S163681

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Plaintiffs/Petitioners

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent,

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

After a Decision By the Court of Appeal, Sixth Appellate District, Case No. H031540

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

APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL PAINT & COATINGS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/REAL PARTIES IN INTEREST

National Paint & Coatings Association, Inc.
Thomas J. Graves
Vice President and General Counsel
1500 Rhode Island Avenue, N.W.
Washington, DC 20005
(202) 462-8743

Spriggs & Hollingsworth
Eric G. Lasker*
Marc S. Mayerson (CA Bar #133129)
1350 I Street, N.W., Ninth Floor
Washington, D.C. 20005
(202) 898-5843

**Pro hac vice* admission pending

Counsel for *Amicus Curiae* National Paint & Coatings Association, Inc.

S163681

Table of Contents

Page

APPLICATION FOR LEAVE TO FILE BRIEF OF THE NATIONAL PAINT & COATINGS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/REAL PARTIES IN INTEREST i

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. Contingent Fee Agreements Improperly Tip the Scale Towards Purported "No Cost" Public Nuisance Litigation. 10

II. Contingent Fee Agreements Prevent Government Attorneys From Pursuing Properly Balanced Equitable Remedies to Address Alleged Public Nuisances. 16

CONCLUSION 27

S163681

TABLE OF AUTHORITIES

Page(s)

CASES

City of Chicago v. Am. Cyanamid Co.,
(Ill. App. Ct. 2005) 823 N.E.2d 126 .... vii, 2, 19

City of Los Angeles v. Decker
(1977) 18 Cal.3d 860 11

City of St. Louis v. Benjamin Moore & Co.
(Mo. 2007) 226 S.W.3d 110 .... vii, 2, 19

County of San Luis Obispo v. Abalone Alliance
(1986) 178 Cal.App.3d 848, 223 Cal.Rptr. 846 17

County of Santa Clara v. Superior Court
(2008) 74 Cal.Rptr.3d 842 19

In re Lead Paint Litig.
(N.J. 2007) 924 A.2d 484 .... vii, 2, 18, 19

Monks v. City of Rancho Palos Verdes
(2008) 167 Cal.App.4th 263, 84 Cal.Rptr.3d 75 17

New Mexico v. General Electric Co.
(D.N.M. 2004) 322 F. Supp. 2d 1237 *aff'd* (10th Cir. 2006) 467 F.3d 1223 .... passim

New Mexico v. Gen. Elec. Co.
(10th Cir 2006) 467 F.3d 1223 23

People ex rel. Clancy v. Superior Court
(1985) 39 Cal.3d 740 .... passim

People ex. rel. Gallo v. Acuna
(1997) 14 Cal.4th 1090 17

State v. Lead Industries Ass'n, Inc.
(R.I. 2008) 951 A.2d 428 .... vii, 2, 19

Torrance Redevelopment Agency v. Solvent Coating Co.
(N.D. Cal. 1991) 763 F. Supp. 1060 17

STATUTES

Childhood Lead Poisoning Prevention Act, Cal. Health & Saf. Code §§ 105275-105310 26

RULES AND REGULATIONS

California Rules of Court, Rule 29.1(f) i

OTHER AUTHORITIES

available at http://www.clearcorps.org. 15

Blood Lead Levels -- United States, 1999-2002, MMWR Weekly 54(20); 513 (May 27, 2005) iv

Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 Boston College Law Review 913 (2008) 13

Donald W. Fowler & Eric G. Lasker, *Federal Court Rejects State AG/Trial Lawyer Effort to Expand "Public Nuisance" Theory*, Washington Legal Foundation Legal Backgrounder 22(11) (April 13, 2007) 20

EPA Sector Strategies Performance Report (March 2006) 15

EPA Sector Strategies Performance Report (March 2006) iii

Joe Nocera, *Talking Business: The Pursuit of Justice, or Money?*, N.Y. TIMES, Dec. 8, 2007 .... 7, 8, 9

NPCA Issue Backgrounder, *Focus: NPCA and the Paint Industry Continue to Redress Childhood Lead Poisoning through "The Next Generation" Program* (June 2008) iv

NPCA Issue Backgrounder, *Focus: NPCA and the Paint Industry Continue to Redress Childhood Lead Poisoning through "The Next Generation" Program* (June 2008), at 4 15

Number of Children Tested and Confirmed EBLLs by State, Year and BLL Group, Children < 72 Months Old v

Peter B. Lord, *Lead paint cleanup: a $2.4-billion solution*, The Providence Journal (September 15, 2007) 25, 26

The Pay-to-Sue Business: Write a check, get no-bid contract to litigate for the state, The Wall Street Journal (April 16, 2009) 16

U.S. Census Bureau, State & County Quick Facts 26

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,
Plaintiffs/Petitioners

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent,

ATLANTIC RICHFIELD COMPANY, et al.,
Defendants/Real Parties in Interest.

