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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

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-001465

Cephalon, Inc., ...Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

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    b. Whether an action for civil penalties under S.C. Code Ann. § 39-5-110 is a criminal prosecution or quasi-criminal action rather than a civil action;

    c. Whether the possibility that the Attorney General's Office may receive up to 10% of outside counsel's fee creates an impermissible risk of bias.

2. Whether the Attorney General's payment of Special Counsel's fee and possible recovery of a percentage of Special Counsel's fee violates the separation of powers doctrine.

STATEMENT OF THE CASE

On June 6, 2011, the State of South Carolina, by and through its Attorney General, Alan Wilson, filed a civil suit against Cephalon, Inc. ("Cephalon"), alleging that it engaged in unfair and deceptive marketing practices with respect to the marketing, sale, and promotion of three prescription drugs—Provigil, Gabitril, and Actiq. The original complaint sought civil penalties for violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.* ("SCUTPA") and equitable relief. The Attorney General later amended his complaint to assert a claim for damages on behalf of the State Health Plan based on the millions of dollars spent unnecessarily on these drugs. The State proceeded initially in this matter without outside counsel and using only attorneys from the Attorney General's Office.

On July 26, 2011, the Attorney General signed a Litigation Retention Agreement with Special Counsel to assist the Attorney General's Office with the litigation in a subservient role and to bear the costs of the litigation in exchange for a percentage of any money ultimately recovered by the State..[1]

More than 15 months after the Attorney General retained Special Counsel, on October 30, 2012, Cephalon filed suit against the Attorney General, seeking a declaration that the retention of Special Counsel on a contingency fee basis violates Cephalon's due process rights and the separation of powers doctrine. Cephalon sought, and the Attorney General provided, documents and answers to interrogatories relevant to these claims. In

[1] The agreement is entitled, "Litigation Retention Agreement with Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq." Special counsel are Kenneth M. Suggs of Janet, Jenner & Suggs, LLC and J. Todd Rutherford of the Rutherford Law Firm.

addition, Cephalon took the depositions of several members of the Attorney General's Office, including the Attorney General Alan Wilson, former Attorney General Henry McMaster, Chief Deputy John McIntosh, Finance Director Tom Osmer, and Assistant Deputy C. Havird "Sonny" Jones, Jr., the head of the Consumer Protection and Antitrust Section and the attorney primarily responsible for the State's litigation against Cephalon.

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

STATEMENT OF FACTS

As noted, the Attorney General filed this action against Cephalon on June 6, 2011. The allegations set forth in that complaint and the remedies sought were crafted by the Attorney General's Office without the involvement of any private lawyers, as was the Attorney General's decision to file suit at all. (R. pp. 72, 86-87). The original complaint sought equitable remedies and civil penalties under SCUTPA for Cephalon's alleged unfair, deceptive, and misleading marketing practices in connection with its promotion of Provigil, Actiq, and Gabitril from January 1, 2001 until December 31, 2006.[2] (R. p. 86). Prior to the State's action, Cephalon entered into a Guilty Plea Agreement and a Settlement Agreement with the United States Attorney's Office for the Eastern District of Pennsylvania, the Department of Justice, and other federal agencies to resolve similar criminal and civil claims for misbranding and off-label marketing of Provigil, Gabitril, and Actiq within the 2001 to 2006 time period. (R. pp. 82, 93-109). Cephalon paid a total of $425,000,000.00 to resolve these claims. (R. pp. 82, 93-109).

When Cephalon filed its Answer on July 5, 2011, the State learned Cephalon had retained two large law firms to represent it in the litigation. (R. pp. 129-130). Thereafter, the Attorney General decided to hire outside attorneys to assist with what was expected to be (and in fact, is) costly and time-consuming litigation. On July 26, 2011, the Attorney General signed a Litigation Retention Agreement with Special Counsel. (R. p. 605).

[2] Cephalon claims the Attorney General's case is "plainly barred by SCUTPA's three-year statute of limitations" and that should "give the Court pause." (Cephalon Br. p. 5 n. 2; p. 28) Indeed, Cephalon filed for summary judgment in the enforcement action arguing just that. Cephalon's motion was denied by the Honorable DeAndrea Gist Benjamin on February 21, 2014. Judge Benjamin ruled that individuals within the Attorney General's Office with knowledge were prevented from acting on that knowledge due to a federal seal, and that Cephalon had presented no evidence that anyone at the Attorney General's Office not subject to the federal had any knowledge of the potential allegations against Cephalon. Cephalon appealed this ruling to the Court of Appeals, who granted the State's motion to dismiss, as denials of motions for summary judgment are not immediately appealable.

That agreement provided for Special Counsel to assist the Attorney General's Office with the litigation in a subservient role, and to bear the costs of the litigation in exchange for a percentage of any money ultimately recovered by the State. The Litigation Retention Agreement also outlined the ceiling for attorneys' fees and rules on what costs would be recoverable following any settlement or judgment. (R. pp. 598-602).

On February 13, 2012, the Attorney General filed an Amended Complaint. In addition to the SCUTPA civil penalties claims, which remained unchanged, the Attorney General added a cause of action for damages, seeking to recover funds the State Health Plan spent on reimbursements for Provigil, Gabitril, and Actiq during the relevant time period. (R. p. 159).

