ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-M-1543 SCT

BRISTOL-MYERS SQUIBB CO., SANOFI-AVENTIS U.S. LLC, SANOFI-AVENTIS U.S., INC., AND SANOFI-SYNTHELABO, INC.

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SUPREME COURT
COURT OF APPEALS

Petitioners/Defendants

vs.

JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI EX REL. STATE OF MISSISSIPPI

Respondents/Plaintiffs

In Re Petition to Appeal Interlocutory Order of the Chickasaw County Chancery Court, Honorable Dorothy Colom, in Jim Hood, Attorney General of The State of Mississippi ex rel. State of Mississippi v. Bristol-Myers Squibb Co. et al., Cause No. 2014-2124-C

PETITION FOR INTERLOCUTORY APPEAL

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MOTION# 2015 4591

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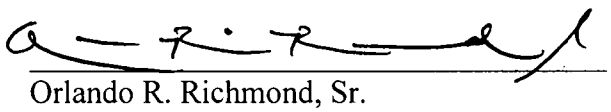
Respondent/Plaintiff

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Bristol-Myers Squibb Company, Petitioner/Defendant
2. Sanofi-Aventis U.S. LLC, Petitioner/Defendant
3. Sanofi-Aventis U.S., Inc., Petitioner/Defendant
4. Sanofi-Synthelabo, Inc., Jr., Petitioner/Defendant
5. Jim Hood, Respondent/Plaintiff
6. Orlando R. Richmond, Sr., Counsel for Petitioners/Defendants
7. Luther T. Munford, Counsel for Petitions/Defendants
8. William M. Gage, Counsel for Petitioners/Defendants
9. John A. Crawford, Jr., Counsel for Petitioners/Defendants
10. P. Ryan Beckett, Counsel for Petitioners/Defendants
11. John G. Wheeler, Counsel for Petitioners/Defendants
12. BUTLER SNOW LLP, Counsel for Petitioners/Defendants
13. MITCHELL MCNUTT & SAMS, Counsel for Petitioners/Defendants
14. Geoffrey C. Morgan, Counsel for Respondent/Plaintiff
15. George W. Nevin, Counsel for Respondent/Plaintiff

16. Martin Millette, III, Counsel for Respondent/Plaintiff
17. Jacqueline H. Ray, Counsel for Respondent/Plaintiff
18. W. Howard Gunn, Counsel for Respondent/Plaintiff
19. W.HOWARD GUNN & ASSOC, Counsel for Respondent/Plaintiff
20. Robert Cowan, Counsel for Respondent/Plaintiff
21. BAILEY PERRIN BAILEY PLLC, Counsel for Respondent/Plaintiff



Orlando R. Richmond, Sr.
Counsel for Petitioners/Defendants

RELATED CASES

Pursuant to Miss. R. App. P. 5(b), Defendants are aware of two other pending cases that present the same issues raised by this Petition. *See Jim Hood ex rel. State of Mississippi v. Astrazeneca Pharmaceuticals LP et al.*, Case No. 72395 (Chancery Ct. of Rankin Cnty.) (pending motion to dismiss Counterclaim alleging Attorney General's retention of contingent fee counsel in MCPA civil enforcement action violates Due Process and Miss. Code § 7-5-8); *Jim Hood ex rel. State of Mississippi v. Fresenius Medical Care Holdings, Inc. et al.*, Cause No. 14-CV-152 (Chancery Ct. of Desoto Cnty. Sept. 29, 2015) (granting State's motion to dismiss Counterclaim alleging Attorney General's retention of contingent fee counsel in MCPA civil enforcement action violates Due Process).

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INTRODUCTION AND STATEMENT OF THE REASONS WHY LEAVE TO APPEAL SHOULD BE GRANTED

Petitioners request the Court to accept this Petition and hold that the Attorney General may not prosecute this lawsuit for civil penalties using private, contingency fee lawyers whose fees depend entirely on—and will increase with the amount of—any civil penalties awarded.

