STATE OF TENNESSEE
OFFICES OF DISTRICT ATTORNEYS GENERAL
Judicial Districts 1-4, 6-10, 13, 16, 17, 22 and 31
Barry Staubus, Tony Clark, Dan Armstrong, Jimmy Dunn, Charme Allen, Dave Clark, Jared Effler, Russell Johnson
Stephen Crump, Bryant Dunaway, Jennings Jones, Robert Carter, Brent Cooper and Lisa Zavogiannis

March 20, 2018

Honorable Herbert H. Slatery III
Attorney General
State of Tennessee
P.O. Box 20207
Nashville, TN 37202

Dear General Slatery:

As the District Attorneys General elected to represent the citizens of our fourteen (14) judicial districts of Tennessee, we feel compelled to write you this letter stating our personal as well as professional reasons for taking on the pharmaceutical industry, whose poison has created the epidemic we fight daily. Since June 2017, fourteen (14) District Attorneys General, representing 47 Tennessee counties, have chosen to address the opioid epidemic in our home communities by challenging the companies that produce and profit from these life-altering drugs. Collectively, the lawsuits we have filed represent nearly half of the citizens of our beloved state.

We filed our lawsuits using statutory and common law remedies that have been specifically assigned to the District Attorney Generals. These remedies are in place to ensure that we, the elected representatives of our constituents, have standing to address wrongs inflicted upon our citizens. Our shared voice speaks on behalf of those Tennessee counties with the highest rates of infants born drug-dependent. We stand on behalf of thousands of citizens agonized by the loss of family members and friends who were unable to overcome the disease of addiction. We advocate for small, rural communities as they struggle with rising financial demands on health care and law enforcement. All of this is done with no financial support to assist us in our efforts.

We have received your March 15 and March 20 letters. We find it troubling that you are taking a position adverse to our goals in this litigation. As we have stated to you many, many times before, we were hopeful that you would be an asset in our fight against the drug producers who drown our communities in illegal opioids. We are disappointed in your attempts to undermine our litigation. We are also disappointed that at the same time you sent the March 15, 2018 letter, your office filed motions to intervene in each our pending lawsuits and contacted each court to set up unnecessarily expedited hearing dates without prior notice to us or our counsel. These concurrent actions seem calculated to prejudice us in the pending lawsuits and to provoke us, rather than to open a reasonable dialogue. Furthermore, in the pending motions and in your recent communications with our attorneys, your office refuses to state why it is seeking to intervene, and will not confirm or deny whether the purpose of intervening will be scuttle our lawsuits without any further discovery into the nature and scope of human devastation and

economic toll that the major drug producers, pill mills, and others have wrought on the communities that we serve.

The State Attorney General does not have the authority to control our litigation.

We disagree about the scope of your authority to represent the interests of our constituents. While we agree that the Attorney General has broad authority to act pursuant to the Tennessee Consumer Protection Act, the District Attorneys General also have broad authority to act pursuant to both the Drug Dealer Liability Act and Tennessee nuisance laws. Just as we would not have the ability to file a claim on behalf of the State for violations of the Tennessee Consumer Protection Act, the Attorney General does not have the authority to file a claim in our judicial districts under the Drug Dealer Liability Act.

The separation of powers between the Attorney General and the District Attorneys General was created intentionally, reserving the independence of the District Attorneys General.

> He or she is answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense. No court may interfere with his discretion to prosecute, and in the formulation of this decision he or she is answerable to no one. In a very real sense this is the most powerful office in Tennessee today.

Dearborne v. State, 575 S.W.2d 259, 262 (Tenn. 1978) (quoting *Pace v. State*, 566 S.W.2d 861, 866 (Tenn.1978) (Henry, C.J., concurring).

In fact, the office of the Attorney General has tried unsuccessfully to exercise control and veto power over decisions of the District Attorney General before. "…[T]he Attorney General of the state may not…become actor, or interfere, as of power, with the discretion of the district attorney in respect of discontinuance." *State ex rel Hardwick v. Vest* 136 Tenn. 167 (1916). The intentional separation of powers was reaffirmed during the 1977 Tennessee Constitutional Convention, where there was considerable discussion, and disagreement, about the proper day-to-day role of the state Attorney General. *See* Lewis L. Laska, *The 1977 Limited Constitutional Convention*, 61 Tenn. L. Rev. 485, 546 (1994). "[M]any people wanted to see the Attorney General [as] more of a consumer advocate, willing to press class actions and antitrust suits." *Id.* Others, including justices of the Tennessee Supreme Court, wanted the Attorney General to be a "true chief law enforcement officer." *Id.* In particular, as described in a 1977 Tennessean article, Tennessee Supreme Court Justice Joe Henry was concerned that "[n]one of (the elected district attorneys) is answerable to any living human being" and urged the adoption of a "unified, coordinated prosecutorial system in Tennessee." *Id.* at 546 n.397 (quoting TENNESSEAN, *High Court Urges DA Supervision*, at 1 (Sept. 15, 1977)).

