IN THE SUPREME COURT OF THE STATE OF NEVADA

LENDER PROCESSING SERVICES, INC., FIDELITY NATIONAL INFORMATION SERVICE, INC., LPS DEFAULT SOLUTIONS, INC., AND DOCX, LLC,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE,

Respondents.

And

STATE OF NEVADA,

Real Party In Interest.

Supreme Court Case No. 61387

District Court Case No. a-11-653289-B

STATE OF NEVADA'S SUR-REPLY RESPONDING TO NEW ARGUMENTS PRESENTED IN PETITIONERS' REPLY BRIEF AND RESPONSE TO AMICUS CURIAE

Attorneys for State of Nevada:

ATTORNEY GENERAL
CATHERINE CORTEZ MASTO
C. WAYNE HOWLE
Solicitor General
WHowle@ag.nv.gov
Nevada State Bar #3443
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1227; Fax (775) 684-1108

SHERI ANN FORBES
Sr. Deputy Attorney General
Nevada State Bar #7337
SForbes@ag.nv.gov

KRISTINE KUZEMKA
Sr. Deputy Attorney General
Nevada State Bar #8836
KKuzemka@ag.nv.gov
555 E. Washington Avenue, #3900
Las Vegas, Nevada 89101
(702) 486-3085

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I. LPS'S DUE PROCESS RIGHTS ARE NOT AFFECTED BY THE PARTICIPATION OF OUTSIDE COUNSEL

LPS now argues that Attorney General's civil enforcement action under the State's consumer protection statute, in which the State seeks *civil penalties*, is "penal and coercive in nature" and therefore akin to a criminal proceeding. Reply in Support of Petition for Writ of Mandamus (filed Sept. 25, 2012) ("LPS Reply") 32. LPS leaps from this characterization to a broader, categorical conclusion that the Attorney General cannot work with outside counsel in prosecuting the State's case, relying upon a line of cases that stand for the inarguable, but distinct, proposition that a prosecutor should not have a financial interest in proving a defendant guilty of a crime. LPS Reply 32-36. However, each step of LPS's three-point argument – that (1) the Attorney General's request for the civil penalties authorized by the Deceptive Trade Practices Act ("DTPA") transforms this civil enforcement action into a quasi-criminal proceeding; (2) LPS is entitled to the heightened due process protections attending a criminal proceeding; and (3) the Attorney General's use of outside counsel to assist her in this case violates these constitutional protections – is unsupported by facts and contrary to precedent, and therefore fails.

A. The Proceedings Below Are Civil, Not Criminal, in Nature and Trigger No Heightened Protection of LPS's Due Process Rights

LPS erroneously asserts that, because the Attorney General seeks the imposition of civil penalties, along with equitable relief and other remedies that are statutorily authorized under the DTPA, LPS essentially faces criminal liability. But none of the three cases cited by LPS, read in its entirety, supports this proposition. In *United States v. Glidden*, 119 F.2d 235 (6th Cir. 1941), the Sixth Circuit was asked to determine whether a civil action to collect tax bonds was barred under the double jeopardy clause of the Fifth Amendment by an earlier criminal prosecution that resulted in similar fines; the Sixth Circuit concluded that no such bar existed. *Id.* at 245. To the extent that any portion of the Sixth Circuit's general discussion of then-existing constitutional jurisprudence can be read as support for LPS's argument, *Glidden* was decided decades before, and is flatly inconsistent with, the Supreme Court's now-controlling guidance set forth in *Hudson v. United States*, 522 U.S. 93 (1997), discussed below. The courts deciding *United States v. Sanchez*, 520 F. Supp. 1038 (S.D. Fla. 1981), and *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), were not considering the question of what constitutional protections should be afforded to a civil defendant facing a penalty scheme that was, in effect, criminal in nature.[1]

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[1] The question before the *Sanchez* court was whether an individual defendant challenging civil fines could raise certain defenses (duress and coercion) in the

Notwithstanding LPS's misplaced reliance, *United States v. Sanchez* is instructive because it refers to the leading Supreme Court authority and indicates the substantial showing a defendant must make to prove that a civil penalty should be construed as a criminal punishment.[2]

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district court or whether the district court's review was limited to the record of the administrative proceeding below, in which the defendant had failed to participate (and therefore presented no defenses). 520 F. Supp. at 1039-40. The court explicitly stated that its characterization of fines levied by the Immigration and Naturalization Service ("INS") as "quasi-criminal" in nature

> [did not] imply that the full panoply of constitutional protections attendant to a true criminal proceeding should apply in this context. . . . It is well settled that Congress may provide for the imposition of a civil fine as a penalty for violation of a statute and this Court does not question that § 1323 is such an enactment. *Indeed, no party has made the assertion that § 1323 should be considered as providing a criminal penalty* under the standards set forth in *Kennedy v. Mendoza-Martinez.*

Id. at 1040 (citations omitted, emphasis added).

