

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Petitioners,

vs.

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

Respondents,

And

STATE OF NEVADA,

Real Party in Interest.

Supreme Court No. 61387  
District Court No. A16-6512-0  
Frankie S. Lindeman  
Clerk of Supreme Court

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**PROPOSED BRIEF OF AMICUS CURIAE,  
FRANKIE SUE DEL PAPA, IN SUPPORT OF  
STATE OF NEVADA, REAL PARTY IN INTEREST**

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## **NRAP 26.1 DISCLOSURE**

In compliance with NRAP 26.1, the undersigned hereby certifies that, in addition to those individuals and attorneys listed in the Motion for Leave to File Brief by Amicus Curiae Frankie Sue Del Papa and Brief of Amicus Curiae, Frankie Sue Del Papa, In Support of State of Nevada, Real Party in Interest, there are no persons or entities that must be discussed under NRAP 26.1. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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## INTEREST OF AMICUS CURIAE

Amicus curiae, Frankie Sue Del Papa, is a former three-term Attorney General for the State of Nevada, serving from 1991 through 2002. She was also the Secretary of State of Nevada from 1987 through 1990. During her tenure as Nevada Attorney General, Ms. Del Papa oversaw several complex and specialized cases that necessitated the use of outside counsel—including Nevada’s retention of outside counsel to assist the State’s prosecution (and eventual settlement) of claims against big tobacco companies in the late 1990’s, as well as the retention of specialized outside counsel in 2001 to assist the State in its battle with the Department of Energy concerning the proposed Yucca Mountain nuclear waste facility. As Attorney General, Ms. Del Papa and her office also provided numerous briefings to various legislative committees in this regard. In her experience and recollection, even after close questioning by the late William Raggio, and other legislators who were of the opposite political party, at no time did the Legislature, using N.R.S. § 228.110, prohibit the Attorney General’s hiring of specialized outside counsel, nor did the Legislature bar the assistance that outside counsel provided.

This case is important. Ms. Del Papa believes the availability of retaining outside counsel to assist the State with complex matters was critical to the performance of her duties as Attorney General—and it remains critical today. Ms.

Del Papa files this *amicus* brief to highlight Nevada specific separation of powers and political question concerns that are implicated by the Petitioners' request for extraordinary relief. It also underscores the procedural posture of this case, and the fact that offensive and multi-faceted attempts at disqualifying counsel choices by State Attorneys General have been standard practice for industries facing serious State supported consumer protection litigation efforts. Courts addressing these attempts have almost universally rejected them. *Amicus* asks this Court to follow suit and remand this proceeding to the District Court, where it can be litigated on the merits.

### ARGUMENT

The Attorney General of Nevada plays a critical role in protecting the citizens of this State. The ability to associate experienced outside counsel, especially in significant cases, is crucial to that role. The option to retain specialized assistance has proven to be a particularly valuable asset to the Nevada Attorney General's office, Nevada's executive branch, and the citizens of this State—where the tool has been necessarily and sensibly employed to not only assist with prosecuting document intensive consumer protection actions against sophisticated and well funded defendants, but also to support the State in major non-consumer litigation.<sup>1</sup>

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<sup>1</sup> See, e.g., *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004).

The approach employed by the Petitioners in this case is not unfamiliar. For example, when states sued big tobacco companies for fraudulent marketing practices in the late 1990's, the industry initially defended the suits by seeking disqualification of the outside law firms retained to assist the states with pursuing the massive endeavor.<sup>2</sup> The courts saw through this ruse and allowed the claims to move forward. Faced with damning substantive evidence, the tobacco companies ultimately entered into a Master Settlement Agreement ("MSA") that benefitted residents of the 46 participating states—including Nevada. In addition to providing significant compensation to state Medicare funds, the MSA also contained important consumer protection elements, including prohibiting tobacco companies from targeting young consumers.<sup>3</sup> When well-heeled paint manufacturers faced attorney general actions asserting deceptive marketing of hazardous lead paint with knowledge of the damage it caused to young children, the industry, like big tobacco, also attempted to disqualify the States' choice of

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<sup>2</sup> See, e.g., *Phillip Morris, Inc. v. Glendening*, 709 A.2d 1230, 1239 (Md. 1998). ("p]rinciples behind constitutional separation of powers place limits on a court's power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority") (citation and quotation omitted).

