STATE OF MINNESOTA DISTRICT COURT
SECOND JUDICIAL DISTRICT
COUNTY OF RAMSEY

THE STATE OF MINNESOTA,
BY HUBERT H. HUMPHREY, III
ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

PHILIP MORRIS INCORPORATED;
R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION;
B.A.T. INDUSTRIES P.L.C.; LORILLARD TOBACCO COMPANY; THE AMERICAN TOBACCO COMPANY;
LIGGETT GROUP, INC.; THE COUNCIL FOR TOBACCO RESEARCH -- U.S.A., INC.; and THE TOBACCO INSTITUTE, INC.,
Defendants.

October 6, 1994

Case File No. C1-94-8565

MEMORANDUM IN SUPPORT OF JOINT MOTION TO PROHIBIT PROSECUTION OF THIS ACTION PURSUANT TO UNLAWFUL CONTINGENT FEE AGREEMENT

Defendants Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., The American Tobacco Co., Liggett Group Inc., The Council for Tobacco Research -- U.S.A., Inc. and the Tobacco Institute, Inc. submit this Memorandum in Support of their Joint Motion to Prohibit Prosecution Of This Action Pursuant To Unlawful Contingent Fee Agreement.

Preliminary Statement

According to the Attorney General, this is a "landmark" lawsuit filed to "prosecute the [tobacco] industry for engaging in consumer fraud, unlawful trade practices, deceptive trade practices and unreasonable restraint of trade in violation of the laws of the State of Minnesota." (*See* Affidavit of Byron Starns, sworn to October 6, 1994 ("Starns Aff."), Attachment 1.) To lead this prosecution, the Attorney General has appointed the firm of Robins, Kaplan, Miller & Ciresi ("Robins") as special attorneys for the State, and has designated Robins as "chief litigation counsel." (Starns Aff., Attachment 2, Exhibit A, ¶ 5.) Robins is to be compensated upon the recovery of money by the State in an amount equal to 25% of the State's total recovery. (Starns Aff., Attachment 2, Exhibit B, ¶¶ 1, 2 and 3.)

The Attorney General's appointment of Robins as special attorneys on a contingent fee basis is without authority under Minnesota law. Indeed, the appointment is an unlawful appropriation of State funds in violation of the Minnesota Constitution, art. XI, § 1, and Minn. Stat. § 16A.57. In addition, by giving his "chief litigation counsel" a financial stake in the outcome of the lawsuit, the Attorney General has violated public policy and defendants' rights, under the United States Constitution and the Minnesota Constitution, to a fair trial. Therefore, pursuant to Minn. Stat. §§ 481.09 and 484.03 and the Court's inherent judicial powers, defendants respectfully request that the Courts issue an order prohibiting the prosecution of this action pursuant to a contingent fee agreement, and directing that Robins may not represent the State pursuant to its contingent fee agreement.

BACKGROUND

The complaint in this action, filed August 17, 1994, alleges that the Attorney General "brings this action to protect the citizens and the public health of the State of Minnesota by seeking declaratory and equitable relief and civil penalties," as well as to enforce "the State's rights to damages for economic injuries...." (Complaint ¶ 7.) The defendants include six cigarette manufacturers, a trade association to which some of the manufacturers belong (the Tobacco Institute, Inc.), and an organization through which some of the manufacturers fund scientific research regarding tobacco and health (The Council for Tobacco Research -- U.S.A., Inc.). The complaint alleges that defendants have engaged in "a decades-long combination and conspiracy of willful and intentional wrongdoing...." (Complaint ¶ 1.) Specifically, the complaint alleges that defendants have violated the Minnesota Antitrust Law, Minn. Stat. §§ 325D.51 and 325D.52; the Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69; the Unlawful Trade Practices Act, Minn. Stat. § 325D.13; the Deceptive Trade Practices Act, Minn. Stat. § 325D.44; and Minn. Stat. § 325F.67 governing false advertising.