The Attorney General of Mississippi filed this lawsuit against two pharmaceutical companies seeking hundreds of millions of dollars in civil penalties. Plaintiff asserts that Defendants' marketing of the prescription drug Plavix®—recommended by leading medical guidelines and one of the most widely prescribed medicines in the world—was a fraud, because Plavix® is less effective and more expensive than alternatives such as aspirin.

This is a lawsuit driven by politics, not medicine. More than two years ***after*** the Attorney General filed this suit, Mississippi Medicaid still endorsed Plavix® as a "Preferred Drug" based on the drug's "efficaciousness, clinical significance, cost effectiveness and safety. . ." Even today, Mississippi Medicaid continues to reimburse for Plavix® (and now its generic formulation) and to endorse it as a life-saving, cost-effective drug.

The bottom line is this lawsuit was not initiated by the department entrusted by the State of Mississippi to protect its citizens' health. The Complaint identifies no doctors or patients in Mississippi who claim to have been defrauded or duped in any way. What there is, however, is a contingency fee agreement between the Mississippi Attorney General's Office and the Texas law firm that is prosecuting for the State. That law firm -- which has donated more than $100,000 to the Attorney General's campaigns for office -- stands to recover up to 25 percent of the millions of dollars from any civil penalties Plaintiff recovers in the case.

The practice of state attorneys general retaining contingency lawyers has generated controversy nationwide, and the Mississippi legislature has now reined in the practice. In its recent enactment of the Sunshine Act, the State prohibited contingency fee payments on civil

penalties. *See* Miss. Code § 7-5-8(2)(c). That Act applies here to preclude recovery of contingency fees on the civil penalties claimed in this action, and the Chancellor erred by not honoring that statutory command.

In addition, the Due Process problems with this arrangement are real and striking. The contradiction between the accusations the Attorney General makes in this lawsuit and what Mississippi's medical experts are doing creates at least the appearance that the financial arrangements here have blinded Plaintiff to the fundamental principle that a prosecutor's duty "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Due Process would obviously preclude a criminal defendant from prosecution by a lawyer who was paid only by securing a conviction. Defendants have the same due process right to be free from a civil prosecution seeking millions in penalties that carries the taint of bias.

Pursuant to Mississippi Rule of Appellate Procedure 5(a), this Court allows interlocutory appeals where "a substantial basis exists for a difference of opinion on a question of law" and appellate resolution may: (1) materially advance "termination of the litigation" and avoid unnecessary expense; (2) protect a party "from substantial or irreparable injury"; or (3) resolve an issue "of general importance in the administration of justice." Because the Chancery Court erroneously denied Defendants relief from Plaintiff's counsels' biased financial arrangements, thus creating a real risk of retrial if this Court ultimately agrees they are improper, Defendants seek permission for immediate interlocutory appeal.

STATEMENT OF FACTS, PROCEDURAL HISTORY, AND STATUS OF THE CASE

Plavix® is an antiplatelet drug used to prevent heart attacks and strokes in certain patients. The U.S. Food and Drug Administration ("FDA") first approved it in 1997, and since

that time Plavix® has been recommended by leading medical consensus organizations.[1] Since at least June 2003, Mississippi's Medicaid program has designated Plavix® as a "Preferred Drug" on its formulary, and it continued to do so long after this lawsuit was filed.[2]

The Attorney General filed this enforcement action in June 2012, alleging that Defendants illegally promoted and advertised Plavix®. The current complaint does not claim the State of Mississippi was damaged by the marketing of Plavix®. It seeks only civil penalties and to enjoin Defendants from continuing to engage in misleading marketing of the drug. It asks for $10,000 in penalties for every claimed Mississippi Consumer Protection Act ("MCPA") violation, apparently for every time Plavix® was sold in the State. *See* Appendix ("APP.") 2, at 22. Yet, as the State surely knows, Plavix® went generic in 2012 and these Defendants have not actively promoted it since then.

