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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-001465

Cephalon, Inc., ... Appellant,

v.

Alan Wilson, ... Respondent.

INITIAL BRIEF OF APPELLANT

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1. The monetary penalties scheme established in S.C. Code Ann. § 39-5-110 is so punitive in purpose and effect that the Enforcement Action should be treated as a criminal proceeding. Accordingly, the use of private lawyers on a contingency fee basis is a *per se* violation of Cephalon's due process rights.

2. The Due Process Clause requires that the Attorney General, and any private lawyers acting on his behalf, exercise their discretion in quasi-criminal actions free of impermissible biases and extraneous influences.

    a. The fee agreement violates the neutrality doctrine by creating an improper financial incentive for the Attorney General and his private lawyers to pursue monetary penalties regardless of the public's best interests.

    b. Even if this were an ordinary damages action, payment of a contingency fee to private lawyers is permissible only if the litigation is controlled by a neutral and disinterested government attorney. The Attorney General's direct financial interest in the litigation means that this critical safeguard is wholly absent from the Enforcement Action.

3. The fee agreement between the Attorney General and his private lawyers violates the separation of powers doctrine by entitling the Attorney General to retain a portion of a settlement or judgment that should be remitted to the general fund.

STATEMENT OF THE CASE

Cephalon is the defendant in a monetary penalties action brought by the Attorney General pursuant to the South Carolina Unfair Trade Practices Act. The Attorney General has retained several private lawyers, on a contingency fee basis, to litigate that case. This appeal arises from a declaratory judgment action filed by Appellant Cephalon, Inc. on October 30, 2012, seeking a ruling that the contingency fee agreement between the Attorney General and his private lawyers violates Cephalon's due process rights under State and Federal Constitutions. Cephalon further sought a ruling that the fee agreement, under which the Attorney General retains for himself funds that should be deposited into the general fund, violates the separation of powers doctrine of the South Carolina Constitution.

Following discovery, Cephalon and the Attorney General filed and fully briefed cross-motions for summary judgment. On April 21, 2014, the motions came before the circuit court, the Honorable G. Thomas Cooper, Jr. for oral argument. On June 2, 2014, the circuit court entered an order granting the Attorney General's motion and denying Cephalon's motion. A timely notice of appeal was filed. Thereafter, the Attorney General filed an unopposed motion to certify the appeal to this Court under Rule 204(b), SCACR. On September 24, 2014 the motion was granted

INTRODUCTION

"[C]ommon sense often makes good law."[1]

As this Court noted nearly a century ago, "the Attorney General is the highest executive law officer of the state." *State v. Sanders*, 118 S.C. 498, 110 S.E. 808, 810 (1920). As such, "[h]e is charged with the duty of seeing to the proper administration of the laws of the state, *and his duties are quasi-judicial.*" *Id.* (emphasis added). The Attorney General's duty is to serve the public interest. *See Langford v. McLeod*, 269 S.C. 466, 473, 238 S.E.2d 161, 164 (1977). Accordingly, he must "act fairly and impartially in the discharge of his duties, and ... not lend his official sanction to an unwarranted action." *Sanders*, 110 S.E. at 810.

Appellant Cephalon is the defendant in an action for monetary penalties filed by the Attorney General under the South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. §§ 39-5-10 *et seq.* (1976 & Supp. 2013). The monetary penalties sought in the action are wholly punitive; they serve no remedial purpose. The present appeal concerns Cephalon's challenge to the contingency fee agreement between the Attorney General and his hand-picked private lawyers who are prosecuting the SCUTPA action on behalf of the Attorney General. Under the fee agreement, the private lawyers are to be paid a substantial portion of any monetary penalties imposed on Cephalon. Even worse, the fee agreement provides that the Attorney General is entitled to a ten percent cut of his private lawyers' contingency fee. Through this arrangement, the fee agreement gives the Attorney General—the constitutional officer charged with "fairly and impartially" enforcing the laws of this state—a direct financial interest in seeking the highest possible monetary penalties against Cephalon. Common sense dictates that this arrangement violates Cephalon's due process rights.

Even when accused of misconduct, companies that do business in South Carolina

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[1] *Peak v. United States*, 353 U.S. 43, 46 (1957) (Douglas, J.).

have the same right as individual South Carolinians to expect the Attorney General to act in the interest of justice and not for pecuniary gain. The contingency fee agreement, under which both the Attorney General and his private lawyers have a direct financial interest in punitive monetary penalties, denies Cephalon its right to fair administration of South Carolina's laws. *Cf. Langford*, 269 S.C. at 471, 238 S.E.2d at 163 (noting that the Attorney General is prohibited from "receiv[ing] any fee or reward ... for services in any prosecution or business to which it is his official business to attend" (internal quotation marks and citation omitted)). Furthermore, the fee agreement violates the separation of powers doctrine of the South Carolina Constitution.

The record in this appeal is complete and provides the Court with everything needed to rule and finally determine this case and its controversy. This Court should reverse the circuit court's order granting summary judgment to the Attorney General, and should direct the entry of judgment in favor of Cephalon.

STATEMENT OF FACTS

A. The Enforcement Action

On June 6, 2011, the Attorney General filed an action against Cephalon ("the Enforcement Action") pursuant to SCUTPA's monetary penalties provision, *see* S.C. Code Ann. § 39-5-110, alleging that Cephalon improperly engaged in off-label marketing of Provigil, Gabitril, and Actiq ("the Medicines"). The Enforcement Action ultimately stems from Cephalon's plea, entered in the U.S. District Court for the Eastern District of Pennsylvania, to a single misdemeanor count of off-label marketing during a 10-month period in 2001. In the Enforcement Action, the Attorney General seeks the maximum $5,000 monetary penalty for "[e]very deceptive, unfair, and/or misrepresentative act or practice by Cephalon in marketing and promoting" the Medicines for a period of *six years*, "from at least January 1, 2001 until at least December 31, 2006." (Complaint ; R. p. __.)[2] The Attorney General does not allege that the Medicines did not work in the manner intended by the doctors who prescribed the Medicines to their patients. Indeed, there is ***no*** allegation that even a single South Carolina citizen has been harmed in any way by taking these Medicines. The ***only*** allegation of wrongful conduct, rather, is that Cephalon marketed and/or promoted an off-label use for these Medicines.

The Enforcement Action alleges that Cephalon engaged in deceptive marketing practices by promoting the Medicines for "off-label" uses. However, use of a medication

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[2] The Enforcement Action is plainly barred by SCUTPA's three-year statute of limitations. *See* S.C. Code Ann. § 39-5-150. Although the Attorney General filed the Enforcement Action within three years of Cephalon's September 2008 guilty plea, his office has known about the allegations against Cephalon since at least 2005. (Gambrell Dep. 52:6-53:23, R. p. _.) Moreover, in 2007 Assistant Deputy Attorney General C. Havird Jones, Jr. received e-mail correspondence specifically addressing the Connecticut Attorney General's investigation of the activities now alleged in the Enforcement Action. (Jones Dep. 104:8-105:6; R. p.__.) In March 2011, after the Attorney General contacted Cephalon in hopes of extracting a settlement before filing the Enforcement Action, Cephalon provided a detailed recitation of the many ways in which the Attorney General's office obtained actual knowledge of the allegations against Cephalon well over three years prior to the filing of the Enforcement Action. (Letter, R.p.__.)

for a purpose other than one for which the FDA specifically approved it—*i.e.*, an "off-label" use—is a normal and expected part of American medical practice. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 & n.5 (2001) (noting that "'off-label' usage ... is an accepted and necessary corollary of the FDA's mission to regulate in this area without directly interfering with the practice of medicine.").[3]

FDA approval of a medicine represents the agency's determination that the medicine is "safe and effective for each of its intended uses," as identified by the manufacturer during the approval process. *See Wash. Legal Found. v. Henney*, 202 F.3d 331, 332 (D.C. Cir. 2000). "It will often be discovered after initial FDA approval, however, that a [medicine] has uses other than those for which it was approved." *Id.* For example, one of the medicines involved in the Enforcement Action, Provigil, is approved for the treatment of "excessive sleepiness associated with narcolepsy, obstructive sleep apnea/hypopnea syndrome, and shift work sleep disorder." (Complaint ¶__; R. p. __.) However, doctors treating patients with multiple sclerosis routinely prescribe Provigil to alleviate the fatigue associated with the disease. This is an "off-label" use, and it is entirely legal and ethical for a doctor to prescribe Provigil in this way. "A physician may prescribe a legal drug to serve any purpose that he or she deems appropriate, regardless of whether the [medicine] has been approved for that use by the FDA." *Wash. Legal*

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[3] As the authors of an oft-cited article explain, "Off-label use is not only legal and ethical, but is a common and integral feature of medical practice":

> Off-label uses of medical devices and drugs perform an important therapeutic role in many, if not most, areas of medical practice. Prescriptions for off-label uses of drug products "may account for more than 25% of the approximately 1.6 billion prescriptions written each year, with some recent estimates running as high as 60%." Examples of medical conditions whose standard treatments involve or have involved extensive off-label use include cancer, heart and circulatory disease, ... and various uncommon diseases. Pediatric uses also are mostly off-label.

