E-FILE

SHORT FORM ORDER **INDEX NO. 400000/2017**

SUPREME COURT - STATE OF NEW YORK
NEW YORK STATE OPIOID LITIGATION PART 48 - SUFFOLK COUNTY

PRESENT:
HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 2/7/18
FINAL SUBMITTED DATE: 4/18/18
MOTION SEQ#003
MOTION: MOTNDECD

IN RE OPIOID LITIGATION **INDEX NO.: 400000/2017**

ALL PARTIES VIA NYSCEF
(FULL PARTICIPATION RECORDED)

The Court has considered the following submissions in rendering this decision:

1. Defendants' Notice of Motion, Affirmation In Support by Ingo W. Sprie, Jr., inclusive of Exhibits 1 through 10 and Memorandum of Law In Support;
2. Plaintiffs' Memorandum of Law In Opposition;
3. Defendants' Reply Memorandum of Law; and
4. April 18, 2018 minutes of oral argument.

Before the Court is a petition seeking an order precluding prosecution of the Plaintiffs'-Respondents' claims by outside counsel retained on a contingent-fee basis; and granting such other and further relief as the Court deems just and proper.[1]

As the roster of parties is expected to expand to include other Counties as well as New York City, the Court's determination herein shall be deemed the law of the case as to all parties similarly situated.

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1. The Court notes that the Master Long Form Complaint identifies 17 of the defendants as "manufacturer defendants." The motion was filed by 14 of those defendants; the remaining manufacturer defendants (INSYS Therapeutics, Inc., Allergan and Allergan Finance LLC chose not to join in this petition).

The petitioning Defendants have advanced an argument that the contingent-fee arrangements violate their due process rights. Petitioners claim that their due process rights are violated in three respects. First, that the nature of the claims they must defend are of a class that *per se* prohibits assignment to outside counsel. Second, and only if the first basis fails, the retainer agreements lack requisite "control" protections.[2] Lastly, Petitioners claim that the contingent-fee arrangements violate State and County conflict of interest law and appropriations rules.

The petitioning Defendants artfully claim that there is a "categorical bar" in certain cases involving governmental claims being prosecuted by outside counsel. In other words, the Defendants are suggesting that the issue of "control" is a second, and perhaps optional, step in the analysis because one must first consider the nature of the case being assigned to outside counsel. The distinction appears in *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351 (Cal. 1985). That Court barred a governmental entity's use of private lawyers to prosecute a claim (with an enhanced fee schedule only if successful) to close an existing business. Essentially, allowing the government to circumvent political and constitutional limits on its authority by authorizing previously private actors to exercise public power (to close a business). *Citing Merck Sharp & Dohme Corp. v. Conway*, 947 F.Supp.2d 733 (E.D.K.Y. 2013). The *Clancy* case involved a public nuisance being prosecuted on behalf of the city by an outside attorney. The entity was an ongoing business. An important issue in the *Clancy* case was the nature and extent of sanctions. Defendants argue that if part of the claims prosecuted by the contingent retained attorney affords a penal like sanction it is *per se* prohibited. Another class of cases are those where "control" by the government is the relevant inquiry. Petitioners' suggest a *Clancy* analysis by the court must precede a "control" inquiry.

With the exception of claims seeking an abatement of a public nuisance, the Court rejects the assertion that outside counsel is *per se* prohibited and disqualified. The remedies in all other causes of action do not cross into an area where relief is more akin to that found in the penal code.

The responding Counties oppose the Petition in all respects claiming: (1) The Counties have the legal authority to engage outside counsel on a contingent-fee basis; (2) The Defendants lack standing to challenge the fee arrangements between the Counties and their special outside litigation counsel; (3) The contingent-fee arrangements do not violate due

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2. Specifically, due process and control as the Plaintiffs' claims are being prosecuted by outside counsel not subject to the neutrality obligations of government lawyers as well as sufficient direct and specific control over the course of litigation.

process rights of these Defendants; and (4) The contingent-fee arrangements do not violate State and/or County conflict of interest and/or appropriations rules. [3]

Mr. Justice Frankfurter once said, "Courts should not be ignorant as Judges of what we know as men." The litigation before this Court presents itself as a complex matter requiring skill to both prosecute and defend beyond the usual practice reach of dedicated municipal attorneys whose work never involve issues presented in this litigation.

