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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

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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

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[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

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[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.)

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[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,

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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,

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

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

money in exchange for the government's agreement to prosecute specific private companies and to share in any proceeds with the payor. This image of a government-for-rent and champerty is antithetical to the central tenets of our representative government. But that effectively is the very deal that the Government Entities have struck in this litigation. The private contingent fee attorneys approached the Government Entities with the offer of free legal services (worth a substantial sum of money) in exchange for use of the government's *parens patriae* authority to prosecute a public nuisance lawsuit against the private defendants and an agreement to share in any damages award.

Absent the essential restraint imposed by *Clancy*, government attorneys in California will continue to be subject to these types of "marketing" pitches by private contingency attorneys and those private attorneys will continue to view government public nuisance litigation in California as a target for new business development and potential profit. Armed with substantial financial resources from tobacco and asbestos litigation, the private attorneys will be able to directly impact government decision-making by offering their "no cost" services only in connection with those alleged "public nuisances" that they believe provide the greatest potential financial returns on their investment.

As a noted legal scholar has observed and at least one private plaintiff counsel has advocated, private counsel paid by contingent fee

agreements thus are poised to become "a de facto fourth branch of government." Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 Boston College Law Review 913, 921 (2008). Rather than neutral decisions motivated in the first instance from a government attorney's impartial balancing of the public interest of the people he serves as a representative of the sovereign, the government's decisions originate in the financial calculations of private counsel searching for potential deep pocket private defendants.

> [M]ost often, the power shift is not simply one between two elected branches of government …. Instead, public policy decisions regarding which public health and safety crisis to address and who should be held financially accountable for these matters have been functionally delegated to a small handful of mass products plaintiffs' lawyers who specialize in litigation brought by states and municipalities against products manufacturers.

Id.

The government attorney did not reach a neutral judgment as to which defendants were responsible for the public health problem and how to allocate resources to best address a public health concern. Absent the government attorneys' acceptance of the private plaintiff counsel's solicitation, including the targeting of particular defendants with the vast powers of the government and the acceptance of the plaintiff counsel's

financial terms of a share in the recovery, this litigation would not have been brought.[7]

Indeed, the history of the governmental and private-public initiatives in successfully addressing elevated BLLs without litigation provides a powerful rejoinder to any argument that this litigation arose from a neutral governmental decision to address an unmet public nuisance. The voluntary efforts of NPCA, in partnership with governments across the country, are but one example of how government has addressed and can continue to address this issue in its proper role as impartial sovereign. As cited by the U.S. Environmental Protection Agency, NPCA has spearheaded a number of successful initiatives to reduce elevated BBLs, 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-

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[7] *See, e,g, Engagement and Contingency Agreement*, Executed March 27, 2001, on behalf of the City and County of San Francisco, at Section 1.A ("The Special Attorneys are retained to provide legal services to the San Francisco City Attorney *for the purpose of seeking damages* and injunctive or other relief, *including restitution and disgorgement of profits* ... against lead and lead paint industry companies …"), Exh. To Petition for Writ of Mandate, Vol. 2, pp. 226, 230; *Legal Services Agreement Between The County of Santa Clara and Cotchett, Pitre & Simon*, executed April 4, 2000, at Section 10 (specifically identifying defendants' as to whom "[i]t is [private counsel's] intent to investigate, and if warranted, file an action against …"), Exh. To Petition for Writ of Mandate, Vol. 2, pp. 226, 246.

dust hazards." EPA Sector Strategies Performance Report (March 2006), at 64.[8] 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 owners, families and children across the country.[9] 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.[10]

Moreover, as the Court recognized in *Clancy*, the contingent fee agreements the Government Entities here seek to defend are hardly cost-free. They sully the public's faith and confidence in the neutral exercise of governmental prosecutorial power. This cost is amply demonstrated in the recent "pay-to-play" scandals surrounding a number of government

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

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

[10] *See* 16(2) NPCA Issue Backgrounder, *Focus: NPCA and the Paint Industry Continue to Redress Childhood Lead Poisoning through "The*

officials who have entered into the types of contingent fee agreements at issue here. *See The Pay-to-Sue Business: Write a check, get no-bid contract to litigate for the state*, The Wall Street Journal (April 16, 2009) (detailing Pennsylvania governor Rendell's decision to retain plaintiff counsel – who had made repeated donations to the governor's reelection campaign – contingent fee basis after counsel had been rebuffed by the Pennsylvania attorney general and similar "pay-to-sue" relationships in other states), available on line at http://online.wsj.com/article/SB123984994639523745.html.

