UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: PLAVIX MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION (NO. II)	MDL No. 2418
This Document Relates to: JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, ex rel. THE STATE OF MISSISSIPPI, Plaintiff, v. BRISTOL-MYERS SQUIBB COMPANY, SANOFI-AVENTIS U.S. L.L.C., SANOFI-AVENTIS, U.S., INC., SANOFI-SYNTHELABO, INC., and DOES 1 to 100, Inclusive, Defendants.	Case No.: 3:13-cv-05910-FLW-TJB **Motion Date: December 16, 2013**

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT THAT PLAINTIFF'S FEE ARRANGEMENT IS UNLAWFUL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. One of the Chamber's key functions is to represent the interests of its members before the courts, Congress and the Executive Branch. The Chamber has filed many *amicus* briefs in cases of vital concern to the nation's business community, including cases addressing the constitutional, ethical, and policy issues surrounding the controversial practice of state and local governments hiring private attorneys on a contingency-fee basis.

PhRMA is a voluntary nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier and more productive lives. During 2012 alone, PhRMA members invested an estimated $48.5 billion in efforts to research and develop new medicines. PhRMA has frequently filed amicus curiae briefs in cases raising matters of significance to its members.

Both the Chamber and PhRMA have a strong interest in this case, as their members are being targeted with increasing frequency by private contingency-fee

lawyers prosecuting civil-penalty and other enforcement actions on behalf of state and local governments across the country.

INTRODUCTION

This case is part of a growing trend around the country, in which state attorneys general delegate quasi-criminal enforcement powers to private attorneys who are already involved in multidistrict litigation against drug manufacturers or other corporate entities. In nearly every case, including this one, the private attorneys are to be paid on a contingency-fee basis – in other words, they are paid only if they win; and if they do win, they are paid more and more for each additional dollar they recover. The problem with these arrangements is simple: they entrust the duty of impartially administering justice to attorneys with an overwhelming incentive to "win" the case – even if it is entirely bereft of merit. As a result of these pressures, the neutral forum assured to defendants by basic principles of due process is incurably tainted. Given the personal interests of counsel, defendants have no hope of persuading them to abandon a meritless case or to settle for any reasonable amount. The result is guaranteed litigation and, when the state prevails, highly inflated penalties, placing additional burdens on court dockets and harming American businesses.

Defendants' brief in support of their motion for summary judgment cogently argues for a categorical rule against all such arrangements. As the brief makes

clear, the Supreme Court's due-process precedents are incompatible with the test adopted by some courts, which would allow the retention of private attorneys on a contingency-fee basis as long as a governmental office or attorney exercises "control" over the litigation. (*See* Br. In Supp. Of Defs.' Mot. For Summ. J. That Pl.'s Fee Arrangement Is Unlawful ("MSJ") at 10-13, ECF No. 76-2 (filed Nov. 18, 2013).)

Amici seek leave to file this brief to supply the Court with two additional points to guide its consideration. First, even courts that have approved a control test in some circumstances have acknowledged that a categorical bar on the use of contingency-fee counsel remains appropriate in cases, like this one, that are quasi-criminal in nature. Second, the growing use of contingency-fee counsel by state attorneys general in quasi-criminal enforcement actions around the country makes it all the more critical that the Court find the fee arrangement improper in this case.

ARGUMENT

I. A CATEGORICAL BAR AGAINST THE USE OF CONTINGENCY-FEE COUNSEL APPLIES IN QUASI-CRIMINAL CASES LIKE THIS ONE.

Due process requires a categorical bar against the retention of private, contingency-fee counsel in suits like this one that resemble criminal prosecutions. This suit is brought in the name of the state; it seeks injunctive rather than compensatory relief, which would bar certain types of speech; and it seeks

substantial penalties that, like criminal sanctions, are designed to punish and deter, and are not rooted in any damage ostensibly sustained by the state or its citizens. The need for neutrality is at its apex in such cases, because any temptation to pursue self-enrichment rather than justice would subvert basic due-process protections. Accordingly, the use of contingency-fee counsel is inappropriate – even if such arrangements might be permissible in other circumstances.

As the defendants' brief explains, "due process includes the right to an impartial tribunal and prosecution by a lawyer for the government whose judgment is not clouded by a financial or other personal stake in the outcome." (MSJ at 5 (citing, inter alia, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)).) Pursuant to this principle, Supreme Court decisions have adopted a "categorical" rule against the use of prosecutors who have a financial incentive to obtain a conviction – be they government attorneys or private, retained counsel – a rule that other courts have extended to quasi-criminal enforcement actions. (*See id.* at 6-9.)