Worthy of note is that in the case of Suffolk County, and presumptively all others, the Suffolk County Legislature passed a resolution directing the County Attorney to determine the feasibility of the County bringing an action against the manufacturers of prescription opiates. In furtherance of that resolution, the County Attorney submitted a report which advised the County Legislature that the County appeared to have cognizable claims under State law. Thereafter, a legislative committee was established pursuant to County Law to issue a report to the Suffolk County Legislature concerning the viability of an action against drug manufacturers and to report damages the County sustains as a result of the Opioid Crisis. The Committee recommended that the County retain outside counsel to work with a consultant to analyze cost, with all work to be performed on a contingent basis.

In April 2015, a formal request for qualifications was issued to determine which law firms were qualified to prosecute the claims on behalf of the County against the manufacturers and/or distributors of prescription opiates. At the conclusion of the six month review process, Suffolk County retained the firm of Simons Hanley Conroy. That firm was chosen "due to the firm's extensive expertise in this type of litigation and resources to support of litigation." Thereafter, a resolution was passed which authorized the Suffolk County Attorney to commence litigation against the allegedly responsible parties.[4]

The retention contract at issue (dated December 16, 2015) is an agreement wherein Simons Hanley Conroy will represent the County in a civil action against manufacturers of prescription opiates on a contingent basis with the firm advancing all expenses of the litigation. The County, could not fund the prosecution on an hourly basis, was not equipped with the financial resources to pay customary disbursements necessitated in the proposed

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3. As concerns conflict of interest issues, Respondents counter that outside counsel are not "officers" or "employees" of the Counties. The agreements define them as independent contractors and clearly not armed with the authority and tools of the government.

4. Petitioners' due process argument is that due process requires the claims must be advocated by municipal lawyers who are bound by concepts of neutrality without a profit incentive.

litigation. Additionally, the Counties do not have staff necessary to litigate the case. Unless the County retained outside counsel to pursue these claims, on a contingent no cost basis, the claims could not be brought.

Plaintiffs-Respondents detail the statutory support of their claim that the retention contracts are permissible:

> Plaintiffs are municipal corporations. Municipal corporations have the right to sue and be sued. N.Y. Const. Art. X, § 4. Municipal corporations may exercise the "powers and discharge the duties of local government and administration of public affairs" as delegated to them. County Law § 3.
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> To promote "effective local self-government," the New York Constitution and Municipal Home Rule Law have delegated power to the Counties so that they may act as an independent local governments. N.Y. Const. Art. IX, § 1.4 The "rights, powers, privileges and immunities granted" to the County "shall be liberally construed." N.Y. Const. art. IX, § 3(c).
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> The power to engage outside counsel is expressly granted by County Law § 501(1) , which provides: "the County Attorney may employ counsel to assist in any civil action or proceeding brought by or against the county or any county officer in his official capacity."
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> The Counties have each adopted a Charter which implements their authority to sue and be sued and to engage outside counsel. These Charters create a Department of Law of which the County Attorney is the head...
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> Under the Charter, "the County Attorney may employ such special counsel as may be necessary." Special counsel may be retained "on behalf of the County" for "matters which affect the County ... and/or its residents." Charter Art. XVI, § C16-1(C).

A central issue concerning the legitimacy of the fee arrangements is whether or not such arrangements violate statutory and/or common-law precepts concerning the duties and responsibilities of municipal counsel, be it civil and/or criminal, vis-à-vis the rights of the

subject of the allegations to face counsel whose aim is to pursue only justice without the prospect of financial gain. Their argument is that private counsel retained on a contingent basis have an impermissible dog in the fight (the fee), and are not bound, as are public service lawyers, to act as "neutrals" in pursuit of a just result. The *Clancy* Court articulated a neutrality doctrine *albeit* in a criminal and/or quasi criminal matter:

> The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his activities, his duties are conditioned by the fact that he 'is the representative not of any [*sic*] 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.' " (*Id.* at p. 266, 137 Cal.Rptr. 476, 561 P.2d 1164, quoting *Berger v. United States* (1935) 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314.)[5]