Throughout this litigation, including after hiring outside counsel, the Attorney General has remained in complete control of the litigation, with Special Counsel serving to support and effectuate the Attorney General's decision-making. This control is reflected in both the terms of the Litigation Retention Agreement and the undisputed testimony of the members of the Attorney General's Office with responsibility for the litigation.

As to the Attorney General's control of the litigation, the agreement provides as follows:

> **Article II. SERVICES**
> **A. Scope of Appointment**
>
> . . .
>
> 1. The Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General. The Attorney General at his sole discretion has the right to appoint a designated assistant ("designated assistant") to oversee the litigation, which appointment the Attorney General may modify at will.

2. Special Counsel shall provide legal services to the Attorney General subject to the approval of the Attorney General for the purposes of seeking injunctive relief, monetary relief, and other relief against all entities in this litigation.

3. The Attorney General may provide attorneys and other staff members to assist Special Counsel with this litigation. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. All pleadings, motions, briefs, formal documents, and agreements must bear the signature of the Attorney General or his designated assistant.

4. Special Counsel shall coordinate the provision of the legal services with the Attorney General or his designated assistant, other personnel of the Office of the Attorney General, and such others as the Attorney General may appoint as Special Counsel. All pleadings, motions, briefs, and other material which may be filed with the court shall first be approved by the Attorney General and provided to his office in draft form in a reasonable and timely manner for review. Regular status meetings may be held as requested by the Attorney General.

5. Special Counsel shall communicate with state entities through the Office of the Attorney General unless otherwise authorized by the Attorney General.

. . .

B. Delegation of Work

Special Counsel may delegate work to other attorneys or paralegals within the firm with which the Special Counsel is affiliated but may not, without express approval of the Attorney General, delegate any work whatsoever to any attorney in any other firm.

. . .

Article III. Case Management

A. Status Reports

The Attorney General may at any time request status reports from Special Counsel regarding any aspect of this litigation. Within twenty days after the request is received, Special Counsel shall submit such status reports to the Attorney General. Failure to timely provide such status reports may result in forfeiture of a portion of Special Counsel's compensation at the sole discretion of the Attorney General.

. . .

C. Communication

Special Counsel agrees to consult in advance, by telephone, fax machine, or in writing, with the Attorney General promptly on all matters that may be precedential, controversial, of particular public interest, or otherwise noteworthy or important, and to keep the Attorney General fully informed at all times.
Special Counsel shall give timely written notice to the Attorney General of any and all of the following legal events in this litigation:

1. Pleadings
2. Dispositive motions
3. Hearings
4. Rulings
5. Trials
6. Settlement negotiations
7. Appeals or Notice of Appeals
8. Briefs filed by any party or entity
9. Appellate arguments or decisions
10. Enforcement efforts

Special Counsel agrees to meet with the Attorney General's Office personnel when and where requested by the Attorney General in furtherance of the litigation.

D. Settlement

The Attorney General must approve in advance all aspects of this litigation and shall be included in any settlement discussions. Special Counsel agrees that any settlement in this case must receive the Attorney General's express prior approval in writing. Special Counsel shall confer with the Attorney General as early as practicable in any settlement negotiation process.

(R. pp. 598-602).

These provisions clearly indicate that the Attorney General retains full and complete control of the litigation. Special Counsel must seek and obtain approval from the Attorney General's Office for every aspect of the litigation, remain in constant contact with the Attorney General's Office, and receive the Attorney General's written approval prior to accepting any settlement offer.

Moreover, the uncontroverted testimony in this case is that the Attorney General has exercised actual control over the litigation against Cephalon at all points in time. As Attorney General Wilson testified, "[Assistant Deputy Attorney General Sonny] Jones, along with his attorneys—attorneys and support staff--review, monitor, control all aspects of litigation on behalf of the state when it involves consumer protection, and they report everything that is of import to Mr. McIntosh. And if he thinks that I need to be involved, he brings me involved. But major decisions like to bring a suit, what attorneys to hire, things like that are always my final decision." (R. p. 291). Attorney General Wilson also testified the decision to settle was a decision that he would make personally. (R. p. 292) Assistant Deputy Attorney General Sonny Jones noted "you have to be in constant contact with outside counsel on any decisions they make. The same way that I get approval on anything I do, outside counsel is required, per the contract and per law, to get approval for things they do." (R. p. 318).

The Litigation Retention Agreement, in Article IV, paragraph 3, provides that Special Counsel will be compensated by a sliding scale contingency fee. By the agreement, the higher the recovery, the lower the contingency fee percentage. The maximum percentage listed is 25% of the net proceeds of judgment or settlement. As the net judgment or settlement increases, the percentage for special counsel's contingency fee decreases incrementally. However, Special Counsel is not entitled to seek the actual listed percentages, as the Agreement provides the Attorney General shall retain 10% of Special Counsel's fees awarded.

