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

RESPONSE BY REAL PARTIES IN INTEREST TO *AMICI CURIAE* BRIEFS BY (1) ASSOCIATION OF CALIFORNIA WATER AGENCIES AND (2) PUBLIC JUSTICE, P.C., HEALTHY CHILDREN ORGANIZING PROJECT, AND WESTERN CENTER FOR LAW AND POVERTY

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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"), respectfully submit this Response to the *Amici Curiae* briefs filed by (1) the Association of California Water Agencies ("ACWA"); and (2) Public Justice, P.C., Healthy Children Organizing Project, and Western Center for Law and Poverty (the "Public Justice Amici") (collectively, "Amici").

INTRODUCTION

Neither ACWA nor the Public Justice Amici raise any new arguments to support the Petition. Instead, Amici reiterate the same erroneous arguments asserted by Plaintiffs.

First, Amici argue that, despite the clear holding of *Clancy* and the principles upon which it is based, the prohibition against contingent fees in public nuisance cases brought by the government on behalf of the People is not absolute. (*See* Public Justice Amici Brief at 4-7; ACWA Amicus Brief at 17-21.) This is wrong. As *Clancy* unequivocally concluded: 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*"). Accordingly, any contingent fee agreement in

any such public nuisance action is barred, and no "case-by-case" analysis is required.

Second, Amici argue that, despite this clear precedent, courts nevertheless should defer to local governments whenever those governments decide that contingent fee counsel is necessary and in the public interest. (*See* Public Justice Amici Brief at 2-3, 7-11.) This too is incorrect. It is the role of the courts to determine if the interests of justice and due process have been violated, and the principles expressed in *Clancy* make clear that such a violation occurs when the government retains counsel on a contingent fee basis in a public nuisance case.

The Order issued by the trial court precluding contingent fees in this case was proper, and the Petition should be denied.

ARGUMENT

A. Public Nuisance Actions Fall Into That Category Of Cases In Which Contingent Fees Are Precluded Absolutely

In *Clancy*, the California Supreme Court reviewed due process and ethical principles and concluded that all public nuisance actions brought by the government on behalf of the People fall into a category of cases in which contingent fee agreements are barred. (*See* Return at 26-31.) The Court began its analysis by tracing the historical roots of this prohibition in *Tumey v. Ohio*, 273 U.S. 510 (1927), and other cases. (*Id.* at 20-26.)

After reviewing the basis for precluding fees contingent upon the outcome of an action for judges and criminal prosecutors, the Court noted that the "justification for the prohibition against contingent fees in criminal actions extends to certain civil cases." *Clancy*, 39 Cal. 3d at 748. Recognizing that the "abatement of a public nuisance involves a delicate weighing of values" similar to that involved in eminent domain actions (another category of civil cases in which contingent fees are precluded), the Court ultimately held "that the contingent fee arrangement between the [government] and [its attorney] is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 749-50.

Amici nevertheless repeat the same argument asserted by Plaintiffs that the propriety of a contingent fee arrangement in a public nuisance case is one that must be addressed on a "case-by-case" basis. (*See, e.g.*, Public Justice Amici Brief at 4.) Like Plaintiffs, Amici incorrectly base this argument on an out-of-context quote from the *Clancy* opinion in which the Court stated that the government is not prevented from retaining contingent fee counsel "under appropriate circumstances." *Clancy*, 39 Cal. 3d at 748. Relying on this truncated quote, Amici argue that this action is one in which contingent fee agreements should be permitted because it does not involve constitutional issues, the government staff attorneys purportedly will retain "control" over the litigation, there is no evidence of any "actual"

impropriety, and the defendants allegedly are more well-financed than the government. (*See* Public Justice Amici Brief at 4-6, 23-28; ACWA Amicus Brief at 5, 19.)

As detailed in Defendants' Return, this argument is without merit. (Return at 31-55.) Indeed, the full quote from which Amici take their "appropriate circumstances" reference itself makes clear that the government is categorically precluded from retaining counsel on a contingent fee basis in public nuisance cases:

> Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case. (See, e.g., *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580 [140 P.2d 392, 149 A.L.R. 320] [contingent fee arrangement whereby the city hired a law firm to represent it in all matters relating to the prosecution of its oil rights].) But just as certainly <u>there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement.</u>

Clancy, 39 Cal. 3d at 748 (emphasis added).

The *Clancy* Court thus articulated a bright-line rule. For certain categories of cases (such as when the government is pursuing its own proprietary claim as a private claimant asserting a private claim might), contingent fee agreements are permissible. However, if a civil action falls into the "class" of cases involving the exercise of the state's police power in which the government representative must remain neutral, contingent fee agreements are "precluded." After considering the nature of public nuisance actions (including the "delicate weighing of values" and "balancing of interests" that must occur in such cases), the Court determined that such actions fall into the category of cases in which contingent fees are precluded. *Clancy*, 39 Cal. 3d at 750.

