S 163681

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Plaintiffs/Petitioner,

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

After a Decision By the Court of Appeal
Sixth Appellate District
Case Number H031540

REPLY BRIEF ON THE MERITS

ARNOLD & PORTER LLP
Ronald C. Redcay (No. 67236)
Ronald.Redcay@aporter.com
Sean Morris (No. 200368)
Sean.Morris@aporter.com
John R. Lawless (No. 223561)
John.Lawless@aporter.com
Kristen L. Roberts (No. 246433)
Kristen.Roberts@aporter.com
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199

ARNOLD & PORTER LLP
Philip H. Curtis*
Philip.Curtis@aporter.com
William H. Voth*
William.Voth@aporter.com
399 Park Avenue
New York, New York 10022
Telephone: (212) 715-1000
Facsimile: (213) 715-1399

Attorneys for defendant
Atlantic Richfield Company

[Names and addresses of counsel for other defendants/respondents appear on inside cover and on signature pages]

S 163681

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Plaintiffs/Petitioner,

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

After a Decision By the Court of Appeal
Sixth Appellate District
Case Number H031540

REPLY BRIEF ON THE MERITS

ARNOLD & PORTER LLP
Ronald C. Redcay (No. 67236)
Ronald.Redcay@aporter.com
Sean Morris (No. 200368)
Sean.Morris@aporter.com
John R. Lawless (No. 223561)
John.Lawless@aporter.com
Kristen L. Roberts (No. 246433)
Kristen.Roberts@aporter.com
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199

ARNOLD & PORTER LLP
Philip H. Curtis*
Philip.Curtis@aporter.com
William H. Voth*
William.Voth@aporter.com
399 Park Avenue
New York, New York 10022
Telephone: (212) 715-1000
Facsimile: (213) 715-1399

Attorneys for defendant
Atlantic Richfield Company

[Names and addresses of counsel for other defendants/respondents appear on inside cover and on signature pages]

ORRICK, HERRINGTON &
SUTCLIFFE LLP
Richard W. Mark*
Elyse D. Echtman*
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

FILICE BROWN EASSA &
McLEOD LLP
Peter A. Strotz (S.B. #129904)
William E. Steimle (S.B. #203426)
Daniel J. Nichols (S.B. #238367)
Lake Merritt Plaza
1999 Harrison Street, 18th Floor
Oakland, California 94612-0850
(510) 444-3131

Attorneys for defendant American
Cyanamid Company

GREVE, CLIFFORD, WENGEL
& PARAS, LLP
Lawrence A. Wengel (S.B. #64708)
Bradley W. Kragel (S.B. #143065)
2870 Gateway Oaks Drive, Suite 210
Sacramento, California 95833
(916) 443-2011

LAW OFFICE OF ALLEN RUBY
Allen J. Ruby (S.B. #47109)
125 South Market Street,
Suite 1001
San Jose, California 95113-2285
(408) 998-8503

MCGRATH, NORTH, MULLIN
& KRATZ, P.C.
James P. Fitzgerald*
James J. Frost*
1601 Dodge Street, Suite 3700
Omaha, Nebraska 68102
(402) 341-3070

Attorneys for defendant ConAgra
Grocery Products Company

MCGUIRE WOODS LLP
Steven R. Williams*
Collin J. Hite*
One James Center, 901 East Cary St.
Richmond, Virginia 23219-4030
(804) 775-1000

GLYNN & FINLEY, LLP
Clement L. Glynn (S.B. #57117)
Patricia L. Bonheyo (S.B. #194155)
100 Pringle Avenue, Suite 500
Walnut Creek, California 94596
(925) 210-2800

Attorneys for defendant E.I. du
Pont de Nemours and Company

MCMANIS FAULKNER
James McManis (S.B. #40958)
William Faulkner (S.B. #83385)
Matthew Schechter (S.B. #212003)
50 West San Fernando Street,
10th Floor
San Jose, California 95113
(408) 279-8700

BARTLIT, BECK, HERMAN,
PALENCHAR & SCOTT LLP
Donald E. Scott*
1899 Wynkoop Street, Suite 800
Denver, Colorado 80202
(303) 592-3100

Timothy Hardy*
Unit 8B
300 West 11th Avenue
Denver, Colorado 80203
(303) 733-2174

Attorneys for defendant NL
Industries, Inc.