Thus, Special Counsel's contingency fee percentages are reduced by the Attorney General's allocation, and the fees ultimately received by Special Counsel and the

Attorney General's Office are as follows:

Amount of recovery	Contingent percentage (outside counsel)	Contingent percentage (Attorney General)
From $0.00 to $5,000,000.00	22.5%	2.5%
From $5,000,000.01 to $10,000,000.00	19.8%	2.2%
From $10,000,000.01 to $25,000,000.00	16.2%	1.8%
From $25,000,000.01 to $50,000,000.00	13.5%	1.5%
From $50,000,000.01 to $100,000,000.00	10.8%	1.2%
Greater than $100,000,000.00	9.0%	1.0%

Consequently, the table Cephalon used in its brief is incorrect, as Cephalon fails to subtract the Attorney General's fees from the fees that Special Counsel receives. By way of example, for a $5,000,000.00 recovery, Special Counsel would receive fees of $1,125,000.00, rather than $1,250,000.00 as incorrectly calculated by Cephalon. (Cephalon Br. pp. 8-9.) Furthermore, the Litigation Retention Agreement makes clear that the Attorney General's fee is, at most, 2.5% of the overall recovery. And because of the sliding scale, the Attorney General's fee as a percentage of total recovery decreases for any settlement or judgment in excess of $5,000,000.00.

Importantly, before either Special Counsel or the Attorney General can receive attorneys' fees in this case, those fees must be approved by a court. In paragraph 7 of the same Article, the Litigation Retention Agreement requires that "the distribution and compensation calculation shall be included in a final order in the case." Thus, by the terms of the contract, with respect to any proposed settlement or after a verdict, the Attorney General and his outside counsel must seek court approval of the distribution and compensation paid from the funds. As such, a court will have to review and approve of both the outside counsel's fees and expenses as well as those allocated to the Attorney General's office.

Additionally, if a court approves an allocation of Special Counsel's fee to the Attorney General's Office, the Attorney General cannot spend those funds without an appropriation from the General Assembly authorizing its use. As Attorney General Alan Wilson explained in his deposition, "we are allowed by law to retain that money. So we have statutory authority. The court has to approve it to begin with. So the court has approved it, and it's vetted by a neutral court. And then the General Assembly has to be made accounting to by this office, which we do. And then the General Assembly has to turn around and authorize us to spend any moneys we keep. So I believe the process is safely guarded by both law, courts, the General Assembly and general transparency." (R. p. 294).

Nearly fourteen months after learning of Special Counsel's involvement in this case, Cephalon filed a declaratory judgment action. Cephalon sought a declaration that its due process rights are violated by the contingent fee arrangement in place in the enforcement action, a declaration that the allocation of fees violates the separation of powers doctrine, and an injunction barring prosecution of the enforcement action by the Attorney General and Special Counsel under the Litigation Retention Agreement. (R. p. 202).

After both parties filed motions for summary judgment, the trial court rejected Cephalon's arguments and ruled in favor of the Attorney General, finding that Cephalon's constitutional rights have not been violated and that the fee allocation as set forth in the Litigation Retention Agreement does not violate separation of powers.

ARGUMENT

In this appeal, Cephalon asks this Court to do what no other court to consider the issues has done—hold that due process prevents a state Attorney General from hiring outside counsel on a contingency fee basis in a civil case seeking damages and civil penalties.

The circuit court correctly rejected the arguments Cephalon advances here. This Court should affirm the circuit court's order granting summary judgment to the Attorney General and, as well-stated by the Texas Court of Appeals in rejecting similar arguments, "decline Defendants' invitation to become the first court to hold that the due process clause establishes a blanket prohibition against a governmental entity's engagement of private counsel on a contingent-fee basis to pursue civil litigation in which the only remedy sought is civil penalties." *Int'l Paper Co. v. Harris County*, 445 S.W.3d 379, at 394 (Tex. App. July 25, 2013).[3]

I. The Attorney General's Legal Authority to Hire Special Counsel on a Contingency Fee Basis

The Attorney General has broad authority under South Carolina's Constitution, statutes, and common law. *See Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003). The common law and the laws of this state provide for a "wide scope of the authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." *Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445, 451 (1943). "As the chief law officer of the State, [the Attorney General]

[3] Cephalon continually refers in its brief to the Attorney General's enforcement case as an action for civil penalties. While it is true that the Attorney General does seek civil penalties for Cephalon's willful violations of SCUTPA, the complaint also seeks equitable relief in the form of an injunction to prevent future violations of SCUTPA, restitution, and disgorgement, and the amended complaint adds a claim for damages to the State Health Plan for expenditures on the three drugs at issue. This is notably absent from Cephalon's brief.

may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require, and may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239, 562 S.E.2d 623, 627 (2002) (quoting *State ex rel. Daniel v. Broad River Power Co.*, 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), *aff'd* 282 U.S. 187 (1930)).

By statute, the Attorney General is also responsible for the hiring of outside attorneys, both by the Attorney General's Office and any other state agency, and for approving their compensation. S.C. Code Ann. §§ 1-7-160; 1-7-170. Importantly, the General Assembly did not prohibit contingency fee arrangements; indeed, the language of the statute broadly provides the Attorney General's approval of any attorney hired on a "fee basis." S.C. Code Ann. § 1-7-170; *see also Cooley v. S.C. Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445 (1943) (recognizing that the Attorney General, as the State's chief legal officer, possesses the authority to appoint and approve private counsel to represent the State).