LPS's reliance on *Feltner,* 523 U.S. 340, is even more tenuous. The question presented in *Feltner* was whether a defendant in private, civil litigation was entitled to a jury trial under the Seventh Amendment where the plaintiff sought statutory damages for copyright violations under 17 U.S.C. § 504(c) (the Copyright Act of 1976), a statute that does not explicitly provide for jury trials. 523 U.S. at 345-47. LPS quotes *dicta* – addressing the inapplicability of a losing argument – that refers to a concurring and dissenting opinion in another case in which Justice Scalia opined that "civil penalties . . . could be viewed as analogous to sentencing in a criminal proceeding." 523 U.S. at 355.

[2] In *Sanchez*, a district court was asked to review a fine of $92,000 levied by the INS against a man who had helped 92 Cuban refugees land in Key West, Florida during the Mariel Boatlift of 1980. 520 F. Supp. at 1039-40. Recognizing the highly unusual facts presented – the chaos surrounding the Mariel Boatlift, the inconsistency of the United States' position vis-à-vis the Cuban refugees, the severity of the fine (which the court felt it would be "hard pressed to find any other

The question of whether a statutory penalty is civil or criminal is one of statutory construction that begins with the legislature's intent. *United States v. Ward*, 448 U.S. 242, 248 (1980). If a penalty is denominated as civil, courts will then examine the statutory scheme to ascertain whether the scheme is "so punitive either in purpose or effect as to negate [the legislature's intent]." *Id.* at 249. Where the legislature has expressly denominated a disputed penalty as civil, that designation is overridden only where "the clearest proof" establishes that the penalty must be viewed as criminal contrary to the legislature's intent. *Id.* at 249; *Hudson*, 522 U.S. at 99-100. Such proof is derived from the consideration of these several factors:

> (1) whether the sanction involves an affirmative disability or restraint;
> (2) whether it has historically been regarded as a punishment;
> (3) whether it comes into play only on a finding of *scienter*;
> (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence;
> (5) whether the behavior to which it applies is already a crime;
> (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and

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conduct which [this Defendant] might be accused of which could result in a fine of as much as $92,000") – the court ruled that the defendant should have the opportunity to present defenses that had not been presented in the administrative tribunal. *Id.* at 1040. The court did not, however, review the challenged fines against the standards set forth in *Kennedy v. Mendoza-Martinez*, 372, U.S. 144 (1963) and was not even, in fact, considering a due process challenge. The *Sanchez* court, therefore, did not conclude that the INS proceeding was quasi-criminal, and cannot be used to support LPS's contention that the prospect of even a substantial fine will trigger the full procedural protections provided in a criminal proceeding.

(7) whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (internal punctuation changed, citations omitted, numbering scheme added). None of these factors is controlling and, in the words of the Court, they "may often point in differing directions." *Id.* at 169.

Additional guidance can be drawn from the Supreme Court's more recent pronouncements on the distinction between criminal and civil punishments. Penalty schemes – whether they are denominated "civil" or "criminal" – can be characterized as either remedial and compensatory (where the penalty is calculated to correspond with the costs associated with defendant's conduct or is subsequently used to remediate the damage caused by the defendant) or punitive (where the penalty is intended to have punitive and deterrent effects). But contrary to LPS's assertion, the imposition of civil penalties – alone – is unlikely to transform a civil case into a criminal action. The Supreme Court has recognized that "all civil penalties have some deterrent effect," and has flatly rejected a bright line test premised upon the remedial/deterrent distinction because it would lead to the re-designation of all civil penalties as criminal ones. *Hudson*, 522 U.S. at 102.

