IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SHERWIN-WILLIAMS COMPANY,

Plaintiff,

v.

CITY OF COLUMBUS, OHIO, et al.,

Defendants.

Civil Action No. 2:06cv829

JUDGE SARGUS

Magistrate Judge Kemp

PLAINTIFF THE SHERWIN-WILLIAMS COMPANY'S
MOTION FOR DECLARATORY RELIEF AND
A PRELIMINARY INJUNCTION PURSUANT TO 42 U.S.C. § 1983

An impartial government, not influenced by personal pecuniary interests, is a cornerstone of due process. Financial interest should not cloud the judgment or discretion of a lawyer acting for the government on whether to sue, whom to sue, what claims to assert, what remedies to seek, or how best to resolve a lawsuit filed on the public's behalf. The public interest and fair-minded justice, not a government attorney's potential financial windfall, must be paramount in any decision.

By this motion, plaintiff The Sherwin-Williams Company seeks to prevent the continuing violation by several Ohio cities of its rights under both the First Amendment and the Due Process Clause of the United States Constitution. U.S. Const. amend. I & XIV, § 1. Defendants are five Ohio cities and their mayors and chief law enforcement officers (hereinafter the "Cities"). Private attorneys, intent on setting off waves of contingency fee public nuisance lawsuits in Ohio, approached these Cities and sold them on the notion that these would be no risk, no money down, "see if we can strike gold" lawsuits. The Cities thereafter entered into contingency fee

agreements pursuant to which the Cities' police power for prosecuting public nuisance actions was effectively transferred to private lawyers acting for their personal gain. The resulting lawsuits violate Sherwin-Williams' due process rights. As the California Supreme Court recognized 20 years ago, such a delegation to contingency fee lawyers is impermissible; it destroys the impartiality required of lawyers exercising the government's police powers to prosecute a public nuisance action. *See People ex rel. Clancy v. Super. Ct.*, 705 P.2d 347, 350-53 (Cal. 1986); Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, filed Apr. 4, 2007, *County of Santa Clara v. Atlantic Richfield Co.*, Cal. Super. Ct. Case No. 1-00-CV-788657 (Cal. Super. Ct. April 4, 2007) (Readler Aff., Ex. 23).[1]

These privately controlled lawsuits also fail to account for the constitutional rights of the targeted corporations. Driven by the prospect of a fee, the contingency fee counsel pursue "deep pocket" corporations. Notwithstanding the fact that Sherwin-Williams could not have known of the alleged harms at issue today, let alone the fact that no evidence connects Sherwin-Williams to those harms, the contingency fee counsel attempt to impose liability based on Sherwin-Williams' past exercise of its constitutional rights—its association with a trade organization, legislative and petitioning activities, and commercial speech. That the government's actions

[1] Through contingency fee counsel, the Cities of East Cleveland, Toledo, Columbus, Cincinnati, and Lancaster have filed suits virtually identical to each other. The Cities of Canton, Massillon, Youngstown, and Dayton have also recently filed nearly identical complaints against Sherwin-Williams, utilizing the same contingency fee counsel as the other Cities. *See* City of Canton Complaint and Jury Demand Endorsed Heron [*sic*], *City of Canton, Ohio v. Sherwin-Williams, et al*., Case No. 2006 CV05048, filed Jan. 2, 2007 (Readler Aff., Ex. 1); City of Massillon Complaint, *City of Massillon, Ohio v. Sherwin-Williams, et al.*, Case No. 2007 CV01224, filed Mar. 19, 2007 (Readler Aff., Ex. 2); City of Youngstown Complaint and Jury Demand Endorsed Hereon, *City of Youngstown, Ohio v. Sherwin-Williams, et al.*, Case No. 07CV1167, filed Apr. 2, 2007 (Readler Aff., Ex. 3); City of Dayton Complaint and Jury Demand Endorsed Heron [*sic*], *City of Dayton, Ohio v. Sherwin-Williams, et al.*, Case No. 07-2701, filed Apr. 2, 2007 (Readler Aff., Ex. 4). At least one additional lawsuit appears imminent, with the City of Athens having agreed to retain contingency fee counsel to file an identical complaint. *See* Nick Claussen, *City Back on Board Lead-Paint Suit*, The Athens News, Apr. 2, 2007 (Readler Aff., Ex. 5). Although Athens, Canton, Massillon, Youngstown, and Dayton are not yet defendants in this case, their lawsuits demonstrate the expansion of the continuing constitutional violations sought to be stopped by this federal court action.

violate and chill Sherwin-Williams' and other similarly situated person's constitutional rights is of no moment to the private lawyers.

Sherwin-Williams seeks declaratory and injunctive relief to protect against the invasions of its constitutional rights. While Sherwin-Williams does not suggest that the Cities cannot sue it if a viable cause of action exists, it firmly believes the Cities cannot pursue their claims in a manner that violates both the Due Process Clause and the First Amendment. In accordance with 42 U.S.C. § 1983, which authorizes a civil action to redress the deprivation of one's constitutional rights, as well as Federal Rules of Civil Procedure 57 and 65, Sherwin-Williams asks this Court for: (a) a declaratory judgment stating that it is a violation of due process for the Cities to bring public nuisance actions against Sherwin-Williams by delegating their police powers, in whole or in part, to attorneys with financial interests in the outcome of the lawsuit; (b) a declaratory judgment holding the Cities' attempt to impose liability based on Sherwin-Williams' past associational and speech activities violates the First Amendment; (c) a preliminary injunction prohibiting the Cities from using unconstitutional contingency fee agreements to retain counsel when filing or proceeding with public nuisance lawsuits against Sherwin-Williams; and (d) a preliminary injunction precluding the Cities from violating and chilling First Amendment freedoms by seeking to impose liability based on constitutionally protected activities.

Respectfully submitted,

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Dated: April 9, 2007

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TABLE OF CONTENTS

Page

Summary:

42 U.S.C. § 1983 authorizes an action against "local governing bodies . . . for monetary, declaratory or injunctive relief" where the governing body, "acting under of color of law," has "deprived [the plaintiff] of his rights secured by the United States Constitution or its laws." *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658 (1978); *Neuens v. City of Columbus*, 303 F.3d 667 (6th Cir. 2002). Section 1983 is the vehicle for enforcing Sherwin-Williams' due process rights, which are being violated by the Cities' use of contingency fee arrangements with private counsel to prosecute the Cities' public nuisance claims.

Summary:

The Due Process Clause of the U.S. Constitution precludes vesting a local government's prosecutorial function in someone who has a personal financial interest in using the government's police power to extract money from the defendant. *See Berger v. United States*, 295 U.S. 78 (1935). A "private attorney appointed to prosecute a criminal contempt . . . should be as disinterested as a public prosecutor who undertakes such a prosecution." *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987). More specifically, an individual exercising a governmental body's police power in a public nuisance case must do so impartially, and without a vested financial interest in the outcome. *See*, *e.g.*, *People ex rel. Clancy v. Super. Ct.*, 705 P.2d 347 (Cal. 1985). Contingency fees, however, distort the careful weighing process required when deciding whether to enforce an ordinance or prosecute a crime in the name of the

public interest. After all, "[a] private prosecutor, who is being paid handsomely to convict someone, cannot also, without at least some subtle bias, fairly represent the interests of that person and consider the 'public interest' in treating that person justly." J. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511 (1994).

The standard of neutrality required by the Due Process Clause is absent here. *See County of Santa Clara v. Atlantic Richfield Co.*, Cal. Super. Ct. Case No. 1-00-CV-788657 (Cal. Super. Ct. April 4, 2007). Because contingency fee counsel stand to gain up to 33% of any monetary award received by the Cities in the lawsuits, private counsel's decisions regarding whom to sue, what theories to assert, what strategies to employ, and what type of relief to seek are influenced by their financial interest in the litigation's outcome, in violation of due process. *See Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987). The Cities' state court complaints already reveal this improper interest, as contingency fee counsel are suing "deep pocket" companies, not the landlords who have created lead hazards, allowed them to persist, and who are best positioned to immediately correct lead hazards and protect children. Methods pursued by other states, moreover, demonstrate that the relief contingency fee counsel seek can be achieved by means far more equitable than requiring defendants to pay for unnecessary lead abatement (thereby generating legal fees for counsel). Contingency fee counsel not only seek relief for the detection and abatement of the *mere presence* of lead paint, regardless whether it presents any hazard (which diverges profoundly from federal, state, and local regulatory schemes), at a cost of potentially hundreds of millions of dollars, but also seek punitive damages.

Summary:

The Cities are attacking Sherwin-Williams for its lawful membership and participation in a trade association and its petitioning and legislative activities. The Cities' lawsuits not only seek to hold Sherwin-Williams liable for engaging in protected speech, and are actionable as

such, but the chilling effect is also unmistakable. Under § 1983, the Cities' attempt to premise liability on protected conduct is enjoinable. *See, e.g.*, *NAACP v. Claiborne Hardware*, 458 U.S. 886, 915-17 (1982) (holding that courts have a "special obligation" to ensure that civil liability is imposed *only* for unprotected conduct or speech).

The Cities' speech-based attacks violate the First Amendment in at least three respects. First, the free association right guaranteed by the First Amendment prohibit the imposition of liability for a defendant's membership in, or association with, a trade organization. *See Thomas v. Collins*, 323 U.S. 516, 530-31 (1945). Second, "opposing legislation is a way of participating in the legislative process just as proposing legislation is" and is equally protected by the First Amendment. *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir. 1999); *see also Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 139 (1961). And third, Sherwin-Williams' advertising, which constitutes statements that do "no more than propose a commercial transaction," are strenuously protected by the First Amendment. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

Summary:

These lawsuits immediately and irreparably harm Sherwin-Williams, as private lawyers are making strategic decisions on the use of the Cities' police power, to the lawyers' pecuniary benefit, in violation of due process. "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am. Civil Liberties Union of Ky. v. McCreary County, Ky.*, 354 F.3d 438 (6th Cir. 2003). What is more, the longer the litigation proceeds, the more difficult it will be to remedy Sherwin-Williams' constitutional injury. Defending against the unsubstantiated lawsuits, moreover, causes Sherwin-Williams to suffer financial and reputational harm, jeopardizes employees' jobs, and risks shareholders' investments and retirement savings.

Immediate action is also required in light of the Cities' First Amendment violations. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, even "*[a] mere threat to First Amendment interests is a legally cognizable injury.*" *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 399 (6th Cir. 2001) (emphasis added). While the Cities' lawsuits have not yet imposed liability on Sherwin-Williams because of its

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

FEDERAL CASES

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

STATE CASES

TABLE OF AUTHORITIES
(Continued)

Page

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

STATE STATUTES

TABLE OF AUTHORITIES
(Continued)

Page

MISCELLANEOUS

TABLE OF AUTHORITIES
(Continued)

Page

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Cities' recent decisions to turn over to contingency fee lawyers the Cities' police and regulatory powers to bring public nuisance actions violates Sherwin-Williams' due process rights. By handing fee-minded lawyers authority over public nuisance litigation against former lead pigment manufacturers, including Sherwin-Williams, the Cities have abdicated their public regulatory duties in favor of counsel with a financial interest in the litigation's outcome. In similar circumstances, a unanimous California Supreme Court held that cities may not use contingency fee lawyers to prosecute a public nuisance action. *See People ex rel. Clancy v. Super. Ct.*, 705 P.2d 347, 350-53 (Cal. 1986). As the court emphasized, "[w]hen a government attorney has a personal interest in the litigation," like an enormous contingency fee agreement dependent on the outcome of the case, "the neutrality so essential to the system [of carefully weighing the public interest in litigation] is violated." *Id.* at 351.

