Appeal No. 13-5792/13-5881

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Merck Sharp & Dohme Corp.,
Plaintiff - Appellant Cross-Appellee,

v.

Jack Conway, in his capacity as
Attorney General of the Commonwealth of Kentucky,
Defendant - Appellee Cross-Appellant.

On Appeal from the United States District Court
for the Eastern District of Kentucky
Hon. Danny C. Reeves
Case No. 3:11-cv-0051-DCR-EBA

BRIEF OF PLAINTIFF - APPELLANT CROSS-APPELLEE MERCK SHARP & DOHME CORP.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit Case Number: 13-5792/13-5881 Case Name: Merck Sharp & Dohme Corp. v. Jack Conway, in his official capacity as AG of the Commonwealth of Kentucky

Name of counsel: Susan J. Pope, Frost Brown Todd LLC; and John H. Beisner and Jessica D. Miller, Skadden, Arps, Slate Meagher & Flom LLP

Pursuant to 6th Cir. R. 26.1, Merck Sharp & Dohme Corp.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Merck Sharp & Dohme Corp. is a wholly owned subsidiary of Merck & Co., Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on July 5, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Susan J. Pope

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT REGARDING ORAL ARGUMENT

This case raises the question whether a government agency's use of contingency-fee counsel to prosecute a quasi-criminal action violates the defendant's due-process rights. The Commonwealth of Kentucky, by Attorney General Jack Conway, sued Merck Sharp & Dohme Corp. ("Merck"), alleging violations of the Kentucky Consumer Protection Act, and seeking relief in the form of an injunction and civil penalties for each alleged violation. To prosecute its penalties case, the Commonwealth retained a private firm, which stands to recover 18% of any judgment or settlement paid by Merck. Few courts – and to Merck's knowledge, no federal appellate courts – have addressed whether such retentions are constitutional. Given the novelty and importance of the issue presented, Merck respectfully submits that the Court would benefit from oral argument.

JURISDICTIONAL STATEMENT

This case arises under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. On May 24, 2013, the district court entered Final Judgment in favor of Defendant-Appellee Jack Conway, the Attorney General of Kentucky (the "Kentucky AG" or "AG"). Plaintiff-Appellant Merck Sharp & Dohme Corp. ("Merck") timely noticed an appeal on June 13, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

INTRODUCTION

This appeal presents the question whether a government agency that is charged with pursuing the public interest may hire private, contingency-fee counsel to prosecute an enforcement action that seeks to enjoin business activities and impose substantial penalties. The AG sued Merck in 2009 (the "KCPA action"), alleging that by marketing Vioxx, a prescription drug approved for sale by the U.S. Food and Drug Administration, Merck violated the Kentucky Consumer Protection Act ("KCPA"). Although the KCPA authorizes the AG to seek relief for individual consumers in the form of restitution, the AG's suit does not seek such relief. Instead, the AG seeks civil penalties of $2000 or more for each alleged violation.

Despite stating that the purpose of its suit against Merck is to advance "sovereign interests," the Commonwealth has relied on private attorneys to prosecute the action. Shortly after it filed suit, the AG's office retained private counsel to take the "lead role" in the litigation, with the promise of an 18% contingency fee in the event of any recovery. In other words, counsel will not get paid unless the Commonwealth prevails; and if it prevails, the ultimate payout to private counsel will increase proportionately with a larger penalty award.

This arrangement injects an incurable conflict of interest into the litigation and violates Merck's due-process rights. As the U.S. Supreme Court has made clear, a defendant in a suit brought to enforce state law has a due-process right to a neutral tribunal, which includes the right to prosecution by neutral lawyers. Particularly where the potential consequences of liability are so stark – an injunctive remedy that could interfere with the defendant's business and penalties intended to serve a punitive purpose – the need for neutral prosecution and adjudication is at its apex. The use of contingency-fee counsel violates this principle because it poses the substantial risk that private pecuniary interests will displace the careful balancing of public interests that should be the only calculus driving the litigation.

The district court nevertheless approved the AG's use of outside counsel in this case, believing that retention of contingency-fee counsel is proper as long as

the AG exercises "control" over the litigation. But the control test offers insufficient protections in quasi-criminal cases like this one, as other courts have held. This is all the more true because most of the evidence relevant to proving control is subject to claims of privilege.

Even if the exercise of control *could* protect due-process rights, the AG failed to exercise the "absolute and total control" that other courts have required. Most notably, it exercised no control over the decision about the 45 alleged KCPA violations that will form the core of the Commonwealth's case – and directly drive the amount of any recovery. And it was similarly uninvolved in a number of other critical litigation decisions concerning the witnesses to be called at trial and the experts to be employed in preparing the Commonwealth's case. Although the AG claims to have "approved" these decisions after the fact, that approval amounts to mere rubber-stamping, a far cry from the "absolute and total control" required by due process.

Left undisturbed, the district court's decision will promote the use of prosecutors for hire across the Circuit, with grave consequences for American business and the rule of law. State-enforcement proceedings previously intended to serve the public interest by seeking a penalty commensurate to the harm allegedly caused by a defendant will be replaced with privately sponsored suits guided only by the maxim that "the sky's the limit." *See, e.g.*, Chris Dickerson,

Johnson & Johnson to fight $181M legal fees in Ark. Risperdal case, Legal Newsline Legal J., Feb. 6, 2013, http://legalnewsline.com/news/239381-johnson-johnson-to-fight-181m-legal-fees-in-ark-risperdal-case (noting that private attorneys stood to receive $181 million fee from $1.1 billion verdict against Johnson & Johnson based on Risperdal sales, which cost the state only $8.1 million). The resulting wealth transfer from corporations to private attorneys is contrary to fundamental notions of justice.

For all of these reasons, the district court erred in denying Merck's motion for summary judgment and in granting summary judgment to the AG, and this Court should reverse.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in concluding that the retention of profit-motivated, contingency-fee counsel is ever permissible in a quasi-criminal enforcement action?

2. Assuming, *arguendo*, that the district court was correct that retention of outside counsel may be permissible in a quasi-criminal enforcement action if the AG exerts the requisite control over the litigation, did the district court err in denying summary judgment to Merck and granting summary judgment to the AG, where Merck presented significant undisputed evidence that the AG had merely

rubber-stamped critical discretionary decisions, including those that bear directly on the amount of compensation outside counsel may ultimately obtain?

STATEMENT OF THE CASE

Merck filed this action against the Kentucky AG in the district court, asserting that the AG's retention of outside counsel on a contingency-fee basis in the KCPA action violates Merck's fundamental right to due process under the Fourteenth Amendment to the U.S. Constitution. Merck sought both temporary and permanent injunctive relief in the form of an order directing the Kentucky AG to desist using contingent-fee counsel to prosecute the KCPA action. (Compl., R.E.1, PageID#1-8.) The district court denied Merck's request for a preliminary injunction on March 21, 2012 (Mem. Op. & Order ("PI Order"), R.E.31, PageID#670-94), and denied the AG's motion to dismiss on March 23, 2012 (Mem. Op. & Order ("MTD Order"), R.E.32, PageID#695-702). The case then proceeded to discovery.

On January 31, 2013, the parties filed cross-motions for summary judgment. (R.E.64, PageID#855-57; R.E.65, PageID#1142-44.) While these motions were pending, the parties then began to prepare for trial (scheduled to begin on June 18, 2013). (*See* R.E.61, PageID#851.) A final pretrial conference was held on April 30, 2013. (R.E.103, PageID#3173.)

On May 24, 2013, the district court issued a Memorandum Opinion and Order granting the AG's motion for summary judgment and denying Merck's. (Mem. Op. & Order ("MSJ Order"), R.E.104, PageID#3174-3206.) In so ruling, the district court found that Merck had "failed to establish that the AG relinquished control over the [KCPA] litigation" and "conclude[d] that the AG ha[d] retained and exercised decision-making authority in the underlying litigation." (*Id.* at 32, PageID#3205.) The district court then entered final judgment in the AG's favor. (R.E.105, PageID#3207-08.)

STATEMENT OF FACTS

A. Vioxx

Vioxx is an anti-inflammatory pain reliever – developed, manufactured and marketed by Merck – that was available by prescription from May 1999 through September 2004. Vioxx belongs to the class of non-steroidal anti-inflammatory drugs ("NSAIDs"). Traditional NSAIDs, such as ibuprofen, suppress two forms of an enzyme called "cyclooxygenase" that are known as "COX-1" and "COX-2." Because the COX-1 enzyme protects the lining of the stomach, traditional NSAIDs are believed to cause gastrointestinal problems, largely from inhibition of COX-1 activity. By contrast, Vioxx is a selective COX-2 inhibitor, a type of NSAID that selectively blocks only the COX-2 enzyme and is therefore less likely to cause the gastrointestinal issues associated with traditional NSAIDs.

Vioxx was withdrawn from the market on September 30, 2004, after an external safety board monitoring the results of a long-term study – the APPROVe study – informed Merck that interim data from the study showed an increased rate of cardiovascular events in the group taking Vioxx after 18 months of continuous use, compared to the group taking a placebo. After Merck voluntarily withdrew Vioxx from the market in 2004, plaintiffs began filing lawsuits in courts around the country alleging that they had sustained heart attacks, strokes and other physical injuries as a result of their ingestion of Vioxx. *See, e.g.*, *Plunkett v. Merck & Co.*, 401 F. Supp. 2d 565, 571 (E.D. La. 2005). In February 2005, the Judicial Panel on Multidistrict Litigation created a multidistrict litigation ("MDL") proceeding before the Honorable Eldon E. Fallon of the United States District Court for the Eastern District of Louisiana to coordinate pretrial discovery in the Vioxx cases pending in federal courts around the country. *Id.*; *see also In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

The litigation swelled, ultimately embracing tens of thousands of cases, including several consumer-protection actions commenced by state attorneys general from around the country. In mid-2008, Merck settled consumer-protection claims with the attorneys general of 29 states and the District of Columbia. *See, e.g.*, Stipulated Gen. J. As To The Def., *State of Or. v. Merck & Co.* (Or. Cir. Ct. Marion Cnty., May 20, 2008), R.E.20-6, PageID#345-64. As part of this

resolution agreement, Merck paid $58,000,000 to the participating states. (*See, e.g.*, *id.* ¶ 23**,** PageID#355.)

