

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin

C.A. No. 2011-CP-40-3661

RECEIVED

APR 07 2014

SC Court of Appeals

State of South Carolina, ex rel. Alan Wilson,
in his official capacity as Attorney General
for the State of South Carolina,

Respondent,

v.

Cephalon, Inc.

Appellant.

APPELLANT'S RETURN TO MOTION TO DISMISS

Cephalon, Inc. ("Cephalon") files this return in opposition to the Motion to Dismiss ("Motion") filed by the State of South Carolina (the "State"). Cephalon raised affirmative defenses regarding the untimeliness of the State's case on summary judgment. However, the trial court did not simply deny Cephalon's motion. Instead, the trial court struck Cephalon's affirmative defenses as a matter of law and found that the State's action was timely. Thus, contrary to the State's arguments, the trial court went far beyond denying Cephalon's request for summary judgment. This appeal is therefore well taken. Accordingly, Cephalon respectfully requests that the Court deny the State's Motion to Dismiss and review the trial court's order denying Cephalon's Motion for Summary Judgment and striking defenses.

BACKGROUND

I. Procedural History

The State filed this action on June 6, 2011 asserting claims against Cephalon for alleged violations of the South Carolina Unfair Trade Practices Act (“SCUTPA”) and for unjust enrichment (“Complaint”). The State claims that Cephalon marketed three federally-approved prescription medications (the “Medications”) for unapproved or “off-label” uses. Cephalon filed its Answer to the Complaint on July 5, 2011 and raised affirmative defenses under the applicable three-year statute of limitations and the doctrine of laches. SCUTPA expressly provides that: “No action may be brought . . . more than three years after the discovery of the unlawful conduct which is the subject of the suit.” S.C. Code Ann. § 39-5-150. Therefore, the Answer contained detailed allegations regarding the timing of various events that put the Attorney General’s Office on notice of a possible claim against Cephalon well before three years preceding its filing of the lawsuit. (Ex. A, Answer at ¶¶ 56-57, Affirmative Defenses 1 & 2.)

Thereafter, the parties agreed to bifurcate the case, first addressing the limitations issue and, after that was resolved, if necessary, to move onto the merits. (Ex. B, Joint Scheduling Order.) Accordingly, discovery to date has been limited to the issue of the timeliness of the State’s lawsuit. Once that was completed, on June 6, 2013, Cephalon filed a motion for summary judgment arguing that the State’s case was untimely. The State did not file a cross-motion for summary judgment. On February 21, 2014, the trial court issued an order denying Cephalon’s motion (“Order”). However, in so doing, the court below struck several of Cephalon’s limitations defenses.

II. Factual Background

Beginning over six years prior to the filing of the State’s Complaint, Cephalon’s alleged “off-label” promotion was investigated by a joint federal and state Medicaid fraud task force (the

“Federal/State Investigation”), and also by the Connecticut Attorney General who claimed violations of Connecticut’s Unfair Trade Practices Act. The state Medicaid portion of the investigation was coordinated by the National Association of Medicaid Fraud Control Units (“NAMFCU”), which was headed by South Carolina Assistant Deputy Attorney General C. William Gambrell, Jr. The Federal/State Investigation was settled in 2007 for \$425 million, with the formal agreements executed in 2008. The Federal/State Investigation, Connecticut’s investigation and the settlement of the Federal/State Investigation received substantial publicity both nationally and within South Carolina.

Evidence gathered during bifurcated discovery on the statute of limitations issue confirmed that the State knew about Cephalon’s alleged off-label marketing activities well before June 6, 2008 (three years prior to filing of the Complaint). Indeed, the State conceded this point at the hearing on Cephalon’s Motion for Summary Judgment. (Ex. C, Oct. 14, 2013 Transcript at 35:15-20.) For example, the undisputed evidence showed that between May 2005 and January 2008, Gambrell led a team formed by NAMFCU to work with the United States Attorney’s Office in Philadelphia (“USAO”) to investigate Cephalon’s marketing conduct as alleged in four federal *qui tam* False Claims Act lawsuits. (Ex. D, Memorandum of Law in Support of Cephalon’s Motion for Summary Judgment at 3, 10.) In that role, Gambrell was made privy and had access to: (1) the four federal *qui tam* False Claims Act complaints; (2) the facts underlying the allegations in the complaints; (3) evidence gathered by the government during the course of the investigation, much of which was subpoenaed from Cephalon; (4) presentations by the government to Cephalon setting forth the government’s evidence and theories; (5) off-label usage data collected from the 50 states; and (6) multiple settlement negotiation sessions with Cephalon – all more than 3 years before the State filed suit. (*Id.* at 3, 9-14.) Gambrell was also involved in the negotiation of the global federal and state Medicaid

settlement. This settlement included a payment of \$1,529,596.75 to South Carolina for its state Medicaid portion of the settlement. The global settlement was reached in principle in November, 2007 – also more than three years before the State filed suit.

During the course of his work, and more than three years before the State filed suit, ADAG Gambrell also had multiple direct communications with the Connecticut Attorney General's Office about Connecticut's separate Unfair Trade Practices investigation of the very same issues that were the subject of both the global settlement and the State's instant lawsuit ("CUTPA Investigation"). (*Id.* at 12-14.) Chief Deputy Assistant Attorney General John McIntosh, also well more than three years before the State filed suit, was informed about the specific allegations relating to Cephalon's marketing of the Medications, the Federal/State Investigation, and the global settlement in principle. (*Id.* at 3, 15-16.)

In addition, long before three years prior to the State filing suit, there was widespread publicity of the off-label marketing allegations against Cephalon. Between 2004 and 2008, the Federal/State Investigation received both local and national news coverage, including in Columbia's The State, multiple wire services (Reuters and Associated Press), the New York Times, and the Wall Street Journal, among numerous other publications. The investigation was likewise publicly disclosed in Cephalon's filings with the United States Securities and Exchange Commission. There was also extensive publicity about the CUTPA Investigation, and direct communications between the SCAG's Consumer Protection Division and the Connecticut AG's Office. Furthermore, the November 2007 global settlement generated widespread news coverage, coverage that was received directly by the SCAG in an e-mail received by Gambrell. (*Id.* at 2, 6-7, 11-12; Ex. E, Reply In Support of Cephalon's Motion at 2-3.)

III. Cephalon's Motion for Summary Judgment

Cephalon's Motion for Summary Judgment contended that the State's Complaint was time-barred for three reasons. First, the information obtained by the SCAG during the Federal/State Investigation put the State on notice of its potential claims against Cephalon prior to three years before the State filed suit. Second, the widespread publicity likewise put the State on actual and constructive notice of its potential claims. And third, the State's unjust enrichment claim was barred by the three-year limitations period of S.C. Code Ann. § 15-3-530(7) and laches.

The State responded to Cephalon's motion but did not file a cross-motion of its own. (Ex. F, State's Opposition to Cephalon's Motion for Summary Judgment.) As to the information, facts and evidence learned during the Federal/State Investigation, the State conceded that this was enough to have put it on notice of its claim more than three years before if filed suit. (*Id.* at 20, 21; Ex. C at 35:15-20.) However, the State argued that the fact that the federal *qui tam* lawsuits were under seal precluded it as a matter of law from acting on that information. (Ex. F at 13-18.) As to the widespread publicity, the State argued as a factual matter that the publicity was not widespread, and as a legal matter that constructive knowledge does not start the running of the statute of limitations under South Carolina law. (*Id.* at 21-26.) Finally, as to the unjust enrichment claim, the State contended that, as a matter of law, the three-year limitations period of S.C. Code Ann. § 15-3-530(7) did not apply and that the equitable doctrine of laches did not bar the State's claim. (*Id.* at 11-13, 27-30.)

On February 21, 2014, the trial court issued the Order. The Order largely adopted verbatim the proposed order submitted by the State. In adopting the language of the State, the Court struck statute of limitations and laches defenses raised by Cephalon as a matter of law, and

found that, with regard to a number of Cephalon's arguments, the State's Complaint was timely filed.

First, although acknowledging that the State had actual knowledge of claims through the Federal/State Investigation, the trial court held that the State, as a matter of law, was precluded from sharing or acting on the knowledge because the federal *qui tam* lawsuits were under seal. In doing so, the trial court erroneously interpreted the seal broadly to include not just pleadings but all information obtained through the State's involvement in the Federal/State Investigation, including facts and evidence, and even information obtained from Cephalon itself. The trial court concluded that:

Accordingly, **I find that the State's interpretation of the scope and purpose of the federal seal is correct.** By virtue of the seal and the federal court orders, the State was prohibited from making public any information it obtained solely through its involvement in the joint federal/state investigation. While former Attorney General McMaster, CDAG McIntosh, and ADAG Gambrell had actual knowledge, to varying degrees, of the conduct at issue in this action, **the federal seal prevented them from disclosing that information to the civil section and filing an action** based upon that information on behalf of the State of South Carolina.

(Ex. G, Order at 10 (emphasis added).)

Having determined that the seal prevented individuals with knowledge from disclosing the Federal/State Investigation, the trial court then concluded that, as a matter of law, the seal tolled the applicable statute of limitations. (*Id.* at 11.) In reaching this result, the trial court effectively shut the door on Cephalon's statute of limitations defense by ruling as follows:

Accordingly, in this case **I find that the statute of limitations period was tolled during the time the federal *qui tam* cases were subject to seal** thereby preventing the members of the Attorney General's office with knowledge from acting on that knowledge. As such, **the applicable stat[ute] of limitations was tolled** until September 29, 2008. Because the State filed its SCUTPA action within three years of that date, **the action was timely.**

(*Id.* at 14 (emphasis added).)

Second, the trial court also disposed of Cephalon's statute of limitations and laches defenses to the unjust enrichment claim as a matter of law. It ruled that the claim was not filed on the "ground of fraud" so that the three-year statute of limitations did not apply and found that Cephalon had not otherwise established a case for the application of laches. (*Id.* at 22-23.) The trial court left no room for further argument on this point, holding that "[a]ccordingly, **the State's claim for recovery on the doctrine of unjust enrichment is timely.**" (*Id.* at 23 (emphasis added).)

Finally, as to Cephalon's statute limitations defense based on constructive knowledge through widespread publicity, the trial court held as a matter of law that "constructive notice by publicity is not the law of South Carolina." (*Id.* at 16.) In what appears to be a direct inconsistency, the Order later says that "[t]he question of whether the publicity Cephalon cites is sufficient to put the State on constructive notice is a question of fact to be determined at trial." (*Id.* at 21.) However, if constructive knowledge by publicity is not the law of South Carolina as the trial court explicitly ruled, there is no set of facts that could be offered to establish this defense. Thus, Cephalon's constructive notice defense has been stricken as well.¹

ARGUMENT

I. S.C. Code Ann. § 14-3-330

As a general rule, orders denying summary judgment are not appealable. This case is different. It does not present just a denial of summary judgment. Instead, the trial court went beyond simply denying summary judgment and struck Cephalon's statute of limitations and

¹ For the reasons described below, even if the trial court had not struck the constructive notice defense, its striking of the other limitations defenses warrants appeal.

laches defenses, disposing of them finally and as a matter of law.² Subsections (1) and (2) of S.C. Code Ann. § 14-3-330, therefore, provide separate and distinct grounds for appellate jurisdiction over the Order. *See Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 5, 393 S.E.2d 176, 178 (1990).

As explained by the South Carolina Supreme Court, “determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330.” *Baldwin Constr. Co., Inc. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). S.C. Code Ann. § 14-3-330 states that this Court “**shall** have appellate jurisdiction” and “**shall** review upon appeal” of:

(1) Any intermediate judgment, order or decree in a law case **involving the merits in actions** commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions;

....

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or **(c) strikes out an answer or any part thereof or any pleading in any action**[.]

(emphasis added.) Thus, under the plain language of the statute, Cephalon may take an immediate appeal in this case since the trial court’s order strikes a portion of Cephalon’s answer. In addition, Cephalon may appeal now because the trial court’s order involves the merits of the action.

² To the extent this Court disagrees with Cephalon’s arguments and finds that the Order is not appealable pursuant to S.C. Code Ann. § 14-3-330, Cephalon reserves the right to revisit these issues as allowed by the South Carolina Rules of Civil Procedure.

II. Cephalon is Entitled to Appeal Because the Order Strikes Part of its Answer

S.C. Code Ann. § 14-3-330(2) provides a right to appeal for any order that “strikes out an answer **or any part thereof.**” (emphasis added). Where, as here, an order strikes a defense, the order is immediately appealable. *Link*, 302 S.C. at 6, 393 S.E.2d at 179 (holding that an order that “has the effect of striking out a pleading” is immediately appealable under S.C. Code Ann. § 14-3-330(2)(c)); *Jefferson v. Gene’s Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988) (allowing the immediate appeal of an order that “finally determines **some substantial matter forming the whole or a part of some . . . defense**”) (emphasis added).

Here, the trial court held repeatedly that the action was timely and that the limitations defenses raised by Cephalon did not bar the State’s claims. The Court’s rulings (1) that the *qui tam* seal applied to any information South Carolina had regarding Cephalon’s conduct obtained through the Federal/State Investigation and prevented the State from acting on that information; (2) that the State’s unjust enrichment claims are not subject to a three-year statute of limitations or laches, struck those defenses; and (3) that South Carolina does not recognize that constructive knowledge can trigger the statute of limitations.

Moreover, in reviewing the Order, the Court is to consider its language and effect as a whole. *See, e.g., White’s Mill Colony, Inc. v. Williams*, 363 S.C. 117, 124, 609 S.E.2d 811, 814 n.1 (Ct. App. 2005) (“In construing a judge’s order, we must do so in light of the judge’s intent as discerned from the order as a whole.”); *Eddins v. Eddins*, 304 S.C. 133, 135-136, 403 S.E.2d 164, 166 (Ct. App. 1991) (quoting the rules of construction for judgments as follows: “effect must be given to that which is unavoidably and necessarily implied in a judgment, as well as to that which is expressed in the most appropriate language”).

In its Motion, the State cites to a few cases where denials of summary judgment were not appealable. (Motion at 4.) Those cases are inapposite. In all of them, the underlying orders did

not finally dispose of an issue in a way that struck a defense. Rather, they were simply garden variety denials of motions for summary judgment. For instance, in contrast to the instant matter, in *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), under the trial court's order, the question of whether the plaintiffs complied with the applicable limitations period **"remained one the circuit court had to answer at trial."** *Id.* at 307 (emphasis added). Similarly, in *Davis v. Tripp*, there was no contention that the trial court's order struck a defense. In fact, the defendant in that case proceeded to trial and appears only to have raised the trial court's statute of limitations decision after losing on the merits. 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999).

However, as required by S.C. Code Ann. § 14-3-330(2), where a court goes beyond denying summary judgment and "strikes out an answer or any part thereof," South Carolina courts have found the order immediately appealable. Thus, in *Ex parte South Carolina Farm Bureau Mut. Ins. Co.*, 314 S.C. 487, 443 S.E.2d 379 (1993) (*overruled in part by Ballenger v. Bowen*, 313 S.C. 476 (1994)), the trial court denied the defendant's motion for summary judgment arguing that the case was barred by the statute of limitations. *Id.* at 488. The South Carolina Supreme Court held that the decision could be immediately appealed because the **"Order on appeal . . . in effect, strikes a portion of the [Defendant's] Answer and, therefore, is appealable pursuant to S.C. Code Ann. § 14-3-330(2)(c)."** *Id.* at 488 n.2 (emphasis added); *cf. Ballenger v. Bowen*, 313 S.C. 476, 478, 443 S.E.2d 379, 380 (1994) (explaining that an appeal is not available where the "defense may be raised again later in the proceedings."); *see also Menezes v. WL Ross & Co. LLC*, 392 S.C. 584, 589 n.7, 709 S.E.2d 114, 117 n.7 (Ct. App. 2011) *aff'd in part, rev'd in part*, 403 S.C. 522, 744 S.E.2d 178 (2013) (finding in case where party appealed order striking defenses on motion to dismiss or for summary judgment, "Menezes filed a motion to dismiss the appeal arguing the order was interlocutory. A

single judge denied the motion but limited appellate review to the dismissal of Appellants' counterclaims and the striking of their affirmative defenses citing section 14-3-330(2)(c) of the South Carolina Code (1977)"). Here, like *Farm Bureau* but unlike *Ballenger*, the court struck statute of limitations defenses raised by Cephalon. Thus, the Order fits squarely within the plain language of S.C. Code Ann. § 14-3-330(2) and is immediately appealable.

Accordingly, because the Order strikes Cephalon's statute of limitations and laches defenses as a matter of law, Cephalon has a right to an immediate appeal.

III. Cephalon is also Entitled to Appeal Because the Order Involves the Merits

Cephalon also has a statutory right to an immediate appeal under S.C. Code Ann. § 14-3-330(1). That section explicitly provides that the appellate court "shall review upon appeal" any "intermediate judgment, **order** or decree in a law case **involving the merits.**" (emphasis added). An order involving the merits "is one that must finally determine some substantial matter forming **the whole or a part** of some cause of action or **defense.**" *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (quotations omitted) (emphasis added); see *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 466 (2006) (holding that "[a]n order 'involves the merits,' as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense"). As discussed above, the Order made repeated, erroneous legal rulings disposing of Cephalon's argument that the action was time-barred as a matter of law. The Order involved the merits because, as explained by the South Carolina Supreme Court in *Edwards*, it "finally determined" a substantial matter forming several of Cephalon's defenses. See *Edwards*, 369 S.C. at 94, 631 S.E.2d at 530. Thus, because the Order involves the merits, it is also immediately appealable.

IV. The Court Should Review the Order in its Entirety

Given the above arguments, Cephalon respectfully submits that this Court should review the Order in its entirety. *See* Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 88 (2d ed. 2002) (“Where there is a single order that is admittedly appealable in part, the entire order should be considered upon the appeal.”). South Carolina appellate courts have repeatedly held that, in an interlocutory appeal, the Court can and should review all related rulings in the order under appeal. *See, e.g., Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (“An order that is not directly appealable may be considered if there is an appealable issue before the court.”); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) (“This Court reviews interlocutory orders when they contain other appealable issues.”); *Briggs v. Richardson*, 273 S.C. 376, 379, 256 S.E.2d 544, 546 n.1 (1979); *Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 635 n.14, 670 S.E.2d 680, 687 n.14 (Ct. App. 2008) (“[C]ourt may review an interlocutory order when the order is coupled with an appealable issue.”). This straightforward rule controls here. There is only one order on appeal, and the legal issues raised, as between the trial court’s findings that this action was timely and Cephalon’s summary judgment motion, are identical. For that reason, this appeal should address the entire Order.

As an additional reason to allow review of the entire Order, South Carolina law allows review of issues in the interests of judicial economy, including matters that would not otherwise be appealable. *See, e.g., Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006); *Ex parte Wilson*, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005). Thus, this Court is free to resolve all matters of law relating to the timeliness of the State’s filing of its Complaint to the extent such a ruling would obviate the need for a trial or streamline the issues to be determined at trial. To the extent the Court determines that this action was not timely filed as a

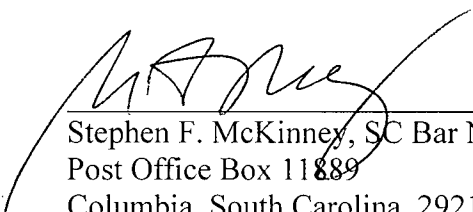
matter of law, it may direct that judgment be entered in favor of Cephalon. *See Campbell v. Hilton Head No. 1 Pub. Serv. Dist.*, 354 S.C. 190, 197, 580 S.E.2d 137, 141 (2003) (reversing the trial court's grant of summary judgment in favor of respondent, and instead finding "summary judgment should have been granted in appellants' favor" in appeal following cross-motions for summary judgment).

CONCLUSION

Because the Order effectively struck the statute of limitations and laches defenses raised by Cephalon, the appeal is proper and the State's motion should be denied.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, PA



Stephen F. McKinney, SC Bar No. 11833
Post Office Box 11889
Columbia, South Carolina 29211
(803) 779-3080

Sarah P. Spruill, SC Bar No. 68337
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

Attorneys for Appellant

April 7, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin

C.A. No. 2011-CP-40-3661

State of South Carolina, ex rel. Alan Wilson,
in his official capacity as Attorney General
for the State of South Carolina,

Respondent,

v.

Cephalon, Inc.

Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Return to Motion to Dismiss on
Respondent, the State of South Carolina, by hand delivery, on April 7, 2014, addressed to
the State's counsel of record:

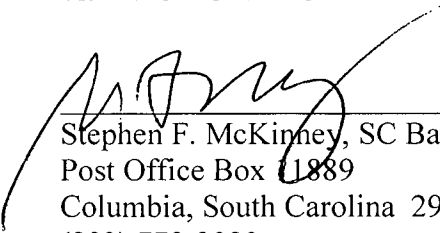
Kenneth M. Suggs, Esq.
Gerald Jowers, Esq.
Janet, Jenner & Suggs, LLC
500 Taylor Street, Suite 301
Columbia, South Carolina 29201

J. Todd Rutherford, Esq.
Rutherford Law Firm, LLC
2113 Park Street
Columbia, South Carolina 29201

C. Havird Jones, Jr., Esq.
Assistant Deputy Attorney General
1000 Assembly Street, Room 519
Columbia, South Carolina 29201

RECEIVED
APR 07 2014
SC Court of Appeals

HAYNSWORTH SINKLER BOYD, PA



Stephen F. McKinney, SC Bar No. 11833

Post Office Box 1889

Columbia, South Carolina 29211

(803) 779-3080

Sarah P. Spruill, SC Bar No. 68337

Post Office Box 2048

Greenville, South Carolina 29602

(864) 240-3200

Attorneys for Appellant

EXHIBIT A

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

STATE OF SOUTH CAROLINA, ex rel.
ALAN WILSON, in his official Capacity
as Attorney General for the State of
South Carolina)

Plaintiff,)

CEPHALON, INC.)

Defendant.)

IN THE CIRCUIT COURT

Civil Action No. 2011-CP-40-3661

JEANETTE W. MCBRIDE
C.C.P. & G.S.

2011 JUL -5 PM 4:24

RICHLAND COUNTY
FILED

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT

Defendant Cephalon, Inc. ("Cephalon") answers the Complaint filed by the State of South Carolina ("plaintiff") and pleads affirmative defenses as follows:

**FOR A FIRST DEFENSE TO THE INTRODUCTORY
PARAGRAPH AND FACTUAL ALLEGATIONS OF THE COMPLAINT**

1. Each and every allegation of the Complaint not hereinafter specifically admitted is denied and strict proof thereof is demanded.
2. After taking office on January 30, 2011, Attorney General Wilson announced that, in facing the challenge of managing his office with less money, his Office had the potential to raise "significant revenue" through investigations and lawsuits. He added that he was "thinking outside the box" on how to bring in more money.
3. Within days of that pronouncement, in early February, 2011, one of plaintiff's deputies called Cephalon's General Counsel, himself a former state Attorney General, to "discuss" claims the Attorney General purported to have against the company. Those claims turned out to be a demand based on matters known to the South Carolina Attorney General's Office ("SCAG") for over six (6) years. As the below demonstrates, however, this case is clearly

time-barred by the three (3) year limitations period in § 39-5-150 of the South Carolina Unfair Trade Practices Act ("SCUTPA").

4. The State of South Carolina files this lawsuit in 2011 despite having been on notice of its purported claims for more than six (6) years and having taken no action to preserve them. It does so despite the fact that the statute under which it proceeds, SCUTPA, S.C. CODE ANN. §§ 39-5-10, *et seq.*, unequivocally provides that: "*No action may be brought . . . more than three years after the discovery of the unlawful conduct which is the subject of the suit.*" § 39-5-150 of SCUTPA (emphasis added).

5. Specifically, as far back as at least 2004, the SCAG became directly involved in the investigation of the very claims it now makes. That investigation followed the filing of the first of a series of four federal and state *qui tam* civil False Claims Act lawsuits (collectively referred to as the "*qui tam* False Claims Act lawsuits"). The investigation was conducted by a state task force headed by a South Carolina Assistant Deputy Attorney General and the United States Attorney's Office for the Eastern District of Pennsylvania ("U.S. Attorney's Office"). Following extensive negotiations between Cephalon, the South Carolina Assistant Deputy Attorney General, and the U.S. Attorney's Office, an agreement in principle was reached on September 14, 2007, over three (3) and one-half years ago, settling all state Medicaid and all federal claims and the *qui tam* False Claims Act lawsuits. At that time, the agreement in principle as to South Carolina's state Medicaid claim was approved by the SCAG. Cephalon denies that plaintiff is entitled to obtain civil penalties against Cephalon for any alleged violation of SCUTPA or for alleged violations of common law and this action should be dismissed in its entirety.

6. The allegations of the introductory paragraph of the Complaint are denied as alleged. Cephalon admits only that plaintiff purports to bring this action "by and through its Attorney General," but denies that plaintiff properly brings this action in this or any other purported capacity. Cephalon denies any remaining averments of fact in this paragraph

7. The allegations of paragraph 1 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

8. The allegations of paragraph 2 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact they are admitted in part and denied in part. Cephalon admits only that the SCAG purports to "appear in this action pursuant to his *parens patriae*, constitutional, statutory (S.C. CODE ANN. § 1-7-100 and S.C. CODE ANN. § 39-5-10, *et seq.*), and common law authority" as the chief legal officer of the State of South Carolina. Cephalon denies that plaintiff properly brings this action in those or any other purported capacities. Cephalon denies any remaining averments of fact in this paragraph.

9. The allegations of paragraph 3 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact they are admitted in part and denied in part. Cephalon admits only that it is a Delaware corporation with its principal place of business in Frazer, Pennsylvania. Cephalon denies any remaining averments of fact in this paragraph.

10. The allegations of paragraphs 4 and 5 of the Complaint are conclusions of law to which no response is required, and Cephalon denies them. To the extent that they are construed as averments of fact, they are denied.

11. The allegations of paragraph 6 of the Complaint are admitted in part and denied in part. Cephalon admits only that, pursuant to approval by the FDA, its products are prescribed throughout the United States, including in the State of South Carolina. Cephalon denies any remaining averments of fact in this paragraph.

12. The allegations of paragraph 7 of the Complaint are admitted in part and denied in part. Cephalon admits that, pursuant to approval by the FDA, Cephalon develops, manufactures, markets and sells pharmaceutical products. Cephalon denies any remaining averments of fact in this paragraph.

13. The allegations of paragraph 8 of the Complaint are admitted in part and denied in part. Cephalon admits only that, pursuant to approval by the FDA, its products are prescribed throughout the United States, including in the State of South Carolina. Cephalon denies any remaining averments of fact in this paragraph.

14. The allegations of paragraph 9 of the Complaint are admitted in part and denied in part. Cephalon admits only that, pursuant to approval by the FDA, its products are prescribed throughout the United States, including in the State of South Carolina. Cephalon denies any remaining averments of fact in this paragraph.

15. The allegations of paragraphs 10 and 11 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

16. The allegations of paragraph 12 of the Complaint are admitted in part and denied in part. Cephalon admits only that plaintiff purports to bring this action under state law. The remaining averments in this paragraph are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

17. The allegations of paragraph 13 of the Complaint are admitted in part and denied in part. Cephalon admits only that plaintiff purports to bring this action under state law. By way of further response, Cephalon states that plaintiff's claims require judicial resolution of substantial federal questions under the Federal Medicaid Statute, 42 U.S.C. § 1396, *et seq.*, and the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, and are founded on the interpretation of federal law. Cephalon denies any remaining averments of fact in this paragraph and denies that plaintiff is entitled to the relief it seeks.

18. The allegations of paragraphs 14, 15, 16 and 17 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

REGULATORY AND LEGAL BACKGROUND

19. The allegations of paragraphs 18, 19, 20 and 21 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

20. The allegations of paragraph 22 of the Complaint are denied. The FDA approved labels for Provigil, Gabitril and Actiq are documents that speak for themselves and plaintiff's characterizations thereof are denied. Cephalon denies any remaining averments of fact in this paragraph.

21. The allegations of paragraph 23 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are admitted in part and denied in part. Cephalon admits only that prescribing drugs for off-label uses is neither improper nor illegal. Cephalon denies any remaining averments of fact in this paragraph.

22. The allegations of paragraphs 24, 25, 26, 27, 28 and 29 of the Complaint are conclusions of law to which no response is required. To the extent they are construed as averments of fact, they are denied.

FACTUAL BACKGROUND

23. The allegations of paragraph 30 of the Complaint are denied. Cephalon denies that it "promoted Provigil, Gabitril, and Actiq for unapproved uses from at least January 1, 2001 until at least December 31, 2006 in an effort to expand sales and market share." The remaining averments in this paragraph are conclusions of law to which no response is required, and they are denied.

24. The allegations of paragraphs 31, 32, 33 and 34 of the Complaint are denied.

25. The allegations of paragraph 35 of the Complaint are admitted in part and denied in part. Cephalon admits only that under certain circumstances, irrespective of whether used on or off-label, Gabitril and Actiq, as do many prescription medications, carry certain risks. Cephalon denies any remaining averments of fact in this paragraph.

26. The allegations of paragraph 36 of the Complaint are denied. Cephalon denies that it adopted an unfair or deceptive marketing or promotion strategy for Actiq. By way of further response, upon information and belief, the quoted language plaintiff purports to attribute to Cephalon's CEO appeared in a press release issued by the Attorney General of Connecticut dated September 29, 2008. The Connecticut Attorney General's press release is a writing which speaks for itself and plaintiff's characterization thereof is denied. Cephalon denies any remaining averments of fact in this paragraph.

27. The allegations of paragraph 37 of the Complaint are denied.

28. The allegations of paragraph 38 of the Complaint are admitted in part and denied in part. Cephalon admits only that the FDA issued a letter in January 2002 regarding Provigil. To the extent that the averments in this paragraph purport to be based on written documentation, that documentation, being in writing, speaks for itself and plaintiff's characterization thereof is denied.

29. The allegations of paragraph 39 of the Complaint are admitted in part and denied in part. Cephalon admits only that the FDA issued a public health advisory in February 2005 regarding Gabitril. To the extent that the averments in this paragraph purport to be based on written documentation, that documentation, being in writing, speaks for itself and plaintiff's characterization thereof is denied.

30. The allegations of paragraph 40 of the Complaint are admitted in part and denied in part. Cephalon admits only that the FDA issued a letter in February 2007 regarding Provigil. To the extent that the averments in this paragraph purport to be based on written documentation, that documentation, being in writing, speaks for itself and plaintiff's characterization thereof is denied.

31. The allegations of paragraph 41 of the Complaint are denied.

32. The allegations of paragraphs 42 and 43 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

33. The allegations of paragraph 44 of the Complaint are denied.

THE FEDERAL GUILTY FLEA

34. The allegations of paragraph 45 of the Complaint are denied as stated. From 2003 to 2005 four *qui tam* False Claims Act lawsuits were commenced against Cephalon under federal

and several state False Claims Acts. Amended complaints in two of those lawsuits were filed in January and April, 2008. At least as early as 2004, a lengthy state and federal investigation into the allegations in the lawsuits was commenced and conducted by the U.S. Attorney's Office and a state task force. The state task force was headed by South Carolina Assistant Deputy Attorney General C. William Gambrell, Jr. ("Gambrell"). As head of the state task force, Gambrell was involved in the investigation of the allegations against Cephalon, as well as the ensuing settlement negotiations with Cephalon. Cephalon denies any remaining averments of fact in this paragraph.

35. The allegations of paragraph 46 of the Complaint are admitted in part and denied in part. Cephalon admits only that pursuant to 31 U.S.C. § 3730(b)(2) a *qui tam* False Claims Act complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." The sealing applies to the defendant in the matter and the general public. The government is served with a copy of the complaint upon filing and, as it did here, investigates the allegations contained in it as well as any other issues that may arise from leads developed during the investigation. Cephalon denies any remaining averments in this paragraph.

36. After reasonable investigation, Cephalon is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 47 and denies them.

37. The allegations of paragraph 48 of the Complaint are admitted in part and denied in part. It is admitted only that the Honorable Thomas J. O'Neill, Jr., issued an Order dated September 25, 2008 providing that, with respect to the four *qui tam* False Claims Act lawsuits, "[t]he seal shall be lifted on all pleadings filed in these actions after the filing of the United States' Notice of Intervention," which Order is attached as Exhibit A to the Complaint.

Thereafter, the complaints in the four *qui tam* False Claims Act lawsuits were provided to Cephalon and available to the general public. Cephalon denies any remaining averments of fact in this paragraph.

38. The allegations of paragraph 49 of the Complaint are admitted in part and denied in part. It is admitted only that the United States filed a document on September 29, 2008 in the four *qui tam* False Claims Act lawsuits entitled "United States Notice of Intervention for Purposes of Settlement." Cephalon denies any remaining averments of fact in this paragraph.

39. The allegations of paragraph 50 of the Complaint are admitted in part and denied in part. Cephalon admits only that it signed a Guilty Plea Agreement in 2008, a copy of which is attached as Exhibit B to the Complaint. The remaining averments in this paragraph are denied to the extent they purport to characterize writings that speak for themselves and are otherwise denied. Cephalon denies any remaining averments of fact in this paragraph.

40. The allegations of paragraph 51 of the Complaint are denied. The Guilty Plea Agreement is a document that speaks for itself and plaintiff's characterization thereof is denied. Cephalon denies any remaining averments of fact in this paragraph.

41. The allegations of paragraph 52 of the Complaint are admitted in part denied in part. It is admitted only that Cephalon pleaded guilty to a one-count misdemeanor of off-label promotion of Provigil, Gabitril and Actiq for the period January 1, 2001 to October 1, 2001, a strict liability offense requiring no proof of willfulness. The Guilty Plea Agreement is a document that speaks for itself and plaintiff's characterization thereof is denied. Cephalon denies any remaining averments of fact in this paragraph.

42. The allegations of paragraph 53 of the Complaint are denied as stated. Cephalon admits only that on September 14, 2007, following negotiations by and with, among others, the

SCAG, U.S. Attorney's Office, Cephalon and the individual States, including South Carolina, reached an agreement to settle claims asserted by the United States concerning federal programs, the States concerning their Medicaid programs, and the allegations in the *qui tam* False Claims Act lawsuits. The settlement was later embodied in written settlement agreements between Cephalon and the United States, and between Cephalon and each of the 50 states, including South Carolina. The South Carolina Medicaid settlement was approved and later executed by then South Carolina Attorney General Henry McMaster. Cephalon denies any remaining averments of fact in this paragraph.

43. The allegations of paragraph 54 and 55 of the Complaint are denied.

COUNT I

Civil Penalties - Provider

44. Answering the allegations of paragraph 56 of the Complaint, Cephalon incorporates by reference the foregoing responses as if set forth at length herein.