In *Hudson v. United States*, the Supreme Court was asked to determine whether substantial civil fines (which were mandatory and set under a statutory schedule of maximum daily penalties – and not compensatory) and occupational

debarment sanctions issued by the Office of the Comptroller of the Currency ("OCC") under federal banking law should be construed as criminal punishment that would preclude further criminal prosecution under the double jeopardy clause of the Constitution. The Supreme Court concluded that the sanctions unquestionably carried a deterrent effect, but also served a regulatory purpose – stabilizing the banking industry – that rendered them civil, and not criminal, penalties. 522 U.S. at 105. Such a regulatory purpose may be discerned from the overall scheme of a statute, or from particular provisions – for example, where penalties are paid into a revolving fund that is used to support ongoing remedial and enforcement activities. *See, e.g.*, *Ward*, 448 U.S. at 246 (describing statutory provision outlining potential uses of penalties assessed under the Water Pollution Control Act), *id.* at 256-57 (concluding that legislatively-created "revolving fund" strongly indicates "pervasively civil and compensatory thrust of the statutory scheme").

The DTPA expressly authorizes civil and criminal penalties for violations of the Act. The civil penalties are set by the courts but cannot exceed $5,000 per violation. NRS 598.0999(2). Criminal penalties are tied to the Crimes and Punishments Title of the Nevada Revised Statutes under NRS 598.0999(3); all criminal penalties under the DTPA include the prospect of imprisonment as well as fines. *See* NRS 193.130 (felonies), 193.140 (gross misdemeanors) and 193.150

(misdemeanors). Because the Legislature has explicitly distinguished civil penalties from criminal penalties, LPS must establish with "clear proof" – using the *Mendoza-Martinez* standards – that these civil penalties are, in fact, so punitive as to transform the State's case into a criminal proceeding. 372 U.S. 144.

LPS has articulated only one basis – the prospect of civil penalties, which LPS characterizes as punitive and not compensatory – as the basis for its argument. LPS Reply 13, 30-31. LPS has not even argued that these penalties are excessive or ruinous. While the prospect of DTPA penalties, hopefully, deters businesses from engaging in deceptive conduct, these penalties – like the OCC penalties in *Hudson* – also advance the regulatory goal embodied in the Act, which is the operation of markets that are fair to consumers and foster competition. Moreover, penalties collected under the DTPA, like those seen in *Ward*, are used to fund the administration and enforcement of the Act under NRS 598.0975, including not only investigation and litigation but also public education efforts aimed at consumers, businesses and other branches of law enforcement. NRS 598.0975(1)(a).

In summary, LPS's attempt to re-cast this civil enforcement action as a criminal proceeding that would trigger heightened due process safeguards is not only unsupported by the case law LPS cites, but is inconsistent with Supreme

Court guidance. Not surprisingly, LPS's reasoning has been rejected by numerous courts.[3]

B. Even If The State's Case Could Be Construed as Quasi-Criminal, The Attorney General's Control of the Litigation Ensures that Due Process Will Be Satisfied

Even if LPS were correct in construing the DTPA's civil penalties scheme as criminal punishment, the ultimate conclusion LPS urges – the expulsion of outside counsel from the State's litigation team – does not follow.

The cases involving prosecutorial neutrality cited by LPS underscore the weaknesses in LPS's argument. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), the Supreme Court disapproved the appointment of private attorneys as independent special counsel to prosecute a criminal contempt action for violation of an injunction. The private attorneys previously represented

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[3] *See, e.g., United States v. J.B. Williams Co.*, 498 F.2d 414, 420 (2d Cir. 1974) (rejecting defendant's argument that a civil penalty by the Federal Trade Commission was criminal just because of its allegedly punitive purpose); *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 204-05 (D. Mass. 1998) ("a civil penalty alone does not transform the [consumer protection] statute into a criminal statute"); *State v. WWJ Corp.*, 941 P.2d 717, 720 (Wash. Ct. App. 1997) (rejecting mortgage brokers' argument that they were entitled to appeal the imposition of civil penalties because the civil penalties made the proceeding criminal, the court noted that "our supreme court has held . . . that the imposition of civil penalties under the [Consumer Protection Act] does not make the act or the penalty quasi-criminal. Even though a civil penalty under the [Consumer Protection Act] punishes, it also promotes compliance with the law without becoming a criminal or quasi-criminal punishment."); *People v. Toomey*, 203 Cal. Rptr. 642, 653 (Cal. Ct. App. 1984) (rejecting constitutional challenge to award of civil penalties under California's consumer protection statute because the "case against appellant was not criminal or quasi-criminal in nature").