James M. Beck & Elizabeth D. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 FOOD & DRUG L.J. 71, 79-80 (1998) (footnotes omitted) [hereinafter *Off-Label Use.*].

Found., 202 F.3d at 333. Indeed, it has been recognized that "'[i]n some cases, if you didn't use the drug in the off-label way, you'd be guilty of malpractice.'" *Off-Label Use* at 80 (quoting a statement by the vice president of the American Medical Association). In short, doctors lawfully and properly prescribe medicines for off-label purposes in South Carolina every day, and their patients benefit from those prescriptions every day.[4]

While doctors, patients, and the general public are free to discuss the off-label uses of medications, federal law prohibits pharmaceutical manufacturers from joining the conversation. Under FDA regulations, a manufacturer's promotion of its own medicine for an off-label purpose is deemed "misbranding," a federal criminal offense. *United States v. Caronia*, 703 F.3d 149, 153-55 (2d Cir. 2012). So even though a doctor may prescribe a medicine for an off-label use, a pharmaceutical manufacturer cannot talk to a doctor about off-label uses.[5] Federal law prohibits pharmaceutical manufacturers from marketing or promoting a medicine for an off-label purpose no matter how beneficial that purpose may be, and no matter the degree to which the medical community has already adopted the off-label use. *Accord* Lise T. Spacapan and Jill M. Hutchison, *Prosecutions of Pharmaceutical Companies for Off-Label Marketing: Fueled by Government's Desire to Modify Corporate Conduct or Pursuit of a Lucrative Revenue Stream?*, 22 ANNALS HEALTH L. 407, 421 (Summer 2013) (hereinafter "Spacapan") ("Without off-label prescribing, key populations of patients may go without needed medicine.").

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[4] The General Assembly has stated a policy preference in favor of off-label prescriptions. So long as the medical profession has accepted an off-label use of a cancer-treatment drug, an insurance company in this State cannot refuse coverage on the basis that it is being prescribed for a purpose other than the FDA label allows. S.C. Code Ann. § 38-71-275(A) (2002).

[5] Since Cephalon entered its misdemeanor plea in 2008, at least one federal appellate court has held that the First Amendment prohibits criminal prosecution "for speech promoting the lawful, off-label use of an FDA-approved drug." *Caronia*, 703 F.3d at 161 (holding that the First Amendment prohibits criminal prosecution "for speech promoting the lawful, off-label use of an FDA-approved drug"); *see Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) ("Speech in aid of pharmaceutical marketing ... is a form of expression protected by the Free Speech Clause of the First Amendment.").

B. The Attorney General's Retention of Private Lawyers to Prosecute the Enforcement Action

Shortly after filing the Enforcement Action, the Attorney General selected several private practice lawyers to prosecute the Enforcement Action on his behalf, in exchange for a contingency fee based in part on the amount of monetary penalties imposed by the court.[6] Before accepting the engagement, the private lawyers inquired about the potential damages award, presumably for the purpose of assessing whether the potential contingency fee justified the effort and expense of conducting the litigation. The Attorney General's office replied,

> [We] will get you a figure on the disgorgement amount ... ***the civil penalties would be the big #.***

(E-mail, R. p. __ (emphasis added).) As evidence of the "big #" to be obtained in penalties, the Attorney General's office forwarded a copy of the trial court's order in a previous monetary penalties action against Ortho-McNeil-Janssen Pharmaceuticals, imposing a penalty of $327 million. *See State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 2011 WL 2185861 (Com. Pl. June 3, 2011) (hereinafter "*Janssen*").

The fee agreement between the Attorney General and his private lawyers provides for compensation on a contingency basis. In the event of a settlement or judgment, the private lawyers are entitled to reimbursement of expenses on a dollar-for-dollar basis. Once actual expenses have been reimbursed, a contingency fee will be calculated based on a cumulative sliding scale:

Amount of Net Proceeds	Contingent Percentage	Private Lawyers' Fee	Attorney General's Share
$0 to $5 million	25%	$1,250,000	$125,000
$5 to $10 million	22%	$1,100,000	$110,000

[6] The Attorney General "did not employ a competitive bidding process or issue any requests for proposal to identify or retain" the private lawyers. (Interrog. Resp. No. 11; R. p. __.)

Amount of Net Proceeds	Contingent Percentage	Private Lawyers' Fee	Attorney General's Share
$10 to $25 million	18%	$2,700,000	$270,000
$25 to $50 million	15%	$3,750,000	$375,000
$50 to $100 million	12%	$6,000,000	$600,000
Over $100 million	10%	*Unlimited*[7]	*Unlimited*

(Fee Agreement at 6; R. p. _.) The fee agreement provides that the contingency fee will be calculated on the basis of "net settlement or judgment proceeds ***including civil penalties***, restitution, or damages (but not including punitive or exemplary damages)." (Fee Agreement at 6, R. p. _.) A separate cumulative sliding scale, with a maximum of 20 percent, applies to punitive and exemplary damages. (Fee Agreement at 7, R. p. _.)

Under the fee agreement, the Attorney General obtains ten percent of his private lawyers' contingency fee. (Fee Agreement at 6, 7, R. pp. _, _.) Thus, the fee agreement gives the Attorney General the same financial interest as his private lawyers in the imposition of substantial monetary penalties. *Cf.* S.C. Code Ann. § 17-1-20 ("No prosecuting officer shall receive any fee or reward from or in behalf of a prosecutor for services in any prosecution or business to which it is his official business to attend ...")

Although many state attorneys general retain private lawyers on a contingency-fee basis in certain kinds of cases, it appears that the South Carolina Attorney General stands alone in giving himself a ten percent cut of his private lawyers' contingency fees. During the summary judgment hearing, Cephalon asserted that ***no*** other attorney general in America engages in this type of scheme. The Attorney General never challenged that assertion. Indeed, the Attorney General testified during his deposition that he is "not aware" of any other attorney general from any state who gets a cut of the

[7] Using the *Janssen* monetary penalties judgment of $327 million as an example, and assuming expenses of $1 million, the percentages set forth in the above table would result in a fee of $37.4 million to the private lawyers. The Attorney General would deposit ten percent of that amount ($3.74 million) into this "civil litigation account."

contingency fees paid to his private lawyers. (Wilson Dep. 49:23-50:9; R. p.__.) This in itself speaks volumes about the inappropriateness of the arrangement designed and implemented by the Attorney General.

The Attorney General has been taking a rake from its enforcement cases for some time now. Despite a statute that requires the Attorney General to deposit "all monies, except investigative costs or costs of litigation"—categories that do not include attorneys' fees—"in[to] the general fund of the State," the Attorney General deposits his contingency fee in his own "civil litigation account." (Production Response No. 13, pp.5-6; Osmer[8] Dep. 115:16-21.) Since 2002, $36.5 million has been deposited into this account rather than into the general fund. (Jones Dep. 228:22-230:25.) These funds have been used to pay salaries and fringe benefits, such as retirement and healthcare, for the Attorney General's employees. (Osmer Dep. 123:11-125:16.) The funds are also used for a number of other unclear purposes, such as "other profess [sic] services" (R. p. _, $157,402.76 [FY 2011]; $158,234.14 [FY 2012]; $43,359.55 [FY 2013]), and "dues & membership fees." (R. p._, $58,808.71 [FY 2013].)

The ten percent rake appears to be motivated by the Attorney General's desire to increase available funding over the amount allocated to his office by the General Assembly. A January 30, 2011 *Post & Courier* article reported that newly elected Attorney General Alan Wilson "said the attorney general's office has the potential to raise significant revenue through some investigations and lawsuits." (Article, R. p. __.) Under South Carolina law only the Attorney General can file a SCUTPA penalty case. *See* S.C. Code Ann. § 39-5-110(a). In an effort to increase revenue, the Attorney General has unconstitutionally leased out the statutory powers of his office to a group of private lawyers who agree to front all costs of litigation. The lease terms, of course, provide that the Attorney General gets a piece of the pie—that is, his ten percent rake.

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[8] Thomas M. Osmer, Jr. is the Attorney General's Finance Director.