* Admitted or seeking
admission *pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

INTRODUCTION

Plaintiffs' Answering Brief fails because the three arguments it proffers to justify the prosecution by contingent fee attorneys in this case do not address, much less overcome, the fundamental principles upon which the rule of absolute neutrality at issue in this case is based. The core such principle goes to the very nature of government exercising its sovereign power to prosecute its own citizens. As this Court has stated, a government prosecuting its citizen is "not . . . any ordinary party to a controversy, but . . . a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746 (*Clancy*)[1].) This core principle extends to certain civil cases and applies when the sovereign government is prosecuting a public nuisance claim. (*Id.* at 748.)

As this Court also has recognized, the prosecuting lawyer's requirement of absolute neutrality derives from two aspects of the sovereign nature of a government prosecution. First, that as a representative of the sovereign, the prosecuting attorney can act justly only if the attorney acts with the impartiality required of those who govern. And, the attorney's impartiality is also necessary because the attorney has available the vast power of the government, a power that must not be abused. These twin requirements of justness and

[1] Citing and quoting *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266, and *Berger v. United States* (1935) 295 U.S. 78, 88.

impartiality are "essential to the proper function of the judicial process as a whole." (*Clancy*, *supra*, 39 Cal.3d at p.746.) Each of Plaintiffs' three arguments diminishes the rule of absolute neutrality and the principles on which it is based.

First, Plaintiffs argue that the requirements of justness and impartiality do not categorically preclude the sovereign from compensating its prosecuting attorneys contingent upon winning the case. Rather, Plaintiffs contend that the government's giving the prosecuting attorney a direct financial reward for winning is just like other various circumstances, such as acquaintanceship or the chance for fame, that can give government attorneys an interest in successful prosecution. (Answering Brief, pp. 19-24.) Plaintiffs therefore urge that the courts should examine the particular circumstances of a case to determine whether the requisite neutrality exists. Indeed, they go so far as to contend that the defendant affirmatively must show that the prosecutor, by reason of the contingent fee, has engaged in an ethical violation or other misconduct that has deprived the defendant of a fair trial. (*Ibid.*) Plaintiffs are wrong.

Simply put, a direct financial interest in winning is different. Money bestowed by the sovereign on its attorneys as a reward for successful prosecution always violates neutrality. In such instances, both sovereign and attorney lack neutrality. Most importantly, the very act **by the government** of bestowing a financial incentive for winning in establishing its relationship with its attorneys is a non-neutral act intrinsic to the engagement. No "surrounding circumstance" can take away the appearance or reality of that bias. The contingent attorney's one-sided opportunity for financial reward infects the attorney's every

act and the public's perception of those acts. That is certainly the case here, where the government has granted contingent fee counsel a 17% interest in any recovery, and the "out of pocket" litigation costs are advanced by the outside counsel and thus recoverable only if the prosecution is successful. (*E.g.*, Petitioners' Appx., p. 232.)

Second, Plaintiffs contend that this public nuisance action, unlike the one in *Clancy,* is exempt from the rule of sovereign neutrality because this case does not involve direct threats of "criminal liability and significant First Amendments concerns." (Answering Brief, p. 16.) Plaintiffs' attempt narrowly to confine *Clancy* to its facts fails, because *Clancy* held that all public nuisance actions fall into the "class of civil actions that demands the representative of the government to be absolutely neutral." (*Clancy*, *supra*, 39 Cal.3d at p. 748.) This is true for many reasons indentified in *Clancy*. Most importantly, a public nuisance prosecution "involves a delicate weighing of values" such that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Id.* at p. 749.) This is true here, just as it was in *Clancy*.

Third, Plaintiffs contend that neutrality is not violated if the government bestows a financial interest only on "subordinate" prosecuting attorneys but not on their "supervisors." (Answering Brief, pp. 12-16.) Again, this argument does not square with the underlying premise that the responsibility for absolute neutrality "follows the job: if [the attorney] is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, *supra*, 39 Cal.3d

at p. 747.) The contingent fee attorneys here certainly are performing tasks on behalf of and in the name of the governments. They must be, and appear to be, absolutely neutral in doing so. Plaintiffs' "subordinate lawyer" exception also would be unworkable, impossible to monitor or enforce, and would erode public confidence in the legal system.