45. The allegations of paragraphs 57, 58, 59, 60 and 61 of the Complaint are conclusions of law to which no response is required. To the extent they are construed as averments of fact, they are denied.

COUNT II

Civil Penalties - Gabitril

46. Answering the allegations of paragraph 62 of the Complaint, Cephalon incorporates by reference the foregoing responses as if set forth at length herein.

47. The allegations of paragraphs 63, 64, 65, 66 and 67 of the Complaint are conclusions of law to which no response is required. To the extent they are construed as averments of fact, they are denied.

COUNT III

Civil Penalties - Actia

48. Answering the allegations of paragraph 68 of the Complaint, Cephalon incorporates by reference the foregoing responses as if set forth at length herein.
49. The allegations of paragraphs 69, 70, 71, 72 and 73 of the Complaint are conclusions of law to which no response is required. To the extent they are construed as averments of fact, they are denied.

COUNT IV

Unjust Enrichment, Restitution, Disgorgement

50. Answering the allegations of paragraph 74 of the Complaint, Cephalon incorporates by reference the foregoing responses as if set forth at length herein.
51. The allegations of paragraph 75 are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.
52. The allegations of paragraph 76 of the Complaint are denied.
53. The allegations of paragraphs 77 and 78 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.
54. The allegations of paragraph 79 of the Complaint are denied.
55. The allegations of paragraphs 80, 81 and 82 of the Complaint are conclusions of law to which no response is required, and Cephalon denies them. To the extent that they are construed as averments of fact, they are denied.

WHEREFORE, Cephalon requests that plaintiff's Complaint be dismissed and that all costs, attorney's fees, and all other appropriate relief be assessed against plaintiff and in favor of Cephalon.

AFFIRMATIVE DEFENSES

In further response to the Complaint, Cephalon pleads the following affirmative defenses. By asserting these defenses, Cephalon does not assume any burden of proof not otherwise legally assigned to it.

FIRST AFFIRMATIVE DEFENSE

56. Plaintiff's claims are barred by the three (3) year limitation under § 39-5-150 of SCUTPA. That section provides: "No action may be brought . . . more than three years after the discovery of the unlawful conduct which is the subject of the suit."

The SCAG has been on notice of its purported claims for well beyond three (3) years. From 2003 to 2005, four *qui tam* False Claims Act lawsuits were filed against Cephalon under the federal and several state False Claims Acts (collectively referred to as the "*qui tam* False Claims Act lawsuits"). Those lawsuits alleged, *inter alia*, that Cephalon was engaging in precisely the same underlying conduct alleged here, the off-label promotion of Provigil, Gabitril and Actiq. The lawsuits contended that this off-label promotion caused losses to Medicare, and the state and federal Medicaid programs.

Procedurally, a *qui tam* False Claims Act lawsuit is filed under seal and not immediately served on the defendant in the action. Instead, the complaints are served on the federal and state governments. The allegations contained in them, and any ensuing leads, are investigated by those governments, often for years. The governments then decide whether to intervene in the matter and proceed with the suit as if it is their own. At that point, the lawsuit is unsealed,

served on the defendant and available in the public record. The case then proceeds like any other civil litigation.

A state task force was created at that time to investigate the matter along with the U.S. Attorney's Office. The state task force was coordinated through the National Association of Medicaid Fraud Control Units ("NAMFCU") which represented the interests of the fifty states. Gambrell was selected to serve as the chair of the NAMFCU task force. As such, Gambrell oversaw the investigation of the alleged off-label marketing of the Drugs on behalf of the states. Additionally, on information and belief, as chair of the NAMFCU task force, Gambrell was provided with copies of the *qui tam* False Claims Act lawsuits beginning at least as early as 2004. In any event, Gambrell was privy to the issues under investigation, the alleged off-label marketing of Provigil, Gabitril and Actiq, and the information gathered during the course of the investigation.

As chair of the NAMFCU task force, Gambrell also played a pivotal role in negotiating the ensuing settlement with Cephalon. Gambrell personally attended three negotiating sessions between the NAMFCU task force, the U.S. Attorney's Office, and Cephalon on May 31, July 23 and August 29, 2007. During those sessions, Gambrell identified himself as the "head" of the NAMFCU negotiating team and participated extensively in settlement negotiations. Moreover, following the August 29, 2007 meeting, settlement negotiations continued by way of email and telephone correspondence to which Gambrell was a party. These negotiations all occurred more than three (3) years before the filing of the Complaint here.

On September 14, 2007, as a result of those negotiations, Gambrell's NAMFCU task force, the U.S. Attorney's Office and Cephalon reached an agreement to settle the matter. The settlement was between Cephalon, the United States (for Medicare and Medicaid) and all 50

states, including South Carolina, and the District of Columbia (for the state funded Medicaid programs). Cephalon publicly announced this settlement in a November 8, 2007 press release, attached hereto as Exhibit A, and in its Form 10-Q filed with the Securities and Exchange Commission on November 9, 2007, the relevant portion of which is attached hereto as Exhibit B. The state Medicaid settlement was approved by all of the states' respective attorneys general, including Gambrell's then boss, South Carolina Attorney General Henry McMaster. These settlements were reached more than three (3) years before the filing of the Complaint here. It was only because of lengthy negotiations with the Department of Health and Human Services' Office of Inspector General that the written agreements were not executed until beginning in September, 2008.

Two states, Connecticut and Massachusetts, proceeded in a timely manner with claims under their state statutes. The Connecticut Attorney General asserted a claim under the Connecticut Unfair Trade Practices Act ("CUTPA") and the Massachusetts Attorney General asserted a claim under her state's consumer protection statute.

Gambrell was fully aware that the Connecticut Attorney General was pursuing his CUTPA claims. A Connecticut Assistant Attorney General, Rob Deichert ("Deichert"), joined Gambrell at the previously referenced May 31 and August 29, 2007 negotiations. Deichert's stated purpose at the meeting was to represent Connecticut's interests with respect to the Connecticut Attorney General's CUTPA claims, separate and apart from his state's interest in the NAMFCU group. Massachusetts pursued its consumer protection law claims in 2007 as well, again separate from that state's participation in NAMFCU. Both Connecticut's and Massachusetts' claims were settled prior to the execution of the formal *qui tam* False Claims Act settlement documentation.

Other than Connecticut and Massachusetts, with the exception of South Carolina's untimely demand, no other state has pursued an unfair trade practices act or consumer protection claim against Cephalon based on the matters settled in 2007.

Accordingly, the SCAG has been on notice of its purported claims against Cephalon since at least 2004. Plaintiff's claims are therefore barred under § 39-5-150 of SCUTPA.

SECOND AFFIRMATIVE DEFENSE

57. Plaintiff's claims are barred, in whole or in part, by the applicable prescriptive periods, statutes of repose and statutes of limitations, by the doctrines of laches, and/or by any and all legislative or administrative restrictions on the time within which plaintiff, its agencies or the unidentified individuals whom it purports to represent are required to commence an action.

THIRD AFFIRMATIVE DEFENSE

The Complaint fails to state facts upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

58. The granting of relief prayed for in the Complaint would impede, impair, frustrate, or burden the effectiveness of federal law, including the Medicaid laws, the federal Food, Drug and Cosmetic Act, and the regulations promulgated thereunder. Plaintiff's claims are also barred, in whole or in part, because the federal government has preempted the applicable field of law. In particular, the FDA is vested with exclusive regulatory authority and possesses the expertise to determine the content and acceptability of material disseminated to healthcare providers regarding prescription drugs. In addition, plaintiff does not have the right to enforce the federal Food, Drug, and Cosmetic Act. Furthermore, to the extent that plaintiff's claims are based on alleged misrepresentations made to the FDA, the claims are barred pursuant to

Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2000). Moreover, Cephalon acted in good faith regarding applicable federal statutes, rules and regulations.

FIFTH AFFIRMATIVE DEFENSE

59. Plaintiff's claims are barred, in whole or in part, because the Attorney General lacks standing to seek actual and treble damages under the SCUTPA, S.C. CODE ANN. §§ 39-5-50; 39-5-110.

SIXTH AFFIRMATIVE DEFENSE

60. Plaintiff's claims are barred, in whole or in part, by SCUTPA, S.C. CODE ANN. § 39-5-40(a).

SEVENTH AFFIRMATIVE DEFENSE

61. Plaintiff's claims are barred, in whole or in part, because the SCUTPA is unconstitutionally vague as applied under the circumstances and/or in general.

EIGHTH AFFIRMATIVE DEFENSE

62. Plaintiff's claims are barred, in whole or in part, because plaintiff did not purchase Provigil, Gabitril and/or Actiq.

NINTH AFFIRMATIVE DEFENSE

63. Cephalon's marketing and labeling of Provigil, Gabitril and/or Actiq were truthful and non-misleading and constituted lawful and constitutionally protected scientific and/or commercial speech under the First Amendment to the Constitution of the United States and Article I, Section 2 of the South Carolina Constitution.

TENTH AFFIRMATIVE DEFENSE

64. Any award of statutory penalties in this action would violate the Fourth, Fifth, Eighth, Due Process Clause, and Fourteenth Amendments to the Constitution of the United

States. An award of statutory or punitive damages would violate Cephalon's rights to due process, and any claim for punitive damages thus is barred by the Constitutions of the United States and the State of South Carolina. Plaintiff's request for actual or compensatory damages violates the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States because the unquantifiable damages sought constitute an excessive and arbitrary punishment that furthers no legitimate purpose, and, thus, is an arbitrary deprivation of property. Plaintiff's request for penalties violates the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States inasmuch as the requested penalties are purely punitive, do not bear any relation to either actual damages or government enforcement costs, and are unreasonably excessive.

ELEVENTH AFFIRMATIVE DEFENSE

65. Plaintiff's claims are barred, in whole or in part, because Cephalon did not actually deceive plaintiff or the entities or persons on whose behalf plaintiff purports to bring this action.

TWELFTH AFFIRMATIVE DEFENSE

66. Plaintiff's claims are barred, in whole or in part, by the learned intermediary and sophisticated user doctrines.

THIRTEENTH AFFIRMATIVE DEFENSE

67. Cephalon is not liable to plaintiff because of the superseding, intervening, independent conduct of other persons who have broken the causal chain between any of the liability-causing conduct alleged by plaintiff against Cephalon, which conduct is denied, and any harm suffered by plaintiff or the entities or persons on whose behalf plaintiff purports to bring this action.

FOURTEENTH AFFIRMATIVE DEFENSE

68. Restitution is impossible to assess or to quantify based on the vague and cursory averments in the Complaint. Indeed, the averments are so vague that plaintiff cannot establish that Cephalon's alleged conduct proximately caused any harm or loss to plaintiff or any unidentified South Carolina citizens. To the extent plaintiff's claims are premised on a theory of liability without actual proof of proximate causation or reliance, the claims violate Cephalon's rights to substantive and procedural due process of law and to equal protection under the law, which rights are guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by the South Carolina Constitution.

FIFTEENTH AFFIRMATIVE DEFENSE

69. Plaintiff's claims and any relief thereon are barred, in whole or in part, by the doctrines of waiver, estoppel, unclean hands, collateral estoppel, and/or *res judicata*.

SIXTEENTH AFFIRMATIVE DEFENSE

70. Plaintiff's claims are barred, in whole or in part, because plaintiff lacks standing to pursue them.

SEVENTEENTH AFFIRMATIVE DEFENSE

71. Plaintiff's claims are barred, in whole or in part, to the extent that plaintiff or the entities or persons on whose behalf plaintiff purports to bring this action and/or participants in plaintiff's programs have released, settled, discharged, entered into an accord and satisfaction, otherwise compromised their claims, received an adverse judgment on their claims, or had their claims dismissed with prejudice.

EIGHTEENTH AFFIRMATIVE DEFENSE

72. Plaintiff's claims are barred, in whole or in part, pursuant to the benefit-of-the-bargain rule.

NINETEENTH AFFIRMATIVE DEFENSE

73. Plaintiff is not entitled to recover in this action any penalties or damages allegedly caused by Provigil, Gabitril, and/or Actiq, because patients who received Provigil, Gabitril and/or Actiq were determined by their physicians to be appropriate candidates for Provigil, Gabitril and/or Actiq treatment.

TWENTIETH AFFIRMATIVE DEFENSE

74. Plaintiff's claims are barred, in whole or in part, because individuals who were prescribed Provigil, Gabitril and/or Actiq, and whose prescriptions and claims are implicated in the Complaint, received a net benefit from taking Provigil, Gabitril and/or Actiq.

TWENTY-FIRST AFFIRMATIVE DEFENSE

75. Plaintiff's claims are barred, in whole or in part, because plaintiff, its agents, and/or the entities or persons on whose behalf plaintiff purports to bring this action and/or participants in plaintiff's programs have failed to exercise reasonable care and diligence and failed to mitigate their alleged damages.

TWENTY-SECOND AFFIRMATIVE DEFENSE

76. Plaintiff's claims are barred, in whole or in part, by the doctrine of consent and/or ratification to the extent that plaintiff or its agents, or the entities or persons on whose behalf plaintiff purports to bring this action, continued to pay for Provigil, Gabitril and/or Actiq after becoming aware of the matters alleged in the Complaint.

TWENTY-THIRD AFFIRMATIVE DEFENSE

77. Plaintiff's claims are barred for failure of the Complaint to adequately identify the individuals for whom plaintiff purports to seek relief.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

78. Plaintiff's claims are barred, in whole or in part, because plaintiff would be unjustly enriched if allowed to recover any portion of the damages alleged in the Complaint.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

79. Plaintiff is not entitled to any recovery, including, but not limited to, compensatory or punitive damages, penalties, or any equitable remedy.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

80. Cephalon hereby gives notice that it intends to raise and rely upon any additional defenses that become available or apparent during discovery, and thus it reserves the right to amend these affirmative defenses and assert such additional defenses.

WHEREFORE, Cephalon respectfully requests that judgment be entered in its favor and against plaintiff and that this Court dismiss the Complaint with prejudice and grant Cephalon its attorney's fees and costs and such other and further relief as the Court deems to be just and appropriate.

DATED: July 5, 2011



Marguerite S. Willis
mwillis@nexsenpruet.com
Susan P. McWilliams
smcwilliams@nexsenpruet.com
Nikole Setzler Mergo
nmergo@nexsenpruet.com

NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: (803) 771-8900
Facsimile: (803) 252-8277

and

Eric W. Sitarchuk (ID No. 39082)
Timothy D. Katruff (ID No. 75490)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: (215) 963-5000

Attorneys for Plaintiff
Cephalon, Inc.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

STATE OF SOUTH CAROLINA, ex rel.
ALAN WILSON, in his official Capacity
as Attorney General for the State of
South Carolina)

Plaintiff,)

CEPHALON, INC.)

Defendant.)

IN THE CIRCUIT COURT

Civil Action No. 2011-CP-40-3661

JEANETTE W. McBRIDE
C.C.P. & G.S.

2011 JUL -5 PM 4:24

RICHLAND COUNTY
FILED

CERTIFICATE OF SERVICE

The undersigned certifies that she caused a copy of the foregoing Answer and Affirmative Defenses of Defendant to be served upon the following counsel of record by delivering a copy of the same, via hand delivery, on the 5th day of July 2011, the address shown below:

Alan Wilson
John W. McIntosh, Jr.
Robert D. Cook
C. Havird Jones
Mary Frances Jowers
Geoffrey K. Chambers
Jared Q. Libet
1000 Assembly Street, Suite 500
Columbia, SC 29211

Felicia Howell

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE OF SOUTH CAROLINA, ex rel.
ALAN WILSON, in his official Capacity as
Attorney General for the State of South
Carolina,

Plaintiff,

v.

CEPHALON, INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-3661

SCHEDULING ORDER
AS TO DISCOVERY AND
DISPOSITIVE MOTIONS ON
THE STATUTE OF LIMITATIONS

RICHLAND COUNTY
FILED
2013 FEB - 7 AM 10:47
JEANE C. R. BRIDE

The parties have agreed to bifurcate the proceedings to allow the Court to first address whether summary judgment should be granted on statute of limitations grounds before proceeding to discovery on the merits. To establish and facilitate the orderly progression of the first phase of this case, the Court deems it appropriate now to ORDER and DIRECT a scheduling order as follows:

1. FACT DISCOVERY ON STATUTE OF LIMITATIONS ISSUES:

a. Plaintiff the State of South Carolina (the "State") shall produce all documents responsive to Defendant Cephalon, Inc.'s ("Cephalon") First Set of Requests for Production to the South Carolina State Health Plan on or before February 11, 2013.

b. The State shall respond to Cephalon's First Set of Interrogatories to the South Carolina State Health Plan on or before February 11, 2013.

c. The State shall produce all documents responsive to Cephalon's First Set of Requests for Production in accordance with the Court's orders dated July 18, 2012 and January 18, 2013 on or before February 11, 2013.

SCANNED

d. All depositions on the statute of limitations shall be completed on or before April 1, 2013.

2. CEPHALON'S DISPOSITIVE MOTION(S) AS TO STATUTE OF LIMITATIONS ONLY:

a. Cephalon's motion(s) for summary judgment as to the statute of limitations, as well as all accompanying memoranda and affidavits in support, shall be filed and served on or before June 3, 2013.

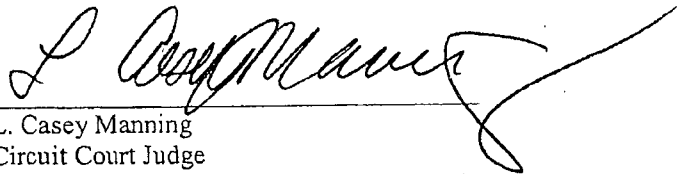
b. All response(s) thereto, including all memoranda and affidavits, shall be filed and served on or before July 1, 2013.

c. All replies shall be filed and served on or before July 22, 2013.

d. The Court shall schedule a hearing on the motion(s) thereafter.

In the event that the Court's denies Cephalon's statute of limitations motion for summary judgment, the parties will thereafter propose a scheduling order for discovery, motion practice and trial on the merits.

SO ORDERED, this the 6 day of February, 2013


L. Casey Manning
Circuit Court Judge

Columbia, South Carolina

EXHIBIT C

1 STATE OF SOUTH CAROLINA) Court of Common Pleas
2 COUNTY OF YORK) 2011-CP-40-03661
3
4 -----)
5 State of South Carolina) Transcript of Record
6 vs.)
7 Cephalon, Inc.,)
8 -----)

9 Date: October 14, 2013

10
11 BEFORE: The Honorable DeAndrea Benjamin,

12
13 APPEARANCES:

14 Kenneth Suggs, Esq.,
15 Attorney for Cephalon

16 Eric Sitarchuk, Esq.,
17 Attorney for Cephalon

18 ALSO PRESENT:

19 Todd Rutherford, Esq., for the State

20 Sonny Jones, Esq., for the State

21 Jerry Jowers, Esq., for the State

22 Tim Katsiff, Esq., for Cephalon

23 John Pease, Esq., for Cephalon

24 Stephen F. McKinney, Esq., for Cephalon

25 Phyllis M. Campo, RPR
Court Reporter

1 THE JUDGE: This is the State of South.
2 Carolina versus Cephalon, 2011-CP-40-03661. If
3 someone can give me the background on the case;
4 and also, if you can let me know who is
5 representing who.

6 MR. SITARCHUK: Good morning, you Honor,
7 Eric Sitarchuk for Cephalon.

8 THE JUDGE: How do you spell your last
9 name?

10 MR. SITARCHUK: S-I-T-A-R-C-H-U-K.

11 THE JUDGE: Yes, sir.

12 MR. SUGGS: Your Honor, I am Ken Suggs for
13 the State of South Carolina, along with Todd
14 Rutherford, Sonny Jones from the AG's Office,
15 and my partner, Jerry Jowers.

16 THE JUDGE: On behalf of the State?

17 MR. SUGGS: Yes, ma'am.

18 THE JUDGE: This is a motion for summary
19 judgment filed by the defendant.

20 MR. SITARCHUK: That's correct, your
21 Honor.

22 MR. SUGGS: The underlying case, your
23 Honor, is the State is suing under the Unfair
24 Trade Practices Act and some equitable theories
25 Cephalon for what we claim is improper marketing

1 of their drugs in South Carolina.

2 We had agreed that they have a statute of
3 limitations defense and so far the case has been
4 limited to pursuit of discovery on statute of
5 limitations issues which is now up before you on
6 their motion for summary judgment.

7 THE JUDGE: All right.

8 MR. SITARCHUK: Your Honor, if I may.
9 Your Honor, we have a power point to refer to as
10 we go along. I have a couple of hard copies if
11 I may hand them up to the Court.

12 THE JUDGE: All right.

13 MR. SITARCHUK: Your Honor, I would like
14 to reserve a couple minutes for rebuttal, if I
15 could?

16 THE JUDGE: Yes. Proceed, sir.

17 MR. SITARCHUK: Thank you, your Honor, as
18 Mr. Suggs said, the only issue before the Court
19 today is the timeliness of the State's lawsuit.
20 Your Honor, essentially what occurred here is
21 that there was an underlying investigation by a
22 number of states, Medicaid units, by the Federal
23 Government, by the state of Connecticut, and
24 others with respect to allegations that have
25 been made in whistleblower complaints in

1 Pennsylvania. That's in contacts that your
2 Honor will see how that relates as this argument
3 unfolds.

4 Essentially, before the Court is the
5 question of whether the State should have known
6 that it had a potential plan against Cephalon
7 within three years -- prior to three years of
8 filing the lawsuit, your Honor. If it did, our
9 position is that the case is time barred.

10 What your Honor will see today is that the
11 State had a wealth of information that was
12 available to it. Number one, it certainly could
13 have set it off on an inquiry as to whether it
14 had a claim against Cephalon, and indeed, was
15 the sum and substance of the lawsuit that the
16 State ultimately brought against Cephalon.

17 Now, in the face of all this information,
18 your Honor, the State says, well, these federal
19 lawsuits I referred to in Pennsylvania, the
20 complaints in those cases were under seal, and
21 we cannot use information that is under seal,
22 and therefore, we cannot go forward.

23 The problem with that argument, your
24 Honor, is there is two buckets of information
25 that your Honor can consider in questioning this

1 issue with the statute of limitations.

2 One is there was a ton of information out
3 there in the public domain that had nothing to
4 do with the seal, it was publically available
5 information. That information was available to
6 the State well before three years before it
7 filed a suit, and that was amply enough to put
8 the State on notice that it had. So for that
9 reason alone, the State's case is untimely.

10 The second and completely separate piece
11 of information is that the State was involved in
12 this investigation with Cephalon. And during
13 that investigation, they had presented to them
14 and made available to them a lot of information
15 that was not under seal, that was not subject to
16 the seal. And that is a second independent
17 reason as to why the State's case is untimely.

18 Your Honor doesn't even need to reach the
19 issue of the seal, however, because the
20 information in the public domain in and of
21 itself was enough.

22 So, your Honor, the key date here is June
23 6th of 2008 because the State filed its lawsuit
24 June 6 of 2011. So we have a three year statute
25 of limitations. If the State was on notice

1 prior to June 6, 2008, this case is untimely.

2 Now, your Honor, South Carolina has said,
3 and it is in the Mahar case we quote in our
4 briefs. It takes very little to start the clock
5 with respect to the running of the Statute of
6 Limitations in South Carolina.

7 Your Honor, the key cases here are Burgess
8 and Hedgepath, which both parties have cited in
9 their briefs. Those cases make two things
10 clear. First of all, the State didn't have to
11 actually know that it had a claim. All the
12 State had to know was that -- all the State had
13 to do was to exercise reasonable diligence in
14 investigating a potential claim.

15 So the standard, your Honor, is not what
16 the State actually knew but what the State
17 should have known had it exercised reasonable
18 diligence. Even if the State doesn't know
19 anything about the claim, if there is
20 information that it should have seen, if it was
21 acting diligently, that's enough to put it on
22 notice.

23 So it is a question of either actual
24 notice, which it turns out they had, or
25 constructive notice where there wasn't

1 information they knew but should have known. So
2 that is the first thing that comes out of the
3 cases, your Honor.

4 The second thing that comes out of cases
5 is that notice, whether actual or constructive,
6 doesn't have to be enough for them to go ahead
7 and file a lawsuit. It just has to be enough to
8 sort of tip them off that they may have a claim,
9 that a claim might exist. And once that tip off
10 occurs, they have an obligation to investigate
11 the claim, see whether they have a lawsuit to
12 bring, and bring the lawsuit within three years.
13 So the issue before the Court, your Honor, is
14 was there information out there that the State
15 should have known about exercising reasonable
16 diligence, and was that information enough to
17 tip them off that they might know that there was
18 a possible claim, that there was a possible
19 claim, to quote the Vale case, which is also
20 cited in the briefs.

21 So, your Honor, I am going to turn first
22 to that first bucket, all of the information
23 that was out there in the public domain that had
24 nothing to do with the complaints under seal in
25 Pennsylvania. With respect to that, the South

1 Carolina courts told us a couple of things.
2 They told us, first of all, evidence of
3 widespread publicity provides that constructive
4 knowledge. So if there is widespread publicity
5 out there about a potential claim, even if the
6 Plaintiff didn't read any of this publicity,
7 that's enough to put them on constructive
8 knowledge and they have to act within three
9 years.

10 In addition to that, your Honor, if there
11 are public record filings, filings that have to
12 be made that set forth enough information to tip
13 the plaintiff off to a claim then the plaintiffs
14 are chargeable with knowledge of those public
15 filings irrespective of whether they actually
16 know of them or not.

17 In this case, your Honor, there is
18 widespread publicity and a wealth of public
19 funds. There is newspaper article after
20 newspaper article. There are SEC filings that
21 Cephalon made. There are other lawsuits brought
22 under the very same theories that the State's
23 cases brought. There was a congressional
24 investigation, and all of these things existed
25 before June 6, 2008, the cutoff date.

1 So, your Honor, here are some examples of
2 widespread publicity. There was a three article
3 exposé in Columbia's paper, The State. It was
4 on the front page of The State. It ran in
5 November of 2003. And your Honor, what we have
6 done is excerpted a portion of that article.
7 That article lays out the very issues that
8 eventually become part of the State's lawsuit
9 here, that Cephalon was promoting its drugs for
10 off-label education, and that's what the State's
11 lawsuit is all about, that the FDA approves
12 certain uses for drugs. There is other uses
13 that are not approved by the FDA. Physicians
14 can still prescribe for those other uses, but
15 there is a question as to whether or not
16 pharmaceutical companies can promote for those
17 non-FDA approved uses. That's what this case is
18 all about.

19 An article back on the front page of the
20 local paper in 2003 talked about how Cephalon
21 was promoting two of the three medications at
22 issue here off label. That put them on notice,
23 constructive notice.

24 There were articles in the Wall Street
25 Journal that talked about the fact that the U.S.

1 Attorneys Office in Philadelphia was
2 investigating Cephalon for off-label marketing
3 of these three drugs. These articles appeared
4 throughout time, your Honor, and the thing with
5 the Wall Street Journal, your Honor, is that the
6 AG's office subscribes to the Wall Street
7 Journal. The Deputy AG and the AG himself
8 admitted in depositions that they regularly read
9 the Wall Street Journal. So here you have front
10 page exposé in the local paper. You have
11 multiple articles in the Wall Street Journal all
12 of which have more than adequate notice to the
13 State if the State had looked at those articles.
14 They didn't need to look at the articles, they
15 needed to be available to the State if they
16 acted with reasonable diligence.

17 Your Honor, the list goes on. Here is
18 another Wall Street Journal article that talks
19 about details with respect to the alleged
20 off-label promotion that Cephalon was engaging
21 in.

22 There is another article in the New York
23 Times that talks about the fact that Cephalon is
24 under investigation for this off-label promotion
25 of these drugs.

1 Your Honor, here is wire service, and
2 there is a series of wire service articles
3 talking about the fact that not only is Cephalon
4 under investigation, your Honor, but this will
5 also become important, Cephalon in the fall of
6 2007, the year before that June 6, 2008 cut off
7 date, they settled the federal and state
8 investigations, they paid a whopping amount of
9 money for the off-label promotion of these three
10 drugs. So that is also reported in the press.

11 What should the State have known at this
12 time, that there were articles talking about the
13 off-label promotion, that there was an
14 investigation of the off-label promotion, and
15 there was a settlement of the off-label
16 promotion, and that settlement not only involved
17 the Federal Government, but it involved multiple
18 state Medicaid programs.

19 They also knew, your Honor, that there was
20 an investigation by the state of Connecticut,
21 which I will get to in a moment.

22 Your Honor, we talk about the fact that
23 they don't need constructive knowledge, they
24 don't need actual knowledge, but in fact, they
25 had actual knowledge.

1 Here is a website that talked about the
2 settlement that Cephalon entered into with
3 respect to these allegations, and this article
4 was actually e-mailed to the AG's office by
5 another AG's office. So here is the situation
6 where they had in addition to constructive
7 notice, actual notice.

8 So what we have here, your Honor, and you
9 will see how this unfolds. What we have done is
10 all of the articles that we have put in the
11 briefing, your Honor, which we selected 42, we
12 have created a timeline with respect to those
13 articles. You can see how each and every one of
14 those articles appeared over time. So just
15 looking at the press alone, prior to June 6th of
16 2008, there were a minimum 42 press reports with
17 regard to the allegations that became the
18 subject matter of the State's complaint, the
19 investigation that led to the settlement, and
20 the settlement itself. All of that information
21 was available to the State prior to June 6,
22 2008. That would be enough but there is more.
23 Because Cephalon is a publically traded
24 corporation, they have to make filings in SEC
25 filings. So prior to June 6, 2008, Cephalon

1 made 20 filings that disclosed the existence of
2 the federal and state investigation, disclosed
3 the settlement of the federal and state
4 investigation, disclosed the allegations that
5 were under investigation.

6 This here, your Honor, refers to the
7 Connecticut Unfair Trade Practices Act
8 investigation. Because what this case that the
9 State of South Carolina is bringing is an Unfair
10 Trade Practices Act case. That's essentially
11 what it is, that they brought in 2011.

12 Now, back in 2005, 2006, 2007, Connecticut
13 is investigating its own Unfair Trade Practices
14 case. So not only does the State know about all
15 of these allegations against Cephalon, which is
16 the very essence of the case it brings today,
17 but it also knows there was at least one other
18 State that is investigating whether that
19 violated their unfair trade practices.

20 So, your Honor, let's look at these public
21 filings today, which again, under South Carolina
22 Law are chargeable to the knowledge of the
23 State.

24 Here, again, we can see a public filing
25 with the SEC from 2005 that talks about the fact

1 that Cephalon has received subpoenas with
2 respect to the investigation to the three drugs
3 at issue and the marketing of the three drugs at
4 issue, and also discloses that there is an
5 office of the Attorney General Connecticut
6 investigation with respect to the Unfair Trade
7 Practices Act in that case.

8 Here is another SEC filing by Cephalon in
9 2007, third quarter of 2007. It talks about how
10 this all has been settled, how Cephalon is
11 paying this large amount of money to settle
12 allegations with respect to these three drugs,
13 and all federal unrelated state Medicaid plans,
14 and that the investigation of the Connecticut
15 office of the Attorney General is still ongoing.

16 Both of these, your Honor, are enough
17 standing alone to have tipped the Attorney
18 General's office off to the fact that it had a
19 potential claim and it needed to investigate.

20 What do we have so far, your Honor. We
21 have a massive amount of press, including press
22 that made it through the door of the Attorney
23 General's s office.. We have 20 public filings.
24 So right now, your Honor, just on our count,
25 based on the exhibits that we have provided to

1 the Court in connection with the motion, we have
2 42 articles plus 20 SEC notices, 62 things out
3 there to put them on notice.

4 But there is more than that, your Honor.
5 Because in addition to the press reports, in
6 addition to the SEC filings, there was also
7 private lawsuits. There were four private
8 lawsuits brought. There was a congressional
9 investigation. So if we look at how this
10 develops, you can see, your Honor, that in the
11 congressional investigation, the congressional
12 investigation started because the congress read
13 about the Cephalon issue in the Wall Street
14 Journal.

15 What you have here, your Honor, is all of
16 this information available, and you can see that
17 you have private plaintiffs who rely on that
18 information to bring lawsuits, and we have
19 congress that relies on this information to
20 start an investigation. With all due respect to
21 AG Wilson's father, certainly the Attorney
22 General's office can exercise more reasonable
23 diligence than congress can, and just like this
24 information was available to congress when they
25 chose to look, it would have been available to

1 the Attorney General's office, if the attorney
2 General Office's had chosen to look.

3 What we have here, your Honor -- as you
4 can see, here is one of the civil lawsuits which
5 also relied on press reports in bringing the
6 civil lawsuit. This information was out there.
7 It was enough. The plaintiff's attorney found
8 it. Congress found it. The Attorney General's
9 office exercising reasonable diligence, they
10 should have found it too. It was enough to
11 start an inquiry.

12 So, your Honor, to complete the timeline
13 with the congressional investigation and the
14 four civil lawsuits, and you can see prior to
15 June 6, 2008, there is an enormous amount of
16 information that is available to the Attorney
17 General's office if it had chosen to look.

18 What did that information tell the
19 Attorney General's office if it had looked? It
20 would have told them that Cephalon was promoting
21 all three of these drugs off-label according to
22 the allegations that were made. That was enough
23 to bring a lawsuit, certainly enough to tell
24 them they had a possible claim.

25 It would have shown them there was

1 allegations that the off-label promotion was
2 causing a significant increase in off-label use.
3 It would have shown them that this off-label use
4 was being reimbursed by federal and state
5 programs. All they had do, your Honor, is what
6 they did in advance of this lawsuit is see that
7 the state of South Carolina State Health Plan
8 was also paying for these drugs. All they had
9 to do is call up and find out if there were
10 payments being made for these drugs, and it
11 would have seemed that was an issue for State
12 Health Plan as well.

13 From these reports, your Honor, it would
14 have seemed that all of this was being
15 investigated by the Federal Government and the
16 states under their Medicaid programs. It would
17 have seemed there was an Unfair Trade Practices
18 Act investigation by at least one AG's office,
19 precisely the type of claim that they waited
20 over three years to bring.

21 They would have seen there were four
22 previous lawsuits that rely on this publically
23 available information to proceed with claims
24 against Cephalon; and indeed, your Honor, those
25 private lawsuits that rely on this publically

1 available information, they made claims under
2 the South Carolina Unfair Trade Practices Act,
3 the very claim that the state brought. They
4 made those claims back in 2007. Those lawsuits
5 made unjust enrichment claims. The very unjust
6 enrichment claims that the State brought in
7 2011, they brought in 2007 based on this
8 publically available information. The list goes
9 on from there, your Honor.