B. The AG's "Investigation" And The Resulting Complaint

Although the Commonwealth of Kentucky claims to have first learned of Merck's allegedly deceptive promotional activities in November 2004, the Kentucky AG did not conduct any independent investigations in connection with these claimed violations until 2009. (Dep. of Elizabeth Natter ("Natter Dep."), Nov. 27, 2012, 88:14-89:7, R.E.77-1, PageID#2192-93; 107:17-20 PageID#2211; 110:5-12 PageID#2214; 111:13-22 PageID#2215; 112:22-113:19, PageID#2216-17.) Nor did it monitor the ongoing Vioxx litigation against Merck, or review any of the discovery collected in the MDL proceeding. (*Id.* 110:14-111:5 PageID#2214-15; 146:4-7 PageID#2250.) Indeed, the AG's 30(b)(6) deponent, Assistant Attorney General Elizabeth Natter, was not even aware of any Vioxx litigation until 2009. (*Id.* 137:22-138:11 PageID#2241-42.) As she put it, she did not "think it was a priority for the office" through 2008. (*Id.* 124:17-18, PageID#2228.)

At some point in 2009, the Office developed an interest in Vioxx after learning that other states had participated in a settlement of consumer-protection claims. (*See id.* 75:15-76:10, PageID#2179-80; 112:20-114:7, PageID#2216-18.) By August 2009, believing that they were operating under a five-year statute-of-

limitations period, unnamed supervisors urged Ms. Natter to seek a tolling agreement with Merck "for the purpose of investigating and determining if we should file suit." (*Id.* 76:1-5, PageID#2180; 127:10-19, PageID#2231; 130:21-131:4, PageID#2234-35; 137:6-16, PageID#2241.)[1] She did, and Merck declined. (*See id.* 76:1-7, PageID#2180.) Absent tolling, the Office's near five-year delay in initiating its investigation meant that a complaint "would need to be filed in fairly short order." (*Id.* 127:17-18, PageID#2231.) Thus, "at that point," Ms. Natter began "drafting a complaint." (*Id.* 76:5-7, PageID#2180.)

With no serious investigation having been done by her own office, Ms. Natter based her Complaint "largely on information that we got in reliance on other assistant attorneys general . . . who had investigated allegations against Merck." (*Id.* 141:8-12, PageID#2245; *see also id.* 140:19-24, PageID#2244 (admitting that her office had not done "the kind of thorough, you know, months-long investigation that we might do in some cases"); *id.* 163:23-164:6, PageID#2267-68 (agreeing that the "entire time period" of the pre-suit investigation was approximately two months).) In fact, she had "other complaints . . . filed by other attorneys general" in front of her while she drafted. (*E.g.*, *id.* 142:11-143:19, PageID#2246-47 (Ms. Natter testifying that she "looked at Florida" and Oregon

[1] Merck does not accept the AG's positions regarding the statute of limitations in the underlying case, but the limitations issue is immaterial to this appeal.

complaints but refusing to provide any detail on the extent of her reliance on those complaints on the ground that it is work product).) And indeed, the substantive allegations of the final Complaint filed in the KCPA action track those in Florida's Vioxx consumer complaint almost word for word. (*Compare generally* KCPA Compl., R.E.64-4, PageID#998-1005 *with* Florida Compl., R.E.64-5, PageID#1007-15; *see also* Redline Comparison of KCPA Compl. with Florida Compl., R.E.64-6, PageID#1017-23.)

On September 28, 2009 – almost five years after Vioxx was withdrawn from the market – the Kentucky AG filed the KCPA action, *Commonwealth of Kentucky ex rel. Conway v. Merck & Co.*, in the Franklin Circuit Court. Although heavily copied from prior pleadings by other states, the Kentucky AG's Complaint was different from those filed in most other state-initiated consumer suits in one respect: the AG did not seek any compensatory relief or restitution. (*See* KCPA Compl. Prayer for Relief, R.E.64-4, PageID#1004-05.) Instead, pursuant to the KCPA, the AG seeks the maximum civil penalty of $2000 per violation and $10,000 per violation directed at a person aged sixty or older. *See* Ky. Rev. Stat. § 367.990(2). As the Commonwealth has emphasized, it is "pursuing a cause of action that only the Kentucky Attorney General may enforce," and its desired relief of an award of "civil penalties" "is not a form of relief consumers can recover." (Response To Merck's Pet. For Interlocutory Appeal From Remand Order at 7

("Resp. to Pet. to Appeal Remand"), *Kentucky ex rel. Conway v. Merck Sharp & Dohme Corp.*, No. 12-90002 (5th Cir. filed Jan. 26, 2012) (internal quotation marks and citation omitted); Pl.'s Reply To Def. Merck's Opp'n To Pl.'s Mot. To Remand at 12 ("Remand Reply"), R.E.63,324, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-1657 (E.D. La. filed Aug. 29, 2011).)[2] The Commonwealth further seeks to "enjoin advertising practices that potentially reach the entire viewing and reading public." Resp. to Pet. to Appeal Remand at 3 n.1.[3] According to the Commonwealth, its pursuit of these remedies – without restitution for consumers – aims "to vindicate the State's sovereign and quasi-sovereign interests" rather than the interests of any "individual citizens." (*Id.* at 7-8, 15 (internal quotation marks and citations omitted).)

Presumably because of its hasty investigation and heavy reliance on the work of other states, the AG's office appeared to have little facility with the facts

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[2] Merck respectfully requests that the Court take judicial notice of the Commonwealth's previous statements in the KCPA action because those statements were made in filings in federal court. *See* Fed. R. Evid. 201(b); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) ("'[F]ederal courts may take judicial notice of proceedings in other courts of record.'") (citation omitted).

[3] This request for injunctive relief is not viable, because Vioxx-related conduct ceased long before the Commonwealth brought suit. *See, e.g.*, *Commonwealth ex rel. Stephens v. Isaacs*, 577 S.W.2d 617, 618 (Ky. Ct. App. 1979) (injunctive relief under the KCPA is not available "where [the] events make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur").

alleged in the Complaint – even years after it was filed. In her deposition, Ms. Natter, the "primary drafter" of the Complaint (Natter Dep. 139:14-22, R.E.77-1, PageID#2243), had difficulty answering basic questions pertaining to some of the AG's core allegations. For example, although Study 090 is discussed repeatedly in the Complaint (*see* KCPA Compl. ¶¶ 9, 15, 20, R.E.64-4, PageID#1000-01, 1003), Ms. Natter could not recall anything about the study – its purpose, the comparator drug used, or the indication studied (*see* Natter Dep. 146:16-19, R.E.77-1, PageID#2250; *see also id.* 146:20-147:18, PageID#2250-51). She further admitted that she did not know the basis for the Commonwealth's allegations pertaining to Study 090. (*Id.* 147:23-148:18, PageID#2251-52.) Likewise, the ADVANTAGE clinical trial is also discussed at length in the Complaint (*see* KCPA Compl. ¶¶ 11, 23-24, R.E.64-4, PageID#1000, 1003), but Ms. Natter again could not recall the purpose of the study beyond what was stated in the Complaint; nor could she name the comparator drug used in the trial (Natter Dep. 154:16-157:12, R.E.77-1, PageID#2258-61).[4] Ms. Natter defended her lack of knowledge by suggesting that she need not be "aware of every detail that is in this complaint" (Natter Dep. 157:10-12, R.E.77-1, PageID#2261), but these facts were not just "details"; the

[4] Notably, even in the course of litigating this federal case, Ms. Natter admitted that her office has occasionally had to "request[] some factual background from outside counsel." (Natter Dep. 13:12-13, R.E.77-1, PageID#2117.)

two studies are referenced in 7 of the 26 paragraphs that set forth the AG's core factual allegations.

C. The AG's Retention Of Outside Counsel

Shortly after the Complaint was filed, the case was removed to federal court and ultimately transferred to the United States District Court for the Eastern District of Louisiana as part of *In re Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La.). Soon after the KCPA action arrived in the MDL proceeding, the AG's office sought and retained contingency-fee counsel to prosecute the suit, entering into a contract with the Garmer & Prather firm of Lexington, Kentucky in September 2010, which brought in the Hare Wynn Newell & Newton firm of Birmingham, Alabama. (Natter Dep. 176:22-177:3, R.E.77-1, PageID#2280-81.)

The contract expressly provides that contingency-fee counsel shall "assum[e] [the] *lead role* in investigating and . . . preparing litigation against Merck." (*See* 2010 Contract at 3, R.E.64-7, PageID#1027 (emphasis added).) This "lead role" extends to a broad range of expressly defined activities, including, but not limited to:

- "[I]nvestigating and, if warranted, preparing litigation against Merck & Co. Inc. and other potentially responsible entities";
- "[C]onduct[ing] all phases of investigation and litigation including responding to motions, including motions to dismiss";
- "[D]rafting and answering discovery propounded to the Commonwealth";

- "[C]oordinat[ing] litigation with other states and the federal government to promote, to the extent beneficial, a unified approach to these cases";
- "[T]aking" and "defending depositions";
- "[R]esponding to motions for summary judgment and other pretrial dispositive motions";
- "[I]dentif[ying] [and preparing] . . . experts to testify in favor of the Commonwealth";
- "[A]ssessing the strength of legal arguments propounded by the litigants"; and
- "[R]epresent[ing] the Commonwealth in trial or in any settlement negotiations that may occur."

