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No. S163681
In the Supreme Court of California

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

Petitioners

vs.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

ATLANTIC RICHFIELD COMPANY, et al.,

Real Parties in Interest.

From A Published Opinion Reversing An Order Of The Superior Court
Sixth Appellate District Case No. H031540
Santa Clara Superior Court Case No. CV 788657

PUBLIC ENTITY PLAINTIFFS' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes & Codes

Federal Cases

Other State Cases

Rules

Other References

COUNTER STATEMENT OF ISSUE FOR REVIEW

May public entities retain contingency fee counsel to assist their public attorneys with litigating a civil action to abate a public nuisance, when the public attorneys retain control over the litigation?

INTRODUCTION AND SUMMARY OF ARGUMENT

The County of Santa Clara filed this case against the Defendants ("the Lead Paint Companies") in March 2000. In the intervening years, nine additional counties and cities joined or have sought to join the case. These plaintiffs ("the Public Entities") allege that the Lead Paint Companies created a massive public nuisance by concealing the dangers of lead, campaigning against the regulation of lead in paint, and promoting lead paint for interior use even though they knew for decades about the hazards that lead paint posed to human beings. The Court of Appeal held that these allegations state a valid public nuisance claim under California Law, in a ruling that this Court declined to review. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 306, *rev. den.* 2006 Cal. LEXIS 7622.)

From the outset of this case, the Public Entities retained private counsel on a contingent fee basis to assist their public attorneys. They did so because they anticipated, correctly, that litigation against the Lead Paint Companies would be complex and protracted. The Public Entities feared that the attorney time and financial resources necessary to bring such a major case to trial would become prohibitively expensive, and that the Lead Paint Companies might prevail simply by waging a war of attrition. To protect the public fisc, the Public Entities retained contingent fee attorneys to serve as outside counsel. These attorneys have contributed

substantial professional expertise to support the Public Entities, but public attorneys have always exercised control over the case.

After the case was remanded from the Public Entities' successful appeal on the merits, the Lead Paint Companies filed a motion to disqualify contingency fee counsel. They argued that *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 created an absolute rule barring public entities from ever retaining outside counsel under a contingency fee arrangement in a public nuisance case. The Superior Court granted the motion and entered an order prohibiting the Public Entities from using contingency fee counsel. Because the Superior Court's order in effect would preclude the Public Entities from going forward with this important public nuisance action, the Public Entities filed this writ. The Court of Appeal unanimously reversed, distinguishing *Clancy* on the ground that no public attorney had appeared as counsel of record or exercised control over that case. By contrast, it is undisputed that public attorneys have exercised actual control over this case since its inception and that contingency counsel have played a subordinate role. (*County of Santa Clara v. Superior Court (Atlantic Richfield Co.)* (2008) 161 Cal.App.4th 1140, 1152.)

This Court should affirm the ruling of the Court of Appeal. In *Clancy*, a city improperly bypassed the statutory authority granted to its city attorney to file public nuisance abatement actions under Code of Civil Procedure section 731. The city instead retained private counsel acting on a contingency fee basis as the sole attorney of record, who then filed the case in his own name. This arrangement constituted an excessive delegation of public power into private hands, and prejudiced the defendants. The *Clancy* Court rejected this arrangement in an exercise of its authority "to disqualify counsel when necessary in the furtherance of justice." (*Clancy, supra*, 39 Cal.3d at 745, citing Code Civ. Proc. § 128(a)(5).) In contrast,

there has been no such excessive delegation of public authority here because public attorneys control this case. Similarly, because neutral public attorneys make all significant decisions in this case, the contingency fee arrangement does not prejudice the Lead Paint Companies. For these reasons, every published decision that has considered this issue after *Clancy* has refused to invalidate co-counsel arrangements as long as public attorneys retain adequate control. This Court should reach the same result.

The Lead Paint Companies' other arguments for reversal are equally unavailing. The contingency fee agreements in this case do not infringe their due process rights or constitute an ethical violation. Nor would it be unworkable to allow co-counsel arrangements. Courts have upheld such arrangements based on objective evidence that public attorneys retain sufficient control, without undertaking the intrusive inquiries that Defendants argue are required. In light of the presumptions that private attorneys behave ethically and that public officials faithfully discharge their duties, no such inquiries are appropriate unless and until there is some specific evidence of misconduct. If evidence is introduced that public power has been delegated excessively to private attorneys, courts are well suited to determine whether it is "necessary in the furtherance of justice" to disqualify private counsel based on the facts of that particular case.

Finally, a categorical rule banning public entities from contracting for assistance from private contingency fee attorneys will hamstring public efforts to enforce public nuisance law. Smaller public entities may be unable to bring even moderately extensive nuisance cases if they must hire additional staff attorneys or pay hourly rates to private firms. Even large public entities will be hesitant, and in some cases unable, to bring complex public nuisance actions against well-financed opposition. If the litigation would be extremely complex and protracted, as here, a rule that prohibits

public entities from retaining co-counsel on a contingency fee basis will have the perverse effect of excusing the biggest wrongdoers from having to answer for their misconduct. On the other hand, allowing contingency fee co-counsel arrangements under appropriate terms will make it possible for these cases to be resolved on their merits.

NATURE OF THE CASE

The Public Entities filed this action to remedy a hazardous condition: the presence of lead-based paint in public and private buildings within Plaintiffs' jurisdictions. Although lead paint was banned for residential use in 1978, it remains as a ticking time bomb in and on many homes, schools, hospitals and other buildings in California. (Petitioners' Appendix ["Pet. Appx."] p. 34, ¶ 92; p. 57, ¶ 175; p. 95 ¶ 34.) Lead paint is an enormous public health hazard. The Public Entities filed this case so that the Lead Paint Companies, whose conduct created this public nuisance, would be compelled to contribute to the costs of cleaning it up.

The Lead Paint Companies developed and marketed lead paint, even though they knew since the early 1900s that it was hazardous and that safer alternatives existed. Despite this knowledge, the Lead Paint Companies engaged in a massive campaign to promote the use of lead paint on the interiors and exteriors of private residences and public and private buildings, and on furniture and toys. Had they not done so, lead paint would not have been incorporated into so many buildings and would not have created the enormous public health hazard that now exists. (Pet. Appx. pp. 96-108.)

Exposure to lead-based paint causes serious and irreversible harm, both physical and developmental, especially to young children. The California Legislature has found that "[l]ead poisoning poses a serious

health threat for significant numbers of California children" and that "[l]evels of lead found in soil and paint around and on housing constitutes a health hazard to children living in the housing." (Health & Saf. Code § 124150(c) and (e).) Lead paint is the primary source of lead poisoning in California's children, causing acute and chronic damage to the renal system and red blood cells and having serious negative effects on the development of brains and nervous systems in the unborn and in children under age six. In utero and childhood exposure to lead causes difficulty in learning and behavioral problems that can persist for life. Even low levels of lead exposure can have permanent impacts, causing heart damage, high blood pressure, and other ills. (Pet. Appx. p. 43, ¶¶ 107-109; pp. 94-96, ¶¶ 32-40.)

Even this short description should demonstrate the extraordinary scope and significance of this case. To establish that the Lead Paint Companies are liable, the Public Entities will need to develop information dating back over a century. The issues that will be contested at trial include: the Lead Paint Companies' historical knowledge of the risks of lead; their manufacturing and marketing practices since the early 1900s; the historical development of alternatives to the use of lead in paint; the historical development of scientific and medical knowledge concerning the hazards associated with lead; and the scientific and medical understanding of the risks currently posed by lead paint.

Factual and expert discovery in all of these areas will pose immense challenges, especially for the Public Entities who have the burden of proof at trial. Much of the information needed to prove liability exists only in the records of the Lead Paint Companies, in historical archives, or in other obscure locations. Moreover, there is an asymmetry of information for most of these issues. The Lead Paint Companies already have worked up

their positions on many of them or have the information at hand, based on their past business practices or from prior litigation.

Given the scope of this case and the complex legal issues raised, the Public Entities anticipated that this litigation could last many years and require vast amounts of attorney time and out-of-pocket expenses. The Public Entities, and their duly appointed or elected public attorneys, therefore made legislative and executive decisions to enlist the assistance of private outside counsel, acting under contingency fee contracts. By bringing in the resources and expertise of outside counsel, the Public Entities greatly increased the likelihood that they could see this matter through to a trial on the merits.

The Public Entities' decision to engage outside counsel proved prescient. This case has been ongoing for almost nine years now, and no trial date is in sight. Much burdensome discovery and trial preparation work remains ahead. If the Public Entities cannot work with their outside counsel, they effectively will be deprived of their chance to present their case on the merits.

A categorical rule banning public entities from ever retaining contingency fee co-counsel in public nuisance actions will have a chilling effect on other cases and will frustrate the enforcement of public nuisance law. As exemplified by this case and other recent public nuisance actions, representative public nuisance claims are an important tool for addressing large-scale, serious, and ongoing harms to public health and to the environment. However, litigation of these actions often requires massive resources and specialized legal and scientific expertise that most public entities lack. Consequently, retaining outside counsel pursuant to a contingency fee agreement will sometimes be the only way for public entities to pursue public nuisance actions for the public benefit.

STANDARD OF REVIEW

The legal question presented to this Court is whether, given that public attorneys have retained control of this case, it is permissible for them to be assisted by private attorneys acting on a contingency fee basis. All parties agree that this Court reviews this legal question de novo. (*Haraguchi v. Superior Court* (*People*) (2008) 43 Cal.4th 706, 711-712.)

ARGUMENT

Clancy involved a motion to disqualify a contingency fee attorney from serving as sole counsel for the government in a public nuisance case. The Court evaluated that motion in light of the authority of courts "to disqualify counsel when necessary in the furtherance of justice." (*Clancy*, supra, 39 Cal.3d at 745, citing Code Civ. Proc. § 128(a)(5).) The Court amplified that, under this standard, "we may order that Clancy be dismissed from the case if we find the contingent fee arrangement prejudices the [defendants]." (*Id.*) The Court held that the fee arrangement in *Clancy* was "inappropriate under the circumstances, and in the interests of justice grant[ed] the extraordinary relief of disqualifying" him. (*Id.* at 743.)

This result was entirely justified on the facts of *Clancy*. Clancy was the government's sole attorney, bringing an action to abate a nuisance allegedly created by a bookstore that sold sexually explicit materials. Clancy's discretion to litigate the matter as he saw fit was not controlled by any neutral public attorney. If the government prevailed and recovered its attorneys fees from the defendants, Clancy's contract purported to double his hourly rate. The direct prejudice this arrangement imposed on the defendants was manifest: they would be required to pay Clancy twice his normal hourly rate if they lost. Moreover, they might be subject to criminal

liability for violating obscenity laws, or have their freedom of expression chilled, as a result of an overzealous prosecution by an unsupervised private attorney motivated by the prospect of increased fees.

The facts here are different. It is undisputed that neutral public attorneys have always controlled this case. The Lead Paint Companies have made no showing that they have been prejudiced or are likely to be prejudiced because outside counsel are assisting these public attorneys. This Court therefore should reject Defendants' invitation to extend the holding of *Clancy* to cover the very different co-counsel arrangement at issue here. Instead, this Court should again ask the question it asked in *Clancy*: whether it is "necessary in the furtherance of justice" to disqualify contingency fee counsel given the facts of *this* case. (*Id.* at 745.)