While the South Carolina appellate courts have not directly considered the Attorney General's right to appoint special counsel on a contingency fee basis, this issue was addressed by the Honorable Roger L. Couch in *State ex rel. McMaster v. Eli Lilly & Co.*, No. 2007-CP-42-01855 (Sep. 22, 2009), who found that the Attorney General had the authority to retain outside counsel on a contingency fee basis to represent the State in litigation against a pharmaceutical company for violations of SCUTPA. (R. pp. 50-54).

In addition, the appellate courts of other states have expressly approved of such an arrangement. In *West Virginia ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 651 (W.Va. 2013), the Supreme Court of West Virginia held that "the Attorney General has common law authority to provide for compensation to be paid to special assistant attorneys general through a court-approved award of attorney's fees taken directly from the losing opponent in the litigation." Similarly, the Supreme Court of Rhode Island held that,

> [T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters. Indeed, it is our view that the ability of the Attorney General to enter into such relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable.

Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 475 (R.I. 2008) (internal citations and footnotes omitted). The Supreme Court of Missouri reached the same conclusion, reasoning:

> The statute that allows for the attorney general to hire assistants and to pay them from appropriations does not prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorney fees directly to the State's outside counsel. In the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general.

Missouri ex rel. Nixon v. Am. Tobacco Co., Inc., 34 S.W.3d 122, 136 (Mo. 2000). As these decisions recognize, retention of outside counsel to assist the Attorney General with civil litigation for a contingency fee is a common and accepted practice. The circuit court correctly found "the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies

for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case." (R. p. 10).

II. Neither the Litigation Retention Agreement Nor The Underlying Action Violate Cephalon's Right to Due Process

a. The Litigation Retention Agreement Does Not Create the Attorney General's Right to Seek Attorneys' Fees and Reimbursement for Costs

Cephalon's arguments stem from the flawed premise that the Litigation Retention Agreement creates the Attorney General's right to seek attorney fees and costs. To the contrary, that right is not created by contract, but by South Carolina law. S.C. Code Ann. § 1-7-85 provides, in pertinent part:

> 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[.]

This statute specifically provides that the Attorney General may obtain attorneys' fees and costs for representing the State in civil proceedings. The statute does not, as Cephalon contends, limit the ways in which the attorneys' fees for the Attorney General could be calculated.

Accordingly, the terms of the Litigation Retention Agreement do not create the Attorney General's ability to seek attorneys' fees. Rather, the fee calculation agreed to by the Attorney General and outside counsel operates as a ceiling to the fees the Attorney General can ultimately seek without violating a contract. In the absence of this language, the Attorney General would have the unfettered right under § 1-7-85 to seek attorneys' fees in the event the enforcement action against Cephalon is settled or a judgment is

entered in favor of the State. Similarly, if the Attorney General had continued this action without outside counsel, he would still have the statutory authority to seek attorneys' fees calculated in the same manner as set forth in the Litigation Retention Agreement..[4]

The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees he will ultimately seek the court approve, and provides notice that any fees for the Office approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery. Furthermore, the Litigation Retention Agreement provides the "distribution and compensation calculation shall be included in a final order in the case." Before any attorneys' fees or costs are disbursed to Special Counsel or retained by the Attorney General's Office, a motion to the court for their approval will be made pursuant to this provision. Any objections Cephalon, or any other party, may have to the amount of fees or costs sought by Special Counsel or the Attorney General may be raised at that time. As the circuit court, correctly observed, "Cephalon retains the opportunity to challenge the fees awarded to the Attorney General if it believes that this fee is unconstitutionally excessive." (R. p. 18); *accord S.C. Dept. of Transp. v. Revels*, __ S.C. __, 766 S.E.2d 700, 2014 WL 6967590, at *5 (Dec. 10, 2014) (recognizing the use of a contingency fee agreement "is a legitimate and well-established practice for attorneys throughout our state," but that the terms of the agreement are not controlling when it comes to an award

[4] Cephalon argues the affidavit of Geoffrey Hazard, a professor of legal ethics. It is noteworthy that at deposition Professor Hazard could not recall reviewing either S.C. Code § 1-7-85 or S.C. Code § 1-7-150. (R. p. 493) He further testified that his opinions were ***not*** influenced by these statutes. (R. pp. 493-494) More significantly, he testified that, if state law allows the Attorney General to seek recovery of attorneys' fees, that is ***not*** something he would take issue with. (R. p. 497)

of attorneys' fees). Whether the fees and costs sought are ultimately awarded will be a decision made by a neutral court.

b. Cephalon's Right to Due Process Is Not Violated by the Attorney General's Retention of a Portion of Outside Counsel's Attorneys' Fees

Cephalon urges that its constitutional rights are violated because the Attorney General retains a portion of any attorneys' fees awarded to outside counsel on a contingency fee basis. As noted above, under the Litigation Retention Agreement, the Attorney General may retain up to 2.5% of any recovery as attorneys' fees, subject to approval by the court and legislative appropriation. Because of this "financial incentive," as Cephalon terms it, the Attorney General cannot satisfy the heightened level of neutrality which Cephalon believes is required. The trial court correctly ruled that, while the enforcement action is a civil proceeding, even if the case is treated as quasi-criminal in nature, "the Attorney General's contingency fee interest does not rise to the level of a due process violation." (R. p. 16)