10 All the AG had to do was Google Cephalon
11 and off-label use and all of this would have
12 sprung up on their screens.

13 Certainly, if a lay person can do it, the
14 Chief Law Enforcement Officer for the State has
15 the capability of doing that.

16 Now, your Honor, you will hear from the
17 State a lot about this False Claims Act under
18 seal. And the False Claims Act is what those
19 cases were about pending in Pennsylvania. The
20 problem is the seal issue has nothing to do with
21 what we talked about. Your honor could stop
22 here and find the State was on ample notice.
23 You would not have to consider the False Claims
24 Act, what is the seal, what does the seal mean,
25 how broad is it, how narrow is it? None of that

1 would need to be reached because it is all
2 irrelevant. The seal has nothing to do with all
3 this public information.

4 But because the State will talk about it,
5 your Honor, I will talk about it as well. There
6 is this second bucket of information. The first
7 bucket of information is publically available
8 stuff that we reviewed stand alone, independent
9 of the seal.

10 The second bucket of information is the
11 information that the State learned in the course
12 of working with the Federal Government and the
13 other states on the False Claims Act
14 investigation related to the cases in
15 Pennsylvania.

16 Now, with respect this issue of the seal,
17 your Honor, there is just one straight forward
18 legal question that your Honor would need to
19 resolve if your Honor chose to reach the issue
20 of the seal. That is whether the seal covers
21 evidence and facts that are underlying the
22 investigation.

23 It is Cephalon's position that the seal
24 relates only to the complaint and the other
25 filings in the federal cases.

1 It is the State's position that the seal
2 extends to the underlying evidence and facts
3 that support those admissions.

4 Now, the problem with the State's position
5 is that it is not the law. It is not what the
6 Court ordered. Because the law is clear, your
7 Honor, where you find what the scope of the seal
8 is, False Claims Act itself, because that's
9 where it comes from. What the False Claims Act
10 says is -- it is right here, your Honor, is the
11 complaint shall be filed under seal. That's the
12 civil complaint filed in connection with the
13 lawsuit. That's all the False Claims Act seals
14 is the complaint.

15 Now, you also look at the sealing orders
16 that the Court put in place in the federal
17 cases, your Honor, and as the act authorizes,
18 the Court limits its seal to the complaints and
19 all of the other filings in the action that
20 would have revealed the existence of the
21 complaint.

22 Now, the State, they are going waive an
23 order in front of you, and they are going to
24 say, well, there was this order that the court
25 issued in Pennsylvania that says that the United

1 States is allowed to disclose the complaint and
2 information about the investigation to
3 appropriate officials in the states of the
4 District of Columbia. What they don't
5 reference, your Honor, but should reference is
6 what the rest of the order says. What the rest
7 of the order says is that the complaint should
8 remain under seal because the only thing under
9 seal is the complaint, not the facts and
10 evidence underlying the allegations.

11 Indeed, your Honor, this would authorize
12 them to share it with appropriate state
13 officials, and what you see in the evidence,
14 your Honor, is the Connecticut Unfair Trade
15 Practices Act lawyers, the lawyers had nothing
16 do with the Federal and Medicaid investigation.
17 The Unfair Trade Practices' lawyer, he was at
18 the table with the entire investigation and he
19 was able to use that information with his Unfair
20 Trade Practices Act case because he was an
21 appropriate state official. This doesn't
22 actually support their position. It is fatal to
23 it, that order.

24 Your Honor, what does the case law state
25 with respect to the scope of the claim. Well,

1 there is a case that came out of the Fourth
2 Circuit in 2011 that gives us that answer. The
3 Holder case, your Honor, says that the seal is
4 limited to the filing of the qui tam complaint.
5 The Holder case says explicitly, your Honor,
6 nothing in the False Claims Act prevents -- this
7 is the qui tam relator of the whistleblower --
8 from disclosing the existence of the fraud.
9 There is nothing that prevents the discussion of
10 the underlying fraud or facts or evidence that
11 relates to it.

12 The United States Department of Justice,
13 they are the ones who are charged with enforcing
14 the False Claims Act with sealed provisions so
15 their views of this ought to be paid substantial
16 deference.

17 Here is an example of a brief that they
18 filed in that Holder case. The Department of
19 Justice says specifically the seal does not
20 prohibit a relator from disclosing the facts
21 underlying the alleged fraud.

22 Our position is the seal does not prohibit
23 a relator from disclosing the facts underlying
24 the alleged fraud. The Department of Justice
25 agrees with us, Fourth Circuit agrees with us,

1 the Court orders agree with us, and the False
2 Claims Act agrees with us.

3 In addition, your Honor, the Assistant
4 Attorney General, Bill Gambrell, he was the
5 South Carolina representative on this state
6 Medicaid federal examination investigation. He
7 testified about the scope of the seal. What he
8 testified to, your Honor, was that the seal
9 applies to the complaint, the identity of the
10 whistleblower. But with regard to the
11 underlying evidence, that is separate and apart
12 from the seal; is that correct? That is
13 correct.

14 So the very lawyer charged in
15 investigating this case agrees with our
16 position. Then he was asked if he was aware of
17 anything that would have prevented the Attorney
18 General's office from pursuing this Unfair
19 Trades Practices Act claim against Cephalon even
20 when the cases were still under seal. And he
21 said, no, sir, there was not.

22 We have the Fourth Circuit that agrees
23 with us. We have the Department of Justice that
24 agrees with us. The Act agrees with us. The
25 Court orders agree with us, and the Assistant

1 Attorney General in charge of the investigation
2 agrees with us. The only party that doesn't
3 agree with us, your Honor, is Mr. Suggs'
4 interpretation of the scope of the seal. Every
5 other interpretation of the scope of the seal
6 says the seal does not apply to the underlying
7 facts in evidence.

8 Your Honor, when you look at the
9 underlying facts and evidence in this case,
10 there was a wealth of information that was
11 actually provided to the Attorney General's
12 office with regard to the evidence that the
13 Attorney General's office was free to use. This
14 is just an example, which is Exhibit 4,
15 underlying documents that tell the tale, your
16 Honor.

17 So with respect to what the Attorney
18 General's office learned during the course of
19 these investigations of the False Claims Act
20 cases pending in Pennsylvania that was not under
21 seal, was all of the evidence that was gathered
22 that was shared with them, which in and of
23 itself was enough for them to be on notice. It
24 was the off-label sales data that the Attorney
25 General's office, South Carolina Attorney

1 General's office, gathered from every state
2 including South Carolina. It was the discussion
3 of factual and legal theories with Cephalon's
4 lawyers during the settlement negotiations where
5 the South Carolina Attorney General's office was
6 actually at the table during those discussions.
7 It was the settlement of the case, your Honor.

8 Here is a point I didn't make earlier. The
9 case was settled in principle in the third
10 quarter of 2007. That was publically announced,
11 publically disclosed, reported in the press.
12 Then it took a year to finalize the written
13 agreements because there were other negotiations
14 going on. So the written agreements were not
15 finalized until the fall of 2008.

16 Now, the State says that it was not until
17 the cases were unsealed and the written
18 agreements that were finalized that started the
19 clock running on statute of limitations. But
20 the very settlement of all these allegations
21 that were recorded, that was publically
22 announced a year before that and available for
23 the Attorney General's office to rely on and
24 trigger their own inquiry into whether they had
25 a case, your Honor.

1 So, your Honor, what we see with respect
2 to this second bucket of information, the stuff
3 that came to the Attorney General's office under
4 False Claims Act, that was not under seal. It
5 was only the complaints that were under seal.
6 That was available to them to act on as well.

7 The South Carolina Deputy Attorney
8 General -- the Connecticut Deputy Attorney
9 General who was in charge of Connecticut's
10 investigation of unfair trade practices, he was
11 there, he was provided all of this information
12 just as the Court order that they cite
13 permitted, your Honor.

14 So what we have, your Honor -- I am going
15 to turn to one more issue and I am going to sit
16 down. What we have is two massive sources of
17 information that put the Attorney General's
18 office in place. One is the publically
19 available information to which this whole issue
20 of the seal is completely irrelevant. That put
21 them on notice before June 6, 2008, should have
22 brought their claim before June 6, 2008.

23 Then a completely separate bucket of
24 information is all the information that was
25 available to them in the course of their

1 investigation of the federal and state issues
2 with regard to the cases that were pending in
3 Pennsylvania. None of those underlying facts in
4 evidence were under seal. They could have
5 relied on all of that as well. Even if they
6 weren't involved in the investigation, the
7 publicity was enough to put them on notice.

8 There is one final thing, your Honor,
9 which is that they realize they have an issue
10 with respect to these claims. So what they do,
11 and you will see in the briefing, your Honor,
12 they throw up a Hail Mary pass to the unjust
13 enrichment claim. With respect to the unjust
14 enrichment claim, they say, wait a second, it is
15 really not the three year statute of limitation
16 that applies. We could have up to ten years
17 maybe, even latches, that bring unjust
18 enrichment claim. First of all, that doesn't
19 apply to their unfair trade practices claim.
20 They are locked down through the years with
21 respect to their unfair trade practices claim.
22 They know it. They know they have an issue with
23 this and that is why they throw the Hail Mary
24 with unjust enrichment claim. The problem with
25 the unjust enrichment claim, your Honor, is that

1 it is founded on fraud. All your Honor needs to
2 do is take a look at how they alleged the unjust
3 enrichment claim in Count 2 of their complaint.

4 In Count 2 of their complaint, they say
5 this promotion was false and deceptive. They
6 say it was Cephalon's, quote, "fraudulent
7 marketing practices" that resulted in Cephalon
8 improperly realizing value which resulted in the
9 unjust enrichment claim. They, therefore, say,
10 your Honor, in the entirety of that count is
11 based on this fraud and deceptive marketing
12 practices.

13 The problem with that, your Honor, is when
14 the unjust enrichment claim is founded on fraud,
15 then the statute of limitations that applies is
16 South Carolina Code Section 15-3-530, Subsection
17 7. What that provision, your Honor, says is
18 that any action for relief on the ground of
19 fraud in cases that before the adoption of the
20 rules of civil procedure back in 1870 were
21 cognizable solely in the court of chancery, the
22 three year statute limitations applies to this.

23 What we have here, your Honor, is an
24 unjust enrichment claim founded on allegations
25 of fraud. An unjust enrichment claim was

1 cognizable by the court of chancery as all
2 equitable claims prior to 1870. So by black and
3 white terms, Section 15-3-530-7, it gets a three
4 year statute of limitations as well.

5 The final piece of their Hail Mary, your
6 Honor, and this is really tossing it in the end
7 zone to see if anyone catches it. They say,
8 well, maybe the unjust enrichment claim is not
9 an equitable claim at all, and therefore, it is
10 a legal claim and we will throw it into this ten
11 year, there is no statute of limitations
12 catchall.

13 The problem, again, your Honor, is they
14 didn't plead it that way. The way they pled it,
15 and when Mr. Suggs stood up this morning he said
16 it, it is an equitable claim. Paragraph 79 of
17 their complaint, restitution and disgorgement
18 are equitable remedies designed to prevent
19 unjust enrichment. A court may grant equitable
20 relief. They have said in their pleadings it
21 was an equitable claim, and therefore, doesn't
22 go into the legal catchall.

23 The cases that have dealt with this held
24 the same way. The State in another case against
25 another pharmaceutical company Eli Lilly took

1 the position I am taking today. That's why this
2 is a Hail Mary, your Honor, and that's why it is
3 contrary.

4 To sum it up, your Honor, we have two
5 sources of notice that was well more than enough
6 to tell the State that they had a possible claim
7 before June 6 of 2008.

8 We have the publicity, the public filings,
9 the other lawsuits, the congressional
10 investigation, number one, nothing to do with
11 the seal.

12 Then we have all of the information the
13 State learned during the course of the False
14 Claims Act investigation that wasn't under seal
15 according to the law, the facts and the evidence
16 underlying the allegations. And your Honor, all
17 that applies in the context of a three-year
18 statute of limitations.

19 Your Honor, we don't have to show a
20 prejudice to show this case is barred, but there
21 is certainly prejudice here to us, and prejudice
22 is not a factor. But I think it is important to
23 point it out, your Honor, because they will talk
24 about the fact that Cephalon pled guilty to
25 single misdemeanor count with respect to

1 off-label marketing. In fact, in connection
2 with that investigation, that was publically
3 reported.

4 Your Honor, that guilty plea was the
5 conduct that occurred for a ten-month period in
6 2001. So now we are talking about a case that
7 relies on a guilty plea that relates to conduct
8 that is over ten years old, and they waited and
9 waited to bring the lawsuit. Cephalon has been
10 acquired. The CEO is dead. The head of sales
11 is dead. The witnesses are gone to the four
12 winds. That's why we have statute of
13 limitations, your Honor, to make sure that
14 claims are brought in a timely manner, that
15 claims don't get stale, that there is finality,
16 that parties are able to proceed without
17 something hanging over their head, and when they
18 are sued it is within a timely manner so that
19 the case can be dealt with effectively and
20 fairly. They simply waited too long, your
21 Honor. Thank you.

22 THE JUDGE: Thank you. Mr. Suggs.

23 MR. SUGGS: May it please the Court?

24 THE JUDGE: Yes, sir.

25 MR. SUGGS: If I can, your Honor, let me

1 start with a little bit of a sort of general
2 background because I don't know what the Court's
3 experience has been with pharmaceutical cases or
4 with qui tam false claims cases.

5 THE JUDGE: Okay.

6 MR. SUGGS: On the pharmaceutical side,
7 drug agencies are regulated by FDA and the FDA
8 had nothing to do with regulation of doctors.
9 So a doctor can take a medicine and
10 theoretically use it for anything he or she
11 wants to, and that is an off-label use. What is
12 prohibited is for the drug company to go out and
13 say to the doctor that we have permission from
14 FDA to sell the drug for this disease but we
15 know you can use it for this disease so why
16 don't you buy it for that. They are not allowed
17 to promote it off-label.

18 In this case we are talking off-label
19 promotion of three drugs, one of which was a
20 narcotic lollypop that was approved only for
21 cancer treatment where the pain was so bad that
22 morphine and other first line pain medications
23 wouldn't take care of it. That's what the
24 off-label promotion of that particular drug was,
25 that they promoted it for up to like 80 percent

1 of it was for uses other than cancer.

2 The other background thing I want to talk
3 about is the False Claims Act which is sometimes
4 referred to as qui tam, which is Latin phrase
5 that means something -- I don't know what it
6 means. It is a case, and you saw on the screen
7 the word relator. In that case -- and in these
8 cases, for example, there were four False Claims
9 Act cases filed against Cephalon. Three were
10 by, I believe, sales people, their inside sales
11 people, and one was by a physician.

12 The requirement for a qui tam case is that
13 the person filing the case, the relator has to
14 have insider knowledge that is not in the public
15 domain. If it is in the public domain you can't
16 be a relator because everybody knows about it.
17 So it has to be some secret inside knowledge
18 that the relator has. They file not only a
19 complaint, your Honor, but they file a long,
20 detailed statement of facts which is filed with
21 the Federal Court under seal and given to the
22 U.S. Attorney only. The defendant doesn't get
23 served with the papers. The defendant doesn't
24 even know the investigation is going on, and the
25 idea is to give the Federal Government the

1 chance to investigate this without being
2 interfered with. The federal judge can continue
3 to seal as long as -- it is a 60-day seal but it
4 can be renewed indefinitely as long as the
5 federal judge is willing to do that.

6 In this case, the federal judge -- and it
7 did issue an order that said seal shall be
8 partially lifted for purposes of allowing the
9 United States to disclose the complaint and
10 information about the investigation to
11 appropriate officials in the states in the
12 District of Columbia. The information about the
13 investigation is the important part of that.

14 Now, that part of it is, when what is
15 being implicated in these cases is usually
16 Medicaid payments by the state. So the Federal
17 Government has a share of it and the state has a
18 share of it. In these drugs cases, when the
19 Federal Government thinks there is reason to go
20 forward, then they will involve the states. The
21 states have got a unit they call NAMFCU, which
22 is National something Medicaid Fraud Control
23 Unit, and South Carolina participates in that.
24 So the appropriate officials are the officials
25 in that unit. In South Carolina, that would be

1 the Attorney General themselves, John McIntosh
2 and Bill Gambrell. The Attorney General at the
3 time this began was Henry McMaster who has been
4 a United States attorney. John McIntosh worked
5 in U.S. Attorney's office and they knew what the
6 meaning of the seal was.

7 The testimony in this case is that the
8 seal in the qui tam case in the Attorney
9 General's office in South Carolina is treated
10 like a state grand jury matter, that the people
11 who have need to know are isolated from the
12 rest, they have a separate computer system.
13 They don't share it with anybody else in the
14 office.

15 So let's start there. We know
16 Mr. Gambrell, and because he reported to
17 Mr. McIntosh who reported to the AG himself,
18 those three people did have actual knowledge of
19 the underlying facts that give rise to the claim
20 we are bringing now.

21 Now, why doesn't that trigger the running
22 of the statute of limitations, and the answer to
23 that, your Honor, is in the South Carolina case
24 of Cooper versus Ebenezer Senior Services where
25 our Supreme Court adopted the doctrine of

1 equitable tolling. Equitable tolling has to be
2 distinguished from equitable estoppel.
3 Equitable estoppel is when the defendant, like
4 an insurance adjuster, tells the person in a car
5 wreck, you don't need to bring suit. I am going
6 to pay your medical bills and everything will be
7 all right. In other words, some conduct on the
8 part of the defendant to keep the person from
9 filing suit.

10 Equitable tolling does not require any
11 conduct from the defendant to keep him from
12 filing suit. Equitable tolling is, according to
13 our court, to ensure fundamental practicality in
14 fairness. It is applied where there is an
15 extraordinary event beyond the control of the
16 person who should be filing suit that keeps them
17 from filing suit.

18 The Court in that case gives many examples
19 of different ways but says this is open ended
20 and there can be anything, in fairness, the
21 Court can apply this doctrine.

22 Now, if you think about this, we have --
23 somebody is filing qui tam case somewhere today.
24 That qui tam case may develop into a full blown
25 investigation by U.S. Attorney's office and U.S.

1 Attorney's office may involve the State Attorney
2 General.

3 The people that are involved in those
4 cases are serious about keeping those matters
5 under wraps and not sharing anything about them
6 with unauthorized folks. So the folks who can
7 bring the civil case don't get the information.
8 And to imply that it's just the complaint is
9 utterly wrong, your Honor. There have been
10 cases where you can be held in civil contempt,
11 you can be held in criminal contempt, or the
12 whole qui tam case can be dismissed because
13 somebody discloses something they are not
14 supposed to disclose. There have been cases
15 where somebody just made a general statement to
16 the press and was held that that was a violation
17 of the seal. So it is one of the things you
18 don't fool around with.

19 What the Court can do in our view, your
20 Honor, is say that because those folks with
21 actual notice were forbidden from acting on it
22 and from sharing it from the people that can act
23 on it, that the Court ought to apply equitable
24 tolling to the case and the statute of
25 limitations under tolling idea, and the way our

1 court interprets it is it is totally suspended
2 until the impediment is lifted. And in that
3 case, it would have been when the seal was
4 lifted I think in November of 2008. We brought
5 this suit in June of 2011, so well within three
6 years. So you get three years from there.

7 So our position is that this is the way
8 the Court ought to hold it. There is another
9 bucket that Mr. Sitarchuk talked about. That is
10 this widespread publicity.

11 First of all, your Honor, I urge you to
12 please read the Hedgepath case that they cited
13 and we cited in our brief very carefully. The
14 only South Carolina case they site with
15 proposition that quote, unquote, widespread
16 publicity can trigger the running of the statute
17 of limitations is Hedgepath. Hedgepath was an
18 environmental pollution lawsuit where one party
19 brought the case for a contamination because I
20 think because of a gold mine or something like
21 that, brought the case and settled it. Then all
22 of these other people jumped on board and said,
23 well, we want to file class action suit too
24 because they didn't get paid in the other class
25 action. They filed their case, and the Court in

1 the opinion does say there was widespread
2 publicity for this, that, and the other, but the
3 real holding of that case is that all of these
4 people filed affidavits saying we knew about the
5 pollution and we knew about the lawsuit, we just
6 thought we were protected by the lawsuit.

7 In other words, they just made a mistake
8 that they thought they were plaintiffs in the
9 other lawsuit, and they actually filed
10 affidavits saying they knew. So that is an
11 actual notice case, not constructive notice
12 case.

13 If you look at the other cases they cite,
14 and it is interesting, there are three or four
15 around the whole country they found that adopted
16 this notion of widespread publicity being a
17 trigger. Those cases are cases that dealt with
18 one single case and the specifics of the case
19 were published in the venues where the people
20 were, and if you look at a lot of them, there is
21 also plenty of actual notice. Like the ones
22 with the Klu Klux Klan, the United States
23 Marshall actually delivered a letter to the head
24 of Klan in the town they were suing saying you
25 are part of this investigation. So they are

1 different cases, your Honor, very different.

2 They called this -- they put up all of
3 that stuff. I think they called this in their
4 brief a towering mountain of notice, of
5 publicity. It is really more like one of those
6 mole hills of Mississippi notice of publicity,
7 your Honor, because The State newspaper article,
8 that would be the most critical one. There was
9 a three-part series in The State. Each day
10 there was a headline on the front page, but
11 Cephalon was never mentioned on the front page
12 of the paper. The second day Cephalon was
13 mentioned on Page 6 of the junk page of the
14 paper.

15 There is Wall Street Journal articles.
16 There is New York Times articles. A lot of
17 articles they put up were duplicates where
18 somebody would put it on the paper and put it on
19 the website too. But the point is, your Honor,
20 the Attorney General's office is charged with
21 protecting the people of the South Carolina from
22 fraudulent or improper practices. They have to
23 do that on a budget. To say that they are
24 charged with every day someone going work and
25 putting in Cephalon and then Phizer and

1 Warner-Lambert and Bayer, and every drug
2 company's name into the search engine and see if
3 anything pops up, and say that they have to read
4 all of the newspapers in the United States, and
5 they have to read the Wall Street Journal, and
6 they have to read the New York Times, and then
7 they have to go and investigate that after they
8 do that. These newspaper articles that they
9 cite don't ever say that Cephalon, not a single
10 one of them, that Cephalon marketed off-label in
11 South Carolina. The article in The State paper
12 talked about things going on in Denver,
13 Philadelphia and all other places, but not here.

14 To do what Cephalon wants us to do now, we
15 would have to launch an investigation every time
16 somebody issued a subpoena to a drug company
17 because that's what their SEC filing, that is
18 all they say, we have a subpoena and they are
19 interested in our marketing practices.

20 It is an impossible burden to put on the
21 state of South Carolina in those cases, your
22 Honor, even if widespread publicity notice was
23 the law of South Carolina, which we say it is
24 not.

25 Let me address this issue they say there

1 is a three year statute of limitations of
2 equitable claim because it is a fraud claim. As
3 the Court knows, fraud in South Carolina has to
4 be pled with particularity, which is not in our
5 complaint. There is no nine elements of fraud
6 in our complaint. If we made this a fraud
7 claim, they would have the right to dismiss it
8 because we hadn't properly pled it.

9 So that is an equitable claim to which at
10 least the ten year statute of limitations
11 applies. If not, no statute of limitations.

12 Secondly, we also have a claim that they
13 have not addressed, the State Health Fund. We
14 amended our complaint to add that. They have
15 not deposed anyone from the State Health Fund.
16 There is no evidence that anybody from the State
17 Health Fund has any knowledge whatsoever. By
18 the way, your Honor, they deposed everyone they
19 wanted to depose from the Attorney General's
20 office. They deposed Mr. Jones. They deposed a
21 lawyer named J. Smith. They deposed John
22 McIntosh, and they deposed Bill Gambrell. They
23 even deposed the two Attorney Generals, Alan
24 Wilson and Henry McMaster. Not a single one of
25 those people testified, your Honor, that they

1 had seen any of these articles, that they
2 actually seen any of them. That, at least, your
3 Honor, we would say raises the issue of whether
4 it is a question of fact, not for disposition on
5 summary judgment, whether it is a question of
6 fact, whether that is, in fact, widespread
7 enough to put anybody on notice since, in fact,
8 it didn't put anybody in South Carolina on
9 notice. It at least raises that question of
10 fact.

11 Finally, let me address this deposition
12 testimony. I am disappointed to see this was
13 taken out of context. What was being discussed
14 at this point in the deposition, your Honor, is
15 a partial lifting of the seal so that the U.S.
16 attorney could discuss it with Cephalon, with
17 the defendant, and that's where that part, that
18 comes from. Mr. Gambrell is not saying in that
19 that you could go out and talk about the
20 underlying evidence with anybody and everybody
21 you want to. In fact, you cannot, unless you
22 want to risk of being in contempt in Federal
23 Court, which I don't think anybody in the AG's
24 office would be happy with.

25 I will answer any questions the Court may

1 have about any of this, your Honor.

2 THE JUDGE: All right. Thank you.

3 MR. SITARCHUK: Your Honor, if I may.

4 THE JUDGE: Yes, sir. You have about five
5 minutes.

6 MR. SITARCHUK: Thank you. I appreciate
7 it, your Honor. Just a couple of things. One
8 is, your Honor, this equitable tolling argument.
9 They didn't raise that in their briefs. It is
10 the first time we heard it. Your Honor, they
11 didn't cite that case. They just talked about
12 it in their briefs. We have not had an
13 opportunity to respond to that for hearing that
14 for the first time.

15 With that said, your Honor, as I understand
16 Mr. Sugg's description of equitable tolling,
17 which doesn't appear anywhere in the briefs,
18 there has to be something that prevents the
19 State from moving forward. Nothing prevented
20 the State from moving forward here. Your Honor
21 has deposition transcripts, and you will see
22 this is not taken out of context at all. Look
23 at this particular quote here, your Honor. Here
24 Assistant Attorney General Gambrell is saying
25 there is nothing that prevented them from filing

1 suit, that the seal did not prevent them from
2 filing suit. In fact, they sued a bunch of
3 other pharmaceutical companies while the qui tam
4 case was still under seal. If I understand
5 equitable tolling from what Mr. Suggs says
6 today, it doesn't apply.

7 They also say there was nothing in the
8 press reports that told us that there was
9 off-label promotion in South Carolina. Your
10 Honor, take a look at these press reports, take
11 a look at the description in the investigation,
12 take a look at the description of settlement.
13 It was alleged that it was a nationwide
14 off-label promotion scheme, that's what is
15 alleged. They were on notice that it was in
16 South Carolina. They even gathered information,
17 and it is in the record, information from South
18 Carolina with respect to Medicaid payments
19 because they understood that South Carolina
20 Medicaid was part of this because they
21 understood that there was alleged off-label
22 promotion in South Carolina according to the
23 allegations in qui tam.

24 Just two final things, your Honor. One
25 with respect to the False Claims Act generally,

1 and your Honor, again, with respect to the False
2 Claims Act, you don't even have to reach all of
3 that because of all of the other publicity out
4 there that stood independent of the seal. With
5 respect to that, the False Claims Act seal is
6 designed to protect the investigation so that
7 the defendant does not find out they are under
8 investigation before the investigation is
9 complete. In this case, Cephalon was notified
10 it was under investigation well before June 6,
11 2008. It knew it in 2005. It was presented
12 evidence about the investigation in 2005. It
13 negotiated a settlement of the investigation
14 long before June 2008. So even when you look at
15 the purposes of the seal, there is no policy
16 here that the seal should apply even when by its
17 terms it clearly doesn't.

18 The final point, your Honor, they claim
19 that, wow, there is no evidence from anybody
20 from State Health Program was on notice with
21 respect to this information.

22 In fact, your Honor, the notice to the
23 Attorney General's office is enough. The law
24 says the notice of the Attorneys General's
25 office is enough. They are the law enforcement

1 agency charged with going forward with these
2 acts and conceded in other cases that notice to
3 the Attorney General's office is enough.

4 In the end, they say, well, we don't have
5 to sit there and read newspaper articles or
6 figure out if there is conduct going on with
7 public information that may harm our citizens.

8 Your Honor, I just would like to finish
9 with a quote from a court in another state that
10 I think aborally answers that argument, and this
11 is the Delaware Court talking about a case in
12 which the state had claimed it shouldn't be held
13 to constructive notice. What the Delaware court
14 said was, and applies equally as well here,
15 particularly to the Chief Law Enforcement
16 Officer in the state. The state does not have
17 the luxury to recline in the leather chair for
18 believing that the statute of limitations will
19 only run when some aggrieved citizen gets around
20 to making a complaint. The law says they have
21 obligations beyond that. They have an
22 obligation to exercise reasonable diligence, and
23 reasonable diligence includes being aware of
24 issues that receive widespread publicity that
25 are the subject of public filings and are the

1 subject of other lawsuits and congressional
2 investigations. Thank you.

3 THE JUDGE: Thank you. I do have one
4 question for Mr. Suggs regarding unjust
5 enrichment claim. Is it the defendant's
6 position that if it is -- I think the words used
7 sound and fraud -- that it would fall under the
8 three year statute of limitation? What is your
9 position?

10 MR. SUGGS: Well, if it were a fraud
11 claim, it would be under the three year statute
12 of limitations. But, again, your Honor, to
13 plead fraud in South Carolina to bring a claim
14 for fraud, there is dozens and dozens of cases
15 where you have to plead fraud the nine elements
16 of fraud, reliance and all, and we certainly
17 didn't ever plead that in your complaint.

18 We are not saying they mislead the state
19 of South Carolina and that we relied on
20 misrepresentations by them.

21 THE JUDGE: Okay. Thank you.

22 MR. SUGGS: Your Honor, I noticed when
23 Cephalon filed its papers last week they sent it
24 in a proposed order. I don't know if you have
25 seen that. Would you like a proposed order from

1 us as well?

2 THE JUDGE: I did see they filed proposed
3 order. And also, if you all would like to -- I
4 believe he says there was no -- in your brief
5 there was no -- the argument equitable tolling
6 was not in there. If you would like to brief
7 that and give it to me in 10 days I will accept
8 that and a proposed order from you all.

9 MR. SUGGS: Thank you.

10 MR. SITARCHUK: Thank you, your Honor.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

I, Phyllis M. Campo, Official Court
Reporter for the Sixteenth Judicial Circuit of
the State of South Carolina, do hereby certify
that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings
at the time and place herein in the
above-entitled matter.

I do further certify that I am neither of
kin, counsel, nor interest to any party hereto.

October 16, 2013

Phyllis M. Campo
Official Court Reporter

EXHIBIT D

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
STATE OF SOUTH CAROLINA, ex rel.)
ALAN WILSON, in his official capacity)
as Attorney General for the State of)
South Carolina,)
)
Plaintiff,)
)
v.)
)
CEPHALON, INC.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-3661

DEMETRIE R. MCBRIDE
C.C.P. & G.S.

2013 JUN -6 PM 12:01

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT CEPHALON, INC.'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
II. UNDISPUTED FACTS.....	4
A. Various Investigations of Cephalon's Purported Off-Label Promotion Were Widely Reported Before the June 6, 2008 Cut-Off Date.....	5
1. SEC Filings.....	6
2. Press Reports	6
3. Publicity Surrounding the Connecticut Attorney General's Unfair Trade Practices Act Investigation of Cephalon	7
4. Other Plaintiffs Filed Actions Against Cephalon for Alleged Off- Label Marketing of the Medications	8
B. The South Carolina Attorney General's Office Had Actual Knowledge of the Purported Off-Label Marketing by Cephalon.....	9
1. South Carolina is Directly Involved in the Joint Federal/State Investigation	9
2. Gambrell is Selected to Lead the NAMFCU Team.....	10
C. Other SCAG Employees Also Knew About the Potential Claims Against Cephalon Prior to June 2008	14
D. The SCAG Waited Until June 2011 to Bring the State's Claims Against Cephalon.....	17
III. SUMMARY JUDGMENT STANDARD	17
IV. ARGUMENT	18
A. The State's Claims are Time-Barred	18
1. The Widespread Media Coverage of Cephalon's Alleged Off- Label Promotion Put the State on Notice	20
2. Cephalon's SEC filings put the State on notice.....	22
3. The SCAG Had Actual Knowledge Long Before June 6, 2008.....	23
4. The SCAG Had Constructive Notice Based on the E-mail From the Connecticut Attorney General's Office.....	24
B. Nothing Prevented the SCAG From Acting on Its Knowledge of Cephalon's Alleged Off-Label Marketing Activities	26
1. The SCAG's Mistaken or Negligent Interpretation of The qui tam Seal Did Not Toll the Statute of Limitations.....	28
V. CONCLUSION	30

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>ACLU v. Holder</i> , 673 F.3d 245 (4th Cir. 2011)	27
<i>Bayle v. S.C. Dep't of Transp.</i> , 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001)	25
<i>Berry v. McLeod</i> , 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997)	22, 23
<i>Burgess v. Am. Cancer Society, S.C. Div., Inc.</i> , 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989)	19, 20
<i>Epstein v. Brown</i> , 363 S.C. 372, 610 S.E.2d 816 (2005)	19
<i>Fuller-Ahrens v. S.C. Dep't. of Highways and Pub. Transp.</i> , 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993)	22
<i>Gayle v. United Parcel Serv., Inc.</i> , 401 F.3d 222 (4th Cir. 2005)	29
<i>George v. Fabri</i> , 345 S.C. 440, 548 S.E.2d 868 (2001)	17
<i>Harris v. Hutchinson</i> , 209 F.3d 325 (4th Cir. 2000)	28
<i>Hedgepath v. Am. Tel. & Tel. Co.</i> , 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)	20, 21
<i>Hughes v. Vanderbilt Univ.</i> , 215 F.3d 543 (6th Cir. 2000)	20
<i>Maher v. Tietex Corp.</i> , 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998)	19
<i>McCune v. Myrtle Beach Indoor Shooting Range, Inc.</i> , 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005)	17
<i>Miller v. Pac. Shore Funding</i> , 224 F. Supp. 2d 977 (D. Md. 2002)	29

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Moriarty v. Garden Sanctuary Church of God</i> , 341 S.C. 300, 534 S.E.2d 672 (S.C. 2000)	20
<i>Patterson v. United States</i> , 451 F.3d 268 (1st Cir. 2006)	20
<i>Rumpf v. Mass. Mut. Life Ins. Co.</i> , 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004)	18
<i>State v. Eli Lilly & Co., Inc.</i> , 2007-CP-42-1855	18
<i>State v. Ortho-McNeil-Janssen Pharm., Inc.</i> , No. 2007-CP-42-1438, 2011 WL 3794016 (S.C. Com. Pl. Feb. 25, 2011) . (Ex. 62.)	19
<i>Stutz Motor Car of Am., Inc. v. Reebok Int'l, Ltd.</i> , 909 F. Supp. 1353 (C.D. Cal. 1995)	20
<i>U.S. v. Babb</i> , 54 F. App'x 772 (4th Cir. 2003)	29
<i>U.S. v. Caronia</i> , 703 F.3d 149 (2d Cir. 2012)	2
<i>United Klans of Am. v. McGovern</i> , 621 F.2d 152 (5th Cir. 1980)	20
<i>Wiggins v. Edwards</i> , 314 S.C. 126, 442 S.E.2d 169 (1994)	19, 28
<i>Witt v. Am. Trucking Assn's, Inc.</i> , 860 F. Supp. 295 (D.S.C. 1994)	25
 STATUTES	
31 U.S.C. § 3730(b)	27
31 U.S.C. § 3730(b)(2)	4, 5, 26
31 U.S.C. §§ 3729, <i>et seq.</i>	4
S.C. Code Ann. § 15-3-40	28
S.C. Code Ann. § 15-3-530(7)	2, 18
S.C. Code Ann. §§ 39-5-10, <i>et seq.</i>	1, 8

TABLE OF AUTHORITIES
(continued)

	Page(s)
S.C. Code Ann. § 39-5-150	2, 18
Conn. Gen. Stat. §§ 42-110, <i>et seq.</i>	8
 OTHER AUTHORITIES	
18 S.C. Jur. Reference § 3 (June 2011)	18
Rule 56(c), SCRCF	1

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Cephalon, Inc. ("Cephalon") moves for summary judgment in its favor because the State of South Carolina's (the "State") claims are time-barred.¹

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Well more than three years before filing this lawsuit, South Carolina was fully on notice of its purported claims against Cephalon.