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

The improper influence of contingent fee agreements on government attorney decision-making continues well after the initial decision to bring a public nuisance action. The Government Entities' attempt to minimize this ongoing conflict rests upon a fundamental misconception: that the proper remedy in a *parens patriae* action addressing an alleged public nuisance action is monetary relief. From this misconceived starting point, the Government Entities suggest that the interests of the government attorneys and the private contingent fee attorneys are generally aligned, with the only question being whether the government attorneys retain control so as to

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Next Generation" Program (June 2008), at 4, available at http://www.paint.org/pubs/ib_6-08.pdf

prosecute and/or settle the litigation for a financial payment that may not maximize the private attorneys' recovery. *See* Answering Br. at 39 ("If the public entities involved in this case choose, in the public interest, to resolve [the litigation] for something less than the maximum award that conceivably could be obtained after trial, outside counsel are bound, contractually and ethically, to accept the decision.")

But this framing of the question is directly contrary to well established jurisprudence that monetary relief generally is not an appropriate remedy in a government public nuisance lawsuit. As the Court has explained: "The public nuisance doctrine … embodies a kind of collective ideal of civil life which the courts have vindicated *by equitable remedies* since the beginning of the 16th century." *People ex. rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103; *see also*, *e.g.*, *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 300-302, 84 Cal.Rptr.3d 75, 103-104 (following *Acuna*). California courts repeatedly have rejected efforts by governmental entities to seek monetary relief for alleged public nuisances. *See Torrance Redevelopment Agency v. Solvent Coating Co.* (N.D. Cal. 1991) 763 F. Supp. 1060, 1069 ("the public nuisance claim must be dismissed for failure to state a claim to the extent that the claim seeks abatement-related costs and monetary damages"); *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 860, 223 Cal.Rptr. 846 ("counties cannot obtain damages for abating a public nuisance

because the statutory scheme does not authorize them to do so"). In dismissing a public nuisance claim identical to those asserted here, the New Jersey Supreme Court likewise held that monetary relief is not appropriate in public nuisance litigation. *See In re Lead Paint Litig.* (N.J. 2007) 924 A.2d at 502 ("these complaints do not state a claim for public nuisance … the complaints seek damages rather than the remedy of abatement. As such, they fall outside the scope of remedies available to a public entity plaintiff").

The question accordingly is not whether the government attorneys, despite the financial interest of their contingent fee "subordinate" counsel, have the authority to insist upon a strategy that would result in a lower monetary award. Rather, the question is whether the government attorneys, who can continue to receive services from their retained counsel only with the continued prospect of monetary relief, have the practical ability to select a strategy that would focus the litigation on the appropriate and legally supportable public nuisance remedy of injunctive relief.

The record below provides the answer to this question. Despite the clear legal authority to the contrary, the Government Entities pointedly have held out the possibility of pursuing a monetary remedy in this case. For example, when the Superior Court specifically questioned the basis for a contingent fee agreement in this litigation given the lack of a right to monetary relief, the Government Entities argued that "it could not be

predicted what type of remedy or fees would be available." *County of Santa Clara v. Superior Court* (2008) 74 Cal.Rptr.3d 842, 845 n.2. The explanation for the Government Entities' position is not hard to discern: if the government attorneys act appropriately in *parens patriae* and seek an equitable public nuisance remedy, their contingent fee co-counsel will have no source of payment and will discontinue their representation.

Thus understood, however, it is apparent that the use of contingent fee agreements in public nuisance litigation not only precludes neutral decision-making by the contingent fee counsel, it also precludes neutral decision-making by the government staff attorneys. While the Government Entities' public nuisance theory is fatally flawed in this case regardless of the remedy sought,[11] the use of contingent fee agreements in other cases of true public nuisance would create a financial incentive for government attorneys to forego equitable remedies protective of the public health and welfare and instead pursue legally untenable monetary damages theories that may in any event be less protective of the public (even if viable) but that are necessary for the government to retain and pay its counsel.

Thus, the contingent fee agreements in this case are even more problematic than the agreement at issue in *Clancy*, where the private

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[11] *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.

attorney's contingent fee did not depend upon the pursuit of monetary rather than abatement relief. *See Clancy*, 39 Cal.3d at 745 (explaining fee arrangement in which private attorney would be paid an additional $30 per hour if successful in securing abatement remedy). While the contingent fee agreement in *Clancy* created an impermissible bias in favor of the filing of public nuisance claims, the agreements did not – as do the agreements here – create the additional artificial biases in favor of the pursuit of certain types of remedies unrelated to the potential benefit to the public or against certain groups of defendants based on the depths of their pockets rather than their responsibility for, control over, or ability to address the alleged public nuisance.