(*Id.* at 3-4, PageID#1027-28.)

Garmer & Prather agreed to prosecute the KCPA action in exchange for an 18 percent contingency fee of any civil penalties or other amounts recovered from Merck. (*See* Cost Proposal, Bates No. 000013**,** R.E.64-8, PageID#1037.) The firm also agreed to advance "[a]ll expenses incurred in the investigation, assessment and litigation." (*Id.*) These costs are not recoverable if Merck does not pay civil penalties in the KCPA action. (Natter Dep. 218:5-219:6, R.E.77-1, PageID#2322-23.)

Once outside counsel was retained in the KCPA action, the AG's office essentially disappeared from the MDL proceedings. Outside counsel submitted all briefs to the MDL court, often without a signature or reference to the AG's office.

(Mot. to Quash Subpoena or Enlarge the Time for Compliance, Merck v. AG 000114-000115; Mem. in Supp. of Mot. to Quash Subpoena or Enlarge the Time for Compliance, Merck v. AG 000116-000126; Notice of Appearance as Co-Counsel for Pl., Merck v. AG 000128-000130; Notice of Supplemental Auth., Merck v. AG 000140-000141, R.E.64-9, PageID#1039-1056.) Letters to the MDL court were similarly devoid of any reference to the AG, and were submitted on Garmer & Prather letterhead. (Letter from W. Garmer to Hon. E. Fallon, Aug. 1, 2011, Merck v. AG 000002-000007; Letter from W. Garmer to Hon. E. Fallon, Mar. 29, 2011, Merck v. AG 000057-000058, R.E.64-10, PageID#1058-1065.) The AG's office also failed to appear at hearings before the MDL court.[5] When MDL mediation proceedings were initiated in November 2010, the Commonwealth was represented by outside counsel, and no representative from the AG's office participated either in person or telephonically. (Natter Dep. 223:6-224:4, R.E.77-1, PageID#2327-28.)

Outside counsel also assumed the lead role in communicating with Merck during this period. (*Id.* 225:17-226:1, PageID#2329-30; *see also* Letter from B. Vines to B. Barnett & E. Flaster, Apr. 11, 2011, Merck v. AG 000059-000062,

[5] Ms. Natter appeared telephonically at "some" MDL status conferences, but admits that she never spoke on the record, other than to introduce herself to the court. (Natter Dep. 221:10-223:5, R.E.77-1, PageID#2325-27.) No representative from the AG's office personally appeared at MDL conferences.

R.E.64-11, PageID#1067-70.) Indeed, all correspondence relating to the KCPA action while it was pending in the MDL proceeding was exchanged directly between outside counsel and Merck. (*Id.*)

Over the course of 2011, Merck engaged in a settlement process with representatives of the National Association of Medicaid Fraud Units ("NAMFCU") to resolve outstanding AG-sponsored litigation involving Vioxx. The NAMFCU settlement, which focused mostly on Medicaid-related claims, ultimately resulted in a payment by Merck of $915 million to settle Vioxx-related claims with the federal government and 42 states in November 2011. Kentucky was invited to participate, but outside counsel refused Merck's settlement offer in connection with the NAMFCU settlement process. (Letter from B. Vines to J. Beisner, Merck v. AG 000023-000024, R.E.64-12, PageID#1072-73.) The letter declining the offer was prepared on outside counsel's letterhead and signed by Brian Vines, an attorney for Hare Wynn. (*Id.*) The Kentucky AG's office was not mentioned in the letter, and no attorney from the AG's office was listed in the correspondence. (*Id.*)

In light of outside counsel's lead role in all communications, Merck became increasingly concerned that the Commonwealth was not appropriately engaged in settlement discussions. As such, Merck hired Terry McBrayer, an attorney in Kentucky, to discuss the terms of the settlement directly with the Kentucky AG.

(Dep. of Terry McBrayer ("McBrayer Dep.") 12:5-8, 23:1-11, Nov. 13, 2012, R.E.64-13, PageID#1076-77.) When Mr. McBrayer first contacted the AG about the KCPA litigation, Mr. Conway demonstrated a lack of familiarity with the case, stating "Let me check with Sean [Riley], and we'll find out . . . and we'll see what's going on." (*Id.* 43:25-44:2, R.E.77-8, PageID#2776-77; *see also id.* 25:16-18, R.E.77-7, PageID#2758.) Mr. McBrayer ultimately met face-to-face with Mr. Conway and Sean Riley, Deputy Attorney General, on two occasions, from which Mr. McBrayer could not determine whether the AG's office was in control of the litigation. (*See id.* 32:20-33:2, R.E. 77-8, PageID#2765-66.) Specifically, in the second of these meetings, Mr. Conway indicated that he had never seen the letter declining the settlement. (*Id.* 47:8-12, R.E.64-13, PageID#1078.)[6] And while Mr. Conway apparently stated that he rejected the idea of settlement "pretty quickly," he offered no reason for the decision to decline Merck's settlement offer. (*Id.* 28:18-24, R.E.77-7, PageID#2761.)

In short, by all outward appearances, the AG's office hired outside counsel and disengaged from the litigation while it was pending in the MDL proceeding.

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[6] Indeed, although Ms. Natter maintained that the AG's office "authorized [outside counsel] to reject the offer" and had "a lot of discussions" about the settlement (Natter Dep. 294:10-12, R.E.77-1, PageID#2398; 286:7-19, PageID#2390), she admitted that no attorney from the AG's office saw the letter before it was sent (*id.*).

D. Merck's Assertion Of Its Constitutional Right To Due Process

In light of Mr. McBrayer's meeting with the AG – and the AG's apparent lack of familiarity with the proposed NAMFCU settlement – Merck became concerned that the AG's office had abdicated control of the litigation to its outside counsel. Thus, in August 2011, while the KCPA action was still pending in the MDL proceeding, Merck commenced suit in the district court against the AG, seeking injunctive relief from the violation of its due-process right to a fair proceeding pursuant to 42 U.S.C. § 1983. The Complaint alleges that the Kentucky AG has improperly delegated the coercive powers of the Commonwealth to outside lawyers who have a clear, direct and substantial financial stake in the outcome of the underlying KCPA lawsuit. (*See* Compl. ¶¶ 29-30, R.E.1, PageID#7.) The Complaint further alleges that this delegation of powers has tainted the fairness of the underlying KCPA action, which, in turn, has deprived Merck of its fundamental right to due process under the Fourteenth Amendment. (*Id.*)

Merck moved for a preliminary injunction, and the AG filed a motion to dismiss. The district court denied both motions. With respect to Merck's request for a preliminary injunction, the district court recognized that "quasi-criminal civil cases may implicate the AG's requirement of neutrality." (*See* PI Order at 15, R.E.31, PageID#684.) Because "[t]he civil penalties sought by the AG [in the

KCPA action] are intended to punish and deter," the district court concluded that the "KCPA action against Merck is penal in nature and thus implicates the [due process] requirement of neutrality." (*Id.* at 17, PageID#686.) But the court rejected Merck's argument that contingency-fee counsel should be categorically prohibited in quasi-criminal cases (*see* Pl.'s Mem. of Law in Supp. of Mot. for Preliminary Injunction at 13, R.E.2-1, PageID#47 (arguing that in quasi-criminal cases "the risk that private counsel may misuse the Commonwealth's enforcement powers to enrich themselves is simply too great to pass constitutional muster"), concluding instead that, "[e]ven in civil cases that implicate the prosecutor's requirement of neutrality, the existence of a contingency fee arrangement with outside counsel does not necessarily violate the defendant's due process rights," (*see* PI Order at 17, R.E.31, PageID#686). Specifically, the district court held that "the existence of a contingency fee arrangement with outside counsel does not *necessarily* violate the defendant's due process rights . . . *if* the government attorney or prosecutor retains full control over the course of the litigation." (*Id.* at 17-18, PageID#686-87 (internal quotation marks and citation omitted, emphases added).) Thus, in the court's view, "the fundamental inquiry in this case concerns the issue of control over the litigation." (*Id.*) Based on the limited record before it, the district court found that Merck had failed to establish "a lack of control over

the litigation on the part of the AG," (*id.* at 20, PageID#689), and denied Merck's request for a preliminary injunction.[7]

In denying the AG's motion to dismiss shortly thereafter, however, the district court recognized that Merck's Complaint "allege[d] numerous facts that support Merck's contention that the AG has allowed contingency-fee counsel to assume the lead role in prosecuting the action." (MTD Order at 6, R.E.32, PageID#700 (internal quotation marks and citation omitted).) In particular, the district court highlighted Merck's assertion that "all relevant correspondence and other communications have come from contingency-fee counsel." (*Id.* (internal quotation marks and citation omitted).) The court then concluded that Merck had pled "sufficient facts to proceed to discovery" on the issue of whether "private

[7] The district court also rejected several jurisdictional arguments raised by the AG, including ripeness and abstention under the *Pullman* and *Burford* doctrines. The court rejected the AG's ripeness argument, which contended that no violation of rights would occur unless Merck lost at trial, because the lawsuit alleges that Merck's due-process rights have been imperiled by the existence of biased proceedings. (*See* PI Order at 6, R.E.31, PageID#675.) The court also declined to abstain, noting that abstention under the *Pullman* doctrine is only proper where resolution of a difficult state-law issue might obviate the need for decision on a federal issue, and that no such state-law issue is presented in this case. (*Id.* at 9, PageID#678.) As to *Burford* abstention, the court recognized that this narrow doctrine applies only where a federal action threatens to interfere with the state's ability to administer a complex regulatory regime that is "of vital interest to the general public" in a coherent manner. (*Id.* at 10, PageID#679 (internal quotation marks and citation omitted).) According to the district court, the regulations governing retention of outside counsel do not qualify, particularly because the procedures for retention are "far from being 'of vital interest to the general public.'" (*Id.* at 10, PageID#679 (citation omitted).)