The Cities' private lawyers are far from the disinterested, neutral government attorneys that the Due Process Clause demands. Proving as much, the first named partner of the private law firm retained by the Cities promised years ago that he would "bring the entire lead paint industry to its knees." *See* M. Curriden, *Tobacco Fees Give Plaintiffs' Lawyers New Muscle for Other Litigation*, Dallas Morning News, Oct. 31, 1999 (quoting Motley Rice attorney Ron Motley: "If I don't bring the entire lead paint industry to its knees within three years, I will give them my boat.") (Readler Aff., Ex. 6). To make good on this promise, these private lawyers have traversed the country, draft complaint in hand, in search of local governments willing to pursue the private lawyers' agenda. At these lawyers' direction, local governments sue the same corporate entities—a select number of former manufacturers of lead pigments—under the same public nuisance theory crafted by the private lawyers. These pre-packaged public nuisance

claims are troubling not only for their inherent legal flaws, but also because public nuisance "is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large." Prosser and Keeton on the Law of Torts 618 (W. Keeton ed., 1984). This type of legal claim requires careful balancing of the public interest and, in this case, careful deliberation regarding the protection of public health. *See Clancy*, 705 P.2d at 352-53. Public nuisance litigation, in other words, is not something that should be sold as a one-size-fits-all commodity to communities around the country.

Nonetheless, these private lawyers have now succeeded in selling their public nuisance lawsuit to a number of our cities in Ohio. With little or no oversight from the Cities, the private lawyers seek to prosecute substantially identical complaints in venues throughout Ohio, with the goal of achieving a significant cut of any recovery—typically 25% to 33%. (*See*, *e.g.*, R.62, Defendants' Reply In Support of Their Motion to Dismiss, at 2 n.2 (conceding that "[a]ll City complaints are the same"; Columbus Contract for Professional Services (Readler Aff., Ex. 7) at 4-5; City of Akron Agreement for Special Services at 3 (Readler Aff., Ex. 8).)[1] The City of East Cleveland's agreement, for example, allows the City to "monitor" the litigation, but the agreement expressly prohibits the City from "settl[ing], compromis[ing], releas[ing], discontinu[ing] or otherwise dispos[ing] of the Claim or suit"—even if such action were demanded by the public interest—*"without the consent of the [contingency fee counsel]*." (East Cleveland Contract at 3 (Readler Aff., Ex. 9) (emphasis added).)

[1] Sherwin-Williams has obtained executed copies of four Cities' contingency fee agreements, East Cleveland, Cincinnati, Akron, and Lancaster, and unexecuted agreements for Toledo and Columbus. Athens, Massillon, Canton, Youngstown, and Dayton have yet to produce their contingency fee agreements in accordance with requests made under Ohio's Public Records Act.

Remarkably, the Cities ratified these contingency fee agreements by "emergency" ordinances, foregoing public comment and the ordinary procedural protocols.[2] These "emergencies" were called notwithstanding the facts that lead-containing paint has not been sold in the United States since the late 1970s and that average blood lead levels in Ohio and across the country are at historic lows. These emergency ordinances were simply pretexts conceived by the contingency fee lawyers to avoid public comment, discussion and scrutiny. It is no wonder that a major Ohio newspaper views these public nuisance lawsuits as having "the appearance of a cowboy lawsuit, with an outside firm riding into town, lassoing the city into signing on, and looking for a payout of a hefty percentage of the settlement if successful." Editorial, *Fishing for Lead*, Toledo Blade (Dec. 22, 2006) at A12 (Readler Aff., Ex. 12).

The private lawyers are making the strategic decisions, including whom to sue, what claims to pursue, and what remedies to seek, all with an eye on maximizing their contingency fee, and with no regard for controlling law.[3] While not directly relevant to the due process violations at issue here, it is noteworthy that the private lawyers seemingly have not told the Cities that, for example, their claims are based on vague, retroactive standards, in violation of due process; the lawyers' retained experts, in fact, have previously admitted that the manufacturers could not have scientifically known about the risks associated with low-level lead exposures from lead dust, allegedly from deteriorating lead-containing paint. *See* FAC ¶¶ 17-19.

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[2] *See* Columbus Ordinance and Contract for Professional Services ("Columbus Ordinance" or "Columbus Contract") (Readler Aff., Ex. 7) (declaring an emergency and authorizing the City Attorney to enter into an agreement for legal services to "immediately begin the investigation into the City's potential legal claims and to possibly recover funds"); East Cleveland Ordinance and Contract for Legal Services ("East Cleveland Ordinance" or "East Cleveland Contract") (Readler Aff., Ex. 9) (same); Lancaster Resolution (Readler Aff., Ex. 10) (authorizing the Law Director to "execute the contingency fee contract for professional services to be rendered by the City of Lancaster Lead Litigation Group for the investigation, prosecution, and defense of litigation in connection with any and all matters pertaining to claims by the City of Lancaster against lead based paint manufacturers"); Lancaster Contract (Readler Aff., Ex. 11).

[3] In the contingency fee agreements, these law firms agree to finance the lawsuits for the Cities, advancing expert fees, transcript costs, and other such expenses, raising profound questions of champerty and legality.

Nor apparently has counsel informed the Cities that these products were lawful when made, sold and promoted and often specified by the government. The lawyers also seem to have failed to inform the Cities that the claims of conspiracy and punitive damages, which counsel included improperly to imbue the case with "bad conduct" from other unrelated entities and to try "the industry," not Sherwin-Williams individually, have been dismissed by every court to address them. Nor have the lawyers explained to the Cities that they are seeking to hold the manufacturers liable for engaging in constitutionally protected activities, including non-misleading advertisements, lobbying and government petitioning activities, and participation in trade organizations. *See* FAC ¶¶ 77-78, 83-85. Simply put, the private lawyers have misled the Cities to induce them to enter into agreements through which the private law firms take control of the Cities' police powers to use them against these defendants. They have not explained that signing up for these lawsuits requires the Cities to unfairly target selected corporations for their supposed "deep pockets," even at the risk of violating each city official's oath to uphold the Constitution.

The Cities' continuing constitutional violations have immediately and irreparably harmed Sherwin-Williams. To put an end to these ongoing irreparable injuries, the Court should issue a declaratory judgment followed by a preliminary injunction, which together will prevent the Cities from further violating Sherwin-Williams' constitutional rights. A preliminary injunction would prevent irreparable injury to Sherwin-Williams and, at the same time, would not harm the Cities (or any other party), as it would only prevent the Cities from acting unconstitutionally in bringing public nuisance actions.

II. BACKGROUND

A. State and local governments responded to potential lead paint hazards by enacting regulatory schemes to detect and abate lead hazards while holding neglectful landowners responsible.

The crux of the Cities' lawsuits is that the Cities should be able to recover today for their and others' decisions to use lead paint decades ago. By way of background, the sale of lead paint for residential interiors was voluntarily discontinued by Sherwin-Williams over fifty years ago, its use of white lead pigments in interior residential paints virtually ceased over seventy years ago, and the sale of lead paint for residential use was banned by federal law in 1972.[4] (FAC ¶ 57.) In some buildings in Ohio, one may find, under multiple layers of non-lead paint, one or more layers of lead paint applied decades ago. If these painted surfaces are not maintained by owners and are allowed to deteriorate, the long-buried lead paint could become accessible to children. Elevated blood lead levels ("EBLs"), which may result from ingesting lead dust from paint or other environmental sources, are considered potentially harmful to children.

Today, these risks are common knowledge. When the lead pigments at issue were manufactured decades ago, however, many of these risks were unknown. While it has long been known that lead could be toxic if ingested in sufficient quantities over a sufficient period of time, the historic prevailing view of public health regulators was that lead pigments could be safely used in architectural paints because paint was not (and is not) a product designed to be ingested. (*See* FAC ¶¶ 2, 19, 54.)

[4] It is beyond dispute that paint was but one of the many sources of lead in the environment. For example, the greatest infusion of lead into the environment in the 20th Century came from gasoline, and the greatest drop in blood levels nationally came when lead was removed from gasoline. Water systems and plumbing are another major source of lead. Apparently, the private lawyers have not informed the Cities that their lawsuits put water departments across the State at financial risk for their historic and continuing use of lead pipes and solder in their water systems.

Once the potential lead paint hazards became known, the federal government responded. In 1971, Congress passed the Lead-Based Paint Poisoning Prevention Act ("LPPPA"), 42 U.S.C. § 4821 *et seq.*, which, among other things: (1) prohibited the use of lead paint (defined as 1% or more lead) for federally-assisted housing; and (2) provided funds for lead-related state and municipal programs. The next year, the Food and Drug Administration prohibited the use of paint containing more than 0.5% lead by weight for housing. *See* Federal Hazardous Substances Act, 37 Fed. Reg. 5229 (March 8, 1972) (codified at 21 C.F.R. § 191.9(a)(6) (1973)). The effect of this rule was the removal from interstate commerce of lead pigments from architectural paints. Building on these efforts, in 1977 the Consumer Product Safety Commission promulgated regulations banning paint containing more than 0.06% lead by weight for residential, school, and consumer uses. *See* 42 Fed. Reg. 44199-201 (creating 16 C.F.R. Part 1303). This rule removed all lead ingredients from architectural paints.

In 1994, Ohio established a child lead poisoning prevention program, which authorizes the Director of Health (or a designated local health board) to screen children for EBLs. Ohio Rev. Code Ch. 3742. When the screening detects an EBL, the property suspected to be the source of the lead is investigated. *Id*. §§ 3742.30, .36. If the property is deemed to be a hazard, the Director "shall issue an order [to the property owner and manager] to have each lead hazard in the property controlled." *Id.* § 3742.37(A). Owners and managers are required to cooperate with the Director to address the owner's or manager's failure to comply. *Id.* §§ 3742.38-.40.