I. THE GOVERNMENT CANNOT GRANT ITS COUNSEL A PROFIT INTEREST IN THE USE OF SOVEREIGN POWER TO PROSECUTE A PUBLIC NUISANCE ACTION

A. The Prohibition Against The Government Granting Contingent Fees In Public Nuisance Prosecutions Is Absolute And Does Not Depend Upon The Particular Facts Of The Case

Plaintiffs argue that contingent fees are not barred absolutely in cases brought by the government in its sovereign capacity, because such arrangements can be deemed improper only if a defendant proves -- based on the facts of a particular case -- that the contingent fee agreement at issue makes it unlikely that the defendant will receive a fair trial. (Answering Brief, pp. 19-24 [citing Penal Code § 1424 and cases decided thereunder]; see also *id.* at p. 31 [the law does not extend the bar against "a direct financial benefit" to "public attorneys, even in criminal matters"].) Alternatively, Plaintiffs argue that a defendant must establish that the contingent fee attorney has engaged in an ethical violation. (*Id.* at pp. 34-41). Neither argument is correct. When the government grants its attorney a contingent fee interest in a public nuisance action, that arrangement is "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750.) Nothing further is required.

To maintain the public trust in government and the rule of law, it is imperative that litigants in a case and the society at large believe that the government is exercising its sovereign powers in a neutral manner. (*Clancy, supra*, 39 Cal.3d at p. 746.) This trust in government cannot be maintained if the government confers upon its attorneys a direct financial interest at odds with their official duties. (*Ibid.*) By offering a contingent fee, the government provides an undeniable direct financial incentive, personal to the attorney, to obtain a particular outcome of the litigation. Thus, the government's agreement with its attorney creates an inherent and ever-present temptation to the attorney to act in the attorney's own personal interest, rather than in the "interest of justice." As this Court put it in *Clancy*, it was "obvious[]" that the government's grant of a contingent fee interest gave the attorney "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (*Id.* at pp. 747-48.)

The direct, personal incentive created by a contingent fee arrangement may not actually cause a contingent fee attorney to engage in improper or unethical conduct. The integrity or ethics of any particular lawyer, however, is not the issue. It is the undeniable doubt and temptation to prejudice caused by the very terms of contingent fee agreements that renders them categorically prohibited. (*Clancy, supra*, 39 Cal.3d at p. 749 ["[a]ny financial arrangement that would tempt the government attorney to tip the scale [in such cases] cannot be tolerated"].) There is no need for a defendant to proffer "specific evidence of misconduct." (Answering Brief, p. 3.)

Contingent fee arrangements thus are fundamentally different from other types of potential biases that this Court has addressed in other contexts, such as a potential conflict of interest arising where the government's prosecuting attorney is an acquaintance of a party involved in a crime or where there is a chance of enhanced fame or fortune for the prosecutor from another source. (*E.g.*, *People v. Vasquez* (2006) 39 Cal.4th 47 [assistant district attorney in the same office with an employee whose son was being prosecuted]; *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706 [prosecutor had written a novel that described a case similar to that being tried]; *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [prosecutor acted as consultant on movie based on crimes at issue].)

Most fundamentally, these types of conflicts of interest are not created by the government when establishing the relationship with its attorneys. Moreover, the impact of such situations can vary. Only the details of a particular scenario can reveal the prejudice of the potential conflict. How well did the attorney know the party in the case? What is the exact nature of the potential increase in reputation or fame? Under what circumstances might the prosecutor receive additional financial gains in the future outside the compensation relationship with the government? It is only by answering these types of questions that the potential conflict can be evaluated.

In contrast, there are no additional questions that need be answered to evaluate the effect of the government expressing its bias by granting its attorneys a contingent fee interest. The direct, personal financial stake in the outcome of a case created when the

government bestows a contingent fee interest on its attorneys is apparent on its face.[2]

Plaintiffs' argument that the enactment of Penal Code section 1424 requires a case-by-case examination of the effect of contingent fee agreements is not correct. Section 1424 was enacted **prior** to *Clancy*. Indeed, in *Clancy*, the Court cited to and relied upon its own holding in *People v. Conner* (1983) 34 Cal.3d 141, which examined Section 1424. (See *Clancy*, *supra*, 39 Cal. 3d at p. 747; *Conner*, *supra*, 34 Cal. 3d at p. 148.) After careful consideration, this Court established in *Clancy* a bright-line rule prohibiting contingent fee agreements in government prosecutions, including public nuisance actions, for a reason. Such agreements inherently violate the standard of justness and neutrality required of the government when it acts in its sovereign capacity.[3]

---

[2] Indeed, this Court has repeatedly confirmed the distinction between the inherent impropriety of direct pecuniary interests and other types of bias that need only disqualify an attorney if the underlying facts warranted it. (*Vasquez*, *supra*, 39 Cal.4th at pp. 63-64 [while it is impossible for anyone to "completely avoid personal influences on their decisions," "pecuniary conflicts of interest on a judge's or prosecutor's part pose a constitutionally more significant threat to a fair trial . . ."]; *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 ["Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny"].)