At the 1977 Convention, "[a]n elaborate provision" was presented that would "make the Attorney General the chief law enforcement officer" (including the ability to initiate criminal prosecutions) and to "provide for a Solicitor General to represent the state before the courts and render opinions." *Id.* at 546 n. 398. If that provision had been adopted, it would have created the

type of top-down, "unified" prosecutorial system envisioned by Justice Henry. However, the proposal was **rejected** 43-39. *Id.*

The passage of § 8-6-303 a mere two years later reaffirmed, and codified, the limits of the State Attorney General's power relative to actions brought by the District Attorneys. "[t]his part is ***not to be construed as requiring the attorney general and reporter to approve of, participate in, or supervise actions instituted by the various district attorneys general pursuant to law***." This interpretive provision expressly prohibits any construction of the other substantive provisions of Title 8, Chapter 6 (including § 8-6-106 which outlines the authority of the State Attorney General) that would require (or, for that matter, permit) the State Attorney General to direct and/or supervise the actions of a District Attorney. In fact, Tennessee courts have held that any attempt to require permission or approval from an agency of the State, "impede the inherent discretion and responsibilities of the office of district attorney general without violating Article VI, § 5 of the Tennessee Constitution." State v. Super. Oil, Inc., 875 S.W.2d 658, 661 (Tenn. 1994).

Your position that we are not authorized to hire outside counsel to assist us in suing big pharma is without merit.[1] The statute you cite references situations where the Governor and the State Attorney General agree that outside counsel is necessary to assist the District Attorneys General and permits the Governor to employ such counsel and arrange payment for the attorney's services from State funds. It does not address a situation where the additional counsel is not paid out of the State treasury. Regardless, permitting such control over the decision-making of the District Attorney General would amount to a veto of our ability to fulfill our obligations to the citizens of East Tennessee, the babies born day after day dependent on these devilish drugs, and to our neighbors who elected us. The law simply does not give you that authority.

It should be quite clear that, with our budgets already ravaged by the need to respond to the opioid crisis, we could not possibly handle litigation of this scale in house, while upholding our other duties. In order to pursue these claims, we need to have a law firm working beside us. We retain full control and decision-making authority over our cases and in fact, have been deeply involved in every aspect of the litigation with our attorneys. This law firm is covering all costs in the matter and will request that the court award them their fee -- if we win. The costs of our lawsuits are not being borne by the taxpayers, but by the lawyers. These types of fee arrangements are commonplace and have been approved in litigation of this scale in other contexts.[2] We feel confident that our decision to hire the firm was proper. To that end, moving forward please include our lawyers on any communications regarding this lawsuit.

---

[1] It is curious to us that you would be so focused on trying to remove our lawyers. Typically, that is a tactic of corporate defendants (Big Pharma, Big Tobacco, Wall Street Banks, etc.).

[2] *See County of Santa Clara v. Sup. Ct.*, 235 P.3d 21, 39 n.14 (Cal. 2010) (expressly permitting contingent fee agreement between public entity and outside counsel, and rejecting the "suggestion of defendants and their amici curiae to view all contingent-fee agreements as inherently suspect because of an alleged 'appearance of impropriety' created by such arrangements"); *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 436 (R.I. 2008) (allowing use

Challenge to Punitive Damages Caps

We do, however, understand your concern relating to the challenge to the constitutionality of the punitive damages caps contained in the *Staubus* complaint. In an effort to compromise, we would consider filing a notice with the court clarifying that we, as the District Attorneys General for the First, Second, and Third Judicial Districts, are not bringing such a challenge and that the challenge to the constitutionality of the punitive damages cap is brought only by Baby Doe, the other party in the *Staubus* matter. We are hopeful that such a clarification would ameliorate your concerns on this topic.

Settlement Prospects

While we appreciate your mutual concern over the devastation the opioid crisis has brought upon Tennessee, we disagree that you are in the "best position…to obtain the best possible monetary recovery" for our communities. According to a recent article by the Tennessean, the "substance abuse epidemic – most notably involving opioids" costs Tennessee more than $2 billion annually. That $2 billion annual price tag includes $46 million for babies born in Tennessee with NAS; $422.5 million for hospitalizations associated with opioid abuse.[3]

We know you are fulfilling the statutorily responsibilities assigned to you against the same drug manufacturers and respect your need to do so. However, the damages available under the Tennessee Consumer Protection Act are dwarfed by those available pursuant to the DDLA and nuisance. The damages available under the DDLA include policing, prosecutions, jails, hospital stays, rehabilitation centers, medical expenses, and educational services for those dependent on opioids, including the babies. The abatement provisions under nuisance laws can provide the necessary funding to stem the tide of opioids into our communities and for future costs to end the opioid stranglehold on our towns. We need these remedies to save our communities, not statutory damages put into the state common fund that never make it back to our hometowns.

---

of outside counsel where outside counsel served in a "subordinate role"); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1231 (Md. 1998) (finding retention of outside counsel poses no due process concern where attorney general retains "the authority to control all aspects of [outside counsel's] handling of the litigation"); *State ex rel. Discover Fin. Serv. Inc. v. Nibert*, 744 S.E.2d 625, 634-640 (W.Va. 2013) (rejecting challenge to contingent fee agreement between West Virginia Attorney General and outside counsel grounded in West Virginia rules of professional conduct); *Merck Sharp & Dohme Corp. v. Conway*, 861 F. Supp. 2d 802, 814 (E.D. Ky. 2012) ("As long as safeguards are in place, a government agency's contingency fee contract with outside counsel does not infringe a defendant's due process rights.").