The opening paragraph of the Amended Complaint, filed by the Attorney General's private lawyers in February 2012, states that this is a "civil action for civil penalties ... and other legal and equitable relief for violations of the South Carolina Unfair Trade Practices Act." (Complaint ¶_, R. p. _.) The lead claim for monetary penalties is no coincidence. That is primarily what this case is about; "***the civil penalties [are] the big #.***" (E-mail; R. p. _ (emphasis added).) Under S.C. Code Ann. § 39-5-110, a monetary penalty of up to $5,000 could be imposed against Cephalon for every occasion in which its employees promoted an off-label use for its Medicines. In the *Janssen* case, for example, the circuit court imposed a separate monetary penalty for each and every sample packet, as well as a separate monetary penalty for each and every distribution of a certain letter and each and every marketing visit to a doctor's office. *See Janssen*, 2011 WL 2185861. In addition to monetary penalties, in this case the Attorney General also seeks a permanent injunction that would preclude Cephalon from engaging in speech that has recently been held to be constitutionally protected.

C. The Declaratory Judgment Action

On October 3, 2012, Cephalon filed this action in the Richland County Court of Common Pleas, seeking a declaratory judgment that the contingency fee agreement between the Attorney General and his private lawyers violates Cephalon's due process rights under the State and Federal Constitutions. First, SCUTPA's monetary penalty scheme is so punitive in purpose and effect that the Enforcement Action should be treated as a criminal proceeding for due process purposes. Accordingly, the Attorney General is prohibited from paying his private lawyers (not to mention himself) on a contingency fee basis. Alternatively, monetary penalties under SCUTPA are at least quasi-criminal. By giving the Attorney General and his private lawyers a contingency fee interest in the punitive sanction of monetary penalties, the fee agreement violates Cephalon's due process rights by creating an impermissible risk of bias in the

enforcement of South Carolina's laws. Moreover, the fee agreement would be impermissible even if the private lawyers' contingency fee were based only on the amount of compensatory remedies such as damages or disgorgement. Cephalon has a due process right to have a fair and impartial government decision maker controlling the private lawyers' work. The Attorney General's ten percent stake in his private lawyers' contingency fee creates a direct financial interest in the litigation; by definition, therefore, the Attorney General is not neutral. Finally, the fee agreement is invalid because the Attorney General's retention of a portion of his private lawyers' contingency fee violates South Carolina's separation of powers doctrine.

ARGUMENT

I. BECAUSE THE ENFORCEMENT ACTION IS INDISTINGUISHABLE FROM A CRIMINAL PROSECUTION, THE USE OF PRIVATE LAWYERS ON A CONTINGENCY FEE BASIS VIOLATES DUE PROCESS.

It "seems beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution." *County of Santa Clara v. Superior Ct.*, 235 P.3d 21, 31 n.7 (Cal. 2010). Indeed, this principle is rooted so deeply in our understanding of due process that "there is virtually no law on the subject." *Clancy v. Superior Ct.*, 705 P.2d 347, 351 (Cal. 1985). Accordingly, if the Enforcement Action is tantamount to a criminal proceeding, the contingency fee agreement between the Attorney General and his private lawyers is *per se* prohibited.

This Court has held that the determination of whether an action to impose monetary penalties is civil or criminal is governed by the two-phase inquiry set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See State v. Price*, 333 S.C. 267, 272 n.5, 510 S.E.2d 215, 218 n.5 (1998). The first inquiry is whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248 (1980). If the legislature has used the civil label, the court must then look beyond the label to determine "whether the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *Id.* at 248-49.

A. The statutory text of § 39-5-110 is, at best, ambiguous.

The first *Kennedy* inquiry requires an examination of the statutory language. *See Hudson v. United States*, 522 U.S. 93, 99 (1997) ("Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction."). The text of § 39-5-110(a) describes the monetary penalties as "civil," but that is not the only relevant

statutory language. *See S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (holding that a "statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect"). SCUTPA provides that only the Attorney General—the State's chief law enforcement officer—may bring an action for monetary penalties, and makes clear that he may do so independently of any attempt to obtain compensation for consumers' monetary losses. And, SCUTPA uses the term "prosecution" to describe enforcement actions by the Attorney General. S.C. Code Ann. § 39-5-130. Further, SCUTPA gives the Attorney General authority to issue subpoenas and administer oaths, and specifically recognizes an investigative target's constitutional right against self-incrimination under both U.S. and South Carolina Constitutions. *See* S.C. Code Ann. § 39-5-80.

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *Huntington v. Attrill*, 146 U.S. 657, 668 (1892). *Accord United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1993) ("[A] penal action imposes damages upon the defendant for a general wrong to the public."). In this case, the Attorney General states that he is bringing the action "as the chief legal officer of the State ... to vindicate the State's sovereign interests, as well as the interests of its citizens." (Complaint at __, R. p. _.) Thus, despite the General Assembly's use of the term "civil" to describe SCUTPA's monetary penalties scheme, when considered as a whole it is at best unclear that the legislature intended to establish a civil, as opposed to a criminal, punishment.

B. The *Kennedy* factors support a conclusion that SCUTPA's monetary penalties scheme is criminal.

In addressing the question of whether a nominally civil proceeding is a criminal prosecution, the courts have at least seven relevant factors at their disposal:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its

> operation will promote the traditional aims of punishment, retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Price, 333 S.C. at 272 n.5, 510 S.E.2d at 218 n.5 (citing *Kennedy*, 372 U.S. at 168-69). Application of these factors—particularly, the presence of a scienter requirement and the fact that monetary penalties under SCUTPA are clearly punitive and not remedial—demonstrates that the Enforcement Action is criminal and thus precludes the Attorney General's use of private lawyers with a contingency fee agreement.

1. SCUTPA permits the imposition of an affirmative disability or restraint.

First, the Enforcement Action involves an "affirmative disability or restraint." (Complaint, Prayer for Relief 7; R.p.__.) SCUTPA authorizes permanent injunctive relief, and the Attorney General seeks that remedy in the Enforcement Action. S.C. Code Ann. § 39-5-50(a); (Complaint, Prayer for Relief 7; R.p._.) The permanent injunctive relief, if granted, would enjoin Cephalon from exercising its First Amendment right "to disseminate even *truthful*, scientific information about [its] product[s] if it relates to an off-label use." Spacapan, at 409; *see Caronia*, 703 F.3d at 161 ("A pharmaceutical representative's promotion of an FDA-approved drug's off-label use is speech.").

The circuit court erroneously discounted the severity of the restraint imposed by injunctive relief, reasoning that an injunction "does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." (Order, p.5; R. p. _.) Because a corporation ***cannot*** be imprisoned, however, the fact that SCUTPA does not authorize incarceration is of little relevance in determining whether the monetary penalties are civil or criminal. It is far more relevant that the Attorney General seeks to impose a prior restraint on Cephalon's truthful speech about its products.

2. *Corporate entities have historically been punished through the imposition of monetary penalties.*

Second, the monetary penalties sought in the Enforcement Action are clearly intended for the sole purpose of punishing Cephalon in the only way available to the Attorney General. As noted above, "corporations cannot be imprisoned for [the] commission of crimes." *Kentucky v. Fortner LP Gas Co.*, 610 S.W.2d 941, 943 (Ky. Ct. App. 1980). Instead, criminal conduct by a corporation is generally most often punished by the imposition of monetary penalties. In federal courts across the land, for example, corporations are punished at sentencing by the imposition of a fine in the vast majority of cases.[9] "[F]or a corporation ... the difference between civil and criminal law is small. Corporations cannot be imprisoned. Only money is at issue." *United States v. Vitek Supply Co.*, 151 F.3d 580, 585 (7th Cir. 1998).

Moreover, monetary penalties under SCUTPA plainly are not compensatory. The Attorney General's authority to seek the imposition of monetary penalties, found in S.C. Code Ann. § 39-5-110, is entirely separate from his authority to seek restitution for individual citizens' monetary losses, S.C. Code Ann. § 39-5-50(b). Further, SCUTPA permits the Attorney General to bring an action for monetary penalties *after* an individual citizen has received trebled damages under SCUTPA's citizen-suit provision. *See* S.C. Code Ann. § 39-5-140; *see also id.* § 39-5-160 ("The powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law.").

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[9] United States Sentencing Commission, Organizations Receiving Fines or Restitution by Primary Offense Category 2011-2013:

http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table51.pdf

http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table51.pdf

http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table51.pdf

It is also important to note that SCUTPA imposes no limits whatsoever on the total amount of the monetary penalty that may be imposed. Certainly, the amount of a monetary penalty is not tied to the amount of economic harm done (or not done). It bears noting that in the *Janssen* case, the circuit court imposed a monetary penalty of $4,000 for each act of allegedly deceptive marketing, even though there was no evidence of any economic or other harm. SCUTPA's monetary penalties scheme thus involves a level of financial exposure far in excess of any measure of remediation or recompense. Therefore, it can only be considered as punishment. Accordingly, this factor decisively supports the conclusion that an action for monetary penalties under SCUTPA should be treated as a criminal proceeding.