counsel have ever engaged in any conduct that invaded the sphere of control reserved to the AG's office." (*Id.* at 8, PageID#702 (internal quotation marks and citation omitted).)[8]

E. Subsequent Proceedings In The KCPA Action & The 2012 Revisions To The Contingent-Fee Contract Of Outside Counsel

The KCPA action was remanded to state court in 2012 and has been proceeding toward trial. In an apparent reaction to the instant suit, the AG's office has made a few minor changes in its conduct of that litigation. For example, Ms. Natter now appears in court and participates in "a weekly conference call" with outside counsel. (*See, e.g.*, Natter Dep. 308:19-309:3, R.E.77-1, PageID#2412-13.) Ms. Natter also claims that "a larger percentage of [her] time is involved in the [KCPA action] than it was in the MDL" proceeding and that she "now physically sign[s] all pleadings" in that case. (*Id.* 233:17-18, 234:9-10, PageID#2337-38.) And when the Commonwealth renewed its contract with Garmer & Prather in July 2012, although it retained the language that contingency-fee counsel "assum[es] [the] lead role in investigating and . . . preparing litigation" against Merck (along with the lengthy list of duties that follows), it added a proviso

[8] The AG later filed a second motion to dismiss, arguing that the district court should abstain from adjudicating Merck's due-process suit pursuant to the *Younger* abstention doctrine. The district court denied the AG's second motion too, finding that there was no "ongoing" state proceeding when Merck asserted its due-process claim. (Mem. Op. & Order, R.E.57, PageID#834-46.)

that the AG shall have "final authority over all aspects of this litigation" and that "[t]he Attorney General may provide attorneys and other staff members to assist Contractor with this litigation." (2012 Contract at 4-5, R.E.64-16, PageID#1097-98.) As later revealed in deposition, the AG's office considered these revisions "a good idea" in light of the lawsuit filed by Merck. (Natter Dep. 231:18-232:6, R.E.77-1, PageID#2335-36.)

Notwithstanding these cosmetic changes, the AG's office has continued to let its outside counsel direct the KCPA action. Although Ms. Natter repeatedly offered generic assertions to the effect that the AG's office has the "final word" on all litigation decisions in the KCPA action at her deposition (*e.g.*, *id.* 315:19, PageID#2419), the reality is that essential decisions in the case are controlled by outside counsel, not the AG's office. For example, Ms. Natter demonstrated no substantive knowledge of any of the 45 alleged violations that form the core of the KCPA action. (*Id.* 267:7-268:6, PageID#2371-72.) The list of violations was assembled exclusively by outside counsel in the course of their review of thousands of documents produced by Merck. (*Id.* 264:20-21, PageID#2368 ("Outside counsel sent this list to me.").) No Kentucky AG attorney ever reviewed the underlying documents in support of these allegations, and Ms. Natter – the AG attorney "most knowledgeable" about the KCPA action – was only able to testify that she was generally familiar with the "boilerplate" descriptions of each separate

violation. (*Id.* 268:7-14, 276:11-277:17, PageID#2372, 2380-81.) When shown three of the documents on the list that allegedly violated the KCPA, Ms. Natter testified that she could not recall having seen a single one of them. (*See id.* 279:4-284:1, PageID#2383-88.) And when asked to identify "anything . . . that is false or misleading" in one such document, she could not do so. (*Id.* 281:20-282:5, PageID#2385-86 (initially stating that she "probably can" but, upon reviewing the document, testifying that "I don't want to testify regarding any specifics relating to this article").)

Ms. Natter claimed that the AG's office "approved" the list of claimed violations – apparently intending to suggest an exercise of its "final authority" over the litigation (2012 Contract at 4, R.E.64-16, PageID#1097) – but no attorney from the AG's office either added or removed even a single violation from the list prepared by outside counsel (Natter Dep. 276:17-20, 323:9-23, R.E.77-1, PageID#2380, 2427). Moreover, the list of violations is *identical* to the one produced by the same outside counsel in a very similar enforcement action regarding Vioxx brought on behalf of the State of Alaska, confirming that the Kentucky AG's office had absolutely no input in preparing it. (*Compare generally*, Appendix A to Kentucky Discovery Responses *with* Appendix A to Alaska Discovery Responses, R.E.64-17, PageID#1111-25.) This fact is notable because Ms. Natter claimed earlier in her deposition that one measure of the AG's

control of the litigation was its habit of "mak[ing] changes" and "add[ing] arguments" to "positions and briefs" authored by outside counsel. (Natter Dep. 195:15-18, R.E.77-1, PageID#2299.)

Similarly, Ms. Natter knew little about the 65 witnesses on the Commonwealth's good-faith witness list in the KCPA action – i.e., the list of individuals that the Commonwealth may call on its behalf at trial. (*Id.* 247:11-17, PageID#2351.) Although Ms. Natter claims that she "approv[ed]" the witness list and was "generally aware of the methodology" used to devise it (*id.* 248:2-18, PageID#2352), she could only identify seven of the 65 witnesses (*id.* 252:9-17, PageID#2356). She did not know nearly 60 witnesses selected by outside counsel; nor could she describe their alleged role in the promotion of Vioxx. (*Id.* 258:13-259:24, PageID#2362-63; *see also id.* 249:3-12, PageID#2353.) And once again, neither Ms. Natter nor any other attorney from the AG's office removed a single witness from the list compiled by outside counsel. (*Id.* 260:1-8, PageID#2364.) Ms. Natter was likewise unable to confirm whether the Commonwealth has formally retained experts in the KCPA litigation. (*Id.* 305:15-306:7, PageID#2409-10.) She similarly could not answer whether experts had been retained as consultants – much less whether consultancy agreements had been entered into with outside counsel or the AG's office. (*Id.* 305:21-306:7, PageID#2409-10.)

The AG's office was likewise uninvolved in preparing a list of 12 witnesses in response to an interrogatory in which Merck asked the Commonwealth to identify the witnesses who had information relevant to its allegations that Merck engaged in unfair and deceptive trade practices. (*Id.* 237:15-244:12, PageID#2341-48.) No attorney from the AG's office contributed any of the names included in the response to the interrogatory. (*Id.* 237:15-238:2, PageID#2341-42.) Outside counsel "did factual investigation, reviewed documents, [and] reviewed depositions" in order to prepare the list. (*Id.* 246:4-6, PageID#2350.) Although Ms. Natter once again claimed to have approved the list and the methodology used to compile it, she admitted that she "did not know in particular . . . who each of these [witnesses] are." (*Id.* 246:4-12, PageID#2350.)

F. The AG's Assertion Of Privilege

As the instant suit proceeded to discovery, the AG resisted inquiry into any facts touching on the control issue under the auspices of various privileges. Most prominently, Ms. Natter's deposition itself was the product of extensive litigation over privilege. The AG initially refused to designate an attorney employee of the AG's office in response to Merck's 30(b)(6) Notice of Deposition, contending that any conceivably relevant topic was off-limits under the attorney-client and work product privileges. (*See* Letter from C. Barkley to Magistrate Judge E. Atkins, Oct. 2, 2012, R.E.71-8, PageID#1965-68.) Instead, the AG proposed designating a

representative to participate in a written deposition. (*Id.*) Only after a series of letters between opposing sides' counsel and to the magistrate judge were the parties able to resolve this discovery dispute, agreeing to a protective order limiting Ms. Natter's 30(b)(6) deposition. (*See, e.g.*, *id.*; Protective Order, R.E.52, PageID#814-15.) While Ms. Natter was ultimately deposed, she and her attorney invoked privilege on a number of occasions, undermining Merck's ability to obtain basic facts in support of its claim. (*See, e.g.*, Natter Dep. 55:7-14, R.E.77-1, PageID#2159; 85:15-19, PageID#2189; 94:9-22, PageID#2198; 238:16-23, PageID#2342; 255:11-21, PageID#2359; 269:3-18, PageID#2373; 309:4-14, PageID#2413.)

One matter over which the AG claimed privilege at Ms. Natter's deposition was a letter from an attorney to the Commonwealth about the possibility of Vioxx-related litigation years before the Commonwealth filed suit. When Merck challenged this claim of privilege, the AG moved for a protective order. (*See generally* Merck's Opp'n To Def.'s Mot. For Protective Order, R.E.68, PageID#1776-82.) Although the attorney was never retained by the Commonwealth, the AG succeeded in its claim of privilege, depriving Merck of potentially relevant evidence regarding control. (*See id.* at 6-7, PageID#1781-82; Order, R.E.69, PageID#1802-04.)

The parties were also forced to litigate privilege with respect to the AG's more recent motion for a protective order, which requested that the district court allow the AG to disclose two e-mails protected by the attorney-client privilege and the work-product doctrine without waiving these protections as to other internal communications. (*See* Def.'s Mot. for Protective Order, R.E.96, PageID#3114-16; Pl.'s Opp'n to Def.'s Mot. for Protective Order, R.E.99, PageID#3132-41.) The e-mails were just two among over 1000 e-mails over which privilege had been claimed – any one of which (singly or in combination) could have been relevant to the issue of control. (*Id.* at 8, PageID#3139; *see also* Natter Dep. 309:22-311:8, R.E.77-1, PageID#2413-15.) The magistrate judge denied the motion because the request occurred months after the close of discovery. (*See* Order, R.E.102, PageID#3171-72.) While the AG requested that the district court reconsider this ruling, the motion for reconsideration was not adjudicated before the district court granted the AG summary judgment.