[3] The government is not precluded from entering into contingent fee agreements when pursuing proprietary claims, however, as this Court also noted in *Clancy*. (*Clancy*, *supra*, 39 Cal.3d at p. 748 [citing *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580 (case in which city pursued its oil rights)].) A proprietary claim is one in which the government, like any other party, sues to recover for property damage or to enforce a contract right. Plaintiffs' citation to cases involving the tobacco litigation thus is inapposite. Contrary to Plaintiffs' arguments, those actions involved the government bringing tort claims to recover money damages and restitution. (See *City and County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F.Supp. 1130, 1135 [the lawsuit, "which is basically a fraud action,

(Footnote Cont'd on Following Page)

B. The Absolute Prohibition Against Contingent Fee Agreements Is Not Limited To Particular Types Of Public Nuisance Actions

Plaintiffs also argue that only certain types of public nuisance actions, such as public nuisance actions involving direct threats of "criminal liability and significant First Amendment concerns," require that the government adhere to the neutrality principle. (Answering Brief, p. 16.) Because this public nuisance action does not involve, according to Plaintiffs, direct criminal threats and First Amendment concerns, Plaintiffs assert that the requirements of justness and impartiality underlying *Clancy* do not apply and that they are free to compensate any of their attorneys on a contingent fee basis.

The neutrality principle does not distinguish between different types of sovereign actions. Whenever the government acts in its sovereign, as opposed to proprietary, capacity, it acts in a special role that sets it apart from private litigants. It is this special role as sovereign that brings with it the requirement of neutrality so that trust in government can be maintained. Thus, the question, as the Court framed it in *Clancy*, is whether public nuisance actions fall into the "class of civil actions that demands the representative of the government to be absolutely neutral." (*Clancy*, *supra*, 39 Cal.3d at p. 748.) The answer, as the Court found in *Clancy* and as remains true

---

(Footnote Cont'd From Previous Page)

does not raise concerns analogous to those in the public nuisance or eminent domain contexts . . . . Plaintiffs' role in the suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers"]; *Philip Morris, Inc. v. Glendening* (Md. 1998) 709 A.2d 1230, 1231 [tort litigation in which government sought "the recovery of [medical] costs and other damages arising from the sale and/or distribution of tobacco products"].)

today, is that public nuisance actions constitute sovereign actions to which the absolute neutrality principle applies.

Public nuisance actions by the government under California Code of Civil Procedure Section 731 are "brought in the name of the people." Such actions, like criminal and eminent domain actions, require that the government remain committed to the objective of obtaining "impartial justice." (*Clancy*, *supra*, 39 Cal.3d at p. 749.) Pursuing the abatement of a public nuisance in the name of the people,

> involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes.
>
> * * *
>
> Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.

(*Ibid.*)

In this case, the Court of Appeal (in the prior appeal) reinstated the public nuisance cause of action after it had been dismissed on demurrer expressly because the government Plaintiffs were acting in their sovereign capacity "in the name of" and "acting as the People,"

as opposed to pursing a proprietary tort-type claim. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 305-06.) The Court of Appeal noted,

> the representative cause of action is a public nuisance action brought *on behalf of the People seeking abatement*. [The government plaintiffs] are *not* seeking *damages* for injury to *their* property or the cost of remediating *their* property.

(*Id.* at p. 309, emphasis in original; see also Court of Appeal Typed Opinion ("Typed Opinion"), p. 1 [Plaintiffs "are prosecuting a representative public nuisance action," which "seeks abatement as the sole remedy"].) Because the public nuisance claims were distinct from a tort action (involving a different remedy on behalf of the citizens), the Court of Appeal determined that the claims could proceed rather than being precluded as encroaching on "an arena that is otherwise fully encompassed by products liability law." (*County of Santa Clara*, *supra*, 137 Cal.App.4th at p. 313.)

Indeed, throughout this litigation, Plaintiffs themselves have emphasized the sovereign nature of the public nuisance claims here by invoking "the government's duty to do justice." (*E.g.* Petition for Writ of Mandate, p. 30.) As the sovereign representatives of the people, the government Plaintiffs must abide by the principle that they -- and the attorneys prosecuting this case --remain impartial. They cannot both gain the benefits of the sovereign nature of this claim and at the same time evade this rule by arguing that the issues in this

particular sovereign action are not important enough to trigger the need for neutrality.[4]

C. The Prohibition Against The Government's Granting A Contingent Fee Interest In Public Nuisance Actions Precludes Such Agreements With Any Attorney Representing The Government, And Should Not And Cannot Be Waived For "Subordinate" Lawyers