The Attorney General is "entitled to a presumption that he is pursuing the [enforcement] action in a manner consistent with his duty to seek justice as well as his ethical and professional obligations to the [State]." *Merck Sharp & Dohme Corp. v. Conway*, 947 F.Supp.2d 733, 744 (E.D. Ky. 2013); *see also County of Santa Clara v. Superior Court*, 235 P.3d 21, 38 (Cal. 2010) ("In light of the supervisory role played by government counsel in this litigation—and their inherent duty to serve the public's interest in any type of prosecution pursued on behalf of the public—we presume that government attorneys will honor their obligation to place the interests of their client above the personal, pecuniary interests of the subordinate private counsel they have hired.").

i. The Supreme Court's decision in *Marshall v. Jerrico* supports the Attorney General's position

Contrary to Cephalon's view, the Supreme Court decision in *Marshall v. Jerrico*, 446 U.S. 238 (1980), supports the Attorney General's position. In *Marshall*, after the Employment Standards Administration (ESA) uncovered violations of child labor provisions at Jerrico's restaurants, "the ESA Assistant Regional Administrator in the Atlanta office assessed a total fine of $103,000 in civil penalties for the various violations." 446 U.S. at 240. Under federal law, the ESA retained these civil penalties as "reimbursement for the costs of determining violations and assessing penalties." *Id.* at 239. The penalty was reduced by an administrative law judge following a hearing, but rather than seek further judicial review, Jerrico filed a suit of its own, "challenging the civil penalty provisions of the Act on constitutional grounds and seeking declaratory and injunctive relief against their continued enforcement." *Id.* at 241. According to Jerrico, the ability of the ESA to both assess and keep civil penalties "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.*

The District Court agreed with Jerrico. "According to the [district] court, an assistant regional administrator would therefore be inclined to maximize the total expenditures on enforcement of the child labor provisions of the Act, and those increased expenditures would result in an increase in the number and amount of penalties assessed." *Id.* at 247. In support of this conclusion, the District Court relied on *Tumey v. Ohio*, 273 U.S. 510 (1927), where the Supreme Court held that the Ohio statutory scheme that allowed town mayors to sit as judges in prosecutions of certain offenses violated due

process because the mayors were paid a portion of any fines collected upon conviction.[5] The District Court also relied on *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), which invalidated a "mayor's court" that provided vital income to the village by imposing fines, forfeitures, costs, and fees.

The Supreme Court disagreed and reversed. "The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and *Ward* have been held applicable. ***He is not a judge. He performs no judicial or quasi-judicial functions.*** He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a ***prosecutor or civil plaintiff***." *Marshall*, 446 U.S. at 247 (emphasis added). "The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are ***not applicable*** to those acting in a prosecutorial or plaintiff-like capacity." *Id.* at 248 (emphasis added).

The Supreme Court addressed the question of the required neutrality of a prosecutor, holding that "[p]rosecutors need not be entirely 'neutral and detached.'" *Id.* (citing *Ward*, 409 U.S. at 62); *see also Int'l Paper*, 445 S.W.3d at 395 n.13 ("Even in the criminal justice system, prosecutors are not ***entirely*** neutral and detached.") (emphasis in original). "In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Marshall*, 446 U.S. at 248; *see also Int'l Paper*, 445 S.W.3d at 394-5. ("Once a decision to prosecute has been made, lawyers who represent a governmental entity in litigation may act as advocates, not simply as adjudicators of whether to continue the prosecution. And, as advocates in an adversarial system,

[5] Importantly though, even the court in *Tumey* recognized "that the Legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people." 273 U.S. at 535.

prosecutors are necessarily permitted, even required, to be zealous in their enforcement while being mindful of the public interest."); *Wright v. U.S.*, 732 F.2d 1048, 1056 (2d Cir. 1984) ("[A] prosecutor need not be disinterested on the issue of whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury—not the prosecutor.") Indeed, the Supreme Court specifically ruled that the constitutional interest in a fair decision is "not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." *Marshall*, 446 U.S. at 248-49.

The Supreme Court found additional support for its decision in the fact that "no official's salary is affected by the levels of the penalties" and "[n]o governmental official stands to profit economically from vigorous enforcement of the child labor provisions of the Act." *Id.* at 245; 250. In addition, the civil penalties retained by the ESA did not result "in any increase in the funds available to the ESA over the amount appropriated by Congress." *Id.* at 246. And because the penalties made up such a minimal part of the ESA's budget, there was no "realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." *Id.* at 250. The civil penalties themselves, while initially imposed by the ESA, were subject to judicial review in the form of a *de novo* hearing by an administrative law judge. *Id.* at 244-45.

