THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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NOTICE OF DECISION

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Case Name: **State of New Hampshire v Actavis Pharma, Inc., et al**
Case Number: **217-2015-CV-00566**

Enclosed please find a copy of the court's order of March 08, 2016 relative to:

ORDER

March 09, 2016

Tracy A. Uhrin
Clerk of Court

(484)

C: James T. Boffetti, ESQ; Brian M. Quirk, ESQ; Joseph H., Esq. Jolly; James W., Esq Matthews; Holly J. Barcroft, ESQ; Anthony J. Galdieri, ESQ; GORDON J MACDONALD, ESQ; Edmund J. Boutin, ESQ; Christopher H.M. Carter, ESQ; Kimberly MR Sullivan, ESQ; Michael J. Connolly, ESQ; Joshua M. Davis, ESQ; Sean O. Morris, ESQ; Wilbur A. Glahn, III; Michael A. Delaney, ESQ

STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

State of New Hampshire

v.

Actavis Pharma, Inc.,
Endo Pharmaceuticals Inc.,
Janssen Pharmaceuticals, Inc.,
Purdue Pharma L.P.,
and
Teva Pharmaceuticals USA, Inc.

Docket No. 217-2015-CV-00566

ORDER

The State of New Hampshire, through the Office of the Attorney General ("OAG"), brought this action against the defendants, Actavis Pharma, Inc., Endo Pharmaceuticals Inc., Jannssen Pharmaceuticals, Inc., Purdue Pharma L.P., and Teva Pharmaceuticals USA, Inc. (collectively the "Defendants"), to enforce administrative subpoenas issued to the Defendants under the Consumer Protection Act ("CPA"), RSA chapter 358-A. The Defendants object and move for a protective order barring the Attorney General from engaging contingent fee counsel from: (a) participating in or assuming responsibility for any aspect of the State's investigation of alleged CPA violations; or (b) participating in or assuming responsibility for any subsequent enforcement action pertaining to alleged CPA violations. The State objects. In a separate action (Docket No. 217-2015-CV-00641), the Defendants seek declaratory and injunctive relief. The Court held a hearing on December 11, 2015. Based on the following, the Court DENIES the State's Motion to Enforce and GRANTS the

Defendants' Motion for Protective Order to the extent that the OAG and Cohen Milstein's contingency fee agreement is invalid.

Factual Background

This action arises from the OAG's retention of outside counsel, Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein"), to assist on a contingency fee basis with the investigation of and any subsequent litigation related to whether certain pharmaceutical companies have deceptively marketed opioids in violation of the Consumer Protection Act, RSA chapter 358-A. Specifically, the investigation seeks to determine whether these companies exaggerated the benefits and minimized the risks, including the risk of addiction, associated with using opioids to treat chronic pain.

Pursuant to its investigative authority under the CPA, the OAG issued administrative subpoenas to the Defendants in August 2015. The subpoenas seek documents and information related to the Defendants' marketing and sales of opioids in New Hampshire. Although the Defendants initially intended to comply with the subpoenas, they ultimately refused citing the OAG's retention of outside counsel on a contingency fee basis. Specifically, the Defendants were concerned with whether the retainer agreement violated the Executive Branch Code of Ethics due to Cohen Milstein's conflict of interest arising from its financial stake in the outcome of the investigation and litigation.

The OAG and Cohen Milstein first entered a retainer agreement on June 15, 2015. (Defs.' Mem. Law in Supp. of Mot. for Protective Order [hereinafter Defs.' Mem.] Ex. A.) On September 25, 2015, the OAG and Cohen Milstein entered a second retainer agreement that "supersedes the initial retainer agreement, executed June 15,

2015, and is effective as of that date." (OAG's Mot. to Enforce Administrative Subpoenas [hereinafter OAG's Mot.] Ex. 6.)

There are two primary differences between the two agreements. First, the opening paragraph of the June agreement stated that Cohen Milstein was retained "to represent [the OAG] in an investigation and litigation of potential claims regarding fraudulent marketing of opioid drugs." (Defs.' Mem. Ex. A, at 1 (emphasis added).) The opening paragraph of the September agreement, however, stated that Cohen Milstein was retained "to assist [the OAG] in an investigation and litigation of potential CPA claims." (OAG's Mot. Ex. 6, at 1 (emphasis added).) Second, the September agreement added an additional term, which stated, "Cohen Milstein will be an independent contractor, and not an employee, of OAG, under the criteria set forth in R.S.A. § 281-A:2 . . . . Cohen Milstein is not a public employee for purposes of R.S.A. § 15-B:2 and R.S.A. § 21-G:21." (OAG's Mot. Ex. 6, ¶ 11.)

The September retainer agreement provides that Cohen Milstein "is responsible for providing all legal services," including the prosecution of any subsequent litigation.[1] (OAG's Mot. Ex. 6, ¶¶ 12, 19.) It specifies that the OAG "is responsible for providing access to . . . information[] and documents required to investigate its claims." (OAG's Mot. Ex. 6, ¶ 14.) The OAG, however, reserved the right to "maintain control of the investigation and . . . make all key decisions, including whether and how to proceed with litigation, which claims to advance and what relief to seek." (OAG's Mot. Ex. 6, ¶ 15.) In furtherance of this role, the retainer provided that Cohen Milstein must regularly provide

[1] The June agreement states, "Cohen Milstein shall have primary responsibility for the prosecution and conduct of litigation," (Defs.' Mem. Ex. A, ¶ 16), while the corresponding term in the September agreement was edited to state, "Cohen Milstein shall prosecute and conduct the litigation." (OAG's Mot. Ex. 6, ¶ 19.) Nonetheless, in both agreements Cohen Milstein's authority is constrained by the subsequent language that Cohen Milstein shall do so "under the Direction of the Attorney General."

reports to the OAG, the OAG will review and approve all key documents, the OAG will provide a "point of contact" to supervise the investigation, and the OAG will appear as lead counsel and have control over any litigation or settlement decisions. (OAG's Mot. Ex. 6, ¶¶ 17–19.)

The retainer agreement stipulates that Cohen Milstein will not receive any fees or expenses associated with the investigation if the OAG decides not to proceed to litigation. If the OAG determines to proceed to litigation, however, the retainer provides that Cohen Milstein shall be compensated on a contingent fee basis, but specifies that Cohen Milstein will not receive any fee if there is no recovery through either a judgment or a settlement. (OAG's Mot. Ex. 6, ¶¶ 3–4.) Specifically, Cohen Milstein will receive "twenty-seven (27) percent of the net recovery, exclusive of the costs of litigation, with the balance of the net recovery being retained solely by and for the benefit of the State." (OAG's Mot. Ex. 6, ¶ 5.) The retainer defines "net recovery" as "any settlement or judgment amount, not including any award of attorneys' fees and costs, and not including any penalties awarded to the State." (OAG's Mot. Ex. 6, ¶ 6.) However, if the Cohen Milstein's contingent fee is less than its actual attorney fees and costs awarded by a court or paid by the Defendants in a settlement, Cohen Milstein is entitled to an amount of those awarded fees and costs necessary for full compensation. (OAG's Mot. Ex. 6, ¶ 7.)

The retainer also requires Cohen Milstein to "advance all reasonable costs and expenses of the investigation and any litigation," and report those expenses to the OAG on a quarterly basis. (OAG's Mot. Ex. 6, ¶¶ 8, 9.) The OAG agreed to reimburse all such expenses "out of any recovery before the contingent fee applies." Such a

reimbursement would not be part of any contingent fee. (OAG's Mot. Ex. 6, ¶ 8.) Cohen Milstein would not be reimbursed for those expenses "if there is no recovery or the recovery is not sufficient to cover [Cohen Milstein's] time or expenses." (OAG's Mot. Ex. 6, ¶ 10.)

Cohen Milstein currently represents other plaintiffs on a similar contingency fee basis in matters concerning the same Defendants' marketing and sales of opioids. In April 2013, the City of Chicago hired Cohen Milstein to investigate potential claims and conduct any resulting litigation. See City of Chicago v. Purdue Pharma L.P., No. 14 C 4361, 2015 WL 920719, at *1 (N.D. Ill. Mar. 2, 2015). Similarly, Santa Clara County and Orange County jointly hired Cohen Milstein to represent the interests of Californians. See First Amended Complaint at 101–02, California v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC (Cal. Super. Ct., Orange County, filed June 6, 2014), https://www.sccgov.org/sites/cco/overview/impact/Documents/First_Amended_Complaint_-_People_v_Purdue_Pharma.pdf.