Many Ohio cities have also developed lead poisoning prevention programs. In Columbus, for example, City Code Chapter 4527 authorizes the City to inspect dwellings for the presence of "lead-based coatings contained in loose, chipped, peeling or flaking paint," *id*. § 4527.06, notify the occupants of those dwellings of testing and treatment programs if lead is detected, *id*., and

order the owners to "remove or permanently cover the lead paint," *id*. § 4527.07. If the owners fail to correct the hazard, the City may make the repairs and charge the cost "against the land on which the building exists as a municipal lien or to be recovered in a civil suit against the owner." *Id.*; *see also* Toledo Municipal Code Ch. 1759 (providing that where a child under age six tests twice with an EBL, the City shall issue to the property's owners and occupants an emergency order to abate lead hazards, and if the owner fails to comply, the City may remedy the situation and recover its costs through a civil action against the owner or a lien on the property).[5]

Public health programs to reduce the number of children with EBLs are working. Average blood lead levels ("BLLs") and the incidence of EBLs have declined steadily, with both reaching historic lows. From 1999 to 2005, Columbus saw an 84% decrease in childhood EBLs, Massillon saw an 83% decrease, Canton saw a 76% decrease, Cincinnati and Youngstown each saw a 68% decrease, Dayton saw a 65% decrease, East Cleveland saw a 59% decrease, and Toledo saw a 45% decrease. *See* Ohio Dept. of Health, 2005 City Data on Children Found To Have High Blood Levels, *available at*

[5] *See also* Cincinnati Municipal Code § 00053-15 (providing that surfaces should be removed, covered or made inaccessible to children where the lead-containing paint is loose and flaking and accessible to children, or where the coating is identified to be the source of undue lead absorption). The Codified Ordinances for East Cleveland, Lancaster, Youngstown, and Dayton do not specifically address lead hazards, although each City's code requires residents to maintain safe dwellings. *See, e.g.*, East Cleveland Codified Ordinance § 1313 (setting forth a comprehensive program for the City to identify and abate public nuisances in residences); City of Lancaster Codified Ordinance Chapter 531 (governing health, safety and sanitation); City of Youngstown Codified Ordinance § 546.04, HC 407(d) (prohibiting owners, occupants and operators from maintaining any condition "which constitutes a hazard to the occupants"); Dayton Housing Code § 93.33 (Municipal Code, Tit. IX, Ch. 93) ("every dwelling shall be so constructed and maintained and be kept in good repair and in safe condition"). State laws and regulations regarding lead-based paints still apply as well to those Cities.

The Department of Housing and Urban Development also provides funding to Cities to reduce lead-based paint hazards. *See*, *e.g.*, *Grants To Curb Lead Paint Hazards*, Columbus Dispatch, Nov. 9, 1994 ("Columbus will receive $4.7 million; Cleveland, $5.5 million; Toledo, $1.5 million; and Montgomery County, $4.9 million, [HUD] said" to "reduce lead-based paint hazards in low-income, private housing") (Readler Aff., Ex. 13); *City Laxness on Lead Must End Now*, Cincinnati Enquirer, June 25, 2006 ("[Cincinnati "received a $6 million grant from [HUD] to correct lead paint hazards in 250 identified homes.") (Readler Aff., Ex. 14); Mark Ferenchik, *City Testing Cheaper Option for Recycling*, Columbus Dispatch, Jan. 29, 2005 ("The city will use a $1 million federal grant to reduce lead and other hazards in 220 homes.") (Readler Aff., Ex. 15). The Cities' lawsuits, which typically try to count their expenditures of federal program grants as damages, would result not only in a windfall to the Cities, but also to the very landlords who have failed to maintain their properties.

http://www.odh.ohio.gov/healthStats/disease/lead/lead1.aspx) (Readler Aff., Ex. 16). The problem is all but gone in Lancaster and Massillon. Massillon reported only three children with EBLs in 2005. *Id.* Lancaster similarly reported six children with EBLs in 1999 and five in 2005. *Id.* Indeed, between 1999 and 2005, Lancaster has never had more than seven children with EBLs in a given year, and in 2000 and 2004 had three. *Id.*

While childhood EBLs in the Cities have declined substantially, some cases still occur. When they do, they are reported to the Ohio Department of Health, giving the state and its cities notice of the dwellings that may contain lead hazards. By and large, those cases are confined to a relatively small number of older, low-income rental units whose owners failed to maintain them properly and which often have sources of lead other than old paint.

B. Despite the success of these regulatory programs, contingency-fee lawyers convinced the Cities to sue Sherwin-Williams, utilizing legal theories that conflict with successful lead poisoning prevention programs crafted by elected officials.

Notwithstanding the proven results of these extensive regulatory programs, lawyers from Motley Rice LLC (flush with cash from tobacco and asbestos suits and apparently now willing to finance lawsuits for Ohio cities) have teamed with private New Jersey and Ohio lawyers to solicit Ohio cities with an aggressive (and in our view, misleading) marketing campaign for a money-making venture involving contingency fee litigation. *See* Columbus City Council Meeting Tr., July 31, 2006 at p. 2 (City Attorney Pfeiffer: "We have been approached about . . . going after lead paint manufacturers . . . ."); *id*. at p. 6 (Assistant City Attorney Delaney: "Other cities have been approached . . . to undertake similar action, and they're in the same position as the City of Columbus . . . the firms that we would engage . . . have experience in this area already . . . .") (Readler Aff., Ex. 17). Private counsel's plan does not enforce laws and regulations, nor does it target neglectful landlords. Rather than prosecuting culpable individuals

for violating the law or for allegedly harming children, private counsel advocated pursuing the purported "deep pockets" of Sherwin-Williams and other companies to abate all lead-containing paint in all buildings within the Cities' boundaries, regardless of whether it is hazardous, poses any threat to children, or has caused any loss to the Cities.

While contingency fee counsel promise "no risk and no cost" to the Cities, the risk and cost to the public health and property owners belies that promise. At the direction of contingency fee counsel, the Cities: (1) claim that the mere presence of lead paint in every building is a public nuisance, even if the building presents no lead hazard or houses no children; (2) assert that the public nuisance can be abated only by the inspection of all pre-1978 properties and total abatement of all lead paint (rather than making the property lead-safe); (3) demand that several former pigments manufacturers (not property owners) be required to pay the cost of that abatement, on the ground that their sale decades ago of lawful products to companies that used the pigments to manufacture paint has "caused" the present "nuisance" and makes manufacturers liable "as an insurer of the public health" (East Cleveland Compl. ¶ 54; Lancaster Compl. ¶ 47; Toledo Compl. ¶ 54; Columbus Compl. ¶ 50; Cincinnati Compl. ¶ 52; Canton Compl. ¶ 50; Massillon Compl. ¶ 50; Youngstown Compl. ¶ 73; Dayton Compl. ¶ 51); and (4) seek to divert from public coffers to the private lawyers, as a contingency fee, a sizeable percentage of whatever the Cities can compel those companies to pay.[6]

Contingency fee counsel's approach to prevent lead paint hazards diverges profoundly from federal, state, and local lead hazard regulatory schemes. First, despite counsel's allegation

[6] The Complaints filed by East Cleveland, Lancaster, Toledo, and Akron are attached to Sherwin-Williams' First Amended Complaint (R.21). Columbus's Complaint is attached to Sherwin-Williams' Supplement to Its Response in Opposition to the Cities' Motions to Dismiss (R.55), and Cincinnati's Complaint is attached to Sherwin-Williams' Second Supplement to Its Response in Opposition to the Cities' Motions to Dismiss (R.60). The Complaints filed by Canton, Massillon, Youngstown, and Dayton are attached as Exhibits 1, 2, 3, and 4 respectively, to the Readler Affidavit.

that the mere "*presence* of Lead in and on buildings throughout the City is an environmental hazard," (Lancaster Compl. ¶ 41; East Cleveland Compl. ¶ 48; Toledo Compl. ¶ 48; Columbus Compl. ¶ 44; Cincinnati Compl. ¶ 46; Canton Compl. ¶ 44; Massillon Compl. ¶ 44; Youngstown Compl. ¶ 67; Dayton Compl. ¶ 45) (emphasis added), intact, well-maintained or inaccessible lead paint is not considered hazardous.[7] Second, federal agencies, including HUD, the EPA, and the CDC, agree that in-place management and maintenance of lead paint (the "lead-safe" approach)—as opposed to contingency fee counsel's demand that all lead paint be abated (the expensive "lead-free" approach)—is the preferred means of avoiding lead paint risks to children, as sloppy abatement can create a hazard where none currently exists.[8] Finally, state and local provisions make those in the best position to prevent or fix lead paint hazards, the property owners and managers, not companies that manufactured lead pigments decades earlier, responsible for preventing or abating lead paint hazards.[9]

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[7] *See*, *e.g.*, Ohio Rev. Code § 3742.41(A) ("A property constructed before January 1, 1950, that is used as a residential unit, child care facility, or school *shall be legally presumed not to contain a lead hazard* and not to be the source of the lead poisoning . . . if the owner or manager of the [property completes the] preventative treatments [set forth in the section].") (emphasis added); Columbus City Code §§ 4527.05 & 4527.07 (declaring only dwelling units with interior or exterior surfaces that contain "loose, chipped, peeling or flaking paint or plaster" to be a nuisance, and requiring owners of such properties to either "remove or permanently cover such paint or plaster").

[8] *See* CDC, Managing Elevated Blood Lead Levels Among Young Children: Recommendations from the Advisory Committee on Childhood Lead Poisoning Prevention, March 2002, *available at* http://www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm, at 21 (reporting that one study of children found "on-site paint removal . . . resulted in increases in children's [BLLs] . . . despite a protocol for safe work practices") and 15 ("Keep to a minimum on-site removal of intact leaded paint."); *see also* Lead; Identification of Dangerous Levels of Lead; Final Rule, 66 Fed. Reg. 1206, 1213 (Jan. 5, 2001) ("Not all lead-based paint is a hazard, only that paint which EPA determines 'would result' in adverse health effects.").

[9] *See*, *e.g.*, Ohio Rev. Code §§ 3742.37 (allowing issuance of a hazard control order to owners and managers); 3742.38 (describing the managers' and owners' duty to comply with the order); Columbus City Code § 4527.07 (providing that the City can ask property owners to remove and cover lead paint, and if the owner fails to do so, the City may perform the work and recover the costs from the owner); Toledo Municipal Code § 759.02(d)(2) (providing that "[o]wners shall be responsible for permanent abatement of lead based paint hazards"); Ohio Rev. Code § 715.261 (permitting municipalities to bring a lien against property or an action against property owners to recover municipality's cost to abate a public nuisance where the property owner fails to do so); Ohio Rev. Code § 3707.01 (giving the Board of Health the power to compel "the owners, agents, assignees, occupants, or tenants" of property to abate and remove any nuisance).

C. The Cities handed over their police powers to contingency fee counsel to prosecute public nuisance claims against Sherwin-Williams.

Private contingency fee counsel are using police powers to try to make an enormous profit for themselves. Lancaster, Columbus, Toledo, Cincinnati, East Cleveland, Canton, Massillon, Youngstown, and Dayton have all retained Motley Rice and others to represent them on a contingency fee basis.[10] Under the contingency fee agreements, if the cases are successful, the Cities will reimburse counsel for all litigation costs and, in addition, will pay them up to 25% of any award if the cases settle, and up to 33% of any award should the cases go to trial. (*See*, *e.g.*, Columbus Contract for Professional Services (Readler Aff., Ex. 7) at 4-5.)[11]

The contingency fee agreements not only give the private attorneys a substantial portion of any award, but they also empower counsel to determine the course of the litigation. These agreements provide for substantial, *if not exclusive*, control over the litigation by outside counsel. For example, East Cleveland's Contract states that contingency fee counsel shall "[i]nvestigat[e] the City's potential claims" and may "hire expert witnesses or other law firms to assist [counsel]," with a City attorney merely "monitoring" the case as a "liaison." (East Cleveland Contract (Readler Aff., Ex. 9) at 2-3.) Even more remarkably, the City cannot "settle, compromise, release, discontinue or otherwise dispose of the Claim or suit"—even if such action is demanded by the public interest—"without the consent of the [contingency fee counsel]." (*Id.*

[10] *See* Columbus City Council Tr. (Readler Aff., Ex. 17); Columbus Ordinance (Readler Aff., Ex. 7); East Cleveland Ordinance (Readler Aff., Ex. 9); City of Toledo Contract for Legal Services (Readler Aff., Ex. 18); City of Cincinnati Contract for Legal Services (Readler Aff., Ex. 19); Lancaster Contract (Readler Aff., Ex. 11); City of Toledo Compl.; City of East Cleveland Compl.; City of Lancaster Compl.; City of Cincinnati Compl.; City of Canton Compl. (Readler Aff., Ex. 1); City of Massillon Compl. (Readler Aff., Ex. 2); City of Youngstown Compl. (Readler Aff., Ex. 3); City of Dayton Compl. (Readler Aff., Ex. 4).