While brought in the name of the State of Mississippi, this case is being prosecuted on a contingency fee basis by a Texas law firm, Bailey Perrin Bailey, PLLC (the "Bailey firm"). On May 1, 2012, the Bailey firm and the Attorney General signed a "Retention Agreement" to compensate the Bailey firm for their work on this suit. *See* APP. 6 ("Agreement"). The ***only*** compensation the Agreement contemplates are two sliding percentage contingency rate scales. APP. 6 ¶ 5.A. Because the suit seeks only civil penalties, moreover, any contingent payment to the Bailey firm will be based on the civil penalties they recover. The higher the penalties, the more money the Bailey firm will receive.

The practice of attorneys general retaining contingency fee lawyers to pursue cases on its behalf has been generating significant controversy because it raises questions as to whether the

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[1] *See* (APP. 3) Ezra A. Amsterdam *et al., 2014 AHA/ACC Guideline for the Management of Patients With Non-ST Elevation Acute Coronary Syndromes*, 64(24) J. Am. C. Cardiology e139, e161 (2014); (APP. 4) Patrick T. O'Gara et al., *2013 ACCF/AHA Guideline for the Management of ST-Elevation Myocardial Infarction*, 61(4) J. Am. C. Cardiology e78, e91 (2013).

[2] *See* (APP. 5 at 53, Preferred Drug List as of 07/01/2014).

lawyers are pursuing the state's interests or their own. Mississippi's Attorney General has been at the forefront of this practice, routinely hiring contingency fee lawyers to represent him. What is more, the Attorney General has demonstrated a tendency to use out-of-state lawyers who contributed handsomely to his campaign. Even though the Bailey firm has no offices in Mississippi, it has donated over $100,000 to the Attorney General. The Attorney General in turn has retained the Bailey firm in multiple contingency fee cases, of which this is the most recent.

Like numerous other jurisdictions,[3] Mississippi finally decided to limit this practice. Approximately three weeks after the Attorney General and private counsel executed the Agreement underlying this case, Mississippi's Governor signed the Sunshine Act, including § 7-5-8(2)(c), into law. That section provides that contingency fees like these "shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines." *Id.* This prohibition took effect on July 1, 2012.

After multiple jurisdictional and venue transfers, Defendants on January 26, 2015 filed their Amended Answer and Counterclaim ("Counterclaim") in the Chancery Court for Chickasaw County, seeking a declaratory judgment that the Attorney General's retention of private counsel was unlawful. APP. 7. Count I of the Counterclaim alleged that the Agreement violated Defendants' Due Process rights under the United States and Mississippi Constitutions. APP. 7 at ¶¶ 20-37. Count II alleged that the financial terms of the retention violated

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[3] *See* Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (May 16, 2007). President George W. Bush, in issuing an Executive Order "Protecting American Taxpayers from Payment of Contingency Fees," explained that it was necessary to prohibit contingent-fee arrangements in order to "help ensure the integrity and effective supervision of the legal . . . services provided to or on behalf of the United States." *Id.* President Obama has left this Executive Order in place; *see, e.g.*, *U.S. chamber Applauds Passage of Nation's Strongest Outside Counsel Sunshine Law in Wisconsin, available at* http://www.instituteforlegalreform.com/resource/us-chamber-applauds-passage-of-nations-strongest-outside-counsel-sunshine-law-in-wisconsin (noting Wisconsin joined a "growing group of states including Alabama, Arizona, Florida, Indiana, Iowa, Mississippi, and West Virginia that have taken action to limit outside contingency fee counsel arrangements by AGs.").

Mississippi Code section 7-5-8(2)(c)'s prohibition on contingency fees being awarded from civil penalty awards. APP. 7 at ¶ ¶ 38-41. That same day, Defendants filed a motion for summary judgment on their Counterclaim arguing that the Agreement on its face was unlawful. APP. 8. Plaintiff then moved to dismiss the counterclaim and opposed summary judgment. APP. 9.

On September 22, 2015, Chancellor Colom issued an opinion denying Defendants' Motion for Summary Judgment as to all counts and granting Plaintiff's Motion to Dismiss Counts I and II of the Counterclaim. APP. 1. Chancellor Colom held that contingent fee arrangements are permitted by state law and declined to be the first Court to hold they were unconstitutional. APP. 1 at 12. Chancellor Colom also held that she was "convinced that Miss. Code § 7-5-8(2)(c) should be applied prospectively, as opposed to retroactively" and that it did not apply to the Agreement. APP. 1 at 12. This Petition is timely filed within 21 days from entry of the Chancellor's Order. APP. 1.