Analysis

The OAG moves to enforce the administrative subpoenas issued pursuant to the CPA. The OAG maintains that the contingency fee arrangement complies with New Hampshire law and points out that it has previously retained outside counsel on a contingency fee basis to assist in complex and resource-intensive cases. It also contends that the Defendants' refusal to respond is not the appropriate remedy under RSA 358-A:8, IV.

The Defendants object and move for a protective order barring the Attorney General from engaging contingent fee counsel to: (1) participate in or assume

responsibility for any aspect of the State's investigation of alleged CPA violations; or (2) participate in or assume responsibility for any subsequent enforcement action. Broadly, the Defendants contend the contingency fee arrangement is problematic because Cohen Milstein has a large financial stake in the outcome of the investigation and litigation. Because Cohen Milstein advances all expenses and can only recover those expenses by bringing an enforcement action, the Defendants contend the outcome of the investigation is preordained to result in a recommendation that the OAG bring an enforcement action. The Defendants maintain Cohen Milstein has a conflict of interest that taints the entire process because that interest will select, shape, and interpret all of the information on which the OAG will make its ultimate decision.

The Defendants raise a number of arguments, which the Court summarizes and consolidates as follows: (1) under the agreement, Cohen Milstein is a public employee, and its conflict of interest violates the Executive Branch Code of Ethics, common law, and the New Hampshire Rules of Professional Conduct; (2) the OAG's retention of Cohen Milstein on a contingency fee basis is ultra vires because it does not comply with RSA 7:12 or RSA 7:6-f; (3) the contingency fee arrangement violates separation of powers because it encroaches on the legislature's appropriation function; and (4) the contingency fee arrangement violates the Defendants' right to due process because Cohen Milstein's financial stake unfairly effects the neutrality of any prosecution.

In its Objection and Reply in Support of its Motion to Enforce, the OAG asserts that the Defendants' objection to the subpoenas is untimely and therefore waived because the Defendants' procedure for challenging the subpoenas does not comport with RSA 358-A:8, IV. It also contends the Defendants lack standing because their

alleged injury is too remote and hypothetical. Finally, the OAG contends that the fee arrangement is lawful and within its statutory authority. The Court addresses the parties' arguments in turn.

I. Timeliness of Defendants' Objections

Under RSA 358-A:8, the OAG has the authority to subpoena documents and information when investigating possible CPA violations. The statute further provides that, within 21 days of notice of the subpoena or at any time prior to a date specified within the notice, the summoned party may file a motion for good cause with this Court to "extend said reporting date, or modify or set aside the demand." RSA 358-A:8, V.

The OAG argues this process is the only available process through which the Defendants could object to the subpoenas, and because the Defendants did not make any such motion within the prescribed timeframe, they have waived any challenge to the subpoenas. The Defendants respond that their objections are not untimely because they made efforts to reach an agreement with the OAG about the scope of the subpoenas and the schedule of the production. Furthermore, the Defendants maintain some delay was due to the parties' disagreement as to Cohen Milstein's access to and use of the requested documents and information.

The OAG's argument mistakes the nature of the Defendants' objections. The Defendants' objections are not related to the subpoenas themselves. The Defendants do not actually seek to extend compliance dates, modify the demands, or set aside the subpoenas. Indeed, the Defendants represent—and the OAG concedes—that the Defendants initially sought to comply with the subpoenas. (OAG's Mot. ¶ 6.) Rather, the Defendants' objections concern Cohen Milstein's involvement with the investigation and

access to the requested documents and information, some of which the Defendants represent is confidential. The Defendants represent that learning of the OAG's retention of Cohen Milstein on a contingent fee basis caused them to reconsider producing the documents sought by the subpoenas. Consequently, the Defendants' current challenge is not the type of challenge anticipated by RSA 358-A:8, IV. Therefore, the Court does not conclude that RSA 358-A:8, IV applies to bar the Defendants' objections as untimely or waived.

II. Defendants' Standing

The OAG contends the Defendants do not have standing because their alleged injuries caused by Cohen Milstein's retention are hypothetical. Specifically, the OAG reasons that for the Defendants' alleged harm to be caused by Cohen Milstein's financial incentive or possible misuse of the information, Cohen Milstein's attorneys would have to disregard their ethical obligations as well as the limited uses of the information set forth in RSA 358-A:8, VI, and the OAG's supervision of Cohen Milstein would have to either miss or ignore such conduct. The OAG concludes such attenuated reasoning is too speculative to recognize a cognizable injury sufficient to afford the Defendants standing.

The Defendants counter that their alleged injuries are not speculative as they are directly, specifically, and adversely impacted by the OAG's unconstitutional and unlawful contingency fee agreement with Cohen Milstein. The Defendants maintain that the OAG's retention of Cohen Milstein on a contingency basis adversely affects their rights because they are the direct target of the investigation conducted pursuant to a retainer agreement that preordains an outcome adverse to the Defendants and taints

any subsequent litigation against the Defendants. The Defendants contend the fee structure violates their due process rights, offends the protections afforded by separation of powers, and transgresses ethical rules, all of which are intended to prevent the type of harm alleged.

"[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another . . . with regard to an actual, not hypothetical, dispute . . . which is capable of judicial redress." Duncan v. State, 166 N.H. 630, 642–43 (2014) (citations omitted). Neither an "abstract interest in ensuring the State Constitution is observed" nor an injury indistinguishable from a "generalized wrong allegedly suffered by the public at large" is sufficient to constitute a personal, concrete interest. Id. at 643, 646 (quoting Watson v. Fox, 44 A.3d 130, 137 (R.I. 2012)). Rather, the party must show its "own personal rights have been or will be directly and specifically affected." Eby v. State, 166 N.H. 321, 334 (2014). "In evaluating whether a party has standing to sue, [the Court will] focus on whether the party suffered a legal injury against which the law was designed to protect." O'Brien v. N.H. Democratic Party, 166 N.H. 138, 142 (2014) (quoting Libertarian Party of N.H. v. Sec'y of State, 158 N.H. 194, 195 (2008)).

"Any person claiming a present legal or equitable right . . . may maintain a petition against any person claiming adversely to such right . . . to determine the question as between the parties." RSA 491:22, I. Declaratory judgment provides "relief from uncertainty and insecurity created by a doubt as to rights, status or legal relations existing between the parties." Morrissey v. Town of Lyme, 162 N.H. 777, 784 (2011). A party has standing to bring an action for declaratory relief when it demonstrates "that the

facts are sufficiently complete, mature, proximate and ripe to place [it] in gear with [its] adversary, and thus to warrant the grant of judicial relief." Duncan, 166 N.H. at 645 (quoting Delude v. Town of Amherst, 137 N.H. 361, 364 (1993)). "The claims raised must be 'definite and concrete touching the legal relations of parties having adverse interests,' and must not be based upon a 'hypothetical set of facts.'" Id. (quoting Avery v. N.H. Dep't of Educ., 162 N.H. 604, 608 (2011)). "Simply stated, a party has standing to bring a declaratory judgment action where the party alleges an impairment of a present legal or equitable right arising out of the application of the rule or statute under which the action has occurred." Avery, 162 N.H. at 608.

At the outset, the Court notes a distinction between the alleged injury in the Defendants' separation of powers and ultra vires claims and the Defendants' due process and ethics claims. With respect to the due process and ethics claims, the alleged injury is that the Defendants are subject to an investigation and potential prosecution inherently biased by Cohen Milstein's conflict of interest. The alleged injury is personal because the investigation specifically targets the Defendants and thus is not a generalized wrong that can be said to similarly affect the public at large. This injury is concrete because, if Cohen Milstein is in the public employ with a financial interest driving the outcome of their service, the complained of injury is inherent in the contingency fee arrangement. To put it simply, the injury is the unfair prosecution itself by a government tasked with the responsibility to pursue the fair and neutral administration of justice, which is precisely the type of injury due process and ethics rules are intended to prevent. Therefore, one need not speculate about whether Cohen Milstein will disregard its ethical obligations or whether the OAG will neglect its

supervisory responsibilities in order to demonstrate the alleged injury. Consequently, the Defendants have demonstrated standing as to the due process and ethics claims.