3. SCUTPA permits the imposition of monetary penalties only upon a finding of scienter.

The third *Kennedy* factor looks to whether the sanction requires a finding of scienter. *Kennedy*, 372 U.S. at 168. Scienter is a hallmark of a criminal action. *See Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224, 236 (D. Mass. 2011) (finding the presence of scienter requirement in the Massachusetts False Claims act "weighs in favor of a finding that the MFCA sanctions are punitive."). SCUTPA permits the imposition of monetary penalties only if the Attorney General proves the defendant acted "willfully." S.C. Code Ann. § 39-5-110(a); *see also id.* § 39-5-110(c) (providing that a "willful violation" occurs when the defendant "knew or should have known that his conduct was a violation of" SCUTPA). This factor favors a finding that the Enforcement Action is criminal in nature.

4. SCUTPA's monetary penalties scheme promotes the traditional aims of punishment – retribution, and deterrence.

The fourth factor, whether the sanction promotes punishment and deterrence, is likewise fully implicated here. *Kennedy*, 372 U.S. at 168. The Complaint makes this plain:

"This is precisely the type of behavior that the equitable doctrine of disgorgement was intended to ***punish and deter***, and precisely the type of willful and intentional behavior to which the penalties provision of SCUTPA applies." (Complaint ¶20, R. p. _.) This factor favors a finding that the Enforcement Action is criminal in nature.

5. *The Enforcement Action is premised on the notion that off-label marketing is an unfair trade practice because it is a federal criminal offense.*

The fifth factor is whether the allegedly actionable behavior is already a crime. *Kennedy*, 372 U.S. at 168. There is no dispute that the Attorney General takes the position that off-label marketing of the Medicines is a crime. The Complaint alleges that "the marketing and/or promotion of an off-label use is illegal under federal law under 21 U.S.C. § 352(t)(l)" and points out that the conduct alleged in the Enforcement Action resulted in a misdemeanor guilty plea by Cephalon. (Complaint ¶¶ 26, 54; R. p.__.) Indeed, much of the language of the Complaint is drawn *verbatim* from the criminal information against Cephalon. In addition, the Complaint describes the alleged off-label promotion in overtly criminal terms, describing Cephalon's alleged conduct as "illegal," "unlawful," "fraudulent," and "adverse to the public interest."[10] (Complaint, ¶¶ 7, 45, 47, 75, 76, 80, 81, 82; R. p. _.)

6. *SCUTPA's monetary penalties scheme is not rationally connected to any alternative, non-punitive purpose.*

7. *Whether the punishment appears excessive in relation to the alternative purpose assigned.*

The sixth and seventh *Kennedy* factors focus on whether there is an alternative, non-punitive purpose that is rationally assignable to the sanction, and, if such a purpose

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[10] The Attorney General has similarly described SCUTPA claims against other pharmaceutical manufacturers in unmistakably criminal terms. In the *Janssen* case, the Attorney General's private lawyers argued to the jury that the action was an "enforcement case[]" and that Janssen's alleged conduct was no different than when someone goes "in to rob the 7-Eleven." (*Janssen* Transcript, p. 204, ln. 22-23, R.p. _.)

exists, whether the sanction appears "excessive" in relation to it. *See Kennedy*, 372 U.S. at 168-69. As discussed at length above, monetary penalties under SCUTPA serve no remedial purpose; they are pure punishment. There is no alternative, non-punitive purpose.

In sum, the statutory text of SCUTPA and each of the *Kennedy* factors support a conclusion that the Enforcement Action is, in purpose and effect, a criminal proceeding. For this reason, the payment of contingency fees to the Attorney General and his private lawyers cannot pass constitutional muster. As the New Mexico Supreme Court noted nearly a century ago:

> To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.

Baca v. Padilla, 190 P. 730, 732 (N.M. 1920).

II. THE FEE AGREEMENT CREATES A FINANCIAL INCENTIVE FOR THE ATTORNEY GENERAL AND HIS PRIVATE LAWYERS THAT IS FUNDAMENTALLY INCOMPATIBLE WITH THE PROSECUTORIAL NEUTRALITY REQUIRED IN QUASI-CRIMINAL ACTIONS LIKE THE ENFORCEMENT ACTION.

> Laws that provide for punishment but are civil rather than criminal in form have sometimes been labeled "quasi-criminal" by the Supreme Court. These laws, broadly speaking, provide for civil money penalties, forfeitures of property, and the punitive imposition of various disabilities.

Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1362 n.6 (10th Cir. 1979) (citing Clark, *Civil & Criminal Penalties & Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 381 (1976)).

Even if the Enforcement Action is considered a civil proceeding, there can be no doubt that monetary penalties under SCUTPA are sought as "punishment for the infraction of the law." *United States v. La Franca*, 282 U.S. 568, 573 (1931). "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *Huntington*, 146 U.S. at 668; *see NEC Corp.*, 11 F.3d at 137 ("[A] penal action imposes damages upon the defendant for a general wrong to the public."). Under SCUTPA, only the Attorney General has authority to seek the imposition of monetary penalties, and any penalties imposed are paid to the State.

> [A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action.

La Franca, 282 U.S. at 575. In this case, the facts underlying Cephalon's misdemeanor guilty plea provide the factual basis for the Attorney General's demand for monetary penalties under SCUTPA. There can be no question, therefore, that monetary penalties under SCUTPA are at least quasi-criminal. *See First Am. Bank of Va. v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985) ("Civil penalties may be considered 'quasi-criminal' in nature.").

The Court of Appeals has correctly noted that the purpose of SCUTPA is to

"punish[] acts that adversely affect the public interest." *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 259, 743 S.E.2d 868, 873 (Ct. App. 2013). For that reason, the Enforcement Action implicates the neutrality requirements embodied in due process. Accordingly, it is improper for the Enforcement Action to be prosecuted by any lawyer with a direct financial interest in the outcome. The fee agreement is invalid because it creates—in both the Attorney General and his private lawyers—a financial incentive that is fundamentally incompatible with the duty of a government lawyer to act in the best interest of the public.[11]

A. Due process mandates an enforcement process that is free of extraneous influences.

Due process mandates a judicial system free from government actors with extraneous or financial interests in the outcome of the proceedings. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding unconstitutional, as a violation of due process, an ordinance providing that a mayor, acting as a judge, was paid a portion of criminal fines but received nothing from acquittals); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-50 (1980) (concluding that administrative prosecutor's financial interest in penalties litigation raised the possibility of due process concerns but that the concern was too attenuated to constitute a violation).

For adjudicative bodies, "[i]t is a basic tenet of constitutional law that 'due process requires a neutral and detached judge in the first instance.'" *Merck Sharp & Dohme Corp. v. Conway*, 861 F. Supp. 2d 802, 811 (E.D. Ky. 2012) (quoting *Concrete Pipe &*

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[11] Earlier versions of the Attorney General's contingency fee agreement made clear that ***no amount*** of a private lawyer's contingency fee could be recovered from monetary penalties. (Jones Dep. 191:1-204:18.) This, of course, made sense because imposition of a monetary penalty is either criminal or quasi-criminal and a government lawyer should never have any extraneous financial temptations in representing the State. When this version of the fee agreement turned out to be insufficiently lucrative for the Attorney General and his private lawyers, however, the Attorney General suddenly changed his mind about the propriety of paying contingency fees out of monetary penalties, and amended the agreement. (*See id.*; Wilson Dep. 54:9-56:5, R. p. _.)

Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 617 (1993)). "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall*, 446 U.S. at 242.

"Prosecutors [, on the other hand,] need not be entirely 'neutral and detached.'" *Id.* at 248 (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972)). Unlike judges, prosecutors are advocates; "they are necessarily permitted to be zealous in their enforcement of the law." *Marshall*, 446 U.S. at 248. Nevertheless, the Supreme Court has ***never*** "suggest[ed] ... that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest." *Id.* at 249. *Accord State v. Peake*, 353 S.C. 499, 508, 579 S.E.2d 297, 302 (2003) ("[A] prosecutor is charged with the responsibility of being 'a minister of justice and not simply that of an advocate.'"). Consequently, "traditions of prosecutorial discretion" do not allow government attorneys to escape judicial scrutiny of "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process." *Marshall*, 446 U.S. at 249. In fact, the *Marshall* Court warned, such a scheme may "raise serious constitutional questions." *Id.* at 250.

The constitutional prohibition of improper interests applies to civil enforcement proceedings as well as to criminal prosecutions. *See, e.g., State v. Lead Industries Ass'n*, 951 A.2d 428, 473 (R.I. 2008) ("It is the duty of the Attorney General to see to it that justice shall be done not only in the context of criminal prosecutions, but also while he or she carries out all the functions of that high office—including engagement in litigation in the civil arena."). And, the neutrality required of government-employed lawyers applies with equal force to private lawyers who step into the shoes of a government lawyer. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (extending the disinterested and neutrality requirements to private lawyers representing the government).