G. The District Court's Ruling on the Parties' Cross-Motions for Summary Judgment

On January 31, 2013, following the close of discovery, the parties filed cross-motions for summary judgment. While these motions were pending, the parties began to prepare for trial (scheduled to begin on June 18, 2013), and filed with the district court – among other things – witness lists, exhibit lists, motions in limine and pretrial memoranda. (*See* R.E.66, PageID#1687-89; R.E.86,

PageID#2792-97; R.E.87, PageID#2798-2800; R.E.88, PageID#2801-03; R.E.90, PageID#2812-27; R.E.91, PageID#2828-32; R.E.92, PageID#2833-37; R.E.93, PageID#2838-70; R.E.94, PageID#2871-86.) A final pretrial conference was held on April 30, 2013. (R.E.103, PageID#3173.)

On May 24, 2013, the district court denied Merck's motion for summary judgment and granted the AG's motion for summary judgment. In its order, the district court once again noted that "Merck has a due process right to a neutral prosecution, free from any financial arrangement that would tempt the government attorney, or his outside counsel, to tip the scale." (MSJ Order at 8-9, R.E.104, PageID#3181 (internal quotation marks and citation omitted).) Nevertheless, the district court ruled that the evidence did not establish that "the AG's arrangement with outside counsel . . . violated the requirement of neutrality." (*Id*. at 10, PageID#3183.) According to the district court, the contracts between the AG and outside counsel "contain[ed] sufficient safeguards against the violation of Merck's due process rights." (*Id.* at 17, PageID#3190.) The district court further held that the AG has exercised "actual control" over the KCPA action because it "retained and exercised decision-making authority in the underlying litigation." (*Id*. at 32, PageID#3205.) In so doing, the district court reasoned that "knowledge alone is [not] a reliable indici[um] of control," and, thus, Ms. Natter's lack of knowledge regarding the KCPA action was not dispositive. (*Id.* at 20, PageID#3193; *see also*

id. at 22, PageID#3195 ("Natter's lack of substantive knowledge regarding the witnesses on the list is not a sufficient basis for the conclusion that she failed to control the procedure by which the lists were created and approved.").)

According to the district court, "Merck's most compelling argument" was the one regarding the list of 45 claimed violations of the KCPA. (*Id.* at 23, PageID#3196.) This list, the court recognized, was "identical to the one produced by the same outside counsel on behalf of the State of Alaska." (*Id.* (internal quotation marks and citation omitted).) "The Court agree[d] that the AG's approval and use of the KCPA violations list suggest[ed] a disappointingly casual approach to the details of the *Merck I* proceeding." (*Id.*) As the Court recognized, Ms. Natter testified that she did not "review[] [the] entire set of documents" upon which the list of violations is based and stated that she is "not 100 percent sure of the source of th[e] list." (*Id.* (internal quotation marks and citation omitted).) The district court nonetheless concluded that "Merck's due process rights were not violated," declaring that "the AG's office does not need to be intimately involved in all of the everyday work or decision-making that occurs in the [Vioxx] litigation to exercise meaningful control over the proceedings." (*Id.* at 25, 33 PageID#3198, 3206.) While the district court so held, it found the AG office's "unfamiliarity" with certain aspects of the underlying state court litigation to be "disconcerting"

and suggested that the office was "complacen[t] or laz[y]." (*Id.* at 23-24, PageID#3196-97.)

Merck timely noticed an appeal and moved to expedite review in order to allow resolution before October 2013, the currently scheduled trial date in the KCPA action. (*See* Mot. to Expedite Appeal at 3 (filed June 12, 2013).)

SUMMARY OF THE ARGUMENT

1. The district court erred in concluding that the AG could ever retain contingency-fee counsel to assume a "lead role" in the prosecution of a penalties-only enforcement action. Because of their significant financial stake in the outcome of the quasi-criminal suit (i.e., payment in the form of 18% of the penalties recovered), outside counsel has every incentive to pursue maximum penalties in this matter regardless of the public interest or Merck's culpability. Such an arrangement "is antithetical to the standard of neutrality that an attorney representing the government must meet" when prosecuting a quasi-criminal enforcement action, *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985), and therefore contravenes due process.

2. Even if the retention of outside contingency-fee counsel were not a *per se* violation of Merck's due-process rights, the district court nevertheless erred in denying Merck's motion and granting the AG's because Merck proffered significant undisputed evidence that the AG had abandoned control over critical

decisions in the case. Most notably, the AG did not exercise any meaningful review or exhibit any substantive knowledge over the list of 45 claimed statutory violations that form the basis of the Commonwealth's suit in the KCPA action; the list of witnesses to be called for trial; or the decision to retain experts. In the district court's view, none of these facts was material as long as the AG retained the "right" to control the litigation. But as courts have recognized in analogous circumstances, the right to control does not amount to control in fact, particularly where – as here – it results in mere rubber-stamping of delegated decisions. Thus, the district court was wrong to ignore Merck's evidence and deny it summary judgment. Alternatively, at a minimum, Merck's evidence raised an issue of fact as to control, and the district court should have allowed the case to proceed to trial.

STANDARD OF REVIEW

An order granting summary judgment under Rule 56 is reviewed *de novo*. *Rupert v. Daggett*, 695 F.3d 417, 422 (6th Cir. 2012). "Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Spectrum Health Continuing Care Grp. v. Anna Marie Bowling Irrevocable Trust*, 410 F.3d 304, 309 (6th Cir. 2005) (internal quotation marks and citation omitted); *see also Am. Beverage Ass'n v. Snyder*, 700 F.3d 796, 803 (6th Cir.

2012) (quoting Fed. R. Civ. P. 56(a)). However, "'[i]f disputed factual issues . . . exist, those issues must be submitted to a jury for the jury to determine the appropriate facts,'" making summary judgment improper. *Alman v. Reed*, 703 F.3d 887, 896 (6th Cir. 2012) (quoting *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005)). "'For cross-motions for summary judgment, we must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the non-moving party.'" *Spectrum Health*, 410 F.3d at 309 (quoting *Beck v. City of Cleveland*, 390 F.3d 912, 917 (6th Cir. 2004)).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT MERCK'S DUE-PROCESS RIGHTS COULD BE PROTECTED BY THE AG'S EXERCISE OF "CONTROL" OVER THE LITIGATION.

The district court first erred in requiring Merck to prove that the AG abdicated control of the KCPA action. The AG's decision to give private counsel a financial stake in the outcome of the KCPA litigation violated – and continues to violate – Merck's due-process rights, irrespective of any control that the AG may be exercising over the conduct of the litigation. This is so because at least in quasi-criminal cases like this one – in which the Commonwealth eschews compensation and seeks only the imposition of penalties and a permanent restriction on Merck's future advertising activities – the Due Process Clause imposes a categorical prohibition on the use of counsel with a financial stake in the outcome.

The district court recognized that the AG's suit was "penal in nature," which "implicates the requirement of neutrality" – i.e., that counsel not have a private stake in the litigation. (*See* PI Order at 17, R.E.31, PageID#686.) But it nevertheless concluded that, "if the government attorney or prosecutor retains full control over the course of the litigation, then the right to an impartial tribunal is not infringed by the use of a contingency fee arrangement." (*Id.* at 18, PageID#687 (internal quotation marks and citation omitted).) This conclusion was erroneous. The Due Process Clause guarantees a right to a neutral proceeding, free from pecuniary influences on the government attorney, and that interest in neutrality bars the use of contingency-fee counsel in quasi-criminal cases like this one.

A. The Due Process Clause Guarantees A Right To A Neutral Tribunal And Prohibits The Use Of Contingency-Fee Counsel In Quasi-Criminal Proceedings.

The Supreme Court long ago recognized that a state violates due process when it deprives a defendant of an impartial tribunal. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the trial judge presiding over the case derived income from fines that the defendant would be required to pay upon conviction. The Supreme Court easily found a due-process violation, unanimously declaring 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." *Id.* at 523. The Court reached that conclusion after considering the history of the common law, which revealed that, for "hundreds of years the justices of the peace of England seem not to have received compensation for court work" at all, and "judges in towns [were] paid salaries." *Id.* at 525. This policy made good sense: "[i]t is certainly not fair to each defendant" that "the prospect of" losing a fee by failing to convict "should weigh against his acquittal" in the mind of a judge. *Id.* at 532.

As the Supreme Court has since made clear, the impartial-tribunal requirement of due process applies not only to judges, but also to plaintiffs and prosecutors in suits brought to enforce state law. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the Supreme Court warned that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50 (rejecting constitutional challenge but nonetheless recognizing requirement of neutrality and impartiality in enforcement proceeding). This holding was consistent with the universally acknowledged principle that prosecutors and other state-appointed defenders of the public interest are subject to special obligations that go beyond the baseline ethical tenets governing all attorneys. *See, e.g., id.* at 249 ("Prosecutors are also public officials; they too must serve the public interest."); *see also, e.g.*, *United States v.*

Grey, 422 F.2d 1043, 1045-56 (6th Cir. 1970) (recognizing that a prosecutor "'is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (same). Thus, "[i]n appropriate circumstances," the "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." *Marshall*, 446 U.S. at 249.