STATEMENT OF THE QUESTIONS PRESENTED

I. Can Plaintiff avoid the plain language of Miss. Code § 7-5-8(2)(c), which provides in absolute terms that contingency fees "shall not be based" on civil penalties after the Act's effective date simply because the fee agreement was signed prior to that date?

II. Does Due Process permit an outside law firm, paid solely on a contingency fee basis based on the size of the civil penalty recovered, to prosecute a quasi-criminal enforcement action in the name of the State of Mississippi?

ARGUMENT AND AUTHORITIES

I. MISSISSIPPI CODE SECTION 7-5-8 PRECLUDES OUTSIDE COUNSEL FROM RECOVERING CONTINGENCY PAYMENTS BASED ON CIVIL PENALTIES

The Mississippi legislature's recent amendments to the Sunshine Act prohibited the State from making contingency fee payments based on civil penalties after July 1, 2012. This provision applies even if the Retainer Agreement was signed before the effective date. *See* Miss. Laws, Ch. 546, § 4 (2012), effective July 1, 2012.

The new statute contains two types of changes: (a) those regulating the Attorney General's retention *agreements* with private counsel; and (b) those governing other aspects of the State's relationship with private counsel not tied to the negotiation and execution of the retainer agreements.

Where the Sunshine Act's effective date was intended to govern the execution of retainer agreements, the Mississippi legislature said so explicitly:

- "***Before entering into a contingency fee contract with outside counsel,*** the state . . . must first make a written determination that contingency fee representation is both cost effective and in the public interest." *See* § 7-5-8(1) (emphasis added).

- "***The state . . may not enter into a contingency fee contract***" that provides for the outside attorney to receive a contingency fee . . which is in excess of the following [specifically identified percentage recovery levels]." *See* § 7-5-8(2)(a) (emphasis added).

- "***Any contract for services of outside counsel*** shall require current and complete written time and expense records that describe in detail the time . . and money spent each day in performance of the contract." *See* § 7-5-5(2)(b)(1) (emphasis added).

But other provisions of the Sunshine Act, including § 7-5-8(2)(c), are not tied to execution of the retention agreement. By their plain terms, these provisions apply even if the retainer agreement was signed before the effective date:

- "A contingency fee shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines." *See* § 7-5-8(2)(c).

- "Any payment of contingency fees shall be posted on the Attorney General's website within fifteen (15) days after the payment of the contingency fees to the outside attorney . . . ." *See* § 7-5-8(5)(c).

- "An outside attorney under contract to provide services to the state on a contingency fee basis shall, from the inception of the contract until not less than four (4) years after the contract expires or is terminated, maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the providing of attorney services." *See* § 7-5-8(6).

Section 7-5-8(2)(c) provides that the Attorney General "shall not" base payments of contingency fees on civil penalties beginning July 1, 2012. This statutory prohibition is not tied

to execution of the retainer agreement: it prohibits the State from making a contingency fee payment based on civil penalties at any time after July 1, 2012.

The Attorney General glosses over this statutory language, arguing broadly that ***none*** of the Sunshine Act amendments apply to attorneys acting pursuant to retention agreements reached before the Act's effective date. But outside the litigation spotlight, the Attorney General has recognized that these two different categories of provisions exist. For example, the Attorney General has posted payments of contingency fees on his website ***even for retainer agreements executed before the Act's effective date.*** *See* APP. 10 at 66-67 (referencing and providing the court with a copy of, http://www.ago.state.ms.us/wp-content/uploads/2015/09/Contingent-Fund-Attorney-Payments.pdf). The Attorney General's conduct only make sense if § 7-5-8 applies to private attorney relationships ***regardless*** of when the retainer agreements were signed.