Plaintiffs also argue that, even if this case is subject to the *Clancy* requirements of justness and impartiality, they satisfy these requirements so long as at least one of their attorney representatives is not paid on a contingent basis and "controls" the other contingent fee attorney representatives. (Answering Brief, pp. 12-16.) This "subordinate" lawyer exception distorts the fundamental neutrality obligation, and is inconsistent with *Clancy*'s clear direction that the responsibility to remain neutral "follows the job" for anyone acting as an attorney on behalf of the government.[5]

---

[4] Defendants on this Reply note that another defendant, Millennium Holdings LLC (which filed for bankruptcy on January 6, 2009), has taken the position in order to try to obtain a stay through that bankruptcy proceeding that this lawsuit essentially is a private tort action. This is not correct. As discussed above and as described in *Clancy*, public nuisance actions are exercises of the government's sovereign power on behalf of the people, and are thus distinct from proprietary tort actions.

[5] Plaintiffs' contention that the public entity non-contingent fee attorneys in fact exercise "control" over their contingent fee counsel is not "undisputed," but, more importantly, is irrelevant. (*E.g.*, Answering Brief, p. 8, 12.) Moreover, an exception to the principles of *Clancy* for "subordinate" attorneys would be impossible to monitor or enforce. A court would need to consider how much control was being exercised and what decisions were being made by whom. And it would not be enough to consider those issues once at the outset of the case; a court would need to evaluate them throughout the litigation, to ensure that the proper level of "control" -- whatever that means -- was never relinquished. However, for the reasons discussed in the Opening Brief at 13-15, there simply is no way for the defendants to know, or the Court to determine, whether sufficient litigation "control" has been exercised.

In lawsuits brought in a sovereign capacity, the government acts through its attorneys. Thus, an attorney representing the government takes on the responsibility of maintaining the same level of neutrality required of the government itself:

> [A] prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly.

(*Clancy*, *supra*, 39 Cal.3d at p. 746.)

The responsibility of the government's attorney to remain neutral applies to every aspect of the representation. "In all his activities, his duties are conditioned by the fact that he 'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . .'" (*Greer*, *supra*, 19 Cal.3d at p. 266 [quoting *Berger*, *supra*, 295 U.S. at p. 88], emphasis added.)

In *Clancy*, the Court was very clear in stating when a government attorney must adhere to the neutrality standard.

> [A] lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if [the attorney] is

> performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards.

(*Clancy*, *supra*, 39 Cal.3d at p. 747, emphasis added.) It therefore does not matter if the government attorney is the elected district attorney, the most junior assistant district attorney, or outside counsel hired to "assist" the district attorney. Any attorney "performing tasks on behalf of and in the name of the government" has a responsibility to remain neutral. No matter how many other "impartial" attorneys also may be working on the matter, those other impartial attorneys cannot satisfy the neutrality obligation of another attorney who is also representing the government.[6]

There is no question that the government's contingent fee counsel in this action are "performing tasks on behalf of and in the name of the government." Plaintiffs' contingent fee counsel have been retained in this action expressly because of their "unique skills, ability, and experience" in this type of litigation and are referred to as

---

[6] Plaintiffs imply that the Ninth Circuit recently overturned the disqualification of contingent fee counsel because that counsel was merely assisting non-contingent fee counsel. This is not accurate. In *City of San Diego v. District Court (Kinder Morgan Energy Partners L.P.)* 2008 U.S. App. LEXIS 17325, the Ninth Circuit noted that the district court had disqualified contingent fee counsel even though the claims at issue in the underlying case involved private tort claims. The Ninth Circuit remanded the action reasoning that "*Clancy* does not bar the City from hiring private counsel pursuant to a contingent fee agreement to bring its private tort claims, i.e., its claims for trespass and negligence." (*Id.* at p. 3.) As noted above (see footnote 3), Defendants do not contend that the *Clancy* rule of absolute neutrality applies to tort claims brought by the government to recover damages.

"Special Assistant City Attorneys." (Petitioners' Appx., pp. 230, 234.) These attorneys therefore have a personal obligation to adhere to the neutrality obligations that arise from representing the government, and a contingent fee arrangement is "antithetical to [that] standard of neutrality." (*Clancy*, *supra*, 39 Cal.3d at p. 750.)