In his press release announcing the filing of this suit, the Attorney General declared that one of the purposes of the suit is to "prosecute" the defendants

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for their alleged violations of state law. (Starns Aff., Attachment 1.) Pursuant to Minn. Stat. §§ 8.31, subd. 3 and 645.24, the complaint seeks to impose on defendants penalties of $25,000 for each alleged violation of Minnesota's consumer fraud, unlawful trade practices, deceptive trade practices and false advertising statutes. (Complaint ¶ 135.b.) Similarly, pursuant to Minn. Stat. §§ 325D.56 and 645.24, the complaint seeks to impose penalties of $50,000 for each alleged violation of the Minnesota Antitrust Law. (Complaint ¶ 135.a.)

In addition, the complaint seeks declaratory and injunctive relief and money damages (including treble damages under the Minnesota Antitrust Law). Although the complaint does not specify the amount of damages the State seeks to recover, it does allege that medical expenditures for alleged smoking-related disease in Minnesota amount to hundreds of millions of dollars annually. (Complaint ¶ 79.) Thus, the State apparently will claim damages amounting to many millions of dollars. The complaint also requests that defendants be ordered to: 1) disclose and publish all research they have conducted relating to smoking and health; 2) fund a "corrective public education campaign" regarding smoking and health; 3) take steps "to prevent the distribution and sale of cigarettes to minors under the age of 18"; 4) fund "clinical smoking cessation programs" in Minnesota; 5) dissolve the Tobacco Institute and the Council for Tobacco Research, or divest their membership in those organizations; 6) "disgorge all profits from sales of - cigarettes in Minnesota"; and 7) "pay restitution." (Complaint ¶¶ 134.c-134.i.)

Robins appears on the complaint as special attorneys for the State, and as attorneys for plaintiff Blue Cross and Blue Shield of Minnesota. The Special Attorney Appointment, which became effective July 25, 1994 (hereinafter "the Appointment"), provides that Robins "shall provide legal services to the State and Attorney General relative to seeking recovery and relief from third parties for damages arising from the sale and/or distribution of cigarettes...." (Starns Aff., Attachment 2, ¶ 1.) In a "Case Handling Agreement" incorporated by reference into the Appointment, Robins is designated as "chief litigation counsel for the Litigation." (Starns Aff., Attachment 2, Exhibit A, ¶ 5.) Robins' compensation under the Appointment is governed by a "Contingent Fee Retainer Agreement for State Claims" attached to the Appointment (hereinafter the "Contingent Fee Agreement"). (*See* Starns Aff., Attachment 2, Exhibit B.) The Contingent Fee Agreement, ¶ 1, provides that, unless the Appointment is terminated by the State before a monetary recovery, "[t]he State is not liable to pay compensation otherwise than from amounts collected for the State by the Special Attorneys...." (*Id*.) Moreover, ¶ 2 of the Contingent Fee Agreement specifies that "[t]he contingency upon which compensation is to be paid is the recovery for the State of monies ... from third parties liable for damages arising from the sale and/or distribution of cigarettes." (*Id*.) Under ¶ 3 of the Contingent Fee Agreement, Robins is to be paid 25% of "the total recovery to the State, including but not limited to compensatory or punitive damages, restitution, civil penalties, interest and any amounts which may later be payable to the federal government under the Medicaid program." (*Id*.)

ARGUMENT

The Court has the statutory and inherent power to prevent prosecution of an action by an attorney who lacks proper authority or whose retention threatens the integrity of the judicial process or whose retention is otherwise improper. *See* Minn. Stat. § 481.09; *Buysse v. Baumann-Furrie & Co*., 448 N.W.2d 865, 868 (Minn. 1989); *In re Clerk of Court's Compensation for Lyon County*, 241 N.W.2d 781, 784 (Minn. 1976). Here, Robins should be prohibited from representing the State pursuant to the Contingent Fee Agreement, which violates Minnesota law and public policy and deprives defendants of their rights under the United States and Minnesota Constitutions.

I.

The Contingent Fee Agreement Violates Minnesota Law.