These distorting effects of contingent fee arrangements on government attorney decision-making were starkly illustrated in a recent case in New Mexico, where the state attorney general – and her contingent fee private counsel – unsuccessfully used, *inter alia*, public nuisance theories to pursue a series of increasingly outlandish damages theories based on alleged unremediated contamination in the Rio Grande aquifer. *See New Mexico v. General Electric Co.* (D.N.M. 2004) 322 F. Supp. 2d 1237 *aff'd* (10th Cir. 2006) 467 F.3d 1223; *see also* 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), available at

http://www.wlf.org/upload/041307fowler.pdf. As in this case, the State AG's claim in the New Mexico litigation started from a dubious factual foundation. While her claim was based on the argument that contamination of the aquifer had deprived the State of clean drinking water, the source of this alleged contamination was a Superfund groundwater site that was being successfully remediated to drinking water standards under the supervision of both federal and state regulators. But of greater significance here is the manner in which the State AG and her contingent fee counsel were plainly guided in prosecuting the case by the pursuit of money rather than the public welfare.

In granting summary judgment to the defendants, the federal district court focused particular attention on the State AG's damages theory, which "was unequivocal" in seeking monetary damages rather than an equitable remediation of the alleged contaminated groundwater. *New Mexico v. General Electric Co.* (D.N.M. 2004) 322 F. Supp. 2d 1237, 1262 *aff'd* (10th Cir. 2006) 467 F.3d 1223. This fact was established in questioning by the court during an extensive pretrial conference:

> THE COURT: As I understand in this case, you're asking for money. You're not asking for remediation, you're asking for money.
>
> MR. LEWIS: That is correct.
>
> . . . . .
>
> THE COURT: Your effort here, as I understand

> it, isn't to have them fix [the deep contaminant plumes], and you don't want to fix them, apparently. You want money, and that's it.
>
> MR. LEWIS: Well, in this courtroom, that is it, yes....

Id. The court continued: "So long as the damages award would be large enough, the Attorney General of New Mexico – asserting the State's standing as public trustee of the public's interest in the waters of the State of New Mexico and as *parens patriae* of the people of the State of New Mexico – has been content to assume that nothing further could be done to protect the public health and safety against the grave risks to health and safety that Plaintiffs insist the contaminants pose." *Id.*

Thus, the court explained, the State AG and her contingent fee counsel blatantly abandoned what *Clancy* properly recognizes is the government attorney's crucial role as a neutral representative on behalf of the public trust:

> Under the damages theory propounded by the Attorney General and her outside counsel … the State of New Mexico … as *parens patriae* for and on behalf of the people of the State of New Mexico – proposed to stand idle and do *nothing* further to clean up toxic contamination beneath the South Valley Site that counsel insist will go untreated by the existing remedial actions. Instead, the State of New Mexico, by and through the Attorney General, sought to be paid *billions* of dollars in damages – *not* to clean up the deep groundwater contamination they insist can be found beneath the South Valley Site, but to leave that contaminated water exactly as they

allege it is, untreated and unusable.

Id. at 1259 (emphasis in original).

In affirming the summary judgment ruling, the Tenth Circuit squarely addressed the tension between the State AG's need to compensate her contingent fee counsel and her proper role in prosecuting public nuisances on behalf of the public interest. "The AG's right to pursue public nuisance claims against [defendants] … was largely illusory (at least as far as the AG was concerned) because … New Mexico law limited the available remedy to injunctive relief." *See New Mexico v. Gen. Elec. Co.*, (10th Cir 2006) 467 F.3d 1223, 1238. Of course, if the State AG had been acting in her proper role as a neutral sovereign, the ability to secure injunctive relief to abate a purported public nuisance would have been anything but illusory. The State AG considered the right illusory because her entry into a contingent fee agreement with private plaintiffs' counsel impermissibly "tempt[ed] the government attorney to tip the scale" in her prosecution of the alleged public nuisance and to focus solely on monetary remedies rather than the putative public interest in securing clean drinking water. *See Clancy*, 39 Cal.3d at 749. The Tenth Circuit was even more pointed in its admonition against contingent fee agreements in discussing the related issue of the State AG's *parens patriae* claim for natural resource damages for alleged injury to the groundwater. The Tenth Circuit held that the use of any recovery for payment of contingent fee attorneys would be

contrary to the sovereign objective of restoring the alleged injured groundwater. *See New Mexico*, 467 F.3d at 1248 (rejecting State AG's damages theory because "a portion of the recovery … could be used for something other (for example, attorneys fees) than to restore or replace the injured resource").