Plaintiffs wrongly argue that *Clancy* "planted the seeds" of a subordinate attorney exception to the neutrality principle. (Answering Brief, p. 14.) Such an argument simply cannot be reconciled with the clear statement in *Clancy* that all attorneys who perform tasks on behalf of and in the name of the government must adhere to the neutrality standards.[7] The amount of "control" or "supervision" by any other attorney was never the issue in *Clancy*. Instead, the only question was whether it was impermissible for Mr. Clancy, in "performing tasks on behalf of and in the name of" the City of Corona, to have a contingent fee interest in the outcome of the case. It was.

Just as Mr. Clancy's contingent fee arrangement was impermissible, so too are the agreements between the government Plaintiffs and the contingent fee counsel here.

---

[7] As discussed in Defendants' Opening Brief, the Court's citation to *Sedelbauer v. State* (Ind.Ct.App. 1983) 455 N.E.2d 1159, does not imply anything different. *Sedelbauer* did not involve a contingent fee agreement and merely stands for the proposition that an attorney's personal emotional bias does not automatically preclude the attorney from representing the government in a public nuisance action. (Opening Brief, pp. 22-23.)

II. THE GOVERNMENT'S GRANTING OF CONTINGENT FEES IN PUBLIC NUISANCE ACTIONS VIOLATES DUE PROCESS

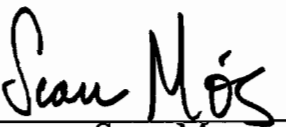
Plaintiffs also are wrong when they argue that the neutrality requirement precluding contingent fees in public nuisance actions is not based on principles of due process. As this Court noted in *Clancy*, when the neutrality required by the government in its sovereign capacity is not maintained, the defendant is denied due process of law. (*Clancy*, *supra*, 39 Cal.3d at p. 747 [citing *Tumey v. Ohio* (1927) 273 U.S. 510, and *Ward v. Village of Monroeville* (1972) 409 U.S. 57].)

Indeed, in *Vasquez*, *supra*, 39 Cal.4th at p. 64, this Court again noted the constitutional issues raised by contingent fee arrangements, finding that "pecuniary conflicts of interest on a judge's or prosecutor's part pose a constitutionally more significant threat to a fair trial" than do other types of potential conflicts. The impropriety of the contingent fee agreements in this action thus rise to a constitutional level, which provides another reason for disallowing them.

CONCLUSION

The fundamental principles upon which this Court in *Clancy* rested its rule of absolute neutrality apply equally in this case. For the foregoing reasons and for the reasons stated in Defendants' Opening Brief, this Court should reverse the decision of the Court of Appeal, vacate the writ of mandate, and remand the action to the trial court with directions that the action proceed pursuant to the trial court's order of April 4, 2007.

Dated: March 26, 2009



Sean Morris

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court, Rule 8.504(d)(1), the attached brief, excluding tables and attachments, consists of 3,369 words as counted by the Microsoft Word word-processing program used to generate this petition. The brief was typed using Times New Roman proportionally spaced font in 14-point typeface.

Dated: March 26, 2009

Sean Morris

Case No. S 163681

CALIFORNIA SUPREME COURT

County of Santa Clara, et al. v. Superior Court (Atlantic Richfield Co.)

(Court of Appeal, Sixth District Case No. H031540)

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. I a readily familiar with Arnold & Porter's practices for the service of documents. On **March 26, 2009** I served or caused to be served a true copy of the following document(s) in the manner listed below.

REPLY BRIEF ON THE MERITS

☒ **BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. Executed on **March 26, 2009** at Los Angeles, California to:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on **March 26, 2009.**

Stacie James

SERVICE LIST BY U.S. MAIL

Attorneys for Plaintiffs	
Joseph W. Cotchett Frank M. Pitre Nancy Fineman Douglas Y. Park COTCHETT, PITRE & McCARTHY 840 Malcolm Road, Suite 200 San Francisco Airport Office Center Burlingame, CA 94010 Tel: 650-697-6000	Ann Miller Ravel Cheryl A. Stevens OFFICE OF THE COUNTY COUNSEL 70 West Hedding Street, East Wing, 9th Floor San Jose, CA 95110-7240 Tel: 408-299-5900
Dennis J. Herrera Owen J. Clements Erin Bernstein SAN FRANCISCO CITY ATTORNEY Fox Plaza, 1390 Market Street, Sixth Floor San Francisco, CA 94102-5408 Tel: 415-554-3800	Ronald L. Motley John J. McConnell, Jr. Fidelma L. Fitzpatrick Aileen Sprague MOTLEY RICE LLC 321 South Main Street P.O. Box 6067 Providence, RI 02940-6067 Tel: 401-457-7700
Michael P. Thornton Neil T. Leifer THORNTON & NAUMES 100 Summer Street, 30th Floor Boston, MA 02110 Tel: 617-720-1333	Mary E. Alexander Jennifer L. Fiore MARY ALEXANDER & ASSOCIATES, P.C. 44 Montgomery Street Suite 1303 San Francisco, CA 94104 Tel: 415-433-4440
Lorenzo Eric Chambliss Richard E. Winnie Raymond L. McKay Deputy County Counsel COUNTY OF ALAMEDA 1221 Oak Street, Suite 450 Oakland, CA 94612-4296 Tel: 510-272-6700	Roy Combs General Counsel OAKLAND UNIFIED SCHOOL DISTRICT 1025 Second Avenue, Room 406 Oakland, CA 94606 Tel: 510-879-8658