A. The Attorney General Lacks Authority to Compensate Robins By Means of a Contingent Fee.

The Attorney General lacks authority to compensate Robins by means of a contingent fee. Minn. Stat. § 8.02 permits the Attorney General to employ special counsel, but does not authorize the use of a contingent fee as compensation. On the contrary, in *Bush v. Arrowood*, 293 Minn. 243, 198 N.W.2d 263 (1972), the Minnesota Supreme Court held that a special attorney's right to compensation was derivative of the Attorney General's right to compensation -- a right that is expressly limited by statute.

In *Arrowood*, the Attorney General hired a special attorney pursuant to § 8.02 to represent the State's interests in a case regarding the management of a charitable trust. The Minnesota Supreme Court held that an award of fees could not be made to the special attorney from the trust. The court based its holding on Minn. Stat. § 15A.01, subd. 2, which provides that:

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> The salaries provided in this chapter for the officers and employees named herein *shall be in full payment for all services that may be rendered by them* either in the performance of their regular or special duties or while acting as a member or employee of any state board or commission .

(Emphasis added). Based on this provision, the court observed that, had the Attorney General himself participated in the case, he would have had no right to compensation from the trust. Because the special attorney acted in the role of the Attorney General, the court held that the special attorney's right to compensation from the trust was "a derivative right and [was] coextensive with the right of the attorney general to make a similar recovery." *Arrowood*, 293 Minn. at 252, 198 N.W.2d at 268. Inasmuch as the Attorney General could not be compensated from the trust, neither could the special attorney.[1]

Under *Arrowood*, the Attorney General cannot retain as compensation any part of any recovery by the State in this case, because the prosecution of this lawsuit purportedly falls within his official duties. (Complaint, ¶ 7.) Similarly, because the Attorney General would not be entitled to receive any part of any recovery by the State, neither is Robins.

It would also be inconsistent with Minn. Stat. §§ 8.09 and 8.10 to allow a contingent fee to be used to compensate Robins in this case. Sections 8.09 and 8.10 provide for the retention of special attorneys pursuant to a contingent fee agreement in only one type of case -- a lawsuit against the United States. *See* Minn. Stat. §§ 8.09, 8.10. Because the Legislature has expressly allowed a contingent fee in only one instance, all other contingent fee agreements, including the State's agreement with Robins in this case, are implicitly prohibited. *See Maytag Co. v. Commissioner of Taxation*, 218 Minn. 460, 463, 17 N.W.2d 37, 40 (1944) ("Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others.")[2] In order to give effect to §§ 8.09 and 8.10, a special attorney hired by the State in a lawsuit against a party other than the United States cannot be given a contingent fee.

B. The Contingent Fee Agreement Is An Unlawful Appropriation of State Funds.

Not only does the Attorney General lack authority to grant a contingent fee, but the fee violates express requirements of Minnesota law and constitutes an unlawful appropriation of State money.

The State seeks to recover civil penalties pursuant to Minn. Stat. § 8.31, subd. 3, which expressly requires that any recovery by the Attorney General be deposited into the general fund: "All sums recovered by the attorney general under this section shall be deposited in the general fund." Moreover, to the extent the State's claims fall outside § 8.31, Minn. Stat. § 15A.01, subd. 3 requires that any monies recovered by the State also be deposited in the state treasury:

> All fees of any nature collected by any officer or employee named in this chapter in the performance of official duties for the state shall be paid into the state treasury.

Thus, according to Minnesota law, any recovery by the State in this action must be deposited into the state treasury.

Moreover, the Attorney General is forbidden from expending moneys belonging to the state treasury without an appropriation. Minnesota Constitution art. XI, § 1 provides that "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." Similarly, Minn. Stat. § 16A.57 provides: "Unless otherwise expressly provided by law, state money may not be spent or applied without an appropriation, an allotment, and issuance of a

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[1]In an Official Opinion Letter, the current Attorney General of Minnesota rendered an opinion very similar to the holding in *Arrowood*. In Minn. Op. Atty. Gen. 121a-9, a county attorney requested an opinion regarding whether "the county attorney who probates the public assistance recipient's estate [could] receive a separate fee from the estate apart from his yearly salary as county attorney." The opinion states that the county attorney could not receive an additional fee. The opinion rests, in part, on the same analysis used by the court in *Arrowood*:

> Since the county agency is a party to the proceedings, representation of the agency is among the county attorney's official duties. The county attorney, therefore, cannot receive a separate fee from the estate. Minn. Stat. § 388.08 (1984) prohibits a county attorney from receiving a separate fee for services rendered in the conduct of his official duties or business.

