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June 2, 2008

Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Mr. Kevin Underhill

333 Bush Street, Suite 600
San Francisco
California 94104-2828
415.544.1900
415.544.1923 DD
415.391.0281 Fax
kunderhill@shb.com

RE: ***County of Santa Clara v. Superior Court (Atlantic Richfield Co., et al.)***
(Petition for review filed May 19, 2008)
Supreme Court Case No. S163681
Sixth Appellate District Case No. H031540
Santa Clara County Superior Court Case No. CV788657

To the Honorable Chief Justice George and Associate Justices of the Supreme Court:

Amici curiae Chamber of Commerce of the United States of America ("the Chamber")[1] and American Tort Reform Association ("ATRA")[2] write pursuant to Rule 8.500(g) to support Atlantic Richfield Company's petition for review, which addresses the constitutionality of government use of contingency fee agreements with private attorneys to pursue public nuisance claims.

Amici are organizations that represent companies doing business in California and their insurers. *Amici* believe the California Court of Appeal decision violated well-established tort law and sound public policy by permitting public entities to engage in contingency fee arrangements with private counsel to pursue litigation. In addition, *amici* have a strong interest in ensuring that the government not be permitted to hire out its police-power functions to private attorneys with a profit interest in the outcome of a case, lest members find themselves targeted by private attorneys who are clothed in the mantle of state authority, but who are unrestrained in the exercise of that authority by constitutional checks and governmental ethics obligations.

This case should be of significant interest to this Court because permitting the state to "contract out" its enforcement power to private attorneys can lead to prosecution

[1] The Chamber is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the nearly 30,000 Chamber members located in California, countless others do business in the state and are directly affected by its litigation climate. The Chamber advocates for its members in matters before the courts, Congress, and executive branch agencies. It regularly files amicus briefs in cases raising issues of vital concern to the nation's business community.

[2] Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed amicus curiae briefs in cases before federal and state courts that have addressed important liability issues.

of government lawsuits on the basis of profitability, not public interest. Agreements that provide private attorneys with a percentage of the recovery in an action brought on behalf of the state violate principles of due process, ethics, and fundamental fairness.

In *People ex rel. Clancy v. Superior Court*, this Court recognized that the interests of government and private contingency fee attorneys are widely divergent, making such arrangements "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance claim." 705 P.2d 347, 353 (Cal. 1985). Based on this clear constitutional precedent and sound public policy, the Superior Court for the County of Santa Clara properly invalidated the contingency fee agreements in this case and ordered the counties to submit a new agreement, not based on a contingency fee, before permitting private counsel to further pursue this public litigation. *See* Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, *County of Santa Clara v. Atlantic Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Super. Ct., Santa Monica Cty., Apr. 4, 2007). The Superior Court found unpersuasive the government's claim that it maintains control over the litigation, recognizing the inherent practical difficulty of monitoring the reality of such an arrangement. *Id.* at 3-4.

This rationale was largely abandoned by the Court of Appeal, which distinguished *Clancy* on the premise that use of private contingency fee counsel "only to *assist*" the litigation, not to control it, upheld the standard of neutrality necessary to prosecute a nuisance action on the public's behalf. 74 Cal. Rptr. 3d 842, 848 (Ct. App. 2008) (emphasis in original). The court grounded its decision in provisions of some, but not all, of the contingency fee agreements indicating ultimate control over the litigation remained with the state. Indeed, the court acknowledged that two of these agreements actually had to be disclaimed or re-worded after the fact because they expressly stated that the private counsel had "absolute discretion" in the case. *Id.* at 849. Thus, the Court of Appeal's decision undermines *Clancy* significantly because all a private attorney must do to overcome it is to include a provision that final say over the litigation rests with the state.

Courts in other states have demonstrated serious concern over the propriety and constitutionality of this kind of contingency fee contract. *See, e.g., Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997) (finding contingency fee agreement between state and private firm violated the principles of separation of powers). The Rhode Island judiciary is currently considering the issue. *See Rhode Island v. Lead Indus. Ass'n, Inc.*, 898 A.2d 1234, 1238-40 (R.I. 2006) (quashing writ of certiorari for lack of necessity of deciding matter on an interlocutory basis, but finding the practice "necessarily implicates sensitive questions regarding the proper role of the constitutional office of the Attorney General in relation to the exclusively legislative powers of the General Assembly" and "will not evade review"); Order, *Rhode Island v. Lead Indus. Ass'n, Inc.*, Nos. 04-63-M.P., 06-158A, 07-121A (R.I. May 21, 2007) (resubmitting validity of contingency fee arrangement for decision without further briefing).