<sup>3</sup> See *State of New York v. Phillip Morris, Inc.*, 308 A.D. 2d 57, 60 (N.Y.A.D. 2003).

counsel.<sup>4</sup> Courts rejected the endeavor, paving the way to settlements that have compensated this State and resulted in a safer industry for Nevada residents. The same procedural maneuvers were at play when Eli Lilly faced claims over off-label marketing of the schizophrenia drug Zyprexa. While Eli Lilly ultimately paid over \$1.4 billion to resolve criminal fines and civil suits, its first line of defense was an attempt at counsel disqualification (the effort failed).<sup>5</sup> The approach was no different when Janssen Pharmaceutical was recently faced with a civil action asserting it improperly (and dangerously) marketed the anti-psychotic medication

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<sup>4</sup> See, e.g., *State of Rhode Island v. Lead Industries Assoc., Inc.*, 951 A.2d 428, 474-75 (R.I. 2008). In Nevada, like Rhode Island, the Attorney General is vested with common law powers. See *id.* at 470–71; see also *Fowler v. Moore*, 46 Nev. 65, 79, 207 P. 75, 76 (1922).

<sup>5</sup> See *In re Zyprexa Products Liability Litigation, State of Louisiana, ex rel. Foti, v. Eli Lilly and Co., Inc.*, 375 F.Supp.2d 170 (E.D.N.Y. 2005) (stating, “[t]he capacity of the Attorney General to employ counsel is not contestable”); see also *State of South Carolina v. Eli Lilly and Co., Inc.*, Case No. 2007-CP-42-1855 (So. Car. Court of Common Pleas), Order dated September 22, 2009, at p. 18 (rejecting a challenge to a state attorney general’s retention of outside counsel and stating, among other things, “[i]n other words, if the practice of hiring private lawyers in special cases by States’ Attorneys General was actually unconstitutionally proper, one would expect that some authoritative court would have definitively ruled that way by now”). The South Carolina trial court in *Eli Lilly* also stated, “the various statutes and common law relating to the powers and duties of the Attorney General bestow upon him broad discretion to appoint or engage attorneys to assist him in the representation of the State . . . .” *Id.* at 35. In noting the questionable procedural and strategic tactics employed by the defendants, the court further found, “[i]n sum, the Court finds that in a disqualification motion under these circumstances, proof of actual prejudice must be shown by the movant. No showing of actual prejudice has been made here.” *Id.* at 23-24.

Risperdal for off-label use. The Pennsylvania Supreme Court soundly rejected Janssen's misguided strategic disqualification attempt, specifically noting the inherent problem with attempting to substantively defend claims by seeking to disqualify counsel.<sup>6</sup> Nevada's Attorney General recently announced that Nevada's share of the resulting multi-state consumer protection settlement involving Risperdal (which also contained significant non-monetary consumer protections) will be over \$3.3 million.<sup>7</sup>

The Attorney General has alleged the Petitioners' actions in this case harmed Nevadans and shook the very foundation of the statutory non-judicial foreclosure process—all while putting millions of dollars of profit in corporate coffers. These state court defendants are now engaged in a well funded, multi-pronged, and multi-jurisdictional strategic attack on the Attorney General's power to use the tools necessary for the executive branch to prudentially enforce the laws of this State and protect its citizens. Even if N.R.S. § 228.110(2) attempted to limit the

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<sup>6</sup> See *Commonwealth v. Janssen Pharmaceutica, Inc.*, 607 Pa. 406, 423 (Penn. 2010) (stating, “[a]s a general matter, it is difficult to see how a party-opponent in active litigation with the Commonwealth could be said to have a substantial, direct and immediate interest in the authority or identity of the legal representation the Commonwealth has chosen. This is true in legal matters generally: **one's opponent generally cannot dictate the choice of otherwise professionally qualified counsel**”) (emphasis added).

