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AUG 18 2014

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**S.C. Supreme Court**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-001465  
Case No. 2012-CP-40-07317

Cephalon, Inc., .....Appellant,

v.

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

**MOTION TO CERTIFY APPEAL**

Alan Wilson, SC Bar #71754  
Attorney General  
John W. McIntosh, SC Bar # 3841  
Chief Deputy  
Robert D. Cook, SC Bar #1373  
Solicitor General  
C. Havird Jones, Jr., SC Bar #3178  
Senior Assistant Deputy Attorney General  
Jared Q. Libet, SC Bar # 74975  
Assistant Deputy Attorney General  
Johanna Valenzuela, SC Bar #79834  
Assistant Attorney General  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211

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AUG 19 2014

**SC Court of Appeals**

(803) 734-3970

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Attorneys for Cephalon, Inc.

Pursuant to Rule 204(b), SCACR, Respondent Alan Wilson, in his capacity as Attorney General for the State of South Carolina, requests an order certifying this case for review by this Court. Appellant Cephalon, Inc. joins in the present motion. Attached as Exhibit A is a copy of the Appellant's Notice of Appeal as well as the Order of the Honorable G. Thomas Cooper, Jr., currently on appeal.

This case involves issues of significant public interest and legal principles of major importance. Namely, this case involves the authority of the Attorney General to engage outside counsel on a contingency fee basis to assert claims under the South Carolina Unfair Trade Practices Act ("SCUTPA").

On June 2, 2011, the Attorney General commenced a lawsuit on behalf of the State of South Carolina against Cephalon. The complaint seeks damages, equitable remedies, and civil penalties. On July 26, 2011, the Attorney General entered into a litigation retention agreement with outside counsel. That agreement provides for a contingent fee to be paid to outside counsel in the event of a settlement or judgment, calculated as a sliding percentage of any settlement or judgment obtained. The agreement also provides that, subject to court approval, the Attorney General retains attorneys' fees consisting of a percentage of outside counsel's fee. The Attorney General's case against Cephalon is currently pending in the court of common pleas.

On October 30, 2012, Cephalon filed a separate action against the Attorney General. In its complaint, Cephalon seeks a declaration that its due process rights are violated by the contingent fee arrangement in place in the Attorney General's enforcement action, a declaration that the allocation of attorneys' fees violates the separation of powers doctrine, and an injunction barring prosecution of the enforcement

action by the Attorney General and outside counsel under the contingent fee arrangement. Both parties moved for summary judgment, and oral argument in front of Judge Cooper was held on April 21, 2014. On June 6, 2014, the court entered an order granting the Attorney General's motion for summary judgment and denying Cephalon's motion for summary judgment. Cephalon appealed to the Court of Appeals.

At issue on appeal is the scope and extent of the Attorney General's authority to engage outside counsel, on a contingency-fee basis, to bring SCUTPA enforcement actions under the control of the Attorney General, pursuant to the South Carolina Constitution and S.C. Code §§ 1-7-85 and 1-7-170. Further at issue is Cephalon's contention that actions where the Attorney General seeks to recover civil penalties pursuant to S.C. Code § 39-5-110 are akin to criminal proceedings, as opposed to civil cases. And if Cephalon is correct that an action to enforce SCUTPA is akin to a criminal proceeding, at issue then is whether the Attorney General's use of outside counsel on a contingency fee basis violated Cephalon's due process rights. The appellate court must also address Cephalon's argument that the Attorney General's retention of a portion of outside counsel's contingency fee is a due process violation, and that the Attorney General's retention of fees and payment of fees to outside counsel violates S.C. Code § 1-7-150(B) and therefore the separation of powers doctrine.

Both sides agree that these questions are largely unsettled in South Carolina, as the appellate courts of this State have not squarely considered the issues raised in Cephalon's complaint. This Court's guidance on these issues is critical given that Cephalon seeks an order enjoining the Attorney General and outside counsel from prosecuting the underlying SCUTPA enforcement action under the present fee

arrangement. The Attorney General has other pending cases with similar litigation retention agreements; a decision in this case could impact those matters as well. Given that the Attorney General has made, in this and all other SCUTPA actions, the determination that a lawsuit is in the public interest under S.C. Code § 39-5-50(a), the public interest is well-served by this appeal bypassing the Court of Appeals and being heard directly by this Court.

### CONCLUSION

For all the foregoing reasons, Respondent's Motion to Certify the Appeal should be granted and this Court should decide the appeal.

Respectfully submitted,



Alan Wilson, SC Bar #71754

Attorney General

John W. McIntosh, SC Bar # 3841

Chief Deputy

Robert D. Cook, SC Bar #1373

Solicitor General

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Attorneys for Alan Wilson, in his capacity  
as Attorney General for the State of South  
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**PROOF OF SERVICE**

I certify that I have served the Motion to Certify Appeal on Cephalon, Inc. by depositing a copy of it in the United States Mail, postage prepaid on August 18, 2014, addressed to its attorneys of record:

William W. Wilkins  
Kirsten E. Small  
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Morgan Lewis & Bockius, LLP

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1701 Market Street  
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(215) 963-5000

I have also provided a copy of the Motion to Certify Appeal to the Clerk of Court of the South Carolina Court of Appeals by depositing a copy in the United States Mail, postage prepaid on August 18, 2014 addressed as follows:

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211



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Attorney for Respondent

August 18, 2014