Attorneys for Plaintiffs	
John A. Russo Randolph W. Hall Christopher Kee OAKLAND CITY ATTORNEY One Frank H. Ogawa Plaza, 6th Floor Oakland, CA 94612 Tel: 510-238-3601	Michael J. Aguirre City Attorney Daniel F. Bamberg Deputy City Attorney OFFICE OF THE SAN DIEGO CITY ATTORNEY CITY OF SAN DIEGO 1200 Third Avenue #1100 San Diego, CA 92101 Tel: 619-533-5800
Dennis Bunting County Counsel SOLANO COUNTY COUNSEL Solano County Courthouse 675 Texas Street, Suite 6600 Farifield, CA 94533 Tel: 707-784-6140	Thomas F. Casey III County Counsel Brenda Carlson, Deputy Rebecca M. Archer, Deputy COUNTY OF SAN MATEO 400 County Center Sixth Floor Redwood City, CA 94063 Tel: 650-363-4760
Raymond G. Fortner, Jr. County Counsel Donovon M. Main Robert E. Ragland Deputy County Counsel LOS ANGELES COUNTY COUNSEL 500 West Temple St., Suite 648 Los Angeles, CA 90012 Tel: 213-974-1811	Jeffrey B. Issacs Patricia Bilgin Elise Ruden OFFICE OF THE CITY ATTORNEY CITY OF LOS ANGELES 500 City Hall East 200 N. Main Street Los Angeles, CA 90012 Tel: 213-978-8097

Attorneys for Plaintiffs	
Charles J. McKee County Counsel William M. Litt Deputy County Counsel OFFICE OF THE COUNTY COUNSEL COUNTY OF MONTEREY 168 West Alisa Street 3rd Floor Salinas, CA 93901 Tel: 831-755-5045	Samuel Torres, Jr. Dana McRae Rahn Garcia Office of the County Counsel THE COUNTY OF SANTA CRUZ 701 Ocean Street, Suite 505 Santa Cruz, CA 95060-4068 Tel: 831-454-2040

Attorneys for Defendant American Cyanamid Company	
Richard W. Mark Elyse D. Echtman ORRICK, HERRINGTON & SUTCLIFFE, LLP 666 Fifth Avenue New York, NY 10103 Tel: 212-506-5000	Peter A. Strotz William E. Steimle Daniel J. Nichols FILICE BROWN EASSA & McLEOD LLP Lake Merritt Plaza 1999 Harrison Street, 18th Floor Oakland, CA 94612-0850 Tel: 510-444-3131

Attorneys for Defendant ConAgra Grocery Products Company	
Lawrence A. Wengel Bradley W. Kragel GREVE, CLIFFORD, WENGEL & PARAS, LLP 2870 Gateway Oaks Drive, Suite 210 Sacramento, CA 95833 Tel: 916-443-2011	Allen J. Ruby LAW OFFICE OF ALLEN RUBY 125 South Market Street, Suite 1001 San Jose, CA 95113-2285 Tel: 408-998-8503

James P. Fitzgerald James J. Frost MCGRATH, NORTH, MULLIN & KRATZ, P.C. Suite 3700 1601 Dodge Street Omaha, NB 68102 Tel: 402-341-3070	

Attorneys for Defendant E.I. du Pont de Nemours and Company	
Steven R. Williams Collin J. Hite McGUIRE WOODS LLP One James Center 901 East Cary Street Richmond, VA 23219-4030 Tel: 804-775-1000	Clement L. Glynn Patricia L. Bonheyo GLYNN & FINLEY, LLP 100 Pringle Avenue, Suite 500 Walnut Creek, CA 94596 Tel: 925-210-2800