APPLICATION FOR LEAVE TO FILE BRIEF OF THE NATIONAL PAINT & COATINGS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/REAL PARTIES IN INTEREST

Pursuant to Rule 29.1(f) of Title One of the California Rules of Court, the National Paint & Coatings Association, Inc. ("NPCA") respectfully moves for permission to file the attached brief as *amicus curiae*. NPCA files this brief in support of Defendants/Real Parties in Interest American Cyanamid Company, Atlantic Richfield Company, Conagra Grocery Products Company, DuPont de Nemours and Company, NL Industries, Inc., and Sherwin-Williams Company, and urges this Court to reverse the judgment of the Court of Appeal for the Sixth Appellate District and uphold the judgment of the Superior Court for the State of California County of Santa Clara that the Plaintiffs/Petitioners Government

Entities retention of private attorneys on a contingent fee basis to bring this public nuisance litigation is impermissible under *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740.

NPCA is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. As the preeminent organization representing the coatings industry in the United States, NPCA's primary role is to serve as an advocate and ally for its membership on legislative, regulatory and judicial issues at the federal, state, and local levels. In addition, NPCA provides members with such services as research and technical information, statistical management information, legal guidance, and community service project support. Collectively, NPCA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

NCPA and its member companies have undertaken recognized voluntary efforts, and initiated landmark public-private partnerships, to address the problems of lead poisoning arising from the failure of property owners to maintain their property in lead safe condition. While intact lead paint is not a health hazard, a risk of lead exposure does arise where property owners allow historically applied lead paint to chip or deteriorate, contributing to dangerous dust levels in the child's environment, whereby

hand-to-mouth activity is now recognized as the major pathway of exposure. NPCA's initiatives have contributed to a proper focus on the kind of lead-safe remediation work practices, preventative education and practical steps families can take in the dwellings and with their children that are working throughout the nation.

As cited by the U.S. Environmental Protection Agency, NPCA has spearheaded a number of initiatives to address this issue, such as a 2003 landmark cooperative agreement with Attorneys General from 46 states, plus the District of Columbia and three territories, "which establishes a national program of consumer paint warnings, point-of-sale information, and education and training to avoid the potential exposure to [EPA-HUD] lead-dust hazards." EPA Sector Strategies Performance Report (March 2006), at 64.[1] NPCA also founded the now-independent Community Lead Education and Reduction Corps USA ("CLEARCorps"), as a joint public service partnership of the paint industry and the non-profit Shriver Center at the University of Maryland. Since 1995, CLEARCorps has protected thousands of young children from the risk of lead exposure through directed education programs and on-the-ground assistance for property

---

[1] A copy of the EPA report can be found at http://www.epa.gov/sectors/performance.html.

owners, families and children across the country.[2] Further, NPCA has worked in tandem with numerous state legislatures including Maryland, Rhode Island and New Jersey to pass comprehensive state legislation designed to eliminate childhood lead poisoning.[3]

NPCA's initiatives demonstrate the variety of approaches that governments have successfully implemented to ameliorate the threat of lead poisoning. Working hand-in-hand with state and federal government across the country, NPCA's efforts have played a key part in these governments' success in dramatically decreasing blood lead levels ("BLLs"). The Centers for Disease Control ("CDC") reports that the percentage of children nationwide aged 1-5 with BLLs greater than 10 µg/dL (thus meeting the CDC standard of elevated) has dropped sharply over the past 30 years, from 77.8% in the period 1976-1980 to 4.4% in 1991-1994 to 1.6% in 1999-2002.[4] In 2006, the percentage of children below 6 years of age nationwide

---

[2] This and further information about CLEARCorps is available at http://www.clearcorps.org.