The Supreme Court has also extended "the requirement of a disinterested prosecutor" to private attorneys representing the government. For example, in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), private attorneys were appointed as special prosecutors to prosecute a criminal contempt action against certain individuals who violated an injunction barring them from engaging in trademark infringement. *Id.* at 791-92. These private attorneys were representatives of the company whose trademark interests had been violated. *Id.* The infringers were found guilty of criminal contempt. *Id.* at 792. The Second Circuit affirmed, and the Supreme Court reversed, holding that the private attorneys appointed to prosecute the criminal contempt action were subject to the

same standards of impartiality as government employees. *Id.* at 805-06. The Court explained that because the private attorneys were appointed to represent the United States "to pursue the public interest," they "certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. According to the Court, the "appointment [of the interested attorneys] illustrate[d] the potential for private interest to influence the discharge of public duty." *Id.* at 805. As a result, the Court concluded that the appointment of the private attorneys was improper and reversed the lower court's rulings.[9]

Consistent with these precedents, courts have invalidated fee agreements between states or municipalities and private counsel in enforcement proceedings where counsel's pay hinged on the outcome of the lawsuit, particularly where the enforcement proceeding was quasi-criminal in nature.[10] For example, in *Clancy*,

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[9] While the Court invalidated the appointment under the Court's supervisory authority over the federal courts, and not as a matter of federal constitutional law, Justice Blackmun suggested that the appointment violated the defendant's due-process rights. 481 U.S. at 814-15 (Blackmun, J., concurring) ("I would go further, however, and hold that the practice – federal or state – of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process.").

[10] Indeed, the same concerns regarding neutrality led the federal government to prohibit the use of contingency-fee arrangements in all cases brought on behalf of the United States. *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.

705 P.2d 347, the City of Corona, California hired outside counsel to prosecute abatement actions under a public-nuisance theory. *Id.* at 348. Specifically, the City sought to enjoin a bookstore from selling sexually explicit materials. The retention agreement provided that the private firm's hourly rate would double if the City were successful in the litigation, and the court ordered the losing party to pay the City's attorneys' fees. *Id.* at 350.

The California Supreme Court rejected this arrangement as violative of due process. Citing *Tumey* and other cases, the court began by emphasizing the importance of prosecutorial neutrality and objectivity to due process and the rule of law itself:

> Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated.

Id. at 351 (citations omitted).

The court then found 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.* 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. In reaching its decision, the court determined that the attorney representing the government had to abide by the same requirements as government officials. *Id.*

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 "balancing of interests." *Clancy*, 705 P.2d at 352-53. "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." *Id.* at 352. Balancing all of these important interests, the court held that "[a]ny financial arrangement that would tempt the . . . attorney to tip the scale cannot be tolerated." *Id.* The court therefore disqualified the counsel.[11]

B. The District Court Erred In Concluding That Use Of Contingency-Fee Counsel Is Permissible In This Case.

Under *Tumey* and *Clancy*, the AG violated – and continues to violate – Merck's due-process rights by employing contingency-fee counsel to prosecute its state-court action against Merck, and the district court erred in holding otherwise. As Merck argued in its motion for a preliminary injunction, the KCPA action, like the nuisance suit in *Clancy*, resembles a criminal prosecution. (*See generally* R.E.2-1 at 10-12, PageID#44-46.) The district court agreed that this case was similar to *Clancy* (PI Order at 14-17, R.E.31, PageID#683-86), but it viewed *Clancy*'s categorical bar on the use of outside counsel as stemming entirely from

[11] The personal financial interest at stake in *Clancy* serves to distinguish that case from *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983), in which this Court held that the mere participation of a private attorney in "assistance of the public prosecutor is not a per se constitutional violation," *id.* at 911, as the *Stumbo* opinion does not state that the attorney in that case was to be paid a contingency fee. In any event, because the private attorney at issue in *Stumbo* was hired by the family of the victim of the habeas petitioner's crime, the case is of questionable vitality in light of the Supreme Court's subsequent decision in *Young*, 481 U.S. 787, which condemned the use of representatives of the victim of criminal conduct to prosecute the case.

the fact that the retained counsel in that case was serving as the government's "'*sole* representative in its public nuisance abatement action and had *complete control* over the litigation'" (*id.* at 18, PageID#687 (internal quotation marks and citation omitted)). "[I]n situations where the government [has] retained control over the litigation," the court concluded, "courts have tended to uphold [contingency-fee] arrangements." (*Id.*) Thus, in the district court's view, "the fundamental inquiry in this case concerns the issue of control over the litigation." (*Id.*)

This conclusion was erroneous. As the California Supreme Court has explained, the distinguishing feature of *Clancy* was the quasi-criminal character of the underlying lawsuit. This was evidenced in *Santa Clara*, where the California Supreme Court confronted another nuisance action, this time by various municipalities against the former manufacturers of lead paint, seeking a remedy of abatement – i.e., removal of the lead paint by the manufacturers or payment for removal by someone else. Examining the "types of remedies sought and the types of interests" at issue in *Santa Clara*, the court concluded that *Clancy*'s rule of "automatic disqualification" was "unwarranted." 235 P.3d at 32. As the court explained, the claims in *Santa Clara* were different from those in *Clancy* because:

- "[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

- In financial terms, 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.*

Nevertheless, because the case was "being prosecuted on behalf of the public," the court concluded that the "attorneys prosecuting this action, although not subject to the same stringent" rule adopted in *Clancy*, were "subject to a heightened standard of ethical conduct." *Id.* at 35. And to ensure that the private attorneys adhered to this heightened standard, the court adopted a rule that the "'Office of Attorney General [must] retain[] *absolute and total control over all critical decision-making.*'" *Id.* at 36 (quoting *State of Rhode Island v. Lead Indus. Assoc., Inc.*, 951 A.2d 428, 475 (R.I. 2008)). In other words, while the court approved retention of contingency-fee counsel in *some* cases, it reaffirmed *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).[12]

For several reasons, this case is like *Clancy*, not *Santa Clara*, and the Due Process Clause therefore categorically prohibits the use of contingency-fee counsel.[13] *First*, the AG seeks injunctive relief – i.e., to "enjoin advertising

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[12] The district court noted that "[m]ost courts that have considered the issue have determined that contingency fee arrangements between state attorneys general and outside counsel are permissible if certain criteria are met." (PI Order at 17, R.E.31, PageID#686 (internal quotation marks and citation omitted).) But the decisions of those other courts are distinguishable because, like *Santa Clara*, each sought civil remedies and posed no risk of criminal sanctions, restrictions on liberty, or impositions on legitimate business operations. Indeed, each of the cases the district court cited expressly noted this distinction from *Clancy*. *See, e.g.*, *City & Cnty. of San Francisco v. Philip Morris*, 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 (noting that, unlike *Clancy*, "the case presently before us is completely civil in nature" and agreeing with *Santa Clara* and *San Francisco* that this fact made *Clancy*'s categorical bar inapplicable, but cautioning that "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 on the ground that "there are no constitutional or criminal violations directly implicated here, and, hence, there is no potential conflict of interest"). (*See also* PI Order at 18, R.E.31, PageID#687 (citing *Glendening*, *San Francisco*, and *Lead Industries* in support of belief that "courts have tended to uphold such arrangements" where the "government retained control").)

[13] Like both cases, this suit is brought in the name of the Commonwealth and on behalf of the people. (R.E.2-1 at 10, PageID#44; *see also, e.g.*, Resp. to Pet. to Appeal Remand at 7-8, 15 (asserting that the AG has brought suit on behalf of "its residents in general" rather than any "individual citizens" and seeks "to vindicate

(cont'd)

practices that potentially reach the entire viewing and reading public" (Resp. to Pet. to Appeal Remand at 3 n.1) – conduct that is essential to Merck's business. Thus, unlike *Santa Clara*, in which "no ongoing business activity will be enjoined," 235 P.3d at 34, the remedy sought here, like the one in *Clancy*, would impose a significant burden on "the continued operation of an established, lawful business." *Id.* at 32.

Second, the requested injunctive relief would "implicate[] both the defendants' and the public's constitutional free-speech rights." *Id.* As noted, the Commonwealth seeks an injunction aimed at advertising, which involves protected speech – indeed, speech subject to greater protection than the adult materials at issue in *Clancy*. *See, e.g.*, *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); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester, Mass.*, 851 F. Supp. 2d 311, 315 n.3 (D. Mass. 2012) (recognizing that there is less First Amendment protection for sex-related businesses compared to other

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the State's sovereign and quasi-sovereign interests") (internal quotation marks and citations omitted).)

commercial speech because of the "inherent harm in the advertising itself," "namely the commodification of sex").

Third, the AG's request for penalties, like a criminal indictment, invokes a "remedy [that] is [exclusively] in the hands of the state," as in *Clancy*, rather than "the type of remedy one might find in an ordinary civil case," as in *Santa Clara*. 235 P.3d at 33 n.10, 34 (internal quotation marks and citation omitted). (*See* R.E.2-1 at 10-12, PageID#44-46; *see also* Resp. to Pet. to Appeal Remand at 7 ("Kentucky is pursuing a cause of action that only the Kentucky Attorney General may enforce.") (internal quotation marks and citation omitted); Remand Reply at 12 (an award of "civil penalties" under the KCPA "is not a form of relief consumers can recover").) Indeed, statutory penalties are virtually indistinguishable from punitive damages, which "serve the same purposes as criminal penalties." *State Farm. Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *see also, e.g., US Fax Law Ctr., Inc. v. iHire, Inc.*, 374 F. Supp. 2d 924, 928-29 (D. Colo. 2005) (where penalties rather than damages were sought under the state consumer-protection statute, the court construed the law as "penal" in nature), *aff'd*, 476 F.3d 1112 (10th Cir. 2007); *Tessier v. Moffatt*, 93 F. Supp. 2d 729, 737 (E.D. La. 1998) ("[Louisiana Unfair Trade Practices Act] is penal in nature and must be strictly construed."); *Beam v. Monsanto Co.*, 532 S.W.2d 175,

181 (Ark. 1976) ("The Arkansas Unfair Practices Act is penal in nature and imposes liabilities unknown [at] common law[.]").