Despite the clarity of the Supreme Court's "categorical" approach, some courts have concluded that attorneys general may retain private counsel on a contingency-fee basis as long as the attorney general retains "control" of the litigation. (*See id.* at 10.) But even these courts have recognized that a categorical

bar on such arrangements remains necessary in quasi-criminal enforcement proceedings like this one. The California Supreme Court, for example, categorically rejected the use of contingency-fee counsel in quasi-criminal cases. In *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), the City of Corona, California, sought to enjoin a bookstore from selling sexually explicit materials. The City hired outside counsel to prosecute abatement actions under a public-nuisance theory, *id.* at 348, agreeing to double the private firm's hourly rate if the City prevailed (as long as the court ordered the losing party to pay the City's attorneys' fees). *Id.* at 350.

The California Supreme Court rejected this arrangement as violating due process, finding that the retention agreement "[o]bviously" gave outside counsel "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.* at 351. The court held that such an interest was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 353.

As part of its rationale, the court explained that the abatement proceeding closely resembled a criminal prosecution, in which principles of neutrality and impartiality are of paramount importance. *Id.* at 352. In particular, both in *Clancy*

and in a subsequent case describing it, the California Supreme Court emphasized that the suit at issue:

- Was "brought in the name of the People," *id.* at 352-53, and "on behalf of the public," *County of Santa Clara v. Superior Court*, 235 P.3d 21, 34 (Cal. 2010);
- Sought not compensatory but injunctive relief, which would impinge upon "the continued operation of an established, lawful business," *Santa Clara*, 235 P.3d at 32;
- "[I]mplicated both the defendants' and the public's constitutional free-speech rights" because the materials at issue "involved speech that arguably was protected in part," *id.*; and
- Claimed a "remedy [that] is in the hands of the state" and "carried the threat of criminal liability," *id.* at 33 & n.10 (internal quotation marks and citation omitted).

Based on these characteristics, the California Supreme Court determined that the close relationship between the nuisance action and a criminal proceeding "supports the need for a neutral prosecuting attorney," and "***[a]ny*** financial arrangement that would tempt the . . . attorney to tip the scale cannot be tolerated." *Clancy*, 705 P.2d at 352-53 (emphasis added). The court therefore disqualified the counsel.

Years later, when the same court embraced the control test in a different case, it was careful to point out that *Clancy*'s categorical bar would continue to apply in quasi-criminal cases. In *County of Santa Clara v. Superior Court*, the California Supreme Court confronted another nuisance action, this time by various

municipalities against former manufacturers of lead paint. The municipalities sought to have the manufacturers remove or pay for the removal of lead paint. The court concluded that *Clancy*'s rule of "automatic disqualification" was "unwarranted" because the cases differed in nature. 235 P.3d at 32. Specifically, in *Santa Clara*:

- "[W]hatever the outcome of the litigation, no ongoing business activity will be enjoined" since the manufacture of lead paint had already been illegal for decades, *id.* at 34;
- "[T]he ***remedy*** will not involve enjoining current or future speech" and thus could not "prevent defendants from exercising any First Amendment right or any other liberty interest," *id.*;
- The suits posed "neither a threat nor a possibility of criminal liability," *id.*; and
- The proposed remedy would "result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created" – "the type of remedy one might find in an ordinary civil case," *id.*

Under these circumstances, the court held that the attorney general's office could hire private counsel on a contingency-fee basis, but only if it retained "'***absolute and total control over all critical decision-making***.'" *Id.* at 36 (quoting *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 475 (R.I. 2008)). Importantly, however, the court's need to distinguish the case before it underscored the vitality of *Clancy*'s rule of "automatic disqualification" in quasi-criminal cases. *Accord, e.g.*, David M. Axelrad & Lisa Perrochet, *The Supreme Court of*

California Rules on Santa Clara Contingency Fee Issue – Backpedals on Clancy, 78 Def. Couns. J. 331, 342 (2011) ("The court found the ***determinative*** factor in the case . . . to be the difference between 'the types of remedies sought and the types of interests implicated' in *Clancy* and in *Santa Clara*.") (citation omitted, emphasis added).[1]

Here, even if the Court were to conclude that a control test might be appropriate in some circumstances, the *Clancy* rule should apply. This case, like *Clancy*, seeks injunctive relief that would stifle ongoing advertising and promotional conduct critical to the defendants' business. (*See* 1st Am. Compl. ¶ 6.10, ECF No. 24 (filed Sept. 17, 2012) (seeking an injunction against certain conduct "relative to Defendants' Plavix sales aids and promotional materials and messages"); Pl.'s Br. In Opp'n To Defs.' Mot. To Dismiss Pl.'s 1st Am. Compl. ("MTD Opp'n") at 32, ECF No. 72 (filed Nov. 4, 2013) (explaining that