The State's failure to timely bring claims was not the result of insufficient information upon which to act. Instead, it was due to a lack of diligence – and undoubtedly a lack of interest – in pursuing the matter. That only changed with newly elected South Carolina Attorney General Alan Wilson's directive that the South Carolina Attorney General's Office (the "SCAG") "think outside the box" about ways to raise money to fund its operations. (Ex. 1.)² On January 30, 2011, within a month of taking office, General Wilson publicly addressed the budget constraints facing the SCAG, commenting that his Office could raise "significant revenue" through investigations and lawsuits. On the heels of that pronouncement, the SCAG, on behalf of the State, filed this action. Then, almost immediately thereafter, the SCAG executed a contingent-fee agreement with private counsel that allows the SCAG to keep a large portion of any recovery.

This case was filed on June 6, 2011, and purports to assert causes of action against Cephalon for alleged violations of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. §§ 39-5-10, *et seq.*, and equitable relief. Both causes of action are governed by a

¹ The parties agreed to bifurcate this litigation to first address the dispositive issue of the statute of limitations. Discovery on the statute of limitations is almost complete except for the resolution of the State's motion for a protective order regarding the deposition of Jay Smith, the current Director of the South Carolina Attorney General's Office's Consumer Protection Division.

² The exhibits herein shall be referred to as "Ex. ____" and are attached to the Affidavit of Stephen F. McKinney ("McKinney Affidavit"), which is being filed contemporaneously herewith.

three-year statute of limitations.³ Thus, the State's action is time-barred if it knew or was on inquiry notice prior to June 6, 2008 of either a potential claim against Cephalon or the existence of facts that potentially could give rise to such a claim.

The allegations are based on the alleged off-label promotion of three federally approved Cephalon prescription medications, Provigil, Gabitril and Actiq (the "Medications"). "Off-label promotion" refers to a company promoting its products for uses that have not been approved by the United States Food and Drug Administration. Physician prescribing of drugs for off-label uses is perfectly legal. The United States Court of Appeals for the Second Circuit has ruled that off-label promotion is commercial speech protected by the First Amendment and therefore not illegal. *U.S. v. Caronia*, 703 F.3d 149, 165 (2d Cir. 2012). Prior to the *Caronia* decision, off-label promotion was in certain circumstances considered unlawful by the FDA.

The undisputed evidence demonstrates that the State had both actual knowledge and was on inquiry notice of Cephalon's alleged off-label promotion and its potential claims long before June 2008. This is established by the following undisputed evidence:

- In 2004, a joint federal and state Medicaid fraud investigation ("the Joint Federal/State Investigation") of Cephalon's alleged off-label promotion of the Medications began. The state Medicaid portion of the investigation was coordinated by the National Association of Medicaid Fraud Control Units ("NAMFCU"), a consortium of state Medicaid Fraud Control Units ("MFCU") from throughout the United States. (*See infra* 4-5.)
- Between 2004 and 2008, the Joint Federal/State Investigation received extensive, national news coverage (including in *The New York Times* and *The Wall Street Journal* and by Reuters and the Associated Press), and was publicly disclosed in Cephalon's filings with the United States Securities and Exchange Commission ("SEC"). (*See infra* 6-7, 11-12.)
- In 2004, the State of Connecticut through the Connecticut Attorney General's Office began an investigation of Cephalon's alleged off-label promotion of the Medications under the Connecticut Unfair Trade Practices Act (the "CUTPA Investigation"). (*See infra* 7-8.)

³ SCUTPA expressly provides: "No action may be brought . . . more than three years after discovery of the unlawful conduct which is the subject of the suit." S.C. Code Ann. § 39-5-150. The State's claims for equitable relief are governed by a similar three-year statute of limitations. S.C. Code Ann. § 15-3-530(7).

- The CUTPA Investigation was also widely publicized, being the subject of multiple reports in, among other publications, *The Wall Street Journal*. Cephalon also disclosed the CUTPA Investigation in scores of SEC filings. (*See infra* 8.)
- In May 2005, South Carolina Assistant Attorney General C. William Gambrell, Jr. was assigned to the NAMFCU team overseeing the Joint Federal/State Investigation. In September 2006, Gambrell was appointed to lead the NAMFCU team. (*See infra* 9-14.)
- Between May 2005 and January 2008, Gambrell learned about Cephalon's alleged off-label promotion of the Medications through multiple sources, including: (1) his receipt of under seal *qui tam* False Claims Act complaints (whistleblower complaints) alleging the unlawful promotion; (2) his involvement in the Joint Federal/State Investigation as a member and then leader of the NAMFCU team; (3) his being privy to evidence and information regarding the alleged off-label promotion, including receiving presentations prepared by the Joint Federal/State Investigation and Cephalon's defense counsel, and participating in settlement negotiations with Cephalon; (4) his knowledge of the CUTPA Investigation; and (5) press reports about the allegations and investigations. (*See infra* 9-14.)
- By May 2007, the SCAG's second-highest ranking official, Chief Deputy Attorney General John McIntosh, knew about the specific allegations concerning Cephalon's off-label promotion of Provigil, Gabitril and Actiq, and the Joint Federal/State Investigation. By January 2008, McIntosh knew about the \$425 million agreement in principle to settle the Joint Federal/State Investigation. (*See infra* 15-16.)
- On November 9, 2007, Cephalon publicly disclosed that it had entered into a \$425 million agreement in principle to settle the Joint Federal/State Investigation. The settlement in principle was widely publicized. (*See infra* 12-14.)
- On November 15, 2007, South Carolina Assistant Attorney General C. Havird ("Sonny") Jones, Jr., of the SCAG's Consumer Protection Division, received an e-mail from a Connecticut Assistant Attorney General informing him of the CUTPA Investigation and inviting him to contact the Connecticut Attorney General's Office for additional information. (*See infra* 16-17.)
- Attorney General Henry McMaster knew, or should have known, about the specific allegations against Cephalon through at least ten memoranda he received from NAMFCU from June 2005 to June 2008. (*See infra* 24.)

The State will attempt to sidestep the overwhelming evidence establishing its actual knowledge by arguing that it was somehow precluded from acting as a result of the fact that the False Claims Act *qui tam* lawsuits against Cephalon were under seal. This argument is wrong for several reasons.

First, the *qui tam* seal does not present a bar to the filing of lawsuits regarding the same, or any other, subject matter.

Second, the seal does not restrict the use of information contained in press reports, disclosed in public SEC filings, presented by a defendant's counsel in the course of negotiations or provided by a sister law enforcement agency investigating an unfair trade practices act case.

Third, the seal does not restrict the use of evidence or other information gathered in the course of the investigation of allegations made in *qui tam* complaints. Instead, it only limits disclosure of the *qui tam* complaint, the fact that it was filed and the identity of the whistleblower.

Thus, well before June 6, 2008, the SCAG both had, and was on notice of, ample information on which to act, and nothing about the *qui tam* seals prevented it from doing so. Even if the SCAG were somehow mistaken about the scope of the seal, such misunderstanding does not toll the statute of limitations.

Accordingly, because the applicable statutes of limitations began to run before June 6, 2008, the State's lawsuit is time-barred, and Cephalon is entitled to the entry of summary judgment on all of the State's claims.

II. UNDISPUTED FACTS

Cephalon is a biopharmaceutical company that sells federally approved prescription Medications. From 2003 to 2005, four *qui tam* False Claims Act lawsuits⁴ were filed against Cephalon and were eventually consolidated in federal court in Philadelphia, Pennsylvania (collectively, the "*qui tam* Lawsuits").⁵ (Exs. 3, 4, 5, 6.) The lawsuits alleged that Cephalon

⁴ The federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, allows private persons, known as "relators" or whistleblowers, to bring suit on behalf of the government to recover for losses occasioned by the submission to government programs of alleged false claims for payment. The whistleblower is entitled to a portion of the government's ultimate recovery. While not all states have their own false claims acts, those that do have similar provisions.

⁵ Procedurally, a *qui tam* False Claims Act lawsuit is filed under seal and not immediately served on the defendant in the action. See 31 U.S.C. § 3730(b)(2). Instead, the allegations are first investigated by the government and, if it so chooses, the government may intervene in the matter and proceed with the suit as its

engaged in off-label promotion of Provigil, Gabitril and Actiq – the same conduct which allegedly gives rise to the State’s claims here. (*See, e.g.*, Ex. 3 at ¶ 26.)

In 2004, the United States Attorney’s Office in Philadelphia (“USAO”) began investigating the allegations of off-label promotion in the *qui tam* Lawsuits. Thereafter, around May 2005, NAMFCU formed a team to represent the interests of the 50 states’ Medicaid programs in the Joint Federal/State Investigation. (Gambrell Dep. at 42:25-43:11; Ex. 8 at 2.)⁶ In or around September 2004, a subpoena was issued to Cephalon for documents. (Ex. 9.)

The State’s claims under SCUTPA and for unjust enrichment arise from allegations that Cephalon engaged in off-label promotion of Provigil, Gabitril and Actiq from January 1, 2001 through December 31, 2006. (Ex. 2 at ¶¶ 60-82.) Those allegations are precisely the same allegations that were at issue in the Joint Federal/State Investigation and the Connecticut Attorney General’s CUTPA Investigation, and which were disclosed in numerous national press reports and Cephalon’s public regulatory filings and disclosures.

A. Various Investigations of Cephalon’s Purported Off-Label Promotion Were Widely Reported Before the June 6, 2008 Cut-Off Date

By 2007, public filings with the SEC and a multitude of news reports and articles disclosed that the government was investigating Cephalon’s alleged off-label promotion of the Medications. Between 2004 and 2007, the news reports appeared in wire services and numerous newspapers, including *The New York Times* and on the front page of *The Wall Street Journal*. (*See, e.g.*, Exs. 10, 11.)

own. *See id.* § 3730. At that point, the lawsuit is unsealed and served on the defendant, and the case then proceeds like any other civil litigation. *See id.* § 3730(c).

⁶ Excerpts from the transcript of the February 28, 2013 deposition of C. William Gambrell, Jr. (“Gambrell Dep.”) are attached to the McKinney Affidavit as Ex. 7 thereto.

1. SEC Filings

The first disclosure was in September 2004 when Cephalon disclosed in a Form 8-K filed with the SEC that it had received a subpoena "from the United States Attorney's Office in Philadelphia requesting documents from 1998 to the present regarding the sales and promotional practices relating to the company's products." (See Ex. 12.) At the time Cephalon only manufactured three products – Provigil, Gabitril and Actiq. In its November 9, 2004 Form 10-Q filed with the SEC, and every subsequent quarterly and annual report filed with the SEC between 2004 and 2008, Cephalon disclosed that it "had received subpoenas from the U.S. Attorney's Office in Philadelphia requesting [information] generally relating to our sales and promotional practices for Provigil, Actiq and Gabitril." (Ex. 13; see Ex. 64 ("In September 2004, we announced that we had received subpoenas from the U.S. Attorney's Office in Philadelphia with respect to Provigil, Actiq and Gabitril. This investigation is ongoing and appears to be focused on our sales and promotional practices"))).

In addition, in a March 7, 2007 Form 8-K filed with the SEC, Cephalon disclosed that it received a letter from Congressman Henry Waxman, Chairman of the House Committee on Oversight and Government Reform, requesting information relating to Cephalon's sales and marketing practices as a result of the articles appearing in *The Wall Street Journal* in November 2006. (See Ex. 27.)

2. Press Reports

Newspapers and wire services also reported on the various governmental investigations of Cephalon's alleged "off-label" promotion of the three drugs at issue in the State's Complaint, Provigil, Gabitril and Actiq:

- On September 8, 2004, the *Philadelphia Inquirer* reported that Cephalon had received a subpoena from the USAO containing a "very broad request" for documents relating to Cephalon's "sales and promotional practices of [Cephalon's] three drugs, Provigil, Actiq

and Gabitril.” In its analysis, the report explained what “off-label” promotion is, and stated that the subpoena likely concerned allegations that Cephalon was being investigated for “off-label” promotional practices. (Ex. 14.)

- On November 3, 2006, *The Wall Street Journal* published an above-the-fold front page article about Cephalon’s alleged off-label promotion of Provigil, Gabitril and Actiq. The article reported that the USAO was investigating “Cephalon’s marketing practices in connection with Actiq and two of its other products, the popular narcolepsy drug Provigil and the epilepsy medicine Gabitril.” The article also highlighted Cephalon’s alleged “off-label” promotion, stating “Cephalon stands out among drug makers for unusually large off-label sales” of Provigil and Gabitril. (Ex. 11.)
- Two weeks later, on November 21, 2006, *The Wall Street Journal* followed up on its initial report about Cephalon’s alleged off-label marketing of Provigil, Gabitril and Actiq. That report reinforced and confirmed the earlier story that the USAO was investigating Cephalon’s promotional practices for Provigil, Gabitril and Actiq as “part of a broader crackdown by prosecutors against off-label marketing.” (Ex. 15.) Another follow-up article appeared in *The Wall Street Journal* on September 14, 2007. (Ex. 22 (reporting on state and federal law enforcement investigations into Cephalon’s promotion of Actiq for off-label treatments)).

Similar press reports continued throughout the course of the Joint Federal/State Investigation. (See, e.g., Ex. 9, Press Release, Cephalon, *Cephalon Receives Subpoena from U.S. Attorney’s Office*, Sept. 7, 2004; Ex. 10, *Cephalon Receives a Subpoena Over Marketing Practices*, N.Y. Times, Sept. 8, 2004; Ex. 16, *Cephalon Receives Subpoena*, Atlanta J. Const., Sept. 8, 2004; Ex. 17, *Provigil Maker Receives Subpoena*, L.A. Times, Sept. 8, 2004; Ex. 18, *Painkiller is Topic of Inquiry*, Salt Lake Tribune, Nov. 11, 2004; Ex. 19, Business News, L.A. Times, Oct. 6, 2004; Ex. 20, Business in Brief, Boston Herald, Nov. 10, 2004; Ex. 21, *Cephalon’s Painkiller Promotion Questioned*, Philadelphia Inquirer, Nov. 22, 2006 (reporting that Cephalon was being investigated by state and federal law enforcement authorities in connection with the alleged off-label promotion of Provigil, Gabitril and Actiq)).

3. Publicity Surrounding the Connecticut Attorney General’s Unfair Trade Practices Act Investigation of Cephalon

In or around 2004, the Connecticut Attorney General’s Office started investigating whether Cephalon was involved in off-label marketing of Provigil, Gabitril and Actiq in

violation of Connecticut's Unfair Trade Practices Act ("CUTPA"). CUTPA is similar to South Carolina's Unfair Trade Practices Act. *Compare* Conn. Gen. Stat. §§ 42-110, *et seq.* with S.C. Code Ann. §§ 39-5-10, *et seq.* The CUTPA Investigation was separate from the Joint Federal/State Investigation as it involved state specific programs rather than the Medicaid program. (Gambrell Dep. at 138:10-139:4.) However, the Connecticut Assistant Attorney General conducting that investigation, Robert Deichert, coordinated closely with the Joint Federal/State Investigation through, for example, attending multiple settlement negotiation meetings with representatives of the Joint Federal/State Investigation and Cephalon's counsel. (Gambrell Dep. at 147:4-148:7.)

As with the Joint Federal/State Investigation, the CUTPA Investigation was widely publicized. Cephalon first publicly disclosed the CUTPA Investigation in the Form 10-Q it filed with the SEC on November 9, 2004. (*See* Ex. 13.) The November 21, 2006 article in *The Wall Street Journal* included a detailed description of the evidence gathered in the CUTPA Investigation. As the *Journal* reported:

Cephalon, Inc. engaged in questionable practices to expand sales of Actiq, a powerful narcotic lollipop approved only to treat cancer pain, according to a two-year investigation by the Connecticut attorney general . . . [the CUTPA Investigation] also involves off-label sales of two other Cephalon drugs, the narcolepsy pill Provigil and the epilepsy treatment Gabitril.

(Ex. 15.) Other media outlets ran similar reports describing the CTAGO Investigation. (*See, e.g.,* Ex. 21.) Following *The Wall Street Journal's* report on the CUTPA Investigation, Cephalon's share price fell 5%. (*See* Ex. 23.)

4. Other Plaintiffs Filed Actions Against Cephalon for Alleged Off-Label Marketing of the Medications

In late 2007, three separate class action complaints were filed in federal court against Cephalon for alleged violations of state unfair trade practice laws. Each of these cases

specifically asserted claims under SCUTPA and other state's unfair trade practices laws based on alleged off-label marketing of Provigil, Gabitril and Actiq. (Ex. 24 at ¶ 61(dd); Ex. 25 at ¶ 61(dd); Ex. 26 at ¶ 61(dd)). Some of the cases directly quoted the press reports regarding Cephalon's alleged off-label marketing. (Ex. 24 at ¶¶ 26, 29, 30, 38; Ex. 25 at ¶¶ 26, 29, 30, 38; Ex. 26 at ¶¶ 3, 50, 61, 62, 66).

B. The South Carolina Attorney General's Office Had Actual Knowledge of the Purported Off-Label Marketing by Cephalon

In addition to the widespread publicity of the allegations regarding Cephalon's alleged off-label marketing of Provigil, Actiq and Gabitril, the SCAG had direct knowledge of its potential claims against Cephalon well before June 6, 2008 through a multitude of other sources and over an extended period of time.

1. South Carolina is Directly Involved in the Joint Federal/State Investigation

Almost every state, including South Carolina, has a Medicaid Fraud Control Unit ("MFCU"). Those units are tasked with investigating allegations of Medicaid Fraud. (Gambrell Dep. at 23:13-24:15, 111:16-112:25.) South Carolina's MFCU is part of the South Carolina Attorney General's Office. (*Id.* at 12:19-22.) NAMFCU is the national umbrella organization that coordinates the activities of the states' MFCUs, including the coordination of joint investigations of Medicaid fraud by state and federal law enforcement agencies. (*Id.* at 35:22-36:15.)

South Carolina Assistant Attorney General Gambrell has been the head of the SCAG's MFCU since 1995. (Gambrell Dep. at 22:16-23:2.) Gambrell was appointed to the Cephalon NAMFCU team when it was formed in early May 2005. (*Id.* at 42:25-43:11, 52:2-25; *see* Ex. 8 at 2.) On May 19, 2005, shortly after his appointment, Gambrell opened an official SCAG file for the Cephalon investigation. (*Id.* at 51:25-53:11; Ex. 28.)

Upon his appointment to the NAMFCU team, Gambrell was almost immediately given detailed information regarding the allegations that Cephalon engaged in off-label promotion of the Medications. (Gambrell Dep. at 49:8-50:16, 68:3-20.) In 2005 alone, Gambrell received the following:

- On May 16, 2005, the NAMFCU team's then leader, Ohio Assistant Attorney General John Guthrie, sent Gambrell an e-mail describing the Joint Federal/State Investigation, including that the investigation concerned Cephalon's alleged "off-label marketing," and that Cephalon was in the process of complying with a detailed subpoena. (Gambrell Dep. at 47:7-49:2; Ex. 29.)
- On June 3, 2005, Guthrie sent Gambrell copies of the three sealed *qui tam* Lawsuits that had been filed as of that time. (Gambrell Dep. at 59:7-22, 59:18-22, 60:3-61:6; Exs. 30, 31.)
- At that time, Guthrie also gave Gambrell the disclosure materials that the *qui tam* whistleblowers had submitted to the USAO. (See Gambrell Dep. at 59:18-22). Those materials detailed the evidence purportedly supporting the allegations that Cephalon engaged in off-label marketing of the Medications. They included, among other materials, Cephalon business records and the names of witnesses whom the whistleblowers recommended that the Joint Federal/State Investigation interview. (*Id.* at 62:9-63:5, 70:14-72:12, 80:21-81:1; see Ex. 32.)
- In November 2005, Gambrell received a PowerPoint presentation that the USAO had given to Cephalon's counsel the previous summer. (Ex. 33.) According to Guthrie, the PowerPoint presentation "provid[ed] good background material on the allegations" and included what the USAO regarded as some of the most significant documents regarding the alleged unlawful off-label marketing of the Medications. (*Id.*; see Gambrell Dep. at 55:18-56:5.)

2. Gambrell is Selected to Lead the NAMFCU Team

In September 2006, Gambrell was selected to replace Guthrie as head of the NAMFCU Cephalon team. (Gambrell Dep. at 43:6-11; Ex. 8 at 2.) As the team leader, Gambrell helped coordinate the Joint Federal/State Investigation with the federal authorities. (Gambrell Dep. at 44:12-45:7.) He also coordinated a detailed analysis of the off-label use of the Medications to develop a damages model for the USAO and NAMFCU team to use during settlement negotiations with Cephalon. (*Id.* at 86:13-88:12, 91:5-21.) In connection with the development of the damages model, in late 2006/early 2007, Gambrell oversaw the NAMFCU team's

collection of off-label utilization data for Provigil, Gabitril and Actiq from the state agencies responsible for Medicaid in all 50 states. (*Id.* at 92:21-93:6, 96:9-97:2.)⁷ This included the South Carolina Department of Health and Human Services. (Ex. 35.)

As the NAMFCU team leader, on May 31, July 23, and August 29, 2007, Gambrell attended, and participated in, negotiation sessions with representatives from the USAO and Cephalon. Those sessions ultimately led to a settlement of the Joint Federal/State Investigation of Cephalon. (Gambrell Dep. at 108:9-13; Exs. 36, 37, 38, 39.) In preparation for the negotiations, Gambrell attended strategy meetings with the USAO. (Gambrell Dep. at 108:25-109:11; Exs. 37, 38, 39, 40.) During both the strategy meetings and negotiation sessions, Gambrell participated in discussions regarding the evidence collected during the Joint Federal/State Investigation, and the strengths and weaknesses of the government's claims. (Gambrell Dep. at 135:15-137:23; Exs. 36, 38, 41.)

As a result of the negotiations, on September 14, 2007, Cephalon agreed in principle to a \$425 million global settlement with the United States, and all fifty states (including South Carolina) and the District of Columbia's Medicaid programs. (Gambrell Dep. at 110:11-111:15, 155:11-156:12.) The settlement consisted of a \$375 million civil settlement that addressed the federal and state Medicare/Medicaid civil claims and the Cephalon *qui tam* Lawsuits, and a misdemeanor guilty plea with a combined criminal fine and forfeiture of \$50 million. (*Id.* at 161:13-162:7.)

The \$425 million settlement in principle was publicly disclosed in a press release issued by Cephalon on November 8, 2007:

⁷ The NAMFCU team collected the data by submitting to the agencies detailed questionnaires that stated, "NAMFCU is conducting a preliminary investigation of potential off-label marketing practices by CEPHALON, INC.," and identified the Medications. (*See* Ex. 34). Nothing in those requests notified those agencies that the requests were under seal or otherwise confidential. (*Id.*)

The company also announced that it has reached an agreement in princip[le] with the U.S. Attorney's Office in Philadelphia and the U.S. Department of Justice with respect to the previously disclosed investigation of the company's sales and marketing practices. The company expects to pay \$425 million as part of a comprehensive settlement of federal and related state Medicaid claims.

(Ex. 42.)

It also received extensive press coverage in national media, including, among many others, *The Wall Street Journal*, *The New York Times*, the Associated Press, and Reuters. The reports stated that the settlement concerned allegations that Cephalon engaged in off-label promotion of Provigil, Gabitril and Actiq:

[Cephalon] said late Thursday that it has agreed to pay \$425 million under an agreement with the U.S. Department of Justice. Cephalon was being investigated for 'off-label' sales and marketing practices of its epilepsy drug Gabitril, narcolepsy drug Provigil and cancer pain reliever Actiq.

(Ex. 45; see Exs. 43, 44, 46, 47.) The Taxpayers Against Fraud Education Fund ("TAF") touted the settlement in principle on its website. (Exs. 48, 49.) On November 15, 2007, Gambrell received a public bulletin from TAF announcing the settlement in principle. (Ex. 50; Gambrell Dep. at 181:7-182:15.) During his deposition, Gambrell admitted that nothing prohibited any SCAG employees, including non-MFCU employees, from reviewing press articles about the investigation of Cephalon or the settlement. (Gambrell Dep. at 184:1-13.) Chief Deputy Attorney General John McIntosh also testified that Gambrell was free to disclose publicly available information to the rest of the SCAG's office. (McIntosh Dep. at 110:22-111:1.)⁸

By May 2007, Gambrell was also fully aware of the Connecticut investigation. (Ex. 52; Gambrell Dep. at 116:17-117:5, 180:11-20.) On May 15, 2007, Gambrell attempted to contact Rob Deichert and Mike Cole, the Connecticut Assistant Attorneys General leading the CUTPA

⁸ Excerpts from the transcript of the April 11, 2013 deposition of John W. McIntosh ("McIntosh Dep.") are attached to the McKinney Affidavit as Ex. 51 thereto.

Investigation, to obtain evidence and information that had been collected during that investigation:

[Gambrell] is aware of our investigation and wants to chat with us about the marketing conduct and, based on our interactions with the company to date, what we expect the company's explanations for its conduct, defenses, etc. are likely to be

(Ex. 52; Gambrell Dep. at 171:15-172:20, 172:24-173:10.)

In addition, Deichert participated in several negotiation strategy sessions with the USAO and the NAMFCU team. (Gambrell Dep. at 141:23-142:23; Exs. 53, 39, 40, 54.) Deichert also attended at least one of the negotiation sessions with Cephalon on August 29, 2007. (Gambrell Dep. at 151:5-23.) Deichert's participation in the strategy and negotiation sessions was strictly in his capacity as a representative of the CUTPA Investigation:

Q. And [Deichert] was there to represent the Connecticut state interests as opposed to the Connecticut Medicaid interest; is that correct?

A. Yes, sir.

* * *

Q. So is it fair to say that Mr. Deichert, on behalf of the State of Connecticut, participated in the internal discussions with the [USAO] and the NAMFCU team with regard to what the causation arguments were and what their substance was?

A. Yes, sir.

(*Id.* at 138:10-13, 174:8-14; *see id.* at 138:21-139:4.) Additionally, Gambrell kept Deichert "in the loop and informed" of the preparations for and negotiations with Cephalon. (*Id.* at 147:4-148:7.)

The Connecticut Attorney General also issued a detailed press release regarding the settlement in principle, and its impact on the CUTPA Investigation:

If it becomes final, the Cephalon settlement by no means ends Connecticut's intensive ongoing investigation into the company's off-label marketing. The

proposed settlement – disclosed by Cephalon to shareholders yesterday – involves restitution only for government healthcare programs.

(Ex. 55.)

As a result of issues that needed to be resolved among the various state and federal agencies and Cephalon, the final settlement agreement between Cephalon, the United States, and the fifty states and the District of Columbia was not executed until September 2008.

C. Other SCAG Employees Also Knew About the Potential Claims Against Cephalon Prior to June 2008

During the Joint Federal/State Investigation, Gambrell was supervised by and reported directly to Chief Deputy Attorney General McIntosh, and ultimately Attorney General Henry McMaster. (Gambrell Dep. at 27:16-28:4, 30:6-20; McIntosh Dep. at 12:20-22; McMaster Dep. at 29:20-30:2.)⁹ As Chief Deputy Attorney General, McIntosh was and is responsible for managing the SCAG, including deciding what cases the SCAG should bring and “keep[ing] track of everything that’s going on” in the SCAG. (McIntosh Dep. at 11:4-12; Smith Dep. at 139:4-21.)¹⁰ In addition, McIntosh monitored the SCAG’s significant cases. (McIntosh Dep. at 12:12-13:9, 16:10-18:7; Jones Dep. at 19:7-18.)¹¹

Gambrell admitted that he was free to share any information about the Joint Federal/State Investigation of Cephalon with either McIntosh or McMaster. (Gambrell Dep. at 58:10-23.) During his deposition, McIntosh admitted that he knew by May 2007 that Cephalon was being investigated for alleged off-label promotion of Provigil, Gabitril and Actiq. (McIntosh Dep. at 87:2-20; Gambrell Dep. at 122:8-18; Exs. 41, 59.) On August 27, 2008, Gambrell informed

⁹ Excerpts from the transcript of the March 8, 2013 and April 4, 2013 deposition of Henry D. McMaster (“McMaster Dep.”) are attached to the McKinney Affidavit as Ex. 56 thereto.

¹⁰ Excerpts from the transcript of the March 28, 2013 and March 29, 2013 deposition of Joseph W.H. “Jay” Smith (“Smith Dep.”) are attached to the McKinney Affidavit as Ex. 57 thereto.

¹¹ Excerpts from the transcript of the April 10, 2013 and April 11, 2013 deposition of C. Havird (“Sonny”) Jones, Jr. (“Jones Dep.”) are attached to the McKinney Affidavit as Ex. 58 thereto.

McIntosh by e-mail that he would be traveling to Philadelphia for three days to participate in the settlement negotiations with Cephalon for a large "off-label marketing" case in which he expected the "civil settlement to exceed a hundred million nationwide." (Ex. 41; McIntosh Dep. at 89:10-90:22.)

Gambrell also told McIntosh about Cephalon's \$425 million settlement in principle on January 7, 2008, shortly after it was publicly disclosed. (Ex. 60.) Specifically, Gambrell e-mailed McIntosh that Cephalon had agreed to a settlement in principle, and a "federal settlement agreement and [Corporate Integrity Agreement]" were being drafted. (McIntosh Dep. at 92:5-93:14.) By January 7, 2008, McIntosh knew about the Joint Federal/State Investigation, that it involved allegations of off-label marketing against Cephalon concerning Provigil, Gabitril and Actiq, and that the settlement in principle had been reached. (*Id.* at 87:2-20, 89:10-90:22, 92:5-93:14; Gambrell Dep. at 122:8-18, 162:22-163:8; Exs. 41, 59, 60.)

In addition, during McMaster's tenure as Attorney General, the SCAG had a subscription to *The Wall Street Journal* and McMaster read it as frequently as possible. (McMaster Dep. at 16:24-17:18.) McIntosh had a personal subscription to *The Wall Street Journal*, which he "scanned" every day, and where he may have seen the November 21, 2006 article describing both the CUTPA Investigation and the Joint Federal/State Investigation. (McIntosh Dep. at 104:18-21, 136:13-137:1.)

By November 2007, the SCAG's Consumer Protection Division also knew or should have known of the allegations and investigations relating to Cephalon's off-label promotion of the Medications. (Ex. 61.) The Consumer Protection Division is the SCAG unit responsible for prosecuting alleged violations of SCUTPA. (Smith Dep. at 55:17-22.) Because SCUTPA cases

have significant overlap with cases investigated by NAMFCU and the DOJ, the Consumer Protection Division monitors DOJ/NAMFCU settlements to identify potential SCUTPA cases:

Q. Now, when you evaluate claims and research claims and determine the strength of claims, where do you get your information from?

A. Yeah, I would say mainly, you know, we get our initial information from other states' investigations or DOJ investigations that have already settled.

(*Id.* at 152:25-153:7; *see id.* at 86:15-25, 136:9-14.) It also relied on information it received from other states to identify SCUTPA claims. (*Id.* at 35:13-18 ("Usually, I think back in the 2006, 2007, 2008 time period, it was – I mean, we got information from other states, and we tried to look at what other states were doing and researched cases that way").

In addition, the Consumer Protection Division participated in the Health Fraud Group of the National Association of Attorneys General ("NAAG"). (Jones Dep. at 60:6-14; Smith Dep. at 45:6-14.) NAAG's Health Fraud Group is primarily designed to share information regarding the various states' investigations concerning the marketing of prescription medications by pharmaceutical companies, and to jointly conduct such investigations. (Smith Dep. 45:15-46:7.) For example, on November 15, 2007, less than a week after the Connecticut Attorney General's press release regarding the \$425 million settlement in principle, Connecticut Assistant Attorney General Thomas Saadi e-mailed the NAAG Health Fraud Group, including the attorney in charge of the SCAG's Consumer Protection Division, Sonny Jones. Saadi's e-mail invited members to contact Connecticut about the CUTPA Investigation:

As you may know CT has been engaged in an investigation of Cephalon for the better part of three years. Over the past two days several states have contacted me regarding this case and, as such, I wanted to broadly inform the Health Fraud Group to please contact AAG Mike Cole . . . with any questions regarding this matter. In the meantime Mike and I will be in touch with each of you soon with further information.

(Ex. 61.) Jones read the e-mail when he received it and sent it to Smith. (Jones Dep. at 114:11-15; Ex. 61.) Despite Saadi's invitation to contact Cole with any questions about the CUTPA Investigation, neither Jones nor Smith did so. (Jones Dep. at 322:10-23; Smith Dep. at 183:2-18.)

D. The SCAG Waited Until June 2011 to Bring the State's Claims Against Cephalon

Cephalon's settlement with the United States and the fifty states and the District of Columbia was finalized on September 29, 2008, and executed by the State on October 1, 2008. However, the SCAG did not file its SCUTPA complaint until years later, June 2011. When asked why the SCAG waited so long, Jones stated that he "thought" the statute of limitations on SCUTPA did not begin to run until the *qui tam* seals on the *qui tam* Lawsuits were lifted in September 2008. (Jones Dep. at 79:24-80:7.) However, Jones did not ask Gambrell whether he was privy to any information not subject to the *qui tam* seals. (*Id.* at 84:17-20.) Nor did Jones, or anyone else in the SCAG, conduct any research to determine when the statute of limitations started to run on the State's potential SCUTPA claim. (Jones Dep. at 93:22-94:5.)

III. SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *See George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Under South Carolina law, summary judgment is mandated when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCF; *see McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 246, 612 S.E.2d 462, 464 (Ct. App. 2005).

A party seeking summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *See Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct. App. 2004). Once the moving party has shown the absence of a genuine issue of material fact, the burden shifts to the non-moving party, who “cannot simply rest on mere allegations or denials contained in the pleadings” to avoid summary judgment, but “must come forward with specific facts showing there is a genuine issue for trial.” *Id.* Where, as here, “plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Id.*

IV. ARGUMENT

A. The State’s Claims are Time-Barred

The SCAG filed this action on June 6, 2011. Both of the State’s claims (Count I SCUPTA and Count II unjust enrichment) are governed by a three-year statute of limitations. SCUTPA expressly provides: “No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.” S.C. Code Ann. § 39-5-150.

Similarly, the State’s claim for unjust enrichment is governed by the three-year statute of limitations in S.C. Code Ann. § 15-3-530(7). *See* S.C. Code Ann. § 15-3-530(7) (providing that actions “for relief on the ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery” are governed by three-year statute of limitations); *see also* 18 S.C. Jur. Reference § 3 (June 2011).¹²

¹² In a nearly identical case against Eli Lilly & Co., the SCAG argued that the State’s unjust enrichment claim was governed by the three-year statute of limitations in S.C. Code Ann. § 15-3-530(7). *See State v. Eli Lilly & Co., Inc.*, 2007-CP-42-1855, Plaintiff’s Opp. to Motion for Summary Judgment on Statute of Limitations, at 4 (S.C. Com. Pl. Aug. 31, 2009). (Ex. 63 at 5.)

The complaint is time-barred if the State knew or, through the exercise of reasonable diligence, should have known that it might have a claim against Cephalon prior to June 6, 2008. See *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (“[T]he statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct.”). The SCAG’s knowledge is determinative of when the statutes of limitations began to run on the State’s claims. *State v. Ortho-McNeil-Janssen Pharm., Inc.*, No. 2007-CP-42-1438, 2011 WL 3794016, at *3-4 (S.C. Com. Pl. Feb. 25, 2011) (holding that the statute of limitations began to run “when [the SCAG] would have become aware of ‘unfair or deceptive acts or practices’ in the Defendant’s marketing and labeling actions”). (Ex. 62.)

“South Carolina’s statute of limitations requires very little to start the clock.” *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998). South Carolina courts have explained that “either actual or constructive knowledge of facts or circumstances” indicating the existence of a cause of action trigger a plaintiff’s duty “to exercise reasonable diligence in investigating and, ultimately, in pursuing a claim arising therefrom.” *Burgess v. Am. Cancer Society, S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 800 (Ct. App. 1989). Thus, the inquiry as to when a statute of limitations begins to run does not focus on when the complaining party identifies a specific cause of action or develops a full-blown theory of recovery. See, e.g., *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). Rather, the discovery rule “focuses upon whether [the plaintiff] acquired knowledge of existing facts ‘sufficient to put [it] on inquiry, which, if developed, will disclose’” the existence of a potential claim. *Burgess*, 300 S.C. at 186, 386 S.E. 2d at 800.

This is an objective rather than a subjective standard. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 300, 332, 534 S.E.2d 672, 678 (S.C. 2000) (explaining that the standard is not whether a plaintiff was on notice by a certain date (a subjective standard), but whether a reasonable person in the plaintiff's circumstances would have been on notice by a certain date (an objective standard)). Thus, a plaintiff's claim that it was ignorant of the relevant facts or circumstances is insufficient to toll the statute of limitations if such facts and circumstances could have been known through the exercise of reasonable diligence. *Burgess*, 300 S.C. at 186-187, 386 S.E.2d at 800-801.

1. The Widespread Media Coverage of Cephalon's Alleged Off-Label Promotion Put the State on Notice

Under South Carolina law, where events receive widespread publicity, prospective plaintiffs are charged with knowledge of their occurrence for the purpose of determining when a statute of limitations begins to run. *E.g., Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 358-359, 559 S.E.2d 327, 337-338 (Ct. App. 2001) (holding that plaintiff is charged with notice of events where events receive widespread publicity). Similarly, courts in other jurisdictions routinely hold that widespread media attention puts a plaintiff on notice for statute of limitations purposes even if the plaintiff claims it "did not hear or read any of the media reports." *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000); *see, e.g., United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980) ("[W]here events receive such widespread publicity, plaintiffs may be charged with knowledge of their occurrence."); *Patterson v. United States*, 451 F.3d 268, 271 (1st Cir. 2006) ("Where events receive widespread publicity, plaintiffs may be charged with [constructive] knowledge of their occurrence."); *Stutz Motor Car of Am., Inc. v. Reebok Int'l, Ltd.*, 909 F. Supp. 1353, 1362 (C.D. Cal. 1995) (noting that "sufficient widespread publicity

existed for plaintiff to be charged with constructive knowledge of the Reebok products and the potential use of Stutz's trade secrets").

Here, the widespread publicity over several years about the Joint Federal/State Investigation, the CUTPA Investigation and the \$425 million settlement in principle put the State on notice of potential claims against Cephalon well before June 2008. Beginning in September 2004 through November 2007, numerous national media sources reported on the Joint Federal/State Investigation and the CUTPA Investigation, and revealed that Cephalon allegedly engaged in off-label promotion of Provigil, Gabitril and Actiq – the exact same conduct that gives rise to the State's claims in this action. (*See, e.g.*, Ex. 14.) But one example of the many press reports is the November 21, 2006 *Wall Street Journal* article entitled, *Cephalon Used Improper Tactics to Sell Drug, Probe Finds*. That article not only described Cephalon's alleged off-label marketing of Provigil, Gabitril and Actiq, but it included various details of Connecticut's investigation into Cephalon's alleged off-label marketing practices for the Medications, and Connecticut's alleged factual findings. The article also discussed the USAO investigation into Cephalon's marketing practices concerning the Medications. (*See id.*) As detailed above, numerous other reports between 2004 and 2007 disclosed similar information. (*See* Exs. 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 42, 43, 44, 45, 46, 47, 48, 49).

Cephalon's \$425 million settlement in principle to resolve the Joint Federal/State Investigation into alleged claims of Medicare/Medicaid fraud for Cephalon's alleged off-label marketing of Provigil, Gabitril and Actiq also received significant and widespread coverage. (*See, e.g.*, Exs. 43, 44, 45, 46, 47.) The widespread press coverage regarding the Joint Federal/State Investigation and the CUTPA Investigation was more than sufficient to place the SCAG on inquiry notice of its potential claims. *See, e.g., Hedgepath*, 348 S.C. at 359, 559

S.E.2d at 337-338 (holding that uncontested evidence of widespread publicity of alleged environmental contamination triggered the running of the applicable statutes of limitations).

Indeed, three class action lawsuits were filed in October/November 2007 quoting directly from *The Wall Street Journal's* November 3, 2006 article which contained an extensive analysis of Cephalon's alleged off-label promotional activities for Provigil, Gabitril and Actiq. (*See, e.g.*, Ex. 24 at ¶ 31 ("According to *The Wall Street Journal*, Cephalon 'stands alone for its unusually large off-label sales.' Its top seller Provigil is estimated by industry analysts to have 80% of its sales from off-label use. As a result of its aggressive off-label marketing its revenue exceeds \$1.6 billion or double the figure of three years ago.") Even according to AAG Sonny Jones's definition of inquiry notice, the publicly available information concerning Cephalon's alleged off-label promotion of Provigil, Gabitril and Actiq was sufficient to trigger the running of the statute of limitations. (Jones Dep. at 338:18-23 ("It tells me that Cephalon's a pharmaceutical company, that South Carolina has an interest in it because it settled with South Carolina Medicaid, and it tells me about the three drugs Now, that – that puts me on notice.") Thus, there was ample information available in the public domain, not only to put the State on inquiry notice, but on which other plaintiffs used to file three class action lawsuits. (Exs. 24, 25, 26.)

2. Cephalon's SEC filings put the State on notice

The State was also put on constructive notice of its claims in this action by Cephalon's SEC filings. South Carolina law is well-settled that a prospective plaintiff is on constructive or inquiry notice of the content of documents filed in conformity with statutory law, which an inquiry would have revealed. *See, e.g., Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799-800 (Ct. App. 1997) (holding that statute of limitations began to run upon public filing of statutorily required materials with the clerk of court); *see also Fuller-Ahrens v. S.C. Dep't. of Highways and Pub. Transp.*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993). Every annual and

quarterly report that Cephalon filed with the SEC from November 9, 2004 through December 31, 2008 disclosed the Joint Federal/State Investigation and the CUTPA Investigation. (Exs. 13, 27, 64.) These disclosures specifically notified the public that the Joint Federal/State Investigation and the CUTPA Investigation were investigating Cephalon's sales and promotional practices for Provigil, Gabitril and Actiq and were sufficient to trigger the running of the limitations period. *See Berry*, 328 S.C. at 445, 492 S.E.2d at 799-800 (filing of bond documents with clerk of court in connection with the installation of municipal sewer system placed town residents on constructive notice of potential challenge to issuance of bond).

3. The SCAG Had Actual Knowledge Long Before June 6, 2008

The undisputed facts also establish that the SCAG had actual knowledge of the allegations concerning Cephalon's alleged off-label promotion long before June 6, 2008.

Specifically, in 2005, Gambrell received three of the four complaints in the *qui tam* Lawsuits, the whistleblowers' disclosure materials, and the USAO's PowerPoint presentation to Cephalon, which identified the key pieces of evidence supporting the allegations of off-label promotion and which was not marked with any indication that it contained material under seal or was otherwise confidential. Thus, in 2005, Gambrell had actual knowledge of not only allegations that Cephalon engaged in off-label promotion of Provigil, Gabitril and Actiq, but also detailed and specific evidence underlying those allegations. This included Cephalon business records and the names of witnesses who would likely be able to substantiate the allegations of off-label promotion. Then by 2007, Gambrell had information concerning the potential damage models for the alleged off-label marketing, and the Medicaid utilization data for Provigil, Gabitril and Actiq in South Carolina and other states that Gambrell's NAMFCU team had collected from the fifty states. (Gambrell Dep. at 55:18-56:5, 70:14-72:12, 80:21-81:1, 92:21-93:6, 96:9-12, 96:20-97:2, 135:15-137:22; Exs. 33, 34, 36, 38, 41.) It is also undisputed

that Gambrell knew that the Connecticut Attorney General was pursuing claims on behalf of Connecticut consumers under Connecticut's version of SCUTPA for the same alleged conduct relating to the off-label marketing of Provigil, Gabitril and Actiq. (Gambrell Dep. at 116:17-117:5, 180:11-20, 181:7-182:15; Exs. 36, 50.)

Gambrell was not the only SCAG employee who had actual knowledge of the allegations concerning Cephalon's alleged off-label promotion of the Medications. By at least May 2007, Chief Deputy Attorney General McIntosh knew that Cephalon allegedly promoted Provigil, Gabitril and Actiq off-label, and that the company was being investigated by the USAO and NAMFCU for Medicare fraud as a result of the alleged conduct. (McIntosh Dep. at 87:2-20, 89:10-90:22; Gambrell Dep. at 122:8-18, 162:22-163:8; Exs. 41, 59.) Moreover, by January 2008, McIntosh knew that Cephalon had agreed to the \$425 million settlement in principle. (McIntosh Dep. at 92:5-93:14; Ex. 60.) McIntosh therefore also had actual notice of the State's potential SCUTPA claims against Cephalon before June 2008.

Finally, beginning in June 2005, both McIntosh and McMaster received and reviewed numerous memoranda from NAMFCU which explained that NAMFCU was participating in the Joint Federal/State Investigation into allegations that Cephalon engaged in off-label promotion and marketing of Provigil, Gabitril and Actiq. (McIntosh Dep. at 103:21-104:10; McMaster Dep. at 84:7-85:3; Ex. 65.)

4. The SCAG Had Constructive Notice Based on the E-mail From the Connecticut Attorney General's Office

The State also had notice when the SCAG's Consumer Protection Division received an e-mail from the Connecticut Attorney General's Office regarding the CUTPA Investigation. The e-mail, which was directed to the Health Fraud Group, explained that Connecticut had been engaged in a three-year investigation of Cephalon and that a group e-mail was being sent

because other members of the Health Fraud Group had inquired about the CUTPA Investigation. (Ex. 61). Both Smith and Jones testified that one of the principal reasons they participated in the Health Fraud Group was to receive information from other states to develop leads for potential off-label promotion cases against pharmaceutical companies. (Jones Dep. at 337:24-338:7; Smith Dep. at 86:15-25, 136:9-14, 152:25-153:12.) The fact that Connecticut "wanted to broadly inform the Health Fraud Group" about its investigation, and that other members of the group were interested in Connecticut's investigation of Cephalon should have immediately alerted Smith and Jones of the potential importance of the investigation to South Carolina and to the fact that additional inquiry was necessary. (Ex. 61.) Connecticut's e-mail would have led a person acting with reasonable diligence to conduct an additional inquiry. Indeed, during his deposition, Smith conceded that the Connecticut Attorney General's Office would likely have disclosed both the CUTPA Investigation and the Connecticut Attorney General's press release regarding the \$425 million settlement in principle. (Smith Dep. at 209:20-211:8.)

The fact that Smith, the current Director of the Consumer Protection Division, concedes that an additional inquiry would, at the very least, have led to information about the CUTPA Investigation, by itself demonstrates the existence of inquiry notice. *See Witt v. Am. Trucking Assn's, Inc.*, 860 F. Supp. 295, 302 (D.S.C. 1994) (statute of limitations begins to run where facts and circumstances are such that a person of common knowledge and experience would be put on notice that some claim against defendant might exist); *see also Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 124, 542 S.E.2d 736, 740-741 (Ct. App. 2001) (holding that statute of limitations was triggered when, acting with reasonable diligence, plaintiff should have known cause of action might exist).

B. Nothing Prevented the SCAG From Acting on Its Knowledge of Cephalon's Alleged Off-Label Marketing Activities

Despite the overwhelming information that was known, and that should have been known, by the SCAG, the State claims the statute of limitations did not begin to run until September 2008 because although the SCAG's "[MFCU] was necessarily aware of the allegations and facts supporting [the] allegations," the MFCU was "prevented by the federal seal from sharing that information with others." (Ex. 66.) Not only is this argument wrong as a matter of law, it also entirely misses the point.

First, the *qui tam* seal did not restrict Gambrell or any other SCAG employee from using information that was contained in press reports, Cephalon's public SEC filings or information that the SCAG obtained from the Connecticut Attorney General's Office. That information existed completely independent of the *qui tam* cases. The State's argument also ignores Gambrell's knowledge of information and evidence collected by the CUTPA Investigation and the public disclosure of the settlement in principle. Indeed, McIntosh conceded that nothing prevented Gambrell from sharing the information he acquired from publicly available press reports about the CUTPA Investigation and the settlement in principle with anyone he wanted. (McIntosh Dep. at 110:22-111:1.)

Second, the *qui tam* seal did not prevent Gambrell, McIntosh, McMaster or any other member of the MFCU from sharing the evidence and information they acquired during the course of the Joint Federal/State Investigation. The sealing provision of the FCA provides: "The [*qui tam*] complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). The court sealing orders sealing the *qui tam* cases were thus limited to "the Complaint and all other filings in these actions." (*E.g.*, Ex. 67.)

The FCA contains no restrictions on the use of underlying facts or evidence gathered in the course of the investigation of the allegations contained in the *qui tam* complaint. *See* 31 U.S.C. § 3730(b). The Fourth Circuit recently confirmed the narrow scope of the *qui tam* seal. In *ACLU v. Holder*, 673 F.3d 245, 256 (4th Cir. 2011), the court held that: “Nothing in the FCA prevents the *qui tam* relator from disclosing the existence of the fraud. Therefore, even if there is a First Amendment right of access to a *qui tam* complaint and docket sheet sealed in accordance with 31 U.S.C. § 3730(b)(2)-(3), the FCA’s seal provisions are narrowly tailored to serve a compelling government interest.” (emphasis added). Thus, while the “seal provisions limit the [whistleblower] from publicly discussing the filing of the *qui tam* complaint,” they do not prevent disclosure of the existence of the underlying fraud. *Id.* at 254.

Here, it is undisputed that Gambrell had a vast amount of factual information concerning Cephalon’s alleged off-label marketing of Provigil, Gabitril and Actiq (*see supra* at 9-14) which was not protected by the seal and which Gambrell was free to share with colleagues in the SCAG. This information included, at a minimum, all of the factual allegations in the complaints, the whistleblowers’ disclosure materials, the USAO’s PowerPoint presentation to Cephalon and the evidence gathered during the course of the Joint Federal/State investigation. Gambrell conceded in his deposition that “underlying evidence” was not protected by the *qui tam* seal. (Gambrell Dep. at 57:8-11.) Thus, Gambrell freely shared information about the Joint Federal/State Investigation with representatives from Connecticut Attorney General’s Office who were neither on the NAMFCU team, nor involved in the Joint Federal/State Investigation, but instead were pursuing claims under CUTPA. (*Id.* at 138:10-13, 138:21-139:4.)

Third, any argument by the State that the *qui tam* seal created a “disability” which tolled the statute of limitations until the seal was lifted should be rejected as a matter of law. As

Gambrell conceded, nothing prevented the SCAG from pursuing a SCUTPA claim while the *qui tam* Lawsuits were under seal:

Q. Are you aware of anything that would have prevented the Attorney General's Office from pursuing an Unfair Trade Practices Act claim against Cephalon even when the *qui tam* cases were still under seal?

A. No sir.

(*Id.* at 19:4-9.)

Indeed, South Carolina law recognizes only two types of limited "disability" that are capable of tolling a statute of limitations: (1) age under 18; and (2) insanity. *See* S.C. Code Ann. § 15-3-40. Thus, the courts have repeatedly stated that they are "without authority to alter the plain and unambiguous language of the statute," and refuse to expand the scope of § 15-3-40. *See Wiggins*, 314 S.C. at 129, 442 S.E.2d at 171 (finding physical disability does not toll the statute of limitations because "[a]ny amendment to the disabilities provided in the tolling statute is a matter for the legislature").

Finally, the SCAG's own conduct thoroughly undercuts the suggestion that it was prevented from filing of the State's complaint until the *qui tam* seal was lifted. It is undisputed that the seal was lifted on September 25, 2008. Nevertheless, the SCAG waited years, until June 2011, to bring its claim. The SCAG's after-the-fact story as to why it failed to act in a timely manner is a transparent attempt to explain nothing more than a clear lack of diligence in pursuing the State's claims.

1. The SCAG's Mistaken or Negligent Interpretation of The *qui tam* Seal Did Not Toll the Statute of Limitations

Nor can the State argue that the SCAG's misinterpretation of the scope of the seal or the law operated to toll the statute of limitations because it is well-settled that a misinterpretation of the law or negligence of an attorney does not toll the statute of limitations. *See Harris v.*

Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (finding innocent attorney error in construing the statute of limitations insufficiently “extraordinary” to justify equitable tolling); *U.S. v. Babb*, 54 F. App’x 772, 773 (4th Cir. 2003) (“Equitable tolling will not aid claimants who, through their own negligence, fail to preserve their legal rights.”).

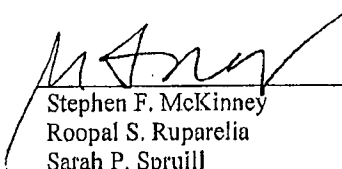
Courts have held repeatedly that attorney error regarding the meaning of the law or application of the statute of limitations does not toll the running of the statute of limitations. *See, e.g., Babb*, 54 F. App’x at 774 (not equitably tolling the statute of limitations where the United States mistakenly failed to give proper notice, which “could easily have been avoided by the basic exercise of due diligence”); *Gayle v. United Parcel Serv., Inc.*, 401 F.3d 222, 226-27 (4th Cir. 2005) (not equitably tolling the statute of limitations because “attorney negligence – including allowing a client’s case to fall through the cracks – ” is not an “extraordinary circumstance” that justifies equitable tolling); *see also Miller v. Pac. Shore Funding*, 224 F. Supp. 2d 977, 986 (D. Md. 2002) (recognizing that misinterpretation of the law does not toll the statute of limitations; “[t]he discovery rule, in other words, applies to discovery of *facts* . . . [K]nowledge of the law is presumed”) (emphasis in original).

V. CONCLUSION

For the foregoing reasons, Cephalon respectfully requests that the Court grant this motion and enter summary judgment in its favor.

Respectfully submitted,

DATED: June 6, 2013



Stephen F. McKinney
Roopal S. Ruparelia
Sarah P. Spruill
HAYNSWORTH, SINKLER, BOYD P.A.
P.O. Box 11889
Columbia, SC 29211
Telephone: (803) 779-3080
Facsimile: (803) 733-0823

and

Eric W. Sitarchuk (admitted *pro hac vice*)
Timothy D. Katsiff (admitted *pro hac vice*)
Tyler Brody (admitted *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: (215) 963-5000
Facsimile: (215) 963-5001

Attorneys for Defendant Cephalon, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE OF SOUTH CAROLINA, ex rel.
Alan Wilson, in his official capacity as
Attorney General for the State of South
Carolina,

Plaintiff,

v.

CEPHALON, INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2011-CP-40-3661

CERTIFICATE OF SERVICE

JEANETTE W. McBRIDE
S.C.P. & G.S.
2013 JUN -6 PM 12:01

RICHLAND COUNTY
FILED

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 6th day of June, 2013, caused the foregoing corrected Memorandum of Law in Support of Defendant Cephalon, Inc.'s Motion for Summary Judgment to be served via U.S. mail, postage prepaid and via email on plaintiff's counsel of record at the addresses shown below:

Kenneth M. Suggs
Gerald D. Jowers, Jr.
Janet Jenner & Suggs, LLC
500 Taylor Street
Columbia, SC 29201
ksuggs@medlawlegalteam.com
gjowers@medlawlegalteam.com

C. Havird Jones
Office of the Attorney General
1000 Assembly Street, Suite 500
Columbia, SC 29211
AGSJones@scag.gov

James Todd Rutherford
The Rutherford Law Firm
2113 Park Street
Columbia, SC 29201
trutherford@sc.rr.com

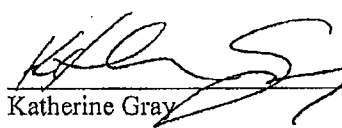

Katherine Gray

EXHIBIT E

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
STATE OF SOUTH CAROLINA, ex rel.)
ALAN WILSON, in his official capacity)
as Attorney General for the State of)
South Carolina,)
)
Plaintiff,)
)
v.)
)
CEPHALON, INC.)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-3661

2013 JUL 22 PM 3:57
CLERK OF COURT
C.C.P. & G.S.

**REPLY BRIEF IN FURTHER SUPPORT OF
CEPHALON, INC.'S MOTION FOR SUMMARY JUDGMENT**

Defendant Cephalon, Inc. ("Cephalon") submits this Reply Brief in further support of its Motion for Summary Judgment.

I. Multiple Press and other Reports Put the State on Notice

The State spends a great deal of its lengthy response expounding on the federal False Claims Act ("FCA"), and struggling to pull and stretch the FCA's limited seal into something it is not. The State then asserts that it was precluded from bringing a timely action because "there was no independent source of information relating to Cephalon's marketing practices in South Carolina." (Opp. at 20.) The State's first insurmountable problem is that the Court need not even reach the issue of the seal. Irrespective of the seal, there were a multitude of independent sources of information that placed the State, "a person of common knowledge and experience," on constructive or actual notice of its potential claims. *See Burgess v. Am. Cancer Soc'y*, 300 S.C. 182, 185-86, 386 S.E.2d 798, 800 (Ct. App. 1989).

The State argues that the Attorney General's Office ("SCAG") did not monitor the news or other publicity for matters that might be of concern to the citizens of South Carolina. (*See*

Opp. at 25.) This argument is irrelevant. Under South Carolina law, actual knowledge is not required to start the running of the statute of limitations clock. **Constructive knowledge is sufficient.** *E.g., Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 358, 559 S.E.2d 327, 337 (Ct. App. 2001) (holding that plaintiff is charged with notice of events where events receive widespread publicity) *citing United Klans of America v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980) (holding that widespread reporting by wire services and leading newspapers in the country is sufficient to put plaintiff on notice); *accord Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000) (holding that widespread media attention puts a plaintiff on notice for statute of limitations purposes even if the plaintiff claims it did not hear or read any of the media reports) (internal citations omitted); *Patterson v. United States*, 451 F.3d 268, 271 (1st Cir. 2006); *see also State v. Pettinaro Enters.*, 870 A.2d 513, 532-33 (Del. Ch. 2005) (“[T]he State [does not have] the luxury to recline in a leather chair, believing that the statute of limitations will only run once some aggrieved citizen gets around to making a complaint.”).

A. The Press

The State argues that the national publicity regarding the allegations against Cephalon – including on the front page of *The Wall Street Journal* which the SCAG subscribed to and Chief Deputy Attorney General McIntosh regularly read – was insufficient because local press reports are required to charge the State with notice. (Opp. at 23-24.) While there is, in fact, no “local press requirement” for notice, there was, contrary to the State’s claims, substantial local press coverage as well.

South Carolina’s daily newspaper, *The State*, published a three-article series entitled “Risky Rx.” which appeared on its front page between November 2 and November 4, 2003. (Ex. 68-70.) *The State* is, of course, the largest newspaper in South Carolina, and is based in Columbia. Cephalon’s alleged off-label promotion was discussed prominently in the series. For

example, the second article – entitled “Off-Label Drug Sales Soar” – discussed the increase in off-label promotion of prescription drugs. (Ex. 69.) The article described an annual conference of the American Academy of Pain Management, at which Cephalon was purportedly discussing off-label uses of Gabitril. (*Id.*) The article also stated that “Cephalon relies more on off-label sales than other companies” and, “[a]t times, Cephalon has aggressively marketed its drugs off-label.” (*Id.*) Indeed, the article identified a January 2002 letter the FDA sent to Cephalon in which it cited Cephalon “for making ‘misleading claims’ about a ‘variety of unapproved uses’ for another of its drugs, Provigil.” (*Id.*) That very same January 2002 letter is cited in the State’s Complaint. (First Amended Complaint (“FAC”) at ¶ 41.)

Thus, even under the State’s overly exacting standards, this series was more than sufficient to put the State “on inquiry, which, if developed, will disclose the alleged fraud.” *Burgess*, 300 S.C. at 185-86, 386 S.E.2d at 800. Under the State’s own theory, the series of articles in *The State* alone requires the dismissal of its claims. *See Hedgepath*, 348 S.C. at 351, 358, 559 S.E.2d at 333, 337 (local publicity alone found sufficient to put the plaintiff on constructive notice of its potential claim).

Of course, the reports in *The State* about Cephalon’s off-label promotion are but the base of a towering mountain of publicity that provided the requisite notice. This includes the extensive national press coverage surrounding the Joint Federal/State Investigation, the \$425 million settlement in principle and the CUTPA Investigation consisting of numerous articles published by major news wires such as Reuters and the Associated Press, and newspapers with national circulation, including *The Wall Street Journal*, *The New York Times*, *The Los Angeles Times*, *The Atlanta Journal Constitution*, *The Boston Herald*, and *The Philadelphia Inquirer*. (See Opening Brief at 6-8, 20-22.)

The State cannot plausibly argue these newspapers and news wires were unavailable in South Carolina – indeed, the SCAG itself had a subscription to *The Wall Street Journal* that both Attorney General McMaster and Chief Deputy Attorney General McIntosh admitted to reading on a regular basis. (Ex. 56 (McMaster Dep.) at 16:24-17:1 (“I try to read it six days a week.”); (Ex. 51 (McIntosh Dep.) at 104:18-21 (“I flip through it every morning.”)). The State also attempts to discount the extensive media coverage by attacking Cephalon’s citation of “a paltry 21 publications.” (Opp. at 23.) 21 publications are hardly paltry. But, in any event, because of the sheer quantity of publications that reported on the allegations, Cephalon cited a large but nonetheless representative sample. Suffice it to say, the number of publications far exceeds 21. By way of further examples, an additional 21 articles discussing the topic are attached. (Exs. 68-69, 73-91.)

The State also claims that most of the cited articles were internet versions. (Opp. at 23.) The relevance of this point is hard to discern in the internet age. And the SCAG surely does not argue that it lacks the know-how or technology to access the internet. But, in any event, the State is mistaken here as well. The majority of the articles cited by Cephalon in its Opening Brief were published both in print and online. (See Exs. 92-103.)

Indeed, the publicity resulted in a Congressional investigation and at least four civil lawsuits concerning Cephalon’s marketing practices. On March 1, 2007, citing the November 3, 2006 and November 21, 2006 articles in *The Wall Street Journal*, the then-Chair of the House Committee on Oversight and Government Reform made investigative inquiries of Cephalon. (Ex. 71.) The articles also caught the attention of civil plaintiffs from around the country. Between October 2007 and January 2008, at least three class actions and one shareholder derivative suit against Cephalon were filed, all alleging the same off-label promotion that is the

basis for the State's lawsuit. (Exs. 24-26, 72.) All four lawsuits cited the articles in *The Wall Street Journal*. (Ex. 24 at ¶¶ 26, 29, 30, 38; Ex. 25 at ¶¶ 26, 29, 30, 38; Ex. 26 at ¶¶ 3, 50, 61, 62, 66; Ex. 72 at ¶¶ 30, 31.)

Both the quantity and quality of the coverage is more extensive than media coverage that South Carolina courts have held constitutes constructive notice. *See, e.g., Hedgepath*, 348 S.C. at 358, 559 S.E.2d at 337 (holding that plaintiff is charged with notice of events where such events receive widespread publicity).

B. Cephalon's SEC Filings

Beginning in November 2004, all of Cephalon's statutorily required annual and quarterly SEC filings disclosed the existence of the Joint Federal/State Investigation, the CUTPA Investigation and the nature of the alleged misconduct under investigation. The disclosures also identified the products involved and the potential for significant sanctions. (Exs. 12-13, 27, 64.) Moreover, in its November 9, 2007 10-Q, Cephalon disclosed that it had entered into the agreement in principle to settle the previously described Joint Federal/State Investigation for \$425 million. (Ex. 64.) In that disclosure, Cephalon stated, "[t]he investigation has focused on our sales and promotional practices with respect to ACTIQ, GABITRIL AND PROVIGIL." (*Id.*)

The State claims that these filings were insufficient because no one from the SCAG "saw or was even aware of any of Cephalon's SEC filings." (Opp. at 22.) Again, however, constructive notice is sufficient. *E.g., Burgess*, 300 S.C. at 185-86, 386 S.E.2d at 800. Indeed, under South Carolina law, the public filing of statutorily required materials is sufficient to commence the running of the statute of limitations. *See Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799-800 (Ct. App. 1997).

The State's claim that the SEC disclosures did not provide "any indication that potentially actionable marketing practices had occurred in South Carolina or that South Carolina was harmed in any way by those practices" is similarly meritless. (Opp. at 22.) The analysis under the discovery rule focuses on whether the notice (constructive or actual) was "sufficient to put [it] on inquiry, which, if developed, will disclose" the existence of a potential claim. *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800 (internal citations omitted). Certainly, the State was able to determine prior to June 2008, just like it did before filing the instant suit, that the Cephalon products at issue were sold in South Carolina.¹

C. The Connecticut Unfair Trade Practices Act Investigation

The State also misconstrues the significance of the November 15, 2007 email from Connecticut Assistant Attorney General Thomas Saadi to the members of the state Attorneys General Health Fraud Group that was received by both SCAG Assistant Attorney General Sonny Jones and Jay Smith of the SCAG's Consumer Protection Division. (Ex. 61.) The State argues that the email did not contain all of the information it needed to put it on notice "that it might have a cause of action against Cephalon for SCUTPA violations." (Opp. at 17.) However, the email, which was entitled "Cephalon," explicitly stated that the CTAGO "had been engaged in an investigation of Cephalon for the better part of two years." (Ex. 61.) The email invited all members, including South Carolina, to contact Connecticut to learn more. Had the SCAG exercised reasonable diligence by contacting Connecticut, the State does not dispute that Connecticut would have disclosed information about its investigation. (Ex. 57 (Smith Dep.) at 209:20-211:8.)

¹ Indeed, Cephalon's disclosures of the settlement in principle described the agreement as "part of a comprehensive settlement of all Federal and related state Medicaid claims." (E.g., Ex. 64 (November 7, 2009 10-Q)).

Once again, the Connecticut communication alone was sufficient to put the State on notice. *See Burgess*, 300 S.C. at 185-86, 386 S.E.2d at 800 (“[A]lthough a party claims ignorance of existing facts and circumstances, the same result follows if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence.”). Facts that the State could have learned through the exercise of “ordinary care and reasonable diligence” are imputed to it. *Id.* The State was then well aware of the importance of timely proceeding with pharmaceutical litigation. It already had brought SCUPTA suits against Janssen Pharmaceutica, Inc. (on April 23, 2007) and Eli Lilly & Co. (on May 25, 2007). (Ex. 110 (McMaster Dep.) at 78:8-25, 80:18-81:16.)

II. The Narrow *Qui Tam* Seal

Irrespective of the existence of the under-seal federal False Claims Act *qui tam* Lawsuits, any one of the above-listed disclosures standing alone was sufficient to place the State on notice and to begin the running of the limitations period. Taken together, they were overwhelmingly so. However, the State’s actual knowledge of the alleged facts and evidence gathered during the course of the Joint Federal/State Investigation was likewise by itself sufficient to bar the State’s lawsuit. And nothing in the FCA *qui tam* seal prevented the State from timely acting on this information.

The State does not dispute that what it learned through the federal government’s investigation was sufficient to put it on notice of its claims. Instead, it argues that Cephalon’s contention that the federal False Claims Act seal “does not apply to the factual allegations or the evidence relating to those allegations” is wrong as a matter of law. (Opp. at 13.)

The United States Department of Justice (“DOJ”), however, agrees with Cephalon’s position and rejects that of the State. In its briefing before the Fourth Circuit in *ACLU v. Holder*, 673 F.3d 253 (4th Cir. 2011), the DOJ wrote:

[The False Claims Act] merely imposes a temporary seal restricting a relator from disclosing the existence of the *qui tam* action and, by logical extension, any related investigation, while allowing relators to **disclose the facts underlying their allegations of fraud**.