If anything, graver concerns are implicated by the penalties remedy sought in this case because such penalties are uniquely susceptible to manipulation by counsel with a financial stake in the outcome of an enforcement proceeding. In cases seeking only compensation, the potential recovery is defined – and limited – by any damage actually caused by the defendant, which in turn diminishes the risk of "governmental overreaching or economic coercion." *Santa Clara*, 235 P.3d at 34. By contrast, and particularly in the case of a mass-advertised product, decisions regarding the number of violations to assert and the amount of penalties to seek are essentially discretionary and entirely unmoored from any assessment of damage actually sustained by the Commonwealth. *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).

For all of these reasons, this case is like the quasi-criminal action at issue in *Clancy* and should have been subject to "the absolute prohibition on contingent-fee arrangements" that applies in criminal prosecutions. *Santa Clara*, 235 P.3d at 35.

The district court erred in holding to the contrary, and its judgment should be reversed.[14]

II. THE DISTRICT COURT, IN ANY EVENT, ERRED IN CONCLUDING THAT THE AG "CONTROLS" THE KCPA ACTION.

Even if contingent-fee arrangements in quasi-criminal cases could ever pass constitutional muster, the district court still erred in denying Merck's motion for summary judgment and granting the AG's motion for summary judgment because there is undisputed evidence that the AG delegated control over critical decisions to profit-motivated outside counsel. Alternatively, and at the very least, the court should have found that Merck created a genuine dispute of material fact as to the issue of control and allowed the case to proceed to trial.

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[14] The district court's "control" test is unsound for the additional reason that it is unworkable. Most of the facts relevant to control are known only to the governmental entity and are immune to review due to the attorney-client and work-product privileges. Thus, as Professor Martin Redish has explained, "it is impossible to see how a reviewing court could assure itself, in the individual case, that such control is in fact being exercised." Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 S. Ct. Econ. Rev. 77, 106 (2010). In this case, for instance, although discovery provided Merck with some understanding of the (limited) role of government counsel in the KCPA action, the AG prevented discovery of substantial relevant information based on claims of privilege, successfully invoking privilege to prevent Merck from discovering a letter from a private attorney who apparently sought to be retained for litigation (R.E.69, PageID#1802-04), and repeatedly asserted privilege throughout the examination (*e.g.*, Natter Dep. 55:7-14, R.E.77-1, PageID#2159; 85:15-19, PageID#2189; 94:9-22, PageID#2198; 238:16-23, PageID#2342; 255:11-21, PageID#2359; 269:3-18, PageID#2373; 309:4-14, PageID#2413).

A. The District Court Erred In Denying Summary Judgment To Merck Because The AG Failed To Exercise Absolute And Total Control Over The List Of Merck's Alleged KCPA Violations.

Merck's motion for summary judgment presented undisputed evidence demonstrating that the AG's retained contingency-fee counsel developed key elements of the case without substantive involvement from the AG's office, including the list of alleged violations to pursue in the KCPA action; the list of witnesses to be called at trial; and the list of witnesses with knowledge of Merck's alleged violations of the KCPA. Merck also presented undisputed evidence that the AG was not even aware whether experts had been retained for the case. Each of these issues indisputably constitutes a central discretionary decision in the case, as to which the government must maintain "*absolute and total control*" in order to ensure due process. Here, the AG exercised *no* control – and certainly not "absolute and total control" – over these decisions. Merck was therefore entitled to summary judgment, and the district court erred in holding otherwise.

At a minimum, "neutral government attorneys" must retain "'*absolute and total control over all critical decision-making* in any case'" involving retained contingency-fee counsel. *Santa Clara*, 235 P.3d at 36, 38 (quoting *Lead Indus.*, 951 A.2d at 475); *see also id.* at 38 ("critical discretionary decisions . . . may not be delegated to private counsel possessing an interest in the case, but instead must be made by neutral government attorneys"). This control is necessary because

"discretionary decisions provide the greatest opportunity to abuse the judicial process by placing personal gain above the interests of the public in a fair and just prosecution and outcome." *Id.* at 38. Strict control by neutral government attorneys is needed to "provide[] a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary reward." *Id.* at 38-39; *see also Lead Indus. Ass'n*, 951 A.2d at 475 (the AG must "retain[] [control] in [cases in] which such agreements have been entered into"); Axelrad & Perrochet, 78 Def. Couns. J. 334 (explaining that "strategy calls, development and evaluation of facts, trial tactics, whether to proceed, whether to settle, whether even to end the litigation" "are all necessarily colored by the inescapable fact that counsel hired to litigate the case will not be paid unless there is a substantial monetary recovery").

Although courts have yet to detail the showing required to establish "absolute and total control," at least one court has suggested that the inquiry would entail a determination of "'whether the government attorneys have been exercising such control throughout the litigation or whether they have *passively* or *blindly* accepted recommendations, decisions, or actions by outside counsel.'" Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 603 (2009) (emphases added) (quoting *Santa Clara v. Atl. Richfield Co.*, No. 1-00-cv-788657,

slip op. at 3 (Cal. Super. Ct. Apr. 4, 2007)).[15] This conception is consistent with the standards by which courts have judged the concept of control in other contexts. *See, e.g.*, *Affco Invs. 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185, 191 (5th Cir. 2010) (holding that, where the profits of the plaintiffs' limited-liability companies were derived solely from the efforts of others, the "Plaintiffs' control [over the companies] was theoretical rather than actual"); *Stanton v. Shearson Lehman/Am. Express, Inc.*, 631 F. Supp. 100, 103 (N.D. Ga. 1986).

In *Stanton*, for example, the court considered a claim under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA"), that a stock broker had improperly exercised "authority or control" over the assets in two ERISA-governed plans – a predicate for liability as a fiduciary under ERISA. 631 F. Supp. at 103. The defendant argued that the trustees of the plans had final say regarding all transactions made on behalf of the plans and that she therefore could not be said to be in "control." But the record indicated that a large majority of the trading decisions were "made pursuant to instructions" from one of the trustees, "which were prompted by specific, unsolicited recommendations made by" the

[15] This language comes from the trial court decision in the *Santa Clara* case. Although the trial court's conclusion that the control test would be too difficult to administer was ultimately rejected on appeal, the appellate courts did not express disagreement with the notion that passive or blind acceptance of recommendations would fall short of the requisite "control."

stock broker. *Id.* at 102. Accordingly, the court rejected the defendant's argument, explaining:

> Even though a client may have the final word on how his or her assets will be traded and is, thus, technically in control of the assets, it is the stock broker who is *effectively* and *realistically* in control of the assets when, for whatever reason, the client merely "rubber stamps" – follows automatically or without consideration – the investment recommendations of the broker.

Id. at 103.

Summary judgment should have been granted to Merck under this standard, for several reasons. *First*, Merck presented evidence establishing that nothing more than a "rubber stamp" was given to contingency-fee counsel's list of violations in this case. Specifically, Merck proffered the following evidence – *none of which was subject to genuine dispute*:

- Testimony that the list of the alleged 45 KCPA violations was assembled exclusively by outside counsel based upon their review of thousands of documents produced by Merck. (Natter Dep. 264:20-21, R.E.77-1, PageID#2368.)

- Testimony from Ms. Natter – the AG attorney most knowledgeable about the KCPA action – that she was not even certain where the list came from (*id.* 264:24-265:4, PageID#2368-69) and that she was only generally familiar with the "boilerplate" descriptions of each violation (*id.* 276:11-277:17, PageID#2380-81).

- Testimony that *no* Kentucky AG attorney *ever* reviewed the entire set of documents in support of the purported statutory violations prior to approving the list of violations. (*Id.* 268:7-14, PageID#2372.)

- Testimony that although the AG's office had the right and authority to reject or change the list of KCPA violations, *no* Kentucky AG attorney offered *any* revisions to the list of claimed violations. (*Id.* 323:9-23, PageID#2427.)

- Evidence that the list of statutory violations in the KCPA action was *identical* to the one prepared by the same outside counsel on behalf of the state of Alaska. (*Compare generally*, Appendix A to Kentucky Discovery Responses *with* Appendix A to Alaska Discovery Responses, R.E.64-17, PageID#1111-25.)

Despite this record, the district court viewed the evidence of the list's origins and formation as irrelevant. The court agreed that the AG's "uncertainty and unfamiliarity" were "disconcerting" and that Natter's testimony "suggest[ed] a disappointingly casual approach to the details of the [KCPA] proceeding." (MSJ Order at 23, R.E.104, PageID#3196.) But the court saw this as "proof of complacency or laziness," not "the absence of control." (*Id.* at 24, PageID#3197.) Specifically, the district court found evidence of control in Ms. Natter's alleged discussions with outside counsel about "'how the Kentucky Consumer Act applies,'" her claim to be "generally familiar with the documents that form the basis for the list of violations," and the fact that the AG "had the right" to revise the list of violations. (*Id.* (citation omitted).) And it rejected Merck's argument that the AG's failure to make any revisions to the list was evidence of lack of control. (*Id.*) None of this was correct.

For starters, the district court's conclusion mischaracterized Merck's burden of proof. The issue is not whether there was an "absence of control" (*id.*), but

whether the AG exerted anything less than "*absolute and total control*," *Santa Clara*, 235 P.3d at 36. The need for such complete control is at its zenith on decisions like this one. Other than perhaps the decisions to initiate or settle the suit, the list of alleged violations marks the most significant discretionary decision in the entire litigation, because the alleged violations comprise the core of the lawsuit. (MSJ Order at 23, R.E.104, PageID#3196 (acknowledging that the list of penalties would "form the basis for the Commonwealth's requested recovery").) The list also bears directly on contingency-fee counsel's potential remuneration, since the alleged violations it lists would be the sole basis for the award of any penalties after trial. By requiring proof of "*absence* of control," the district court disarmed the critical "safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary reward." *Santa Clara*, 235 P.3d at 38-39. If this "safeguard" is to have any force, it should fundamentally bar "complacen[t] or laz[y]" oversight by government lawyers.