[11] The agreements between Motley Rice, other private counsel, and the Cities are substantially similar in their wording. The similarity of the agreements suggests that Athens, Massillon, Canton, Youngstown, and Dayton, which have yet to produce their contingency fee agreements, have also entered into agreements mirroring those used by Columbus, East Cleveland, Toledo, Akron, Lancaster, and Cincinnati. There is no indication anywhere that in awarding these contracts, the Cities went through the usual competitive bid process. In other jurisdictions, competitive bids resulted in lower contingency fees.

at 3.) The same contingency fee lawyers are representing the Cities in this federal action to protect their fee arrangements; the constitutionality of the contingency fee lawyers in this case is unquestionably before this Court.

The private lawyers, incentivized by their enormous potential fee, have no regard for Sherwin-Williams' constitutional rights. Because the private lawyers lack evidence regarding any actual harm caused by Sherwin-Williams' products, the Cities' lawsuits are based on various constitutionally protected activities. At the core of the allegations is that Sherwin-Williams will be liable because it was once a member in a trade association, The Lead Industries Association ("LIA"), which petitioned the government and made public statements, and because Sherwin-Williams individually engaged in non-misleading commercial speech. (*See* FAC ¶¶ 77-78.) The Cities' theory is that these activities increased the demand for lead-containing paints and thus substantially contributed to the alleged public nuisance in the Cities. Liability, however, may not be based on First Amendment-protected speech.

III. ARGUMENT

This public nuisance litigation, pursued by counsel with a personal financial stake in the outcome, violates due process and irreparably harms Sherwin-Williams. In accordance with 42 U.S.C. § 1983, Sherwin-Williams seeks a declaratory judgment declaring that these contingency fee agreements violate the Due Process Clause, and a preliminary injunction prohibiting the Cities from using contingency fee counsel. Sherwin-Williams also seeks declaratory relief regarding its rights under the First Amendment and a preliminary injunction precluding the Cities from violating those rights. In deciding whether to grant injunctive relief, the Court should weigh: (1) the likelihood of Sherwin-Williams' success on the merits; (2) whether the injunctive relief will save Sherwin-Williams from irreparable injury; (3) whether the injunctive relief will harm others; and (4) whether an injunction will serve the public interest. *Yotlon v. El*

Paso Tenn. Pipeline Co., 435 F.3d 571, 578 (6th Cir. 2006). While the Court should weigh all of these factors, none is a prerequisite to the issuance of an injunction. *Id*. As explained next, each factor weighs in favor of entering a preliminary injunction here.

A. Sherwin-Williams is substantially likely to succeed on the merits of its claim under 42 U.S.C. § 1983, as private counsel and the Cities, acting under color of state law, are depriving Sherwin-Williams of its constitutional rights.

Sherwin-Williams is substantially likely to succeed on the merits of its due process and First Amendment claims. "To show a likelihood of prevailing on the merits, the appellant must show the likely existence of a constitutional violation causally related to the result sought to be enjoined." *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 205 (6th Cir. 1985) (quotation marks omitted). Here, the already filed lawsuits brought on a contingency fee basis by private attorneys violate due process, as they constitute an improper delegation of the Cities' police powers over public nuisances to financially-interested attorneys, and infringe and chill Sherwin-Williams' rights under the First Amendment, as the Cities' claims are based on constitutionally protected speech and associational activities.

Section 1983 is the vehicle for enforcing Sherwin-Williams' constitutional rights. "Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Congress "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quotation omitted). In creating § 1983, moreover, Congress "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 700-01 (1978). That broadly construed remedy includes actions against "[l]ocal governing bodies . . . under § 1983 for

monetary, declaratory, or injunctive relief." *Id.* at 690 (footnote omitted); *Feliciano v. City of Cleveland,* 988 F.2d 649, 654 (6th Cir. 1993) (same); *see also Shamaeizadeh v. Cunigan*, 338 F.3d 535, 556 (6th Cir. 2003) ("[A] section 1983 action against a city official in his or her official capacity is treated as an action against the City entity itself.") (quotation marks omitted).

To establish a prima facie case under § 1983, a plaintiff must show that "(1) a person acting under color of law (2) deprived [the plaintiff] of his rights secured by the United States Constitution or its laws." *Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002). Here, the Cities' and their officials' actions against Sherwin-Williams, taken under the color of state law, have "subject[ed], or caus[ed] to be subjected, [Sherwin-Williams] to the deprivation of . . . rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. By enjoining the Cities' use of contingency fees and their attempt to impose liability based on Sherwin-Williams' constitutionally protected activities, the Court can directly and immediately remedy Sherwin-Williams' injury.

1. The Due Process Clause forbids lawyers representing the government from having a personal financial stake in the litigation's outcome.

The Due Process Clause precludes vesting a state or local government's judicial or prosecutorial function in a person with a financial interest in the outcome of a case. Where a state's police power is being used to deprive a defendant of liberty or property, the defendant has a protected right in the impartiality of those exercising that power. When the party exercising that power has a personal financial interest in the litigation's outcome, as is the case here, that impartiality disappears.

a. Due process demands financial disinterestedness and impartiality from attorneys who, like criminal prosecutors, exercise government powers in the name of the people.

An individual exercising the government's police power in a legal proceeding must act impartially and without a financial interest in the proceeding's outcome. *See People ex rel. Clancy v. Super. Ct.*, 705 P.2d 347 (Cal. 1986); *County of Santa Clara v. Atlantic Richfield Co.*, Cal. Super. Ct. Case No. 1-00-CV-788657 (Cal. Super. Ct. April 4, 2007) (Readler Aff., Ex. 23). Entrusting the government's powers "to private persons whose interests may be and often are adverse" to the public's interest takes government out of the hands of publicly accountable, "presumptively disinterested" officials. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). The result is governmental "delegation in its most obnoxious form," in violation of due process. *Id.*

The impartiality requirement inherent in the Due Process Clause has its precedential roots in an Ohio case, *Tumey v. Ohio*, 273 U.S. 510 (1927). There, the United States Supreme Court held that a conviction violates due process when the judge derives income from fines that a guilty defendant is required to pay. "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law," the Supreme Court made clear, "to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523.[12]

[12] *See also Ward v. Village of Monroeville*, 409 U.S. 57, 59-60 (1972) (extending *Tumey* to mayor-judges who, because of their interest as executives in collecting fines, have an improper financial interest in cases before them); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-24 (1986) (holding that due process was violated where a judge participated in drafting and issuing an opinion that affected the outcome of the judge's own civil lawsuit in which the judge received a substantial monetary settlement); *DePiero v. City of Macedonia*, 180 F.3d 770, 778-82 (6th Cir. 1999) (finding mayor's interest, as the executive of the city, in mayor's court revenues violated due process).

The "obligation to govern impartially" recognized in *Tumey* extends to the representatives through whom the government prosecutes a case. A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992) (same). On the requirement of prosecutorial neutrality, the courts, the Department of Justice, the American Bar Association, and the State of Ohio all agree: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Ohio Rule of Professional Conduct 3.8, cmt. 1 (eff. Feb. 1, 2007).[13] When exercising the government's police power, a prosecutor, unlike a private practitioner in an ordinary civil proceeding, must consider and weigh the public benefits and consequences of his or her actions, and may not be tempted by any personal pecuniary benefits.

The same is true for other public officials, who, like prosecutors and judges, must also maintain financial disinterest in carrying out their public duties. Under Ohio law, for example, a public employee may not "[h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." Ohio Rev. Code § 2921.42(A)(4). Ohio law also prohibits public employees from "us[ing] or authoriz[ing] the use of the authority or influence of office or

[13] *See also* ABA Model Rule of Professional Conduct 3.8, cmt. 1 (same); U.S. Attorney's Manual, § 9-27.001 (principles of federal prosecution serve "two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case."); *id.* § 9-27.220 (In deciding whether to prosecute a case, "the attorney for the government should not be influenced by [the] possible effect of the decision on the attorney's own professional or personal circumstances."); id. § 9-27.730 (A)(2) (Directing a prosecuting attorney to recommend a sentence when "[t]he public interest warrants an expression of the government's view concerning the appropriate sentence.").

employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties." Ohio Rev. Code § 102.03(D).[14]

b. When a private attorney serves the same function as a government attorney, due process demands financial disinterestedness and impartiality.

Due process demands impartiality and disinterestedness from government lawyers and employees, and it demands no less when private counsel function in a prosecutorial role on behalf of the state or a political subdivision. A "private attorney appointed to prosecute a criminal contempt . . . should be as disinterested as a public prosecutor who undertakes such a prosecution." *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 804 (1987). Put another way, a "lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official." *Clancy*, 705 P.2d at 351. This principle applies whenever citizens, public and private alike, make any decisions about how to exercise the government's police power, including whether to proceed, whom to prosecute, what offenses to charge, and what remedies to seek. *See Young,* 481 U.S. at 807.

Contingency fees, however, distort the careful weighing process required when deciding whether to enforce an ordinance or prosecute a crime in the name of the public interest. As courts and commentators agree, "[a] private prosecutor, who is being paid handsomely to convict someone, cannot also, without at least some subtle bias, fairly represent the interests of that person and consider the 'public interest' in treating that person justly." J. Bessler, *The Public*

[14] *See also Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (optometrists on state board with pecuniary interest in revoking optometry licenses could not constitutionally conduct license revocation hearings); *In re Appeal of Carr*, No. CA-81-22, 1982 WL 2951, at *1-2 (Ohio Ct. App. Apr. 2, 1982) (affirming termination of official who attempted to obtain a sales commission on property he had the duty of assessing for condemnation); *State v. Lordi*, 748 N.E.2d 566, 570-72 (Ohio Ct. App. 2000) (county commissioner could not solicit company under contract with county to buy his goods to fulfill the contract); *City of Cleveland v. Wade*, No. 76652, 2000 WL 1145223, at *8 (Ohio Ct. App. Aug. 10, 2000) (city housing inspector could not solicit loans or gifts from property owner).