Amici's references to cases in which the government has retained contingent fee counsel in actions involving claims brought by the government as alleged direct tort victims (such as in tobacco or securities fraud litigation) are thus irrelevant. *See, e.g., City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) ("[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"); *McClendon v. Georgia Dept. of Cmty. Health*, 261 F.3d 1252, 1253-54 (11th Cir. 2001) (describing litigation brought by states to recover health care costs allegedly paid by them for treatment of smokers); *In re Cendant Corp. Litig.*, 264 F.3d 201, 223 (3d Cir. 2001) (securities litigation

in which government pension funds, along with other shareholders, brought tort claims seeking direct damages). Such cases simply do "not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*." *City and County of San Francisco*, 957 F. Supp. at 1135.[1]

Amici's references to other cases in which public nuisance claims (as opposed to proprietary claims) on behalf of the People have been asserted, such as in MTBE litigation, also miss the mark. (*See* Public Justice Amici Brief at 22-23.) As noted in Defendants' Return, contingent fee agreements in such cases have been precluded when the issue has been raised. *See* July 19, 2002 Order, *People v. Atlantic Richfield Co.*, Cal. Super. Ct. Orange Cty. No. 804030 (Petitioners' Appx. p. 370, RJN at ¶ 15

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[1] Similarly inapposite are ACWA's arguments regarding the tort nature of claims its constituents can assert under various statutes. ACWA argues that its constituents should not be precluded from hiring contingent fee counsel where those agencies "hold a usufructurary interest in the affected water" thereby rendering their roles similar to those "'of a tort victim'" and turning their claims into ones that "sound essentially in tort." (*See* ACWA Amicus Brief at 18.) Regardless of whether such a description of the claims brought by ACWA members is correct, it is undisputed that here, the government plaintiffs are not asserting proprietary claims as alleged direct tort victims; rather, they are exercising the police power of the state to bring public nuisance claims on behalf of the "People." *See County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 313 (2006) (plaintiffs permitted to pursue public nuisance claims "on behalf of the People" expressly because such claims are not "brought on their own behalf" to "seek[] damages for a special injury"). In such cases, contingent fees are precluded absolutely.

(Decl. of John R. Lawless in Support of Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, Exh. J) (contingent fee agreements precluded in case in which Orange County asserted claims based on alleged groundwater contamination by MTBE)). In any event, the holding and principles of *Clancy* are clear: where the government is exercising its police power in the form of public nuisance claims on behalf of the People, contingent fees are barred.[2]

B. Courts Do Not "Defer" To A Local Government's Judgment When Deciding Whether Contingent Fee Arrangements Violate Due Process And Ethical Principles

Amici also argue that the trial court's order should be overturned

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[2] Public Justice Amici also argue that contingent fee agreements for counsel in public nuisance actions should not be precluded because paying government representatives on an hourly-fee basis would raise its own set of improper incentives between the government entities and their attorneys. (Public Justice Amici Brief at 14-16.) Such an argument misconstrues the reasoning behind the prohibition against contingent fees. Contingent fee arrangements in public nuisance cases violate due process principles and jeopardize the judicial process because they destroy neutrality by giving the government lawyer a personal pecuniary interest in one outcome rather than the other. Thus, the danger of such a fee arrangement lies in the profit stake tied directly to "the result of the case," because such "arrangement gives [the attorney] an interest extraneous to his official function in the actions he prosecutes on behalf" of the government and serves as a temptation to "tip the scale" of the public values involved. *Clancy*, 39 Cal. 3d at 747-49 (fee arrangement was improper not because of attorney's hourly rate, but because the fee would double upon a particular outcome); *see also Tumey*, 273 U.S. at 523 (due process violation as a result of "pecuniary interest in reaching a conclusion against [the defendant] in his case"). Hourly fees, paid no matter what the outcome, do not provide any such incentive. *See Hambarian v. Superior Court*, 27 Cal. 4th 826, 844-45 (2002) (rejecting challenge to "the incentives provided to [prosecutor's consultant] by hourly billing").

because courts must "defer" to a local governmental entity whenever that entity "deems proper" the use of a contingent fee agreement. (*See* Public Justice Amici Brief at 2-3, 7-11.) This argument makes no sense and is directly contrary to *Clancy* and the principles upon which it is based.

The rule barring contingent fees in a public nuisance case brought by the government on behalf of the People is founded upon well-established due process and ethical considerations. (*See* Return at 20-31.) As *Clancy* articulated, the rule is necessary because the standard of neutrality required in such cases is "essential to the proper function of the judicial process as a whole," without which "the concept of the rule of law cannot survive." *Clancy*, 39 Cal. 3d at 746.

Determinations regarding due process firmly rest in the hands of the courts. Indeed, if Amici were correct, even the holding of *Clancy* itself would have been improper, because the California Supreme Court should have "deferred" to the judgment of the local government at issue in that case that a contingent fee agreement was appropriate. Courts do not defer to determinations by local governments on the propriety of contingent fee agreements in public nuisance cases, and the trial court's order in this case was entirely correct.

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.

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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 2,013 words. This certification is based on the word count generated by the computer program used to prepare this brief.

Dated: September 13, 2007

Sean Morris/cf

Sean Morris

Case No. H031540

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