The Defendants' ultra vires and separation of powers claims implicate a different injury that does not occur as a result of Cohen Milstein's adverse conflict of interest. Rather, the injury stems from a retainer agreement alleged to be unconstitutional and invalid. Whether this injury constitutes a personal and concrete injury is a more difficult question that requires an examination of relevant case law addressing whether a litigant has standing to assert a separation of powers claim.

The New Hampshire Supreme Court has held that taxpayers lacked standing to bring an action for declaratory judgment as to whether an executive agency violated the separation of powers doctrine. Baer v. N.H. Dep't of Educ., 160 N.H. 727, 729–31 (2010). The agency granted a school district's request to waive minimum lot size requirements for the construction and renovation of the district's elementary schools. Id. at 729. The petitioner challenged the waiver complaining that taxpayer dollars would be used to fund "substandard" schools in their community that would not meet minimum lot sizes. Id. at 730. The Supreme Court reasoned this injury was not sufficiently personal to afford standing because the petitioners "asserted no interest other than the one shared by all [city] taxpayers." Id. at 731.

Federal courts have addressed the issue more specifically.[2] The Supreme Court of the United States has held that "[p]arty litigants with sufficient concrete interests at

[2] Constrained by Article III of the Federal Constitution, which provides that federal courts may only exercise authority over "cases and controversies," federal courts apply a more defined standard for standing than New Hampshire courts. Although the New Hampshire State Constitution does not contain a provision similar to Article III, "as a practical matter, Part II, Article 74 imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution." Duncan v. State, 166 N.H. at 642 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). Consequently, the Court finds instructive federal cases addressing litigants' standing to bring separation of powers claims.

stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." Buckley v. Valeo, 424 U.S. 1, 117 (1976). The D.C. Circuit Court of Appeals has interpreted this language as permitting litigants "standing to challenge the authority of an agency on separation-of-powers grounds only where they are directly subject to the authority of the agency, whether such authority is regulatory, administrative, or adjudicative in nature." Comm. for Monetary Reform v. Bd. of Governors of the Fed. Reserve Sys., 766 F.2d 538, 543 (D.C. Cir. 1985). The D.C. Circuit reasoned that, absent direct authority, challenges to an agency's constitutional authority would be "'generalized grievance[s]' shared in substantially equal measure by all or a large class of citizens." Id. (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)); see also KG Urban Enters., LLC v. Patrick, 693 F.3d 1, 15 (1st Cir. 2012) (citing Comm. for Monetary Reform with approval and holding a petitioner lacked standing to challenge a regulatory agency's authority because the petitioner did not demonstrate he had sufficiently concrete interests at stake); ACLU v. NSA, 493 F.3d 644, 674–75 (6th Cir. 2007) (finding plaintiffs lacked standing because they do not "assert that they themselves have actually been subjected to the conduct alleged to violate the Separation of Powers"); Nat'l Fed'n of Fed. Emps. v. United States, 727 F. Supp. 17, 20–21 (D.C. Cir. 1989) (holding that a construction company lacked standing to maintain separation of powers claim because it was not directly subject to an executive agency's authority, despite that it "generate[d] a significant

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To establish standing in federal courts, a litigant must show: (1) injury in fact, (2) traceability, and (3) redressability. Lujan, 504 U.S. at 560–61. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Id. at 560 (citations and quotations omitted). A causal connection exists where the injury is "fairly traceable" to the challenged conduct, and not the "result [of] the independent action of some third party not before the court." Id. (quotation omitted). Finally, it must be "likely," not merely speculative, that a favorable decision will redress the injury. Id. at 561.

percentage of its revenue through contracts" with the agency, in contrast to a union for civil employees who worked on a base operated by the same agency who were under the agency's direct authority); INS v. Chadha, 462 U.S. 919, 935–36 (1983) (finding that a petitioner had standing to bring a separation of powers claim challenging a law authorizing one House of Congress to invalidate an executive agency's decision to allow a particular deportable alien to remain in the United States because the petitioner was an alien whose deportation suspension was vetoed by the House).

Applying this standard in a context analogous to the one at bar, the Third Circuit addressed whether a movant had standing to bring a separation of powers challenge to the authority of an executive commission to issue a subpoena compelling the movant's testimony before it. In re President's Comm'n on Organized Crime Subpoena of Scarfo, 783 F.2d 370, 371–72, 374 (3rd Cir. 1986). The movant complained that the composition of the executive commission, which included federal judges, was a violation of separation of powers that would taint all of the commission's activities. Id. at 374. In response, the commission argued that the movant "failed to show any personal injury" as a result of the presence of federal judges on the commission, meaning his "stake [was] no greater than any other citizen's generalized interest in proper governmental function." Id. at 372. The Third Circuit disagreed, finding an adequate demonstration of actual injury, because the movant was being summoned "as one of the targets of the investigation" of a pending criminal prosecution. Id. at 373. The court reasoned that as a target of an investigation, compelled testimony could have serious personal consequences for the movant, and "[a]buses of the investigative process may lead to an abridgment of constitutional freedoms." Id. The court also found the movant could

establish traceability to the alleged constitutional violation—the presence of federal judges on the commission, because the injury was "at the hands of an entity allegedly created in violation of the Constitution," which the movant alleged tainted all of its activities. Id. at 374. The Third Circuit did not find the need to undertake a but for analysis to find actual injury occasioned by the constitutional violation and concluded the movant's "inability to demonstrate that injury would not have occurred if the judges had not been members" was irrelevant. Id.

As in the federal cases where standing was found when the litigant was directly subject to the challenged executive agency's authority, the Defendants in this case are the direct targets of an investigation. They are directly subject to the OAG's investigative authority, which they allege is being exercised via an unconstitutional contingency fee agreement with Cohen Milstein that taints the investigation in a manner adverse to them. This position is qualitatively different from the position of the taxpayers in Baer, 160 N.H. at 729–31; these Defendants have a much greater interest in relief than that of the general public's abstract interest in ensuring the OAG is acting lawfully. The Defendants' potential injury occasioned by an unconstitutional contingency fee agreement is sufficiently personal and is not merely hypothetical. This Court agrees with the Scarfo Court that, where a violation of separation of powers doctrine could lead to personal consequences for a litigant directly traceable to the alleged constructional violation, standing is established without inquiry into whether actual injury has or will occur, an inquiry which would require an almost impossible after the fact comparative analysis. 783 F.2d at 373–74. It follows then that whether Cohen Milstein actually

disregards its ethical obligations or the OAG actually neglects its supervisory responsibilities in the course of the investigation is not relevant.

Further, the alleged injury—being subject to a potentially skewed executive branch investigation conducted in a manner that impinges on the legislative power—is the type of injury the separation of powers doctrine is designed to prevent by placing restraints on each branch's power. See Bond v. United States, 131 S. Ct. 2355, 2365 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."); INS v. Chadha, 462 U.S. 919, 959 (1983) ("[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."). Finally, this injury is capable of judicial redress, because by invalidating the financial arrangement of the retainer agreement, the Defendants would be freed from an investigation conducted pursuant to an allegedly unconstitutional arrangement. Accordingly, the Defendants have demonstrated standing to assert their ultra vires and separation of powers claims.

III. Defendants' Ultra Vires and Separation of Powers Claims

The OAG is charged with the responsibility of "act[ing] as attorney for the state in all criminal and civil cases in the supreme court in which the state is interested." RSA 7:6. The OAG also has the authority to investigate and litigate alleged CPA violations. RSA 358-A:4. Three statutes pertain to the OAG's authority to hire and compensate outside counsel in CPA investigations and enforcement actions. First, RSA 7:12, I, states that the OAG may, "[w]ith the approval of the joint legislative fiscal committee and the governor and council . . . employ counsel, attorneys . . . and other

assistants in case of reasonable necessity, and may pay them reasonable compensation, on the warrant of the governor, out of any money in the treasury not otherwise appropriated." Second, RSA 7:6-f provides:

> Any funds received by the attorney general on behalf of the state or its citizens as a result of any civil judgment or settlement of a claim, suit, petition, or other action under RSA 358-A or related consumer protection statutes shall be deposited in a consumer protection escrow account. The consumer protection escrow account shall at no time exceed $5 million, with any amount in excess of $5 million deposited into the general fund. The attorney general shall not include language in any consumer protection settlement that restricts any payments to the state for attorneys' fees, investigation and litigation costs, consumer education, or consumer protection enforcement to the consumer protection escrow account or any other account or fund.