private clients in cases against the defendants for the same conduct and, pursuant to a consent decree, the attorneys' client stood to receive $750,000 in liquidated damages for violation of the injunction. *Young*, 481 U.S. at 805-06. The *Young* prosecutors, once appointed, acted independently, without the supervision of neutral government attorneys. *Id.* at 792. In explaining its rationale, the Supreme Court indicated that financially-interested private counsel's familiarity with the case "may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution." *Id.* at 806 n.17. Thus, not only does *Young* undercut LPS's argument that the use of contingency fee counsel under any circumstances violates due process, but specifically acknowledges that these arrangements are permissible – even in a criminal case. *Id.* at 800-01.

LPS's reliance on *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), for the principle that a government attorney must remain personally neutral, is similarly misplaced. In *Jerrico,* the Supreme Court held that prosecutors do not need to be completely neutral, finding that a Fair Labor Standards Act provision directing funds recovered under the Act to the Department of Labor did not create improper incentives for enforcement. *Id.* at 248 ("[p]rosecutors need not be entirely 'neutral and detached'"). While the *Jerrico* defendants argued that the provision violated their due process rights "by encouraging the assistant regional administrator to

make unduly numerous and large assessment of civil penalties," *id.* at 241, the Supreme Court disagreed, distinguishing the neutrality requirements for judges from those of prosecutors, whose function is not adjudicatory in nature and who should be "necessarily permitted to be zealous in their enforcement of the law." *Id.* at 248 (distinguishing *Brady v. Maryland*, 373 U.S. 83 (1963)). When presented with a challenge to the government's use of outside counsel, Maryland's high court relied on *Jerrico* to hold that the Maryland Attorney General's request for civil penalties against the tobacco companies did not preclude using outside contingency fee counsel because the attorney general retained control of the case. *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1243 (Md. 1998) ("The Supreme Court of the United States . . . has held that due process does not necessarily preclude a prosecutor from having a personal or financial interest in the outcome of a case seeking civil penalties.").[4]

Finally, LPS's argument is wholly undone by the fact that many state and federal remedial statutes – particularly in the area of consumer protection –

[4] *See also State of South Carolina v. Eli Lilly & Co.*, No. 2007-CP-42-1855, slip op. at 4, 14 (S.C. Ct. of C.P. 7th Jud. Cir. Sept. 22, 2009), attached to Addendum to State's Answer to Brief of *Amici Curiae* Chamber of Commerce (filed Oct. 2, 2012) (rejecting defendant's due process challenge to the South Carolina Attorney General's retention of outside counsel and dismissing as inapposite cases involving criminal prosecutions; "[t]he notion that public officials and their lawyers (whether in-house or outside counsel) must be 'neutral' or disinterested in the outcome of civil litigation they bring on behalf of the government is . . . unsupported by any authority").

authorize *private* plaintiffs to seek statutory and exemplary damages, which are the functional equivalents of penalties.[5] This type of enforcement mechanism – authorizing private plaintiffs (and their private counsel), as well as law enforcement, to seek *non-compensatory* damages – demonstrates that penalties are not simply punitive, but rather are intended to encourage vigorous enforcement that is essential to the larger regulatory scheme. Similar public authority is vested in private litigants under the federal False Claims Act and its state counterparts, which are premised on the legislative judgment that rewards proportional to the

[5] *See, e.g.*, Alabama Deceptive Trade Practices Act, Ala. Code § 8-19-10(a)(1), (2) (providing trebling of damages and minimum statutory damages of $1000; Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Stat. § 45.50.531(a) (providing treble damages or $500, whichever is greater); Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-113(2)(a) (providing minimum statutory damages of $500 or treble damages); Hawaii Unfair or Deceptive Acts & Practices, Haw. Rev. Stat. § 480-13(b)(1) (providing minimum statutory damages of $1000 or treble damages, whichever is greater); Idaho Consumer Protection Act, Idaho Code Ann. § 48-608(1) (providing minimum statutory damages of $1000 and punitive damages); Michigan Consumer Protection Act, Mich. Comp. Laws Ann. § 445.911(2) (providing minimum statutory damages of $250); Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code Ann. § 30-14-133(1) (providing minimum statutory damages of $500 and treble damages); New Mexico Unfair Practices Act, N.M. Stat. Ann. § 57-12-10(B) (providing minimum statutory damages of $100 and treble damages for willful violations); Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. § 1345.09(B) (providing minimum statutory damages of $200 or treble damages, whichever is greater); Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-9.2(a) (providing minimum statutory damages of $100 and punitive damages); Utah Consumer Sales Practices Act, Utah Code Ann. § 13-11-19(2) (providing minimum statutory damages of $2000); Virginia Consumer Protection Act, Va. Code Ann. § 59.1-204(A) (providing minimum statutory damages of $500 and treble damages or a minimum statutory damages of $1000, whichever is greater, for a willful violation).

