . .

We are not fooled by what is going on in this case. Wearing down the enemy by making it cover many fronts is a classic tactic of warfare...and it is obvious that the lesson has not been lost on the shipowner. We are fully aware that the present appeal simply represents a new tactical theater of operations designed to inflict collateral damage on an enemy through a costly diversion. As a policy matter, it is unthinkable that state agencies statutorily charged with recovering costs of cleaning up pollution should be deterred from their purpose because they can be outmanned in a paper war.

*Attransco*, 50 Cal.App.4th at 1928, 1936-38 (citations omitted).

Here, the public attorneys have exercised control over all substantive decisions, there is no risk of criminal penalties or violation of constitutional rights of Defendants, and the public health and safety are at issue. Defendants should not be able to gain an unfair advantage in this litigation by preventing the public entities from being assisted by the private counsel of their choice on a contingent fee basis.

## IV. CONCLUSION.

There is no evidence whatsoever that the public attorneys who are in charge of this case are not "neutral," or that the Defendants are prejudiced by the contingency fee agreements or any other aspect of outside counsel's status or performance. To the contrary, the *uncontroverted record* shows that public counsel control all aspects of this litigation (the trial court erroneously quoted to a prior, superseded fee agreement to suggest otherwise). The issue presented is therefore a narrow one: whether a public entity can hire private counsel on a contingent fee basis to assist it with pursuing a public nuisance claim where the public health is at risk and the Defendants face no risk of criminal penalties or violation of any constitutional rights. Nothing in *Clancy* prohibits such action, and other courts have allowed it (including in this very litigation in another state).

Moreover, public policy and common sense combine to permit contingent fee contracts in this narrow situation. For the foregoing reasons, the writ should be granted.

Dated: May 9, 2007

SANTA CLARA COUNTY COUNSEL

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in Microsoft Word for Windows software, this brief contains 13,382 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May __, 2007.

Dated: May 9, 2007

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