(Emphasis added). Finally, RSA 21-M:9, I, which establishes the OAG's Consumer Protection Bureau, states, "The attorney general shall also appoint an investigator and such other staff as may be necessary to carry out the provisions of this section within the limits of the appropriations for the bureau."

The Defendants first contend the OAG's retention of Cohen Milstein on a contingency fee basis is ultra vires because it does not comply with RSA 7:12 or RSA 7:6-f. They reason that RSA 7:12 requires the joint approval of legislative and executive branch oversight bodies before the OAG can hire outside counsel. They further maintain that the retainer agreement exceeds the OAG's statutory authority under RSA 7:6-f because it preemptively restricts any CPA judgment or settlement money for attorneys' fees and investigation and litigation costs.

The Defendants next assert that the contingency fee arrangement violates separation of powers because it encroaches on the legislature's appropriation function. They maintain that RSA 7:12 and RSA 7:6-f, when read together, clearly require the

OAG to obtain approval from the joint legislative fiscal committee before expending funds for hiring outside counsel. By entering a contingency fee agreement with Cohen Milstein without legislative approval, the Defendants reason the OAG is preemptively appropriating funds, thereby interfering with the legislative branch's essential function to control appropriations and disbursements.

The OAG counters that it has broad authority to investigate and litigate CPA violations, which includes the power to retain outside experts, consultants, and counsel as necessary. It contends that RSA 7:12 does not apply to its retention of Cohen Milstein because the statute only applies if anticipated expenses exceed the OAG's budgeted appropriation and must therefore be paid out of the general fund, which is not the case; rather under the terms of the retention agreement the fees will come from settlement or judgment funds, not the treasury. The OAG also argues that RSA 7:6-f does not apply because its restriction only applies to the language of settlement agreements, and there is no settlement agreement at issue. It reasons that RSA 7:6-f is not a limit on the actual use of funds, because such an interpretation would nullify the OAG's authority under RSA 358-A:6, IV to collect attorney's fees and costs. Instead, the OAG maintains the prohibition merely ensures that funds placed in the escrow fund are available for deposit in the general fund. Finally, it asserts that it has previously hired outside counsel on a contingency fee basis without legislative objection, and therefore the doctrine of administrative gloss applies to support its interpretation of RSA 7:12 and RSA 7:6-f.

The OAG further contends that the contingency fee agreement does not violate the separation of powers doctrine because Cohen Milstein's contingency fee and costs

are retained at the time of the award, and therefore never enter the treasury to become funds capable of legislative appropriation. In support of this contention, the OAG cites a number of cases from other jurisdictions that have found that such agreements do not upset the separation of powers because recovery from such litigation "is not 'State' or 'public' money subject to legislative appropriation until the State has fulfilled its obligation under the Contract, collected the recovery, net of the contingency fee and litigation expenses, and deposited the funds into the State Treasury." Philip Morris Inc. v. Glendening, 709 A.2d 1230, 1241 (Md. 1998). Finally, the OAG argues that, even if the entire recovery were to enter the treasury, the payment of the contingency fee may nonetheless be upheld on equitable principles because contingent fee counsel have an equitable right to a portion of the recovery.

The Court begins by addressing the Defendants' ultra vires argument. Because the Court ultimately concludes that the ultra vires claim is dispositive as to whether the contingency fee agreement is void, the Court declines to address the Defendants' separation of powers argument. However, the Court notes that analysis of the ultra vires claim implicates separation of powers considerations.

Determining whether the OAG's contingency fee agreement exceeds its statutory authority to hire and compensate outside counsel requires the Court to construe RSA 7:12, RSA 21-M:9, and RSA 7:6-f. When construing a statute, the Court first examines "the language of the statute, and, where possible, ascribe[s] the plain and ordinary meaning to the words used." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 605–06 (2010). "When a statute's language is plain and unambiguous, [the Court will] not look beyond it for further indication of legislative intent." Id. "[A]n interpretation

that renders statutory language superfluous and irrelevant is not proper interpretation." State v. Duran, 158 N.H. 146, 155 (2008). The Court will "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." In re Town of Brookline, 166 N.H. 201, 204 (2014). Additionally, the Court must not interpret statutes in isolation, "but in the context of the overall statutory scheme." State Emps. Ass'n of N.H., SEIU, Local 1984 v. N.H. Div. of Pers., 158 N.H. 338, 343 (2009) (quoting In re City of Portsmouth, 151 N.H. 170, 174 (2004)). Therefore, "[w]hen interpreting two statutes that deal with a similar subject matter, [the Court will] construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." Id. (quoting Grand China v. United Nat'l Ins. Co., 156 N.H. 429, 431 (2007)).

Reasonably construing RSA 7:12, I, and RSA 7:6-f in the context of the overall statutory scheme, the Court finds that that the legislature intended to require the OAG to obtain legislative approval under RSA 7:12, I, prior to executing a contingency fee agreement that may require additional legislative appropriations in order to satisfy the OAG's contractual obligations. Although neither statute expressly refers to the OAG's use of contingency fee agreements, it does not follow that the OAG may use a contingency fee agreement as an end run to avoid the statutory approval process. Such an interpretation would contravene the legislature's clear intent to exercise control over additional appropriations for hiring outside counsel and recovery funds obtained by the OAG on behalf of the State.

Under the plain language of RSA 21-M:9, I, the OAG may hire staff to conduct CPA investigations "within the limits of the appropriations for the bureau." This language

implies the OAG's discretion to hire staff is broad when the compensation is already within the OAG's budget. But if compensation is outside of the OAG's budget and therefore requires an additional appropriation, the legislature limited the OAG's hiring discretion with RSA 7:12 by requiring approval of the joint legislative fiscal committee and the governor and council. Indeed, RSA 7:12 indicates its intent to further constrain the OAG's hiring discretion by requiring a showing of "reasonable necessity" when seeking an additional appropriation. That the legislature intends to maintain tight control over the OAG's hiring outside of its appropriated budget is further evident in RSA 21-M:5, VI, which requires the OAG to "[s]ubmit annually 60 days after the close of each fiscal year to the fiscal committee of the general court a report detailing each expenditure approved under RSA 7:12."

The language of RSA 7:6-f also reveals a general legislative intent to circumscribe the OAG's control over CPA recovery funds and expand the legislature's control over the same. The plain language of RSA 7:6-f clearly and unambiguously requires the entirety of any CPA recovery to be deposited in the consumer protection escrow account. The word "any" means "one, no matter what one: EVERY." Webster's Third New International Dictionary 97 (unabridged ed. 2002). By providing that "[a]ny funds received by the attorney general on behalf of the state or its citizens as a result of a civil judgment or settlement of a [CPA] claim . . . shall be deposited in a consumer protection escrow account," the legislature unequivocally expressed its intent that the OAG must deposit the entire recovery, not just the net recovery after deducting a contingency fee. RSA 7:6-f (emphasis added); see Meredith v. Ieyoub, 700 So. 2d 478, 482–83 (La. 1997) (holding that a contingency fee agreement between the attorney

general and private attorneys violated the separation of powers doctrine because the recovery statute stated, "All sums recovered through judgment, settlements, assessment of civil or criminal penalties [and] funds recovered by suit or settlement . . . shall be paid into the state treasury," which mandated the deposit of the entire recovery into the state treasury, and any deduction from that recovery to pay the contingency fee would constitute an appropriation from the state treasury).

Furthermore, by placing a $5 million cap on the escrow account and requiring any excess funds to be deposited into the general fund, the legislature maintains its control over the funds while limiting the amount to which the OAG may use at its discretion. This conclusion is further bolstered by the language prohibiting the OAG from "include[ing] language in any consumer protection settlement that restricts any payments to the state for attorneys' fees [and] investigation and litigation costs." RSA 7:6-f. While the legislature affords the OAG discretion with respect to the $5 million maximum escrow fund, this language prohibits the OAG from restricting recovery funds to the escrow account such that those "restricted" funds are prevented from lapsing to the general fund.

The OAG's access to funds in the consumer protection escrow account complicates the application of RSA 7:12 and RSA 21-M:9 to contingency fee agreements. However, the legislature's enactment of RSA 7:6-e and -f is enlightening. In 2014, the legislature enacted RSA 7:6-e, which states:

> No money received by the attorney general, on behalf of the state or its citizens as a result of any civil judgment, settlement of a claim, settlement of threatened litigation, suit, petition, or other action or threatened action, shall be expended or otherwise distributed until authorized by the fiscal committee of the general court, except in those instances where the

> disposition of money received by the attorney general is already provided for in statute.