The Lead Paint Companies argue that to avoid the appearance of any impropriety, *Clancy* should be extended to establish a bright-line rule prohibiting public entities from retaining contingency fee counsel in any public nuisance case. But *Clancy* itself suggests exceptions to this supposed rule, for example in cases where private counsel assist, but do not replace, public attorneys. (*Id.* at 749, fn.3.) Moreover, bright-line rules are best suited to prohibit conduct that almost always is harmful. Where, as here, the utility of the challenged conduct depends on the facts in question, a bright-line rule arbitrarily would ban many beneficial arrangements.

For this very reason, this Court recently rejected a bright-line rule that would have prohibited public law offices from engaging in related successive representations, in favor of a case-specific inquiry into whether the public law office's screening mechanisms were sufficient. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 162, 167.) A similar inquiry should govern the government's retention of outside counsel in public nuisance cases. If a defendant comes forward with evidence that public power has

been delegated excessively into the hands of a private attorney – as it was in *Clancy* – courts are well suited to determining whether disqualification is "necessary in the furtherance of justice" based on that evidence. As the Court of Appeal noted in the opinion below, the record in this case contains "absolutely no evidence" of excessive delegation of public power into the hands of outside counsel. (*Santa Clara*, *supra*, 161 Cal.App.4th at 1155.) Accordingly, there is no basis for disqualification here.

I. A CO-COUNSEL ARRANGEMENT UNDER WHICH CONTINGENCY FEE COUNSEL ASSIST PUBLIC ATTORNEYS IS PERMISSIBLE UNDER *CLANCY*.

In *Clancy*, this Court held that a city could not retain a private attorney on a contingency fee basis to be the city's sole representative in a public nuisance case. The contingency fee arrangement under review here complies with that rule. Not only do the Public Entities' fee agreements expressly provide that public attorneys shall control this case, it is undisputed that public attorneys have maintained actual control throughout. *Clancy* therefore has no application here.

A. *Clancy* Prohibits Public Attorneys From Abdicating Their Statutory Authority To Bring Public Nuisance Actions.

In *Clancy*, the City of Corona hired private attorney James Clancy on a contingency fee basis to replace, rather than to assist, its City Attorney. The *Clancy* opinion is captioned as "The People ex rel. James J. Clancy, as City Attorney etc., et al., Petitioners" v. Superior Court. (*Clancy*, 39 Cal.3d at 740.) The writ filed in *Clancy* sought to "bar the People from proceeding with Clancy *instead of* the regular City Attorney . . . as its representative." (*Id.* at 744 [emphasis added].) The opinion makes no reference to any participation in that abatement action by Corona's regular City Attorney,

Dallas Holmes. (*Id.* at 744, 750, fn.5.) No public attorney was counsel of record for the City of Corona. (*Id.* at 742.) Instead, Clancy was given unfettered discretion to litigate the case against the bookstore as he saw fit. The fee arrangement also contemplated that Clancy would bring similar suits against other adult bookstores, again without the participation of any public attorney. (*Id.* at 743, 749, fn.4.)

From the text of the *Clancy* opinion, it is clear that the regular City Attorney of Corona played no role in litigating that case. This fact is confirmed by the following excerpt from the People's verified interrogatory responses in *Clancy*:

> 27. Has the City Attorney of the City of Corona supervised the filing and maintenance of this lawsuit?
>
> ANSWER: No.
>
> 28. Did the City Attorney of the City of Corona review the pleadings in this case prior to their being filed?
>
> ANSWER: The City Council "directed" the City Attorney to file the action pursuant to C.C.P. section 731. C.C.P. section 731 requires the City Attorney to file the action when the City Council "directs" that such action be filed. The City Attorney has no discretion to refuse to file the action. The City Attorney knew that the pleadings were being filed by the special attorney in the name of the City Attorney and did not and does not object to such filing.
>
> . . . .
>
> 30. What control has the City Attorney of the City of Corona maintained over the filing and pursuit of this lawsuit?
>
> ANSWER: He has been advised from time to time as to the progress being made in the plaintiffs attempt to get the matter to issue.

(Plaintiffs' Request For Judicial Notice "RFJN" [filed herewith], Ex. 1 at pp. 6-7 [submitting verified discovery responses from the appellate record

in *Clancy*].) These discovery responses conclusively establish that the City Attorney of Corona was not exercising any actual control over that case.

By hiring a private attorney to act as its sole representative, Corona ignored the standing requirements for public nuisance abatement actions, which can be brought in the name of the People only by certain public officials, including city attorneys. (Code Civ. Proc. § 731.) Corona violated this rule when it retained private counsel on a contingent fee basis to *be* — rather than to *assist* — its city attorney.

The bookstore owners filed a writ challenging this outsourcing arrangement. They argued that a public nuisance action must be "conducted by the city attorney in deed as well as in name." (*People ex rel Clancy v. Superior Court* (1984) 161 Cal.App.3d 894, 899; 1984 Cal.App. LEXIS 2719, **5 [*superseded by grant of review*].) The Court of Appeal in *Clancy* found "no persuasive rationale in support of this proposition." (*Id.*) The Supreme Court reversed, establishing a rule that it was improper for a private attorney acting on a contingency fee basis to bring a public nuisance claim in his own name, rather than in the name of the actual City Attorney of Corona. It was also improper for the case to be litigated "in deed" exclusively by that private attorney, without the participation of any public attorney.

Put differently, the City Attorney of Corona could not properly limit his role to that of a mere client, passively overseeing public nuisance litigation conducted by contingency fee counsel. The City Attorney instead should have appeared as the lead attorney, and retained "the advocate's traditional ability to conduct his case in the manner he elects." (*Clancy*, *supra*, 39 Cal.3d at 749.) As set forth above, the City of Corona admitted that its City Attorney played no role in litigating that case. The Supreme Court in *Clancy* therefore had no occasion to address the question presented

in this case: whether it would be permissible for public attorneys who are litigating a public nuisance action both "in deed as well as in name" to be assisted by private contingency fee counsel.

B. The Court Of Appeal Properly Distinguished *Clancy* Because Public Attorneys Control This Case.

In stark contrast to *Clancy*, it is undisputed that public attorneys are litigating this case "in deed as well as in name." Numerous County Counsel and City Attorneys are counsel of record for the Public Entities. These public attorneys have played an active role throughout this litigation and have controlled it since its inception. (Petition, ¶ 17 at pp. 12-13.) The fee contracts entered into by the Counties and the Cities make clear that these public attorneys will control all significant aspects of this case. (Pet. Appx. p. 230-231, ¶¶ 1.B-1.C; p. 416, ¶ 3.D; pp. 434-435, ¶¶ 1.B-1.C.) The scope of the representation is limited to this litigation. Private counsel are not given any authority to file similar public nuisance cases against other defendants. (Pet. Appx. pp. 452:6-10; 477:18-21; 484:1-3.) Unlike in *Clancy*, there has been absolutely no delegation of a public officials' authority or responsibility to initiate a public nuisance action. Instead, the public attorneys here fully retain their authority to initiate, pursue, and settle this case.

Based on these undisputed facts, the Court of Appeal determined that the public attorneys who filed this case have always exercised actual control over it, and that outside counsel have played a "subordinate role." (*Santa Clara*, *supra*, 161 Cal.App.4th at 1150.) Furthermore, the Court of Appeal found that "[t]he record before us contains absolutely no evidence that private counsel have ever engaged in any conduct that invaded the sphere of control exercised by the public entities' in-house counsel." *(Id.* at

1155.) The Court of Appeal properly focused on this important factual distinction when it refused to extend *Clancy* to cover the facts of this case:

> Because *Clancy*'s holding is limited to the facts that were before the California Supreme Court in *Clancy*, a private attorney serving as the sole representative of the government in a public nuisance abatement action and completely controlling the litigation, *Clancy* does not justify the superior court's order barring the public entities from compensating, by means of a contingent fee agreement, their private counsel, who are merely assisting in-house counsel and lack any control over the litigation.

(Id. at 1152.)

In an effort to challenge this distinction, the Lead Paint Companies request judicial notice of selected materials from the appellate record in *Clancy*. These materials show that Clancy's contract had control language similar to that contained in the Public Entities' contracts. Defendants assert that this "new" fact shows that the Court of Appeal erred when it distinguished *Clancy*. But the Court of Appeal did not uphold the use of outside counsel based *solely* on the terms of the contracts. Instead, the majority opinion emphasized that public attorneys appeared as counsel of record, and cited at length the declarations submitted by public attorneys and outside counsel demonstrating that the public attorneys actually control this case. (*Id.* at 1149-1150 & fns. 6-9.) Those declarations underscore the stark distinction between the lack of any public attorney control over the *Clancy* case and the actual control exercised by public attorneys here. Similarly, the concurring Justice "[did] not believe that the language of the contingency fee agreement is the only factor to be considered." *(Id.* at 1166.) "Another important factor that must be considered is the conduct of plaintiffs' counsel, which may reveal whether the government attorneys' discretionary decision-making has been placed within the influence or control of an interested party . . . ." (*Id.*) Actual control over this case by

public attorneys, in deed as well as in name, is what distinguishes it from *Clancy*.[1]

In distinguishing *Clancy* based on control exercised by public attorneys, the Court of Appeal read *Clancy* closely and determined that *Clancy* itself had planted the seeds of this distinction. For not only did *Clancy* not involve a co-counsel arrangement, *Clancy* specifically distinguished a case in which private counsel had been retained to assist a public attorney. (*Clancy*, 39 Cal.3d at 749, fn.3, *distinguishing Sedelbauer v. State* (Ind.App. 1983) 455 N.E. 2d 1159.)

In *Sedelbauer*, the State of Indiana brought a criminal prosecution for obscenity against the clerk of an adult bookstore. A private attorney from "the Citizens for Decency through Law" was allowed to assist the prosecution. (*Id.* at 1164.) The defendant argued that his due process rights were violated by "allowing someone so opposed to pornographic materials to aid in [the] prosecution . . . ." (*Id.*) Despite the obvious potential for overzealous prosecution, the Indiana Court approved the arrangement. It did so because the private prosecutor appeared as co-counsel, rather than as the sole attorney representing the State. (*Id.*) The *Clancy* opinion distinguished *Sedelbauer* precisely because the private attorney had not appeared "'in place of the State's duly authorized counsel.'" (*Clancy*, *supra*, 39 Cal.3d at 749, fn.3.) Based on this language from

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[1] Instead of undermining this distinction, Defendants' Request For Judicial Notice confirms it. James Clancy is the only attorney listed as representing the People on all of the pleadings submitted by Defendants. (Def. RFJN [filed May 15, 2008] at 5, 7, 36, 40.) The City Attorney of Corona was merely acting as the point of client contact, and did not participate in the litigation. (*See* Def. RFJN at 25.) Corona did argue that "the control and direction of the case is in the hands of the City Attorney." (Defs. RFJN at 22.) But that argument referred only to "paper" control – i.e., that the contingency fee agreement in the Clancy case purported to vest control in the City Attorney. As is apparent from the materials submitted by Defendants, as well as from the *Clancy* opinion itself, the City Attorney of Corona did not appear in or exercise any actual control over that case.

Clancy, the Court of Appeal below reasoned "that *Clancy's* treatment of *Sedelbauer* suggests that there is a critical distinction between a private attorney who *supplants* the public entity's 'duly authorized counsel' and a private attorney who serves only in a *subordinate* role as 'co-counsel' to the public entity's in-house counsel." (*Santa Clara, supra*, 161 Cal.App.4th at 1153-1154 [emphasis in original].)