As the trial judge in the present case found, the facts in *Marshall* and the facts in this case are strikingly similar. The uncontroverted record reflects that the Attorney

General performs no judicial or quasi-judicial functions in the enforcement action against Cephalon. The Attorney General cannot assess any penalties against Cephalon; any civil penalties would be awarded by a judge after a finding that Cephalon willfully violated SCUTPA. The undisputed evidence in the record demonstrates that no salaries of anyone in the Attorney General's office are tied to the civil penalties received in any enforcement case. While Cephalon contends that the Attorney General has been able to increase the size of the Office because of money received in civil enforcement actions, Cephalon does not and cannot argue that anyone in the Attorney General's Office stands to personally benefit financially from any recovery which may occur in the enforcement case, which is one of the factors the Supreme Court identified in *Marshall.*

ii. Numerous safeguards must be satisfied before the Attorney General can collect or spend any funds

Furthermore, Cephalon does not appear to dispute the testimony from the Attorney General that, even where money is received as a result of a settlement or judgment in an enforcement action under SCUTPA, the Attorney General may not spend that money unless it has been appropriated by the General Assembly. *See Edwards v. State*, 383 S.C. 82, 90, 678 S.E.2d 412, 416 (2009) ("The General Assembly has 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.") (citations omitted). And because the Attorney General's office can only spend what the General Assembly has appropriated, any recovery, including penalties, the Attorney General ultimately receives do not increase his budget without authorization by the General Assembly to retain and spend those funds.

Thus, the Attorney General's contingent fee interest in the enforcement action is not a due process violation because of the numerous safeguards that must be satisfied before the Attorney General can spend any funds he obtains from the enforcement action. First, assuming the matter does not settle, the neutral finder of fact must determine that Cephalon violated SCUTPA. Second, with regard to civil penalties, the neutral finder of fact must determine that Cephalon knew or should have known that its conduct violated SCUTPA, and, upon petition by the Attorney General, the court must determine both the number of violations and the amount of penalty to impose for each. Third, the court must approve the attorneys' fees and costs to be awarded both to the Attorney General and outside counsel. Finally, those funds must be appropriated by the General Assembly for use by the Attorney General's office.

Cephalon, as it did before the trial court, heavily emphasizes the trial court's decision in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 2007-CP-42-1438 (June 3, 2011), where the judge imposed civil penalties of over $327,000,000.00. However, Cephalon's reliance on this decision is misplaced for many reasons. The civil penalties in that case were imposed by the neutral finder of fact, not the Attorney General. That penalty award is currently on appeal to this Court and is not final. Even if this Court affirms the ruling of the trial court and the penalty *in toto*, the Attorney General must still seek an award of attorneys' fees from the court, which would have the discretion to reduce the fees awarded. And even if the impartial trial court approves the full fee, the Attorney General cannot spend any of it without an appropriation by the General Assembly.

Additionally, at this stage there is not sufficient information for a court to determine what attorneys' fees could be recovered by the Attorney General's Office. There has been no determination that Cephalon violated SCUTPA, and, if it did, whether such violations were willful as defined in S.C. Code Ann. § 39-5-110. There has likewise been no determination as to the number of violations of SCUTPA and the penalty imposed for each violation.[6] Thus, there can be simply no showing, at this stage, that the amount the Attorney General will ultimately seek will not be commensurate with the work performed by his attorneys and staff. Cephalon asks the Court to assume there will be a windfall that will be disproportionate to the work performed by the government lawyers. There is no evidence in the record to support that assumption.

Importantly, this is not the only instance under South Carolina law in which a state agency may retain funds from an investigation. The Attorney General's Office receives funding from multiple sources, including insurance fraud recoveries, drug forfeitures, civil litigation, ticket surcharges, complex criminal court fees, and securities fees and fines. (R. pp. 278; 269). Monies derived from civil litigation are used for the general operating budget for the office as authorized by state law and by appropriations from the General Assembly. (R. pp. 283; 272). Under South Carolina law, for example, the Attorney General is permitted to retain the first $750,000.00 of securities fines imposed by his office in enforcement actions. *See* S.C. Code Ann. § 35-1-702(c). Similarly, the Attorney General and SLED share equally the first $500,000.00 of money

[6] Furthermore, Cephalon miscalculates the attorneys' fees that would result from the Litigation Retention Agreement in the event of a judgment equal to that in *Janssen*, subtracting $1,000,000.00 in costs. In such a case, outside counsel would receive $33.7 million, not $37.4 million, assuming that such fees are approved by the court. It is also worth noting that, under the litigation retention agreement in *Janssen*, the Attorney General's Office would receive $1.96 million if the penalty stands and the attorneys' fees are approved by the court, which can only be spent if appropriated by the General Assembly.

recovered in insurance fraud cases. *See* S.C. Code Ann. § 38-55-560(D). More generally, prosecuting agencies are statutorily authorized to retain 20% of the value of all real or personal property that is seized and forfeited. *See* S.C. Code Ann. § 44-53-530(e).

iii. Courts have rejected similar due process arguments in the forfeiture context

Courts that have considered the issue of a prosecutor's financial interest in the forfeiture context have had little difficulty finding no constitutional defects. In *County of Cumberland v. One 1990 Ford Thunderbird*, 852 A.2d 1114 (N.J. Super. Ct. App. Div. 2004), the court considered whether the seizure of an automobile under criminal forfeiture laws violated the defendant's due process rights. Specifically, the defendant challenged on due process grounds the constitutionality of New Jersey's criminal forfeiture laws that permitted seizing and prosecuting agencies to keep forfeited property. In finding "no flaw of constitutional magnitude" with this statutory scheme, the court held that "[t]he role of the court called upon to make an independent evaluation of the validity of the claim, in adjudicating the interests of the parties, provides the forfeiture mechanism with the necessary insulation from unfairness and arbitrary application that principles of due process require." *County of Cumberland*, 852 A.2d at 1120; *see also* 37 C.J.S. Forfeitures § 8 ("A criminal instrumentality forfeiture law does not violate due process by reason of the fact that a forfeiture proceeding is commenced in the form of a civil action complaint by the very prosecutorial entity to which the proceeds of the forfeiture would directly flow[.]"). Even though the prosecuting agency stood to benefit from a successful forfeiture action, the prosecutor was not concluding that any property should be forfeited; "rather, that person is only exercising a choice to proceed in placing the questions before a judicial tribunal." *County of Cumberland*, 852 A.2d at 1125.