[3] https://www.tennessean.com/story/money/industries/health-care/2017/12/04/drug-alcohol-abuse-saps-2-billion-tennessee-annually-under-the-radar-impact-opioid-epidemic/909253001/.

We know that there has been some discussion of a collective settlement and understand the pressure that big pharma can bring to bear on organizations opposing their sales and marketing models. We know the idea of rolling up various opioid-related lawsuits into one settlement can seem appealing, especially when the Defendants are already pleading poverty - despite billions in revenue generated at the expense of our citizens. That said, we also know that in these situations, local communities lose out.

We must look back no further than 2007, when twenty-seven (27) Attorney Generals across this nation agreed to collectively settle opioid claims brought against Purdue Pharma and its related companies for a total $19.5 million. Of that meager amount of settlement money, Tennessee received $400,000.00 for attorneys' fees for your office, $175,750.00 to the State's general fund, and $143,750.00 for consumer education projects to fund further investigations or litigation at the discretion of your office. Tennessee also entered into a ten (10) year agreed judgment that obligated Purdue and the State of Tennessee to monitor and enforce suspected diversion of Oxycontin in Tennessee. The State Attorney General's office had specific enforcement power pursuant to the terms of the agreement. Nonetheless, the terms of the settlement went unenforced and Tennessee settled its claims for pennies on the dollar. The limited monies that were received went into state coffers in Nashville, not into the hands of the smaller communities bearing the greatest need.[4] The results of this failed effort have been another decade lost to growing opioid fueled abuse, addiction, and death. Our local communities have been devastated in this wake and we cannot, and we must not fail again.

Each year, our offices expend thousands of hours and millions of dollars prosecuting crimes as a result of the Opioid crisis. This is our opportunity to hold these companies accountable for their actions, return financial resources to our communities that have been ravaged by this epidemic and stop the flood of opioids into our beloved state. Our local communities can lead the way in resolving the crisis this time, but they must be allowed a seat at the table if we are going to do it right. We ask that you work hand in glove with us to maximize the return to the citizens of Tennessee which will reduce the burden on our tax payers and provide the funding to fully abate the Opioid Epidemic that is currently destroying our great State.

We firmly believe that our lawsuits and your investigation, can proceed side by side – in a way that is mutually beneficial for the citizens of Tennessee.

---

[4] Settlements of this type are routed into the State's general fund. The monies do not flow back to the communities that were impacted. See Slattery testimony to Senate Judiciary Committee on February 13, 2018.

Senator Bell: The money first would cover the cost of the 38 positions (in your office), anything above that would go to the general fund?

AG Slatery: That is correct.

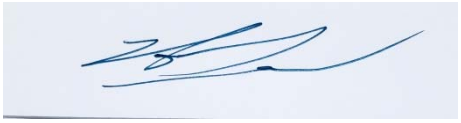
As we have said before, we would like to work with you to seek a mutual solution. We knew what we were doing when we decided to address the harm done by the pharmaceutical industry to our citizens. For the sake of our citizens, we need to see this through.

Respectfully,

Bryant C. Dunaway
District Attorney General
1519 East Spring Street, No. A
Cookeville, Tennessee 38506

Jennings H. Jones
District Attorney General
320 West Main Street, Suite 100
Murfreesboro, Tennessee 37130

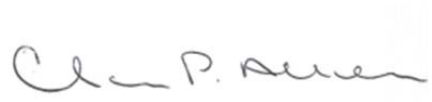
Robert J. Carter
District Attorney General
311 East Market Street
Fayetteville, Tennessee 37344



Brent A. Cooper
District Attorney General
32 Public Square
Lawrenceburg, Tennessee 38464

Lisa S. Zavogiannis
District Attorney General
131 East Main Street
McMinnville, Tennessee 37110

Jared R. Effler
District Attorney General
610 Main Street
Jacksboro, Tennessee 37757



Charme Allen
District Attorney General
400 Main Street Southwest, Suite 16
Knoxville, Tennessee 37902

Dave Clark
District Attorney General
101 South Main Street, No. 300
Clinton, Tennessee 37716

Russell Johnson
District Attorney General
1008 Bradford Way, Suite 100
Kingston, Tennessee 37763

Stephen Crump
District Attorney General
93 North Ocoee Street
Cleveland, Tennessee 37311

Jimmy B. Dunn
District Attorney General
125 Court Avenue, Suite 301-E
Sevierville, Tennessee 37862

Barry P. Staubus
District Attorney General
140 Blountville Bypass
Blountville, Tennessee 37617

Tony Clark
District Attorney General
108 West Jackson Boulevard, Suite 134
Jonesborough, Tennessee 37659

Dan E. Armstrong
District Attorney General
124 Austin Street, Suite 3
Greeneville, Tennessee 37745