The Lead Paint Companies assert that *Sedelbauer* is irrelevant because the private attorney there was not retained on a contingent fee basis. (Arco AOB at 22-23, Sherwin-Williams AOB at 32-33.) But the core concern in *Sedelbauer* was the degree of neutrality required of a private attorney assisting a public attorney in a criminal case. The basis of the assisting attorney's bias, whether personal or financial, was not the issue. Control was. Defendants argue that control is immaterial because a standard of "absolute neutrality" governs both public lawyers and their outside counsel, but this argument is inconsistent with *Clancy's* treatment of *Sedelbauer*. Defendants' rule would preclude the very thing approved in *Sedelbauer*: a private attorney who was a true believer in the cause of "Decency through Law" serving as co-counsel in a criminal obscenity trial. The court in *Sedelbauer* recognized the private attorney's potential bias but held that control of the case by the neutral public attorney cured any bias of the private attorney. By distinguishing *Sedelbauer*, *Clancy* recognized the same principle.

In summary, the Public Entities in this case have not attempted to bypass their public attorneys. Instead, they have retained private contingency fee counsel to assist their public attorneys, who are serving as lead counsel. Because this case is controlled by these public attorneys, who are and always have been neutral in the sense required by *Clancy*, the

opportunity for the misuse of public power that was so apparent in *Clancy* is not present here.

C. Unlike *Clancy*, This Case Does Not Involve Possible Criminal Liability Or Prior Restraints On Speech.

Clancy is distinguishable from this case for a second, independent reason. *Clancy* involved potential criminal liability and significant First Amendment concerns. Moreover, the history of *Clancy* strongly suggests that the City of Corona was trying to prevent the adult bookstore from engaging in politically unpopular activity (selling sexually explicit material) and to intimidate other small business owners from engaging in similar activities. None of these factors is present here.

In *Clancy*, the City of Corona was engaged in a concerted effort to run adult bookstores out of town. Corona first tried to force a particular adult bookstore to move by adopting a zoning ordinance, but the federal courts struck down the ordinance for violating the First Amendment. (*Ebel v. City of Corona* (9th Cir. 1983) 698 F.2d 390 [granting preliminary injunction to bookstore owner]; *Ebel v. City of Corona* (1985) 767 F.2d 635 [granting permanent injunction].) Corona next adopted an ordinance that declared such stores to be public nuisances. At the same time, Corona entered into the contingency fee contract with Clancy, under which Clancy would sue to abate the nuisance. (*Clancy*, *supra*, 39 Cal.3d at 743.) Clancy was to be paid $30 an hour in unsuccessful cases, but $60 an hour in cases where he prevailed *and* he collected his fees from the defendant bookstore. (*Id.* at 745.) Under this fee agreement, Clancy would receive a 100% bounty in successful cases, payable not by Corona but by the bookstore owners.

Clancy then filed suit against the bookstore owner who had won the federal suit. The Corona police raided her store and photographed 262 allegedly obscene items. Clancy subpoenaed a store clerk to produce these items in court, so that the court could determine whether they were obscene. The clerk responded to the subpoena by invoking the Fifth Amendment. As the Clancy opinion notes, the clerk was "potentially subject to prosecution under Penal Code § 311.2, which prohibits the sale of obscene materials." (*Id.* at 744.)

The threat of criminal liability against the bookstore clerk in *Clancy* was explicit, and the store's owner also was subject to an obscenity charge. Criminal procedures, such as the police raid, had been employed.
In addition, Corona's goal was to stop sales of material arguably protected by the bookstores' (and the public's) First Amendment rights. (*Id.* at 749.) *Clancy* involved the very real possibility that contingency fee counsel, utilizing the apparatus of the criminal justice system, might run the bookstore defendants out of town — or at the very least chill their expression of protected speech.

The factual circumstances here, in contrast, do not raise First Amendment concerns, nor do they "include a pending or anticipated criminal prosecution arising from the alleged public nuisance . . . . " (*Santa Clara, supra*, 161 Cal.App.4th at 1164 [concurring opinion].) The Lead Paint Companies do not assert that they may face any criminal liability as a result of this case, nor do they dispute that the statute of limitations for criminal liability against them has long since run. Moreover, in the eight years that this case has been pending, there has been no hint of criminal proceedings or liability, no involvement by the police, and nothing to suggest prosecution in the future.

The Lead Paint Companies raise the specter that wide-spread criminal prosecutions of third-party property owners may follow if Lead Paint Companies are held liable for their role in creating the public nuisance. (Arco AOB at 21, citing Penal Code § 372.)[2] In addition to being wildly implausible, the Lead Paint Companies' conjecture does not support their argument for two reasons. First, the Lead Paint Companies have no standing to assert the due process rights of third-party property owners in hypothetical future criminal proceedings. (See *People v. Badgett* (1995) 10 Cal.4th 330, 344.) Second, contingency fee counsel have no authority to initiate such proceedings, or to utilize police raids or other criminal procedures to set them up. The Lead Paint Companies simply cannot establish any prejudice to themselves, or any threat to the due process rights of others, based on such far-fetched hypotheticals.

Similarly, the Public Entities are not seeking any restraint on Defendants' free speech. Nor are they attempting to enjoin any aspect of the Lead Paint Companies on-going business operations. Unlike the bookstore owner in *Clancy*, the Lead Paint Companies do not face the possibility of being forced out of business by this suit. While many public nuisance suits seek to ban or curtail on-going activities that may have some social utility, the Public Entities here seek no such relief. Instead, the Public Entities seek to have the Lead Paint Companies help abate the public

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[2] The Lead Paint Companies also assert that if they are required to abate the public nuisance caused by lead paint in private residences, some property owners may be inconvenienced and/or have their property values diminished. (Sherwin-Williams AOB at 26-27.) But this would not be true if, for example, an abatement fund were set up, and property owners were allowed (but not required) to apply for grants from the fund to support lead removal projects. Whatever the ultimate form of the abatement program, it is extremely unlikely that residential property owners will be injured if the Lead Paint Companies are required to pay for the removal of lead paint from private residences. To the contrary, the removal of lead paint and the hazards associated with it will almost certainly increase property values, health, and peace of mind.

nuisance they helped create. For all of these reasons, the delicate "balancing of interests" required when pursuing the nuisance abatement claim in *Clancy* is not required here. (*Clancy*, 39 Cal.3d at 749.) But even if such balancing were required, it has been and will continue to be done by the neutral public attorneys who are lead counsel in this case.

D. Defendants' Interpretation Of The Standard Of Neutrality Is Unrealistic And Unobtainable.

Defendants do not attempt to explain why it would be in the "furtherance of justice" on the facts of this particular case to disqualify the Public Entities' outside counsel. Nor do they specify how they have been prejudiced by the fee arrangement in this case, under which neutral public attorneys remain in control. Instead, they argue that under *Clancy*, any attorney who assists in the prosecution of an action to abate a public nuisance must be held to the same standards of neutrality as a criminal prosecutor. Their premise is that California law applies a rule of "absolute neutrality" to criminal prosecutors, who must be recused if there is any "appearance of impropriety." The Lead Paint Companies then argue that this supposed rule also should be applied to outside counsel in public nuisance cases. But their premise is wrong. California law does not require such "absolute neutrality" for prosecutors, even in criminal cases.

1. California Law Does Not Permit Criminal Prosecutors To Be Disqualified, Absent a Showing of Actual Bias that Is Likely To Deprive a Defendant of a Fair Trial.

Prior to 1980, criminal prosecutors in California were subject to disqualification under an "appearance of conflict" standard, set forth in such cases as *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266-267. In response to *Greer*, the Legislature adopted Penal Code section 1424,

which made it more difficult for criminal defendants to recuse prosecutors. (*People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578.) Under the current standard, a prosecutor may be recused only if "a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial." (Penal Code § 1424.)

To justify recusal under this standard, a two-pronged test must be met. First, defendant must demonstrate a "reasonable possibility" that the prosecutor "may not exercise its discretionary function in an even handed manner." (*Hambarian v. Superior Court (the People)* (2002) 27 Cal.4th 826, 832.) Second, "'the potential for prejudice to the defendant — the likelihood that the defendant will not receive a fair trial — must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness." (*Id.* at 834 [emphasis in original], *quoting People v. Eubanks* (1996) 14 Cal.4th 580, 592.) As noted in *Eubanks*:

> Section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.

(*Eubanks*, 14 Cal.4th at 592 [emphasis in original].) Under section 1424, "[o]nly an actual likelihood of unfair treatment, not a subjective perception of impropriety, can warrant a court taking the significant step of recusing an individual prosecutor or prosecutor's office." (*Haraguchi v. Superior Court (the People)* (2008) 43 Cal.4th 706, 719.)

Applying the standard set forth in section 1424, this Court refused to disqualify the district attorney in *Hambarian*, despite the fact that the victim paid a forensic accountant more than $300,000 to become a "full member of the prosecution team." (*Hambarian*, supra, 27 Cal.4th at 839.) Notably, in *Hambarian* this Court focused not on whether any member of

the prosecution team had a personal stake in the litigation, but instead on whether the government attorneys – who had no such stake – sufficiently retained and exercised control. (*Id.* at 839.) In addition, the *Hambarian* opinion expressed no view on whether California law would "permit private counsel for interested parties to prosecute a criminal action 'so long as the Criminal District Attorney retains control and management of the prosecution.'" (*Id.* at 840, fn.6, *quoting Powers v. Hauck* (5th Cir. 1968) 399 F.2d 322, 325.)

This Court recently revisited the issue of prosecutorial disqualification in a trio of cases: *Haraguchi v. Superior Court (People)* (2008) 43 Cal.4th 706; *Hollywood v. Superior Court (People)* (2008) 43 Cal.4th 721; and *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737. These cases involved claims that criminal prosecutors were personally biased. For example, the prosecutor in *Haraguchi* was accused of having an indirect financial stake in the outcome of a criminal trial, because she was promoting a novel that portrayed a similar case. (*Haraguchi*, *supra*, 43 Cal.4th at 714-715.) The prosecutor in *Hollywood* had turned his confidential files over to a film-maker and acted as a consultant on a movie that portrayed the defendant's crimes. (*Hollywood*, *supra*, 43 Cal.4th at 729-730.) Lower courts had disqualified the prosecutors. This Court unanimously reversed in each instance and reinstated the allegedly biased prosecutors. This Court held that the criminal defendants in these cases had not established that they "would be unlikely to receive a fair trial." (*Haraguchi*, *supra*, 43 Cal.4th at 718; *see also Hollywood*, *supra*, 43 Cal.4th at 730.) By so ruling, this Court recognized that prosecutors are not required to be "absolutely neutral" in their beliefs and motives in order to prosecute criminal cases.

The Lead Paint Companies nonetheless place great emphasis on the dictum from *Clancy* suggesting that attorneys who bring public nuisance abatement actions should be "absolutely neutral." (*Clancy*, *supra*, 39 Cal.3d at 748.) But in light of the subsequent decisions of this Court discussed above, this dictum does not accurately describe the standard for disqualification in California, even as applied to criminal cases. This Court has recognized repeatedly that prosecutors are not expected to be "indifferent to the conviction or acquittal of the defendant" or to "share in the neutrality expected of the judge and jury." (*People v. Vasquez* (2006) 39 Cal.4th 47, 55.) To the contrary, this Court recognizes the reality that a criminal prosecutor has the same interest "in burnishing his legacy that every attorney has in a high-profile case . . . ." (*Hollywood*, *supra*, 43 Cal.4th at 734.)

> Success in high-profile cases brings acclaim; it is endemic to such matters. Moreover, if the high-profile nature of a case presents incentives to handle the matter in any way contrary to the evenhanded dispensation of justice, the problem is not one recusal can solve, as the same issue would arise equally for any theoretical replacement prosecutor.