In addition, the experience of other states that have engaged in the practice of entering contingency-fee contracts demonstrates cause for concern as government-hired

private attorneys are often political donors, friends, or colleagues of the hiring government official – creating, at the very least, the appearance of impropriety. In case after case, such behind-closed-door contracts have seriously damaged the public's faith in government. *See, e.g.,* Editorial, *All Aboard the Gravy Train*, St. Louis Post-Dispatch, Sept. 17, 2000, at B2; Assoc. Press, *Lawyer Fees Weren't S.C.'s, Official Says*, Charlotte Observer, May 2, 2000, at 1Y; Glen Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, Philadelphia Inquirer, Oct. 4, 1999, at A1; Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27. In fact, former Texas Attorney General Dan Morales was sentenced to four years in federal prison for attempting to funnel millions of dollars worth of legal fees to a long-time friend who did little work on the state's tobacco litigation. *See* John Moritz, *Morales Gets 4 Years in Prison*, Ft. Worth Star Telegram, Nov. 1, 2003, at 1A.

While the tobacco litigation provides some of the most blatant examples of political favoritism, contingency fee contracts between states and private lawyers have raised controversy and concern in other areas as well, including environmental claims. *See, e.g.,* Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (discussing Oklahoma Attorney General Drew Edmondson's hiring of three private plaintiffs' firms to sue poultry companies for water pollution in an agreement that entitled them to receive up to half of the recovery).

Such government-endorsed lawsuits have predictably resulted in exorbitant fee awards at the public's expense, siphoning recovery that could otherwise be used to support public programs or reduce taxes. *See* John L. Peterson, *Attorneys for Kansas Collect $55 Million in Tobacco Case, Stovall's Ex-Firm Expects $27 Million*, Kansas City Star, Feb. 1, 2000, at B1; Bruce Hight, *Lawyers Give up Tobacco Fight*, Austin American-Statesman, Nov. 20, 1999, at A1; David Nitkin & Scott Shane, *Angelos to Get $150 Million for Tobacco Lawsuit*, Baltimore Sun, Mar. 23, 2002, at 1A. Deals between governments and private personal injury lawyers have spawned bitter fee disputes. *See, e.g.*, Alex Beam, *Greed on Trial*, Atlantic Monthly, June 1, 2004, at 96. These controversies force government officials to waste taxpayer dollars, divert their attention from other matters, and engage in unnecessary litigation.

Contingency fee awards are often misrepresented as coming at no cost to the public, with no need for government resources. But these contracts are not free. A fee paid to private lawyers as a result of the litigation is money that would otherwise fund government services or offset the public's tax burden. For example, South Carolina Attorney General Charlie Condon was criticized by environmental groups as "giving away the house" after a contingency fee contract he entered into resulted in a $1.48 million fee to two private lawyers. *See* Monk, *supra.*

Experience has proven that state and local governments can be equally effective without contracting with lawyers on a contingency fee basis, even when taking on the largest of adversaries. For example, even former New York Attorney General Eliot Spitzer, considered one of the most aggressive and activist state attorneys general, did not enter into contingency fee agreements with private lawyers. *See* Manhattan Inst., Center

for Legal Pol'y, *Regulation Through Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, at 7 (Wash., D.C., June 22, 1999) (transcript of remarks). Moreover, in the multi-state tobacco suits, the attorneys general of some states, such as Virginia, also opted not to hire contingency fee attorneys and instead pursued the litigation with available resources. *See* Editorial, *Angel of the O's?*, Richmond Times Dispatch, June 20, 2001, at A8. The federal government also pursues litigation without hiring lawyers on a contingency fee basis. *See* Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007).

County or district attorneys are best suited to carry out the state's responsibility, particularly when an action involves assertion of the state's police powers. Unlike private attorneys, government lawyers take an oath to support and defend the Constitution, Cal. Const. art. XX, § 3, are prohibited from having a financial interest in matters in which they make decisions, *see* Cal. Gov't Code §§ 87100, 87103, 87105, and are paid through public funds to ensure that their loyalty is to the people of the State. These rules ensure that government officers and employees are independent and impartial, avoid action that creates the appearance of impropriety, protect public confidence in the integrity of its government, and guard against conflicts of interest. The very nature of a contingency fee is directly contrary to the letter and spirit of prohibitions applicable to public actions under California law.

Moreover, contracting out the state's enforcement power to private contingency fee attorneys facilitates what has been called "regulation through litigation." *See* Robert B. Reich, *Regulation is out, Litigation is in*, USA Today, Feb. 11, 1999, at A15. The strategy of the private contingency fee attorneys to select an industry and go after it through tort litigation – as opposed to through legislation – may result in an end-run around representative government. Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 258-59 (2000).