Interest and the Unconstitutionality of Private Prosecutors, 47 Ark. L. Rev. 511, 590 (1994); *see also* L. Brinkman, *Contingency Fees Without Contingencies*, 37 U.C.L.A. L. Rev. 29, 39-42 (1989) (discussing cases barring use of contingency fee agreements due to the danger of corrupting justice). The Due Process Clause prohibits disrupting this careful balancing of public interests through the introduction of personal pecuniary interests. *See Young*, 481 U.S. at 809 (appointing a private attorney to prosecute a contempt action that benefited the attorney's client violates due process); *Ganger v. Peyton*, 379 F.2d 709, 713-14 (4th Cir. 1967) (due process violation where prosecutor also represented the defendant's ex-wife in her divorce from the defendant); *Clancy*, 705 P.2d at 351 ("prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function").

Citing the Due Process Clause, the California Supreme Court in *Clancy* disqualified a private attorney hired on a contingency fee basis to enforce a city nuisance ordinance against the operator of an adult bookstore. *See* 705 P.2d at 351-52. *Clancy* analogized the role of an attorney in a public nuisance action with that of a prosecutor in a criminal action, noting that "[p]ublic nuisance abatement actions share the public interest aspect of . . . criminal cases." *Id.* at 352. That analogy is particularly apt, as public nuisance actions, which can be brought only to vindicate public rights, historically have been brought by governments as either an abatement action or a criminal prosecution. *See* Restatement (Second) of Torts § 821C cmt. a (1979) ("The original remedies for a public nuisance were a prosecution for a criminal offense or a suit to abate or enjoin the nuisance brought by or on behalf of the state or an appropriate subdivision by the proper public authority.").[15] In that regard, a prosecutor's interest "in a criminal

[15] *See also State ex rel. Miller v. Anthony*, 647 N.E.2d 1368, 1371 (Ohio 1995) (finding that Ohio statutory provisions regarding nuisance abatement actions arise from the state's police power); *Brown v. County Comm'rs of Scioto County*, 622 N.E.2d 1153, 1158 (Ohio Ct. App. 1993) ("Historically, public nuisance is criminal in nature . . . ."); *Sullivan v. Metro. Distrib. Co.*, No. 4-99-18, 2000 Ohio App. LEXIS 4323, at *8 (Ohio. Ct. App.

prosecution," including prosecution of a public nuisance action, "is not that it shall win a case, but that justice shall be done," meaning that a prosecutor "must act with the impartiality required of those who govern." *Clancy,* 705 P.2d at 350 (quotation marks and brackets omitted). Equally true, "'[a] government lawyer in a civil action . . . has the responsibility to seek justice . . . 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.'" *Id.* (quoting the ABA Code of Professional Responsibility, Ethical Canon 7-14).

As was the case in *Clancy*, here, too, the Cities' public nuisance actions are in many ways criminal in nature. *See Huffman v. Pursue*, 420 U.S. 592, 604 (1975) (Public nuisance claims are "more akin to [] criminal prosecution[s] than are most civil cases."). Each City brought its action "in accordance with its powers and duties as set forth in R.C. § 715.44," (*see* all Cities' Complaints at ¶ 1), which confers upon municipalities the power to abate nuisances and prevent injury to the public by authorizing the municipality to "prosecute in any court of competent jurisdiction, any person who creates, continues, contributes to, or suffers such nuisance to exist." Ohio Rev. Code § 715.44(A). The criminal underpinnings of these public nuisance actions further demonstrate why the Cities' retained counsel must be held to the same neutrality and disinterestedness requirements imposed upon criminal prosecutors. These neutrality and disinterestedness requirements are amplified here, as under the Cities' theory of public nuisance, the resulting civil damages (abatement costs) can far outweigh any statutory criminal penalties. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (Governmental regulation "can be as effectively exerted through an award of damages [in litigation] as through

(continued…)

Sept. 21, 2000) ("A public nuisance is an unreasonable interference with a right common to the general public and is usually criminal in nature."); Ohio Rev. Code § 3767.99 (providing criminal penalties for violations of select provisions of Revised Code Chapter 37 governing nuisances).

some form of preventive relief," as the "obligation to pay compensation [is] a potent method of governing conduct and controlling policy.")

c. The Cities' retained counsel have an improper pecuniary interest in the outcome of the underlying state-court public nuisance litigation, destroying their ability to act as impartial representatives of the Cities.

In their state court cases, contingency fee counsel representing the Cities have a direct, substantial pecuniary interest in the bringing, course, and outcome of the litigation—up to 33% of any monetary award received by the Cities. Their decisions on whether to sue, whom to sue, what theories to assert, what strategies to employ, and what type of relief to seek all will be influenced by this financial interest in the litigation's outcome. "The abatement of a public nuisance involves a delicate weighing of values," however, meaning that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Clancy*, 705 P.2d at 352. As was the case in *Clancy*, here, too, the use of contingency fee arrangements in public nuisance abatement actions "tempt" the government's lawyers "to tip the scale." That arrangement is "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Clancy*, 705 P. 2d at 353.

Just this month the California Superior Court held that these same neutrality principles prohibited Santa Clara County and other cities and counties that have sued Sherwin-Williams "from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the [public nuisance] litigation." *County of Santa Clara v. Atlantic Richfield Co.*, Cal. Super. Ct. Case No. 1-00-CV-788657, at 4 (Cal. Super. Ct. April 4, 2007) (Readler Aff., Ex. 23). Defendants in public nuisance cases, the California court explained, "are entitled to neutral prosecution by government attorneys who are not operating under a contingent

fee agreement," an entitlement that runs "throughout the prosecution of th[e] case." *Id.* Even where publicly employed attorneys retain "authority and control over the litigation," any involvement in the litigation by contingency fee counsel, the court explained, irreparably taints the litigation. *Id.* at 3. Because "[o]versight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality," "outside counsel must be precluded from operating under a contingent fee agreement" in public nuisance litigation. *Id.* at 3-4 (ordering plaintiffs "to file with the court new fee agreements in accordance with this order" within "30 days").

In the Ohio public nuisance cases, contingency fee counsel's improper financial interest (and thus lack of neutrality) has manifested itself already in the Cities' complaints. First, contingency fee counsel, for reasons motivated far more by a potentially large contingency fee than public health, are suing "deep pocket" companies, not the landlords who have violated the law, created lead hazards and allowed them to persist. Property owners and managers have both the legal duty and practical ability to prevent hazards from arising. While suing landlords would immediately correct lead hazards and immediately protect children, a multiplicity of low dollar lawsuits is not a financially lucrative approach for contingency fee counsel.

Second, the relief that contingency fee counsel seek in their state court complaints can be achieved more fairly and efficiently by means other than holding the defendants liable for lead abatement (generating legal fees for counsel). Other jurisdictions, it bears noting, have pursued far more equitable methods of raising abatement funds. New Jersey, for example, sets aside tax revenue from the sale of paint and collects a lead inspection fee for the purpose of funding loans to landowners to pay for lead abatement. N.J. Stat. §§ 52:27D-437.4, 52:27D-437.10, & 52:27D-437.11. California goes even further, imposing a fee on leaded gasoline producers, paint

distributors, and those releasing lead into the atmosphere to fund its lead poisoning prevention program, with only about 15% of the total fees assessed against paint manufacturers. *See*, *e.g.*, Cal. Health & Safety Code § 105310; *cf*. FAC ¶ 8 (noting that the Cities' soil, air, household dust, food, consumer products, and water are all sources of lead accessible to children). California recognizes what the Cities (or their counsel) do not—that lead paint is not the only source of EBLs in children. *See*, *e.g.*, H. Mielke & P. Reagan, *Soil Is an Important Pathway of Human Lead Exposure*, 106 Envtl. Health Perspectives Supp. S1 (1998), *available at* http://www.ehponline.org/members/1998/Suppl-1/217-229mielke/full.html (concluding that lead in soil, caused primarily by automobile emissions, is a substantial risk to children).[16] When fee-minded counsel are put in charge of public regulation, innovative, cooperative, and comprehensive thinking regrettably fall by the wayside. Here, in fact, the Cities and their contingency fee counsel have failed even to investigate property owners and other lead sources, including those of the Cities' own making (for example, their own water systems), further evidence that counsel are more concerned with their own "recovery," and with crippling former lead pigments manufacturers, than actually protecting children.

Third, the Cities allege—contrary to federal, state, and local regulations—that the mere presence of lead paint is a public nuisance, and the relief sought includes the detection and abatement of the *mere presence* of all lead paint everywhere, regardless of whether it presents any hazard. (Lancaster Compl. ¶ 41; East Cleveland Compl. ¶ 48; Toledo Compl. ¶ 48;

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[16] *Lead Poisoning in Children*, Columbus Health Dep't, *available at* http://www.publichealth.columbus.gov/health_topics_58.asp (acknowledging that "[o]ther sources of lead poisoning can come from: hobbies that use lead (such as making stained-glass windows), work (recycling or making car batteries), drinking water (lead pipes, solder, brass fixtures, valves can all leach lead) . . . ."); *Frequently Asked Questions Concerning Lead Poisoning – Children*, Ohio Dep't of Health, *available at* http://www.odh.ohio.gov/odhprograms/cfhs/lead_ch_faq.aspx (acknowledging that "[l]ead can also be present in soil, water and certain imported items" and that "[r]ecently recalled items with lead content include inexpensive jewelry items, candy, colored chalk and various toy parts.")

Columbus Compl. ¶ 44; Cincinnati Compl. ¶ 46; Canton Compl. ¶ 44; Massillon Compl. ¶ 44; Youngstown Compl. ¶ 67; Dayton Compl. ¶ 45.) This approach not only needlessly runs up the abatement costs (and in turn, they hope, the contingency fees) to hundreds of millions of dollars, but it also conflicts with the federal, state, and local regulatory lead-safe programs, which favor maintaining or covering lead paint. Their counsel's high-cost remedy of removing all intact lead paint creates lead dust and *increases* the lead risk to children. *See supra* n.8. The approach taken in these lawsuits also conflicts with the general theme of the regulatory efforts, which seeks to identify specific lead hazards and then require those in the best position to deal with the problem—the property owners—to remedy it.

Fourth, contingency fee counsel have apparently failed to investigate or advise the Cities of their own responsibility for sources of lead in City-owned or managed buildings, playgrounds, community centers, water systems, incinerators, and other facilities. (FAC ¶ 8.) Nor, it seems, have contingency fee counsel advised the Cities of their potential liabilities for failing to prevent or remedy lead hazards in City properties and failing to enforce laws requiring property owners to prevent or remedy lead hazards. (*Id*.) Equally surprising, counsel have also apparently failed to explain to their clients that the Cities' allegations effectively waive any future right to assert governmental immunity from suit. Ordinarily, one would expect counsel in this setting to advise a City of potential drawbacks to a legal theory, allowing each City to carefully weigh the benefits and harms of pursuing the public prosecution. With such a large contingency fee at stake, however, it would be difficult if not impossible for a contingency fee lawyer to offer the objective, impartial advice needed in deciding whether to bring a public nuisance case. *See* Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. at 590 ("A private prosecutor, who is being paid handsomely to convict someone, cannot also,

without at least some subtle bias, fairly represent the interests of that person and consider the 'public interest' in treating that person justly."). Contingency fee counsel, after all, have nothing to lose if the Cities or other public agencies and officials find themselves as defendants in future public nuisance actions under the same legal theory they are presenting to the courts today.

