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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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PHILIP MORRIS INCORPORATED, a Virginia Corporation; BROWN & WILLIAMSON TOBACCO CORPORATION, a Delaware Corporation; LORILLARD TOBACCO COMPANY, a Delaware Corporation; and R.J. REYNOLDS TOBACCO COMPANY, a New Jersey Corporation,	:	EX PARTE APPLICATION TO FILE AN OVERLENGTH MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
	:	Civil No. 960904948C
	:	Judge William A. Thorne
Plaintiffs,	:	
vs.	:	
JANET C. GRAHAM, Attorney General of the State of Utah; UTAH DEPARTMENT OF HEALTH; UTAH DEPARTMENT OF HUMAN SERVICES; ROD L. BETIT, Executive Director, Utah Department of Health and Executive Director, Utah Department of Human Services,	:	
	:	
Defendants.	:	

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Defendants JAN GRAHAM, Utah Attorney General, UTAH DEPARTMENT OF HEALTH,  
UTAH DEPARTMENT OF HUMAN SERVICES, and ROD BETIT, Executive Director, Utah

Departments of Health and Human Services (collectively, the “State”), pursuant to Rule 4-501 of the Utah Code of Jud. Admin., submit this ex Parte Application to File an Over-length Memorandum of Points and Authorities in Reply to the Plaintiffs’ Opposition to Defendants’ Motion to Dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure.

In response to the Defendants’ Motion to Dismiss, Plaintiffs have filed a lengthy thirty-seven page memorandum, citing numerous cases. Although the parties have agreed to stay the Defendants’ motion as to the Plaintiffs’ fourth and fifth causes of action, Plaintiffs have cited over thirty cases on the remaining three claims, all concerning the Attorney General’s authority to enter into a contingent fee contract with private counsel. While the Defendants’ reply memorandum tries not to unnecessarily reargue the Attorney General’s position, it is necessary to rebut the authorities cited by Plaintiffs. This is not an insignificant task because, with few exceptions, the authorities cited in the Plaintiffs’ opposition memorandum do little to advance the Plaintiffs’ argument.

For example, the Plaintiffs make reference to Article VII, section 8 of the Utah Constitution. (Pls.’ Opp. Mem. at 20 n.9). The constitutional provision, cited, however concerns the Governor’s authority to exercise a line-item veto to the appropriations bill and the Legislature’s ability to call a special session to override the veto. Although only cited in a footnote, and without explanation, it is presumably cited to add weight to the Plaintiffs’ argument. The constitutional provision is irrelevant, but citation to it makes it necessary for the Defendants to respond.

Another example is the Plaintiffs’ citation to *Callahan v. Jones*, 93 P.2d 326 (Wash 1939), and their claim that the Washington Supreme Court invalidated a “similar arrangement” to the one challenged here. In *Callahan*, the prosecuting attorneys, who also had a part-time private practice,

prosecuted an individual for theft. They and also entered into a contingent fee agreement with the victim to recover the stock certificates stolen from him. After the attorneys negotiated a settlement through which the client received the value of the stock certificates, the client challenged his obligation to pay the attorneys an agreed percentage of the amount recovered. The Washington Supreme Court held that the attorneys could not collect the fee. The court, however, relied on a statute that stated: “no prosecuting attorney shall receive any fee or reward from any person on behalf of any prosecution for any of his official services, except as provided in this act, nor shall he been engaged as attorney or counsel for a party in any civil action, [or for] a party to any criminal proceedings depending upon the same facts as such criminal proceedings.” *Id.* at 328. The arrangement between the prosecuting attorney and crime victim in *Callahan* is in no way similar to the contingent fee agreement between the Attorney General and private counsel on the tobacco case, as represented by the Plaintiffs.

These represent two examples of the authority relied on by the Plaintiffs. These, and many others, require some detailed response, requiring an overlength memorandum.

### SUMMARY OF ARGUMENT

Defendants’ response to the Plaintiffs’ argument is best summarized by responding specifically to each of the Plaintiffs’ arguments, as set out in their introductory statement (Pls.’ Opp. Mem. at 9).

***Argument No. 1:*** “*To assure that government officials act impartially in doing the public business and are not motivated by desires for personal gain, our Constitution explicitly precludes the Attorney General from being compensated based on the outcome of a case.*”

**Response:** The Utah Constitution provides that state officers, including the Governor and the Attorney General, “shall receive for their compensation of their services a fixed and definite

compensation as provided by law.” Utah Const. art. VII, § 18. The Attorney General will not receive any additional compensation if the State is successful in its damage action against the Tobacco Companies. Her compensation remains fixed and will not be affected by the result in the lawsuit. The constitutional provision Plaintiffs rely on is irrelevant.