The Chancery Court adopted the Attorney General's argument, holding that § 7-5-8(2)(c) would govern these contingency payments only if applied "retroactive[ly]." But the issue is not one of retroactivity, it is one of statutory interpretation. Namely, what does "effective date" mean? Does it mean that the prohibition is effective only for contingency fee agreements ***entered into*** after the effective date, or does it preclude any contingency fee payments ***to be made*** after the effective date?

"'[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).[4] Here, the ban on penalty-based contingency payments

[4] *See also Miss. Poultry Ass 'n v. Madigan*, 790 F. Supp. 1283, 1288 (S.D. Miss. 1992), *aff'd*, 992 F.2d 1359 (5th Cir. 1993), *amended*, 9 F.3d 1113 (5th Cir. 1993) *aff'd on reh'g*, 31 F.3d 293 (5th Cir. 1994) (use of different words or terms within statute indicates that Congress intended to establish different meaning for those words); 2A Norman J. Singer, Sutherland Statutory Construction § 46:6 (6th ed. 2005) ("[C]ourts do not construe different terms within a statute to embody the same meaning. . . [W]hen the legislature uses certain language in one part of the statute and different language in another, the court

Footnote continued on next page.

is written differently than the provisions governing entry of fee agreements, and therefore applies to ***any*** future payments received by the Attorney General's private attorneys.

This result produces no surprises or unfairness. Plaintiff ***chose*** to sue only for civil penalties; he had other avenues of redress available. For example, Plaintiff's initial lawsuit included claims for damages, which the Sunshine Act permits as the basis for contingency fees. Only when Plaintiff filed his First Amended Complaint on September 17, 2012, did he abandon those claims and decide to seek only civil penalties. He did that with his eyes wide open about the language of the statute.

II. DUE PROCESS DOES NOT PERMIT THE STATE TO HIRE FINANCIALLY-INTERESTED PRIVATE ATTORNEYS TO PROSECUTE QUASI-CRIMINAL PROCEEDINGS FOR CIVIL PENALTIES

The private attorneys in this case are acting as civil prosecutors on behalf of the State. They seek to impose punitive sanctions upon the Defendant, and any payments they receive will be directly linked to the amount of civil penalties they recover. This is no different than paying a prosecutor in a criminal case more money for every conviction obtained. Civil as well as criminal enforcement cases must be pursued in the way that serves the State's best interests in law enforcement – not the prosecutors' own pocketbooks. While no other court has yet invalidated contingency fees on Due Process grounds in a civil enforcement action brought by a state attorney general for statutory penalties, the issue is just beginning to be raised in the various courts and the U.S. Supreme Court has never ruled on this precise issue. The fact that an increasing number of states are limiting the practice suggests an increasing recognition of an appearance of impropriety.

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assumes different meanings were intended. In like manner, where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.").

A. The Agreement Violates the Categorical Bar on Financially Interested Prosecutors

Due Process protects individuals against deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Miss. Const. art. III, § 14. *Sec'y of State v. Wiesenberg*, 633 So. 2d 983, 996 (Miss. 1994) ("The due process required by the Federal Constitution is the same due process required by the Mississippi Constitution."). These Due Process guarantees include the right to an impartial tribunal and to prosecution by a lawyer for the government whose judgment is unclouded by any financial or other personal stake in the outcome. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733 (E.D. Ky. 2013).

The United States Supreme Court has established a categorical rule barring financially interested private prosecutors. Beginning with *Tumey*, the Court recognized that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." 273 U.S. at 523; *see also Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972). In *Marshall*, the Court extended this analysis to civil prosecutions, holding "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in ***both civil and criminal cases***." 446 U.S. at 242 (emphasis added).