Fifth, not only have contingency fee counsel pursued "deep pocket" companies rather than property owners and landlords, but counsel also hope to reach deep into those companies' pockets through their claims for conspiracy and punitive damages. These claims have been rejected as a factual matter in every court that has addressed them. Despite having access to all relevant materials through discovery in other cases, the private lawyers continue to pursue these factually meritless claims. Moreover, that the extreme remedy of punitive damages has been historically reserved for willful and malicious conduct has not dissuaded private counsel, nor has the fact that the use of lead pigments in paints decades ago was both lawful and recommended by government agencies. In fact, notwithstanding that the Cities had access to all of the historic public health information now used against Sherwin-Williams, the Cities themselves chose for decades to specify lead paint, use it regularly, and not to regulate its use, just like they permitted the use of lead in gasoline, water pipes, faucets, food containers, and myriad other products. A public attorney with no financial stake in the outcome would likely never pursue punitive damages to begin with, as "the government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants." H. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 36 (2000). Contingency fee counsel, on the other hand, have every incentive to pursue this "maximum penalty" in hope of multiplying an already super-sized potential fee.

Sixth, contingency fee counsel have no regard for the citizens' constitutional rights. Private counsel continue to urge liability based on the companies' association with trade organizations, lobbying and petitioning activities, and non-misleading commercial speech, despite the fact that the manufacturers cannot be held liable for these speech-related activities. The fact that the Cities must base their lawsuits on protected speech would have convinced fair-minded individuals not to pursue the litigation. After all, there is no incentive for a public official to pursue claims in violation of the defendants' constitutional rights, particularly when the official has sworn to uphold those rights. Contingency fee counsel, however, do not abide by these same restrictions.

Further troubling is the fact that not only do contingency fee counsel have the motivation to make these suits more about benefiting themselves than the public, but they also have the ability to do so. The Cities have delegated to contingency fee counsel almost complete control over the Cities' claims and the course of the litigation. The Cities have wrongly sold their discretion to assess what is in the public interest. The Cities have relegated themselves to the back bench, offering up a city attorney simply to "monitor the case" as a "liaison between the [contingency fee counsel] and the City's Law Department." (East Cleveland Agreement (Readler Aff., Ex. 9) ¶ 2.a.) At its most extreme, the fee agreement essentially prohibits the City from compromising or discontinuing its claims against Sherwin-Williams without the consent of contingency fee counsel. (*Id.* at ¶ 3 (prohibiting the City, "without the consent of [contingency fee counsel], [to] settle, compromise, release, discontinue or otherwise dispose of the Claim or suit").)

Just as in *Clancy*, where the contingency fee agreement at issue authorized the doubling of the private attorney's fee for each successful nuisance action, here, too, the contingency fee

counsel have an improper financial interest in the result of the Cities' actions. 705 P.2d at 348-51. The Cities' contingency fee agreements, in fact, delegate even more authority to contingency fee counsel than did the agreement invalidated in *Clancy*. In *Clancy*, the California Supreme Court rejected the fee agreement, even where the city decided who to prosecute, because "the prosecutor's discretionary functions are not confined to the period before the filing of charges." *Id*. at 353 n.4. (quotation marks omitted). Here, however, the Cities' agreements go even further to empower contingency fee counsel to *investigate* and *determine* what claims to bring and against whom they should be brought.[17] It is thus perhaps no surprise that "[a]ll City complaints are the same." R.62, Defendants' Reply Brief at 2 n.2.

That contingency fee counsel would be motivated primarily by a potential fee award in this setting is not a novel thought. In reacting to the accusation that he cared more about the nationwide tobacco settlement than pursuing Florida's particular tobacco case, Motley Rice lawyer Ron Motley candidly admitted: "Yes, Ron Motley is more interested in the global settlement than he is in Florida." B. Van Voris, *Fallout From Florida Fee Deal, Split Among Plaintiffs' Lawyers Could Obstruct State Tobacco Settlement*, Nat'l L. J., Sept. 29, 1997 (Readler Aff., Ex. 20). With this in mind, it is easy to see how the private interest in "bring[ing] the entire lead paint industry to its knees" has prevailed over the public interest in doing what is best for the Cities' constituents. *See* M. Curriden, *Tobacco Fees Give Plaintiffs' Lawyers New Muscle for Other Litigation*, Dallas Morning News, Oct. 31, 1999 (Readler Aff., Ex. 6).

[17] *See* East Cleveland Contract (Readler Aff., Ex. 9) at 2 (giving contingency fee counsel the authority to "investigat[e] the City's potential claims against lead manufacturers"); Columbus Ordinance (Readler Aff., Ex. 7) at 3 (authorizing retention of contingency fee counsel to "advise" the City on any "claims which the City has, or may have, against others relating to the presence of and effects from lead paint"); Lancaster Resolution (Readler Aff., Ex. 10) (authorizing retention of contingency fee counsel "for the investigation, prosecution, and defense of litigation in connection with any and all matters pertaining to claims by the City of Lancaster against lead based paint manufacturers").

* * * * *

Because the abatement of public nuisances "involves a balancing of interests," it falls into "a class of civil actions that demands the representative of the government to be absolutely neutral." *Clancy*, 705 P.2d at 350-52 (a prosecutor "must act with the impartiality required of those who govern"). That neutrality has been lost here. Because the Cities' delegation of wide-ranging authority to self-interested contingency fee counsel violates due process, this Court should bar the Cities from pursuing their claims through contingency fee counsel.

d. The Cities' fee agreements do not serve the legitimate goals accomplished by allowing lawyers to use contingency fee agreements.

Confirming the constitutional impropriety of the Cities' relationship with contingency fee counsel is the fact that the fee agreements here serve no purpose other than creating an improper and unconstitutional financial interest for contingency fee counsel in the outcome of the public nuisance cases. To be sure, contingency fees can "enabl[e] the poor man with a meritorious cause of action to obtain competent counsel." A. Youngwood, *The Contingency Fee—A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965); *see also* Model Code of Prof'l Responsibility EC 2-20 (1979) (contingency fees can "provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim").

The traditional justifications for contingency fees, however, do not apply to the Cities' use of those agreements here. The Cities have little in common with the "poor man" unable to obtain competent representation. As former Alabama Attorney General (and current U.S. Circuit Judge) Bill Pryor has observed, governments both "have the power to tax" and "control access to

the legal system," calling into deep question the validity of a government's use of contingency fee counsel:

> For a long time, contingent fee contracts were considered unethical, but that view gave way to the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy, because they have the power to tax and condemn. Governments also control access to the legal system. The use of contingent fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

Bill Pryor, *Curbing the Abuses of Government Lawsuits Against Industries*, Speech Before the American Legislative Exchange Council, Aug. 11, 1999, at 8 (Readler Aff., Ex. 21); *see also* D. Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DePaul L. Rev. 743, 785 (2000) ("Although the private legal system benefits from the use of contingency fee contracts, the result is quite different when a contingency fee is placed in the context of a government action.").[18]

Unlike a penniless plaintiff, the Cities can pay for their public nuisance suits in a number of ways, none of which involves engaging private attorneys on a contingency fee basis. The Cities have the power to tax, assess fees, and raise money through regulation, such as assessing inspection costs or recouping their abatement expenses, not to mention the millions in federal

[18] *See also Litigation in Mississippi Today: A Symposium Luncheon Featuring Attorney General Dick Thornburgh*, 71 Miss. L.J. 505, 511 (2002) ("Recent lawsuits involving lawful products . . . promote a kind of regulation by litigation, where trial lawyers take the place of legislators. A development described . . . as not healthy."); D. Thornburgh, *Commentary, The HMO Dilemma; What's the Fairest Battlefield in the Fight for Better Health Care? The Courts Should Be Used To Redress Harms and Not As a Vehicle To Change the System*, L.A. Times, April 23, 2000, at Part 5 ("[P]laintiff attorneys now are targeting the deep pockets of managed health care insurance companies. Their goal, according to one of the lead attorneys, Richard Scruggs, is not to redress alleged wrongs but to 'change this unconscionable health care system through the courts.' Very dramatic. Yet not very democratic.") (Readler Aff., Ex. 22); Bessler, *The Public Interest*, 47 Ark. L. Rev. at 586 ("The argument that private prosecutors are necessary to assist public prosecutors to more vigorously enforce the law must also fail. Once again, the general public is free to devote more financial resources to law enforcement activities if it desires.").

funding the Cities receive to offset their costs. *See supra* at n.5 & n.9. A city council's decision on whether to provide funding would be a sure indicator of whether there is public support for litigation as opposed to other existing or potential solutions. *See City and County of San Francisco v. Philip Morris*, 957 F. Supp. 1130, 1136 n.3 (N.D. Cal. 1997) (rejecting "public policy" argument that "a contingent fee arrangement is necessary . . . to make it feasible for the financially strapped government entities to match resources with the wealthy [corporate] defendants").

Cities raise and spend revenue, and their taxing and spending decisions reflect the policy choices of the Cities' officeholders. *See, e.g.*, City of Columbus 2007 Budget, "Expenditure and Budget Summary All Funds 2004-2007," *available at* http://finance.columbus.gov/AboutUs/Financial_Management/Budget_Office/index.asp (indicating that Columbus's 2007 proposed grand total of expenditures was approximately $1.3 billion). Those policy decisions, however, must comport with the federal Constitution. Cities might find it attractive to incentive enforcement of building codes, restaurant codes, water and sewer restrictions, tax codes and traffic laws by paying enforcement officials on the number of violations they cite. But whether the financial incentive comes at the front or back end of the regulatory enforcement process, such an enforcement regime would plainly violate the Due Process Clause. *See Tumey*, 273 U.S. at 522 (holding that due process forbids a city from creating a financial incentive for judges in their handling of criminal cases). For this reason, cities have found alternative means and funding mechanisms for enforcing their laws. The same must be true for public nuisance enforcement. To the extent a city's officials believe that combating perceived public nuisances is a priority worthy of a commitment of the city's resources, the city can no doubt find a means for financing its regulatory efforts. Due process

simply prohibits a city from doing so by using a contingency fee as a financial incentive for enforcement.

2. The Cities' lawsuits violate Sherwin-Williams' First Amendment rights and unconstitutionally chill speech.

This Cities' lawsuits are not an attempt to litigate the merits of any proper public nuisance case. In that regard, Sherwin-Williams does not suggest that, if a proper cause of action does exist, the Constitution would nevertheless bar any suit by the Cities. Suppose, for example, that the Cities, utilizing financially disinterested counsel, brought a lawsuit based on Sherwin-Williams' manufacture or sale of an illegal product. While not meritorious under the circumstances alleged here and perhaps contrary to state law, a lawsuit in that form seemingly would not violate the Constitution.

But that is not the case for the Cities' lawsuits as presently constructed. Those lawsuits, in fact, violate the Constitution in multiple respects. In addition to seeking a declaration and injunction based on the private lawyers' unconstitutional contingency fee agreements with the Cities, Sherwin-Williams also seeks a declaration and an injunction to protect its constitutionally protected association and speech activities. The Cities are attacking Sherwin-Williams for, among other things, its lawful membership and participation in a trade association and its petitioning and legislative activities. Not only do these assaults by the Cities improperly seek to exact a price on Sherwin-Williams for engaging in protected speech, and are actionable as such, but the chilling effect is unmistakable. Under § 1983, the Cities' attempt to premise liability on protected conduct is enjoinable. *See, e.g.*, *NAACP v. Claiborne Hardware*, 458 U.S. 886, 915-17 (1982) (holding that courts have a "special obligation" to ensure that civil liability is imposed *only* for unprotected conduct or speech).

a. Sherwin-Williams' associational activities cannot form the basis of liability.