The "control" issue, in New York, presents a case of first impression. The Court has considered decisions from other jurisdictions such as *Actavis Pharma Inc.* (170 N.H. 211). There, the Supreme Court of New Hampshire, ruling on issues of standing and the"ultra vires" claims concerning the retention of outside counsel on a contingent basis addressed the propriety of contingent-fee arrangements between government and private counsel. That Court held that an outside law firm retained by the Attorney General on a contingent-fee basis regarding investigations and enforcement of actions under that state's Consumer Protection Act, was not vested with a governmental function, and thus the contingent-fee agreement did not violate common-law and ethics rules requiring impartiality (neutrality) of government lawyers. That Court noted that the plain terms of the agreement between the law firm and the Attorney General demonstrated that the Attorney General retained direct authority (i.e. control) of all aspects of the litigation.

The *Actavis* Court also held: (1) Pharmaceutical companies were not exempt from having to establish standing to raise their challenge to the State's use of outside counsel on a contingent-fee basis; (2) Pharmaceutical companies did not have standing to claim that the contingent-fee agreement was ultra vires per statute; (3) Pharmaceutical companies did not have standing to claim that the contingent-fee agreement violated any statute mandating that

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5. The *Clancy* case presented a scenario where penal sanctions/penalties were foreseeable.

the Attorney General deposit funds received as a result of any action under the act into a Consumer Protection escrow account (appropriations rules); (4) The executive branch code of ethics (Professional Discipline) do not provide a private right of action sounding in violation; and (5) Outside counsel was not vested with a governmental function.

The decision of the New Hampshire Supreme Court was the subject of a petition for certiorari that was denied and therefore, undisturbed by the United States Supreme Court on March 5, 2018.

In *American Bankers Management Company Inc. v Eric L. Heryford, District Attorney, Trinity County*, 885 F.3d 629, an issue before the United States Court of Appeals, (9th Circuit) involved an arrangement whereby the District Attorney of Trinity County had retained private counsel on a contingent-fee basis to litigate in his name an action against the company under California's Unfair Competition Law for relief including civil penalties and, whether such arrangement violated federal due process.

Concerning the issue of whether or not the arrangement violated due process principles, the *American Bankers* Court decided it did not. Specifically, holding that the district attorney's retention of private counsel to pursue civil penalties under state law cannot be meaningfully distinguished from a private relator's pursuit of civil penalties under the qui tam provisions of the False Claim Act, an arrangement that does not violate due process.

A qui tam analogy is thought provoking. The words qui tam are derived from the Latin for "who as well." It is a lawsuit brought by a private citizen (properly called a "whistle blower" and/or relator) against a private company believed to have violated the law in the performance of a contract with the government or in violation of a government regulation where a statute provides for a penalty for violations. Qui tam lawsuits are brought for "the government as well as the Plaintiff." In a qui tam action, the Plaintiff (the person bringing the suit) may be entitled to a percentage of the recovery as a reward for exposing the wrongdoing and recovering funds for the government. Albeit the claims before this Court are simply analogous to qui tam, the analogy, as concerns recovery for the good of the government, is compelling and as the issues evolve the Court anticipates the apparent connection to do so also.

Once again, the Court notes in sum and substance, the Plaintiff-Respondents' opposition is threefold: (1) As a threshold matter Defendants lack standing to challenge the fee arrangement to which they are not parties, are not third-party beneficiaries, and which causes them no injury; (2) From coast-to-coast, state and federal courts have resoundingly and uniformly rejected efforts by defendants to interfere with governmental entity's right to

engage legal services of outside, contingent-fee counsel; and (3)Contingent-fee arrangements, such as are before this Court, do not violate defendants' due process rights, any State law rule of professional conduct, or any appropriations statutes.

As concerns the standing issue both sides cite *State v. Actavis Pharma, Inc.*, 167 A.3d 1277. In the *Actavis case,* the Supreme Court of New Hampshire held: the defendants lacked standing to challenge the contingent-fee arrangements relating to the retention of counsel.[6] Worthy of mention is the dicta articulated by the New Hampshire Supreme Court as concerns "standing" noting as a threshold matter, that "standing applies only to a plaintiff's ability to initiate a lawsuit, not a defendants right to resist the claims against it." This Court concurs and holds the standing issue being raised by the Defendants is actually to resist a lawsuit as opposed to initiate a lawsuit. The Court also held that the company lacked standing to challenge appropriation issues as such a challenge was premature and that the Petitioner lacked standing to complain of code of professional responsibility violations as the relevant law did not provide for a private right of action. The Court rejected the company's common-law ethics challenge to the arrangements on the ground that under the fee arrangement the OAG [Office of Attorney General] maintained control of the direction of litigation.