Attorneys for Defendant Millennium Holdings LLC	
Michael T. Nilan HALLELAND, LEWIS, NILAN & JOHNSON, P.A. 600 U.S. Bank Plaza South 220 South Sixth Street Minneapolis, MN 55402 Tel: 612-338-1838	James C. Hyde Brian M. Affrunti ROPERS, MAJESKI, KOHN & BENTLEY 50 West San Fernando Street Suite 1400 San Jose, CA 95113 Tel: 408-287-6262
David M. Axelrad Lisa Perrochet HORVITZ & LEVY LLP 15760 Ventura Blvd., 18th Floor Encino, CA 91436-3000 Tel: (818) 995-0800	

Attorneys for Defendant NL Industries, Inc.	
James McManis William Faulkner Matthew Schechter MCMANIS FAULKNER 50 West San Fernando Street, 10th Floor San Jose, CA 95113 Tel: 408-279-8700	Donald T. Scott BARTLIT, BECK, HERMAN, PALENCHAR & SCOTT 1899 Wynkoop Street, Suite 800 Denver, CO 80202 Tel: 303-592-3100
Timothy Hardy, Esq. Unit 8B 300 West 11th Ave. Denver, CO 80204 Tel: 303-733-2174	

Attorneys for Defendant The Sherwin-Williams Company	
Charles H. Moellenberg, Jr. Paul M. Pohl JONES DAY One Mellon Bank Center 500 Grant Street, Suite 4500 Pittsburgh, PA 15219-2514 Tel: 412-394-7900	John W. Edwards, II JONES DAY 1755 Embarcadero Road Palo Alto, CA 94303 Tel: 650-739-3939
Brian O'Neill JONES DAY 555 South Flower Street, 50th Floor Los Angeles, CA 90071 Tel: 213-489-3939	
Attorney for Defendant Armstrong Containers	**Attorney for Defendant O'Brien Corporation**
Robert P. Alpert (Courtesy Copy) MORRIS, MANNING & MARTIN, LLP 1600 Atlanta Financial Center 3343 Peachtree Road, N.E. Atlanta, GA 30326 Tel: 404-233-7000	Archie S. Robinson (Courtesy Copy) ROBINSON & WOOD, INC. 227 N First Street San Jose, CA 95113 Tel: 408-298-7120

OTHER COURTS AND ENTITIES
BY US MAIL

Clerk of the Court SANTA CLARA SUPERIOR COURT Old Courthouse 161 North First Street San Jose, CA 95113	Edmund G. Brown, Jr. CALIFORNIA ATTORNEY GENERAL 1300 I Street Sacramento, CA 94244
Clerk of the Court CALIFORNIA COURT OF APPEAL SIXTH APPELLATE DISTRICT 333 West Santa Clara Street #1060 San Jose, CA 95113-1717	

Attorneys for Amici Curiae California State Association of Counties and League of California Cities	
Jennifer B. Henning CALIFORNIA STATE ASSOCIATION OF COUNTIES 1100 K. Street, Suite 101 Sacramento, CA. 94244 Tel: 916-327-7534	

Attorneys for Amici Curiae Chamber of United States of America And the American Tort Reform Association	
Kevin Underhill SHOOK HARDY & BACON, LLP. 333 Bush Street, Suite 600 San Francisco, CA 94104-2828 Tel: 415-544-1900	

Attorneys for Amici Curiae Association of California Water Agencies	
Victor M. Sher SHER LEFF LLP 450 Mission St., Suite 400 San Francisco, CA 94105 Tel: 415-348-8300	

Attorneys for Amici Curiae Public Justice, P.C. Healthy Children Organizing Project, and Western Center for Law and Poverty	
Arthur H. Bryant Victoria W. Ni PUBLIC JUSTICE, P.C . 555 12th Street, Suite 1620 Oakland, CA 94607 Tel: 510-622-8150	

Attorneys for Amici Curiae The American Chemistry Council	
Richard O' Faulk John S. Gray GARDERE WYNNE SEWELL LLP 1000 Louisiana, Suite 3400 Houston, TX 77002-5007 Tel: 713-276-5500	Jay E. Smith STEPTOE & JOHNSON LLP 633 West Fifth Street, Suite 700 Los Angeles, CA 90071 Tel: 213-439-9430

Attorneys for Amici Curiae National Federation of Independent Business Small Business Legal Center	
Karen R. Harned, Esq. Executive Director NFIB Small Business Legal Center 1201 F. Street, N.W., Suite 200 Washington, DC 20004 Tel: 615-872-5800	

Attorneys for Amici Curiae Plaintiff in *O'Connell v. City of Stockton*	
Mark T. Clausen 18 E. Fulton Road Santa Rosa, CA 95403 Tel: 415-221-1817	