As an initial matter, the Cities' lawsuits attempt to impose liability on Sherwin-Williams based upon its association with the LIA, focusing largely on actions undertaken by the LIA, not Sherwin-Williams. *See* FAC ¶¶ 77-82. "Civil liability," however, "may not be imposed merely because an individual belong[s] to a group." *Claiborne Hardware*, 458 U.S. at 920. The free association right guaranteed by the First Amendment prohibits the imposition of liability for a defendant's membership in, or association with, a trade organization. *See Thomas v. Collins*, 323 U.S. 516, 530-31 (1945) (freedom of association applies to organizations engaged in economic activity, as it does to individuals and political organizations); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) (holding that the First Amendment protects "the freedom of an individual to associate for the purpose of advancing beliefs and ideas"). This principle holds true for a corporate defendant, because "though a corporation, it is directly engaged in those activities claimed to be constitutionally protected." *NAACP v. Button*, 371 U.S. 415, 428 (1963).

The federal courts have a duty to protect Sherwin-Williams' associational rights. In a case materially similar to the one at hand, then-Judge Alito, writing for the Third Circuit, granted the extraordinary relief of mandamus to prevent a trial which would have subjected the defendant "to a continuing impairment of its First Amendment freedoms." *In re Asbestos School Litig.*, 46 F.3d 1284, 1295 (3d Cir. 1994). Allowing a trial to go forward against a corporate defendant "predicated solely on its exercise of its First Amendment freedoms," Judge Alito made clear, "could generally chill the exercise of freedom of association by those who wish to contribute to, attend the meetings of, and otherwise associate with trade groups and other organizations that engage in public advocacy and debate." *Id.* at 1295-96. "Joining organizations that participate

in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. . . . But the district court's holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." *Id.* at 1294.[19]

As was the result in the Third Circuit, this Court should also declare unconstitutional the Cities' attempt to impose liability on Sherwin-Williams based on the LIA's protected speech and Sherwin-Williams' association with the LIA. The Cities have brought multiple lawsuits in multiple jurisdictions based on identical complaints, and other cities are contemplating doing the same. Awaiting individual, case-by-case determinations of Sherwin-Williams' associational rights would take years to resolve, likely producing inconsistent and contrary opinions. This uncertainty, as then-Judge Alito noted, would make Sherwin-Williams' exercise of these associational rights "unjustifiably risky" and "would undoubtedly have an unwarranted inhibiting effect on them." *Id.* What is more, the Cities' lawsuits not only infringe Sherwin-Williams' rights of association and speech, but they also impermissibly chill the rights of others. After all, there is nothing in the Cities' theory that is limited to the specific product, organization, or defendant at issue here. If the Cities were allowed to pursue their claims based on associational rights, every corporation in America would have to reconsider its associational memberships for fear of future liability decades later. *See* FAC ¶¶ 83-84.

[19] *See also Hunt v. Air Prods. & Chems.*, No. 053-9419, 2006 WL 1229082, at *5 (Mo. Cir. Apr. 20, 2006) ("Paramount is the burdening of fundamental rights of speech and association. . . . [D]efendants have an absolute right to associate and speak on matters of public importance. . . . [P]laintiffs would impose substantial burdens on those rights if, by associating for the purpose of promoting their economic interests, the defendants thereby were exposed to liability."); *Morgan v. W.R. Grace & Co.*, 779 So. 2d 503, 505 (Fla. Dist. Ct. App. 2000) (rejecting claims against trade association based on its alleged marketing, promoting, and encouraging the sale of radioactive land "given the First Amendment concerns this would raise").

b. Sherwin-Williams' petitioning activities cannot be the basis of liability.

The Cities' use and threatened use of Sherwin-Williams' and the LIA's petitioning activities also violate Sherwin-Williams' constitutional rights. The Cities contend that the LIA's petitioning and lobbying activities to prevent the passage of laws or regulations to restrict the use of lead paint or increase the demand for lead-based paint contributed to the public nuisance. The use of these activities to impose liability cannot be squared with the Constitution. *See* FAC ¶¶ 82-84.

The Constitution protects the right to petition the government and to oppose legislation without fear of reprisal or civil liability. *See* U.S. Const. amend. I. Under a line of cases known as the *Noerr-Pennington* doctrine, the U.S. Supreme Court has recognized that "opposing legislation is a way of participating in the legislative process just as proposing legislation is" and is equally protected by the First Amendment. *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir. 1999); *see also Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 139 (1961). "In a representative democracy such as this, [the legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr Motor Freight*, 365 U.S. at 137. Legislative efforts, even when conducted by a corporation, "are clearly permissible as first amendment rights to petition the government. . . . [S]elfish motivations do not lessen one's right to present views to the government." *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D. Minn. 1984).[20]

[20] The *Noerr-Pennington* doctrine was first articulated in the anti-trust cases, but the Court has recognized that it applies in "other contexts" as well. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993); *see also Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 831 F. Supp. 1516, 1522-23 (D. Colo. 1993) ("*Noerr-Pennington* immunity is a constitutional, not an antitrust, doctrine"); *Bayou Fleet, Inc.*, 68 F.Supp. 2d 734, 743 (E.D. La. 1999) (applying doctrine to defendants' lobbying of local legislature in an action for

Noerr-Pennington forbids holding a defendant liable for its petitioning activities because of any effect from the passage or failure of legislation or regulations. Such activities "are nothing more than protected First Amendment activity to procure favorable government actions":

> [The defendants'] us[e of] the administrative and legislative channels and procedures . . . was within their First Amendment rights. Their actions are nothing more than protected First Amendment activity to procure favorable government actions. . . . The First Amendment protects 'attempts to influence the passage or enforcement of laws,' no matter how harmful their incidental impact may be.

Bayou Fleet, Inc. v. Alexander, 68 F. Supp. 2d 734, 744 (E.D. La. 1999), *aff'd* 234 F.3d 852 (5th Cir. 2000) (citing *Noerr*, 365 U.S. at 135); *see also Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 300 (9th Cir. 1994) (prohibiting plaintiff from arguing that defendant's legislative and petitioning activities were the cause of a harm: "Proof of causation would entail deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers at issue. This inquiry runs afoul of the principles guiding the *Parker* [*v. Brown*, 317 U.S. 341 (1942)] and *Noerr* decisions."). The Constitution, in fact, protects a person from liability for opposing regulations and legislation even if the legislative activities were part of the alleged harm itself. *See*, *e.g.*, *Senart,* 597 F. Supp. at 506 ("[P]laintiffs assail defendants for taking a particular view in a scientific debate and

(continued…)

unfair trade practices); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (action for conspiracy to tortiously interfere: applying doctrine to allegations that defendants reported nursing home's suspected code violations); *Video Int'l Prod., Inc. v. Warner-Amex Cable Comm., Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (action for violation of civil rights and tortious interference with contracts: applying doctrine to defendants' petitioning of city government); *Senart*, 597 F. Supp. at 506 (action for conspiracy: applying doctrine to defendants' trade association's lobbying government for more related regulatory standard).

Although not pertinent here, the protection of *Noerr-Pennington* applies even where the statements made to the government are false. *See, e.g.*, *Noerr*, 365 U.S. at 140 (protecting petitioning even though it involved "deception of the public," the "manufacture of bogus sources of reference" and "distortion of public sources of information"); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 384 (1991) ("[D]eception, reprehensible as it is, can be of no consequence") (internal quotation marks omitted).

for trying to retain a regulatory standard which defendants preferred. Not only do these actions not constitute torts, they are protected by the first amendment.").

The Cities' attempt to hold Sherwin-Williams liable for its or the LIA's petitioning activities is inconsistent with the *Noerr-Pennington* doctrine. The Cities are impermissibly penalizing Sherwin-Williams for voicing its opinion in the legislative process. This type of censorship cannot be tolerated.

c. Sherwin-Williams cannot be liable for its truthful advertising.

Finally, the Cities' lawsuits seek to impose liability based on Sherwin-Williams' decades-old advertisements and promotions. *See* FAC ¶¶ 82-84. The Cities contend that these advertisements and promotions increased the demand for lead pigments and, therefore, substantially contributed to the alleged public nuisance. These advertisements and promotions, however, were not false or misleading and undisputedly were for legal products. Accordingly, they are entitled to constitutional protection.

Statements that do "no more than propose a commercial transaction" are strenuously protected by the First Amendment. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85 (1977); *cf. Leddy v. Narragansett Television, L.P.*, 843 A.2d 481, 490 (R.I. 2004) ("[A] news medium . . . has a constitutional privilege to tout itself in promotional spots or advertisements . . . ."). Even advertisements and promotions for socially undesirable products that directly have a huge negative impact on public health and welfare, such as alcohol and tobacco, are protected by the First Amendment. *See*, *e.g.*, *Lorillard Tobacco Co. v. Reilly*,

533 U.S. 525 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

The First Amendment protects commercial speakers not just against the imposition of criminal liability or civil regulation, but also "imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982). In *Claiborne Hardware*, the Supreme Court addressed the limit of a State's authority under the state common law to impose liability based on lawful and constitutionally protected speech. There, the State held the defendants liable for engaging in an economic boycott. Despite violent conduct by some boycotting individuals, the Court reversed and held that the named defendants could not be held liable for engaging in constitutionally protected speech. "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. *Only those losses proximately caused by unlawful conduct may be recovered*." *Id.* at 918 (emphasis added); *see also Illinois v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003) ("A State's Attorney General surely cannot gain case-by-case ground this Court has declared off limits to legislators."); *Tompkins v. Cyr*, 202 F.3d 770, 780 n.4 (5th Cir. 2000) (quoting *Claiborne Hardware*).

The Cities' claim to hold Sherwin-Williams liable based on constitutionally protected commercial speech should be declared unconstitutional, especially where, as here, Sherwin-Williams had no fair warning that its past commercial speech could be used in such a way. No legislature or regulatory agency barred or otherwise restricted the sale or promotion of the product at the time. Nor did Sherwin-Williams' speech violate any contemporary regulations or statutes. The Cities' only allegations are that Sherwin-Williams' advertisements and promotions

increased the demand for lead-based paint and, years later, these products caused harms. The fact that the speech allegedly accomplished its goals in inducing people to purchase a product cannot be grounds for liability. Such retroactive liability cannot be imposed on Sherwin-Williams' constitutionally protected activities. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment) (retroactivity is of "particular concern" because of the "'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals'") (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)).

B. Sherwin-Williams will suffer immediate, irreparable harm if the Cities are allowed to continue to violate Sherwin-Williams' constitutional rights.

If the unconstitutional contingency fee arrangements continue, Sherwin-Williams, along with its employees and shareholders, will suffer immediate, irreparable harm. As explained above, Sherwin-Williams is substantially likely to succeed on the merits of its constitutional claim that the use of contingency fee agreements in public nuisance cases violates due process. With this substantial likelihood of success on the merits of a constitutional claim comes the presumption that Sherwin-Williams has suffered irreparable harm. As the Sixth Circuit has made clear, "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am. Civil Liberties Union of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003).[21] This conclusion is consistent with the public's interest in zealously guarding constitutional rights against government deprivations.