amounts recovered on the government's behalf provide appropriate incentives to expose and address wrongdoing.[6]

In short, LPS offers no compelling reason for a "complete prohibition of contingency fee arrangements" and no support for its contention that "the inherently coercive nature of the action triggers the requirement that those imbued with public power are not permitted to act out of motivations of private gain." LPS Reply 31. The "control test" set forth in *Santa Clara v. Superior Court of Santa Clara County*, 235 P.3d 21 (Cal. 2010), and *Rhode Island v. Lead Industries Ass'n*, 951 A.2d 428, 477 (R.I. 2008), discussed in the State's Answering Brief, amply ensures due process. State's Answering Brief 42-46 (discussing the control test). In these cases, the high courts of California and Rhode Island approved the retention of outside contingency-fee counsel because the government retained ultimate control of the cases. *Lead Indus.*, 951 A.2d at 477; *Santa Clara*, 235 P.3d at 35.[7] LPS's reliance on *People ex rel. Clancy v. Superior Court of Riverside*

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[6] *See generally United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993) (finding that compensating a relator for successful claims brought under the False Claims Act did not create a conflict of interest).

[7] LPS cannot distinguish *Santa Clara* and *Lead Industries* from the case at bar in any meaningful way that supports LPS's position. While *Santa Clara* was premised upon nuisance law, the California Supreme Court's decision did not turn on the distinction between damages and penalties. Even though the counties sought compensatory damages, the California Supreme Court characterized their lawsuit as "quasi-criminal" in nature; ultimately, however, the court concluded that the suit did not implicate the liberty interests of a purely criminal matter that would

County, 705 P.2d 347 (Cal. 1985), in urging this Court to issue a blanket prohibition on the State's use of outside counsel is again misplaced. As explained in the State's Answer to the *amici curiae* brief filed by the U.S. Chamber of Commerce, the liberty interests (free speech and property rights) at stake in *Clancy* are not typically implicated in deceptive trade practices litigation and are not in jeopardy here. State's Answer to Brief of *Amici Curiae* Chamber of Commerce 17.

The propriety of a state attorney general's use of contingency fee counsel in enforcement actions is well-established and entirely consistent with the Constitution where the Attorney General exercises careful control over the litigation (as in this case). LPS's attempt to replace the widely accepted control test with a rule approaching a blanket prohibition on outside counsel is not only without precedent, but contrary to the overwhelming weight of the case law.

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foreclose the participation of private counsel in the prosecution of the case. *Santa Clara*, 235 P.3d at 32-35. In *Lead Industries*, the Rhode Island Supreme Court never discussed the damages/penalties distinction; indeed, although nuisance was the only legal theory tried and reviewed by the appellate court, the state's complaint presented several causes of action, including violations of the Rhode Island Unfair Trade Practices and Consumer Protection Act, and a request for punitive damages. *Lead Indus.*, 951 A.2d at 440-41, 474-477. Moreover, the court, while acknowledging "the historical relationship" between nuisance and criminal law, concluded that the state's nuisance claim was "completely civil" in nature. *Id.* at 476.

II. NEITHER THE PAYMENT OF ATTORNEYS' FEES FROM THE PROCEEDS OF SUCCESSFUL LITIGATION NOR A COURT-AWARDED FEE CAN BE CONSTRUED AS AN UNAUTHORIZED EXPENDITURE FROM THE STATE TREASURY

Under the Contract, the State agrees that outside counsel shall be paid attorneys' fees from any recovery – whether by judicial award or settlement – obtained from a defendant like LPS. LPS now contends that payment of such fees from funds collected by the Attorney General pursuant to the DTPA is an improper, and unconstitutional, expenditure of State funds. LPS Amicus Answer 4-6 (filed Oct. 16, 2012); LPS Errata, Ex. 1 at 2 n.1 (filed Oct. 17, 2012). This argument fails as a matter of law; it is directly contradicted by both the weight of persuasive case law and the express language of the DTPA.