Despite the claims of most attorneys general that the tobacco litigation was a "unique" situation, states and localities have hired contingency fee lawyers to attack a wide range of manufacturers and service providers. *See, e.g.,* John J. Zefutie, Jr., Comment, *From Butts to Big Macs--Can the Big Tobacco Litigation and Nation-Wide Settlement With States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 Seton Hall L. Rev. 1383, 1411-13 (2004). If the Court of Appeal's decision is allowed to stand, this alliance will no doubt expand into California because these "new style" cases give the state executive branch and local governments a new revenue source without having to raise taxes. These lawsuits also give government officials the chance to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, may not support. *See id.*

In addition to offending the democratic process, contingency fee agreements by the state pose a danger to the business and legal environment in California. They encourage lawsuits against "deep pocket" defendants that are often in industries viewed

as unpopular by the public, making it difficult for them to receive a fair trial. This is particularly true when what is essentially private litigation is backed by the state's moral authority and seal of approval. Should this practice be permitted to continue, the political patronage and unwarranted payouts seen in other states can be expected in California, and exercise of the counties' power based on profit, not public interest, will result.

CONCLUSION

For the reasons stated herein, *Amici* respectfully request that this Court grant Atlantic Richfield Company's petition for review.

Respectfully submitted,

M. Kevin Underhill (Cal. Bar No. 208211)
SHOOK, HARDY & BACON L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900
Attorney for *Amici Curiae*

Victor Schwartz
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005
Tel: (202) 783-8400

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

H. Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
Tel: (202) 682-1163

Of Counsel

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

I certify that on June 2, 2008, I sent four copies of the foregoing by overnight mail to:

Clerk of the Court
SANTA CLARA SUPERIOR COURT
Old Courthouse
161 North First Street
San Jose, CA 95113

Clerk of the Court
CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT
333 West Santa Clara Street, #1060
San Jose, CA 95113-1717

I also served a copy of the foregoing on each of the interested parties in this action by placing true and correct copy in sealed envelopes sent by U.S. Mail, first-class postage-prepaid, addressed to the following:

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

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
Slim von Kalinowski
Chief Deputy City Attorney
OFFICE OF THE SAN DIEGO CITY
ATTORNEY
CITY OF SAN DIEGO
1200 Third Avenue #1620
San Diego, CA 92101
Tel: 619-533-5803

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

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
COUNTY OF SANTA CRUZ
701 Ocean Street, Suite 505
Santa Cruz, CA 95060-4068
Tel: 831-454-2040

Attorneys for Defendant Atlantic Richfield Company

Sean Morris
John R. Lawless
Kristen L. Roberts
ARNOLD & PORTER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Tel: 213-243-4000

Philip H. Curtis
William H. Voth
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
Tel: 212-715-1000

Attorneys for Defendant Millennium Holdings LLC

David M. Axelrad
Lisa Perrochet
HORVITZ & LEVY LLP
5760 Ventura Blvd., 18th Floor
Encino, California 91436-3000
Tel: 818-995-0800

James C. Hyde
ROPERS, MAJESKI, KOHN & BENTLEY
80 North 1st Street
San Jose, CA 95113
Tel: 408-287-6262

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

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
1999 Harrison Street, 18th Floor
Oakland, CA 94612-0850
Tel: 510-444-3131

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 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

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

Allen J. Ruby
LAW OFFICE OF ALLEN RUBY
125 South Market Street, Suite 1001
San Jose, CA 95113-2285
Tel: 408-998-8503

Attorneys for Defendant NL Industries, Inc.

James McManis
William Faulkner
Matthew Schechter
MCMANIS, FAULKNER & MORGAN
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.
837 Sherman, Second Floor
Denver, CO 80203
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, 31st Floor
Pittsburgh, PA 15219
Tel: 412-394-7900

John W. Edwards, II
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Tel: 650-739-3939

Brian J. O'Neill
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071
Tel: 213-489-3939

Attorneys for Defendant Armstrong Containers

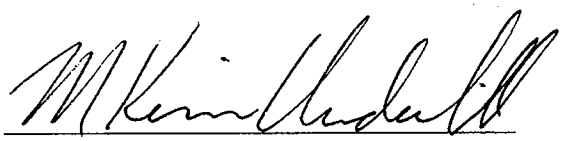
Robert P. Alpert (Courtesy Copy)
MORRIS, MANNING & MARTIN, LLP
1600 Atlanta Financial Center
3343 Peachtree Road, NE
Atlanta, GA 30326
Tel: 404-233-7000

Attorneys for Defendant O'Brien Corporation

Archie S. Robinson (Courtesy Copy)
ROBINSON & WOOD, INC.
227 N. First Street
San Jose, CA 95113
Tel: 408-298-7120

OTHER ENTITIES

Edmund G. Brown, Jr.
CALIFORNIA ATTORNEY GENERAL
1300 I Street
Sacramento, CA 94244



M. Kevin Underhill (SBN 208211)
SHOOK, HARDY & BACON L.L.P
333 Bush Street, Suite 600
San Francisco, CA 94104
Tel: (415) 544-1900