[2]Moreover, Minn. Stat. § 8.02 cannot be read to allow the Attorney General to utilize a contingent fee to compensate a special attorney, because §§ 8.09 and 8.10 were adopted by the Legislature in 1927, *after* § 8.02 had been adopted. *See* Minn. Laws 1927 ch. 315; Minn. Laws 1916 ch. 61. Thus, if the Attorney General were authorized to utilize a contingent fee under § 8.02, §§ 8.09 and 8.10 would have been superfluous at the time they were enacted. Such a result would be contrary to Minnesota law regarding statutory construction. *See* Minn. Stat. § 645.17(2) (court should presume that "[t]he legislature intends the entire statute to be effective and certain"); *see also Kirkwold Constr. Co. v. M.G.A. Constr., Inc.,* 513 N.W.2d 241, 244 (Minn. 1994).

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warrant." Thus, the Attorney General's Contingent Fee Agreement improperly attempts to circumvent Minnesota law. The statutory and constitutional requirements are clear -- all funds recovered by the State must be deposited in the treasury, and no expenditure of those funds can be made without an appropriation.

Nor can the Attorney General circumvent the appropriation requirement by "intercepting" State funds before those funds are deposited in the general fund. *In County of Beltrami v. Marshall*, 271 Minn. 115, 135 N.W.2d 749 (Minn. 1965), the Minnesota Supreme Court found that a similar effort to divert moneys owed to the state treasury was unlawful. In that case, the court discussed the interpretation of two statutes. The first statute required counties to pay to the state a portion of certain traffic fines collected. The second statute provided that court costs and fees incurred in collecting such fines could be taxed to the State. However, no appropriation had been made to fund the payment of costs and fees to the counties. The court held that a county could not deduct such costs and fees from the State's share of the traffic fines before the county delivered that share to the state treasury. Such action, the court held, would amount to an expenditure without an appropriation. *Id*. at 121-22, 135 N.W.2d at 754.

Minnesota law requires that the entirety of any recovery by the State be deposited in the general fund, and that the Attorney General obtain an appropriation from the legislature before paying any part of that recovery to Robins. Thus, the Contingent Fee Agreement amounts to an unlawful appropriation of State funds. Accordingly, the Contingent Fee Agreement, and the Appointment on which it is based, are invalid, and the State may not use Robins to prosecute this action pursuant to that Agreement.

II.

The Contingent Fee Agreement Gives Robins An Unlawful Financial Interest In The Litigation.

Even if prosecution of this action through special attorneys acting under the Contingent Fee Agreement were otherwise consistent with Minnesota law (which it is not), it would still be unconstitutional and a violation of public policy for the State's "chief litigation counsel" to have a financial stake in the outcome of this litigation.

A. Due Process And Public Policy Require That State Law Be Enforced Fairly And Impartially.

A fair trial is a fundamental aspect of the right to due process. *See. e.g*., *Marshall v. Jerrico Inc*., 446 U.S. 238, 242 (1980); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Tumey v. Ohio*, 273 U.S. 510 (1927). Moreover, both the United States Supreme Court and the Minnesota Supreme Court have acknowledged that it is the obligation of the State's attorney, as well as of the court, to observe defendants' rights. Both courts have declared that the State's attorney:

> 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.

State v. Silvers, 230 Minn. 12, 15, 40 N.W.2d 630, 631-32 (1950) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, according to the Minnesota Supreme Court, "it is the duty of the prosecuting attorney as well as the court to see that the accused has a fair trial." *State v. Silvers*, 230 Minn. at 14-15, 40 N.W.2d at 631; *see also* Minn. Rules of Professional Conduct Rule 3.8 Cmt. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Model Code of Professional Responsibility EC 7-13 (1982) (hereinafter the "Model Code") ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.").