(*Id.*)

Thus courts acknowledge that in the real world prosecutors act as advocates as well as public servants, and that prosecutors will often be personally motivated to obtain a conviction. In the cases discussed above, this Court rejected the argument that criminal prosecutors must be recused because of their personal motivation to secure a conviction, even when that motivation is strengthened by factors extraneous to the prosecution.

2. The Neutrality Standard for Attorneys Representing the Government in Civil Public Nuisance Actions Should Not Be More Demanding than that Applied to Criminal Prosecutors.

It is counter-intuitive to argue, as the Lead Paint Companies do, that California law requires a standard of neutrality in civil public nuisances cases that is higher than the standard applicable to criminal cases. One would expect instead that the neutrality required of government lawyers would be highest in criminal cases, where a defendant's liberty is at stake.

Unlike a civil litigant, a criminal defendant is exposed to a host of possible pre-trial deprivations, including the seizure of property via search warrant, booking and detention, and the expense of posting bail. The mere filing of a criminal accusation can have a tremendous impact on the defendant's reputation. If the State succeeds in proving its case, the defendant may be jailed. Criminal defendants are therefore accorded many substantive and procedural protections not available to civil litigants. To name just a few, criminal defendants must be convicted by a unanimous jury based on proof beyond a reasonable doubt. They are entitled to be represented by public defenders if they cannot afford their own attorneys. And they are entitled to invoke special constitutional protections under the Bill of Rights and under such landmark judicial decisions as *Miranda v. Arizona* (1966) 384 U.S. 436 and *Brady v. Maryland* (1963) 373 U.S. 83. In light of the heightened protections granted to criminal defendants, the rules governing neutrality for criminal prosecutors should be stricter than those governing civil public nuisance actions.[3]

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[3] For this reason, even if this Court believed that it would never be "in the furtherance of justice" (per Code Civ. Proc. § 128(a)(5)) to allow *any* lawyer involved in a criminal prosecution to have a direct financial incentive to secure a conviction, it does not follow that the same rule should apply to attorneys assisting government lawyers in civil public nuisance cases. Attorneys playing a subordinate role in civil litigation have no ability to inflict on the opposing party the type of pre-trial deprivations available in criminal cases. The Rhode Island Supreme Court adopted this

Although the neutrality standard need not be as stringent in civil abatement actions as in criminal prosecutions, even that higher standard is satisfied here. The Lead Paint Companies have made no showing that there is a "reasonable possibility" that the public attorneys who retain control of this case "may not exercise [their] discretionary function in an even-handed manner." (*Hambarian, supra*, 27 Cal. 4th at 832.) Nor have the Lead Paint Companies demonstrated "the *likelihood* that [they] will not receive a fair trial." (*Id.* at 834 [emphasis added].) The Lead Paint Companies are represented by a legion of attorneys from thirteen different law firms. There is simply no possibility, let alone the *likelihood*, that the Public Entities and their outside counsel will overwhelm defense counsel and deprive the Lead Paint Companies of a fair trial. To the contrary, it is the Public Entities who will not be able to receive a fair trial in this matter without the continued assistance of outside counsel acting on a contingency fee basis. For these same reasons, the Lead Paint Companies have failed to establish that it is "necessary in the furtherance of justice" to disqualify outside counsel here. (*Clancy, supra*, 39 Cal.3d at 745.)

II. DECISIONS SINCE *CLANCY* UNIFORMLY REFUSE TO EXTEND ITS RATIONALE TO CASES IN WHICH PRIVATE COUNSEL MERELY ASSIST PUBLIC ATTORNEYS.

As discussed in both the majority and concurring opinions below, several state and federal court decisions since *Clancy* "support a general rule that a contingency fee agreement is permitted, even though private counsel retains a financial stake in the outcome, where the agreement provides that government attorneys will maintain control over the

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distinction between criminal and non-criminal matters when it approved the contingency fee agreement in that civil public nuisance case. (See *Rhode Island v. Lead Industries Assn.* (2008) 951 A.2d 428, 475 & fn.48 [discussed in section II below].)

discretionary decision-making throughout the litigation." (*Santa Clara*, *supra*, 161 Cal.App.4th at 1161-1162 [Concurring Opinion].) Defendants do not cite a single appellate decision to the contrary, and there are none.

The first two courts to consider the issue after *Clancy* approved the government's use of contingency fee counsel to assist in the tobacco litigation, precisely because public attorneys retained control over those cases. (*Philip Morris Inc. v. Glendening* (1998) 709 A.2d 1230, 1243; *City and County of San Francisco v. Philip Morris Inc.* (1997) 957 F.Supp. 1130, 1135.) Although these two cases were not pled as public nuisance actions, the remedies sought closely resembled those available in public nuisance cases. The government plaintiffs in those cases sought to reform the tobacco industry's on-going activities that were creating grave public health problems, to obtain compensation for past damages, and to force the industry to contribute to the effort to prevent future harm. The relief sought in this case is limited to the third category: forcing the Lead Paint Companies to abate the public nuisance created by their past activities in order to prevent future harm. The tobacco cases involved governmental efforts to place restrictions and impose liability on otherwise lawful, on-going business activities, and therefore required a weighing of countervailing interests. This case does not. The conduct that created the nuisance here (the marketing of lead based paint) has been banned by law since 1978.

Moreover, since *Glendening* and *CCSF v. Philip Morris* were decided, several courts have held that contingency fee counsel may assist public attorneys in bringing public nuisance abatement actions. In the public nuisance case against many of these same Defendants in Rhode Island, the trial court denied a motion to disqualify contingency fee counsel from representing the State. That court focused on the key fact that the

Rhode Island Attorney General had retained sufficient control over the litigation. (*Rhode Island v. Lead Industries Assn.* 2003 R.I. Super. LEXIS 109, *5-8.)

The Rhode Island Supreme Court unanimously affirmed. (*Rhode Island v. Lead Industries Assn.* (2008) 951 A.2d 428.) The justices there concluded:

> [T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain *non-criminal* matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society -- results which otherwise might not have been attainable.

(*Id.* at 475 [emphasis in original, footnotes omitted].) Citing the Court of Appeal's opinion in this case, the Rhode Island Supreme Court approved the State's use of contingency fee counsel in civil litigation, including public nuisance abatement actions, so long as the Attorney General's Office retained "total control over all critical decision making." (*Id.*) The court emphasized that "the Attorney General's discretionary decision-making must not be delegated to the control of outside counsel; rather, it is the outside counsel who must serve in a subordinate role." (*Id.* at 476.) The record in this case establishes that outside counsel have played precisely such a subordinate role. (*Santa Clara*, *supra*, 161 Cal.App.4th at 1150.) Indeed, the Rhode Island Supreme Court expressly followed the reasoning of the Court of Appeals here in distinguishing *Clancy* on this basis. (*Rhode Island*, *supra*, 951 A.2d at 476, fn.50.)

Three federal district courts also recently refused to extend *Clancy* to disqualify co-counsel in public nuisance actions. In the first case, a district court in Ohio rejected Sherwin-Williams' motion to enjoin several cities

from retaining contingency fee counsel to assist them in bringing public nuisance cases against the Lead Paint Companies. (*The Sherwin-Williams Co. v. City of Columbus, Ohio* 2007 U.S. Dist. LEXIS 51945.) The *Sherwin-Williams* decision turned on the "key issue" of whether the cities retained control over the litigation and settlement of the cases. (Plaintiffs' RFJN [filed herewith] Ex. 2 [June 19, 2007 hearing transcript] at 84:18-85:2.) With this test in mind, the court approved certain of the contingency fee agreements that met "the test as outlined with regard to control of the litigation and authority to settle . . . ." (*Id.* at 87:6-7.)

In addition, the court rejected Sherwin-Williams' argument that contingency fee counsel must be barred because the public nuisance cases against the lead paint companies were analogous to criminal prosecutions. The court had:

> no difficulty finding this is not what I would call a criminal matter or even quasi criminal. There is no access by the cities to the grand jury. There is no right to the issuance or seeking of search warrants, arrests or seizure orders. There is no chance of incarceration. And the remedies sought are all civil in nature, injunctive relief, abatement or damages. While Ohio law does provide for criminal prosecutions of nuisances, these statutes are not involved in the pending civil cases.

(*Id.* at 83:13-20.) The *Sherwin-Williams* court correctly characterized the public entities' suits against the lead paint companies as suits "in equity to abate nuisances" (*id.* at 16:24) and therefore held "that this case involves state actions that are much more similar to civil matters rather than criminal in nature." (*Id.* at 87:7-9.) The same is true under California law. (13 *Witkin, Summary of California Law* (10th Ed.), Equity, § 133.)

In the second case, a federal district court in California held that *Clancy* does not create a blanket prohibition against hiring contingency fee counsel in public nuisance abatement actions. (*City of Grass Valley v.*

Newmont Mining Corp. (E.D. Cal.) 2007 U.S. Dist. LEXIS 89187, *3-4.) Instead, such fee agreements are proper as long as outside counsel and public attorneys are acting as co-counsel. In arriving at this conclusion, the court in *Grass Valley* relied on the fact that *Clancy* had distinguished *Sedelbauer* for this very reason. (*Id.*)

In the third case, a district court in Oklahoma reached the same conclusion in an unpublished order. (*See Attorney General of Oklahoma v. Tyson Foods, et al.*, C.A. No. 05-cv-329-GKF-SAJ, Minute Sheet Order Denying Motion No. 1064 (N.D. Ok. June 15, 2007) [available on the PACER system at www.ecf.oknd.uscourts.gov/cgi-bin/login.pl?383606911561269-L_835_0-1, Docket No. 1187].)

Finally, in briefing below, the Lead Paint Companies cited an unpublished ruling from the Southern District of California disqualifying contingency fee counsel from acting as co-counsel in a public nuisance abatement action. (*See* ARCO's Supplemental Authorities Letter of January 11, 2008, citing *People v. Kinder Morgan Energy Partners L.P.*, No. 07-CV-1883 (S.D. Cal.).) However, the Ninth Circuit has since reversed that disqualification order, ruling in an unpublished decision that the District Court's order was clearly erroneous as a matter of law because it read *Clancy* too broadly. (*City of San Diego v. District Court (Kinder Morgan Energy Partners L.P.)* 2008 U.S.App. LEXIS 17352.)[4]

Although the cases cited above are uniform, they are not numerous. In the 24 years since *Clancy* was decided, the decision below is the first

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[4] The Lead Paint Companies also reference an order of the Orange County Superior Court in *People v. Atlantic Richfield Co.*, No. 804030, which disqualified contingency fee counsel despite the presence of public attorneys acting as co-counsel. However, this Superior Court Order was never reviewed by the Court of Appeal and has no precedential value. The case does demonstrate, however, that Atlantic Richfield has been able to successfully employ the same tactic it seeks to use here to derail major environmental clean up litigation.

published decision on this issue from a California state court. Only a handful of other courts have considered – and all have rejected – Defendants' argument that *Clancy* should be extended to co-counsel arrangements. This is not surprising, as public attorneys typically bring public nuisance cases without the assistance of contingency fee counsel. But in extreme cases involving wide-spread public injuries (such as in tobacco, lead paint, and major environmental cases), it is essential for public entities to be able to retain the assistance of contingency fee counsel. A categorical rule barring such assistance would have the perverse effect of allowing the biggest wrongdoers to escape accountability for their conduct, precisely because their actions created such serious and wide-spread harm.