B. The fee agreement creates an improper financial incentive for the Attorney General and his private lawyers to pursue monetary penalties regardless of the public's best interests.

The Supreme Court articulated the constitutional concerns implicated by a government sanctioned system that incentivized the pursuit of monetary penalties in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). *Marshall* concerned monetary penalties assessed by regional administrators for violations of child-labor laws. Payments for such monetary penalties were remitted to the Employment Standards Administration ("ESA"), which could then "return sums collected ... to the regional offices in proportion to the amounts expended on enforcement efforts." *Id.* at 246. Jerrico challenged the penalty-allocation scheme as a violation of due process, arguing that it "created an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties." *Id.* at 241.

Following a careful review of the workings of the penalty-allocation system, the Supreme Court concluded that the "biasing influence" asserted by Jerrico was "too remote and insubstantial to violate the constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions." *Id.* at 243-44. The *Marshall* Court's discussion of the challenged penalty-allocation scheme provides a roadmap for this Court's consideration of whether the Contingency Fee Agreement between the Attorney General and his private lawyers creates an impermissible risk of bias in the enforcement of SCUTPA's monetary penalties provision. Below is a review of the critical factual elements analyzed by the *Marshall* court compared to the facts of this case. The comparison demonstrates that the fee agreement creates direct and substantial financial incentives for the Attorney General and his private lawyers, and therefore the agreement is unconstitutional under *Marshall*.

First and foremost, the *Marshall* Court noted that "no official's salary is ***affected*** by the levels of the penalties." *Id.* at 245 (emphasis added). The same cannot be said

here. The private lawyers' income is directly proportional to the amount of monetary penalties imposed.[12] As for the Attorney General, his office's payroll is directly supported by recoveries in these cases. "So [you] use [the 10%] for payroll too? A: Yes." (Osmer Dep. 125:15-16; 126:9-25; 127:1-2; R. p. _; Attorney General Civil Litigation Account Statement; R. p. _.) Indeed, some of the Attorney General's employees owe their jobs to the Attorney General's share of the monetary penalties from SCUTPA penalties actions. Deputy Attorney General John McIntosh testified during his deposition that "recoveries from contingency fee contracts are at least one reason that [the Attorney General has] been able to hire additional people in his office." (McIntosh Dep. 61:15-19; *see also id.* at 60:22-25; 61:1-19 (noting that although appropriations have decreased, the Attorney General has been able to increase his staff).)

Second, the Court in *Marshall* noted that the "sums collected as child labor penalties amounted to ***substantially less than 1%*** of the ESA's budget." *Id.* at 245 (emphasis added). The same cannot be said here. The Attorney General's 2013-14 budget was $27,031,138. (Fiscal Year 2013-14 Budget; R. p. __.) If the Attorney General and his private lawyers were to persuade the circuit court to impose a *Janssen*-type monetary penalties against Cephalon, the Attorney General's ten percent rake would be worth $3.74 million—nearly 14 percent of his total 2013-14 budget.[13]

Third, the *Marshall* Court found that the "challenged provisions have not ... resulted in ***any increase*** in the funds available to the ESA over the amount appropriated

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[12] Because the government did not contract out its monetary penalty enforcement to private contingent fee lawyers in *Marshall*, its analysis did not address the issue. For that reason, Cephalon's reference to private lawyers will only apply to a few of the critical factual elements the *Marshall* Court found important. What is clear, though, is that had the government used private lawyers in *Marshall* the same due process concerns would apply.

[13] And that is just for this case. When one considers that the Attorney General is pursuing multiple actions for monetary penalties under SCUTPA, all of which involve substantially similar contingency fee agreements with private lawyers, the unconstitutional motivations of the scheme become even more extreme.

by Congress." *Id.* at 246 (emphasis added). The same cannot be said here. In this case, it is quite clear that the Attorney General is using fee agreements with private lawyers as a significant, ongoing source of funding for his office. Indeed, the Attorney General has touted his ability "to raise significant revenue through ... investigations and lawsuits" under SCUTPA. (Article, R. p. _.) Moreover, the Attorney General and his private lawyers can potentially increase the funds available to their respective offices by alleging a higher number of violations subject to SCUTPA's $5,000-per-violation monetary penalty.[14] One need look no further than the Complaint in the Enforcement Action for evidence of the incentive at work. The Enforcement Action is based on the identical alleged conduct underlying Cephalon's misdemeanor plea, but instead of seeking penalties for a six-month period, the Attorney General and his private lawyers are seeking penalties for each and every act of marketing, for each of the Medicines, for a period of *six years*. (Complaint ¶64, R. p. _.) *Cf. Janssen*, 2011 WL 2185861 (imposing a separate monetary penalty of $4,000 for each of 43,556 marketing letters and sales calls, plus a $300 penalty for each of 509,499 sample boxes of medication).

The *Marshall* Court also noted that any funds not spent by the ESA were returned to the Treasury. *See id.* at 246. In sharp contrast, the Attorney General claims that he is entitled to carry forward any unused funds from his ten percent cut for subsequent budget years. (Osmer Dep. 65:18-66:20; R. p. _.)

Fourth, in *Marshall* the monetary penalties collected from enforcement actions were allocated to regional offices in some years, but not others. And, when allocations were made they were "in proportion to the ***amounts expended*** on enforcement of the child labor provisions." *Id.* at 246 (emphasis added). Allocations to regional offices were ***never*** based on "the total amount of penalties ***collected*** by particular offices." *Id.*

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[14] Deputy Attorney General Jones testified that the specter of monetary penalties is the real leverage in SCUTPA penalty cases: "the clout you have is the civil penalties part." (Jones Dep. 234:22-23; R. p. __.)

(emphasis added.) Thus, a regional administrator could not hope either to ensure the occurrence of an allocation or its amount by increasing assessments of monetary penalties. Under the fee agreement, in contrast, the Attorney General and his private lawyers are certain to receive a substantial portion of any judgment or settlement in a SCUTPA monetary penalties action, and the amount increases with every additional monetary penalty imposed. The private lawyers' contingency fees go straight into their pockets, and the Attorney General's ten percent cut of those fees goes directly into an account he controls.

Moreover—and again, unlike in *Marshall*—the amount received by the Attorney General and his private lawyers bears ***no*** relationship to the actual cost of enforcement. (Osmer Dep. 60:9-12 ("Do you track any of the expenses relating to any of the work Mr. Jones' group is doing? A: No.").) The Attorney General's Finance Director further testified:

> Q: Okay. And now in th[e] Depakote matter with Abbott Labs, the Attorney General's office recovered approximately $3.6 million in fees and costs; right?
>
> A: That's what it looks like, yes.
>
> Q: Okay. Now, you have no idea whether or not that was the actual amount of fees and costs expended by the Attorney General's office to prosecute that matter do you?
>
> A: I would have no knowledge of that.
>
> Q: Okay. And the reason you have no knowledge of that is because the office doesn't track expenses - - the office doesn't track expenses it incurs on a case-by-case basis; isn't that right?
>
> A: That's correct.

(Osmer Dep. 109:3-19; R. p. __.)

Fifth, the *Marshall* Court concluded that no government official stood "to profit economically from vigorous enforcement of the child labor provisions of the Act" because "[t]he salary of the assistant regional administrator is fixed by law" and could not be affected by the amount of monetary penalties assessed. *Marshall*, 446 U.S. at 250.

That is not so in the Attorney General's office. Only the Attorney General's salary is fixed by statute. S.C. Code Ann. § 1-7-10. Moreover, the Attorney General can pay his assistants bonuses—a compensation mechanism found in the private sector that should have no place in the government. (Jones Dep. 50:8-19, R. p. _.) Government lawyers should have only one goal—justice. *See Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963) ("[T]he Government wins its point when justice is done in its courts." (internal quotation marks omitted)).

"[T]here are certain circumstances under which a prosecutor's financial interest in the outcome of a case will violate the defendant's right to due process." *Merck Sharp & Dohme*, 861 F. Supp. 2d at 812. Those circumstances are met in this case. The Attorney General's entitlement to a ten percent share of his private lawyers' contingency fee is a due process violation for it clearly gives the Attorney General an incentive to overzealously pursue SCUTPA's monetary penalties. When the presence of his private lawyers is considered in the arrangement, it only serves to throw fuel on the fire. Each of the critical factual elements analyzed by the *Marshall* Court illustrates the unconstitutional nature of this scheme. And there can be no argument that the use of private lawyers somehow absolves the government. *See Young*, 481 U.S. at 804-05; *see also Clancy*, 705 P.2d at 351 ("The responsibility follows the job.").