Because the State's attorney exercises the power of the sovereign, the United States Supreme Court has recognized that the State's attorney must be free of improper influence or motivation. In *Young v. United States*, 481 U.S. 787 (1987), the Court held that it was improper to appoint an attorney who represented the private beneficiary of a court order to prosecute the defendant for contempt of that order because the attorney's conduct could be influenced by his duty to his private client. The Court declared that "we must have assurance that those who wield [the state's] power will be guided solely by their sense of public responsibility for the attainment of justice." 481 U.S. at 814 (Emphasis added).

In *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), *cert. denied*, 475 U.S. 1121, and *cert. denied*, 479 U.S. 848 (1986), the California Supreme Court explained why the enforcement of state law must be conducted in a neutral manner: a prosecutor is "a representative of the sovereign" and "must act with the impartiality required of those who govern." *Id*. Moreover, the State's attorney "must refrain from abusing" the power of government "by failing to act

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evenhandedly." *Id*. The government's neutrality, the court recognized, is essential to the fair outcome of the litigation, and also to the proper functioning of the judicial process:

> 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.

Id. at 351. Because "the neutrality so essential to the system is violated" when a government attorney has a personal stake in the litigation, "prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." *Id.; see also, People v. Zimmer*, 414 N.E.2d 705, 708 (N.Y. 1980) (a prosecutor's responsibilities must be "conducted in a manner that foster[s] rather than discourage[s] public confidence in our government and the system of law to which it is dedicated").

In order to implement these important policy concerns, courts have held that a prosecutor subject to improper motive or influence should be prohibited from prosecuting the action.[3] Indeed, where a prosecutor has a personal interest in the litigation, his participation in the case constitutes a denial of due process. In *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), for example, the court held that the defendant had been denied due process where the district attorney represented the defendant's wife in a divorce action based on the same assault that was involved in the criminal trial. The court held that the district attorney's conduct in "attempting at once to serve two masters" -- the people of the state and his private client -- was a violation of "fundamental fairness assured by the Due Process Clause..." *Id*. at 714*; see also Cantrell v. Virginia*, 329 S.E.2d 22 (Va. 1985) (where a prosecutor had a personal interest in the case because he had been retained to represent parties in a related civil matter, defendant's due process rights were violated); *State v. Cox*, 167 So. 2d 352 (La. 1964) (due process violated where district attorney had a personal interest in defamation case).

B. The State Is Required To Proceed Fairly In This Case.

The obligation of the Attorney General -- and his chief litigation counsel -- to act fairly and to proceed solely in the interests of justice, without regard to pecuniary or other improper influence, applies in this case. The Model Code EC 7-14 states, for example, that:

> A government lawyer in a civil action or administrative proceeding has the responsibility *to seek justice* and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

(Emphasis added).

It would be inconsistent with this requirement for the State's chief litigation counsel to be given a contingent fee interest in this lawsuit. One of the very purposes of Minn. Stat. § 15A.01, subd. 2 -- which provides that the Attorney General's salary shall be in "full payment" for all services rendered by him in the performance of his regular duties -- is to immunize the Attorney General's enforcement of state law from financial motives. *See State v. Basham*, 170 N.W.2d 238, 241 (S.D. 1969) (construing a similar statutory provision, the South Dakota Supreme Court noted that the purpose of the statute was "to prevent any influence upon the discharge of the duties of a state's attorney by reason of personal interest on his part....").[4] Because the Contingent Fee Agreement injects a pecuniary motive into the enforcement of state law in this action, the agreement thwarts a basic purpose of § 15A.01, subd. 2 to *eliminate* such improper influence.