The *Marshall* Court evaluated Due Process concerns raised by allowing a government agency to keep fines and penalties it collected from the targets of its child labor prosecutions. 446 U.S. at 239. The Court found two critical facts that prevented a Due Process violation. First, "[t]he salary of the assistant regional administrator [was] fixed by law." *Id.* At 250. Second, no prosecuting government official stood "to profit economically from vigorous enforcement of the child labor provisions of the Act." *Id.*

The Court made clear, however, that if the arrangement ***had*** involved individual gain by the prosecutors, it would have violated Due Process guarantees. *Id.* at 251 ("Unlike in *Ward* and *Tumey*, it is plain that the enforcing agent is *in* ***no sense financially dependent on the maintenance of a high level of penalties***.") (emphasis added). The Court warned that "[a] scheme injecting a personal interest, financial or otherwise, into the [civil] enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50.[5]

The contingency contract at issue here likewise provides private counsel with a financial stake in this litigation that violates the requirements of Due Process. The only economic award these private lawyers pursue here are "civil penalt[ies]." Only the State can seek this remedy, using its law enforcement power. The Agreement creates a perverse financial incentive for private lawyers to relentlessly prosecute, even if that is not what justice requires, by providing that the prosecuting attorneys will not be paid unless they recover, and their fees increase if they recover larger civil penalties. *See* APP. 6 ¶ 5A.

The most basic lesson of *Marshall* and *Young* is that the defendant in a quasi-criminal proceeding is entitled to a disinterested prosecutor who will act as justice requires, not to increase his own payday. No one would countenance the State's hiring of a government attorney whose compensation is based entirely on the number of convictions or amount of civil penalties he recovers. Yet that is exactly the financial arrangement the State proposes for this case.

The Chancery Court relied on a Texas case in declining to find a Due Process violation here. But that case failed to grapple with these fundamental principles, recognized by the U.S.

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[5] While *Marshall* recognized that "the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial officers," the Court later clarified that this "difference in treatment is relevant to *whether* a conflict is found, however, not to its gravity once identified." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810-11 (1987) (emphasis in original).

Supreme Court, and was wrongly decided. Indeed, the court did not even mention *Young* in holding that a suit for civil penalties did not implicate Due Process concerns. *See Int'l Paper Co. v. Harris Cnty.*, 445 S.W. 3d 379, 382 (Tex. App. 2013). Other cases Plaintiff cited below which declined to recognize Due Process problems in contingency fee cases brought by state attorneys general involved damages claims or were otherwise far afield from the issues presented here.[6]

Finally, the specific facts of this case raise particularly serious questions about the motivations behind the suit. Defendants' alleged marketing misconduct occurred no later than June 29, 2012, when Plaintiff filed the original complaint in this matter. Yet two years after it was filed, Plavix® was still listed on Mississippi's Medicaid formulary as a "Preferred Drug," meaning that the State's expert medical authorities found its use to not only be beneficial but economically justified.[7] As the Mississippi Medicaid website explains, this means the State's medical experts selected Plavix® for its "efficaciousness, clinical significance, cost effectiveness and safety. . ." *See* https://www.medicaid.ms.gov/providers/ pharmacy/preferred-drug-list/. This fact alone supplies good reason for concern about the true motivations behind this case.

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[6] The West Virginia Supreme Court's opinion in *Discover Fin. Servs. Inc. v. Nibert*, 203 W. Va. LEXIS 603, at *13 n.20 (W. Va. June 4, 2013), addressed the issue in a footnote. Even though the court in *Merck* found no constitutional problem on the facts presented there (after it erroneously grafted a "control" test on to the Due Process inquiry), it expressly recognized that a similar civil penalty enforcement action was "penal in nature" and thus "implicate[d] the [due process] requirement of neutrality." 861 F. Supp. 2d at 814. The other cases cited below are even further afield. *Philip Morris Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998) and *City & Cnty. of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997) both involved damage claims -- not quasi-criminal civil penalties. *Collin Cnty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 654 F. Supp. 943 (N.D. Tex. 1987), did not involve a contingency fee arrangement between a government and private lawyers, nor did it implicate the liberty interest at issue here -- the due process right to a fair and impartial tribunal. In *Hosey v. Barnhill*, 1983 U.S. Dist. LEXIS 15433 (S.D. Tex. July 15, 1983), the plaintiff failed to allege a "constitutional deprivation." *Id.* at *6. The court said nothing to refute the fact that the liberty interest identified by Defendants is protected by Due Process.

[7] *See* APP. 5. Because clopidogrel is now available as a generic drug, Mississippi Medicaid currently lists clopidogrel as the "Preferred Agent," presumably on the assumption that the generic version now available is less expensive than the name-brand Plavix®. Mississippi Medicaid continued to list Plavix® on the Preferred Drug List more than two years after the Bailey firm filed this lawsuit.