In reality, the evidence cited by the district court shows only that the AG had *a right* to control the litigation, while underscoring the fact that it did not *exercise* that right. The fact that Ms. Natter claimed to have explained the KCPA to outside lawyers, or that she was "generally familiar" with the documents that formed the basis for some of the alleged violations, is *no* evidence that she or anyone else

substantively reviewed contingency-fee counsel's list. These assertions evince no more control than the reflexive trading decisions made by the trustees in *Stanton*. After all, the trustees presumably discussed investment goals and nominally had the "final word" on whether to make any transaction, but the court concluded that "*effective*[] and *realistic*[]" control requires more. 631 F. Supp. at 103. So too here, lest the "control" test be stripped of all meaning.

The district court's treatment of Merck's argument regarding the AG's failure to make substantive revisions to the list of violations was also erroneous. The court believed that Merck was pressing a "requirement" that the AG always make at least some revisions to contingency-fee counsel's work, which "ignores the possibility that the AG . . . may simply be satisfied by" that work. (MSJ Order at 24, R.E.104, PageID#3197.) Not so. Merck argued that the lack of substantive revisions was *one of several pieces of evidence that together demonstrated lack of control* – specifically, as discussed above: Ms. Natter's lack of certainty of the list's origin and lack of familiarity with each described violation; her failure to review the complete set of documents said to support the list; and the fact that the list was a carbon copy of the list the same outside counsel are using in their suit on behalf of Alaska's AG.

Second, the district court erroneously disregarded the undisputed fact that Ms. Natter was not even aware whether her contingency-fee counsel had retained

expert witnesses for the litigation. (Natter Dep. 305:21-306:7, R.E.77-1, PageID#2409-10.) The district court agreed that this fact was "troubling" but nevertheless excused the AG's lack of knowledge about this critical litigation decision on the ground that "an attorney can control litigation without knowing every detail of the case." (MSJ Order at 20, R.E.104, PageID#3193 (internal quotation marks and citation omitted).) But whether experts have been retained is no mere "detail" of the case. And it should go without saying that utter lack of knowledge about the issue – i.e., whether experts have been retained at all – precludes meaningful control.

Third, the district court was also wrong to reject Merck's evidence that the AG did not exert any control over the identification of witnesses. Of the 65 individuals listed as possible witnesses at trial, Ms. Natter testified that she recognized only seven; and of the 12 individuals listed in interrogatory responses as having potential knowledge about Merck's alleged violation of the KCPA, she recognized *none*. (Natter Dep. 246:4-12, R.E.77-1, PageID#2350, 249:3-12, PageID#2353, 258:13-259:24, PageID#2262-63.) This unfamiliarity stems from the fact that both lists were crafted exclusively by outside counsel, with no changes by any person in the AG's office. (*Id.* 237:15-238:2, PageID#2341-42; 260:1-8, PageID#2364.) The district court brushed these facts aside, finding it sufficient that Ms. Natter claimed "that she discussed with outside counsel the methodology

for coming up with the names." (MSJ Order at 22, R.E.104, PageID#3195 (internal quotation marks and citation omitted).) But it was outside counsel who developed that methodology, not Ms. Natter (*see* Natter Dep. 257:20-258:2, R.E.77-1, PageID#2361-62), and her unfamiliarity with 58 of the 65 witnesses on the lists suggests no real ability to verify that the methodology described was even followed. Again, this hands-off approach is just like that of the trustees in *Stanton*, who nominally set the investment goals for their pension and profit plans but allegedly "follow[ed] automatically or without consideration – the investment recommendations of the broker." 631 F. Supp. at 103.

In sum, to the extent employment of contingency-fee counsel is ever appropriate, the AG must retain "*absolute and total control*" over critical discretionary decisions, particularly matters that affect contingency-fee counsel's potential remuneration. The only reasonable conclusion from the undisputed evidence is that the AG failed to exercise absolute and total control over several of these decisions. Accordingly, the district court's denial of Merck's summary-judgment motion should be reversed.

B. At A Minimum, Merck Raised Issues Of Fact On Control, Rendering The Order Granting The AG Summary Judgment Erroneous.

In the alternative, in granting the AG's motion for summary judgment, the district court failed to apply settled summary-judgment principles by disregarding

its obligation to view the facts in the light most favorable to Merck, making credibility judgments regarding a key witness, and resolving disputed issues of fact in the AG's favor. Because the district court's conclusion that the AG "retained and exercised decision-making authority in the underlying litigation" is contradicted by record evidence that, at a bare minimum, creates a genuine issue of material fact, judgment in favor of the AG must be reversed for this reason as well.

It is axiomatic that "'[i]f disputed factual issues . . . exist, those issues must be submitted to a jury for the jury to determine the appropriate facts,'" making summary judgment improper. *Alman*, 703 F.3d at 896 (citation omitted). Among the issues of fact that are reserved to the finder of fact are those going to the credibility of witnesses and, correspondingly, their testimony. *See, e.g.*, *Bultema v. United States*, 359 F.3d 379, 386 (6th Cir. 2004) ("[B]ecause it is the fact-finder's duty at trial to weigh the evidence and assess the credibility of the witnesses, it was not appropriate to grant summary judgment[.]"). These principles apply with equal force where both parties have filed cross-motions for summary judgment. *Spectrum Health*, 410 F.3d at 309 ("'For cross-motions for summary judgment, we must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the non-moving party.'") (citation omitted). In other words, the "the filing of cross-motions for summary judgment does not necessarily mean that an award of summary judgment is appropriate." *Id.* (internal quotation

marks omitted); *see also* 10A Charles Alan Wright Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (3d ed. 1998) ("the mere fact that both parties seek summary judgment does not constitute a waiver of a full trial or the right to have the case presented to a jury").

The district court's grant of summary judgment in favor of the AG was improper under this standard, even if Merck did not prove lack of control. As noted above, Merck presented substantial evidence regarding the AG's lack of "absolute and total control" over discretionary litigation decisions. At a minimum, that evidence *suggested* lack of control, even if it did not *prove* lack of control (which Merck believes it unquestionably did). But the district court granted summary judgment to the AG anyway, essentially accepting the AG's gloss on the evidence proffered by Merck and making credibility judgments favorable to Ms. Natter. The district court assumed, for example, that Ms. Natter's lack of knowledge on a range of subjects resulted from the passage of time rather than a lack of sufficient familiarity with the case. (*See* MSJ Order at 20-21, R.E.104, PageID#3193-94.)

The court's language in reaching many of its conclusions confirms that it applied the wrong summary judgment standard. With respect to Ms. Natter's failure to recall "the details of 'Study 090,'" for example, the court concluded that her testimony did "not *necessarily* indicate that [she] failed to investigate the

claims made in the [KCPA] Complaint." (*Id.* at 21 n.7, PageID#3194 (emphasis added); *see also id.* at 24, PageID#3197 (employing similar language with respect to the list of 45 violations).) But in order to survive summary judgment, a party's evidence need not *necessarily* prove liability; it need only *possibly* show it. Thus, the district court should have afforded Merck all favorable inferences in considering the AG's motion.

Because Merck – at the very least – presented evidence that raised the possibility of lack of control, the district court alternatively erred in failing to view the facts – and all inferences drawn therefrom – in the light most favorable to Merck and granting summary judgment in favor of the AG.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and summary judgment should be granted to Merck. Alternatively, this case should be remanded for trial.

Dated: July 5, 2013

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,831 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Appellant Cross-Appellee was filed with the Court via the Court's ECF system on July 5, 2013, and a copy of the brief was served on all counsel of record by operation of the ECF system on the same date.

s/Susan J. Pope
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellant Cross-Appellee hereby designates the following District Court documents as relevant to this matter:

Description of Entry	Date Filed	Record Entry No.	Page ID No.
Complaint with attachments and exhibits	8/16/11	1	1-26
Plaintiff's Motion for Preliminary Injunction with attachments and exhibits	8/16/11	2	27-99
Plaintiff's Reply to Response to Motion for Preliminary Injunction with attachments and exhibits	9/23/11	20	270-534
Memorandum Opinion and Order	3/21/12	31	670-694
Memorandum Opinion and Order	3/26/12	32	695-702
Protective Order	11/9/12	52	814-815
Memorandum Opinion and Order	12/19/12	57	834-846
Order	1/31/13	61	851
Plaintiff's Motion for Summary Judgment with attachments and exhibits	1/31/13	64	855-1141
Defendant's Motion for Summary Judgment with attachments and exhibits	1/31/13	65	1142-1686, 1758-1764
Defendant's Motion in Limine with attachments and exhibits	1/31/13	66	1687-1757
Plaintiff's Response to Motion for Protective Order with attachments and exhibits	2/12/13	68	1776-1801
Protective Order	2/21/13	69	1802-1804
Plaintiff's Response to Motion for Summary Judgment with attachments and exhibits	2/25/13	71	1812-1978
Plaintiff's Reply to Response to Motion for Summary Judgment with attachments and exhibits	3/21/13	77	2087-2464
Plaintiff's Exhibit List	4/16/13	86	2792-2797
Plaintiff's Witness List	4/16/13	87	2798-2800

Plaintiff's List of Demonstrative Aids to be Used at Trial	4/16/13	88	2801-2803
Defendant's Pretrial Memorandum	4/16/13	90	2812-2827
Defendant's Exhibit List	4/16/13	91	2828-2832
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Defendant's Proposed Jury Instructions	4/16/13	93	2838-2870
Plaintiff's Pretrial Memorandum with attachments and exhibits	4/16/13	94	2871-3106
Defendant's Motion for Protective Order with attachments and exhibits	4/23/13	96	3114-3122
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