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[3] *See, e.g., People v. Greer*, 561 P.2d 1164 (Cal. 1977) (prosecutor disqualified because a woman working n his office was the victim's mother, was a material witness, and would gain custody of the victim's children upon defendant's conviction); *Davenport v. State*, 278 S.E.2d 440 (Ga. Ct. App. 1981) (defendant in assault trial was denied fundamental fairness where she was prosecuted by a district attorney who had represented the victim in divorce proceedings between the victim and the defendant); *Sinclair v. State*, 363 A.2d 468, 475 (Md. 1976) (prosecutor with pecuniary interest, which would impair his obligation to act impartially may be disqualified on public policy grounds); *People v. Zimmer*, 414 N.E.2d 705 (N.Y. 1980) (conviction for embezzlement reversed where prosecuting attorney was a stockholder of, and counsel to, corporation from which embezzlement allegedly occurred); *Farber v. Douglas*, 361 S.E.2d 456 (W. Va. 1985) (prosecutor should have disqualified himself where his involvement in underlying allegations prevented him from fulfilling his obligation to objectively serve the interests of justice); *State v. Knight*, 285 S.E.2d 401 (W. Va. 1981) (prosecutor should have been removed where the defendant had previously been convicted of stealing from the prosecutor and had not made restitution).

[4] The court held that a prosecutor who had been retained to represent parties in a civil lawsuit arising out of a car accident that formed the basis of a manslaughter prosecution should have been disqualified from conducting the prosecution. *State v. Basham*, 170 N.W.2d 238, 241 (S.D. 1969).

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The United States Supreme Court has also recognized that in an administrative proceeding to enforce civil penalties, the prosecutor is obligated to "serve the public interest." *Marshall v. Jerrico Inc.*, 446 U.S. 238, 249 (1980). Thus, the Court acknowledged that due process imposes limits on the "partisanship" of the prosecutor in such a proceeding. *Id*. The Court further asserted 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.

Likewise, in *People ex rel. Clancy v. Superior Court*, the California Supreme Court held that a government attorney's duty of neutrality extended to a civil nuisance action. In that case, a municipality retained a "special attorney" to prosecute a nuisance abatement action against an adult bookstore; the attorney was to be compensated at the rate of $60 per hour if the prosecution was successful, but at the rate of $30 per hour if the prosecution was not. Relying on EC 7-14 of the Model Code, the court declared that the duty of the state's lawyer to act fairly and in the interest of justice is "not limited to criminal prosecutors." 705 P.2d at 350. The court ordered that the special attorney be disqualified because "the contingent fee arrangement ... is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id*. at 353.

Moreover, the court in Clancy explained why the duty of neutrality was applicable in a public nuisance abatement action. First, the court noted, an abatement action involves a "balancing" of public and private interests -- the public interest in being rid of the alleged nuisance, and the landowner's interest in the use of his property. *Id*. at 352. In addition, the court noted that public nuisance abatement actions "often coincide with criminal prosecutions," and "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property." *Id*., at 352-53. Moreover, public nuisance abatement actions are "brought in the name of the People...." *Id*. at 352. And, the court declared, "'the normal remedy [to abate a public nuisance] is in the hands of the state.'" *Id*. at 353 (quoting Prosser & Keeton, *The Law of Torts* 618 (5th ed. 1984)).

These considerations require that the duty of fairness and impartiality imposed on the State's lawyers be applied in this case. As in *Clancy*, the Attorney General seeks remedies that are in the exclusive hands of the State -- *only* the Attorney General can seek to impose penalties under Minn. Stat. § 8.31, subd. 3; and *only* the Attorney General can seek to impose penalties under Minn. Stat. § 325D.56.[5] Moreover, just as in *Clancy*, there is a close connection between the State's claims and the criminal law. The State's claims under the Minnesota Antitrust Law allege conduct that may be considered a felony. *See* Minn. Stat. § 325D.56. Likewise, the State's claims under the Unlawful Trade Practices Act and for false advertising allege conduct that may be considered a misdemeanor. *See* Minn. Stat. §§ 325D.15, 325F.67. Finally, the Attorney General alleges that he brings this action "to protect the citizens and the public health of the State of Minnesota," just as the nuisance abatement action in *Clancy* was brought on behalf of the people of the state. (*See* Complaint ¶ 7.) Indeed, both Minn. Stat. § 8.31, subd. 3 and § 325D.59 specify that the relief sought by the Attorney General is "*on behalf of the state*" (emphasis added).