RSA 7:6-e, I (emphasis added).[3] Additionally, statute provides that the OAG, after receiving such judgment or settlement funds, "shall promptly report to the fiscal committee of the general court any money received under this section." RSA 7:6-e, II. Through this language, as well as the previously discussed language of RSA 7:6-f, the legislature has expressed its clear intent to exercise control over funds the OAG receives as a result of a judgment or settlement, thereby restricting the OAG's authority over the disbursement of such funds.

In sum, through this statutory scheme, the legislature clearly intends to assert tight control over the OAG's authority when: (1) the OAG hires and intends to compensate outside counsel with funds outside of its appropriated budget; and (2) the OAG receives funds as a result of a judgment or settlement. Combining these two circumstances, the Court finds that the statutory scheme exerts this control by requiring the OAG to obtain approval pursuant to RSA 7:12 prior to hiring outside counsel to be compensated with any funds obtained through settlements or judgments, which are funds outside of the OAG's appropriated budget. Consequently, the OAG acted outside of its statutory authority by hiring outside counsel under the terms of the retention agreement at issue.

The Court recognizes the argument that the harm could be said to be speculative because or the issue not ripe for review because the OAG could conceivably fulfill its

[3] The Court notes that RSA 7:6-e informs statutory construction, but is not controlling in this case because this is an instance where disposition of the money is otherwise provided for by statute. RSA 7:6-f specifically provides for the disposition of funds received as a result of a CPA judgment or settlement. Even though RSA 7:6-f was not effective until July 1, 2015—after the June retainer agreement but before the September retainer agreement that "supersedes the initial retainer agreement" and is "effective as of that date"—the parties do not dispute its applicability. (OAG's Mot. Ex. 6.) However, under either statute, the outcome is essentially the same.

contractual obligations without recourse to treasury funds should the balance of the consumer protection escrow account be at or under five million after the recovered funds were deposited in the escrow fund. No party disputes the OAG's discretion to use the escrowed funds to hire outside counsel, and, in that event, no additional appropriation would be necessary. It is impossible, however, to know whether funds would be available from the CPA account to fully satisfy Cohen Milstein. The Court concludes that the offense is a current one, committed when the agreement is executed potentially binding the State to honor its terms and thereby forcing the expenditure of funds from the treasury without prior legislative approval. Given the legislature's clear intent to exercise tight control over additional appropriations for hiring outside counsel and all recovered funds, the Court finds that the most reasonable statutory construction requires the OAG to obtain approval prior to entering contingency fee agreements that could require funds beyond which the legislature had allowed for CPA investigations and proceedings.

This conclusion is also consistent with the preservation of separation of powers as set forth in the New Hampshire Constitution, part 1, article 37. The constitution concomitantly grants and restricts the power of each branch. Part 2, article 41, grants the executive branch the power to execute laws, "one of [its] 'essential powers.'" Opinion of the Justices, 162 N.H. 160, 166 (2011). Part 2, article 56, on the other hand, allows the executive branch to expend funds from the public treasury only in a manner consistent with the extent and purpose of the legislative appropriation. N.H. Health Care Ass'n v. Governor, 161 N.H. 378, 387 (2010). Applying these principles, the Supreme Court has held that "[o]nce the legislature has made an appropriation for the executive

branch, the requirement of fiscal committee approval of contracts made pursuant thereto by the executive branch is an unconstitutional intrusion into the executive branch of the government." Opinion of the Justices, 129 N.H. 714, 718 (1987). The flip side therefore is also true: If no appropriation has been made, the executive branch's actions are limited by the money the legislative branch allocates to it, a means by which the legislators establish government priorities and hopefully reflects the desires of their constituents. Therefore, no matter how important the executive branch officials may find the CPA mission to investigate the marketing of opioids, if the legislature does not see fit to fund it, the goals may not be accomplished. Where an executive agency has not received an appropriation and enters a contingency fee contract without knowing whether it can satisfy its contractual obligations absent an additional appropriation, the legislature's power to appropriate is threatened. To interpret the statutory scheme so as to not require the OAG to obtain legislative approval prior to executing a contingency fee contract creates the possibility that the OAG will usurp the legislature's appropriations function, an outcome that could run afoul of our constitution.

The OAG's arguments are in part premised on the notion that Cohen Milstein's fees and expenses will be deducted from the recovery prior to depositing the remaining recovery in the consumer protection escrow fund, thereby eliminating any risk of the use of funds earmarked for or in the general fund. Even if the court were to accept this premise and apply the logic of the cases the OAG cites in support, the plain language of RSA 7:6-f, which requires deposit of the entire recovery, stands in the way and provides a distinction from the cases cited. See Philip Morris Inc. v. Glendening, 709 A.2d 1230, 1241 (Md. Ct. App. 1998) (finding that a contingency fee agreement between an

attorney general and private outside counsel did not violate the separation of powers doctrine because recovery from such litigation "is not 'State' or 'public' money subject to legislative appropriation until the State has fulfilled its obligation under the Contract, collected the recovery, net of the contingency fee and litigation expenses, and deposited the funds into the State Treasury").

Finally, the court is not persuaded that the doctrine of administrative gloss applies in this case, because the statutes are not ambiguous and in need of interpretation. See Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 502 (2007) ("[A] lack of ambiguity in a statute or ordinance precludes application of the administrative gloss doctrine."). Furthermore, the OAG's contention that the payment of the contingency fee may nonetheless be upheld on equitable principles is inapposite. Whether equitable principles apply to afford Cohen Milstein the opportunity to recover the contingency fee is not relevant to whether the contract is ultra vires and void such that the Defendants are free from the OAG's unlawful exercise of its statutory authority. See Pickering v. Hood, 95 So.3d 611, 619 (Miss. 2012) ("But a lien is of no value, except to secure payment to which the attorney is lawfully entitled. . . . In this case, no payment is due outside counsel until the parties comply with Mississippi law . . . ."). Here, the validity the fee arrangement has been raised before substantial work has been performed.

In sum, the Court rules that, in executing the contingency fee agreement without the approval of joint legislative fiscal committee and the governor and council, as required by RSA 7:12, the OAG acted outside of the scope of its statutory authority to hire and compensate outside counsel. Accordingly, the contingency fee agreement

between the OAG and Cohen Milstein is ultra vires and void. See Prof'l Fire Fighters of Wolfeboro, IAFF Local 3708 v. Town of Wolfeboro, 164 N.H. 18, 23 (2012) (finding that a government entity had no authority to enter into the disputed contract, and that contract was therefore ultra vires and wholly void); Marrone v. Town of Hampton, 123 N.H. 729, 735 (1983) ("Where a municipal governing body enters into a contract which is beyond the scope of the municipality's powers, such an attempt to contract is termed ultra vires, and the contract is wholly void.").

IV. Ethics Violations

Although the Court's analysis could end at this point, in the interest of judicial efficiency, the Court nonetheless elects to address the merits of the Defendants' ethics and due process claims. The Defendants' ethics claims essentially assert that Cohen Milstein is a "public employee," and its conflict of interest arising from the contingency fee agreement violates the Executive Branch Code of Ethics ("Ethics Code"), common law, and the New Hampshire Rules of Professional Conduct. The OAG counters that these rules are inapplicable to Cohen Milstein because Cohen Milstein is not a "public employee" within the meaning of RSA 15-B:2, IX.

The Ethics Code states, "executive branch officials shall avoid conflicts of interest. Executive branch officials shall not participate in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties." RSA 21-G:22. The Ethics Code further states, "No executive branch official shall disclose or use confidential or privileged information acquired in the performance of his or her duties for the state for personal benefit or financial gain." RSA 21-G:23, I. Under RSA 21-G:21, the Ethics

Code defines "executive branch official" as "[e]very public employee as defined by RSA 15-B:2, IX," which in turn defines "public employee" as "any person, including but not limited to a classified or non-classified employee or volunteer, who conducts state business on behalf of . . . any executive branch official [or] agency."