Additionally, "[a]s with the administrative prosecutors in *Marshall*, the county prosecutors here derive no personal benefit from the forfeiture process." *Id.* at 1124.

Similarly, in *People ex rel. Sandstrom v. District Court in and for the County of Pueblo*, 884 P.2d 707 (Colo. 1994), a criminal defendant challenged forfeiture proceedings commenced by the district attorney's office, arguing "that the district attorney had a financial interest in the outcome of the criminal case because the district attorney was designated as one of the agencies entitled to receive a portion of the forfeited currency if the forfeiture case was successful." *Id.* at 709. The Supreme Court of Colorado rejected this argument, finding that the district attorney's involvement was "too attenuated to create a conflict of interest." *Id.* at 710. "By pursuing both the criminal case against [the defendant], and the forfeiture case against the seized currency, the district attorney was merely discharging the obligations of that office." *Id.* at 711. Important here as well was the fact that "members of that office will not personally receive benefit or detriment from the outcome of either case." *Id.*

iv. There is no evidence that the Attorney General has acted improperly in this case

Cephalon cites repeatedly to an article published shortly after the Attorney General's inauguration in 2011, which it claims demonstrates that the Attorney General brings enforcement actions like the one against Cephalon in order to increase the revenue of the Attorney General's Office. First, the article stands for no such point. The quotes Cephalon attributes to the Attorney General are rather the paraphrasings of the article's author. (*See* Cephalon Br. pp. 10; 25.) At his deposition, the Attorney General testified that, at the time of the article, he had never read SCUTPA. (R. p. 304). The Attorney General explained that, philosophically, he would never agree with "suing a business

solely to fund this office." (R. p. 304). He further explained that the references in the article to recoveries from tobacco companies and a drug company were not discussed at all with the article's author, and were simply editorializations by the article's author. (R. pp. 304-305). This article is of no aid to Cephalon, especially given the Attorney General's clarifying comments, which Cephalon cannot contradict with any actual evidence. There is simply no evidence in the record which demonstrates that the enforcement case against Cephalon was motivated by any improper financial interests.

In terms of the prosecution of the case, the trial court correctly found that Cephalon offered "no evidence at all" that the "[Attorney General]'s contingent fee interest in this case has caused [the Attorney General] to be overzealous in its prosecution of the underlying lawsuit, to act improperly or with a bias other than that inherent in the adversarial system, or to otherwise act in a manner contrary to the public interest." (R. p. 17). And as in *Marshall*, the Attorney General's contingent interest will not realistically affect his judgment in the enforcement action against Cephalon. See *Int'l Paper*, 445 S.W.3d at 396 ("We reject the contention that simply because a lawyer will be paid a contingent fee in a civil case means that lawyer will disregard any heightened standards to which a lawyer performing government functions is subject."). While Cephalon complains that the Attorney General's Office does not keep hours in the enforcement case, Cephalon has not offered any evidence that 2.5% of the ultimate recovery, which is the most the Attorney General could receive, would be disproportionate to the work performed by the Attorney General in the case. Furthermore, even in the absence of the Litigation Retention Agreement, the Attorney General would be able to seek the same amount in attorneys' fees under the statutory authority in S.C. Code Ann. § 1-7-85. If

Cephalon contends that such a fee is ultimately excessive, Cephalon retains the right to challenge that fee before it is awarded.

c. The Attorney General's Litigation Against Cephalon Is Not A Criminal Prosecution

Cephalon's argument that the Attorney General's action against it for damages to the State Health Plan, civil penalties, and equitable relief is really akin to a criminal prosecution is without merit.

In determining whether a statutory scheme is criminal or civil, this Court has instructed that: "a court looks at the face of a statute to determine if it establishes a criminal or civil penalty, and then determines if the statutory scheme is so punitive in purpose or effect as to transform what was intended as a civil sanction into a criminal penalty." *State v. Price*, 333 S.C. 267, 271, 510 S.E.2d 215, 218 (1998) (citing *Hudson v. United States*, 522 U.S. 93 (1997)). The application of these principles to SCUTPA clearly demonstrates that the statutory scheme is civil in nature.

i. The General Assembly clearly and unambiguously intended SCUTPA to be a civil statute

"Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' We consider the statute's text and its structure to determine the legislative objective." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)) (further citations omitted); *see also In re Justin B.*, 405 S.C. 391, 396, 747 S.E.2d 774, 777 (2013) (quoting same). "The courts 'must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" *Smith*, 538 U.S. at 93 (quoting *Hudson v. U.S.*, 522 U.S. 93, 99 (1997)).