[3] *See* 16(2) NPCA Issue Backgrounder, *Focus: NPCA and the Paint Industry Continue to Redress Childhood Lead Poisoning through "The Next Generation" Program* (June 2008), at 4, available at http://www.paint.org/pubs/ib_6-08.pdf

[4] *See Blood Lead Levels -- United States, 1999-2002*, MMWR Weekly 54(20); 513-516 (May 27, 2005), available at CDC website at http:/www.cdc.gov/MMWR/preview/mmwrhtml/mm5420a5.htm.

with elevated BLLs stood at an all time low of 1.21%.[5] The progress in California has been even more dramatic, with the incidence of elevated blood levels dropping from 18.33% in 1997 to 0.63% in 2006.[6]

This success did not arise through public nuisance litigation against paint manufacturers or the type of monetary awards that are being sought to fund the contingent fee arrangements that the Government Entities are defending before this Court. (Indeed, the public nuisance claims here at issue have been repeatedly rejected in cases brought at the instigation of the same contingent fee counsel in other jurisdictions.) The success arose instead from governmental approaches that correctly target the property owners and private landlords, whose failure to maintain their properties in lead-safe condition are at the heart of the problem, and that involve an integration of balanced cooperative initiatives and regulatory, legislative, and independent health agency approaches that were designed to address the public policy interests as a whole.

NPCA is filing this brief because the outcome of this appeal will greatly influence the ability of state government to continue with the proper "balancing of interests" that must be applied in addressing alleged public

---

[5] *See Number of Children Tested and Confirmed EBLLs by State, Year and BLL Group, Children < 72 Months Old*, available at CDC website at http://www.cdc.gov/nceh/lead/surv/database/State_Confirmed_byYear_1997_to_2006.xls

[6] *Id.*

nuisances. *Clancy*, 39 Cal.3d at 749. As the Court has explained, "the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* The taint of such financial arrangements arises here not solely from the influence of the private attorneys, whose interests will be guided by their own private financial interests as opposed to the public good. The taint also arises from the fact that in-house government counsel likewise are biased away from equitable approaches that – while effective in addressing the public interest – must be funded by the government rather than by private plaintiff counsel's contingent investment and/or, if obtained through litigation, would not hold out the possibility of the monetary payday necessary for the government to receive the continued services of its contingent fee counsel.

It is difficult to overstate the importance of this issue to NPCA and its members. The private attorneys retained by the Government Entities have, over the past decade, waged a concerted solicitation campaign of state and local governments to sign on to public nuisance lawsuits against NPCA member companies with the lure of no-cost-to-the-government contingent fee arrangements. The vast majority of state and local governments properly rejected these solicitations, continuing instead with their successful legislative, regulatory and educational approaches to reduce BLLs, and those governments who did respond to the private attorneys'

siren song have seen their lawsuits uniformly rejected by every court to finally address the issue.[7] But NPCA members have been required to expend scores of millions in defense costs, continuing through this serious economic recessionary period, and have been improperly stigmatized for the historic sale of lawful products over thirty years ago. (In reality, most manufacturers removed lead voluntarily from consumer paints more than one half century ago.)

And contrary to the private attorneys' promises, the litigation has not come at "no cost" to the government entities who signed on to the Faustian agreements. The contingent fee contracts distort the proper role of government in pursuing the public good and threaten the confidence of the public in the proper and even-handed functioning of government. (Moreover, these agreements may carry a hidden financial cost as well. In Rhode Island, successful defendants are pursuing an action against the state for recovery of their litigation costs, eliciting public comments from the contingency lawyers that their agreement would not force them to indemnify the state for these substantial costs should defendants' motion by granted.)

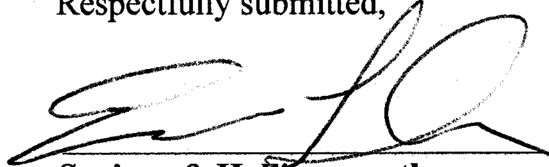
---

[7] *See State v. Lead Industries Ass'n, Inc.* (R.I. 2008) 951 A.2d 428; *In re Lead Paint Litig.* (N.J. 2007) 924 A.2d 484; *City of St. Louis v. Benjamin Moore & Co.* (Mo. 2007) 226 S.W.3d 110; *City of Chicago v. Am. Cyanamid Co.*, (Ill. App. Ct. 2005) 823 N.E.2d 126, 139.