Similarly, common law prohibits contingent fee agreements for public officials who have a duty to act impartially, because such agreements "have a tendency to subject the persons whose compensation is involved in them to the influence of selfish motives, and so, in the case of public officers, have a tendency to lead or crowd them from the path of duty." Edgerly v. Hale, 71 N.H. 138, 145 (1901). In Edgerly, the Supreme Court held that a sheriff's duty as a public official to act impartially was compromised by an arrangement through which he would be paid for service of writs only if the writs resulted in financial recovery. Id. at 146. The Court reasoned that "[t]he purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit." Id.

Likewise, New Hampshire Rule of Professional Conduct 1.7(a)(2) states, "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which exists where "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Attorneys must "avoid conflicts of interest and . . . the appearance of impropriety." Rogowicz v. O'Connell, 147 N.H. 270, 274 (2001) (referring to N.H. R. Prof. Conduct 1.7). Attorneys representing the State "are duty bound to advance the public interest" and therefore the concern is the potential for a "private interest to influence the discharge of public duty."

Id. (quoting Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 805 (1987)).

Whether Cohen Milstein's financial interest arising from the contingency fee agreement violates any of the aforementioned ethics rules depends on whether Cohen Milstein is considered a "public employee" under the Ethics Code, or a public attorney charged with serving the public interest under common law and the New Hampshire Rules of Professional Conduct. Although the definition of "public employee" within the Ethics Code does not apply to the common law and Rules of Professional Conduct claims, it is nonetheless informative because all three rules advance essentially the same purpose: to advance public, not private, interests in the administration of the law. This issue therefore requires the Court to engage in statutory construction of RSA 21-G:21 and RSA 15-B:2, IX in accordance with the previously delineated rules of statutory construction.

The Court finds that under the plain and unambiguous meaning of RSA 21-G:21 and RSA 15-B:2, IX, Cohen Milstein is not a public employee subject to the Ethics Code. The Court focuses on the plain and ordinary meaning of the phrase "on behalf of" in RSA 15-B:2, IX. "The phrase in behalf of traditionally means 'in the interest, support, or defense of'; on behalf of means "in the name of, on the part of, as the agent or representative of." Black's Law Dictionary 184 (10th ed. 2014). "On his behalf" has also been defined to mean "[f]or him and as authorized by him." Ballentine's Law Dictionary 888 (3rd ed.1969).

By its plain meaning, the phrase "on behalf of" may implicate a relationship akin to that of a principal and agent, and the law of agency is therefore instructive in

construing RSA 15-B:2, IX. "[T]he concept of agency posits a consensual relationship in which one person . . . acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person." Restatement (Third) of Agency § 1.01 comment c (2006). Although an agent is subject to the principal's control, "not all relationships in which one person provides services to another satisfy the definition of agency." Id. Agency also "requires that an agent hold power" to deal with third parties in a manner affecting the principal's rights or duties. Id. The Restatement observes:

> It is important to define the concept of "dealing" broadly rather than narrowly. For example, a principal might employ an agent who acquires information from third parties on the principal's behalf but does not "deal" in the sense of entering into transactions on the principal's account. In contrast, if a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent.

Id. The Restatement further discerns that the designation "independent contractor" is "equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers." Id.

In the context of relationships akin to agency with government entities, courts have held that a party acts "on behalf of" the government entity if the government entity has delegated its governing authority, including the power to make decisions, such that the party essentially substitutes for the governing entity. See Ball v. Bd. of Governors of Fed. Reserve Sys., 87 F. Supp. 3d 33, 46 (D.D.C. 2015) (stating that, under the Freedom of Information Act, a party acted "on behalf of" a government entity when it acted under the entity's delegated authority, not by merely performing a function authorized by that entity); 'Ōlelo: The Corp. for Cmty. Television v. Office of Info.

Practices, 173 P.3d 484, 497–98 (Haw. 2007) (holding that "[t]he definitional phrase most relevant to whether [the corporation] operates 'on behalf of' the State is whether [the corporation] is a 'representative of' the State," which involves an agency relationship where the corporation "substitutes for the state in the performance of a governmental function"); Baker Bus Serv., Inc. v. Keith, 416 A.2d 727, 730 (Me. 1980) (interpreting a statute defining a "public employer" as "any . . . persons or body acting on behalf of any municipality or town," and holding that the phrase "on behalf of" involves "the general principles of agency").

Although agency law informs the construction of RSA 15-B:2, IX, the Court does not find that the meaning of "on behalf of" is necessarily confined to the concept of agency. While "on behalf of" subsumes an agency relationship, it can also be construed more broadly to mean "in the interest of" or "for the benefit of." That the legislature intended the phrase to apply beyond agency relationships is evident for two reasons. First, the legislature could have limited the definition of "public employees" to classified or unclassified employees, but it instead chose to apply the definition to more than employees with the phrase "including but not limited to a classified or non-classified employee or volunteer." RSA 15-B:2, IX. Indeed, in the next paragraph, the legislature chose to define "public official" as "a commissioned, unclassified, or nonclassified executive branch employee." RSA 15-B:2, X. Second, a broader definition is more consistent with the reasonably inferred purpose of the Ethics Code to ensure public trust through fair and honest government. It is feasible that a party may not be an agent of an agency or executive official, but would nonetheless be in a position to carry out a

government function where a conflict of interest could negatively affect the public's trust.[4]

In the context of whether a party acts on behalf of a government entity, other courts have similarly construed "on behalf of" more broadly to apply to circumstances where a party is in a position of public trust with official government responsibilities. Notably, in determining whether a party acts "on behalf of" the federal government within the meaning of a federal bribery statute, the United States Supreme Court has held that "the proper inquiry is not whether the person had signed a contract with the United States or agreed to be the Government's agent, but rather whether the person occupies a position of trust with official federal responsibilities." Dixson v. United States, 465 U.S. 482, 496 (1984). Under this interpretation, the Supreme Court concluded that a private company with "operational responsibility for the administration" of a federal housing program and discretion to expend federal resources acted on behalf of the federal government. Id.; see also Div. of Labor Standards v. Friends of the Zoo of Springfield, Mo., Inc., 38 S.W.3d 421, 424 (Mo. 2001) (citing Websters' Third New International Dictionary 198 (1976)) ("The phrase on behalf of is broader than 'by an

[4] For example, an Executive Branch Ethics Committee advisory opinion concluded that "members of a statutorily established executive branch advisory commission who are not appointed by the Governor, Governor and Executive Council, the President of the Senate, or the Speaker of the House," but who accept appointments by private organization or authority, must file a statement of financial interest under RSA chapter 15-A "because he or she is volunteering to act on behalf of the Governor or an agency engaged in state business" and has the ability to "influence public policy and practice." Exec. Branch Ethics Comm., Advisory Op. 2007-007 (Feb. 21, 2007).

RSA chapter 15-A requires certain persons to file statements of financial interests in order "to ensure that the performance of official duties does not give rise to a conflict of interest." RSA 15-A:1. Under RSA 15-A:3, I(h), "[a]ny person, not employed by or working under contract for the state, who is acting on behalf of the governor or an agency while engaged in state business" must file a financial disclosure. However, such a volunteer is exempt if he or she does not directly or indirectly influence "the setting of public policy," "decisions on how state funds will be expended," or "the selection of vendors for the state." RSA 15-A:3, III. This statute, which uses language substantially similar to RSA 15-B:2, IX, clearly evinces the legislature's concern for potential conflicts of interest of any person, agent or non-agent, capable of influencing certain governmental responsibilities.

agent of.' The phrase on behalf of means 'in the interest of: as the representative of: for the benefit of' . . . [and therefore] is not confined to the concept of agency.")