The Attorney General's decision to institute legal action against a citizen, individual or corporate, must be made with only one driving focus—to serve the interests of the public. In performing the duties of his office, the Constitution requires that the Attorney General serve only one master. *See Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) ("We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment."). As noted above, the Enforcement Action seeks monetary penalties for alleged conduct that ended in 2006, and of which the Attorney General has

had ample notice since at least 2005. *See supra* note 2. The Attorney General's decision to pursue the Enforcement Action despite the obvious time bar should give the Court pause. The Attorney General has gone on record stating that he will use his power as the State's chief law enforcement officer as a means of generating revenue not otherwise appropriated by the General Assembly. (Article, R. p. __.) Is the Enforcement Action being pursued to further the public interest, or to further the financial interests of the Attorney General and his private lawyers by forcing a settlement?

Just as troubling as the government-sanctioned system that incentivizes the pursuit of monetary penalties is the appearance this creates in the public. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). The Attorney General and his private lawyers are receiving money by extracting large settlements from corporate defendants who face the prospect of an astronomical judgment for monetary penalties. Yet, "it is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done." *Santa Clara*, 235 P.3d at 35. By selecting private lawyers to pursue SCUTPA penalty cases against corporate citizens, and getting a cut from each case, the Attorney General has compromised the appearance of justice. The Attorney General has placed himself in a position where it appears that his desire to obtain a "big #" penalty award, resulting in a correspondingly larger payment to his office, may override his "responsibility of being 'a minister of justice and not simply that of an advocate.'"[15]

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[15] Professor Geoffrey C. Hazard, Jr., submitted an affidavit in support of Cephalon. Independent of the constitutional infirmities found in the contingency fee agreement, Professor Hazard opined that the agreement was "inconsistent with the concept of a minister of justice and thus with recognized standards of professional conduct." (Hazard Affidavit, p.4; R. p. ___.) Professor Hazard is a Professor Emeritus at Hastings College of the Law, University of California, has served as a Reporter for the American Bar Association Model Rules of Professional Ethics, and is a Director Emeritus at the American Law Institute. (Hazard Affidavit; R. p. ___.)

Peake, 353 S.C. at 508, 579 S.E.2d at 302.

C. A contingency fee agreement cannot be used in a quasi-criminal case.

The Supreme Court has made clear that a government lawyer prosecuting a quasi-criminal action must do so from a neutral and disinterested position free of extraneous motivations, financial or otherwise. Within that analytical framework, it has been recognized that in quasi-criminal actions the government cannot contract out its representation to a private lawyer working on a contingency fee basis. *Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985). In other contexts, courts have approved contingency fee agreements with private lawyers, but the nature of the claims and the relief sought make clear that those cases were essentially ordinary civil cases—that is, seeking a recovery that will make a party whole. *See, e.g., Lead Indus.*, 951 A.2d at 435 (nuisance lead paint abatement). The monetary penalties and injunctive relief sought in the Enforcement action, however, have nothing to do with making a party whole. *See, e.g., NEC Corp.*, 11 F.3d at 137 (noting that "a penal action imposes damages upon the defendant for a general wrong to the public"). For that reason, the Enforcement Action is a case that clearly cannot be pursued by private lawyers with a contingency fee agreement.[16]

In the class of certain civil cases—not applicable here—where the use of private contingency fee lawyers has been approved, the courts have fashioned an unflinching requirement that the government remain in complete and absolute control—thus ensuring the presence of a neutral and disinterested supervising lawyer with no

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[16] It appears that only one court in the Nation has approved the use of contingency fee lawyers in an action seeking monetary penalties. *Int'l Paper Co. v. Harris County*, __ S.W.3d __, 2013 WL 3864317 (Tex. Ct. App. 2013). That case can only be described as a result-oriented decision, for it did not address *Marshall*'s analysis of the critical factual elements relevant to its due process holding. In side-stepping the basis of *Marshall*'s holding, the court concluded that we "do not read *Marshall* to support a blanket prohibition against the zealous pursuit of civil penalties by governmental entities using lawyers who have a financial stake in the outcome of the case." *Id.* at *8. That statement cannot be squared with the *Marshall* decision.

financial interest in the outcome of the case. *E.g., Lead Indus.*, 951 A.2d at 475 ("[T]he Attorney General is not precluded from engaging private counsel pursuant to a contingency fee agreement in order to assist in ***certain civil litigation,*** so long as the Office of the Attorney General retains ***absolute and total control over all critical decision-making.***" (first emphasis added; second emphasis in original)). In this case, however, the Attorney General cannot control the case from a neutral and disinterested position because he also has a direct financial interest in the imposition of monetary penalties. Accordingly, the fee agreement places the Enforcement Action outside the reach of the cases that have approved a State's use of contingency fee lawyers for its cases.

1. *The Analytical Framework Used for Evaluating the State's Use of Contingency Fee Lawyers*

For ordinary civil cases, there is no prevailing *per se* prohibition on a State retaining contingency fee lawyers to represent its interests.[17] *Santa Clara*, 235 P.3d at 33 (noting that, "in ordinary civil cases, we do not require neutrality when the government acts as an ordinary party to a controversy, simply enforcing its own contract and property rights against individuals and entities that allegedly have infringed upon those interests"). "Ordinary civil cases" are those the government pursues as a market participant, such as hiring contingency fee counsel to protect its "oil rights," *Id.* at 31 (citing *Denio v. City of Huntington Beach*, 140 P.2d 392 (Cal. 1943), *overruled on other grounds by Fracasse v. Brent*, 494 P.2d 9 (Cal. 1972)), "to litigate a tort action involving damage to government property, or to prosecute other actions in which the governmental entity's interests in the litigation are those of an ordinary party, ***rather***

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[17] Whether the Attorney General may retain private lawyers to prosecute ordinary civil cases on a contingency fee basis is not before the Court. It is instructive, however, to note that the federal government has banned this practice entirely. President George W. Bush signed an Executive Order banning this practice. Exec. Order No. 13433, 3 CFR § 217 (May 16, 2007). President Barack Obama has kept the Executive Order in force.

than those of the public." *Santa Clara, 235 P.3d* at 33-34 (emphasis added). Such cases are on the opposite end of the spectrum from criminal cases, where, as noted above, there is a complete prohibition upon the State's use of contingency fee lawyers. *See e.g., Lead Indus.*, 951 A.2d at 475 & n.48.

If the Enforcement Action is a civil proceeding,[18] it falls somewhere in between an ordinary civil case and criminal case. In determining whether a contingency fee arrangement is permissible in such cases, courts look to the nature of the case and the remedies sought. The relevant question is whether the case requires the government lawyer to engage in a weighing of values that is akin to the exercise of prosecutorial discretion. If it does, then "the representative of the government [must] be absolutely neutral. This requirement precludes the use in such cases of a contingent fee agreement." *Clancy*, 705 P.2d at 352.

2. *The Enforcement Action falls within the class of cases for which contingency fee agreements are prohibited.*

In *Clancy*, the California Supreme Court addressed a city's attempt to shut down an adult bookstore through a public nuisance abatement action. The city entered into a contingency agreement with a private lawyer, James C. Clancy, to pursue the action. Clancy's retention agreement provided that he would be paid on an hourly basis, but that his hourly fee would be doubled if he won the case. *Clancy*, 705 P.2d at 350. The adult bookstore moved to disqualify Clancy from representing the city based on the extraneous financial interest created by the contingency fee agreement. *Id.*

Clancy approached the legal question by examining the duties of public officials in certain public cases. It noted, for example, that in an eminent domain action, "[t]he duty of a government attorney ... has been characterized as a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those

[18] For the reasons set forth in Part I, the Enforcement Action should be treated as a criminal proceeding.

of the landowner" and that this duty "is of [a] high order." *Id.* at 352 (citation omitted).

Next, the court looked to the actual controversy, and concluded that the public nuisance action fit within the framework found in the eminent domain cases: "[o]n the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes." *Id.* at 352. *Clancy* also found that the presence of First Amendment concerns "added [a thumb] to the balance." *Id.* ("[N]ot only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase."). Accordingly, the Court held that the "public nuisance involves a delicate weighing of values." *Id.* Having found that the action required a weighing of values, the court then concluded that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.*

Independent of the fact that the nuisance action would require the government attorney to undertake a weighing of values for which a tempting financial arrangement could not be tolerated, *Clancy* also noted that public nuisance abatement actions "share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions." *Id. Clancy* noted that these "actions are brought in the name of the People" and that a "person who maintains or commits a public nuisance is guilty of a misdemeanor." *Id.* at 352-53. Accordingly, the court found that the relationship between the public action and criminal law "further support[ed] the need for a neutral prosecuting attorney." *Id.* at 353. Because Clancy was not neutral, the court held that he should be disqualified.