Accordingly, NPCA respectfully requests that the Court grant this application to file NPCA's *amicus curiae* brief. No other party has made a monetary contribution intended to fund the submission of this brief.

April 27, 2009

Respectfully submitted,



Spriggs & Hollingsworth
Eric G. Lasker*
Marc S. Mayerson (CA Bar #133129)
1350 I Street, N.W., Ninth Floor
Washington, D.C. 20005
(202) 898-5843

National Paint & Coatings Association, Inc.
Thomas J. Graves
Vice President and General Counsel
1500 Rhode Island Avenue, N.W.
Washington, DC 20005
(202) 462-8743

**Pro hac vice* admission pending

Counsel for *Amicus Curiae* National Paint & Coatings Association, Inc.

IN THE
SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,
Plaintiffs/Petitioners

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent,

ATLANTIC RICHFIELD COMPANY, et al.,
Defendants/Real Parties in Interest.

BRIEF OF THE NATIONAL PAINT & COATINGS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/REAL PARTIES IN INTEREST

INTEREST OF THE *AMICUS CURIAE*

The National Paint & Coatings Association, Inc. ("NPCA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. Collectively, NPCA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States. On behalf of its member companies, NPCA has engaged in a variety of nationally recognized, public-private initiatives that have played a key part in the dramatic reduction in blood lead levels nationwide and in California over the past

thirty years. As more fully explained in the accompanying motion for leave to file this brief, NPCA's interest in this appeal is significant. Notwithstanding the indisputable successes in existing programs addressing elevated blood lead levels, the private attorneys retained by the Government Entities here have, over the past decade, been aggressively soliciting state and local governments to sign on to public nuisance lawsuits against NPCA member companies with the lure of no-cost-to-the-government contingent fee arrangements and projected billion dollar jackpots for government coffers.[1]

The vast majority of state and local governments properly rejected these solicitations, continuing instead with their successful efforts to reduce blood lead levels through proper governmental actions, and those governments who did respond to the private attorneys' siren song have seen their lawsuits uniformly rejected by every court to finally address the issue.[2] But nonetheless, the costs imposed on NPCA members from the private attorneys' entrepreneurial litigation campaign have been significant. NPCA members have been compelled to expend scores of millions in

---

[1] No other party has made a monetary contribution intended to fund the submission of this brief.

[2] *See State v. Lead Industries Ass'n, Inc.* (R.I. 2008) 951 A.2d 428; *In re Lead Paint Litig.* (N.J. 2007) 924 A.2d 484; *City of St. Louis v. Benjamin Moore & Co.* (Mo. 2007) 226 S.W.3d 110; *City of Chicago v. Am. Cyanamid Co.*, (Ill. App. Ct. 2005) 823 N.E.2d 126, 139.

defense costs, and they have been improperly stigmatized for the historic sale of lawful products over thirty years ago.

STATEMENT OF THE CASE

NPCA adopts the Statement of Facts set forth in the Defendants/Real Parties in Interest's Opening Brief on the Merits ("Real Parties Br.") at 3-6 and the Background Statement and Statement of Facts and Procedural History set forth in the Opening Brief on the Merits of Sherwin Williams ("SW Br.") at 4-16. [3]

SUMMARY OF THE ARGUMENT

In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, the Court held that the government may not enter into contingency fee agreements with private attorneys in public nuisance litigation. There is no justification for modifying or overruling *Clancy.*

In *Clancy*, the Court explained the unique role of lawyers who stand up in the name of the People of California and the crucial value of disinterestedness, evenhandedness, and public interest that must imbue their conduct. Contingent fee arrangements in public nuisance litigation threaten these values by creating, at the very least, the appearance of mixed motives. As the Court explained,

---

[3] Citations to the Respondents' Opening Brief are in the form "Government Entities Br. __." Citations to the Real Parties Reply Briefs are in the form "Real Parties Rep. Br. __ and "SW Reply Br. __."

> [A] government lawyer's neutrality [is] essential to a fair outcome for the litigants in the case in which he is involved, [and] it is essential to the proper functioning of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.

Clancy, 39 Cal.3d at 746. Over the past 24 years, *Clancy* has provided a vital bulwark that has protected the proper functioning of State and local governments in addressing putative public nuisances and has helped secure the public's confidence that their government is justly and impartially serving the public interest and is not operating under the influence of the personal pecuniary interests of the government's counsel.