The Attorney General himself has acknowledged that the intent of this lawsuit is to "prosecute" defendants for their alleged violations of Minnesota law. Justice requires that the enforcement of state law be conducted fairly and impartially. Minnesota citizens must be assured that in an action for alleged violation of state law, the State's attorneys will not be influenced by improper motive, and that the power of the State will not be vested in those with a financial stake in the enforcement action.

C. Because Of Its Contingent Fee Agreement, Robins May Not Prosecute This Action.

Robins' financial interest in this lawsuit -- potential recovery of a multi-million dollar fee -- is far more substantial than the contingent fee agreement that resulted in disqualification in *Clancy*, and far more direct than the prosecutor's personal motivations that caused disqualification in the cases cited above. *See also Connally v. Georgia*, 429 U.S. 245 (1977); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Moreover, by virtue of its appointment as the State's chief litigation counsel, Robins has been cloaked with the power and authority of the State. When it presents its arguments to the Court and to the jury, it will speak for the sovereign. In addition, the State's prosecution of this case will be shaped and influenced by advice it receives from Robins. Thus,

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[5] *See Hoffman v. Delta Dental Plan of Minn.*, 517 F. Supp. 564, 573-74 (D. Minn. 1981) (penalty provided for in Minn. Stat § 325D.56 is a remedy unavailable to a private plaintiff). Contrary to the statute, the Contingent Fee Agreement would permit Robins to receive a portion of any penalties recovered in this case.

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Robins will be able to utilize its position as chief litigation counsel not to seek justice, but to advance its own substantial monetary interest.

Such a result would be antithetical to the requirement that the State protect defendants' rights to a fair trial. Indeed, this is precisely the sort of "scheme injecting a personal interest" in the prosecution that the United States Supreme Court warned against in *Marshall v. Jerrico, Inc*., 446 U.S. at 249. Certainly, neither the Attorney General nor any one on his staff could properly be given a contingent fee interest in this litigation. Nor may the Attorney General rely on chief litigation counsel who are given such an interest -- otherwise, the Attorney General's enforcement of state law in this case may be tainted by conduct and advice that is motivated by Robins' desire for pecuniary gain.

The Attorney General's obligation to proceed fairly and to protect defendants' rights cannot be circumvented or evaded by giving to his chief litigation counsel a contingent fee interest that he could not have. Rather, in order to give substance and meaning to the Attorney General's obligation, Robins may not represent the State on a contingent fee basis. As the California Supreme Court stated in Clancy, if an attorney "is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." 705 P.2d at 351. There can be no doubt that the State's Contingent Fee Agreement with Robins violates the requisite standard of neutrality.

CONCLUSION

For all of the foregoing reasons, defendants' motion should be granted.

Respectfully submitted,

Byron E. Starns (#104486)
Edward A. Murphy (#235416)
LEONARD, STREET AND DEINARD
Professional Association
Suite 2300
150 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500
Facsimile: (612) 335-1657
Attorneys for Defendant The American Tobacco Company

Jack M. Fribley, Esq.
FAEGRE & BENSON
200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Attorneys for Brown & Williamson Tobacco Corporation

Gary J. Haugen, Esq.
MASLON, EDELMAN, BORMAN & BRAND
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4140
Attorneys for The Council for Tobacco Research -- U.S.A., Inc.

Robert V. Atmore, Esq.
LINDQUIST & VENNUM
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2205
Attorneys for Liggett Group Inc.

David G. Martin, Esq.
DOHERTY, RUMBLE & BUTLER
2800 Minnesota World Trade Center
30 East Seventh Street
St. Paul, MN 55101
Attorneys for Lorillard Tobacco Company

Robert A. Schwartzbauer, Esq.
Peter W. Sipkins, Esq.
Michael A. Lindsay, Esq.
DORSEY & WHITNEY
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402-1498
Attorneys for Philip Morris Incorporated

James S. Simonson, Esq.
GRAY, PLANT, MOOTY, MOOTY & BENNETT
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402
Attorneys for R.J. Reynolds Tobacco Company

George W. Flynn, Esq.
COSGROVE, FLYNN, GASKINS & O'CONNOR
29th Floor, Lincoln Centre
333 South Seventh Street
Minneapolis, MN 55402
Attorneys For The Tobacco Institute, Inc.

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