Twenty-five years after the California Supreme Court handed down *Clancy*, it was asked to reconsider its breadth. In *Santa Clara*, a number of cities and counties throughout California brought a lawsuit against the makers of lead paint under a nuisance abatement theory of relief. *Santa Clara*, 235 P.3d at 25. The public plaintiffs

retained private lawyers on a contingency fee basis, and the defendants moved to have the private lawyers disqualified pursuant to *Clancy*. *Id.* at 25-26. The lower court granted that motion, but the California Supreme Court reversed. The manner in which the *Santa Clara* court distinguished *Clancy* highlights the impropriety of the fee agreement between the Attorney General and his private lawyers.

First, the court noted that the lead paint abatement action was more like an ordinary civil case than a criminal case because the plaintiffs sought make-whole relief. *Santa Clara*, 235 P.3d at 34 (predicting that if the plaintiffs were successful, the remedy "will result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that abatement purpose or by undertaking the abatement themselves"). The court also noted that "we can confidently deduce what the remedy will ***not be***." *Id.* at 34 (emphasis in original).

- Because the defendants had already ceased producing lead-based paint, "[t]his case will not result in an injunction that prevents the defendants from continuing their current business operations. ... [N]o ongoing business activity will be enjoined." *Id.*
- "Nor will the case prevent defendants from exercising any First Amendment right or any other liberty interest." *Id.*
- "[T]here is neither a threat nor a possibility of criminal liability being imposed upon defendants." *Id.*

While the *Santa Clara* court acknowledged that a balancing of interests was required, *Santa Clara*, 235 P.3d at 34, it concluded that the remedial relief sought showed that the balancing analysis did not implicate the heightened neutrality requirements of *Clancy*—that is, the case was more civil than criminal. Accordingly, *Santa Clara* approved of the use of contingency fee lawyers because the action was essentially an "ordinary civil case." *Id. Accord Lead Indus.*, 951 A.2d at 475 n.48 ("Significantly, however, the case presently before us is completely civil in nature.").

The Enforcement Action is plainly not an ordinary civil case. The Attorney

General is not seeking to recover on a contract for a state agency that owns land with mineral rights, nor is he seeking to recover monies for property damage to a public building. Rather, in the Enforcement Action the Attorney General is seeking, "on behalf of the public," to punish Cephalon by the imposition of substantial monetary penalties for its allegedly illegal actions and to prevent Cephalon from speaking. The Attorney General is acting as a representative of the sovereign on behalf of all citizens of the State. Therefore, regardless of whether the Enforcement Action should be labeled "criminal" under *Kennedy*, because this is an action on behalf of the public, the concerns inherent in a public prosecution are imputed to this case. *Santa Clara*, 235 P.3d at 34.

In balancing the interests of the public, and deciding how to pursue monetary penalties and injunctive relief under SCUTPA, the Attorney General must be completely neutral. But the very essence of a contingency fee agreement is that the lawyers get paid nothing unless they win money. The Attorney General's use of profit-motive-driven private lawyers, as well as the Attorney General's own financial interests, ensures that government neutrality will never occur and decisions that would be in the best interest of the public may not be made. If a just and publicly beneficial resolution of the Enforcement Action involved Cephalon creating a best practices program for its sales representatives, then that resolution would never occur here. Or, if a just and publicly beneficial resolution were to create an awareness program for medical professionals, again, that resolution would never occur here.

The monetary penalties are being pursued because of Cephalon's alleged decision to promote off-label uses for its Medicines. It is undeniable and "undisputed, however, that the prescription of drugs for unapproved uses is commonplace in modern medical practice and ubiquitous in certain specialties." *Wash. Legal Found.*, 202 F.3d at 333. Furthermore, Cephalon was not speaking to an unsophisticated audience; it was speaking to doctors and other trained medical specialists. The doctors' decisions were made based upon what they believed, in their professional medical judgment, would

benefit their patients.[19] Moreover, the patients' (i.e., the public's) interest must be taken into account; patients seek medical help in order to live fuller and better lives. Since it "will often be discovered after initial FDA approval ... that a drug has uses other than those for which it was approved," *Id.* at 332, how is the public interest being advanced by imposing significant monetary punishment on the messenger? Moreover, will punishing the messenger cause it to think twice before speaking in South Carolina again? It is within this context that the Attorney General must decide how (or even whether) to prosecute this case.

The Attorney General's request for injunctive relief further supports the conclusion that the Enforcement Action is more criminal than civil. Like in *Clancy*, but unlike in *Santa Clara*, the Attorney General is seeking injunctive relief that would prevent Cephalon from conducting its ongoing business operations and from exercising its First Amendment rights. *Santa Clara*, 235 P.3d at 34 (noting that this "case will not result in an injunction that prevents the defendants from continuing their current business operations. ... [N]o ongoing business activity will be enjoined" and neither "will the case prevent defendants from exercising any First Amendment right or any other liberty interest").

The nature of this case also supports the conclusion that this case is more criminal than civil. The Attorney General has premised its whole case on the allegation that Cephalon's business practices are criminal. If discovery in the Enforcement Action reveals information regarding criminal liability, then the Attorney General can use that information to later prosecute Cephalon criminally.[20] *Santa Clara*, 235 P.3d at 34 (noting

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[19]Common law negligence principles ensure that doctors make responsible decisions in their prescribing conduct. *See Caronia*, 703 F.3d at 168 n.11.

[20] *See* S.C. Code Ann. § 39-5-80 (noting that "information obtained pursuant to the powers conferred by [SCUTPA] shall not be made public or disclosed by the Attorney General or his employees ***beyond the extent necessary for law-enforcement purposes in the public interest***" (emphasis added)). Cephalon entered a misdemeanor guilty plea to conduct that occurred in 2001. (Complaint, Exhibit B, ¶1; R. p. __.) The Attorney

that "there is neither a threat nor a possibility of criminal liability being imposed upon defendants").

The Attorney General has created a litigation lottery system that tramples upon Cephalon's due process rights. *See Clancy*, 705 P.2d at 352 (noting that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated"). Under the *Clancy* and *Santa Clara* framework, this Court should conclude that the use of contingency fee lawyers is barred in the Enforcement Action.

D. Even if the Enforcement Action were an ordinary civil case, the fee agreement lacks the critical safeguard of control by a neutral and disinterested government attorney.

Cephalon firmly believes that the use of contingency fee lawyers in the Enforcement Action is unconstitutional; it acknowledges, however, that a few cases approve of the use of contingency fee lawyers in certain types of cases so long as the Attorney General retains complete and total control over the litigation. *E.g.*, *Santa Clara*, 235 P.3d at 36. As discussed immediately above, the *Clancy* and *Santa Clara* decisions make clear that this is not one of those types of cases; indeed, those cases compel the reversal of the circuit court's order. Nevertheless, if this Court concludes that this case is more akin to a civil proceeding, the use of contingency fee lawyers in this case should still be barred because the Attorney General is not neutral.

Courts have held that the due process requirement of neutrality is met when "neutral, conflict-free government attorneys retain the power to control and supervise the litigation." *Santa Clara*, 235 P.3d at 36. Explaining its conclusion, the court noted that "[p]rivate counsel serving in a subordinate role do not supplant a public entity's government attorneys, who have ***no personal or pecuniary interest in a case*** and therefore remain free of a conflict of interest that might require disqualification." *Id.* at 36

General's Complaint, however, includes allegations of actionable conduct that occurred after 2001. (Complaint, ¶¶40-45; R. p. ___.) While Cephalon firmly believes it has done nothing that violates any criminal or civil law, the Complaint alleges the opposite.

(emphasis added). The reasoning is that so long as the government has no financial interest in a case, control of the litigation by a government-employed attorney creates a firewall between the private lawyer's interest in obtaining a fee and the public's interest in justice.

The fee agreement between the Attorney General and his private lawyers tears down that wall: The Attorney General is not neutral. He cannot be, because his office has a direct financial interest in maximizing the monetary penalties imposed on Cephalon. The ten percent provision in the fee agreement places the Attorney General in the same position as his private lawyers, creating the precise concern that the Attorney General's control is supposed to alleviate: "ensuring that [a] defendant['s] constitutional right to a fair trial is not compromised by overzealous actions of an attorney with a pecuniary stake in the outcome." *Id.* at 39.

During the summary judgment hearing, the circuit court appeared to appreciate the unseemly nature of the Attorney General's contingency fee:

> The Court: I understand what you're arguing, but is it good policy for a government agency to have a financial stake in the outcome of litigation? Why does that not sort of pass the smell test?
>
> Private Lawyer: In this state we have a statute that allows it, and that is Section 1-7-85 which the legislature specifically allows the Attorney General to obtain reimbursement for its costs in representing the State in civil proceedings, including attorneys' fees.

(Motions Argument, p. 36 ln. 1-9; R. p. __.) Despite its misgivings, the circuit court erroneously found safe harbor for the Attorney General's ten percent share of the private lawyers' contingency fees by relying on S.C. Code Ann. § 1-7-85, which authorizes the Attorney General to "obtain reimbursement for its costs[, including attorney's fees] in representing the State." (Order, p. 13 (R. p. __ (citing S.C. Code Ann. § 1-7-85).) In doing so, the circuit court misapprehended the significant constitutional infirmities of this scheme.