III. THE LEAD PAINT COMPANIES HAVE NOT ESTABLISHED ANY DUE PROCESS VIOLATION.

The Lead Paint Companies assert that the presence of contingency fee counsel in this case, even in a subordinate role, necessarily violates their due process rights. But the Lead Paint Companies are wrong to argue that this case presents a due process issue and wrong to describe *Clancy* as a due process case. Clancy was not disqualified based on Constitutional considerations, but instead under the authority of the courts "to disqualify counsel when necessary in the furtherance of justice." (*Clancy*, *supra*, 30 Cal.3d at 745, citing Code Civ. Proc. § 128(a)(5).) One of the cases on which *Clancy* relied made this point more explicitly:

> The principle which the real parties in interest seek to extend is not constitutionally based. Disqualification of a prosecutor for a conflict of interest or appearance of impropriety alone is not a matter of due process but rather an exercise of the court's statutory and inherent power over the processes of trial.

(*People v. Municipal Court (Byars)* (1978) 77 Cal.App.3d 294, 299-300; see also *Greer*, *supra*, 19 Cal.3d at 261, fn.4, 264-265, 268; *Vasquez*,

supra, 39 Cal.4th at 56-58 [finding no due process violation despite participation of biased prosecutor in a murder trial].) There is no due process issue in this case, just as there was none in *Clancy*.

A. Federal Due Process Law Does Not Require Absolute Neutrality Even Of Criminal Prosecutors.

Clancy did discuss a few federal due process cases, and the Lead Paint Companies attempt to rely on those same cases to support their due process argument. But these federal cases stand for a substantially different proposition: that a *criminal defendant's* due process rights are violated when a *judge or a quasi-judicial officer* will benefit (either directly or indirectly) by finding the defendant guilty or imposing a larger fine. (*Tumey v. Ohio* (1927) 273 U.S. 510, 532 [holding that due process is violated where a *judge* derives income from the defendant's fines]; *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 60 [holding that a town mayor may not serve as a *judge* if fines imposed by the Mayor contribute to local funds subject to the Mayor's control]; *see also Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 821 [finding due process violation where state supreme court *justice* authored 5-4 opinion that resolved unsettled questions of civil law in a way that allowed the justice to recover a $30,000 settlement in a pending suit that raised similar issues].)

The cases cited by the Lead Paint Companies recognize that a higher standard of neutrality applies to judicial officers than to prosecutors, who necessarily play the role of advocates in our adversarial system. In an effort to conflate these two distinct issues, ARCO misquotes the *Ward* case. ARCO asserts that the United States Supreme Court stated in *Ward* that a defendant "is entitled to a neutral and detached [representative of the government] *in the first instance*." (Arco AOB at 29, quoting *Ward*, *supra*,

409 U.S. at 61-62 [brackets and emphasis added by ARCO].) In fact, the *Ward* opinion states that a criminal defendant "is entitled to a neutral and detached *judge* in the first instance." (*Ward*, *supra*, 409 U.S. at 61-62 [emphasis added].)

The Court of Appeal here had little difficulty differentiating the standard of neutrality applicable to judicial officers from that applicable to prosecutors, and correctly held that the cases cited by the Lead Paint Companies are distinguishable on that basis. (*Santa Clara*, *supra*, 161 Cal.App.4th at 1152-1153.) This Court also has recognized that a higher standard of neutrality applies to judges than to prosecutors. "To show a due process violation arising from a prosecutor's conflicting interest should be more difficult than from a judge's, for the 'rigid requirements' of adjudicatory neutrality articulated in *Tumey v. Ohio*, and other cases, do not apply to prosecutors." (*Vasquez*, *supra*, 39 Cal.4th at 64 [citation omitted].)

Due process prohibits a judicial or quasi-judicial officer from receiving a direct financial benefit based on how he or she rules. However, federal law does not extend this same high standard of neutrality to public attorneys, even in criminal matters, in part because the presence of an unbiased judicial officer serves as a check on the prosecution:

> Prosecutors need not be entirely "neutral and detached." In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties. The distinction between judicial and nonjudicial officers was explicitly made in *Tumey, 273 U.S., at 535,* where the Court noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people."

(Marshall v. Jerrico, Inc. (1980) 446 U.S. 238, 248-249 [citations omitted].)

This passage from *Marshall* establishes that a criminal defendant's federal due process rights would not necessarily be violated if a prosecutor obtained "rewards" for acting on behalf of the State. An unbiased judiciary serves as a sufficient check against overzealous prosecution in such cases. Since this check is sufficient in the case of a criminal defendant whose life or liberty is at stake, it must also be sufficient in this civil case, which involves only the potential post-hearing deprivation of the Lead Paint Companies' property.

B. Under the Flexible Tests Used In Both Federal And State Cases, There Has Been No Due Process Violation Here.

The Lead Paint Companies likewise cannot establish a due process violation based on the facts of this case when analyzed under more general due process case law. The United States Supreme Court has instructed that due process claims inherently require case-by-case inquiries. Due process requirements are flexible, and only call for "such procedural protections as the particular situation demands." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [citation omitted].) When evaluating due process claims, federal courts consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Id.*) California law adds a fourth factor: "the dignitary interest of informing individuals of the nature, grounds and consequences of the action

and of enabling them to present their side of the story before a responsible governmental official." (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1048, 1071.) Otherwise, the test employed in California "is essentially identical" to the federal due process test. (*Id.*)

The Lead Paint Companies cannot not establish a due process violation under these factors. First, the private interest involved is only monetary: Defendants' interest in avoiding any costs associated with cleaning up the public nuisance they created. Second, the risk of an erroneous deprivation is minimal, since any deprivation will take place only after the Lead Paint Companies receive all of the process due to them in these judicial proceedings. For this same reason, substitute procedural safeguards would add little if any value. Third, the interest of the Counties and Cities in remedying the public nuisance created by lead paint is paramount, and the fiscal and administrative burdens of pursuing this case without contingency fee counsel are prohibitive. Fourth, and finally, the Lead Paint Companies' dignitary interest have been fully respected as Defendants have been (and will be) provided with ample opportunity "to present their side of the story."

For these reasons, the court in *Sherwin-Williams* quickly disposed of the identical procedural due process claim:

> The [government entities] have sought injunctive relief and damages but have not sought to seize or restrain any of [Sherwin-Williams'] property or property interests prior to final judgment, if that ever occurs, in state court. If such action occurs and damages are awarded, it will only come after a full trial on the merits in a state court . . . . So I find that with regard to the procedural due process claim, the state law affords [Sherwin-Williams] the greatest possible due process under our law.

(Plaintiffs' RFJN, Ex. 2 at 79:22-80:5.)

The same is true here. The Lead Paint Companies will not be deprived of any property interest until after they are accorded the full panoply of due process associated with a civil trial in front of an unbiased judge or jury.

IV. THE LEAD PAINT COMPANIES HAVE NOT ESTABLISHED ANY ETHICAL VIOLATION.

The Lead Paint Companies also suggest that the mere presence of contingency fee counsel in this case violates ethical rules. But they point neither to any specific ethical canon that allegedly has been breached nor to any allegedly unethical behavior by outside counsel to date. Instead, the Lead Paint Companies assert that contingency fee counsel necessarily are motivated solely by self-interest, rather than the public interest, and that they therefore will disregard any ethical rules that stand in the way of maximizing their own recovery.

But California law embodies the opposite presumption: until confronted with actual evidence to the contrary, courts presume that attorneys behave ethically. In the absence of a showing of either a structural conflict of interest or actual unethical behavior, this Court should reject the Lead Paint Companies' speculative assertions.

A. Until They Are Confronted With Contrary Evidence, Courts Presume That Attorneys Behave Ethically.

California courts presume that attorneys will behave ethically. (*Frazier v. Superior Court* (2002) 97 Cal.App.4th 23, 26; *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 834.) This presumption applies to all attorneys, regardless of whether they are acting on an hourly, contingent, or pro bono basis.

For this reason, mere speculation that an ethical violation exists is insufficient to disqualify counsel. As distinguished from judicial recusals, which may be required on the basis of a mere "appearance of impropriety" (Cal. Code Jud. Ethics, canon 2; *see* Code Civ. Proc., § 170.1, subd. (a)(6)(C)), such an appearance of impropriety by itself does not support a lawyer's disqualification. (*DCH Health Services Corp, supra*, 95 Cal. App. 4th at 833 ["[s]peculative contentions of conflict of interest cannot justify disqualification of counsel"]; see also *People v. Lopez* (1984) 155 Cal.App.3d 813, 823-824 ["[j]udicial decisionmaking should not turn on the psychological or philosophical perceptions of those involved"].)
In addition, California law presumes that public officials, including public attorneys, will regularly perform their duties. (Evid. Code, § 664.)

Because of the robust presumption that attorneys will behave ethically, unsupported assertions by the Lead Paint Companies that contingency fee counsel may be tempted to behave badly do not provide a basis for disqualification in this case.

B. Contingent Fees Do Not Create A Structural Conflict Of Interest For Lawyers Representing The Government.

In an effort to identify an ethical conflict, the Lead Paint Companies cite to federal cases that bar attorneys who are representing victims in civil litigation from also serving as special prosecutors in related criminal prosecutions. But these cases involve a "structural" ethical conflict of the attorney representing *two clients* with conflicting goals: the victim, whose goal is to establish guilt at any price for vindication and to increase the civil recovery; and the People, whose interest is in a just outcome in the criminal prosecution. (See *Young v. United States ex rel. Vuitton* (1987) 481 U.S. 787 [holding that special counsel's dual role of representing the victim in a

civil matter and the government in a criminal matter created an irreconcilable conflict of interest]; see also *State v. Storm* (N.J. 1995) 661 A.2d 790,794 (following *Young*); *Ganger v. Peyton* (1967) 379 F.2d 709, 711, 714 [holding that a state prosecutor could not try a husband for criminal assault while at the same time representing his wife in a divorce action based on the same conduct, because he was "attempting at once to serve two masters"].)

In a footnote relied on by the Lead Paint Companies, the *Young* Court stated:

> It is true that prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction. That problem, however, is personal, not structural .... [S]uch overzealousness "does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction."

(*Young*, *supra*, 481 U.S. at 807, fn.18 [citations omitted].) This clarifies that the "structural" problem identified by *Young* was the conflicting duties of loyalty one attorney owed two separate clients: the victim and the government. No similar structural problem exists in this case. Private counsel here are not representing different clients with differing objectives.[5]

Although the Lead Paint Companies contend that private counsel's own self-interest in the outcome of the litigation creates a conflict, private counsel's ethical duty of loyalty requires them to act at all times in the best interest of their client, rather than in their own best interests. (*Pavicich v.*

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[5] Moreover, the Public Entities are not asserting claims for their own past damages. The Court of Appeal has already ruled that such damages are not available under Plaintiffs' remaining claim to abate the public nuisance. (*Santa Clara*, *supra*, 137 Cal.App.4th at 309.) So there is no danger that private counsel will be tempted to trade off future abatement relief for greater past damages in an effort to maximize their fee claim.

Santucci (2000) 85 Cal.App.4th 382, 398 [noting attorney-client relationship is "a fiduciary relation of the very highest character"].) Should private counsel nevertheless be overzealous or otherwise disregard their clients' best interests, that would represent a problem that was "personal, not structural." As noted in *Young*, any such problem can be dealt with through the oversight of unbiased judicial officers, acting on a case-by-case basis. The control over the case by neutral public attorneys serves as an additional check on any such problem.