(Ex. 104 at 35.) (emphasis added) (internal citations omitted).² The United States likewise wrote in briefing before the district court in *ACLU v. Holder*: **“The seal does not prohibit a relator from disclosing facts underlying the alleged fraud.”** (Ex. 109 at 10.)³ And the Fourth Circuit agreed holding that “[n]othing in the FCA prevents the *qui tam* relator from disclosing the existence of the fraud.” *Holder*, 673 F.3d at 253.

Accordingly, as a matter of law, nothing precluded the SCAG from taking any action against Cephalon based on the facts underlying the *qui tam* actions, provided only that the existence of the *qui tam* lawsuits was not disclosed. *See id.* (“[T]he seal provisions limit the relator **only from publicly discussing the filing of the *qui tam* complaint.**”). *Holder*, 673 F.3d at 253 (emphasis added).

The State suggests that an order of the U.S. District Court in Philadelphia that oversaw the *qui tam* Lawsuits somehow prohibited disclosure of the facts underlying the alleged fraud. In fact, the actual sealing orders of the District Court – orders that the State did not cite – establish just the opposite. The original sealing order stated: **“ORDERED. that the complaint in this action shall be filed in camera and under seal; and . . . the complaint in this action shall remain under seal for at least 60 days”** (Ex. 105.) (emphasis added). Furthermore, all of the orders extending the seal provided that “the United States shall have up to and including [deadline date] to notify the Court of its decision whether to intervene in the above-captioned *qui*

² As the agency charged with enforcing the False Claims Act, the DOJ’s interpretation of the Act is entitled to deference. *See Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (“The well-reasoned views of the agencies implementing a statute constitute a body of experience and informal judgment to which courts and litigants may properly resort for guidance.”).

³ There is no difference between the relator and others. To the extent the seal applies at all, it applies equally to all subject to its limited restrictions. *See* 31 U.S.C. § 3730(b)(2).

qui tam action, during which time **the Complaint and all other filings in this action shall remain under seal.**" (Ex. 106.) (emphasis added).

The State points only to a January 19, 2005 order that partially lifted the seal to permit disclosure to the states and the District of Columbia. However, that order undercuts rather than supports the State's position. (Ex. 107.) First, it contains no limitation on the states' use of that information. (*Id.*) Indeed, the Government's brief in support of the partial unsealing made clear that it was interested in coordinating with the states to "avoid[] unnecessary duplication of investigative efforts." (Ex. 108 at 3.) Second, with respect to the existing scope of the seal, the order provides that "**the Complaint shall remain under seal** until further Order of this Court." (Ex. 107.) (emphasis added).

The simple fact of the matter is that there are only two authorities that dictate the scope of the False Claims Act seal: the language of the Act and sealing orders of the federal court. Neither of those authorities seals the facts or evidence underlying the allegations of fraud:

- The *qui tam* provisions of the False Claims Act provide only that: (1) "[t]he **complaint shall be filed in camera**, and shall remain under seal for at least 60 days"; and (2) "[t]he government may, for good cause shown, move the court for extensions of the time during which **the complaint remains under seal** under paragraph (2)." 31 U.S.C. § 3730(b)(2), (b)(3) (emphasis added).
- The federal court orders likewise only seal "**the Complaint and all other filings**" in the False Claims Act case. (Exs. 105-107.) (emphasis added).

Indeed, at his deposition, Assistant Attorney General Gambrell testified that he agrees with this conclusion:

Q. But with regard to the underlying evidence, that's separate and apart from the seal; is that correct?

A. That's Correct.

(Ex. 7 (Gambrell Dep.) at 57:3-11.)⁴ Thus, Gambrell, the head of the SCAG's Medicaid Fraud Control Unit himself recognized what the State's brief does not, that the seal does not cover the facts or evidence underlying the *qui tam* complaints.

Thus, the State was free to act on the facts and evidence that it learned during the course of the Joint Federal/State Investigation – facts and evidence that it does not dispute were sufficient to put it on notice of the basis for its claim long before June 6, 2008.

III. The Three-Year Statute of Limitations Applies to Unjust Enrichment

A. The Three-Year Statute Applies Under S.C. Code Ann. § 15-3-530(7)

The State argues that the equitable doctrine of laches or, alternatively, a longer statute of limitations should apply to its unjust enrichment claim. The State is incorrect. Section 15-3-530(7) applies to “any action for relief on the ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the Court of Chancery.” S.C. Code Ann. § 15-3-530(7). Here, § 15-3-530(7) applies to the State's unjust enrichment claim for a host of reasons.

First, the FAC expressly alleges that the unjust enrichment claim is grounded in fraud. (FAC at ¶ 75) (“The State . . . conferred a non-gratuitous benefit upon Cephalon that directly resulted from the Cephalon's fraudulent marketing practices.”) (emphasis added); *id.* at ¶ 76 (“Cephalon's fraudulent marketing practices resulted in Cephalon's improperly realizing value from the non-gratuitous benefits conferred upon the [sic] Cephalon from the State and its citizens' payments for the drugs.”) (emphasis added)). Thus, the State's attempt to distinguish

⁴ In addition to admitting that the *qui tam* seal only applies to the existence of the complaint and the identity of the relator, Assistant Attorney General Gambrell also admitted that he knew Marilyn May, the Assistant United States Attorney in-charge of the Joint Federal/State Investigation, had disclosed to Cephalon in 2005 the facts underlying the allegations in the *qui tam* lawsuits, and that the disclosure did not violate the seal. (Ex. 7 (Gambrell Dep.) at 75:11-76:9 (“Q. Yet you were aware that the US Attorney's Office was sharing information about the allegations with Cephalon; correct? A. Yes, sir. . . . Q. And did you ever raise with Marilyn that you were concerned she was violating the seal? A. No sir. . . . Q. You thought it was perfectly appropriate for her to share this information with Cephalon; correct? A. Yes, sir.”); *see also* Ex. 32.)

cases such as *Majstorich v. Gardner*, 361 S.C. 513, 519-21, 604 S.E.2d 728, 732 (Ct. App. 2004) (affirming the dismissal of unjust enrichment claims as time-barred under § 15-3-530), by arguing that its unjust enrichment claim is not grounded in fraud is contradicted by its own allegations. Indeed, the gravamen of the State's entire unjust enrichment claim is that Cephalon engaged in "deceptive and illegal" marketing practices. (FAC at ¶¶ 80-81.)

Second, prior to 1870, the State's unjust enrichment claim would have been "solely" cognizable by the Court of Chancery, which had exclusive jurisdiction over equitable claims such as unjust enrichment. *See Bilderback v. Boyce*, 14 S.C. 528, 539 (1881); 18 S.C. Jur. Reference § 3 (June 2011) (explaining that equitable claims were previously heard by chancery courts instead of courts at law); *see also Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 256-57, 715 S.E.2d 348, 356 (Ct. App. 2011). Here, the State unequivocally asserts that the unjust enrichment claim is equitable and that the State has no legal remedy. (FAC at ¶ 79 ("A court may grant equitable relief where there is no adequate remedy at law."); *id.* at ¶ 80 ("Plaintiff, the State and its citizens, do not have an adequate remedy at law")).

Third, the State already conceded, in a nearly identical action against pharmaceutical manufacturer Eli Lilly & Co. for claims under SCUTPA and common law, that the three-year statute of limitations in S.C. Code. Ann. § 15-3-530(7) applied to its unjust enrichment claim. (Ex. 63 at 4-5 (stating that "Lilly is also correct that for . . . unjust enrichment – the applicable limitations period is three years of discovery of the facts underlying causes of action arising from the wrongful conduct" under § 15-3-530(7))).

Fourth, the State is precluded from arguing that laches applies because that contention directly contradicts its response to Cephalon's interrogatory regarding the applicable statutes of limitations. There, the State answered that: "The State's equitable claims, including claims of

unjust enrichment, are subject to the limitations set forth in S.C. Code Ann. § 15-3-600.” (Ex. 66.) Indeed, the State never supplemented its response, despite being obligated to do so, and it should be precluded from taking a contradictory position now. *See* Rule 26(e), SCRPC.

Fifth, the State’s argument that the unjust enrichment claim should be treated as a legal claim to which the catchall 10-year statute of limitations in § 15-3-600 applies, once again ignores its own allegations in the FAC. Those allegations unequivocally characterize the claim as “equitable.” (FAC at ¶¶ 79-80.)

B. The Ten-Year Catchall Does Not Apply

Even if the unjust enrichment claim were properly characterized as a legal claim it would not be subject to the 10-year catchall, but rather would be subject to the more directly applicable three-year statutes set forth in §§ 15-3-530(1) and 15-3-530(5) because, as pleaded in the FAC, the State’s unjust enrichment claim can be characterized as arising either from a breach of contract (§ 15-3-530(1)) or as causing the injury of another (§ 15-3-530(5)). Contrary to the State’s claim that “unjust enrichment does not have a statute of limitations,” (Opp. at 13), South Carolina courts routinely apply the three-year statute of limitations under §§ 15-3-530(1) and 15-3-530(5) to bar unjust enrichment claims. *See, e.g., Walsh v. Woods*, 358 S.C. 259, 264-65, 594 S.E.2d 548, 551-52 (Ct. App. 2004) (applying three year statute of limitations in § 15-3-530(1), (5) to dismiss plaintiff’s unjust enrichment claim); *Graham v. Welch, Roberts & Amburn, LLP*, -- S.E.2d --, 2013 WL 2560988, at *2-4 (Ct. App. June 12, 2013) (applying § 15-3-530 to claim for unjust enrichment); *see also Brockman v. Am. Suzuki Motor Corp.*, CA 6:11-3381-TMC, 2012 WL 3264995, at *10 (D.S.C. Aug. 10, 2012) (applying South Carolina law and noting that “[t]he parties agree that the applicable statute of limitations as to Plaintiffs’ common law claims [including unjust enrichment] is three years” under §§ 15-3-530(1), (5)).

C. The State's Unjust Enrichment Claim Would be Barred by Laches

Even if a laches analysis were proper, the State's unjust enrichment claim would be time-barred. "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 281 (1993); *see also Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988) (stating that laches is neglect for an unreasonable length of time. "under circumstances affording opportunity for diligence, to do what in law should have been done"). In addition to unreasonable delay, laches connotes "negligence and opportunity to have acted sooner." and resulting injury to the adversary. *Chambers of S.C.*, 315 S.C. at 421, 434 S.E.2d at 281.

In determining whether a delay is unreasonable courts consider statutes of limitations for similar claims. *See Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 329-30, 721 S.E.2d 447, 450-51 (Ct. App. 2011) (holding a party cannot invoke an equitable remedy where it is barred by the statute of limitations from seeking its remedy at law); *see also Schlossberg v. Corrington*, 80 Ill. App. 3d 860, 865-66, 400 N.E.2d 73, 76 (1980) (stating that where period of delay exceeds the statute of limitations, equity follows the law by adopting the limitations period as the period constituting laches, and stating general rule that where limitations has expired the party claiming laches is not required to demonstrate prejudice).

As established above and in Cephalon's Opening Brief, the State was on notice of its potential claims against Cephalon well over three years before it filed this action. The State has no viable reason for its delayed filing. Indeed, the SCAG did not bother to conduct any research on the applicable statute of limitations or when it began to run. (Ex. 58 (Jones Dep.) at 93:22-94:5.) In addition, the SCAG's delay prejudiced Cephalon. The State's claims purport to cover

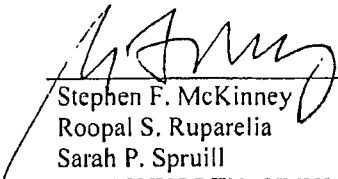
conduct that occurred more than 10-years ago – between January 1, 2001 and December 31, 2006. During the intervening years, critical evidence, including documentary evidence and potential witness testimony, concerning Cephalon's conduct in South Carolina and usage of the Medications by South Carolina doctors and consumers has undoubtedly been lost and is now irretrievable. Moreover, it is highly likely that many Cephalon employees who would have been able to provide crucial evidence in support of Cephalon's defenses are no longer employed by the company. Accordingly, Cephalon's ability to prepare its defense is clearly prejudiced by the State's lack of diligence in timely pursuing its claims. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2006) (holding that plaintiff's claims were barred by doctrine of laches where plaintiff delayed bringing suit for three years); *Bray v. State*, 366 S.C. 137, 139, 620 S.E.2d 743, 745 (2005) (holding that plaintiff's claim barred by laches where delay in filing claim resulted in destruction of evidence).

IV. CONCLUSION

Accordingly, because the undisputed evidence firmly establishes that the State had both constructive and actual knowledge putting it on notice of the potential claims against Cephalon long before June 6, 2008, its action is time-barred, and Cephalon is entitled to judgment in its favor on all the State's claims.

Respectfully,

DATED: July 22, 2013


Stephen F. McKinney
Roopal S. Ruparelia
Sarah P. Spruill
HAYNSWORTH, SINKLER, BOYD P.A.
P.O. Box 11889
Columbia, SC 29211
Telephone: (803) 779-3080
Facsimile: (803) 733-0823

and

Eric W. Sitarchuk (admitted *pro hac vice*)
Timothy D. Katsiff (admitted *pro hac vice*)
Tyler Brody (admitted *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: (215) 963-5000
Facsimile: (215) 963-5001

Attorneys for Defendant Cephalon, Inc.

) IN THE COURT OF COMMON PLEAS

) FOR THE FIFTH JUDICIAL CIRCUIT

) Civil Action No. 2011-CP-40-3661

CERTIFICATE OF SERVICE

)

)

)

2013 JUL 22 PM 3:57
JENNIFER W. MCCOY
SERVICE C.C.P. & G.S.

C. Havird Jones
Office of the Attorney General
1000 Assembly Street, Suite 500
Columbia, SC 29211
AGSJones@scag.gov


Katherine Gray

EXHIBIT F

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE OF SOUTH CAROLINA, ex rel.
ALAN WILSON, in his official Capacity
As Attorney General for the State of
South Carolina

Plaintiff,

v.

CEPHALON, INC.

Defendant.

IN THE CIRCUIT COURT

Civil Action No. 2011-CP-40-3661

FILED
CLERK OF COURT
SOUTH CAROLINA

2013 JUL -1 AM 11:56

**PLAINTIFF THE STATE OF SOUTH CAROLINA'S RESPONSE
IN OPPOSITION TO CEPHALON, INC.'S
MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. APPLICABLE LAW	4
A. Summary Judgment Standard	4
B. The False Claims Act	5
C. Statute of Limitations and Discovery Rule	8
D. SCUTPA & Unjust Enrichment	10
i. SCUTPA - § 39-5-10, <i>et seq.</i>	10
ii. Unjust Enrichment	10
a. Unjust Enrichment As An Equitable Claim	10
b. Alternatively, The State's Unjust Enrichment Claim Can Be Analyzed As A Legal Claim	11
III. ARGUMENT	13
A. The Cephalon Investigation Was Under Federal Court Seal	13
B. The State Did Not Receive Information Regarding Cephalon's Marketing Practices Independent Of The Federal Investigation ..	18
C. Cephalon's SEC Filings Did Not Put The State On Notice Of SCUTPA Cause Of Action	21
D. Sporadic Print Media and Internet Reports Did Not Put The State On Notice Of A SCUTPA Cause Of Action	23
E. Class Actions Filed In Pennsylvania Did Not Put The State On Notice Of A SCUTPA Cause Of Action	26
F. The Single E-mail From Thomas Saadi Did Not Put The State On Notice Of A SCUTPA Cause Of Action	26
G. The State's Equitable Claims Are Not Time Barred	27

- i. Unjust Enrichment Is Not Fraud And Thus Is Not Subject To Fraud's Statute Of Limitations Set Forth In S.C. Code § 15-3-530(7)....27
- ii. The State's Disgorgement Claim Is Subject To Either A Ten-Year Statute Of Limitations Or No Statute Of Limitations 29

IV. CONCLUSION 30

TABLE OF AUTHORITIES

State Cases

<i>Anderson v. Purvis</i> , 211 S.C. 255, 44 S.E.2d 611 (1947)	11
<i>Anderson v. Purvis</i> , 220 S.C. 259, 67 S.E.2d 80 (1951)	11
<i>Anonymous Taxpayer v. S.C. Dep't of Revenue</i> , 377 S.C. 425, 661 S.E.2d 73 (2008)	9
<i>Arant v. Kressler</i> , 327 S.C. 225, 489 S.E.2d 206 (1997)	10
<i>Austin v. Conway Hosp., Inc.</i> , 292 S.C. 334, 356 S.E.2d 153 (Ct. App. 1987)	8
<i>Baughman v. American Tel. & Tel. Co.</i> , 410 S.E.2d 537, 543 (1991)	4
<i>Brockbank v. Best Capital Corp.</i> , 341 S.C. 372, 534 S.E.2d 688 (2000)	5
<i>Burgess v. Am. Cancer Soc'y, South Carolina Div., Inc.</i> , 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989)	8
<i>Chambers of S.C., Inc. v. County Council for Lee County</i> , 315 S.C. 418, 434 S.E.2d 279 (1993)	11
<i>Chisolm v. Pryor</i> , 207 S.C. 54, 35 S.E.2d 21 (1945)	10
<i>Dean v. Ruscon Corp.</i> , 321 S.C. 360, 468 S.E.2d 645 (1996)	9
<i>Dema v. Tenet Physician Servs.-Hilton Head, Inc.</i> , 383 S.C. 115, 678 S.E.2d 430 (2009)	11
<i>Dixon v. Dixon</i> , 362 S.C. 388, 608 S.E.2d 849 (2005)	11
<i>Doe ex rel. Doe v. Batson</i> , 345 S.C. 316, 548 S.E.2d 854 (2001)	4
<i>Epstein v. Brown</i> , 363 S.C. 372, 610 S.E.2d 816 (2005)	25
<i>Grillo v. Speedrite Prods., Inc.</i> , 340 S.C. 498, 532 S.E.2d 1 (Ct. App. 2000)	9
<i>Harper v. McCoy</i> , 276 S.C. 170, 276 S.E.2d 170 (1981)	28
<i>Hedgepath v. Am. Tel. & Tel. Co.</i> , 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)	4, 5, 9, 23, 24
<i>Johnston v. Bowen</i> , 313 S.C. 61, 437 S.E.2d 45 (1993)	10
<i>Majstorich v. Gardner</i> , 361 S.C. 513, 604 S.E.2d 728 (Ct. App. 2004)	29

<i>Mid-State Trust, II v. Wright</i> , 323 S.C. 303, 474 S.E.2d 421 (1996)	11
<i>Moore v. Benson</i> , 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010)	9
<i>Moriarty v. Garden Sanctuary Church</i> , 341 S.C. 320, 534 S.E.2d 672 (2000)	9, 10
<i>Pitts v. Jackson Nat. Life Ins. Co.</i> , 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002)	28
<i>Pye v. Aycock</i> , 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997)	5
<i>Robinson v. Estate of Harris</i> , 388 S.C. 616, 698 S.E.2d 214 (2010)	11, 29
<i>Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n</i> , 298 S.C. 179, 379 S.E.2d 119 (1989)	10
<i>Spencer v. Miller</i> , 259 S.C. 453, 192 S.E.2d 863 (1972)	4
<i>Thomas Sand Co. v. Colonial Pipeline Co.</i> , 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002).....	4
<i>Turner v. Milliman</i> , 381 S.C. 101, 671 S.E.2d 636 (Ct. App. 2009)	8
<i>Verenes v. Alvanos</i> , 387 S.C. 11, 690 S.E.2d 771 (2010)	11
<i>Young v. S.C. Dep't of Corrections</i> , 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)	4

Federal Cases

<i>American Civil Liberties Union v. Holder</i> , 652 F.Supp.2d 654 (E.D. Va. 2009)	5, 6, 7, 15, 22
<i>Amwest Sur. Ins. Co. v. Republic Nat. Bank</i> , 977 F.2d 122 (4th Cir. 1992)	28
<i>Erickson ex rel. U.S. v. Amer. Inst. of Biological Sciences</i> , 716 F.Supp. 908, 912 (E.D.Va.1989)	6
<i>Dastgheib v. Genentech, Inc.</i> , 457 F.Supp.2d 536 (E.D. Pa. 2006)	11, 12
<i>Hughes v. Vanderbilt University</i> , 215 F.3d 543 (6th Cir. 2000)	24
<i>Mauldin Furniture Galleries, Inc. v. Branch Banking & Trust Co.</i> , No. 6:10-240-TMC, 2012 WL 3680426 (D.S.C. Aug. 27, 2012)	9
<i>Reich v. Cont'l Cas. Co.</i> , 33 F.3d 754, 756 (7th Cir. 1994)	12
<i>Stutz Motor Car of Am., Inc. v. Reebok, Int'l, Ltd.</i> , 909 F. Supp. 1353 (C.D. Cal. 1995)	24
<i>Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.</i> , 2005 WL 2405797 (N.D. Ill. Sep. 28, 2005)	12
<i>United Klans of America v. McGovern</i> , 621 F.2d 152 (5th Cir. 1980)	24
<i>U.S. ex rel. Health Outcomes Technologies v. Hallmark Health System, Inc.</i> , 349 F.Supp.2d 170 (D.Mass. 2004)	5
<i>U.S. ex rel. Lujan v. Hughes Aircraft Co.</i> , CV 92-1282 (SHx), slip op. (C.D.Cal. Nov. 9, 1993)	8
<i>U.S. ex rel. Pilon v. Martin Marietta Corp.</i> , 60 F.3d 995, 999-1000 (2d Cir. 1995)	7
<i>U.S. ex rel. Summers v. LHC Group, Inc.</i> , 623 F.3d 287 (6th Cir. 2010)	8
<i>U.S. v. Cinergy Corp.</i> , 397 F.Supp.2d 1025 (S.D. Ind. 2005)	30
<i>Williams Elecs. Games, Inc. v. Garrity</i> , 366 F.3d 569 (7th Cir. 2004)	12

Statutes

31 U.S.C. § 3729	2, 5
31 U.S.C. § 3730(b)(1)	5
31 U.S.C. § 3730(b)(2)	5, 6
31 U.S.C. § 3730(b)(3)	2, 6
S.C. Code § 39-5-10	3, 10
S.C. Code § 39-5-20	10
S.C. Code § 39-5-50(a)	10
S.C. Code § 39-5-50(b)	10
S.C. Code § 39-5-110(a)	10
S.C. Code § 39-5-110(c)	10
S.C. Code § 39-5-140	10
S.C. Code § 39-5-150	10
S.C. Code § 15-3-530	27, 29
S.C. Code § 15-3-535	9
S.C. Code § 15-3-600	13, 29

Other Authorities

S. Rep. 99-345, 1986 U.S.C.C.A.N. 5266	6, 7
77 C.J.S. Restitution at 322-323	28

Rules

Rule 56(c), SCRCF	4
-------------------------	---

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

STATE OF SOUTH CAROLINA, ex rel.
ALAN WILSON, in his official Capacity
As Attorney General for the State of
South Carolina

Plaintiff,

v.

CEPHALON, INC.

Defendant.

IN THE CIRCUIT COURT

Civil Action No. 2011-CP-40-3661

**PLAINTIFF THE STATE OF SOUTH CAROLINA'S RESPONSE IN
OPPOSITION TO CEPHALON, INC.'S MOTION FOR SUMMARY JUDGMENT**

The State of South Carolina, *ex rel.* Alan Wilson, in his capacity as Attorney General of the State of South Carolina ("State" or "Attorney General"), responds in opposition to the Motion for Summary Judgment on statute of limitations grounds filed by Defendant Cephalon, Inc. For the reasons set forth below, Cephalon's motion should be denied and this matter should proceed to trial.

I. INTRODUCTION

In September of 2008 Defendant Cephalon, Inc. ("Cephalon") pled guilty to criminal provisions of the Food Drug & Cosmetic Act for marketing its three drugs, Provigil, Actiq, and Gabitril, for uses that had not been approved by the FDA. In the plea agreement, Cephalon specifically admitted that it was guilty of the conduct at issue. (Ex. 1). As part of the plea, Cephalon was assessed a stipulated criminal penalty of \$50 million.

This guilty plea agreement was the culmination of a four-year investigation by the Department of Justice and state Medicaid Fraud Control Units into Cephalon's marketing practices. The allegations were that Cephalon engaged in a company-wide scheme to improperly market prescription drugs Actiq, Provigil, and Gabitril which resulted in overpayments by the state and federal Medicaid programs. In addition to the criminal plea agreement, the federal government and each of the states reached a civil settlement relating to the Medicaid overpayments in the amount of \$375 million. The settlement was announced on September 29, 2008.

The investigation into Cephalon's marketing practices followed the filing of whistleblower *qui tam* lawsuits pursuant to the federal False Claims Act, 31 U.S.C. 3729, *et seq.*¹ The first case was filed in 2003, and three additional cases were filed in 2004.

Under the False Claims Act the complaints are filed under seal and remain sealed until the United States decides whether to intervene, after which the court enters an order lifting the seal. The complaints are to remain under seal for 60 days unless the government can show good cause for extending the seal. Motions for extensions of the seal "may be supported by affidavits and other submissions in camera," 31 U.S.C. § 3730(b)(3). By successive court orders, the consolidated Cephalon cases remained under seal until September 29, 2008.² Necessarily, the government demonstrated, and the District Court found, good cause to keep these matters under seal for nearly five years.

¹ There were four *qui tam* cases brought against Cephalon: Lucia Paccione v. Cephalon, Inc., Civil Action No. 03-6268; United States of America, et al., ex rel. Joseph Piacentile v. Cephalon, Inc., Civil Action No. 03-6277; United States of America ex rel. Michael Makalusky v. Cephalon, Inc., Civil Action No. 05-1904; and United States of America et al., ex rel. Bruce Boise v. Cephalon, Inc., Civil Action No. 04-4401, all were consolidated before The Honorable Thomas J. O'Neill, Jr. in the Eastern District of Pennsylvania.

² On September 25, 2008 the Honorable Thomas J. O'Neill, Jr. issued an Order that the *qui tam* Complaints would be unsealed upon the filing of a Notice of Intervention by the United States Government. The Government filed its Notice of Intervention on September 29, 2008.

Attorney General Alan Wilson filed this action on June 2, 2011, within three years of the date on which the seal was lifted on the Cephalon whistleblower cases and the guilty plea and Medicaid Settlement were announced. Through this action the Attorney General seeks, pursuant to the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code §§ 39-5-10, *et seq.*, relief on behalf of the State's consumers and civil penalties on behalf of the State to be assessed against Cephalon for willful violations of SCUTPA. Additionally, through an Amended Complaint filed on September 23, 2011, the Attorney General seeks damages on behalf of the State Health Plan for payments it made for medically unnecessary prescriptions of the drugs at issue. Further, the Attorney General seeks restitution and disgorgement from the Defendants based upon a common law unjust enrichment claim. The Attorney General proceeds against Cephalon in this action in two capacities: first, in the exercise of his *parens patriae*, constitutional, statutory, and common law responsibilities to vindicate the State's sovereign interests, as well as the interests of its citizens, and second, in his proprietary capacity as the attorney for the State Health Plan. Neither the guilty plea nor the Medicaid fraud settlement resolved the claims made by the State in this action.

As will be shown in detail below, summary judgment should be denied. The State could not have filed suit because the joint federal/investigation of Cephalon was under seal, the State had no independent source of information about Cephalon's conduct in South Carolina, and the State filed this action within three years of the seal being lifted.

III. APPLICABLE LAW

A. Summary Judgment Standard

“Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

“Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). Under South Carolina Rule of Civil Procedure 56 (c), “the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact.” *Baughman*, 306 S.C. at 116, 410 S.E.2d at 545 (citations omitted).

“In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Hedgepath*, 348 S.C. at 354, 559 S.E.2d at 335. If triable issues exist, those issues must be submitted to a jury. *Young v. S.C. Dep’t of Corrections*, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). “It is the duty of the court, on a motion for summary judgment, not to try issues of fact, but only determine whether there are genuine issues of fact to be tried; and, once having found that triable issues exist, must leave those issues for determination at trial.” *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002) (quoting *Spencer v. Miller*, 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972)). “Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the

application of the law.” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000) (citation omitted). “Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Id.* Summary judgment should only be granted when “plain, palpable, indisputable grounds exist on which reasonable minds cannot differ[.]” *Hedgepath*, 348 S.C. at 355, 559 S.E.2d at 336 (citing *Pye v. Aycock*, 325 S.C. 426, 431, 480 S.E.2d 455, 457 (Ct. App. 1997).

B. The False Claims Act

The False Claims Act (“FCA”), 31 U.S.C. § 3729, *et seq.*, is a tool to combat fraud in government programs. It was originally enacted in 1863 in response to rampant fraud in contracts awarded during the Civil War. *American Civil Liberties Union v. Holder*, 652 F.Supp.2d 654, 658 (E.D. Va. 2009). A civil FCA action can be brought by the government or a private person known as a “relator” under the *qui tam* provisions of the Act. 31 U.S.C. § 3730(b)(1). The relator must file the complaint *in camera* and under seal and it “*shall* remain under seal for at least 60 days, and *shall* not be served on the defendant until the court so orders.” 31 U.S.C. § 3730(b)(2). The relator must serve “[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses” on the government. 31 U.S.C. § 3730(b)(2).

The government is given 60 days to conduct an investigation and determine whether to intervene in the action. *Holder*, 652 F.Supp.2d at 658 (citing *U.S. ex rel. Health Outcomes Technologies v. Hallmark Health System, Inc.*, 349 F.Supp.2d 170, 173 (D.Mass.2004)). “Before the conclusion of this sixty-day period, the government must either inform the court whether it is intervening, or ‘for good cause shown, move the

court for extensions of the time during which the complaint remains under seal’.” *Holder*, 652 F.Supp.2d at 658-659 (quoting U.S.C. § 3730(b)(3)). The requirements contained in sections 3730(b)(2) and (3) are mandatory. “[D]uring the initial sixty-day period *the public has no knowledge* that a civil action has been filed. After completion of the government’s investigation and notice of its intervention decision, the seal is lifted and the qui tam complaint becomes public.” *Holder*, 652 F.Supp.2d at 659(emphasis added).

Sections 3730(b)(2) and (3) “are analogous to grand jury proceedings insofar as both are aimed at preserving the integrity of criminal investigations.” *Id.* at 663 (citing *Erickson ex rel. U.S. v. Amer. Inst. of Biological Sciences*, 716 F.Supp. 908, 912 (E.D. Va. 1989); *see also* S. Rep. 99-345, 1986 U.S.C.C.A.N. 5266, 5281 (“in response to Justice Department concerns that qui tam complaints filed in open court might tip off targets of ongoing criminal investigations, the subcommittee adopted a sixty-day seal provision for all qui tam complaints”). When Congress amended the FCA in 1986, it recognized that safeguarding the integrity of these investigations requires secrecy:

[I]f a *qui tam* complaint entered the public domain during an ongoing government fraud investigation it could tip off the perpetrators and hamper the investigation. . . . [T]he initial sixty-day seal contemplated by the FCA is necessary lest “the subject [of the investigation] be tipped off” and “destroy or remove the evidence.” To the extent *qui tam* complaints filed in open court would spoil fraud investigations, it would make government intervention in the FCA action less likely and thereby reduce the number of FCA suits prosecuted. In short, prematurely unsealed complaints could hamper the government’s efforts in combating fraud and undermine the FCA.

Holder, 652 F.Supp.2d at 663 (internal citation omitted).

“There is a compelling government interest in preserving the secrecy of law enforcement investigations into fraud against the government.” *Id.* at 664. Indeed,

"Congress' central motivation in adding the seal provisions to the FCA was to protect the integrity of ongoing criminal investigations. The legislative history of the 1986 Amendments to the FCA is replete with references to this concern." *Id.*

The Justice Department asserted that the public filing of overlapping false claims allegations could potentially "tip off" investigation targets when the criminal inquiry is at a sensitive stage. While the Committee does not expect that disclosures from private false claims suits would often interfere with sensitive investigations, we recognize the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters ...

Keeping the *qui tam* complaint under seal for the initial 60-day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action.

Id. (citing S. Rep. 99-345, 1986 U.S.C.C.A.N. 5266, 5289). "Given the complexity of white collar fraud and the limited resources of the federal agencies tasked with fraud enforcement, sixty days is the minimal amount of time necessary for the government to conduct its initial review of a *qui tam* complaint." *Holder*, 652 F.Supp.2d at 665 (citing S. Rep. 99-345, 1986 U.S.C.C.A.N. 5266, 5272) ("Taking into consideration the vast amounts of Federal dollars devoted to various complex and highly regulated assistance and procurement programs, Federal auditors, investigators, and attorneys are forced to make 'screening' decisions based on resources factors.").

Some courts treat the seal as so fundamentally important that failure to abide by its provisions requires dismissal of the *qui tam* action with prejudice. *See, e.g., U.S. ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998-1000 (2d Cir. 1995) (district court committed abuse of discretion in granting dismissal of *qui tam* complaint without prejudice for failure to file under seal and for giving a detailed press interview concerning allegations; proper remedy was dismissal *with* prejudice); *U.S. ex rel. Summers v. LHC*

Group, Inc., 623 F.3d 287, 298 (6th Cir. 2010) (upholding dismissal of *qui tam* complaint not filed under seal and noting that “[r]equiring violations of the FCA’s under-seal requirement to be subjected to a balancing test thereby both misses the point of the requirement itself and potentially encourages plaintiffs to comply with the FCA’s under-seal requirement only to the point the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require dismissal of an FCA claim.”); *U.S. ex rel. Davis v. Prince*, 766 F.Supp.2d 679, 682-83 (E.D. Va. 2011) (“The sealing requirement is mandatory; failure to file a complaint under seal requires dismissal of a *qui tam* complaint with prejudice.”); *but see U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-46 (9th Cir. 2005) (adopting the balancing test rejected by the Sixth Circuit in *Summers*).

C. Statute of Limitations and Discovery Rule

It is well settled that “[t]he burden of establishing the bar of the statute of limitations rests upon the one interposing it...” *Turner v. Milliman*, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009), *rev’d in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011). The limitations period begins to run when “the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist.” *Burgess v. Am. Cancer Soc’y, South Carolina Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (quoting *Austin v. Conway Hospital, Inc.*, 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987)) (emphasis in original) (further citations omitted). Under South Carolina’s discovery rule, the statute of limitations does not begin to run until the cause of action reasonably ought to have been discovered. *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C.

340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001) (citing *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996)) (further citations omitted). More specifically, South Carolina law instructs that an applicable statute of limitations begins to run "from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of actions arises from the wrongful conduct." *Hedgepath*, 348 S.C. at 355-356, 559 S.E.2d at 336 (quoting *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647; see also *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008) ("The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist."); *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000) ("[T]he statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another.").