When a court is confronted with enforcing a statute, and opposing parties take

conflicting positions as to its meaning, the court must begin by determining whether a plain reading of the statute is actually subject to differing interpretations. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Protection, LLC*, 409 S.C. 331, 343, 762 S.E.2d 561, 567 (2014). As this Court has often recognized, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). The words used by the legislature "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459; *see Ferguson Fire*, 409 S.C. at 343, 762 S.E.2d at 567 ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will."). Ultimately, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Section 1-7-85 provides that the Attorney General "may obtain ***reimbursement*** for its costs in representing the State in criminal proceedings and in representing the State ... in civil ... proceedings. These costs may include ... attorney fees or investigative costs or costs of litigation." (emphasis added). The word reimbursement is not ambiguous; it means "to pay back to someone" or "to make restoration or payment of an equivalent to." MERRIAM-WEBSTER'S DICTIONARY 1049 (11th ed. 2012). In order for a party to be reimbursed, they must first incur something. The ten percent provision, however, has no relationship to any incurred costs or fees. Indeed, the Attorney General does not even track the personnel or general costs incurred on its cases. (Osmer Dep. 60:5-12; *id.* 109:14-19; R. p. ___.) "[A]pply[ing] the statute according to its own terms," *Ferguson Fire*, 409 S.C. at 344, 762 S.E.2d at 567, leads to the inescapable conclusion that it does not authorize the ten percent provision.

But even if § 1-7-85 were to be somehow interpreted to permit the Attorney General's ten percent rake (which it does not), the Due Process Clause forbids it for all

the reasons previously discussed. As detailed above, the ten percent scheme "violates standards of procedural fairness embodied in the Due Process Clause." *Marshall*, 446 U.S. at 252. Accordingly, the circuit court's interpretation of § 1-7-85 in a manner that approved of a violation of Cephalon's right to the due process of law conflicts with the Constitution and cannot stand. *Peake*, 345 S.C. at 80, 545 S.E.2d at 844 ("It is axiomatic that legislation must be construed so as to be constitutional. ... Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation.").

III. THE FEE AGREEMENT VIOLATES THE SEPARATION OF POWERS DOCTRINE

Permitting the Attorney General to deposit ten percent of his private lawyers' contingency fees into an account controlled by him—instead of remitting that money to the general fund—violates the separation of powers mandated by South Carolina's Constitution. S.C. Const. art. I, § 8. By keeping the money for his own office, the Attorney General unconstitutionally invades the General Assembly's role in developing policy through legislative enactments, including the budget. *Cf. Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) ("Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be.").

The South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

S.C. Const. art. I, § 8. The separation of powers doctrine recognizes "the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). This Court has diligently performed its "role in upholding the separation of powers doctrine," namely, "to maintain the three branches of government in positions of equality." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 591, 757 S.E.2d 408, 413 (2014); *see, e.g., Hampton*, 403 S.C. at 409, 743 S.E.2d at 265 (holding that the Budget and Control Board violated separation of powers by requiring enrollees to bear part of the cost of a premium increase, when the General Assembly had appropriated state funds to cover the entire amount); *Edwards v. State*, 383 S.C. 82, 96-97, 678 S.E.2d 412, 420 (2009) (issuing a writ of mandamus compelling the Governor to

apply for federal stimulus funds, when the General Assembly had passed a budget that appropriated the funds and instructed the Governor to take action necessary to secure them).

The appropriation of funds is a legislative function: "The General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent." *McLeod*, 278 S.C. at 313-14, 295 S.E.2d at 637; *see also* S.C. Const. art. X, § 8 ("Money shall be drawn from the treasury of the State ... only in pursuance of appropriations made by law."). By keeping a portion of every settlement or award obtained by his private lawyers' through the contingency fee arrangement, the Attorney General invades the General Assembly's authority and duty to make its own policy determinations regarding the use of those funds. *State ex rel. Walker v. Derham*, 61 S.C. 258, 39 S.E. 379, 380 (1901) ("To appropriate money is to set it apart—to designate some specific sum of money for a particular purpose or individual. To do this effectually it is necessary that the power in the legislature to defeat the application of the money to some particular object or individual by providing for some other use thereof cannot exist except by some legislative action afterwards to the contrary.") *Accord Ieyoub ex rel. Louisiana v. W.R. Grace & Co.*, 708 So.2d 1227 (La. Ct. App. 1998) (holding that a contingency fee agreement between the Attorney General and private attorneys violated Louisiana's separation of powers doctrine).

The Attorney General claims that he has the statutory authority to keep a portion of the private lawyers' contingency fees. To support this position, the Attorney General points to S.C. Code Ann. § 1-7-85 and S.C. Code Ann. § 1-7-150. Neither of these statutes supports his position.

Section 1-7-85 provides as follows:

> Notwithstanding any other provision of law, the Office of the Attorney General may obtain *reimbursement* for its costs in representing the State in criminal proceedings and in representing the State and its officers and

> agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation awarded by court order or settlement, travel expenditures, depositions, printing, transcripts, and personnel costs. Reimbursement of these costs may be obtained by the Office of the Attorney General from the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses, with the approval of the State Budget and Control Board.

S.C. Code Ann. § 1-7-85 (emphasis added). The Attorney General argues that his ten percent share of his private lawyers' contingency fees is nothing more than a statutorily authorized "reimbursement" of his costs. It is not. Cephalon incorporates and references its explanation, in Part II.D. pp. 39-40, *supra*, for why § 1-7-85 does not authorize the Attorney General's ten percent take.

Further, the Attorney General's argument flies in the face of § 1-7-85, which enumerates two specific sources from which he may seek reimbursement: "the budget of an agency or officer that it is representing or from funds generally appropriated for legal expenses." *Id. Accord* S.C. Const. art. X, § 8 ("Money shall be drawn from the treasury of the State ... *only* in pursuance of *appropriations made by law*." (emphasis added)). Neither of these sources includes monies paid to the Attorney General by private lawyers working on a contingency fee basis.

The Attorney General's position is further undermined by S.C. Code Ann. § 1-7-150, which provides:

> (A) The Attorney General shall account to the State Treasurer for all fees, bills of costs, and monies received by him by virtue of his office.
>
> (B) All monies, *except investigative costs or costs of litigation awarded by court order or settlement*, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State, except for monies recovered for losses or damages to natural resources, which must be deposited in the Mitigation Trust Fund, or where some other disposition is required by law.

(emphasis added). This provision is plain and unambiguous: the Attorney General must turn over *all* funds that come into his office. The only exception is for "investigative costs

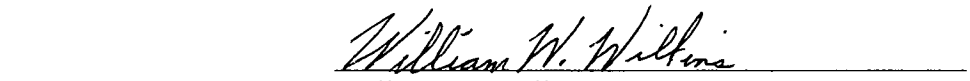
or costs of litigation." § 1-7-150. The statute ***does not*** permit the Attorney General to retain attorneys' fees.

There is an important textual difference between § 1-7-85 and § 1-7-150. Section 1-7-85 provides that the Attorney General may seek reimbursement of "attorney fees or investigative costs or costs of litigation," but § 1-7-150 only authorizes the Attorney General to keep "investigative costs or costs of litigation"—thereby *excluding by implication* attorneys' fees. *See Rainey*, 341 S.C. at 86, 533 S.E.2d at 582 ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting BLACK'S LAW DICTIONARY 602 (7th ed.1999))). Consequently, the Attorney General must deposit any attorney's fees that it receives (*i.e.*, his ten percent) into the general fund. This conclusion is further supported by the rule of statutory construction that a "statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth.*, 368 S.C. at 398, 629 S.E.2d at 629. Again, § 1-7-150 and § 1-7-85 employ the exact same language: "investigative costs or costs of litigation." Section 1-7-85 also makes separate reference to attorney's fees: "attorney fees or investigative costs or costs of litigation." Section 1-7-150's express inclusion of "investigative costs or costs of litigation" means that it does not include attorney's fees. The Attorney General's argument that § 1-7-85's reference to attorney's fees is included within § 1-7-150's "investigative costs or costs of litigation," is belied by the text of the statute.

CONCLUSION

For the reasons set forth above, Cephalon asks this Court to reverse the circuit court's order granting summary judgment to the Attorney General and to remand with instructions to enter judgment in Cephalon's favor.

Respectfully submitted,



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Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-001465

Cephalon, Inc., ... Appellant,

v.

Alan Wilson, ... Respondent.

PROOF OF SERVICE

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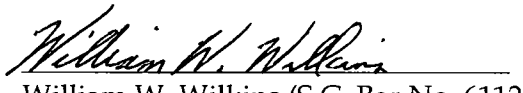

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