*Argument No. 2: “This prohibition is extended to her staff by the Utah Public Officers’ and Employees’ Ethics Act and other laws.”*

**Response:** There is no constitutional prohibition to extend to the Attorney General’s staff or counsel hired by her; moreover, the Ethics Act does not address compensation to the Attorney General’s staff or to private counsel she hires under the authority of Utah Code § 67-5-5. The Ethics Act prohibits specific conduct, none of which exist or is alleged here. For example, it limits an employee’s outside employment and activities. It prohibits an employee from accepting employment that would require him or her to disclose controlled information gained by reason of his or her official position or from using controlled information for his or another’s private gain. Utah Code Ann. § 67-16-4. It also prohibits the acceptance of gifts, loans or compensation under certain circumstances and requires disclosure of interest in regulated businesses. None of these circumstances apply here. Neither the Act, nor any other authority cited by the Plaintiffs, supports their claim that it is a conflict of interest to employ counsel on a contingent fee basis in a civil matter.

*Argument No.3: “The Attorney General cannot circumvent these constitutional and statutory guarantees of impartiality in the administration of justice by contracting with outside counsel to do what the Attorney General cannot -- profit from actions brought in the name of the State.”*

**Response:** There are no constitutional or statutory guarantees of impartiality in the administration of justice that prohibit the Attorney General from hiring private counsel on a contingent

fee basis. The Utah Rules of Professional Conduct and case law prohibit the use of contingent fee counsel in criminal matters, for reasons that do not apply in civil matters. No case holds that paying counsel a contingent fee in a civil matter violates a defendant's right to due process. The few cases invalidating contingent fee agreements in civil matters are based on express statutory provisions, which have no parallel in Utah. There is no authority which holds that the State of Utah, or contractors hired by the State, cannot profit from actions it may bring. If that were the case, private counsel could never be engaged to represent the State, because their fees always include an element of profit.

*Argument No. 4: "Moreover, the Attorney General has not--and cannot--identify any constitutional, statutory, or common law authority that would permit her to enter a contingent fee arrangement, and such an arrangement plainly violates budgetary and appropriations laws".*

**Response:** The Plaintiffs ask the wrong question. The Attorney General need not identify express authority for a particular type of agreement. Rather, the question is whether any statute expressly prohibits such an agreement. The answer to that question is no. The Attorney General has far-reaching statutory authority to represent the public interest, Utah Code Ann. § 67-5-1(1), and has specific authority to hire outside counsel. Utah Code Ann. § 67-5-5. Contingent fee contracts have been approved in the Utah Administrative Rules. Utah Admin. § 105-1-6. Finally, the Attorney General has common law authority to bring an action against the Tobacco Companies to protect the public interest. *Hansen v. Barlow*, 456 P.2d 177, 179 (Utah 1969). There is no express legislative restriction on contingent fee agreements in this circumstance. The Legislature is not required to specifically authorize this contract with outside counsel any more than it must authorize any agreement the Attorney General enters into with outside counsel or any other independent contract. The decision

to seek outside counsel on any particular case and the terms of the specific agreement have been properly left to the Attorney General's discretion.

The contingent fee agreement does not violate Utah's Budgetary Procedures Act because that portion of the funds potentially recovered and contractually due to the attorneys for costs and fees are not public funds, as they are not funds "owned, held and administered by the State." Utah Code Ann. § 51-7-3(18) (1996). The monies that the State seeks to recover clearly belong to the Tobacco Companies, and are derived from their profits. The State is not seeking taxes owed by the Tobacco Companies, nor funds that are in any way connected with the raising of State revenues by operation of general law. It is money that the Tobacco Companies have made from consumers unjustly at the expense of the State.

In conclusion, the Attorney General has an obligation to recover funds that the State has spent as the result of the wrongful conduct of others. The lawsuit and the contingent fee agreement are in the public interest because no public monies will be spent. There are no hourly fees. There are no costs. The Utah taxpayers are fully protected. If the State wins, it may recover millions of dollars it has spent to treat citizens suffering from tobacco-related illnesses. If the State's action fails, private counsel receive no fee and the taxpayers are not worse off.

For these reasons, and as more fully set forth in the Memoranda submitted by the Defendants on its Motion and in response to the Plaintiffs' motion, the Plaintiffs' first, second and third causes of action should be dismissed with prejudice.

Respectfully submitted this 31st day of October, 1996

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CAROL CLAWSON  
Solicitor General  
Counsel for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of October, 1996, I caused to be hand-delivered a true and correct copy of EX PARTE APPLICATION TO FILE AN OVERLENGTH MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS to the following:

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