Plaintiffs-Respondents concede that the contingency contracts do not specifically address the "control" issue by specifically detailing the elements of Plaintiffs' control. Instead, they claim by implication the Rules of Professional Conduct grant sufficient control to the County Attorney.

Respondents contend that Rule 1.2 of the New York Rules for Professional Conduct expressly requires the lawyer shall abide by a client's decisions concerning the objectives of representation and, as a as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle the matter.

In the matter before this Court, it is apparent that the fee arrangement between Suffolk County and outside counsel, properly posits "control," if only by implication, with the client. The law as cited by the Plaintiffs establish in the matter at bar that the County, just as any other party in this non-criminal/penal genre of litigation, has a right to contract, control, discharge, consult, accept and/or reject any item, thing, claim cause of action, and/or

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6. Not at issue is the "standing" of the Petitioner to present this petition. The standing issue relates to the Petitioners' standing to attack the fee arrangement.

allegation to be heard and/or determined.

The Court also considered the holdings in *City of Chicago v. Purdue Pharma L.P.*, No. 14-C 4361, 2015 WL 920719 (N.D. Illinois, March 2, 2015). In that matter, just as the matter before this Court, the defendants moved to invalidate the city's contingent-fee contract with outside counsel. The Court rejected the argument that outside counsel's financial interest in the outcome of litigation violated defendants' due process rights. That Court, after reviewing cases throughout the country, held that there was no violation of due process at least where: (1) The government retains control over the course and conduct of the of the case, (2) The government entity may veto any decision made by outside counsel; and (3) The government entity has a senior team member involved in litigation.[7]

The New Hampshire Court (*Actavis*) held: (1) Standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress. (2) In evaluating whether a party has standing to sue, a court focused on whether the party suffered a legal injury against which the law was designed to protect. (3) Pharmaceutical companies were not exempt from having to establish standing to raise their challenge to the state's use of outside counsel on a contingent-fee basis regarding investigations and enforcement actions involving the New Hampshire Consumer Protection Act.[8] This court interprets those findings to essentially mean who they hire in this non-penal, civil matter "is none of your business."

The benchmark of the New Hampshire case is that the Court rejected the defendant's claim that the contingent-fee arrangements violate the due process rights, agreeing with "the greater weight of judicial precedent finding no violation of due process by contingent-fee arrangements in certain civil litigation where the Office of the Attorney General supervises outside counsel and retains control over all critical decisions such that outside counsel's personal interest is neutralized." (*emphasis added*)

This Court finds that the issue of the propriety of contingent arrangements between municipalities and private counsel must be heard and decided on a cases by case basis. The Court must inspect the nature of the claims and the penalties available to the prevailing party

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7. The Affidavit/Affirmation of Ms. Bizzarro impacts this third element but not with the concise language of the cited case.

8. Albeit a private citizen may indeed be vested with standing.

as a starting point.

This Court further finds "control" as mandated by the Rules of Professional Responsibility vests control with the County thereby over coming personal interest prohibitions. Additionally, the authority of the County to terminate the services of counsel, without recourse retaining the right to accept and/or reject any propositions made by its outside counsel meets the "control" requirements.

Lastly, the appropriations issue raised by the Petitioners is certainly not ripe for determination. Discussion concerning the distribution of any appropriated funds is premature.

The Court reserves decision as concerns prosecution of the public nuisance claims by outside counsel. The Petitioners may renew that aspect of their motion as and if discovery so dictates.

Therefore, it is

ORDERED ADJUDGED AND DECREED that the contingent-fee agreements at issue do not violate any provision of the law and represent valid, enforceable and legitimate contracts between the contracting parties.

The foregoing constitutes the decision and **ORDER** of the Court.

Dated: May 15, 2018

HON. JERRY GARGUILO, JSC