This type of challenge has been presented to a number of courts. While the analysis has varied depending on the particularities of state constitutional law and statutes, the overwhelming majority of courts have validated an attorney general's authority to pay contingency fees to outside counsel without seeking special appropriations from the legislature. For example, some courts have concluded that because attorneys' fees are not due to the state, they are not state funds subject to legislative appropriation. *See, e.g., Lead Indus.*, 951 A.2d. at 477-80 (finding that a judgment is reduced by the fee paid to outside counsel, therefore the fee is not part of the state's funds and not governed by laws relating to state appropriations); *Glendening*, 709 A.2d at 1240-41 (holding that attorney general had authority to

enter contingency fee contract specifying that fees would be paid from recovery and thus only net recovery belonged to state treasury); *Philip Morris Inc. v. Graham*, No. 960904948 CV, slip op. § III(A) (Salt Lake Cnty. 3rd Jud. Dist. Ct. Feb. 13, 1997) ("contrary to the plaintiffs' assertion, the funds to pay the contingent fees are not available only through legislative appropriation, but may, in the alternative, be deducted from funds received from the Tobacco companies"), P.A. Vol. I, LPS153;[8] *Conant v. Robins, Kaplan, Milller & Ciresi, L.L.P.*, 603 N.W.2d 143 (Minn. Ct. App. 1999) (concluding that contingent fees paid to outside counsel were not state money and not subject to legislative appropriation).[9]

Even where courts have found that the entire recovery must be deposited into a state account in the first instance (because of particular provisions in state law), they have still found that payment of contingency fees to counsel does not

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[8] The Utah district court in *Philip Morris v. Graham* also found that the Utah Attorney General could pay the contingency fee pursuant to her power to bill state agencies, including her own, for attorneys fees. P.A. Vol. I, LPS153, § III(A) ("the Attorney General can bill the Departments of Health and Human Services, or themselves, once funds are collected"). The Nevada Attorney General has the same power to charge state agencies for legal services. *See* NRS 228.113(1) ("The Attorney General may charge all state agencies . . . for all services his or her office provides to those agencies, to the extent that the cost of such services is not included in the budget of the Office of the Attorney General.").

[9] The North Dakota Supreme Court has concluded that such recoveries are state funds, but that the common law powers of the office of attorney general empower an attorney general to enter contingency fee agreements with outside counsel and pay such fees without seeking a special appropriation from the legislature. *North Dakota v. Hagerty*, 580 N.W.2d 139, 147-48 (N.D. 1998).

contravene the law or intrude into legislative functions. *See, e.g., Pickering v. Langston*, 88 So. 3d 1269, 1290 (Miss. 2012) (noting that statute authorizing use of and payments to outside counsel required that the fee "be paid only from the Attorney General's 'contingent fund,' or from funds appropriated to the [Office] by the Legislature"). The one contrary authority known to the State, *Meredith v. Ieyoub,* 700 So. 2d 478 (La. 1997), is distinguishable on multiple grounds. In that case, the Louisiana Attorney General pursued violations of environmental laws that directed that all funds recovered be deposited into the general treasury (distinct from several other state statutes that expressly allowed the attorney general to pay contingency fees). *Id.* at 482. Also, in *Meredith*, the statute directed the funds be for general use and for hazardous waste clean up, rather than for defraying the costs of enforcing the statute, as under the DTPA. *Id.* at 482-83.

Consistent with these holdings, the State believes that the Attorney General has the discretion to use monies awarded in DTPA litigation without requiring special appropriations. As the courts of a number of states have held, attorneys' fees deducted from such awards are not even considered state funds. But this Court does not have to decide how DTPA fees should be characterized as a matter of law or fact because the Legislature has authorized the Attorney General, under NRS 598.0975, to spend funds recovered under the Act to cover the costs of

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately space, has a typeface of 14 points or more and contains 4,525 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of November 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ C. Wayne Howle
C. WAYNE HOWLE
Solicitor General

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