B. There Is No Basis for a "Control" Exception to the Due Process Bar Against Financially Interested Prosecutors

Some lower and state courts, while recognizing that Due Process sets limits on the use of private counsel in civil enforcement actions such as this case, have adopted an exception to allow a state's use of financially interested private prosecutors as long as they are subject to supposed "control" by impartial government lawyers. *Merck*, 947 F. Supp. 2d at 739-40; *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 32 (Cal. 2010); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 475-77 (R.I. 2008). Such an exception conflicts with the Supreme Court's categorical rule.

First, arrangements that provide prosecutors with a personal financial stake in these kinds of litigations cannot be saved by purported "safeguards" such as judicial review, government supervision, or other procedural oversight. *See Young*, 481 U.S. at 807 (recognizing judicial supervision is insufficient because many critical prosecutorial decisions are "made outside the supervision of the court"). The United States Supreme Court has refused to recognize *any* exceptions to the categorical rule because that rule is necessary to "preserve[] both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (internal citations and quotation marks omitted). This is true "[r]egardless of whether the appointment of private counsel in this case result[s] in any prosecutorial impropriety." *Young*, 481 U.S. at 805.

Second, contingency-fee prosecutors diminish the public's faith in the fairness of civil government prosecutions. These arrangements frequently result in allegations that government officials are doling out contingency-fee agreements to lawyers in exchange for political contributions. *See, e.g.*, Editorial, *The State Lawsuit Racket: A Case Study in the Politician-Trial Lawyer Partnership*, Wall St. J., Apr. 8, 2009 (APP. 8, Ex. F). Nowhere has the appearance of impropriety been more apparent than in Mississippi. *See* Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, Dec. 18, 2014 (APP. 8, Ex. I) ("In

no place has the contingency-fee practice flourished more than in Mississippi, where lawyers hired by Attorney General Jim Hood . . . have collected $57.5 million in fees during the last two years — three times as much as Mr. Hood has spent on running his state office during the same period. Mr. Hood has taken in $395,000 in campaign contributions from trial law firms over the last decade, more than any other attorney general."). The Bailey firm alone contributed $125,000 to Attorney General Hood between May 2007 and November 2011. Arrangements like this one create an appearance of impropriety that the illusion of "control" cannot cure.

C. At a Minimum, the Court Should Have Denied the State's Motion to Dismiss and Permitted Discovery On the Issue of Control

At a minimum, the Chancery Court should have denied the State's motion to dismiss because Defendants' allegations concerning the private lawyers' control of the suit are more than adequate to state a Due Process claim. The Chancery Court did not address Defendants' alternative argument regarding control or analyze Defendants' allegations in support of that argument, simply noting that the Agreement contains language reserving certain rights to the State in the litigation. APP. 1 at 9.

Such language does not end the inquiry, however. Similar language appeared in the agreement at issue in *Merck*,[8] and the court there ordered discovery to proceed to determine the actual course of dealing between the Kentucky AG and his private counsel. *Merck Sharp & Dohme Corp. v. Conway*, 2012 WL 1029427, at *3 (E.D. Ky. Mar. 26, 2012) (internal quotations omitted). As in *Merck*, Defendants here have alleged sufficient facts to state a plausible claim that private counsel have invaded the sphere of control. *Compare* Defs.' Countercl. ¶ 33 ("To

[8] In fact, the *Merck* agreement contained even stronger language than the agreement in this case, broadly vesting in the Attorney General the "right at all times to direct the litigation in all respects." *Merck*, 2012 WL 1029427, at *1; *Compare* APP. 6 ¶ 2 (private counsel have *primary responsibility* for investigating, researching, filing, and prosecuting these claims); (effectively providing private counsel with *veto power*: Attorney General and private counsel must mutually "agree upon ...Claims to be pursued"); (Attorney General is not required "to assign any members of his staff to pursue the Claims").

date, private counsel have handled all hearings and arguments related to this enforcement action.") *with Merck*, 2012 WL 1029427, at *4 (quoting Complaint's allegation that "contingency-fee counsel have handled all appearances . . . in the multidistrict litigation"). At a minimum, the Court should have allowed discovery on the "control" issue here.