Nor does the "danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations" that was present in *Young* and *Ganger* exist here. (*Young*, *supra*, 481 U.S. at 793; *Ganger*, *supra*, 379 F.2d at 711.) When a private attorney representing a victim in civil litigation is also allowed to prosecute a related criminal case, the attorney's dual role greatly increases the threat that the criminal process will be used to coerce a more favorable civil settlement. The threat created by such dual representation in criminal cases is intolerable because "[p]rosecutors have available a terrible array of coercive methods to obtain information" such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." (*Young*, *supra*, 481 U.S. at 811 [plurality opinion], quoting C. Wolfram, Modern Legal Ethics 460 (1986).)

California law also recognizes that it is unethical to threaten criminal prosecution in order to secure an advantage in a civil proceeding. (Cal. Rules of Prof. Conduct, Rule 5-100.) But this ethical restriction is not implicated here. Outside counsel do not have access to the "terrible array of coercive methods" available to criminal prosecutors. No threat of

criminal prosecution has been made, nor would any such threat be credible. These facts distinguish this case from *Young*, and from *Clancy*.

C. The Lead Paint Companies' Other Ethical Concerns Are Speculative And Insubstantial.

In the absence of evidence of any actual misconduct, any structural conflict of interest, or any misuse of the criminal process, the Court need not consider the speculative ethical concerns raised by the Lead Paint Companies. But these concerns do not withstand scrutiny in any event.

The Lead Paint Companies are quick to assume that contingency fee counsel are focused only on their own self-interest in a recovery, and are unwilling to pursue the larger interests of their clients. This archaic argument presumes that counsel acting on a contingency fee will blatantly disregard the duty of loyalty they owe to their clients (*Pavicich*, *supra*, 85 Cal.App.4th at 398), and is an indictment of all contingency fee arrangements.[6] However, California law has long approved of the use of contingency fee agreements, and recognizes them as both necessary and beneficial to promote access to justice. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 792.)

The Lead Paint Companies' second concern, that contingency fee counsel will press meritless claims against them, also fails. This argument presumes that both the public attorneys involved in this case and private counsel will ignore their ethical duties not to pursue meritless claims.

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[6] On a related point, Sherwin-Williams cites to a recent Executive Order that prohibited federal agencies from retaining contingency fee counsel. (Exec. Order No. 13,433.) This Order merely demonstrates that the Bush Administration, in an exercise of its discretion, decided not to retain outside counsel on a contingent basis. The Order would not have been necessary unless the federal government had the power to do so. The Public Entities also have the power to retain contingency fee counsel in appropriate circumstances (Gov. Code § 37103), and have exercised their discretion to do so here.

(Rule 3-200, Cal. Rules of Prof. Conduct.) Moreover, it simply makes no sense for private counsel, acting on a contingency, to encourage the filing or pursuit of meritless claims, as they will not be paid unless their clients prevail.[7]

The Lead Paint Companies' third concern – that contingency counsel's profit motive will drive them to maximize recovery regardless of the public interest – is also insubstantial. Under the fee contracts entered into in this case, the public attorneys control the decision-making, including all decisions about settlement. (Pet. Appx. pp. 230-231, ¶¶ 1.B-1.C; p. 416, ¶ 3.D; pp. 434-435, ¶¶ 1.B-1.C.) Even without this express contractual language, as a matter of ethics and agency law the client—and not the attorney—must make all settlement decisions. (*Blanton v. Womencare, Inc.* (1991) 38 Cal.3d 396, 404.) If the public entities involved in this case choose, in the public interest, to resolve it for something less than the maximum award that conceivably could be obtained after trial, outside counsel are bound, contractually and ethically, to accept that decision.

Finally, the Lead Paint Companies apparently concede that the Public Entities are free to hire private counsel on an hourly basis to litigate this case. Even assuming this were financially possible, doing so would simply create a different set of financial interests for the private attorneys. While contingency fee counsel will profit personally from a successful

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[7] Sherwin-Williams quotes one academic who finds it "hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without compensation." (See Sherwin-Williams AOB at 21, fn.17.) This observation is exactly backwards. If contingency fee lawyers conclude that a case lacks merit, they have every incentive to counsel their clients to drop the matter, to avoid putting further time into a "dry hole." In contrast, lawyers who are paid by the hour *never* have a financial incentive to drop or even settle a case, as doing so will deprive them of their continued hourly fees, but courts do not assume that this inherent conflict renders hourly attorneys incapable of providing objective advice to their clients regarding settlement.

outcome, hourly attorneys would profit personally from a *prolonged* prosecution of the case. Indeed, hourly counsel have a much greater incentive to raise nonmeritorious claims and defenses or to conduct unnecessary discovery than do contingent fee counsel.[8] As the *Sherwin-Williams* court noted, "in either [hourly or contingent] fee structure, there is hypothetically a conflict of interest built in." (Plaintiffs' RFJN, Ex. 2 at 44:19-20.) Of course, courts presume that hourly counsel will abide by their ethical obligations to their clients, and not needlessly churn files for their own personal gain. Counsel working on a contingent fee basis are entitled to the same presumption of ethical behavior.

This presumption is fully borne out by the record in this case, which contradicts the notion that contingency fee counsel are engaged in some sort of shake down of the Lead Paint Companies. Indeed, if the private attorneys here were looking for a "get rich quick" scheme, they have chosen a phenomenally bad vehicle. This case has been pending for almost a decade now. Unlike their opponents on the defense side, who presumably have been collecting hourly fees, private counsel representing the Public Entities have not received a dime in compensation for their efforts.[9] In light

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[8] The ethical implications of the legal profession's reliance on the billable hour has been the subject of growing concern. (*See generally* ABA Comm'n on Billable Hours Report 5 (2002) [available at http://www.abanet.org/ careercounsel/billable.html]; Scott Turow, *The Billable Hour Must Die*, A.B.A. J., Aug. 2007, http://www.abajournal.com/ magazine/the_billable_hour_must_die/print; see also Billable Hour Likely To Face More Scrutiny In A Lean Economy, San Francisco Daily Journal, p. 1 [11/03/08] [quoting then California State Bar President Jeff Bleich's observation that hourly billing "creates a wedge between an attorney's interest and a client's interest."].)

[9] One of the contingency fee firms in this case (Motley Rice) also served as contingency fee counsel for the State of Rhode Island in the trial of similar claims against the lead paint industry. After two lengthy trials, a Rhode Island jury found three of the Lead Paint Companies responsible for creating a public nuisance in that state. However, that result was overturned on appeal. (*Rhode Island*, *supra*, 951 A.2d 428.) Outside counsel in this case face the same risk: after many years of litigation, they may receive nothing.

of this track record, it seems obvious that private counsel are not motivated solely by the prospect of financial gain. Rather, they have dedicated themselves to righting what they perceive to be a serious social injustice perpetrated by the Lead Paint Companies. The Lead Paint Companies disagree with this view, of course, but they should not be so cynical as to reject the possibility that it is held in good faith.

In any event, the Lead Paint Companies have presented no evidence of unethical behavior in this case. They also concede that "no known corruption exists in this case in the governments' award of contracts." (Sherwin-Williams AOB at p. 28, fn.23.) The record in this case is therefore insufficient to demonstrate any actual or structural conflict of interest sufficient to support disqualification:

> We allow many arrangements that tolerate some risk because they also provide social or other benefits and because we are prepared to believe that lawyers take their ethical responsibilities seriously. The question, therefore, is not whether a lawyer in a particular circumstance "may" or "might" or "could" be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically.

(*People v. Christian* (1996) 41 Cal. App. 4th 986, 995, fn.4 [citations omitted]; see also *Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 Cal. App. 3d 1432, 1444.) That standard for imposing a categorical bar simply is not satisfied here.

In sum, Defendants' unsupported claims about the risks of unethical conduct must be rejected. The presumption here must be that contingency counsel are acting ethically and in the public interest to abate a nuisance that harms thousands of children each year, and that the public attorneys who are in control of this case are also faithfully discharging their duties.

V. COURTS CAN ENSURE THAT PUBLIC ATTORNEYS RETAIN ADEQUATE CONTROL OVER PRIVATE COUNSEL IN PUBLIC NUISANCE LITIGATION.

The Lead Paint Companies next argue that a failure to extend *Clancy* to preclude all co-counsel arrangements with contingency fee counsel will inevitably lead courts into a morass. They conjure a parade of horribles that includes intrusive discovery into governmental decision making, automatic waiver of the attorney-client and work-product privilege, and constant second-guessing of governmental actions by the courts. But none of the cases that refused to extend *Clancy* to co-counsel arrangements involved such inquiries. To the contrary, most courts have limited their review to ensuring that the terms of the challenged contingency fee contracts do not excessively delegate public powers to private attorneys. Some courts also have considered whether public attorneys were exercising adequate control during court proceedings. No court has found necessary the intrusive inquiries proposed by Defendants.

Nor is any such inquiry warranted, until and unless there is specific evidence of misconduct or excessive delegation of public power. In light of the presumptions that attorneys will abide by their ethical obligations and that public officials will faithfully discharge their duties, the burden should be on the party seeking to rebut these presumptions to come forward with sufficient evidence to establish a prima facie case of misconduct. Such evidence would need to reveal specific instances of actual malfeasance, rather than a generalized concern that contingency fee counsel might be tempted to overstep their bounds. If, and only if, a party establishes a prima facie case of actual misconduct, then the burden to demonstrate that

public attorneys have maintained appropriate control could shift to the government.[10]

Administering such a rule has not been and will not become unduly burdensome for the courts or the parties involved in public nuisance litigation. Indeed, evaluating whether attorneys are behaving ethically based on specific allegations of misconduct falls within the core competency of the court system. In analogous areas – such as in evaluating alleged conflicts of interests – courts have been able to monitor the behavior of counsel without requiring wholesale waiver of the attorney client or work product privileges. There is every reason to believe that this Court can devise workable standards in this area.

A. This Court Can Devise Workable Standards To Ensure Public Control Over Public Nuisance Litigation.

Clancy and the subsequent authorities discussed above suggest two necessary conditions for valid contingency fee agreements in public nuisance cases. Both are easily subject to court review and relatively unintrusive.

First, the contracts themselves must provide that public attorneys shall control all significant decision-making in the case. As the Rhode Island Supreme Court described this requirement, the contingency fee agreements must provide that public attorneys "will retain complete control

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[10] The Lead Paint Companies have made no such showing here. Accordingly, as the Court of Appeal noted, this record does not present "an appropriate vehicle" for exploring the degree of control that public attorneys must retain over public nuisance actions. (*Santa Clara*, *supra*, 161 Cal.App.4th at 1152, fn.10.) Such inquiries should await "a case in which there [are] factual disputes regarding the nature of the fee agreement or the relationship between private counsel and a public entity." (*Id.*) Disputes of this nature could arise on remand here. If the Lead Paint Companies develop evidence that "private attorneys are improperly exercising control over this action" they will "no doubt" bring another motion to disqualify outside counsel. (*Id.* at 1155, fn.11.)

over the course and conduct of the case" and have "a veto power over any decisions made by outside counsel." (*Rhode Island*, *supra*, 951 A.2d at 477.)