"The date on which discovery of the cause of action should have been made is an objective question." *Moore v. Benson*, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010). "The court essentially must ask what an objectively reasonable person would have done under similar circumstances." *Mauldin Furniture Galleries, Inc. v. Branch Banking & Trust Co.*, No. 6:10-240-TMC, 2012 WL 3680426, at *6 (D.S.C. Aug. 27, 2012).

"Application of the discovery rule contained in S.C. Code Ann. §15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact for the jury when the parties present conflicting evidence." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000); see

also *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993).

D. SCUTPA & Unjust Enrichment

i. SCUTPA – S.C. Code §§ 39-5-10, *et seq.*

The actions the Attorney General may bring on behalf of the State and its consumers to redress unfair methods of competition, or deceptive acts or practices (*see* § 39-5-20) are set forth in §§ 39-5-50(a) and (b) and §§ 39-5-110(a) and (c). The remedies for those deceptive practices include injunctions, restoring to consumers any ascertainable losses they may have suffered, and civil penalties to the State for willful violations. Pursuant to this statutory authority, the Attorney General seeks such relief in this case. The Attorney General is also seeking damages on behalf of the State Health Plan pursuant to § 39-5-140.

Section 39-5-150 of the Act sets forth the statute of limitations as three years after discovery of the unlawful conduct.

ii. Unjust Enrichment

a. The State's unjust enrichment claim should be treated as an equitable claim

A court may grant equitable relief where there is no adequate remedy at law. *Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n*, 298 S.C. 179, 379 S.E.2d 119 (1989). An adequate remedy at law is one which provides the plaintiff with "the full end and justice of the case. It is not enough that there is some remedy at law, but that remedy must be as practical, efficient, and prompt as the remedy in equity." *Chisolm v. Pryor*, 207 S.C. 54, 35 S.E.2d 21 (1945).

Unjust enrichment is an equitable doctrine that permits the recovery of the amount the defendant has been unjustly enriched at the expense of the plaintiff. *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434. Restitution and disgorgement are remedies for unjust enrichment. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010).

Generally, actions that are equitable in nature are not governed by a statute of limitations. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005) (citing *Anderson v. Purvis*, 211 S.C. 255, 44 S.E.2d 611 (1947); *Anderson v. Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951) (holding the Court's power to do equity transcends the limitations of the statute of limitations)). Rather, the equitable doctrine of laches may apply to bar an equitable action as untimely. *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 434 S.E.2d 279 (1993). For laches to apply, the defendant must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Robinson v. Estate of Harris*, 388 S.C. 616, 698 S.E.2d 214 (2010). Because the question of laches is a largely factual one, each case must be judged on its own merits. *Mid-State Trust, II v. Wright*, 323 S.C. 303, 474 S.E.2d 421 (1996).

b. Alternatively, the State's unjust enrichment claim can be analyzed as a legal claim

The State's unjust enrichment claim seeking disgorgement of Cephalon's ill-gotten claims can be looked at as a legal claim rather than an equitable one. In *Dastgheib v. Genentech, Inc.*, 457 F.Supp.2d 536 (E.D. Pa. 2006), the plaintiff brought a claim for unjust enrichment after he provided certain materials to the defendant under an alleged agreement that the plaintiff would be compensated based on sales of any products derived from those materials. Specifically, the plaintiff sought "money damages in the form of

disgorgement of [the defendant's] profits derived as a result of its use of [the plaintiff's] materials." *Id.* at 543. The defendant moved to dismiss the claim because the plaintiff had an adequate remedy at law in his causes of action for fraud and violation of the North Carolina UDAP statute. In the alternative, the defendant moved to strike the plaintiff's request for a jury trial with respect to the unjust enrichment claim because equitable claims are not triable to a jury.

The Court rejected a bright line rule which would define unjust enrichment as an equitable claim, noting that, "[i]n reality, restitution straddles the divide between legal and equitable relief and is not merely an exclusively equitable remedy." *Dastgheib*, 457 F.Supp.2d at 542 (citing *Reich v. Cont'l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.)). Because the plaintiff did not seek particular funds or property in the defendant's possession, the Court ruled that the plaintiff's claim for disgorgement was a legal claim. *Dastgheib*, 457 F.Supp.2d at 545 (citing *Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.*, 2005 WL 2405797, at *4 (N.D. Ill. Sep. 28, 2005) (noting cases where the disgorgement relief sought was equitable because the "agency seeks no money for itself" did not control where "the plaintiff seeks money for its own coffers.")). The authority for treating the claim as a legal one is well-stated by Judge Posner, who noted that when a plaintiff "wants an award of profits, he cannot obtain a constructive trust, because there is no res (that is, no fund or other specific piece of property) for the trust to attach to." *Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 577 (7th Cir. 2004). In such a case, restitution in the form of disgorgement is awarded "as a legal remedy for a legal wrong, not as an equitable remedy for a legal or an equitable wrong." *Id.*

As a legal claim, unjust enrichment does not have a statute of limitations specifically delineated in the South Carolina Code. Therefore, pursuant to the terms of S.C. Code § 15-3-600, a legal claim for unjust enrichment is an "action for relief not provided for in this chapter," and the statute of limitations on the claim is 10 years.

IV. ARGUMENT

Defendant in its motion contends that the State's claims under SCUPTA and unjust enrichment are time-barred. For the reasons set forth below, those contentions have no merit and, therefore, summary judgment should be denied and this matter should proceed to trial.

A. The Cephalon Investigation Was Under Federal Court Seal

The State of South Carolina could not have brought this action prior to the seal being lifted because to do so would have been to make public matters protected by a federal seal. Cephalon argues that the seal only applies to the whistleblower complaints, and that it somehow does not apply to the factual allegations or the evidence relating to those allegations. This position is not only incorrect, but contrary to the evidence and testimony in this case.

Assistant Deputy Attorney General William C. Gambrell is the director of the South Carolina Medicaid Fraud Control Unit ("SCMFCU"). SCMFCU is a hybrid federal and state program that is funded primarily through a federal grant. Nearly every state has a Medicaid Fraud Control Unit or equivalent group. There is a National Association of Medicaid Fraud Control Units ("NAMFCU") that coordinates the activities of the state groups.

In 2005, through NAMFCU, Mr. Gambrell became a member of a state task force negotiating team working in conjunction with the United States Attorney's Office (USAO) for the Eastern District of Pennsylvania to attempt to reach a settlement of claims of Medicaid fraud relating to Cephalon's marketing practices. In September of 2006, he became the head of the state task force negotiating team. Through his work with the joint state/federal task force, Mr. Gambrell learned of the allegations in the sealed *qui tam* complaints and certain evidence supporting those allegations. But, as will be discussed fully below, the information he received was under seal and, as such, he was not at liberty to disclose it outside of SCMFCU and his immediate chain of command - Chief Deputy Attorney General John McIntosh and then Attorney General Henry McMaster.

Mr. Gambrell and his unit are a part of the South Carolina Attorney General's Office, and, until recently, were located within the same building. However, SCMFCU, because of the nature of the cases in which it is involved, maintains separate files, separate electronic files, and does not share information with the other divisions within the office. This is analogous to the operations of the State Grand Jury. Mr. Gambrell testified that, "everyone in my unit knows that they can't discuss any case outside the unit. That's a standard operating procedure." (Gambrell Dep. 189:23-25) (Ex. 2). He further testified that, "we have a separate file system, separate computer system." (Gambrell Dep. 190:5-6). Only SCMFCU employees can access the unit's electronic files and others within the office are not permitted access. (Gambrell Dep. 187:7-12).

Mr. Gambrell was clear in his deposition, "my position is when I get information in a matter under seal, that I'm not to disseminate that information outside the parameters

of the seal...I'm not to disclose them outside of the Medicaid Fraud Control Unit except in the chain of command and then pursuant to other governmental entities who have a reason to need them to further the purpose of the investigation." (Gambrell Dep. 206:2-17). His position is correct because, "[t]he United States has a compelling interest in protecting the integrity of ongoing fraud investigations...Congress added the seal provisions to the FCA for numerous reasons, including to preserve the integrity of fraud investigations." *American Civil Liberties Union v. Holder*, 673 F.3d 245, 253 (4th Cir. 2011).

Despite the above testimony, and consistent testimony from every employee of the Attorney General's Office who has given a deposition, Cephalon argues that the seal only applied to the complaints, not the information or evidence obtained during the course of the U.S. Attorney's investigation. This position is wrong and one need only look to the District Court's Orders entered in the consolidated federal *qui tam* cases.

As an initial matter, every order entered in the case was filed under seal and remained sealed until April 1, 2013, when the district court granted Cephalon's motion for a partial lift of the seal so that those orders could be obtained and produced in the South Carolina state court case. (Ex. 3). Even Cephalon, the target of the investigation, did not have access to the court orders filed and kept under seal.

The district court's order of January 20, 2005, granted the government's motion for a partial lifting of the seal for the purpose of allowing the government to "disclose the **Complaint and information about the investigation** to appropriate officials in the states and the District of Columbia." (Ex. 4) (emphasis added). In this context, the appropriate state officials were the Medicaid Fraud Control Units of each state. The U.S. Attorney

could not share the complaints or information relating to the investigation with the state Medicaid fraud units without first obtaining permission from the court. Similarly, the government could not even discuss with each whistleblower and their counsel the existence of the other complaints or the allegations contained within them without a court order. (Ex. 5).

Moreover, the government could not disclose the existence of the complaints, the names of the relators, or even the allegations in the complaints with Cephalon without the Court's authorization and a partial lift of the seal. It was not until January 20, 2007, more than two years after the first whistleblower complaint was filed, that Judge O'Neill signed an order allowing the government to "make a limited disclosure of the existence, the names of the relators, and the allegations of the Complaints in these actions to defendant, Cephalon, Inc." (Ex. 6). He went on to order that the complaints shall remain sealed to all other persons and all other contents of the Court's file shall remain sealed and not be served on the defendant or otherwise made public. *Id.* Clearly, the court's orders in the Cephalon consolidated cases establish that it was not simply the complaints that were subject to the seal but also the allegations contained within them and information about the investigation.

These orders are consistent with the interpretation and practice within the office regarding matters under federal seal. Mr. Gambrell testified that "my interpretation has always been I can't reach out to anyone else on these sealed matters except for Mr. McIntosh and the Attorney General." (Gambrell Dep. 119: 8-11). He did not share the complaints against Cephalon with anyone outside of MFCU. He did not forward the complaints to the civil division because the seal prevented him from doing so. (Gambrell

Dep. 195:7-18). While he could have shared documents received during the course of the investigation with the Chief Deputy Attorney General and the Attorney General, he did not do that in this case, and even if he did, "the seal would have followed them -- to them also. They could not have disseminated them to anyone." (Gambrell Dep: 74: 12-18; 203: 19-24; 204: 20 - 205:2.).³ Former Attorney General Henry McMaster agreed, testifying that, when a matter is under seal, it is "confidential for all except official purposes." (McMaster Dep. 208:4-7) (Ex. 7). Chief Deputy Attorney General John McIntosh concurred, "[h]aving been in the U.S. Attorney's Office, if - - as far as I was concerned, if it's under seal, then you don't discuss matters that are under seal, just like grand jury information." (McIntosh Dep. 81:9-12) (Ex. 8).

Cephalon cannot argue, with any credibility, that Mr. Gambrell was free to disclose the information he acquired during the joint federal/state Medicaid fraud investigation. To disclose the information to anyone outside of his unit and direct chain of command would have been to violate the seal. If the South Carolina Attorney General had filed suit based on the information learned solely from the MFCU investigation he would have made public matters subject to a federal seal and violated the Court's orders in the consolidated *qui tam* cases. As such, the State was prohibited from filing suit in this case before the seal was lifted and the settlement, guilty plea, and nature of the conduct involved were made public.

Cephalon argues that former Attorney General McMaster was put on notice because he received memoranda from NAMFCU describing the matters under

³ During the time the case was under seal ADAG Gambrell sent only four emails to CDAG John McIntosh relating to the case. Importantly, in three of the four, Gambrell wrote that "Cephalon is under seal so the case name should not be used outside the office" or "[t]he case is still under seal." Exhibits 9, 10, and 11. There is no evidence in this case that Attorney General McMaster knew of the existence of the Cephalon investigation until the proposed settlement was presented to him in October 2008.

investigation, including the Cephalon case between June 2005 and June 2008. Cephalon fails to mention, however, that every NAMFCU memoranda to the Attorney General began with the statement

**PRIVILEGED AND CONFIDENTIAL
FOR INTERNAL USE ONLY
DOCUMENT CONTAINS MATTERS UNDER FEDERAL COURT SEAL**

(Ex. 12) (emphasis in original). This is entirely consistent with Mr. Gambrell's position, and that of the office, that the seal applies not only to the complaint, but to all filings and information acquired during the investigation.

B. The State Did Not Receive Information Regarding Cephalon's Marketing Practices Independent of the Federal Investigation

In this case, all of the information the State received about Cephalon's marketing practices and potential liability was provided to Mr. Gambrell and his MFCU group during the course of the joint federal/state investigation. As described above, all of his information was subject to a federal seal and he was prohibited from disclosing it outside of his group and direct chain of command.

There have been cases in the past in which South Carolina has brought a SCUTPA case while there was a concurrent federal/NAMFCU matter under seal. The difference between those cases and this one is that in the former the State had an independent source of information relating to the conduct at issue.

For example, the State has previously brought SCUPTA civil enforcement actions against Eli Lilly & Co., Janssen Pharmaceuticals, Inc., and Astra Zeneca, all manufacturers of antipsychotic prescription drugs. In each of those cases, the Attorney General brought a civil enforcement action based on information acquired independently from any NAMFCU/Department of Justice Investigation.

At deposition, Jay Smith, Director of Consumer Protection and Antitrust, explained:

Q: And you filed a SCUTPA action against Eli Lilly and Company?

A: Yes.

Q: And that case was under seal at the time that you filed your claim?

A: Yeah. I mean, obviously, we didn't know that there was a matter being investigated under seal. We [the civil section] just, you know, filed our lawsuit without any knowledge of the matter under seal.

Q: Um-hum.

A: But it turned out later that there was.

Q: And there was no problem with you conducting a parallel investigation?

A: No. I mean, we got our own independent evidence and proceeded on that basis.

(Smith Dep. 146:22 - 147:11) (Ex. 13).

Assistant Deputy Attorney General Sonny Jones testified consistently, "[w]e've had cases in which we have sued and later come to find out that there was a matter under seal we didn't know about. Q: What are those cases? A: Antipsychotic cases." (Jones Dep. 134: 16-21) (Ex. 14). He further testified as follows:

Q: Did the office, in bringing the Astra Zeneca, Eli Lilly and Janssen cases, have what has been referred to as an independent source of information about the conduct at issue?

A: That is my understanding.

Q: Was there any such independent source of information about the conduct alleged in the Cephalon case?

A: No, sir.

(Jones Dep. 331:18 - 332:1).

At deposition, Chief Deputy McIntosh was asked,

Q: If the civil section or the Attorney General's Office obtains information about a matter, even if it's under seal from an independent source, under those circumstances do you believe the office is able to pursue its own action?

A: If it comes from an independent source and has nothing to do with matters that are under seal, yes.

(McIntosh Dep. 138:14-21).

In this case, and as will be further shown below, there was no independent source of information relating to Cephalon's marketing practices in South Carolina. The only personnel within the office that had any information about the case acquired the information through the joint investigation and were bound by the seal. No information was shared outside Mr. Gambrell's MFCU and his direct supervisors. No information was shared with the civil division until after the seal was lifted and the guilty plea and settlement agreement announced. (Gambrell Dep. 195:7-18; Smith Dep. 436:8-14, 436:19 - 437:1; Jones Dep. 327:3-18). Information sufficient to put the State on notice of an injury and cause of action was not shared with the civil division until October 8, 2008, when Mr. Gambrell copied Sonny Jones and Jay Smith on an email and memorandum describing the investigation, the allegations, the loss to the South Carolina Medicaid Program, and the proposed settlement. (Ex. 15). The civil division properly calculated the statute of limitations based on the date the seal was lifted and the public announcement made.

As Cephalon points out in its motion, the State of Connecticut conducted its own investigation into Cephalon's marketing practices with the prescription drugs at issue during the same time that the joint state/federal task force was investigating the

whistleblower cases. Connecticut, however, unlike South Carolina, had an independent source of information that prompted the investigation. According to Cephalon, in 2004, the Connecticut Attorney General began an investigation into Cephalon's off-label marketing. The USAO did not obtain a partial lifting of the seal in order to share the nature of the allegations and information obtained during the investigation with the state Medicaid Fraud Control Units until January 20, 2005 - after the state of Connecticut was already pursuing its own independent investigation. According to Mr. Gambrell, a death or two in Connecticut prompted an investigation into Cephalon and its promotional activities relating to Actiq. (Gambrell Dep. 180:14-20). South Carolina, on the other hand, had no independent source of information that would have put the State on notice of a potential SCUTPA cause of action. Cephalon has produced no evidence of reports made to the Attorney General of off-label marketing occurring within South Carolina. Cephalon has produced no evidence that anyone within the Attorney's General's Office who was not bound by the seal had any information, from any source, regarding Cephalon's marketing practices in South Carolina.

The only people within the office who had any information regarding Cephalon were bound by the seal and prevented from disclosing it to any other person - even other members of the office. (Gambrell Dep. 119:8-11, McMaster Dep. 106: 4-13; McIntosh Dep. 79:12-21, 138: 3-14). No information was released from SCMFCU until after the seal was lifted and the matter made public.

C. Cephalon's SEC Filings Did Not Put the State on Notice of a SCUTPA Cause of Action

In certain SEC filings Cephalon made limited statements disclosing that it had received subpoenas from the U.S. Attorney's Office in Philadelphia and requests for

information from the Connecticut and Massachusetts Attorneys General relating to its sales and marketing practices. Interestingly, legal commentators have written about the dilemma faced by a company under investigation in a *qui tam* action with respect to its obligation not to disclose matters under seal and its obligation to disclose material facts to its shareholders in SEC filings. (Ex. 16).

Cephalon has introduced no evidence that anyone from the South Carolina Attorney General's Office saw or was even aware of any of Cephalon's SEC filings. In fact, the deposition testimony indicates that none of the witnesses had seen these filings. (McMaster Dep. 94:13-17; Jones Dep. 124:7-11; 325:18-24). That is not surprising since the office did not have anyone monitoring SEC filings to look for potential SCUTPA cases. (Jones Dep. 329:25 - 330:11). It is also not surprising because the SCAG had no reason to review or be aware of Cephalon's SEC filings.

But even if someone in the office had seen these filings, the information contained within them was so vague that it could not have put the State on notice of a potential SCUTPA cause of action. Nothing in the SEC filings gave any details about the specific marketing practices under investigation. The SEC filings did not describe the geographic scope of the conduct at issue. Nothing in the SEC filings gave any indication that potentially actionable marketing practices had occurred in South Carolina or that South Carolina was harmed in any way by those practices. Even if someone in the Attorney General's Office saw these filings, without some knowledge that actionable conduct occurred in South Carolina or that the State was harmed in some way, there was not enough information in these filings to prompt an inquiry into the existence of a cause of action. The statute of limitations is triggered not merely by knowledge of an injury, but

by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 617-18 (1997). The State, outside of a limited group subject to a federal court seal, had no information that a harm had occurred, let alone that a cause of action existed against Cephalon.

D. Sporadic Print Media and Internet Reports Did Not Put the State on Notice of a SCUTPA Cause of Action

In all of published media and throughout the vastness of the internet, Cephalon has located a paltry 21 publications that appeared online or in print over a period of three years. Many of these "publications" apparently appeared only on the internet.⁴ Further, Cephalon's exhibit 49 is dated October 1, 2008, after the seal was lifted. Nevertheless, Cephalon argues that these reports were sufficient to put the State of South Carolina on notice to investigate a potential cause of action. Cephalon cannot, however, identify any publications that appeared in South Carolina print media or on television. Cephalon further cannot identify any employee of the South Carolina Attorney General's Office who was aware of any of them, except for Mr. Gambrell who received a single forwarded email and was bound by the federal court seal.

Cephalon's argument that there was "widespread publicity" of its off-label marketing and the federal investigation is specious. Indeed, the cases it relies on are easily distinguishable. In *Hedgepath v. Am. Tel. & Tel. Co*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001), the court of appeals upheld the grant of summary judgment on

⁴ Defendant's Exhibit 9 is a news release from Cephalon's company website, Exhibit 10 is a blurb that was likely only published on the New York Times website, Exhibit 17 is a blurb that likely appeared only on the Los Angeles Times website, Exhibit 23 is a Market Watch update that likely only appeared on the WSJ website, Exhibit 42 is a news release from Cephalon's company website, Exhibit 50 is a Taxpayers Against Fraud email alert, Exhibit 55 is a statement from the Connecticut Attorney General's website.

statute of limitations grounds where there was widespread publicity over environmental concerns about the defendant's copper reclamation facility. The widespread publicity included "community forums, town meetings, government involvement, local political debates, door to door communications, media coverage, grassroots organization initiated by local citizens groups, and lawsuits brought by hundreds of residents." *Hedgepath*, 348 S.C. at 351, 559 S.E.2d at 333. Here, however, Cephalon has failed to identify a single local media report or anyone within the SCAG's office who saw any of the few publications it found on the internet. Similarly, the "widespread publicity" described in *Hughes v. Vanderbilt University*, 215 F.3d 543 (6th Cir. 2000), consisted of front-page news stories in the leading newspapers of the city in which the plaintiff resided as well as television reports in three different broadcasts of the local CBS affiliate. Local media reports were also important to the decision in *United Klans of America v. McGovern*, 621 F.2d 152 (5th Cir. 1980), as was a press conference by the United States Attorney General attended by the three major television networks and wire services. Likewise, *Stutz Motor Car of Am., Inc. v. Reebok, Int'l, Ltd.*, 909 F. Supp. 1353 (C.D. Cal. 1995), *aff'd* 113 F.3d 1258 (Fed. Cir. 1997), sets a high bar for what constitutes constructive knowledge based on widespread publicity. There, the plaintiff in a patent infringement case was found to be on constructive notice where the product appeared in hundreds of retail stores, was the subject of an advertising blitz by the defendant, was featured at a trade show the defendant attended, and appeared in numerous newspaper articles. Clearly, the few publications spanning a three year period that Cephalon cites pale in comparison to the degree of publicity courts have found sufficient to constitute constructive notice.

At deposition, every witness from the Attorney General's office was shown the newspaper articles and internet press releases Cephalon argues put the state on notice of a possible claim. The only member of the office that had seen any of them at the time of publication was Mr. Gambrell, and it was only a single forwarded email of a Taxpayers Against Fraud (TAF) bulletin. (Ex. 17). In very general terms, the bulletin contained an announcement of the global settlement before the seal was lifted and the settlement made public. Mr. Gambrell's reaction was not to pass on the information to the civil division, but to find out whether or not someone from his group had violated the seal by releasing information about the settlement. (Gambrell Dep. 159:7-23; 191:12-19). Other witnesses from the Attorney General's Office were asked about the TAF bulletin at deposition. Sonny Jones testified that he did not follow the TAF Bulletin and was not familiar with it. (Jones Dep. 124: 23 - 125:2) Jay Smith testified that he too had never seen it. (Smith Dep. 216:5-7).

Furthermore, no one in the Attorney General's office was tasked with monitoring the internet and various news sources to look for potential cases against pharmaceutical companies. (McMaster Dep. 70:12-23; Jones Dep. 330:7-11; Smith Dep. 441:22 - 442:2). But the statute of limitations and discovery rule do not require the State to monitor SEC filings, the internet, and media reports looking for possible cases. The discovery rule requires only that a party who knows that it has suffered a loss or injury act diligently to investigate whether a cause of action exists. *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005). Cephalon offers no evidence that anyone who was not subject to the federal court seal had any reason to suspect the State had suffered a loss

due to Cephalon's marketing. Without knowledge of an injury, there cannot be a duty to investigate whether a cause of action exists.

E. Class Actions Filed in Pennsylvania Did Not Put the State on Notice of a SCUTPA Cause of Action

Cephalon touts three class action lawsuits filed in Pennsylvania as another source of notice to the State sufficient to trigger the statute of limitations. In making this argument, Cephalon ignores three critical facts. First, these cases were not reported by any media outlet in South Carolina. Second, no witness in this case had any knowledge of those cases. (Gambrell Dep. 183:9-25; Smith Dep. 442: 3-11). Third, the Attorney General did not have an employee tasked to monitor class action filings in other states for potential SCUTPA cases (Smith Dep. 442:12-16).

Class action lawsuits filed in another state, that are neither publicized in South Carolina nor seen by anyone in the Attorney General's office cannot be sufficient to put the State on notice of a potential cause of action.

F. The Single Email from Thomas Saadi Did Not Put the State on Notice of a SCUTPA Cause of Action.

Cephalon's argument relies heavily on a single email from Connecticut Assistant Attorney General, Thomas Saadi to members of the Health Fraud Group of the National Association of Attorneys General of which ADAG Sonny Jones was a member. The email was sent on November 16, 2007, with the subject line "Cephalon" and contains the following:

Dear all:

As you may know CT has been engaged in an investigation of Cephalon for the better part of three years. Over the past two days several states have contacted me regarding this case and, as such, I wanted to broadly inform the Health Fraud Group to please contact AAG Mike Cole in CT

(Michael.cole@po.state.ct.us) with any questions regarding this matter. In the meantime Mike and I will be in touch with each of you soon with further information.

(Ex. 18). This email, the only communication that ADAG Jones or Jay Smith received that contained the word Cephalon, did not contain any information as to 1) what Cephalon was, 2) the nature of Connecticut's investigation, or 3) the type of claims involved. No one from the Connecticut Attorney General's office contacted anyone at the SCAG's office to discuss the matter. (Jones Dep. 120:12-24). No one from the SCAG's office contacted Mr. Cole in response. (Jones Dep. 108:4-9).

ADAG Jones did not follow up with the email because he had no reason to do so - he did not know what Cephalon was or any reason why South Carolina might have an interest in it. (Jones Dep. 108:10-21). How can a single email that does not describe the conduct being investigated or give any indication that South Carolina might have an interest put the State on notice that it might have a cause of action against Cephalon for SCUTPA violations and overpayments by the State Health Plan? It simply cannot, and Cephalon's reliance on this email is misplaced.

For the reasons set forth above, the State's SCUTPA claims are not time barred.

G. The State's Equitable Claims Are Not Time Barred

i. Unjust enrichment is not fraud and thus is not subject to fraud's statute of limitations set forth in S.C. Code § 15-3-530(7).

Cephalon erroneously asserts that the State's claim for unjust enrichment, and therefore the remedies of restitution and disgorgement, is governed by the three-year statute of limitations in S.C. Code § 15-3-530(7), which governs fraud claims. Cephalon offers no explanation or basis for this beyond pointing to the State's memorandum in opposition to a motion for summary judgment in an unrelated case and not before this

court. Further, contrary to the present case, in the case *Cephalon* cites, the State pled fraud as a cause of action in its complaint in addition to unjust enrichment. *Cephalon* erroneously assumes that in any instance, a claim of unjust enrichment is subject to the same statute of limitations as a claim of fraud, whether or not a claim of fraud is plead.

Fraud and unjust enrichment are often brought in the same action, but are consistently brought as separate causes of action; where one cause of action is dismissed, the other may remain. *See Amwest Sur. Ins. Co. v. Republic Nat. Bank*, 977 F.2d 122 (4th Cir. 1992) (applying South Carolina law in finding that while the beneficiary of the letter of credit failed to state a fraud claim against the bank, it was entitled to restitution of funds it had sent to the bank in an attempt to restore the letter of credit after beneficiary had erroneously issued draft for entire amount of letter). Although unjust enrichment may arise from fraud, the element of fraud on the part of the defendant is not necessary in an action for unjust enrichment. *See Harper v. McCoy*, 276 S.C. 170, 172-73, 276 S.E.2d 782, 784 (1981) (citing 77 C.J.S. Restitution at 322-23) (stating “[i]t is not necessary, in order to create an obligation to make restitution, that the party unjustly enriched should have been guilty of any tortious or fraudulent act; the question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?”); *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002) (considering the presence of fraud or breach of a fiduciary duty in determining the existence of any duty to disclose or other cause of action that would allow recovery for unjust enrichment).

ii. The State's Disgorgement Claim Is Subject to Either a Ten-Year Statute of Limitations or no Statute of Limitations

Unjust enrichment claims have been subject to the three-year statute of limitations under S.C. Code § 15-3-530 in cases where unjust enrichment and the relevant § 15-3-530 causes of action are pled in the same complaint, and the § 15-3-530 cause of action underlies the claim for unjust enrichment. *See Majstorich v. Gardner*, 361 S.C. 513, 604 S.E.2d 728 (Ct. App. 2004) (although claim for unjust enrichment was dismissed on other grounds, court examined all causes of action as subject to the three-year statute of limitations under § 15-3-530). However, in the present case, the State pled only SCUTPA violation and unjust enrichment claims in its Complaint; unjust enrichment is not grounded in fraud, but stands alone. Contrary to the defendant's erroneous assertion, unjust enrichment and fraud are two separate causes of action, and unjust enrichment is not subject to fraud's three-year statute of limitations under S.C. Code Ann. 15-3-530(7).

Treating unjust enrichment is an equitable claim, the equitable doctrine of laches may apply. However, viewing the evidence in the light most favorable to the State, the defendant has presented no evidence that the State delayed unreasonably under the circumstances, nor that the defendant was prejudiced as a result. *See Robinson v. Estate of Harris*, 388 S.C. 616, 698 S.E.2d 214 (2010).

If, instead, the State's unjust enrichment claim seeking disgorgement is considered to be a legal claim, the statute of limitations would be ten years under § 15-3-600. Under a ten year statute of limitations, the State's claim is certainly not time barred.

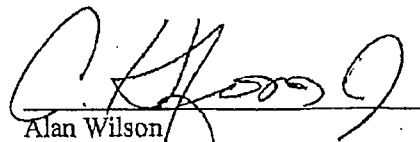
Accordingly, viewing the evidence in the light most favorable to the State, as the law requires on a motion for summary judgment, Cephalon has failed to establish that unjust enrichment is subject to the statute of limitations governing fraud, or that the claim

of unjust enrichment is time-barred on any ground.⁵

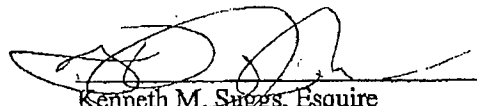
V. CONCLUSION

For the reasons set forth herein, the State of South Carolina, by and through Attorney General Alan Wilson, respectfully requests that Cephalon Inc.'s motion for summary judgment be denied.

Respectfully submitted,



Alan Wilson
Attorney General
Robert D. Cook
Solicitor General
C. Havird Jones, Jr.
Assistant Deputy Attorney General
Jared Q. Libet
Assistant Attorney General
Post Office Box 11549
Columbia, S.C. 29211
803-734-3970



Kenneth M. Suggs, Esquire
Gerald D. Jowers, Jr., Esquire
Janet, Jenner, & Suggs, LLC
P.O. Box 927
Columbia, SC 29202

⁵ The State notes, the concurrent remedy rule does not prohibit it from seeking relief under SCUTPA and unjust enrichment. The concurrent remedy rule is inapplicable to the State when it acts in the public interest, as in the present case. *See U.S. v. Cinergy Corp.*, 397 F.Supp.2d 1025 (S.D. Ind. 2005) (stating the States are acting as enforcers to protect the public interest, just like the federal government. Thus, the concurrent remedy rule is inapplicable to the USA and to the States). Further, because the term "concurrent" denotes equal, the concurrent remedy rule further does not apply in the present case because civil penalties and damages sought by the Attorney General in the SCUTPA action are not the same as the defendant's profits at issue in the action seeking disgorgement. These remedies are not equal and thus not concurrent.

803-726-0050 (TEL)
803-727-1059 (FAX)

James Todd Rutherford
The Rutherford Law Firm, LLC
Post Office Box 1452
Columbia, S.C. 29202

Attorneys for Plaintiff

July 1, 2013
Columbia, South Carolina

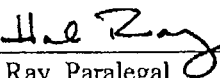
CERTIFICATE OF SERVICE

I, the undersigned, an employee of Janet, Jennet & Suggs, LLC, attorneys for the Plaintiff,
do hereby certify that I have served the foregoing document, Plaintiff State of South Carolina's
Response in Opposition to Defendant Cephalon Inc.'s Motion for Summary Judgment the
below listed counsel via first class mail.

Stephen McKinney
Haynesworth Sinkler Boyd
P.O.B. 11889
Columbia, S.C. 29211

and

Eric Sitarchuk, Esq.
Timothy Katsiff, Esq.
Tyler Brody, Esq.
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA. 19103



Hal Ray, Paralegal

Columbia, South Carolina
July 1, 2013.

FILED
2013 JUL - 1 AM 11:56
JANET, JENNET & SUGGS, LLC
C.C.P. & G.S.

EXHIBIT G

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

State of South Carolina, ex rel.
Alan Wilson, in his official Capacity as
Attorney General for the State of South
Carolina

Plaintiffs,

v.

Cephalon, Inc.,

Defendant.

Civil Action No. 2011-CP-40-3661

ORDER

2014 FEB 21 PM 2:58
JENNIFER H. ALONSO
C.C.P. & G.S.

THIS MATTER CAME BEFORE ME on Defendant Cephalon, Inc.'s ("Cephalon") motion for summary judgment on statute of limitations grounds. For the reasons set forth below, Cephalon's motion is DENIED.

On June 6, 2011, the State of South Carolina, by and through Attorney General Alan Wilson, filed suit against Cephalon. Through this action the Attorney General seeks, pursuant to the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code § 39-5-10, et. seq., relief on behalf of the State's consumers and civil penalties to be assessed against Cephalon for willful violations of the SCUTPA. Through an Amended Complaint filed on February 13, 2012, the Attorney General added a claim for damages on behalf of the State Health Plan for payments it made for medically unnecessary prescriptions of the drugs at issue. Further, the Attorney General seeks restitution and disgorgement from the Defendant based upon a common law unjust enrichment claim.

Cephalon contends that this action is barred by the statute of limitations for two reasons. First, Cephalon argues that the State had actual knowledge of the conduct at issue more than three years before filing this action based on the involvement of the South Carolina Medicaid Fraud Control Unit in the negotiation and settlement of certain Medicaid fraud claims stemming from complaints pursuant to the federal False Claims Act and subject to federal seal. Second, Cephalon argues that even if the State was prevented from acting on information learned during the course of the Medicaid fraud investigation, the State should be deemed to have been on constructive notice of its claims more than three years before the State filed this action because there were sufficient reports of its off-label marketing practices in the public domain.

I. Summary Judgment Standard

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001) (citing *Baughman v. Am. Tel & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

"Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hedgepath v. Am. Tel & Tel Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). Under South Carolina Rule of Civil Procedure 56(c), "the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." *Baughman*, 306 S.C. at 116, 410 S.E.2d at 545 (citations omitted).