Under either a narrow or broad interpretation, the underlying factual determination of whether a party is a "public employee" within the meaning of RSA 15-B:2, IX relies on the (1) degree to which the agency delegates its official government functions, which correlates to the degree to which the party is in a position of public trust, and (2) the degree to which the party retains discretion over its performance. Where an agency delegates its governing authority, including the power to make decisions, such that the private party essentially substitutes for the agency, the private party is a public employee under RSA 15-B:2, IX. See Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1209 (Fla. Dist. Ct. App. 2009) (stating that when determining whether a private party acted "on behalf of" a government agency under Florida's public records law, the underlying question is "whether a private entity has assumed the role of the government"). Conversely, it is most likely not a public employee where the agency does not delegate the authority to make key decisions—such as those related to the expenditure funds, influencing public policy, or affecting the agency's legal rights or duties—involved in the performance of a governmental function. See Citizens All. for Prop. Rights Legal Fund v. San Juan County, 359 P.3d 753, 759 (Wash. 2015) (interpreting a statute prohibiting closed meetings of a legislative committee "when the committee acts on behalf of the governing body," and holding that the phrase "acts on behalf of" applies "to situations where a committee exercises actual or de facto decision-making authority for a governing body"). However, the private entity must also retain sufficient discretion over its performance of that service such that the

agency's control is not so substantial as to create a façade behind which the agency can circumvent its public duties or the law. See Friends of the Zoo, 38 S.W.3d at 424 ("Where, by all the facts and circumstances, a private entity and a public body create a façade behind which the public body engages in public works, the [private entity's] workers are employed on behalf of the city."); News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc., 596 So.2d 1029, 1031 (Fla. 1992) ("This broad definition serves to ensure that a pubic agency can't avoid disclosure under the [public records act] by contractually delegating to a private entity that which otherwise would be the agency responsibility."); Rine v. Imagitas, Inc., 590 F.3d 1215, (11th Cir. 2009) (finding that a private advertising company acted on behalf of a state agency because the private company merely carried out the agency's functions where the agency "actively sought a private entity to administer this program," initially conceived of the program idea, and retained control over the entire program). See also News & Sun-Sentinel, 596 So.2d at 1031 (rejecting the idea that "a private corporation acts 'on behalf of' a public agency merely by entering into a contract to provide professional services to [a public] agency").

In this case, Cohen Milstein's relationship with the OAG under the terms of the contingent fee agreement is akin to a non-agent service provider. The OAG has expressly retained its authority to exercise its own discretion on all key decisions. Without delegation of that decision-making authority, Cohen Milstein cannot substitute for the OAG in the administration of the OAG's governmental function—the investigation and possible enforcement of a CPA violation. Although it may deal with third parties to gather information, it does not have delegated authority to make controlling decisions in

the administration of the OAG's CPA authority, including whether to proceed with litigation and what claims to advance. Rather than substituting for the OAG, Cohen Milstein in the currently controlling retention agreement assists the OAG by providing legal services as a non-agent service provider.

The retainer agreement is replete with terms supporting this conclusion. First, the September agreement edited the opening paragraph to state that Cohen Milstein was retained "to assist" the OAG, which is notable because the June agreement used the phrase "to represent." The difference between "assist" and "represent" is significant in defining Cohen Milstein as a non-agent service provider rather than an agent.[5] (Defs.' Mem. Ex. A, at 1; OAG's Mot. Ex. 6, at 1.) Second, the agreement includes a term stating that the OAG reserved the right to "maintain control of the investigation and . . . make all key decisions, including whether and how to proceed with litigation, which claims to advance and what relief to seek." (OAG's Mot. Ex. 6, ¶ 15.) It further provides that Cohen Milstein must regularly provide reports to the OAG, the OAG will review and approve all key documents, the OAG will provide a "point of contact" to supervise the investigation, and the OAG will appear as lead counsel and have control over any litigation or settlement decisions. (OAG's Mot. Ex. 6, ¶¶ 17–19.)

Given the OAG's substantial involvement and control over Cohen Milstein, Cohen Milstein cannot be said to substitute for the OAG such that it is an agent or otherwise in a position of public trust. Nor can the OAG's involvement be said to be so

[5] The September agreement also clarified, "Cohen Milstein will be an independent contractor, and not an employee, of OAG, under the criteria set forth in R.S.A. § 281-A:2 . . . . Cohen Milstein is not a public employee for purposes of R.S.A. § 15-B:2 and R.S.A. § 21-G:21." (OAG's Mot. Ex. 6, ¶ 11.) Although this term is a clear statement of the parties' intent, it does not have any effect on whether an agency relationship actually exists. See Restatement (Third) of Agency § 1.02 comment a ("Whether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts. . . . [H]ow the parties to any given relationship label it is not dispositive.").

substantial as to be a façade behind which it seeks to avoid the Ethics Code. Cohen Milstein retains discretion over how it will provide the legal services. Moreover, such a façade would be impossible because, by the term of the agreement, the OAG will appear as lead counsel. Accordingly, under RSA 15-B:2, IX, Cohen Milstein is not a "public employee" subject to the Ethics Code.

Furthermore, by extension of the analysis of RSA 15-B:2, IX, Cohen Milstein is not a public attorney under common law or the Rules of Professional Conduct because those claims are also based on the premise that Cohen Milstein is vested with a governmental function and in a position of public trust where its financial stake will create a conflict of interest that will negatively impact the public trust and the fair administration of the law. Moreover, Edgerly and Rogowicz are distinguishable from this case. In Edgerly, it was indisputable that the sheriff was a public official who had the authority to enforce the law as a representative of the state and therefore had a duty to do so impartially and in the service of the public interest. 71 N.H. at 145–46. In Rogowicz, the attorney at issue was a private attorney appointed to be an independent public prosecutor who was given the authority to administer the laws at his own discretion as a substitute for the State. 147 N.H. at 272–74. Cohen Milstein in contrast has no authority to make any key administration decisions and therefore lacks the ability to represent the State as a substitute for the OAG.

Accordingly, the Court finds that Cohen Milstein is not a public employee, and the contingency fee arrangement between the OAG and Cohen Milstein does not create a conflict of interest such that the agreement inherently violates the Ethics Code, common law, or the Rules of Professional Conduct.

V. *Due Process Violations*

Lastly, the Defendants contend that the contingency fee arrangement violates their due process rights because Cohen Milstein's financial stake unfairly affects the neutrality of any prosecution. It further maintains that any control by the OAG does not cure the violation because Cohen Milstein's conflict of interest will have tainted the OAG's decisions, which are based on information Cohen Milstein gathers and shapes. The OAG counters that, consistent with other jurisdictions finding that these arrangements do not inherently violate due process, there is no due process violation because the contingency fee agreement affords the OAG control over all key decisions. The Defendants distinguish this agreement from those in other jurisdictions because those cases involved "a government entity acting in its non-sovereign proprietary capacity," while this case involves the potential for criminal or civil enforcement actions that threaten the Defendants' ongoing business and constitutional rights and exposes them to possible criminal prosecution. (Defs.' Mem. 29.)

As the New Hampshire Constitution provides at least as much protection in this area as the United States Constitution, the Court addresses the Defendants' claim under the State Constitution, referring to federal authority for guidance only. See State v. Ball, 124 N.H. 226, 232 (1983).

Part 1, article 35 of the New Hampshire Constitution states, "It is essential to the preservation of the rights of every individual . . . that there be an impartial interpretation of the laws, and administrations of justice." As part of these due process rights, prosecuting attorneys are held to principles of heightened neutrality that requires them to exhibit some degree of impartiality such that they seek justice, not merely

convictions. State v. Boetti, 142 N.H. 255, 260 (1997); State v. Preston, 121 N.H. 147, 151 (1981); see also Cnty. of Santa Clara v. Superior Court, 235 P.3d 21, 35 (Cal. 2010) ("[I]t is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice be done."). Accordingly, where a government attorney has a personal interest, there is the potential that the interest will influence the attorney's public duty to serve the public interest and risk violating a defendant's due process rights. Id.; In re Jack O'Lantern, Inc., 118 N.H. 445, 448 (1978).

The principles of heightened neutrality may similarly apply to private attorneys. Rogowicz v. O'Connell, 147 N.H. 270, 274–75 (2001). For example, a private attorney acting as a criminal prosecutor is held to the same standard of neutrality as public attorneys, and therefore may not enter into a contingency fee agreement for that representation. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 805 (1987). As the California Supreme Court has observed, "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." California ex rel. Clancy v. Superior Court, 705 P.2d 347, 351 (Cal. 1985), cert. denied, 475 U.S. 1121 (1986).

"The rule against the use of contingency fees in criminal actions has been extended to certain civil actions that resemble criminal prosecutions." Merck Sharp & Dohme Corp. v. Conway, 861 F. Supp. 2d 802, 813 (E.D. Ky. 2012). "However, this

class of civil actions is small," and these "quasi-criminal" civil cases may only implicate the neutrality requirement if they involve a "delicate weighing of values" and fundamental rights. Id. (quoting Clancy, 705 P.2d at 352). "Even in civil cases that implicate the [government attorney's] requirement of neutrality, the existence of a contingency fee arrangement with outside counsel does not necessarily violate [a] defendant's due process rights." Id. at 814; see also Clancy, 705 P.2d at 352 ("Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel."). Under a contingency fee agreement where a neutral, conflict-free government attorney retains complete control over the action, the public interest is adequately safeguarded despite the private attorney's personal interests. Merck, 861 F. Supp. 2d at 814–15. The California Supreme Court has observed:

> Private counsel serving in a subordinate role do not supplant a public entity's government attorneys, who have no personal or pecuniary interest in a case and therefore remain free of a conflict of interest that might require disqualification. Accordingly, in a case in which private counsel are subject to the supervision and control of government attorneys, the discretionary decisions vital to an impartial prosecution are made by neutral attorneys and the prosecution may proceed with the assistance of private counsel, even though the latter have a pecuniary interest in the case.