As cogently explained in the briefing by the Defendants/Real Parties in Interest, in carving out of an exception to *Clancy* for outside contingency fee private attorneys subject to a government staff attorney's supervision, the Court of Appeal has fractured that bulwark by, in effect, proposing a two-tiered system: one in which only senior government attorneys are required to be neutral, but "subordinate" attorneys are allowed a direct financial stake in the outcome of public nuisance actions. NPCA joins in the arguments made by the Real Parties in Interest, which are fully

dispositive and compel a reversal of the Court of Appeal and a reinstatement of the Superior Court's ruling that the contingent fee agreements here at issue are unlawful.

NPCA will not repeat those arguments in this brief. Rather, NPCA submits this *amicus* brief to address a separate failing in the Court of Appeal's analysis: its failure to recognize the distorting impacts of contingent fee agreements not only on the decision-making of the private retained attorneys, *but also on the decision-making of the government attorneys who retained them and on the proper balancing of governmental authority exercised by the legislative, executive, and judicial branches in abating public nuisances*. This distortion arises because contingent fee agreements create improper financial incentives for *both* parties to the contract, the private attorney and the government.

While the Government Entities argue that a neutral supervising government attorney can protect against the financial bias of subordinate private attorneys, they fail to acknowledge that the government's interests are themselves inextricably related to the success of the contingent fee arrangements. Contingent fee agreements "tip the scales" of government decision-making in two key respects:

First, enticed by the illusion of a no-cost option of contingent fee legal representation, the government approaches the "delicate weighing of values" that must guide public nuisance litigation, see *Clancy*, 39 Cal.3d at

749, without the vital counterweight of fiscal responsibility that should inform all government action. The critical choice between, for example, pursuit of a legislative approach to a potential public nuisance with a proven track record, but a countervailing government cost (requiring a political decision either to increase taxes or incur increased deficits), and a litigation approach to the same issue with an unproven (and indeed dismal) track record, but at "no government cost," involves neither a neutral decision nor a decision that will promote the confidence of society in the just and impartial functioning of its government. (Moreover, should the government lose, it may be ordered to pay substantial monies to defendants for their defense costs in an action it would not ordinarily have been enticed to pursue to the limit, or even initiate, were solely its own resources involved.)

Second, when a government entity enters into a contingent fee agreement with private attorneys, its ability to secure the continued services of those attorneys necessarily depends upon its willingness to continue to pursue a monetary damages award that will make the representation worth the private attorneys' time. Thus, the government has an artificial incentive to forego alternative approaches – such as seeking purely equitable or injunctive litigation relief or electing to suspend the litigation in preference for other government action – not because those alternatives fail to protect the public interest, but because they will not allow for the potential

financial payout the government now needs to retain its legal team. Particularly where, as here, the subordinate counsel provides no special expertise, but rather offers real value only in its willingness to work on contingency, there should be special caution to overturn sound law.

In *Clancy*, the Court established the clear cut rule that "[a]ny financial arrangement that would tempt the government attorney to tip the scale" in the balancing of interests in the abatement of public nuisances "cannot be tolerated." *Id.* at 749. The contingent fee agreements here at issue create exactly this temptation. As in *Clancy*, the Court's response must be clear. The Court of Appeal's opinion should be reversed, and the Government Entities contingent fee agreements should be declared unlawful.

ARGUMENT

In the fall of 1999, plaintiff attorney Ronald L. Motley boasted in The Dallas Morning News: "If I don't bring the lead paint industry to its knees in three years, I will give them my boat."[4] As subsequently reported in the New York Times, Mr. Motley began his assault on the paint industry by convincing the Rhode Island attorney general's office to hire his firm Motley Rice to serve as private attorneys general, with the agreement that

---

[4] Joe Nocera, *Talking Business: The Pursuit of Justice, or Money?*, N.Y. TIMES, Dec. 8, 2007, available on line at http://www.nytimes.com/2007/12/08/business/08nocera.html?_r=1&pagewanted=print.