"In determining whether triable issues of fact exist, the evidence and all inferences that can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Hedgepath*, 348 S.C. at 354, 559 S.E.2d at 335. If triable issues exist, those issues must be submitted to a fact finder. *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 718, 511 S.E.2d 413 (Ct. App. 1999). "It is the duty of the court, on a motion for summary judgment, not to try issues of fact, but only to determine whether there are genuine issues of fact to be tried; and, once having found that triable issues exist, must leave those issues for determination at trial." *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002) (quoting *Spencer v. Miller*, 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972)). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 554 S.E.2d 688, 692 (2000) (citation omitted). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Id.* Summary judgment should be granted when "plain, palpable, indisputable grounds exist on which reasonable minds cannot differ[.] *Hedgepath*, 348 S.C. 355, 559 S.E.2d at 336 (citing *Pye v. Aycock*, 325 S.C. 426, 431, 480 S.E.2d 455, 457 (Ct. App. 1997)).

II. Federal Qui Tam Cases

In 2003 and 2004, four whistleblowers filed qui tam suits against Cephalon pursuant to the False Claims Act, 31 U.S.C. 3729, et. seq.¹ Under the False Claims Act, the complaints are filed

¹ There were four *qui tam* cases brought against Cephalon: *Lucia v. Paccione v. Cephalon, Inc.*, Civil Action No. 03-6268; *United States of America, et al., ex rel. Joseph Piacentile v. Cephalon Inc.*, Civil Action No. 03-6277; *United States of America ex rel. Michael Makalusky v. Cephalon, Inc.*, Civil Action No. 05-1904; and *United States of*

under seal while the United States decides whether to intervene. The complaints are to remain under seal for 60 days unless the government can show good cause for extending the seal. Motions for extensions of the seal "may be supported by affidavits and other submissions in camera." 31 U.S.C. § 3730(b)(3). The parties do not dispute that, by successive court orders, the consolidated Cephalon complaints remained under seal until September 29, 2008.² Indeed, Cephalon had to obtain a federal court order just to get the sealing orders in these cases. Necessarily, the government demonstrated, and the District Court found, good cause to keep these complaints under seal for nearly five years.

The False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.*, is a tool to combat fraud in government programs. It was originally enacted in 1863 in response to the rampant fraud in contracts awarded during the Civil War. *Am. Civil Liberties Union v. Holder* ("Holder I"), 673 F.3d 245, 247 (4th Cir. 2011). A civil FCA action can be brought by the government or a private person known as a "relator" under the *qui tam* provisions of the Act. 31 U.S.C. § 3730(b)(1). The relator must file the complaint *in camera* and under seal and it "shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). Pursuant to section 3730(b)(2) and Rule 4(i), FRCP, the relator must serve "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses" on the government.

America et al., ex rel. Bruce Boise v. Cephalon, Inc., Civil Action No. 04-4401. All were consolidated before The Honorable Thomas J. O'Neill, Jr. in the Eastern District of Pennsylvania.

² On September 25, 2008, the Honorable Thomas J. O'Neill, Jr. issued an Order that the *qui tam* complaints would be unsealed upon the filing of a Notice of Intervention by the United States Government. The Government filed its Notice of Intervention on September 29, 2008.

The government is given 60 days to conduct an investigation and determine whether to intervene in the action. *Holder I*, 673 F.3d at 249-50. "Because Congress recognized that some investigations might require more than 60 days, the 1986 Amendment permits the United States, 'for good cause shown,' to file a motion in camera with affidavits or other submissions to extend the seal." *Id.* at 250 (quoting 31 U.S.C. § 3730(b)(3)). The United States must file such motion before the 60-day period expires. *Id.* (citing 31 U.S.C. § 3730(b)(3)). The requirements contained in sections 3730(b)(2) and (3) are mandatory. "[D]uring the initial sixty-day period *the public has no knowledge* that a civil action has been filed. After completion of the government's investigation and notice of its intervention decision, the seal is lifted and the qui tam complaint becomes public. *Am. Civil Liberties Union v. Holder ("Holder II")*, 652 F.Supp.2d 654, 659 (E.D. Va. 2009), *aff'd* 673 F.3d 245 (4th Cir. 2011) (emphasis added).

"Congress added the seal provisions in the FCA for numerous reasons, including to preserve the integrity of such fraud investigations." *Holder I*, 673 F.3d at 253. The seal provisions protect the "government's investigation and evaluation of the relator's allegations." *Holder II*, 652 F.Supp.2d at 662. The statutory seal provisions, sections 3730(b)(2) and (3), "are analogous to grand jury proceedings insofar as both are aimed at preserving the integrity of criminal investigations." *Id.* at 663 (citing *Erickson ex rel. U.S. v. Am. Inst. Of Biological Sciences*, 716 F.Supp. 908, 912 (E.D. Va. 1989)); *see also* S. Rep. 99-345, 1986 U.S.C.C.A.N. 5266, 5281 ("[I]n response to Justice Department concerns that qui tam complaints filed in open court might tip off targets of ongoing criminal investigations, the subcommittee adopted a sixty-day seal provision for all *qui tam* complaints."). When Congress amended the FCA in 1986, it recognized that safeguarding the integrity of these investigations requires secrecy:

[I]f a qui tam complaint entered the public domain during an ongoing government fraud investigation it could tip off the perpetrators and hamper the investigation ... [T]he initial sixty-day seal contemplated by the FCA is necessary lest "the subject [of the investigation] be tipped off" and "destroy or remove the evidence." To the extent qui tam complaints filed in open court would spoil fraud investigations, it would make government intervention in the FCA action less likely and thereby reduce the number of FCA suits prosecuted. In short, prematurely unsealed complaints could hamper the government's efforts in combating fraud and undermine the FCA.

Holder II, 652 F.Supp.2d at 663 (internal citation omitted).

"The United States has a compelling interest in protecting the integrity of ongoing fraud investigations." *Holder I*, 673 F.3d at 253. Indeed, "Congress' central motivation in adding the seal provisions to the FCA was to protect the integrity of ongoing criminal investigations. The legislative history of the 1986 Amendments to the FCA is replete with references to this concern." *Holder II*, 652 F.Supp.2d at 664.

Some courts treat the seal as so fundamentally important that failure to abide by its provisions requires dismissal of the *qui tam* action with prejudice. See, e.g., *U.S. ex rel. Pilon v. Marlin Marietta Corp.*, 60 F.3d 995, 998-1000 (2d Cir. 1995) (district court committed abuse of discretion in granting dismissal of *qui tam* complaint without prejudice when relator failed to file under seal and gave a detailed press interview concerning allegations; proper remedy was dismissal *with* prejudice); *U.S. ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 298 (6th Cir. 2010) (upholding dismissal of *qui tam* complaint not filed under seal and noting that "[r]equiring violations of the FCA's under-seal requirement to be subjected to a balancing test thereby both misses the point of the requirement itself and potentially encourages plaintiffs to comply with the FCA's under-seal requirement only to the point that the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require dismissal of an

FCA claim."); *U.S. ex rel. Davis v. Prince*, 766 F.Supp.2d 679, 682-83 (E.D. Va. 2011) ("The sealing requirement is mandatory; failure to file a complaint under seal requires dismissal of a *qui tam* complaint with prejudice."); *but see U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-46 (9th Cir. 2005) (adopting the balancing test rejected by the Sixth Circuit in *Summers*).

A close reading of the False Claims Act shows that it prevents anyone subject to the seal from disclosing the existence of the complaint. Judge O'Neill, the judge in the consolidated *qui tam* cases, issued orders consistent with the purpose of the seal. His orders address not only the *qui tam* complaints, which would have been the only filings filed in camera as required by 31 U.S.C. § 3730(b)(2), but also the filings, pleadings, documents, allegations, and information about the investigation, which would have been served on the Government pursuant to Rule 4(i), FCRCPP, and section 3730(b)(2).

III. The State's Knowledge of the Qui Tam Cases

The State acknowledges that three individuals within the Office of the Attorney General had actual knowledge of the joint federal/state investigation of Medicaid overpayments relating to Cephalon's off-label promotion of the prescription drugs Provigil, Gabitril, and Actiq during the time the *qui tam* matters were under seal. The first of those is Assistant Deputy Attorney General William C. Gambrell, director of the South Carolina Medicaid Fraud Control Unit ("SCMFCU"), a hybrid federal and state program funded primarily through a federal grant.³ To

³ Nearly every state has a Medicaid Fraud Control Unit or equivalent group. There is a National Association of Medicaid Fraud Control units ("NAMFCU") that coordinates the activities of the state groups.

a lesser extent, ADAG Gambrell's superiors, Chief Deputy Attorney General Josh McIntosh, and Attorney General Henry McMaster had knowledge of the existence of the joint investigation.

In the summer of 2005, ADAG Gambrell learned about the federal *qui tam* actions against Cephalon by virtue of his position as director of the SCMFCU. Importantly, in order to be able to share information relating to the complaints and information relating to the investigation with appropriate state officials such as ADAG Gambrell, who were directly involved with the Medicaid fraud investigation, the United States Attorney moved for a partial lifting of the seal. Judge Thomas O'Neill, Jr. granted the motion and issued an order partially lifting the seal "for the limited purpose of allowing the United States to disclose the Complaint and **information about the investigation** to the appropriate official in the states" on January 19, 2005. (Exhibit 4 to State's Resp. to Cephalon's Motion), (emphasis added).

Judge O'Neill's order is significant. Cephalon argues that the federal court seal applied only to the complaints, and as such, ADAG Gambrell was free to share with others information and evidence he received during the course of the joint investigation. The State, on the other hand, maintains that the seal and the federal court orders addressing the seal applied to all information and evidence obtained during the investigation. At deposition, ADAG Gambrell testified that,

[M]y position is when I get information in a matter under seal, that I'm not to disseminate that information outside the parameters of the seal, I don't think it would be appropriate for me to be standing in front of a federal judge saying I turned over everything in the case except the caption, because that, to me, in my interpretation, is violative of the seal ... I am not to disclose [the evidence of the investigation] outside of the Medicaid Fraud Control Unit except in the chain of command and then pursuant to other governmental entities who have a reason to need them to further the purpose of the investigation.

(Gambrell Dep. 206:2-17)⁴

ADAG Gambrell's superior's confirmed his interpretation. Former Attorney General Henry McMaster agreed, testifying that, when a matter is under seal, it is "confidential for all except official purposes." (McMaster Dep. 208:4 – 7). Chief Deputy Attorney General John McIntosh concurred, "[h]aving been in the U.S. Attorney's Office, if – as far as I was concerned, if it's under seal, then you don't discuss matters that are under seal, just like grand jury information." (McIntosh Dep. 81:9 -12). Offering further support for this view, all NAMFCU memoranda sent to Attorney General McMaster contained the following statement,

**PRIVILEGED AND CONFIDENTIAL
FOR INTERNAL USE ONLY
DOCUMENT CONTAINS MATTERS UNDER FEDERAL COURT SEAL**

(Exhibit 12 to State's Resp. to Cephalon's Motion), (emphasis in original).

Other orders from the consolidated *qui tam* cases confirm the State's interpretation of the scope of the seal. Judge O'Neill's order of February 17, 2004, allowed a partial lifting of the seal so that the U.S. Attorney could reveal to the other relators the existence of the complaints, provide copies of the complaints, and "[d]iscuss with each relator and counsel *the allegations* of each complaint of any portion thereof." (Exhibit 5 to State's Resp. to Cephalon's Motion) (emphasis added). *See also*, Exhibit 106 to Cephalon's Reply Brief, order dated January 30,

⁴ Cephalon's argument that ADAG Gambrell is free to disclose any information learned about Cephalon's alleged wrongful conduct so long as he does not reveal the existence of the *qui tam* complaints fails for another reason. Assuming arguendo that a relator can publicly discuss the allegations in a *qui tam* complaint so long as the existence of the complaint is not revealed, a relator is by definition someone with inside information about a company. As ADAG Gambrell would have no other source of such inside information beyond a *qui tam* complaint, revealing any information publicly would inherently disclose the existence of complaint under federal seal.

2007 (allowing a partial lifting of the seal so that the U.S. Attorney could "make a limited disclosure of the existence [of the complaints], the names of the relators[,] and *the allegations* of the Complaints" to Cephalon (emphasis added)).

If the seal only applied to the complaint, as a document, it would be unnecessary to seek and obtain a partial lifting of the seal to discuss the existence of and allegations in those complaints with the other relators. Furthermore, almost every one of Judge O'Neill's orders in the *qui tam* actions ordered that "the Complaints *and all other filings*" remain under seal. (Exhibit 106 to Cephalon's Reply Brief, orders dated Jan. 26, 2003; Mar. 10, 2004; Aug. 9, 2004; Nov. 30, 2004; Feb. 9, 2005; Aug. 8, 2005; Aug. 23, 2005; Aug. 29, 2005; Jan. 27, 2006; Jan. 30, 2007; Aug. 6, 2007; Jan. 30, 2008; May 12, 2008; June 9, 2008; July 14, 2008; Aug. 11, 2008; and Sept. 11, 2008 (emphasis added)); *see also* order dated Jan. 19, 2005 (ordering the complaints and "all other **pleadings**" to remain under seal) (emphasis added); order dated Jan. 12, 2005 (ordering that the amended complaint and "all other **documents** filed in this matter" remain under seal) (emphasis added). If Cephalon's interpretation of the scope of the seal was correct, Judge O'Neill's orders would have been limited to the complaints only.

Accordingly, I find that the State's interpretation of the scope and purpose of the federal seal is correct. By virtue of the seal and the federal court orders, the State was prohibited from making public any information it obtained solely through its involvement in the joint federal/state investigation. While former Attorney General McMaster, CDAG McIntosh, and ADAG Gambrell had actual knowledge, to varying degrees, of the conduct at issue in this action, the federal seal prevented them from disclosing that information to the civil section and filing an action based upon that information on behalf of the State of South Carolina.

Cephalon points out that there have been other instances in which the State has brought its own SCUPTA action while at the same time there was a parallel Medicaid fraud case under seal. The evidence clearly demonstrates, however, that in those cases the civil section obtained evidence independent of, and without knowledge of, the matters under federal seal. (See Smith Dep. 146:22 – 147:11; Jones Dep. 134: 16 – 21; McIntosh Dep. 138: 14 -21). In this matter, there was no independent source of information to the office. (Jones Dep. 331:18 – 332:1).⁵ Further, the evidence in this case shows that no information was shared with the civil division until after the seal was lifted and the guilty plea and settlement were announced. (Gambrell Dep. 195:7-18; Smith Dep. 436:8-14, 436:19-437:1; Jones Dep. 327:3-18).⁶

IV. Tolling

Having found that the federal seal and court order prevented the individuals with actual knowledge from disclosing any information from the investigation to others and otherwise making that information public the next question is whether the seal tolled the applicable statute of limitations. It is undisputed that § 39-5-150 of the SCUTPA provides a period that an action must be brought within three years after discovery of the unlawful conduct.

⁵ Cephalon argues that an e-mail from Thomas Saadi, of the Connecticut Attorney General's Office, to ADAG Sonny Jones on November 16, 2007 was sufficient to put him on notice. Significantly, though the e-mail contains the word "Cephalon," it does not describe what Cephalon was – a company or a drug or something else entirely. The email also did not give any information as to the nature of Connecticut's investigation, the products involved, or any reason why South Carolina would have an interest in Cephalon or the investigation. The evidence shows that there were no further communications to or from the Connecticut Attorney General's Office. This email, without more, does not support a finding of notice of a potential cause of action against Cephalon.

⁶ Information was not provided the civil section until after the seal was lifted when on October 8, 2008, ADAG Gambrell copied Sonny Jones and Jay Smith on an e-mail and memorandum describing the investigation, the allegations, the loss to the South Carolina Medicaid Program, and the proposed settlement. (Ex. 15 to State's Resp. to Cephalon's Motion.)

A. Equitable Tolling

There is a basis in the law that provides for the tolling of the statute of limitations in extraordinary situations such as this. In *Hooper v. Ebenezer Senior Serv's and Rehabilitation Center*, 386 S.C. 108, 687 S.E.2d 29 (2009), our Supreme Court applied the doctrine of equitable tolling in a case in which the plaintiff was unable to serve a defendant during the limitations period because the defendant failed to accurately list its registered agent with the Secretary of State. The Court asserted that "[e]quitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Id.* at 32. "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate the rules of procedure where justice demands it." *Id.* "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* The equitable tolling doctrine does not require wrongful conduct on the part of the defendant. *Am. Legion Post 51 v. Horry County*, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Cl. App. 2009). Importantly, equitable tolling is not limited to the facts of *Hooper* or any specific list of circumstances, but "may be applied where it is justified under all circumstances." *Hooper*, 386 S.C. at 33, 687 S.E.2d at 117.

Our Supreme Court has instructed that equitable tolling should be used sparingly and only when the interests of justice compel its use. I find that this is such a case. Here, the only individuals within the South Carolina Attorney General's Office with knowledge of the subject of the action were prevented by federal law and court order from disclosing that information to the civil section. As such, no suit could have been brought without violating the seal and federal court orders.

If the Court were to decline to apply equitable tolling on these facts, the Attorney General would have to choose between violating federal law and court orders or forfeiting his responsibility to enforce the SCUTPA. Undoubtedly, the effect would be that corporations would escape liability for otherwise actionable violations of the SCUPTA and the State, and its citizens, would be deprived of the protections of the Act. SCUPTA protects the citizens of South Carolina from unscrupulous business practices and protects businesses from unfair competition by holding accountable those who violate the act. In the extraordinary situation presented here, public policy strongly supports the application of equitable tolling. The statute of limitations' purpose of protecting defendants from potentially stale claims must give way to protecting the integrity of the federal seal and the public's interest in enforcing SCUTPA.⁷

Having established that the statute of limitations should be tolled because of the federal seal, the question for the Court is whether the statute is tolled for the duration of the seal or whether the Attorney General should have filed suit within a reasonable time after the seal was lifted.

Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989) is instructive. In *Hopkins*, our Supreme Court addressed the question of whether, in situations in which equitable tolling applied, suit must be filed within a reasonable time after the reliance period ended or whether the statute was tolled during the period of reliance. The Court held that the statute was tolled during the reliance period, noting that "[t]o hold that claims must be filed within a reasonable time following the end of the reliance period would add yet another layer of fact

⁷ At oral argument Cephalon asserted that its former CEO was now deceased and other individuals with knowledge of the events at issue had left the company and may be difficult to locate. While those are valid considerations, no evidence supporting such assertions can be found in the record.

finding resulting in greater uncertainty as to which claims are compensable. *Hopkins*, 299 S.C. at 900, 382 S.E.2d at 129-30. The Court affirmed this reasoning in *Hooper* and tolled the statute of limitations for the time period Hooper spent looking for a nonexistent agent for service of process.

Accordingly, in this case I find that the statute of limitations period was tolled during the time the federal *qui tam* cases were subject to seal thereby preventing the members of the Attorney General's Office with knowledge from acting on that knowledge. As such, the applicable state of limitations was tolled until September 29, 2008. Because the State filed its SCUTPA action within three years of that date, the action was timely.

V. Information in the Public Domain

Cephalon further argues that even if the State was prevented by the seal from acting on or sharing the investigation from the federal investigation, it was on constructive notice of its claims by virtue of "widespread publicity" relating to Cephalon's off-label marketing practices and investigation into those practices. To prevail on summary judgment, Cephalon must show that, as a matter of law, this publicity put the State of notice of its claims. In support, Cephalon cites a number of print and internet publications, filings with the Securities and Exchange Commission ("SEC"), class action complaints filed in Pennsylvania, and a letter from Congressman Henry Waxman. Because whether these materials were sufficient to create constructive notice is a disputed question of material fact, summary judgment on this basis must be denied.

While it is undisputed that information about Cephalon's marketing practices was in the public domain, there is no evidence that anyone in the Attorney General's Office, not subject to the seal or federal court orders, or anyone at the State Health Plan, had any knowledge of that information. Cephalon has taken the depositions of Jay Smith, the former Director of the Consumer Protections and Antitrust Section, ADAG Sonny Jones, the head of the Consumer Protection and Antitrust Section, CDAG John Mc Intosh, the senior-most member of the office, and even former Attorney General Henry McMaster. None of those witnesses testified that they had ever seen any of the materials Cephalon argues put the State on notice of its claims.

The issue then is whether the publicity was sufficient for this Court to hold, as a matter of law, that the State was on constructive notice such that the state of limitations began to run. As an initial matter, Defendant's reliance on *Hedgepath v. Am. Tel & Tel. Co.*, 348 S.C. 340, 358 S.E.2d 340, 358 S.E.2d 327 (Ct. App. 2001) is misplaced. *Hedgepath* did not hold that widespread publicity triggered the statute of limitations by constructive notice. Instead, though the court mentioned the concept of constructive notice by widespread publicity, the more important basis for the decision was that 240 of the 278 plaintiffs submitted affidavits stating that they knew years earlier that they may have a claim against someone for alleged environmental contamination and that they were aware of another multiparty lawsuit filed by others against the same defendants for similar injuries. Further, the plaintiffs did not dispute that they were on notice of community concerns that the plant was the source of personal injury and property damage. The Court found that the plaintiffs had actual knowledge of their causes of action but had mistakenly relied on a lawsuit brought by others to protect their interests. As such, the Court held that the statute of limitations had expired.

Cephalon cites no other South Carolina cases for the proposition that widespread publicity along is sufficient to trigger the statute of limitations. Contrary to Cephalon's argument, constructive notice by publicity is not the law of South Carolina. The four cases Cephalon cites from other jurisdictions are similarly distinguishable.

In *United Klans of Am. V. McGovern*, 621 F.2d 152 (5th Cir. 1980), the Fifth Circuit Court of Appeals rejected the plaintiff's argument that the government's conduct at issue had been fraudulently concealed by noting that the Attorney General held a local press conference and distributed a press release describing the conduct at issue and identifying white hate groups as a target. The three major television networks as well as wire services attended the press conference. *Id.* at 154. Moreover, the Department of Justice personally notified the president of the organization that he may have been affected by the investigation. *Id.* Consequently, the argument that the conduct forming the basis of the action had been fraudulently concealed was rightly rejected.⁸

In *Hughes v. Vanderbilt Univ.*, 215 F.3d 543 (6th Cir. 2000), a woman who was allegedly subjected to medical testing while in grade school brought suit years later as a putative class action. In rejecting her reliance on the discovery rule, the Court of Appeals noted that in her complaint she alleged that she and the other class members did not know or have reason to know

⁸ Several years later, the Fifth Circuit decided the case of *Texas v. Allan Constr. Co., Inc.*, 851 F.2d 1526 (5th Cir. 1988). In that case, which dealt with fraudulent concealment, the defendant argued that the State of Texas's suit for bid-fixing on highway construction projects was time-barred based on widespread publicity of federal grand jury proceedings, subpoenas issued to the construction companies, and a conversation between the Texas Attorney General's Office and federal prosecutors. The Court reversed the lower court's grant of summary judgment to the defendant on statute of limitations grounds, finding that this evidence was insufficient for the Court to conclude, as a matter of law, that the Attorney General of Texas was not reasonably diligent in acting to discover potential claims. *Id.* at 1534. Instead, this was a question for the jury. *Id.*

of their claims until January 14, 1994. *Id.* at 546-47. The suit, subject to a one year statute of limitations, was not filed until 1998. Relying, in part, on the admission in her complaint the Court held that her action was barred by the statute of limitations. *Id.* at 549. The Court also determined that the Plaintiff had constructive notice of her claim because there were two front page stories published in Nashville's two leading newspapers regarding an identical lawsuit and a major television network also issued a report. *Id.* at 548.

In *Stutz Motor Car of Am., Inc. v. Reebok Int'l, Ltd.*, 909 F.Supp. 1353 (C.D. Cal. 1995), the district court found that the statute of limitations for patent infringement and trade secret claims had expired, finding that the agents and employees had actual knowledge of the basis for the claims years earlier. In *Stutz*, the plaintiff's agent admitted to attending a trade show where the defendant displayed the shoes at issue and testified that if they were displayed, he would have seen them. *Id.* at 1361. The plaintiff's employees admitted discussing possible legal action. *Id.* Further, an employee admitted having seen information about the shoe in the Wall Street Journal. *Id.* Again, this is a case of actual knowledge – a finding supported by the publicity surrounding the product at issue.

In *Patterson v. United States*, 451 F.3d 268 (1st Cir. 2006), the First Circuit Court of Appeals affirmed the trial court's finding that the statute of limitations had run on two sisters' claims for the wrongful death of their father. The Court noted that one of the sisters admitted to having actual knowledge of the pertinent facts years before the suit was brought. While the Court found that the publicity surrounding the decedent's death was sufficient to find that the plaintiff had constructive notice of her claims, it did not need to because her co-plaintiff had actual knowledge, and, as the Court wrote, "it strains credulity to suggest that Patterson, knowing of her

sister's alleged inability to conduct her own reasonably diligent inquiry, waited until the summer of 2002 to inform her sister of those facts." *Id.* at 272.

Importantly, in each of these cases there was a finding of actual knowledge. The publicity described in each case supported the Court's finding of actual knowledge and the expiration of the statute of limitations. None of Cephalon's cited cases stand for the proposition that publicity, without more, is sufficient to trigger the running of the statute of limitations. Equally important is that in none of the cases were the plaintiffs prevented from acting on their actual knowledge. The distinction is critical. Here, all members of the Attorney General's office who were deposed testified that they had not seen any of these articles.⁹ And, while three members of the Attorney General's Office can be charged with actual knowledge, federal law and court orders prevented them from acting on that knowledge and from sharing it with others.

Further, if there were a situation in which publicity alone would support a finding of constructive knowledge such that summary judgment is appropriate, this certainly is not the case. The publications Cephalon cites consist primarily of blurbs containing vague reports that its marketing practices were the subject of subpoenas or, later, that there was a settlement involving an investigation by the U.S. Department of Justice and the Connecticut Attorney General relating to Cephalon's marketing practices. A number of the publications appear to be internet-only press releases. Only one of the articles on which Cephalon relies was published in a South Carolina newspaper. That 2003 article was part two of a three-part series on off-label prescriptions.

⁹ ADAG Gambrell was the only exception. He testified that he had seen an e-mail of a Taxpayers Against Fraud (TAF) bulletin, (Exhibit 17, State's Resp. to Cephalon's Motion), but he was subject to the seal and his reaction to it was not to forward it to the civil section, but to seek to find out who, if anyone, violated the federal seal.

Cephalon and the drugs at issue were not mentioned on the front page of the article and comprised less than five percent of the article's comments. There is no evidence in the record that anyone from the Attorney General's Office did in fact see this article. Most importantly, that article did not describe or intimate that Cephalon was engaged in illegal marketing practices in *South Carolina*.

Indeed, not one of the publication on which Cephalon relies describes off-label marketing activity within South Carolina. Cephalon argues that had the Attorney General's Office just conducted an internet search for news on Cephalon, it would have discovered publications that would have alerted it to the possibility that it may have a cause of action. However, Cephalon cites no authority for its suggestion that the Attorney General's Office is required as a matter of law to monitor the universe of publications for information that might give rise to a potential claim. The resources required for such efforts would be staggering. Cephalon has presented no evidence that the Attorney General's Office had any more reason to search for news relating to Cephalon, than it had reason to search for news relating to Pfizer, Ford, Apple, General Electric, or any of the other thousand corporations doing business in South Carolina.

Cephalon further argues that its SEC filings and the class action lawsuits filed in Pennsylvania also put the State on notice and triggered the statute of limitations. In support, Cephalon relied on *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997), for the proposition that the public filing of statutorily required materials is sufficient to commence the running of the statute of limitations. The facts in *Berry*, however, are readily distinguishable. In *Berry*, town residents brought a legal malpractice action arising from the issuance of a municipal bond. The Court held that the statute of limitations for an action arising from the issuance of the

bond began when the bond at issue was publicly filed and the filing included the true terms of the bond and manner of approval. The Court's holding is far more limited than the broad application Cephalon seeks. Similarly, in *Fuller Ahrens P'ship v. S.C. Dep't of Highways and Pub. Transp.*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993), the plaintiff claimed that it only discovered a pipe discharging highway drainage water onto its property after it had purchased the property. The Court held that the plaintiff had constructive notice of the pipe in question because of an earlier right-of-way deed in its chain of title. *Id.* at 181-82, 427 S.E. 2d at 922-23. Finding constructive notice of something in a real estate purchaser's chain of title is entirely different from what Cephalon urges this Court to find here.

Additionally, the cases on which Cephalon relies do not support a finding that public filings with the SEC put the State of South Carolina on constructive notice of their contents. It would not only be unrealistic to charge the State with knowledge of the contents of the SEC filings of every one of the thousands of companies that make such filings, it would be unreasonable and contrary to the interests of the State and its citizens. The same holds true for lawsuits filed in other states. The State cannot be deemed on constructive notice of the contents of every lawsuit filed in every jurisdiction.¹⁰ Furthermore, as with the publications in the press and on the internet, there is no evidence that the State had any reason to look for and review Cephalon's SEC filings or lawsuits filed in other jurisdictions. The discovery rule requires only that a party

¹⁰ As aptly noted by the Fifth Circuit, "[t]he filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his right, regardless of whether his attorney believes that there is 'good ground to support it.' Rule 11, F.R.Civ.P. the mere filing of a similar lawsuit, without more, does not necessarily give 'good ground' because that suit might be frivolous or baseless. *Allan Constr.*, 851 F.2d at 1533 (quoting *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980)) (emphasis in original).

who knows that it has suffered a loss or injury act diligently to investigate whether a cause of action exists. *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005). To charge the State with knowledge of materials it had no reason to seek out and cannot possibly monitor would be unreasonable and would create a serious impediment to the enforcement of the SCUTPA and other actions on behalf of the State. The issue of whether the State was on constructive notice based on the materials raised by Cephalon is a disputed issue of material fact, and this summary judgment must be denied. The State's SCUTPA claim is not, as a matter of law, barred by the statute of limitations. The question of whether the publicity Cephalon cites is sufficient to put the State on constructive notice is a question of fact to be determined at trial.

VI. The State's Claim for Unjust Enrichment

Finally, there is a dispute as to whether the State's claims for unjust enrichment is subject to the equitable defense of laches or the three year statute of limitations set forth in § 15-3-530(7) which applies to "any action for relief on the ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the Court of Chancery."¹¹ Cephalon argues that because the State, in this Complaint, uses the word "fraud" in its description of the acts through which Cephalon received unjust enrichment, the State's equitable claims are instead claims for relief on the ground of fraud subject to § 15-3-530(7). This Court is not persuaded.

¹¹ The State advanced the alternate view that its claim for unjust enrichment was subject to a ten-year statute of limitations period under S.C Code § 15-3-600. Because I find that, in this case, the State's unjust enrichment claim is equitable in nature and timely, there is no need to address whether the ten-year statute of limitations in S.C. Code § 15-3-600 is applicable to unjust enrichment in other contexts.

S.C. Code § 15-3-530, by its very words, applies to actions for relief on the "ground of fraud." The State's action is not one for relief on the ground of fraud. Instead, the State asserts a claim for relief on the ground of unjust enrichment, an equitable claim. The State did not plead fraud in its complaint. It is well settled that in South Carolina facts supporting each of the nine elements of fraud must be specifically pled in the complaint or the complaint will be fatally defective. See, e.g. *Mut. Sav. & Loan Ass'n v. McKenzie*, 274 S.C. 630, 266 S.E.2d 423 (1980). Facts supporting the elements of fraud were not pled in the State's count for unjust enrichment, nor did Cephalon file a motion to dismiss this claim for failure to state a claim under Rule 12(b)(6), SCRPC.¹²

Unjust enrichment is an equitable doctrine which permits the recovery of the amount the defendant has been unjustly enriched at the expense of the plaintiff. *Dema v. Tenet Physician Services – Hilton Head*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). As an equitable doctrine, there is no statute of limitations applicable to unjust enrichment. Instead, the defense of laches applies. Laches is the negligent failure to act for an unreasonable period of time. *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993). The party asserting laches must show negligence, the opportunity to have acted sooner, and material prejudice before the bar in equity is complete. *Wallace v. Timmons*, 232 S.C. 311, 101 S.E.2d 844 (1958). Based on the evidence before the Court, and in light of the Court's finding that equitable tolling applies on the specific facts of this case, Defendant has not made out a case for the application of laches. In viewing the evidence in the light most favorable to the State, this Court cannot hold as a matter of law that

¹² As discussed below, such a motion would not be appropriate given the State did not purport to bring a fraud claim against Cephalon.

the State delayed unreasonably under the circumstances. Accordingly, the State's claims for recovery on the doctrine of unjust enrichment is timely.

VII. Conclusion

For the reasons set forth herein, Cephalon's motion for summary judgment on statute of limitations grounds is DENIED.

ORDER

For the foregoing reasons, Defendant Cephalon's Motion for Summary Judgment is DENIED.

AND IT IS SO ORDERED.



DeAndrea Gist Benjamin
Presiding Judge

February 21, 2014
Columbia, South Carolina

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

1201 MAIN STREET, 22ND FLOOR (29201-3226)
POST OFFICE BOX 11889 (29211-1889)
COLUMBIA, SOUTH CAROLINA
TELEPHONE 803.779.3080
FACSIMILE 803.765.1243
WEBSITE www.hsblawfirm.com

STEPHEN F. MCKINNEY
DIRECT DIAL NUMBER 803.540.7742
EMAIL smckinney@hsblawfirm.com

April 7, 2014

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

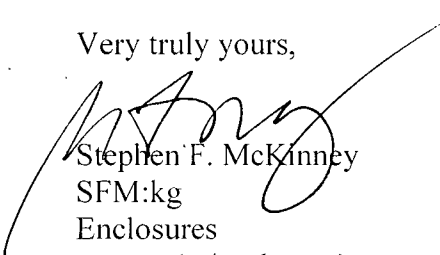
Re: *State of South Carolina, ex rel. Alan Wilson, in his official capacity as Attorney General
for the State of South Carolina v. Cephalon, Inc.*, Civil Action No. 2011-CP-40-3661
Appellate Case No. 2014-000601

Dear Ms. Kitchings:

Enclosed for filing in connection with the above-referenced appeal are the original and six copies of Appellant's Return to Motion to Dismiss and Proof of Service.

I have also enclosed an extra copy and ask that you please file-stamp it and return it to my courier.

Very truly yours,



Stephen F. McKinney

SFM:kg

Enclosures

cc: (w/enclosure)

Kenneth M. Suggs, Esq.

J. Todd Rutherford, Esq.

C. Havird Jones, Jr., Esq.

RECEIVED
APR 07 2014
SC Court of Appeals