III. REASONS WHY THE COURT SHOULD GRANT INTERLOCUTORY APPEAL

This appeal meets each element of Mississippi Rule of Appellate Procedure 5, which allows interlocutory appeals where there is "a substantial basis . . . for difference of opinion on a question of law" and "appellate resolution may": (1) materially advance termination of the litigation and avoid unnecessary expense; (2) protect a party "from substantial and irreparable injury"; or (3) resolve an issue "of general importance in the administration of justice."

As explained above, there is a substantial basis for difference of opinion with the Chancery Court's ruling that the financial arrangements here can be reconciled with Miss. Code Ann. § 7-5-8(2)(c) and Due Process guarantees. An immediate interlocutory appeal would also meet Rule 5(a)(1)'s requirement that an immediate appeal "[m]aterially advance the termination of the litigation and avoid exceptional expense." By resolving now the threshold issue of whether the Constitution and § 7-5-8 allow financially-interested private attorneys to prosecute a case for civil penalties, this Court can avoid the delay and expense of trying this case twice.

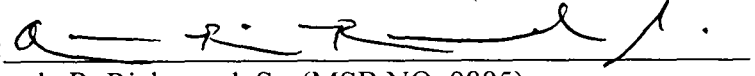
The appeal would also serve Rule 5(a)(2)'s concern with protecting against "substantial and irreparable injury." If Defendants are forced to litigate the enforcement action against financially incentivized prosecutors in violation of their constitutional rights "no appeal from a final judgment would remedy the injury [they] will have sustained." *Johnson v. Ladner*, 514 So. 2d 327, 328 (Miss. 1987). The immediate and ongoing harm here includes the fact that Defendants need to defend themselves in a prosecution tainted by improper incentives. This should be repaired now, before Defendants endure the burden and expense of discovery and trial.

Finally, allowing an interlocutory appeal would also plainly satisfy Rule 5(a)(3)'s test of resolving "an issue of general importance in the administration of justice." Whether financially-motivated civil prosecutions such as this one should be allowed is a question that goes to the heart of the State's justice system. It is critical not only that Defendants be free of biased prosecutions, but that the public at large has faith that civil enforcement cases are brought to serve the interests of justice and not for financial gain. Defendants in two other pending cases have similar challenges to the State's use of financially-interested private attorneys. *See* "Related Cases", *supra* page iii. Accordingly, this Court's immediate resolution of the issue will serve justice for parties throughout the State.

CONCLUSION

Due Process, the Mississippi Code, and basic principles of fairness dictate that the State not subject defendants to a quasi-criminal trial for civil penalties prosecuted by private, financially-interested attorneys. The Court should grant permission for an interlocutory appeal to determine whether the Chancery Court's opinion is consistent with these principles.

Respectfully submitted, this the 13th day of October, 2015.

By: 

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CERTIFICATE OF SERVICE

I, Orlando R. Richmond, Sr., one of the attorneys for the Defendants, do hereby certify that I have on this day caused the forgoing papers to be sent by U.S. Mail, postage prepaid, to the following:

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October 13, 2015

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Via Hand-Delivery

Re: *Bristol-Myers Squibb Co., Sanofi-Aventis U.S. LLC, Sanofi-Aventis U.S., Inc., and Sanofi-Synthelabo, Inc. v. Jim Hood, Attorney General of the State of Mississippi Ex Rel. State of Mississippi*

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COURT OF APPEALS

Dear Ms. Ellis:

Enclosed are the following:

1. Petition for Interlocutory Appeal with Appendix (two volumes);
2. Four copies for the Court;
3. One copy to be stamped "filed" and returned to me via our messenger; and
4. Check in the amount of $50.00 as the filing fee.

Please let me know if you need additional information.

Very truly yours,

BUTLER SNOW LLP

Orlando R. Richmond, Sr.

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Enclosures
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