[21] *See also Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (holding that the district court "properly relied on the presumption of irreparable injury that flows from a violation of [Eight Amendment] rights . . . [because] it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm") (emphasis in original); 11A Wright & Miller, Federal Practice and Procedure, Civil 2d § 2948.1 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

These constitutional violations—and the resulting irreparable harm—occur at the very moment the lawsuits are filed. *See Equal Open Enrollment Ass'n v. Bd. of Educ. of Akron City Sch. Dist.*, 937 F. Supp. 700, 709 (N.D. Ohio 1996) ("Constitutional deprivations for even a minimal period of time are irreparable and cannot be allowed to continue once they are identified."). The Cities' lawsuits have been devised entirely by private, fee-minded lawyers who solicited the Cities, selected the defendants, crafted the legal theories, and devised the litigation strategy, all with their personal financial interest in mind. That financial interest has tainted and will continue to taint each step in the litigation, both from Sherwin-Williams' and the public's perspectives. For this reason, the longer the litigation proceeds, the more difficult it will become to remedy Sherwin-Williams' constitutional injury.

Immediate review of the First Amendment violations is also necessary. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *cf. American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1057-58 (9th Cir. 1995) (holding that aliens had standing and their claim to challenge the INS's selective enforcement of immigration laws on First Amendment grounds was ripe because the "chill to their First Amendment rights is an irreparable injury that cannot be vindicated by post-deprivation review"). Even "*[a] mere threat to First Amendment interests is a legally cognizable injury.*" *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 399 (6th Cir. 2001) (emphasis added). While the Cities' lawsuits have not yet imposed liability on Sherwin-Williams because of its constitutionally protected activities, the risk of liability is chilling Sherwin-Williams' and others' rights. This risk of self-censorship requires quick resolution of these issues in this forum. *See* 13A Charles Alan Wright et al., Federal Practice and Procedure § 3532.3 (2d ed. 1984) ("In a wide variety of settings,

courts have found First Amendment claims ripe, often commenting directly on the special need against any inhibiting chill."); *see also R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999) ("[W]hen First Amendment values are at risk, courts must be especially sensitive to the danger of self-censorship.").

The constitutional injury Sherwin-Williams is experiencing due to the Cities' blatant disregard for the First Amendment is exacerbated by the number of Cities making the same unfounded claims in numerous fora. By way of background, for about 20 years, various contingency fee counsel have attempted to bring lawsuits against Sherwin-Williams for its historical sale of lead pigments or paints. The various cases (many of which are reported) reveal a variety of tactics for attempting to impose liability on what the plaintiffs' counsel have called the lead paint or pigment "industry."[22] Included among the theories asserted in these cases are claims that liability should be imposed on a conspiracy theory because at various times in the past Sherwin-Williams (and others) were members of the Lead Industries Association ("LIA"). That conspiracy theory has been routinely rejected as factually baseless. *See, e.g.*, *Wright v. Lead Indus. Ass'n*, No. 1896, at 8, n.10 (Md. Ct. Spec. App. Oct. 21, 1997) (unreported decision) ("We are hesitant to even dignify the Wrights' charges that the lead industry manipulated in some fashion research facilities of such institutions as the Johns Hopkins University and Harvard University, with requests to conduct research into these issues."); *Rhode Island v. Lead Indust. Ass'n*, No. 99-5226, Tr. at 38-40 (Apr. 26, 2005) (dismissing conspiracy count, as no claims of

[22] *See, e.g.*, *Santiago v. Sherwin-Williams Co.*, 3 F.3d 546, 552 (1st Cir. 1993); *City of Philadelphia v. Lead Indus. Ass'n*, Civ. A. No. 90-7064, 1992 WL 98482, at *12-13 (E.D. Pa. Apr. 23, 1992) (unreported decision); *Swartzbauer v. Lead Indus. Ass'n*, 794 F. Supp. 142, 145 (E.D. Pa. 1992) (finding, on motion to dismiss, failure to allege facts to support elements of civil conspiracy); *Thomas v. Mallett*, 701 N.W.2d 523, 566-67 (Wis. 2005); *Skipworth v. Lead Indus. Ass'n*, 690 A.2d 169, 174 (Pa. 1997); *Wright v. Lead Indus. Ass'n*, Nos. 94363042/CL190487, 94363043/CL190488 (Cir. Ct. for Baltimore City, Md. June 20, 1996) (unreported decision) (Readler Aff., Ex. 24); *Wright v. Lead Indus. Ass'n*, No. 1896 (Md. Ct. Spec. App. Oct. 21, 1997) (unreported decision) (Readler Aff., Ex. 25).

intentional conduct remained in case); *Thomas v. Mallett*, 701 N.W.2d 523, 566-67 (Wis. 2005) (dismissing conspiracy claim for lack of evidence).

This § 1983 action was brought when Sherwin-Williams learned that Ohio Cities were being solicited by these private contingency fee law firms, which were feeding the Cities' baseless conspiracy theories to convince the Cities to authorize privately controlled lawsuits. In combating baseless allegations, defendants often are left to the standard procedural devices set out in the Rules of Civil Procedure, such as motions to strike, to dismiss, for summary judgment, or for judgment on the pleadings, as well as motions under Rule 11. But where alleged conduct, such as the LIA claims, strike squarely at constitutionally protected activity, these procedural measures are not sufficient to protect the chilling of First Amendment freedoms. Under these circumstances it is not enough to say that the baseless theories can be disposed of in the course of the state court litigation brought by the Cities. One cannot be forced to repeatedly litigate in multiple jurisdictions whether liability can arise from engaging in constitutionally protected activity. *See Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 386, 399 (5th Cir. 2003) (reversing district court's decision to dismiss Sherwin-Williams' complaint, in which Sherwin-Williams sought, among other things, a declaration that the defendants could not seek to impose upon Sherwin-Williams liability for engaging in constitutionally protected activities, which would "avoid repetitive litigation").

Assume, for example, that one owns a printing press and publishes pamphlets critical of the government. Cities could not sue to ban the publishing activity as a public nuisance because it is causing civil unrest, nor could they use the fact that the defendant was publishing critical pamphlets as evidence of liability. And, even if a city had concocted a theory that the printing and publication activities somehow give rise to liability, once it becomes clear that the

allegations are baseless, the citizen cannot be forced to repeatedly defend the propriety of that constitutionally protected activity (and bear the associated litigation costs).

Similarly, while the Cities may be able to sue Sherwin-Williams for past activities related to lead paints and pigments, they cannot lace their cases with allegations that require Sherwin-Williams repeatedly to defend already discredited theories that go to the heart of constitutionally protected activity. Simply put, the past exercise of those rights cannot serve as a basis for liability, and the future exercise of those rights cannot be chilled by fear of repeated litigation. Accordingly, the Court should enjoin the Cities from attacking Sherwin-Williams' exercise of its protected First Amendment rights.

Not only is the evidence of a constitutional violation sufficient to establish irreparable harm, but Sherwin-Williams also suffers financial and reputational harm because it has to defend (unsubstantiated) lawsuits brought under unconstitutional contingency fee agreements and unconstitutional grounds. The harm to Sherwin-Williams includes not only a substantial and otherwise unnecessary investment of time and money in the actual defense against these lawsuits, but also harm to the company's financial condition, share value, and reputation based on the contingency fee lawyers' efforts to publicize the lawsuits and inflame public opinion. *See, e.g.*, *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) (holding that loss of customer goodwill could cause irreparable harm); *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 651 (6th Cir. 1982) (party "demonstrated irreparable harm, since it has a substantial financial interest at stake") (internal citations omitted).

Forcing Sherwin-Williams to suffer from the threat of additional lawsuits and to defend against those lawsuits already filed also harms Sherwin-Williams' shareholders and employees. Sherwin-Williams' employees should not have their jobs put in jeopardy to satisfy the pecuniary

interests of contingency fee counsel. Contingency fee counsel have continued to peddle their lawsuit to additional cities in Ohio, and additional lawsuits in additional Ohio jurisdictions appear imminent. Nor should Sherwin-Williams' shareholders be forced to risk losing their investments and retirement savings because of contingency fee counsel's pursuit of monetary gain. Unconstitutional litigation in the trial court results in irreparable harm, immediately affecting the interests of Sherwin-Williams' shareholders and employees. As demonstrated by the government's recent prosecution of Arthur Andersen, which ceased to exist after one erroneous trial court decision, a single unlawful verdict can have an immediate and severe impact on a corporation's business, employees, shareholders, reputation, and very existence, one that cannot be remedied through the appellate process. Injunctive relief forcing the Cities to comply with the Constitution is necessary now to prevent this harm from occurring.[23]

C. Injunctive relief will cause no harm to the Cities.

Injunctive relief will not harm the Cities. This motion asks only that the Court enjoin the Cities from pursuing their claims using contingency fee agreements and from imposing liability based on Sherwin-Williams' constitutionally protected activities. The Cities can continue to pursue their claims under a non-contingency fee agreements with counsel and based on constitutionally permissible grounds. Moreover, the Cities have other proven ways of dealing with any perceived lead problems. They can continue to protect the public health by rigorously enforcing the regulatory programs already in place. Those programs also allow the Cities to recoup any costs of abatement that they must bear.

[23] Some defendants in the City of Cincinnati's state court lawsuit have recently filed a motion to prohibit the Cities' use of an improper fee arrangement to retain counsel. *See* Motion to Bar Payment of Contingent Fees to Private Attorneys, filed Mar. 12, 2007, *City of Cincinnati v. Sherwin-Williams Co., et al.*, Case No. A0611226 (Hamilton Co. Ct. of Common Pleas). Sherwin-Williams did not join that motion. Such piecemeal litigation carried out in multiple state court jurisdictions cannot effectively protect Sherwin-Williams' federal constitutional rights.

D. The public interest will be served by granting this injunction.

Finally, a decision enjoining the Cities from pursuing litigation through unconstitutional means serves the public interest. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). An injunction not only will protect Sherwin-Williams' due process and First Amendment rights, but also will ensure that each City maintains its duty to serve the public interest by exercising its police power in an impartial way, preventing contingency fee counsel from making financially-motivated decisions. If the lawsuits are justified, the Cities can bring them under non-contingency fee agreements and prevent diversion of substantial sums to private attorneys—the entire award would instead go to benefit the public health.

IV. CONCLUSION

For the foregoing reasons, and in accordance with 42 U.S.C. § 1983, this Court should grant plaintiff Sherwin-Williams' request for declaratory judgment and rule that it is a violation of due process for the Cities to file, maintain, or continue any public nuisance lawsuits against Sherwin-Williams using counsel who are compensated by a contingency fee or who have any other financial interest (such as a bonus or premium) based on the outcome of the litigation. The Court should further declare that the Cities' attempt to impose liability based on Sherwin-Williams' constitutionally protected speech and associational activities violates the First Amendment. This Court should then enjoin the Cities from acting in violation of these declaratory judgments.

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Respectfully submitted,

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