The New Mexico litigation also provides a real world answer to the Government Entities' assertion here that their retention of contingent fee counsel will not have any impact on their neutrality in determining the nature and magnitude of any request for monetary relief in this litigation. As the district court in the New Mexico litigation explained, the State AG's damages theory "sought to maximize the dollar amount of their damages award, largely unconstrained by practical considerations." *New Mexico*, 322 F. Supp. 2d at 1261.[12] Indeed, rather than conducting *Clancy*'s "delicate weighing of values," the New Mexico AG's claimed damages "underscore[d] the effort in [her] damages theory to maximize rather than

[12] As subsequently noted by the Tenth Circuit:

> As of January 2004, the [New Mexico AG] demand[ed] over $1.2 billion dollars in cash compensation, including $609,000,000 as the cost of water rights to nearly a quarter-million acre-feet of potable water that likely will never be purchased, and up to $609,000,000 for the construction of a 289,500 acre-foot "replacement" surface storage reservoir that likely will never be built.

New Mexico, 467 F.3d at 1237 n.24.

mitigate the State's asserted losses." *Id.*

This same dynamic was evident in the Rhode Island lead paint public nuisance litigation, where, prior to the Rhode Island Supreme Court reversal of the trial verdict, the same contingent fee private counsel retained by the Government Entities here dreamed up a $2.4 billion monetary remedy – a remedy some 4.5 times more expensive than the state's largest existing public works project – to address a public health concern that was being successfully addressed without any court involvement whatsoever (from 1991 to 2006, the incidence of elevated BLLS in children under the age of 6 in Rhode Island had decreased from 29.6 percent to below 2 percent).[13] Under the government's damages theory, the $2.4 billion would have been used to retain 10,000 workers (despite the fact that there are only 833 workers licensed in Rhode Island to do lead removal work and only 6,000 to 8,000 registered construction workers of any type in the entire state) and to remediate more than half the houses and apartments in the state (the vast majority of which did not have deteriorating lead paint and accordingly would pose no health risk unless the encapsulated paint was disturbed, *e.g.*, through the proposed remediation), requiring the forced

[13] Peter B. Lord, *Lead paint cleanup: a $2.4-billion solution*, The Providence Journal (September 15, 2007), *available at* http://www.projo.com/news/content/Lead_Cleanup_09-15-07_CB738JA.3274607.html.

temporary relocation of the private residents from those homes.[14] That is, of course, after private counsel took out their 16.7 percent share of over $400 million for themselves.

The hypothetical payout to private contingent counsel from a similar damages theory by the Government Entities in this litigation (however far-fetched) would of course dwarf that proposed in Rhode Island, where the entire state population barely exceeds one million people.[15] While such a result might help the plaintiffs' bar fulfill the promise to bring the paint industry "to its knees," the Government Entities cannot plausibly maintain that this prospect is the result of a neutral decision by "a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all." *Clancy*, 39 Cal.3d at 746.

Prior to being solicited to join onto contingent fee counsel's pre-packaged litigation, the Government Entities had properly targeted property owners who failed to maintain their property in lead safe condition, and the State of California, through the Childhood Lead Poisoning Prevention Act, Health & Safety Code §§ 105275-105310, had created government

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[14] *Id.*

[15] *See* U.S. Census Bureau, State & County Quick Facts, Rhode Island, available at http://quickfacts.census.gov/qfd/states/44000.html. By way of contrast, the population of Santa Clara County alone is 1.75 million. *See id.*, Santa Clara County, California, available at http://quickfacts.census.gov/qfd/states/06/06085.html.

programs that reduced the incidence of elevated blood lead levels in California to roughly 1/30th of the 1997 incidence in just 10 years. These impartially conceived government programs – along with the private-public endeavors of NPCA member companies and others – are working. The Government Entities argument that the Court should abandon its long-standing prohibition of contingent fee agreements in public nuisance litigation to authorize an untenable, private counsel conceived litigation solution to this important yet progressively diminishing public health concern is without merit.

CONCLUSION

As the Court forcefully explained in *Clancy*, "the abatement of a public nuisance involves a delicate balancing of values … [and] [a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Clancy*, 39 Cal.3d at 749. The contingent fee agreements executed by the Government Entities here create such intolerable temptation, not only in the private attorneys hoping to secure a contingent payday, but in the government attorneys whose judgment was distorted by the contingent fee attorneys' offer of no cost legal services for a privately-conceived public nuisance lawsuit directed at targeted "deep pocket" defendants. The Court of Appeal's opinion should be reversed and the contingent fee agreements should be declared unlawful.

April 24, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared Microsoft Word 2000 in Times New Roman 13-point font. The text of this brief contains 6,518 words as counted by Microsoft Word, not including the portions of the brief permitted to be excluded by California Rule of Court 8.520(c). I further certify that this brief was prepared on 100% recycled paper.

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CERTIFICATE OF SERVICE

I, Kim D. Arrington, declare:

I am a resident of the State of Maryland, over the age of eighteen years, and not a party to the within action. I am employed by Spriggs & Hollingsworth and my business address is 1350 I Street, N.W., Ninth Floor, Washington, D.C. 20005. On April 24, 2009, I served the following documents:

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

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