Second, in addition to having a contractual right to control the case, public attorneys must appear as counsel of record and exercise actual control over the litigation. As the Rhode Island Supreme Court described this requirement, senior public attorneys "must be personally involved in all stages of the litigation." (*Id.*) By serving as lead counsel, public attorneys will exercise their contractual right (and their statutory duty pursuant to Code Civ. Proc. § 731) to control the case in deed as well as in name. This second requirement, which was violated in *Clancy*, is satisfied here.[11]

After these two necessary conditions are met, the question becomes what standard courts should use to evaluate claims that public power nevertheless is being excessively delegated into private hands. One important issue, raised by the Superior Court, is identifying the types of decisions that must be made by public attorneys. Sherwin-Williams suggests that public attorneys should approve in advance every question asked by a private attorney at a deposition, or every document produced or withheld during discovery. (Sherwin-Williams AOB at 35.) Surely that cannot be the standard. If they could afford it, the Public Entities could hire private counsel on an hourly basis to take depositions and respond to discovery in this action. Public attorneys would not be expected to micromanage every action taken by these hourly attorneys, despite the fact

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[11] By serving as lead counsel, public attorneys also will satisfy the corollary criteria described by the Rhode Island Supreme Court that public attorneys must also "*appear* to the citizenry" to be exercising adequate control over the case. (*Id.*) This criterion will be met even though, as discussed above, California law does not allow for the disqualification of counsel based on the mere appearance of impropriety. (See section IV.A above.)

that hourly attorneys have a direct financial incentive to generate more hourly fees by prolonging depositions and initiating discovery disputes. Concerns about such abuses are more properly addressed by discovery motions than by disqualification motions.

More fundamentally, the suggestion that public attorneys must make every judgment call in a public nuisance case misses the point of *Clancy*. *Clancy* did not express any concern over the prospect of mundane misconduct during day-to-day litigation. Rather, the concern expressed in *Clancy* was over the improper delegation of *sovereign power* into the hands of an unsupervised private attorney acting on a contingency fee, who might misuse this power for his own benefit. When applied to a co-counsel arrangement, this rationale suggests that public attorneys must retain control over the key decisions that involve the exercise of sovereign power. These decisions include whether to file a public nuisance case, which defendants to name, which causes of actions to assert, what relief to seek, and whether to settle or dismiss a case. They also would include any decisions about enlisting the aid of other sovereign powers, such as the apparatus of the criminal justice system.

Lawyers making day-to-day decisions in civil litigation – such as what questions to ask at a deposition, or what documents to produce during discovery – are not exercising sovereign powers. Instead, such decisions involve the exercise of professional judgment by the lawyer engaged in the task at hand. But even as to these types of decisions, the public attorneys involved in this case, in their role as lead counsel, retain the ultimate say and "veto power" over decisions made by private counsel.

When the Rhode Island Supreme Court considered the question of what types of decisions must be made by public attorneys, it concluded that public attorneys must remain in "total control of all *critical* decision-

making." (*Rhode Island*, *supra*, 951 A.2d at 475 [emphasis added].) At the same time, the *Rhode Island* court recognized that "decisions of the 'de minimus' or ministerial variety" need to be made during litigation, and stated that "pragmatism rather than rigidity" should govern who would make such decisions. (*Id.* at 476, fn.51.)

The Superior Court in this case also questioned how a court should determine whether public attorneys have exercised the requisite level of control. Given the presumptions that attorneys behave ethically and that public attorneys faithfully discharge their duties, the party seeking to establish excessive delegation of public authority should initially be required to demonstrate a prima facie case of misconduct based on specific evidence. This evidence could take many forms. For example, a defendant could introduce evidence of impermissible contract terms, and ask the court to void those terms as against public policy. Or a defendant could introduce declarations detailing alleged misconduct based on its own observations. For example, if a public entity rejected a settlement proposal on the grounds that the outcome was unacceptable to its private counsel, a defendant could bring that fact to the court's attention. Similarly, a defendant might claim that public attorneys were playing no role in key aspects of the case, such as settlement negotiations.

Once a defendant established a prima facie case of excessive delegation of public authority, the public entity would have the opportunity to rebut that evidence. In doing so, the public entity typically would submit its own declarations, including declarations from its public and private attorneys, to demonstrate that adequate control had been maintained. In most instances, these declarations would focus on foundational facts concerning control (e.g., which attorneys took which actions and made which decisions) and would not delve into areas protected by the attorney-

client or work-product privileges (e.g., the legal reasoning supporting the decisions that were made). In rare instances, a public entity might request the opportunity to submit privileged information for *in camera* review if such a showing seemed necessary to establish control. But it would be up to the public entity to determine whether to request the court to consider in camera information, just as it is up to the public entity to decide whether to waive any privilege. While a refusal to submit such information might provoke disqualification in some rare case, that is a far cry from Defendants' assertion that all privileges would need to be pierced any time any defendant raised the specter of excessive delegation of public control.

By adopting such procedures, rather than the bright-line rule advocated by the Lead Paint Companies, courts can effectively guard against excessive delegation of public authority. These procedures also will allow public entities to bring important public nuisance cases with appropriate assistance from contingency fee counsel, and give both public and private attorneys a strong incentive to ensure that the public attorneys retain sufficient control over the case. Such procedures have been effective in prior cases and in analogous areas, so there is no reason to adopt Defendants' proposal of throwing the baby out with the bathwater.

B. Courts Have Allowed Contingency Fee Counsel To Assist Public Attorneys Based On Objective Indicia Of Control.

Defendants' argument that allowing co-counsel arrangements would be unmanageable ignores the realities of past cases. All of the post-*Clancy* decisions discussed above allowed contingency fee counsel to assist public attorneys on appropriate terms, without engaging in intrusive inquiries. When confronted with challenges to co-counsel arrangements, courts typically have limited their inquiries to examining the terms of the

contingent fee agreements. Some courts also have considered declarations from counsel demonstrating the degree of control exercised by public attorneys, or their own observations of the public attorneys' participation in the case. In *Clancy* itself, Corona responded to written discovery on this issue. (See Plaintiffs' RFJN, Ex. 1.) But no court allowed defense counsel to depose their adversaries and delve into attorney work product in the guise of exploring the degree of control exercised by the public attorneys. Courts can and do guard against excessive delegation of public authority without allowing such intrusive inquiries.

In determining whether a contingency fee arrangement is an excessive delegation of public power, most courts start, naturally enough, with the express terms of the challenged agreements. Contracts that reserve control to public entities have been approved as appropriate on their face. (See, e.g., *Philip Morris, Inc. v. Glendening*, *supra*, 709 A.2d at 1243 [approving contract that stated "'[the attorney general] shall have the authority to control all aspects of [outside counsel's] handling of the litigation'"].)

On the other hand, courts have held that contractual provisions that purported to vest private attorneys with control over public nuisance cases are void as against public policy. The trial court in Rhode Island invalidated certain contractual provisions on this basis. (*Rhode Island v. Lead Industries Assn.* 2003 R.I. Super. LEXIS 109, *5-8.) Similarly, the district court in Ohio struck down contractual provisions that purported to give private attorneys veto power over settlement decisions in those cases. (*The Sherwin-Williams Co. v. City of Columbus, Ohio*, *supra*, 2007 U.S. Dist. LEXIS 51945 [discussing problematic contractual provisions].) In both instances, the courts ordered that the contractual provisions in question be amended or reformed, then allowed the public entities to be represented

by contingency fee counsel under the reformed contracts. (*Rhode Island*, *supra*, 2003 R.I. Super. LEXIS 109 at *8-9; *Sherwin-Williams, supra,* 2007 U.S. Dist. LEXIS 51945 at *7-12.)[12]

Courts that have gone beyond the terms of the fee contract generally have done so based on declarations submitted by counsel describing the control exercised by public attorneys in the case. For example, the *Grass Valley* court approved the contingency fee arrangement there based on the undisputed affidavit of the City Attorney that set forth the nature of the co-counsel relationship, and the fact that the City Attorney retained "ultimate decision-making authority in the case." (*Grass Valley*, *supra*, 2007 U.S. Dist. LEXIS 89187 at *3.) Similarly, in *City and County of San Francisco v. Philip Morris, Inc* (1997) 957 F. Supp. 1130, Judge Jensen accepted at face value the public entities' explanation that their "respective government attorneys [were] retaining full control over the course of the litigation." (*Id.* at 1135.) The Court of Appeal in this case likewise relied on undisputed declarations from counsel of record that establish that this case has been controlled by public attorneys. (*Santa Clara*, *supra*, 161 Cal.App.4th at 1149-1150 & fns.6-8.) Such declarations could not have been submitted in *Clancy*, because the city attorney of Corona did not appear as counsel of record, and because Corona admitted in response to interrogatories that its city attorney had exercised no actual control over the case.

On the record before this Court, it is clear that all of the objective indicia of control have been met. The Public Entities' fee contracts do provide that public attorneys will retain complete control over this case. As lead counsel, public attorneys do have the authority to make all major

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[12] If this Court should have any concerns about any language in the Public Entities' contingency fee contracts that has not already been replaced or amended, it should adopt this same approach here.

decisions, as well as veto power over day-to-day decisions initially made by outside counsel. Senior public attorneys have been personally involved in and have exercised control over all phases of this litigation. Unless and until the Lead Paint Companies come forward with some actual evidence of excessive delegation of public authority, no further inquiry into these issues is necessary or appropriate.

C. This Court's Recent Observation That Bright-Line Rules Disqualifying Public Law Offices Impose Substantial Social Costs Applies Equally Here.

Courts frequently are called upon to monitor the behavior of counsel appearing before them. Courts have developed standards and procedures in analogous areas that have allowed them to discharge this responsibility without undue intrusion into the independence of counsel or the attorney-client relationship.

The approach this Court recently took in *In re Charlisse C.* (2008) 45 Cal.4th 145, is instructive. In that case, the Children's Law Center of Los Angeles ("CLC") sought to represent Charlisse in dependency proceedings. CLC is a publicly funded non-profit law office that frequently provides representation in dependency court. CLC is organized into a core unit and two conflict units. One of these conflict units sought to represent Charlisse in the dependency action, in which it was alleged that Charlisse had been neglected by her mother, Shadonna. However, CLC's core unit had represented Shadonna previously in related dependency proceedings. Finding a conflict, the trial court disqualified CLC. This Court reversed the disqualification order and remanded for further consideration.

In discussing the applicable standard on remand, this Court noted that "California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law

offices." (*Id.* at 162.) Even in cases involving simultaneous representation, there is no bright-line test for disqualification. Rather, rulings on disqualifications "must proceed according to the circumstances of each case, in light of several competing interests." (*Id.* at 161, fn.8, *quoting Castro v. Los Angeles County Bd. Of Supervisors* (1991) 232 Cal.App.3d 1432, 1441.) Among these competing interests are the higher costs that would be imposed on public entities by vicarious disqualification, since when "a public entity is involved, these higher costs raise the possibility that litigation decisions will be driven by financial considerations rather than by the public interest." (*Id.* at 163, quoting *City of Santa Barbara v. Superior Court (Stenson)* (2004) 122 Cal.App.4th 17, 24-25.)

On remand, the juvenile court was directed to engage in a factual inquiry to determine whether CLC had adequately protected Shadonna's confidences "through timely, appropriate, and effective screening measures and/or structural safeguards." (*Id.* at 165.) The burden is on the party seeking disqualification to establish the fact of the former representation and that the two matters are substantially related. (*Id.* at 166, fn.11.) Once that showing has been made, the burden shifts to the public law office to demonstrate the effectiveness of its screening measures. (*Id.* at 166.)

In adopting the standards and procedure announced in *In re Charlisse C.*, this Court wisely rejected a bright-line rule of vicarious disqualification for public law offices in all cases of related successive representations. Of course, such a bright-line rule would have had the same advantages as the bright-line rule advocated by the Lead Paint Companies here: it would be easy to administer, and it would remove concerns over appearances of impropriety in some situations. But as this Court recognized, bright-line rules impose burdens as well as benefits. The burden involved there consisted of higher costs that would be imposed on

public entities in administering the dependency courts if screening mechanisms were not allowed. The burden involved here is much more significant, as the bright-line rule advocated by the Lead Paint Companies would deprive public entities of their ability to protect public health by pursuing public nuisance claims in many complex cases.