Santa Clara, 235 P.3d at 36–37.

In Clancy, the California Supreme Court invalidated a contingency fee agreement between a city and outside counsel under which the outside counsel would independently bring public nuisance abatement actions to regulate adult book stores, because the action, if successful, would interfere with ongoing business activity by essentially closing adult book stores. 705 P.2d at 352–53. The court reasoned, "Public

nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney." Id. Because eminent domain and public nuisance abatement actions require an "inquiry into value" and are "designed to strike a just balance between the economic interests of the public and those of the landowner," a prosecuting attorney must exercise a great deal of discretion and a personal interest in the outcome of the action may negatively influence the exercise of that discretion. Id. at 352.

In Santa Clara, the California Supreme Court limited Clancy's holding stating, "Although in Clancy we spoke generally of a 'balancing of interests' and a 'delicate weighing of values' . . . our concerns regarding neutrality, fairness, and possible abuse of the judicial process by an interested party appear to have been highly influenced by the [factual] circumstances." 235 P.3d at 32 (citation omitted). Based on the facts at hand in Clancy, the court reasoned, neutrality principles were implicated because the action at issue "implicated important constitutional concerns, threatened ongoing business activity, and carried a threat of criminal liability." Id. at 33. It went on to hold that a contingency fee agreements between a county and private counsel, under which private counsel merely assists the government attorneys under the government attorneys' control and supervision, did not violate due process. Id. at 36.

The Defendants contend that Santa Clara held that "contingent fee arrangements are categorically prohibited in actions brought by the government in its sovereign capacity when either (1) the government may pursue criminal charges; or (2) a government's civil suit invokes interests 'akin to the vital interests implicated in a

criminal prosecution.'" (Defs.' Mem. 26 (quoting Santa Clara, 235 P.3d at 36–37).) The Defendants therefore conclude Cohen Milstein's contingency fee agreement violates due process because the CPA enforcement action implicates free speech interests, threatens ongoing business activities, and carries the possibility of criminal liability. However, the Defendants' argument misses the critical distinction between a private attorney who supplants a government attorney and one who assists. While the rules Defendants cite may implicate heightened neutrality requirements for private counsel who supplant government attorneys in civil cases, they do not categorically prohibit private contingency-fee counsel from assisting government attorneys who retain all of the discretion to make critical decisions.

Merck's application of Santa Clara is illustrative. In Merck, the Kentucky Attorney General brought a consumer protection action against the defendants and hired outside counsel on a contingency-fee basis. 861 F. Supp. 2d at 806. Applying Santa Clara's "delicate weighing of values" test, the court in Merck first found that the consumer protection action was quasi-criminal in nature because it sought civil penalties to punish and deter, and the action therefore implicated the neutrality requirement. Id. at 813–14. The court went on to hold that the contingency fee agreement did not offend due process "[b]ecause the AG has retained the authority to direct the course of the action, the contingency fee counsel are not subject to the requirement of neutrality." Id. at 815.

Other courts have reached similar conclusions. See Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 475–77 (R.I. 2008) (emphasis in original) (approving of contingency fee arrangements "in certain civil litigation, so long as the Office of Attorney General retains **absolute and total control over all critical decision-making**" and

appears to the public to be exercising such control); West Virginia ex rel. Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625, 639 (W. Va. 2013) (finding that private counsel's fee arrangement with attorney general to bring consumer protection action against the defendants did not violate due process because the government entity used both private and public counsel and the public counsel supervised private counsel); Priceline.com Inc. v. City of Anaheim, 103 Cal. Rptr. 3d 521, 532 (Cal. Ct. App. 2010) (interpreting Clancy as barring "governments from granting sole litigation discretion to contingency fee lawyers" in "actions requiring delicate balancing and weighing of interests and values"); Int'l Paper Co. v. Harris County, 445 S.W.3d 379 (Tex. App. 2013) (noting that the contingency fee agreement between county and private counsel did not violate due process because, unlike Clancy where a private attorney prosecuted on behalf of the government entity, the County was represented by both government and private counsel); City of Chicago v. Purdue Pharma L.P., No. 14 C 4361, 2015 WL 920719, at *1 (N.D. Ill. Mar. 2, 2015) ("Because the City retains control over the investigation and litigation of this case, its retention of Cohen does not violate defendants' due process rights.").

The Court agrees with the greater weight of judicial precedent finding no violation of due process by contingency fee arrangements in certain civil litigation where the OAG supervises outside counsel and retains control over all critical decisions such that the outside counsel's personal interest is neutralized. As previously discussed, the contingency fee agreement between the OAG and Cohen Milstein indicates that the OAG is substantially involved in supervising Cohen Milstein and has retained all critical decision-making authority. First, the September agreement edited the opening

paragraph to state that Cohen Milstein was retained "to assist" the OAG, which is notable because the June agreement used the phrase "to represent." (Defs.' Mem. Ex. A, at 1; OAG's Mot. Ex. 6, at 1.) Second, the agreement includes a term stating that the OAG reserved the right to "maintain control of the investigation and . . . make all key decisions, including whether and how to proceed with litigation, which claims to advance and what relief to seek." (OAG's Mot. Ex. 6, ¶ 15.) It further provides that Cohen Milstein must regularly provide reports to the OAG, the OAG will review and approve all key documents, the OAG will provide a "point of contact" to supervise the investigation, and the OAG will appear as lead counsel and have control over any litigation or settlement decisions. (OAG's Mot. Ex. 6, ¶¶ 17–19.)

There is one critical distinguishing feature from Santa Clara and Lead Industries: New Hampshire's CPA exposes the Defendants to potential criminal liability under RSA 358-A:6, I, which states that "any person convicted of violating RSA 358-A:2 hereof shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person." However, this administrative investigation is at a preliminary stage conducted by the Consumer Protection Bureau, not the Criminal Bureau. Should the OAG determine that a criminal prosecution is warranted, at that point, the OAG may have to reevaluate the role Cohen Milstein would play.

The Defendants also unconvincingly characterizes the CPA action as one that may result in the OAG dictating how Defendants market their products, thereby implicating their constitutional free speech rights. However, the remedy in a CPA enforcement action is to prohibit the Defendants from engaging in deceptive or fraudulent marketing, which is not constitutionally protected speech. Second, even

though the Defendants could face criminal liability under RSA 358-A:6, I, Cohen Milstein has not been retained to prosecute any criminal violations, as previously discussed. Finally, this action does not threaten the Defendants' ongoing business activity. Although it may impact how the Defendants' market their products, it does not amount to an action that could substantially impede the Defendants' ability to conduct business as was the matter of concern in Clancy, 705 P.2d at 352-53. Accordingly, the Court finds that Cohen Milstein's involvement in the opioid investigation with possible civil prosecution on a contingency fee basis does not inherently violate the Defendants' due process rights.

Conclusion

In sum, the Court finds that the Defendants' objections are not untimely and waived under RSA 358-A:8, IV; the Defendants have standing to assert its ethics, due process, ultra vires, and separation of powers arguments; Cohen Milstein is not a public employee acting on behalf of the OAG such that it is subject to the same ethics rules as other OAG attorneys; and the contingency fee agreement does not inherently violate the Defendants' due process rights. However, in executing the retainer agreement with Cohen Milstein, the OAG acted outside its statutory authority to hire outside counsel, and the retainer agreement is therefore ultra vires and void. Therefore, the Court DENIES the State's Motion to Enforce and GRANTS the Defendants' Motion for Protective Order, ruling that the OAG and Cohen Milstein's contingency fee agreement is void and barring the use of Cohen Milstein under its terms absent the approval

required by RSA 7:12.

SO ORDERED.

Date: 3/8/2016

Diane M. Nicolosi
Presiding Justice