[1] Other cases have acknowledged this same distinction. *See, e.g.*, *City & Cnty. of S.F. v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) ("This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*. Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers."); *Lead Indus.*, 951 A.2d at 475 nn.48 & 50 (A categorical bar was inappropriate because "the case presently before us is completely civil in nature," but "we are unable to envision a criminal case where contingent fees would ever be appropriate[.]"); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1242-43 (Md. 1998) (distinguishing *Clancy* in part because "there are no constitutional or criminal violations directly implicated here").

defendants' alleged conduct with respect to "Plavix labeling, sales aids, and other promotional materials" are the target of requested injunctive relief).) Moreover, the requested injunctive relief implicates the defendants' liberty interests. In *Clancy*, it was sufficient that the proposed injunctive relief would have affected speech that was "arguably . . . protected in part." *Santa Clara*, 235 P.3d at 32. Here, the liberty interest at stake is at least as strong, as there is no question that pharmaceutical marketing speech is protected. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659, 2667 (2011) ("Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the . . . First Amendment."); *United States v. Caronia*, 703 F.3d 149, 166-67 (2d Cir. 2012) (discussing the public's right to receive information about prescription drugs).

This case also involves a request for penalties – a remedy that (like the one in *Clancy*) rests exclusively in the state's hands. *Santa Clara*, 235 P.3d at 33 n.10, 34 (contrasting the state's exclusive remedies with ordinary compensatory relief, which is all that was sought in *Santa Clara*). The purpose of penalties is not to compensate but to punish and deter, giving them a quasi-criminal character akin to punitive damages. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (noting that punitive damages "serve the same purposes as criminal penalties"). Indeed, the penalties remedy is particularly prone to abuse. Ordinary compensatory relief is, by its nature, limited by the extent of damage

actually sustained by the state or its citizens, reducing the risk of "governmental overreaching or economic coercion." *Santa Clara*, 235 P.3d at 34. But penalties are not so limited, affording essentially unbridled discretion to a private lawyer to seek to maximize the number and amount of penalties, regardless of any damage allegedly sustained. *See*, *e.g.*, Axelrad & Perrochet, 78 Def. Couns. J. at 342 (noting that "a penalty that is not tied to an amount needed to cure or abate harm caused by the defendant" is a consideration weighing against the application of *Santa Clara*'s control rule). Unsurprisingly, the private attorneys in this case have already set the stage to maximize recovery along these lines. (*See* MTD Opp'n at 23-27 (clarifying intent to seek penalties on a "per violation" basis); 1st Am. Compl. ¶ 8.1 (seeking up to $10,000 statutory maximum per violation).)

For all of these reasons, the control test cannot be trusted to afford the neutral forum guaranteed by due process. Instead, even if such a test were permissible in other circumstances, the quasi-criminal nature of this proceeding compels application of a per se rule against retention of private counsel on a contingency-fee basis.

II. THE USE OF CONTINGENCY-FEE COUNSEL IN QUASI-CRIMINAL ENFORCEMENT SUITS IS A GROWING PROBLEM THAT NEEDS TO BE ADDRESSED.

This case is just one of a growing number in which state attorneys general have abdicated their duties by delegating quasi-criminal enforcement power to

self-interested private attorneys. These arrangements promote unseemly quid pro quo relationships between government officials and private lawyers and undermine public confidence in the justice system, underscoring the need for strict judicial oversight.

Over the past few decades, contingency-fee arrangements have led to the "creation of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private lawyers aggressively pursuing litigation that could generate hundreds of millions in contingent fees." Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 968 (2007). The genesis of this practice can be traced to litigation in the 1980s, when Massachusetts hired outside counsel on a contingency-fee basis to prosecute claims over asbestos removal. *Id*.

Since then, state attorneys general have used this model to mount aggressive enforcement actions against the entire spectrum of the business community. *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 80 (2010) ("In the last ten years, state governments have increasingly resorted to this practice in their efforts to pursue 'big money' claims against alleged tortfeasors."). For example, the state of Rhode Island employed outside counsel to sue former manufacturers of lead paint and pigment from 2003 to 2008. Leah Godesky, *State*

Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?, 42 Colum. J.L. & Soc. Probs. 587, 589 (2009). Similarly, Oklahoma's Attorney General hired outside firms to sue poultry companies that allegedly polluted the state's waterways with chicken manure. *See id.* And in suits like this one, brought against the pharmaceutical industry, attorneys general have entered into contingency-fee contracts with outside counsel to prosecute a wide range of lawsuits, alleging failure to warn, fraudulent advertising or off-label promotion of prescription medications. Lise T. Spacapan, Douglas F. McMeyer & Robert W. George, *A Threat to Impartiality: Contingency Fee Plaintiffs' Counsel and the Public Good?*, In-House Defense Quarterly, Winter 2011, at 14.