Motley Rice would take 16.7 percent of the proceeds if its side won. Motley Rice and other big-time plaintiffs' attorneys then "raced all over the country, trying to get other jurisdictions interested in suing the same defendants on the same grounds."[5] In each of those jurisdictions, including the Government Entities here, plaintiffs' attorneys offered the same deal: A prepackaged, private attorney-concocted public nuisance case that would be funded by the private attorneys at "no cost" to the governments in exchange for a financial stake in the putatively government-brought litigation.

The Government Entities recognize that it is impossible to clothe Mr. Motley as a neutral representative of the public interest. But their argument instead – that in signing on to Mr. Motley's campaign and entering into a contingent financial partnership with the private plaintiffs' bar, they have not impaired their own ability to serve as neutral representatives – is equally implausible. As the Government Entities themselves implicitly acknowledge, *see* Answering Br. 54-56, and the public no doubt recognizes, but for the private attorneys' (1) conceiving the idea of the litigation, (2) marketing the litigation to the Government Entities, and (3) advancing the legal costs of the litigation in exchange for a financial stake in securing a hoped-for multibillion dollar recovery from defendants, this litigation would never have been brought, not only because

[5] *Id.*

it is based on an untenable legal theory but because the problem it purports to address is in fact being successfully addressed by other means.

In the ten years leading up to and including the filing of this litigation, California experienced a dramatic reduction in the incidence of elevated blood lead levels ("EBBL"), with the incidence of EBBL in children aged 1-5 decreasing from 18.33 percent in 1997 to 0.63 percent in 2006.[6] This public health triumph was accomplished through a mix of legislative, regulatory, and voluntary initiatives that continue today to address the small, remaining pockets of concern.

The question of why naturally follows: Why are the Government Entities pursuing a public nuisance litigation theory against the paint industry that has been universally rejected by other Courts and that has not been shown to offer any public health benefit over existing programs? The answer is unavoidable and damning to any argument that government neutrality is the controlling force in this litigation. The Government Entities are pursuing this litigation because private attorneys are footing the bill, and those private attorneys are footing the bill and driving this public nuisance litigation because of their private, contingent financial interest in securing a big pay day via this extraordinary charge of public authority.

---

[6] *Id.*

As set forth herein, in entering into contingent fee agreements in prosecuting these public nuisance lawsuits, the Government Entities have in two key respects impermissibly departed from their obligation to address public nuisances as impartial sovereigns. First, the Government Entities have artificially shifted the "delicate weighing of values" that must guide their decisions whether to file and prosecute public nuisance litigation in the first instance, rather than, *e.g.*, pursuing more effective but (because of their contingent fee attorneys' agreement to advance legal costs) more costly regulatory and legislative options. *See Clancy*, 39 Cal.3d at 749. Second, the Government Entities have tied themselves to financial arrangements that require the continued pursuit of legally untenable monetary remedies rather than the types of non-monetary, injunctive remedies that are in fact legally available (in proper cases) to public entities pursuing public nuisance litigation.

I. <u>Contingent Fee Agreements Improperly Tip the Scale Towards Purported "No Cost" Public Nuisance Litigation.</u>

In prohibiting the use of contingent fee agreements in public nuisance litigation, the Court recognized that a government attorney's decision to prosecute a public nuisance action "involves a balancing of interests" and that this balancing must be carried out from a position of neutrality. *Clancy*, 39 Cal.3d at 749.

> Occupying a position analogous to a public prosecutor, the government attorney is

> possessed … of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice … The duty of a government attorney … which has been characterized as a sober inquiry into values designed to strike a just balance between the economic interests of the public and those of the landowner, is of high order.

Id. (internal quotation marks and bracketing omitted), *quoting City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871.

In ordinary circumstances, a neutral government attorney weighing whether to bring a public nuisance lawsuit would need to determine whether the public interest in proceeding with such litigation is of sufficient magnitude to outweigh the costs of that litigation, including the cost of diverting funds from other interests that are more highly valued by the public. However, the willingness of private attorneys to advance the costs of pursuing public nuisance litigation in return for a contingent stake in the outcome impermissibly tips the scale on which the government attorney balances those interests. Rather than the "sober inquiry" required under *Clancy*, the government attorney must resist the siren song of a contingent fee option whereby a public nuisance action that otherwise would not have been of sufficiently high value to the public can be prosecuted "on the cheap," without the discipline of sound fiscal responsibility.

Certainly, the Government Entities would never defend a scenario where a private party offers to pay the government a substantial sum of