VI. THE BALANCE OF INTERESTS HERE TIPS DECISIVELY IN FAVOR OF ALLOWING CONTINGENCY FEE COUNSEL TO ASSIST THE PUBLIC ENTITIES.

Because the Lead Paint Companies cannot demonstrate any due process violation or ethical infraction, the standard for deciding whether to disqualify contingency counsel from further proceedings here should be the same as in *Clancy*: whether, given the circumstances of this case, it is "necessary in the furtherance of justice" to disqualify private counsel. (*Clancy*, *supra*, 39 Cal.3d at 745.)

Applying this standard necessarily involves a weighing of competing interests. An example of such balancing took place in *People v. Municipal Court*, *supra*, 77 Cal.App.3d 294. That case arose out of a criminal prosecution for battery on a police officer. The criminal defendants moved to disqualify the Santa Monica City Attorney, who was prosecuting the criminal case, on the grounds that the city attorney was also defending Santa Monica and its police officers from a civil excessive force claim arising out of the same incident. (*Id.* at 297-298.) According to the criminal defendants, this dual role improperly biased the city attorney in the criminal prosecution. The trial court granted the motion. The Court of Appeal considered the disqualification "in light of the benefit that will result from it and its potential for harm." (*Id.* at 300.) Concluding that the "dislocation and increased expense of government is not justified by the speculative and minimal benefit to be obtained" through disqualification,

the Court of Appeal issued a writ and reinstated the city attorney as criminal prosecutor. (*Id.* at 301.)

This case likewise involves the weighing of competing interests. The interest on the Public Entities' side of the balance include: the Public Entities' "right to chosen counsel, [private attorney's] interest in representing [the Public Entities], the financial burden on [the Public Entities] to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion." (*People v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.)[13] On the other side of the balance rests the Lead Paint Companies' asserted interest in not being prejudiced by the participation of contingency counsel in this case. A consideration of these competing interests demonstrates that the balance overwhelmingly favors the Public Entities.

A. The Public Entities Have Compelling Interests In Retaining Contingency Fee Counsel To Assist Them.

The Public Entities brought this action to address an on-going public health threat that plagues their jurisdictions. The continuing, wide spread presence of lead paint causes continual injuries to the public, and especially to young children. California's Counties and Cities are on the front lines of the effort to combat this continuing nuisance, and are the medical and services providers of last resort for many of those who have been (and will continue to be) injured by lead paint.

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[13] Courts are mindful of the fact that "motions to disqualify counsel are especially prone to tactical abuse because disqualification imposes heavy burdens on both the clients and courts: clients are deprived of their chosen counsel, litigation costs inevitably increase and delays inevitably occur. As a result, these motions must be examined 'carefully to ensure that literalism does not deny the parties substantial justice.'" (*Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23, quoting *SpeeDee Oil Change*, *supra*, 20 Cal.4th at 1144.)

The Public Entities, along with their duly appointed or elected county counsel and city attorneys, have made legislative and executive judgments that bringing this action is in the public interest. They have also made legislative and executive judgments that they must retain private counsel, acting on a contingency fee basis, to have any realistic opportunity for success. Without such assistance, the Public Entities lack the resources to match up against the Lead Paint Companies and their counsel.

For the past nine years, private counsel have provided crucial assistance to the Public Entities. They have advanced a large amount of attorney time and out-of-pocket expenses necessarily involved in litigating this type of case. This commitment includes the time and expenses associated with very extensive discovery and the development of expert testimony on numerous topics, including the history of industry knowledge, the history of medical knowledge, the toxicity of lead, the association of lead paint with childhood lead poisoning, and effective measures to prevent exposure. Outside counsel have litigated cases raising similar issues for many years (as have defense counsel). It simply makes no sense for the Public Entities to attempt to replicate this expertise in-house, nor can they afford to pay for it on an hourly basis.

The Lead Paint Companies have argued that it is inconsistent for the Public Entities to claim that they need the assistance of outside counsel to litigate this matter, while at the same time asserting that public attorneys will retain control over the case. But there is no inconsistency. Committing the resources needed to control a case, as the Public Entities have done, requires a much lower outlay of public resources than would be required to litigate all aspects of this case on an hourly or in-house basis.

The Lead Paint Companies also assert that because the Plaintiffs are large public entities, they necessarily must have ample resources to hire as

many hourly attorneys as necessary to bring this case to trial. (Sherwin-Williams AOB at 46-47.) The short answer to this assertion is that it is for the Public Entities, rather than the Lead Paint Companies or even the courts, to determine how best to utilize their scarce local resources. Moreover, this assertion reveals that the Lead Paint Companies are out of touch with the realities of local government finance in California.

In an attempt to support their assertion, the Lead Paint Companies cite to the size of the Public Entities' budgets and the number of attorneys they employ. But the Lead Paint Companies are only looking at one side of the equation. The absolute sizes of the Public Entities' budgets are irrelevant, unless considered in relation to the enormous financial burdens that have increasingly fallen on California local governments after the passage of Propositions 13 and 218. While the Lead Paint Companies can ignore these realities, this Court has not done so. (See, e.g., *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1193-1195 [discussing "the stringent revenue, appropriations, and budget restraints under which all California government entities operate . . . ."].)

Nothing good has happened for public finances in the three years since this Court decided *Wells*. Many of the Public Entities had to scramble to close budget gaps of hundreds of millions of dollars for the current fiscal year. San Francisco, for example, cut programs by $350 million in order to balance its initial 2008-2009 budget. (See S.F. Budget Faces Larger Shortfall Than Thought, S.F. Chronicle, A-1 [November 4, 2008].) As a result of the recent turmoil in financial markets, and the deepening recession, San Francisco was forced to make an additional $118 million in mid-year budget cuts. (More Budget Cuts in S.F.'s Future, S.F. Chronicle, B-1 [December 15, 2008].) Projections for next year are worse. San Francisco is facing a shortfall of as much as $575 million out of a total

discretionary budget of $1.2 billion. (*Id.*) Santa Clara County is facing a $220 million deficit. (California Counties Brace for the Worst, S.F. Chronicle A-1 [December 22, 2008].) The State of California is facing a budget deficit of over $40 billion over the next 18 months. (*Id.*) Closing this deficit will almost certainly have further negative impacts on local governments. In light of these numbers, Defendants' assertion that the Public Entities can easily afford to bring this case without the assistance of contingency fee counsel is not credible.

Finally, California courts recognize the significant interest that all parties have in being represented by counsel of their choice. (See e.g., *Santa Barbara*, *supra*, 122 Cal.App.4th at 23.) But in this case, an even greater interest is involved. Without the continued assistance of private attorneys acting on a contingency fee basis, the Public Entities will be deprived of any meaningful opportunity to present the merits of their case. Contingency fee contracts can somewhat equalize the imbalance in resources between litigants, thus furthering "the important public policy of ensuring that civil disputes are resolved on their merits" rather than by tactical maneuvers or on procedural grounds. (*Rapp v. Golden Eagle Ins. Co.*, (1994) 24 Cal.App.4th 1167, 1173.) That public policy is at its strongest in a case such as this one, brought by government entities to protect the health of their citizens.

B. The Lead Paint Companies Have No Legitimate Interest In Dictating The Terms Under Which The Public Entities Retain Private Counsel.

The interests of the Public Entities in being represented by outside counsel on a contingency fee basis are both immediate and compelling. In contrast, the Lead Paint Companies have failed to demonstrate any prejudice from contingency fee counsel's participation, since public

attorneys remain in control of this case. Private counsel have assisted the public attorneys for nine years now, and the Lead Paint Companies do not point to one act during this time that demonstrates bias, actual prejudice, or excessive delegation of public power.

The only immediate interest of the Lead Paint Companies is in derailing this litigation by eliminating the Public Entities' outside counsel, to avoid answering on the merits public nuisance claims that the Court of Appeal has already held are well pled. (*Santa Clara*, *supra*, 137 Cal.App.4th at 306.) But that is not an interest that has any legitimacy, regardless of whether the issue is analyzed as a question of due process, ethics, or of the inherent power of the courts to regulate attorneys as necessary in the furtherance of justice. If the Public Entities had the resources to hire an army of hourly attorneys, as the Lead Paint Companies suggest that they should, there is no reason to expect that this case would be litigated any less zealously. The Lead Paint Companies are not entitled to under-zealous government enforcement due to lack of resources. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 800.) Nor are they entitled to gain a tactical advantage by restricting the government's selection of counsel. (*People ex rel. Dept. of Fish and Game v. Attransco, Inc.* (1996) 50 Cal.App.4th 1926, 1936-1938.)

The Lead Paint Companies argue that they will be subject to overzealous prosecution due to the incentive that contingency fee counsel have to prevail in this matter. A number of checks exist against any such problems, including: the private attorneys' ethical duties to act in the best interests of their clients, rather than themselves; the public attorneys' power to control this litigation; defense counsel's proven ability to zealously represent their clients; and the power of the courts to prevent any

overreaching. In light of these safeguards, any injury to the Lead Paint Companies' legitimate interest is remote and entirely speculative.

The Lead Paint Companies engaged in a decades-long course of conduct that created a wide-spread public nuisance throughout California. Theoretically, they could be called to account for their conduct in a number of different civil suits, including being named as defendants in class actions or in public nuisances suits brought by private parties who have been specially injured. (See 13 *Witkin, Summary of California Law (10th)*, Equity, § 133.) The plaintiffs in such suits would almost certainly be represented by private counsel engaged on a contingency fee basis. The Lead Paint Companies suffer no more prejudice responding to this suit than they would responding to such private suits. As a matter of public policy, it makes no sense to deprive only Public Entities of the ability to utilize contingency fee counsel to bring such cases.

Finally, the Lead Paint Companies face no risk of any pre-hearing deprivation. Unlike criminal prosecutors wielding "a terrible array of coercive methods" (*Young*, *supra*, 481 U.S. at 811 [plurality opinion]), neither the public attorneys nor their outside counsel here have the ability to use the machinery of the criminal justice system to cause any immediate injury to the Lead Paint Companies. Before the Lead Paint Companies can be deprived of any property, the Public Entities must prove up their case in a civil trial before an unbiased judge or jury. This process serves as the ultimate check on any overzealous litigation. After all, in the adversarial system, "the basic guardians of the defendant's rights at trial are his attorneys and the court, not the prosecutor." (*Vasquez*, *supra*, 39 Cal.4th at 69.)

CONCLUSION

The Lead Paint Companies' argument that *Clancy* adopted an absolute rule barring contingency fee arrangements in all public nuisance cases is not supported by *Clancy* itself, nor by any other precedent. Rather, both *Clancy* and a series of decision since reflect a principled distinction between impermissible delegation of sovereign power to contingency fee counsel and permissible retention of contingent fee counsel, under the control and supervision of neutral public attorneys, to assist in public nuisance litigation. Defendants have not established that the participation of contingency fee counsel in this case creates any due process violation, ethical conflict, or substantial prejudice to them. On the other hand,

disqualifying the Public Entities' counsel of choice will deprive them of any meaningful opportunity to present their claims on the merits. For these reasons, the Public Entities respectfully request that this Court affirm the ruling of the Court of Appeal.

Dated: January 20 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 17,916 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 20, 2009.

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PROOF OF SERVICE

I, MARTINA HASSETT, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On January 21, 2009, I served the following document(s):

PUBLIC ENTITIES ANSWERING BRIEF ON THE MERITS

on the following persons at the locations specified:

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

Executed January 21, 2009, at San Francisco, California.

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