The breadth of the practice cannot be overstated: in one recent study of the 50 states and the District of Columbia, 36 attorney general offices reported using contingency-fee counsel. *Id.*[2] Mississippi is among the most prolific of these jurisdictions. The Mississippi Attorney General is a repeat hirer of contingency-fee counsel, causing that state to "lead[] the nation in contingency fee contracts." Jim Malewitz, *Mississippi Republicans Challenge Powers of Attorney General*, Stateline, Feb. 3, 2012, http://www.pewstates.org/projects/stateline/

[2] This number does not include the use of contingency-fee counsel in the tobacco litigation during the 1990s. *See* Spacapan, McMeyer & George at 14.

headlines/mississippi-republicans-challenge-powers-of-attorney-general-85899375426.

Such reliance on outside counsel can be expected to increase as state legislatures increasingly call on attorney general consumer-protection and Medicaid-fraud units to contribute to their own budgets or become self-funded. *See* Dave Boucher, *Attorney General Outlines Changes to Office After New Laws Take Effect*, Charleston Daily Mail, Apr. 24, 2013, http://www.dailymail.com/News/201304230240 (referencing a bill passed by the West Virginia legislature that would take $7.46 million from the attorney general's Consumer Protection Fund and distribute it elsewhere in the state budget). This is all the more true because Congress has increasingly given state attorneys general authority to enforce federal laws.[3] And there will be no shortage of private lawyers eager to take on those representations. As one commentator noted in the Wall Street Journal:

> Trial lawyers love these deals. Even aside from the chance to rack up stupendous fees, they confer a mantle of legitimacy and state endorsement on lawsuit crusades whose merits might otherwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee. They're not on the hook for any downside, so wouldn't it practically be negligent to let a chance to sue pass by?

[3] For example, state attorneys general are authorized to enforce the Truth in Lending Act's mortgage mandates, 15 U.S.C. § 1640(e), and the Health Insurance Portability and Accountability Act's privacy provisions, 42 U.S.C. § 1320d-5(d).

Walter Olson, *Tort Travesty*, Wall St. J., May 18, 2007, at A17.

The growth of this practice has adversely affected the public's perception of the justice system. In particular, contingency-fee arrangements with private counsel create an opportunity for unseemly liaisons between public enforcement officials and private, profit-motivated lawyers. In Mississippi, for example, the Attorney General retained 27 law firms to represent Mississippi in 20 separate lawsuits over a five-year span, and "some of Mr. Hood's largest campaign donors are the very firms to which he's awarded the most lucrative state contracts." *Lawsuit Inc.*, Wall St. J., Feb. 28, 2008. As the defendants' brief notes, this case continues that pattern. (*See* MSJ at 13 (private counsel contributed $125,000 to the Attorney General between May 2007 and November 2011).)

Concern over the effects of such liaisons has generated substantial criticism over the last few years. As one former attorney general who has been an outspoken critic of these liaisons observed, "'[t]hese contracts . . . create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.'" Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (quoting Hon. William H. Pryor Jr.).

Further, contingency-fee counsel have incentives that, under any "realistic appraisal of psychological tendencies and human weakness," *Marshall*, 446 U.S. at

252 (internal quotation marks and citation omitted), create a structural conflict between the pursuit of justice and their personal interest in obtaining a substantial financial recovery. In particular, contingency-fee counsel "have a financial incentive to maximize money recoveries, an incentive that would be congruent with a client's interests in private actions but is frequently in tension with a State's public interest role." *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 48 (2012) (testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research).

These concerns, coupled with the threat to important due-process rights as highlighted in the previous section and in defendants' brief, underscore the importance of developing meaningful judicial limitations on the use of contingency-fee counsel by state attorneys general. At a minimum, the Court should hold that such arrangements are invalid in quasi-criminal enforcement suits like this one, in which the public's interest in seeing that justice is done and the defendant's interest in receiving the full protections of due process are at their apex. Absent such a standard, liaisons like the one here – between state attorneys general and private contingency-fee counsel – will continue unabated, fueling

unreasonable verdicts, eroding public trust in judicial proceedings and undermining due process.

CONCLUSION

For the reasons set forth above and in defendants' brief, the Chamber and PhRMA respectfully submit that the Court should hold that plaintiff's fee arrangement is unconstitutional.

Dated: November 25, 2013

Respectfully submitted,

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