<sup>7</sup> See Press Release, Office of Attorney General Catherine Cortez Masto, dated August 30, 2012. Available online at: <http://ag.state.nv.us/newsroom/press/2012/Johnson&Johnson.pdf> (last visited 9/16/2012).

Attorney General’s ability to affiliate outside counsel to assist in representing the State’s interests, which it does not, the Legislature’s attempt would violate the separation of powers clause of the Nevada Constitution and improperly strip the Attorney General of both constitutional and common law powers.<sup>8</sup> This Court long ago held, “[i]t is well settled by the courts that the Legislature, in the absence of special authorization in the Constitution, is without power to abolish a constitutional office or to change, alter, or modify its constitutional powers and functions.”<sup>9</sup>

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<sup>8</sup> See Nev. Const. art. III, § 1, cl. 1; see also Nev. Const. art. V, § 22; also *People ex. rel Elliot v. Covelli*, 112 N.E.2d 156, 88-89 (Ill. 1953) (interpreting a similar clause similar to Nev. Const. art. V, § 22, in the Illinois constitution as only allowing the legislature to supplement the powers the Attorney General held at common law, but prohibiting “any judge or court to assert or to deny the powers of the Attorney General [as it] would constitute an unconstitutional encroachment of the judiciary upon the executive department”).

<sup>9</sup> *State v. Douglas*, 33 Nev. 82, 110 P.177, 180 (1910) (holding, “[e]very constitutional officer derives his power and authority from the Constitution, the same as the Legislature does, and the Legislature, in the absence of express constitutional authority, is as powerless to add to a constitutional office duties foreign to that office, as it is to take away duties that naturally belong to it . . . when an office is created by the Constitution, it cannot be enlarged or lessened in scope by any statute, or be filled in any other manner than the manner directed by the Constitution”), distinguished on other grounds by *State ex. rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 32 P.2d 1263 (2001); see also *Comm’n on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098, 1103 (2009) (stating, “[t]he purpose of the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch”).

The strategic tactics employed by the Petitioners in this case are suspect and should be viewed by this Court with a high level of skepticism. A deep pocket corporate defendant who is facing an active state consumer protection lawsuit simply does not have the right to choose the particular lawyers it will litigate against. The Nevada Constitution properly vests that power in the executive branch of this State's tri-partite system of government.<sup>10</sup> This Court should reject the Petitioner's belated defense strategy and send them back to district court to defend the actual merits of the State's claims.

Respectfully submitted, September 17, 2012.

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BY /s/ 

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<sup>10</sup> See Nev. Const. art. III, § 1, cl. 1; see also Nev. Const. art. V, §§ 19, 22; see also *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) (stating, "each branch of government is considered to be co-equal, with inherent powers to administer its own affairs").

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 28.2 of the Nevada Rules of Appellate Procedures, I, L. Edward Humphrey, certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed fifteen pages, and contains 1,767 words.

I certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED, September 17, 2012.

**DECONCINI MCDONALD YETWIN & LACY, P.C.**

BY /s/

  
L. EDWARD HUMPHREY (NV. 9066)

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**NRAP 28.2 ATTORNEY CERTIFICATION**

The undersigned has reviewed the foregoing Brief for Amicus Curiae, Frankie Sue Del Papa, In Support of State of Nevada, Real Party in Interest. To the best of my knowledge, the Motion is not frivolous or interposed for any improper purpose and complies with all applicable Nevada Rules of Appellate Procedure.

Respectfully submitted, September 17, 2012

**DECONCINI MCDONALD YETWIN & LACY, P.C.**

BY  \_\_\_\_\_  
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