It is clear that the General Assembly drafted SCUTPA as a civil statute providing civil remedies. Indeed, the penalties about which Cephalon complains are expressly designated as civil, not criminal. *See* S.C. Code Ann. § 39-5-110(a); *see also Hudson*, 522 U.S. at 103 (finding an action by the Office of the Comptroller of the Currency was civil in nature because, in part, "both [statutes], which authorize the imposition of monetary penalties for violations . . . expressly provide that such penalties are 'civil.'"). The Attorney General's claim for damages on behalf of the State Health Plan is the same as the private right of action given to individuals and is unquestionably a civil action. *See* S.C. Code Ann. § 39-5-140. The injunctive relief available to the Attorney General is sought by filing an action in the court of common pleas. *See* S.C. Code Ann. § 39-5-50(a). If such an injunction is violated, the court of common pleas retains jurisdiction to award additional civil penalties. *See* S.C. Code Ann. § 39-5-110(b). The Attorney General has the right under SCUTPA to accept assurances of voluntary compliance, as long as those assurances are in writing, filed with and, importantly, subject to the approval of the court of common pleas. *See* S.C. Code Ann. § 39-5-60. Actions either to enforce or to challenge investigative demands served by the Attorney General are filed in the court of common pleas. *See* S.C. Code Ann. §§ 39-5-70; 39-5-100. SCUTPA was codified as part of Title 39, entitled Trade and Commerce, rather than with Title 16, Crimes and Offenses. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (the State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State]'s probate code, instead of the criminal code").

In short, SCUTPA clearly "evince[s] an intent to create a civil scheme designed to protect the public." *See Justin B.*, 405 S.C. at 400, 747 S.E.2d at 778 (citing *Doe v.*

Bredesen, 507 F.3d 998 (6th Cir. 2007)). As the trial court held, "[t]hese and other provisions of SCUTPA all demonstrate beyond any doubt that the General Assembly intended actions brought by the Attorney General under SCUTPA, and the civil penalties available in certain cases, as purely civil in nature." (R. p. 5).

ii. The effects of SCUTPA are not so punitive as to rise to criminal penalties

"Where, as here, the legislature deems a statutory scheme civil, 'only the clearest proof' will transform a civil regulatory scheme into that which imposes a criminal penalty." *State v. Dykes*, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013) (quoting *Smith*, 538 U.S. at 92). Cephalon failed to meet its burden, both before the trial court and this Court, to demonstrate, through clear proof, that SCUTPA is "so punitive in effect as to negate the intention to deem it civil." *Justin B.*, 405 S.C. at 405, 747 S.E.2d at 781 (citing *Hendricks*, 521 U.S. at 361).

The Supreme Court has outlined several factors that may be considered in determining whether, subject to the clearest proof, a civil regulatory scheme has been transformed into a scheme that imposes a criminal penalty:

(1) "[w]hether the sanction involves an affirmative disability or restraint";
(2) "whether it has historically been regarded as 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 in assignable for it"; and
(7) "whether it appears excessive in relation to the alternative purpose assigned."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168- 69 (1963). The Supreme Court has instructed that "these factors must be considered in relation to the statute on its face." *Id.*

at 169. Further, these factors are neither "exhaustive nor dispositive," but are instead "useful guideposts." *Smith*, 538 U.S. at 97.

Analyzing the *Mendoza-Martinez* factors reveals that SCUTPA is not so punitive in effect as to negate the General Assembly's intent. In this regard, the Supreme Court's decision in *Hudson* is instructive. In that case, "the Government administratively imposed monetary penalties and occupational debarment on petitioners for violation of federal banking statutes, and later criminal indicted them for essentially the same conduct."[7] *Hudson*, 522 U.S. at 95. In responding to the petitioners' challenge that the subsequent prosecution violated the Double Jeopardy Clause, the Supreme Court first noted that "[i]t is evident that Congress intended the [Office of the Comptroller of the Currency (OCC)] money penalties and disbarment sanctions . . . to be civil in nature." *Id.* at 103. Next, turning to the *Mendoza-Martinez* factors, "we find that there is little evidence, much less the clearest proof that we require, suggesting that either OCC money penalties or debarment sanctions are 'so punitive in form and effect as to render them criminal despite Congress' intent to the contrary.'" *Id.* at 104 (quoting *U.S. v. Ursery*, 518 U.S. 267, 290 (1996)).

The Supreme Court's holding in *Hudson* mandates the same result in this case. First, SCUTPA does not impose an affirmative disability or restraint. SCUTPA "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100. Regardless of the outcome of the State's litigation against Cephalon, no one will be or can be imprisoned as a result of that litigation. Cephalon's argument that the injunction sought

[7] Notably, in *Hudson* the penalties were actually imposed by the Office of the Comptroller of the Currency, a federal agency. Any penalty imposed against Cephalon in the State's litigation would be imposed, if at all, by the Court.

by the Attorney General implicates its First Amendment rights is unavailing. The injunction sought would prohibit further violations of SCUTPA—that is, unfair and deceptive trade practices. "[O]ff-label promotion that is false or misleading is not entitled to First Amendment protection." *United States v. Caronia*, 703 F.3d 149, 165 n.10 (2d Cir. 2012).[8] Additionally, the Supreme Court has already ruled that the "sanction[] of occupational debarment" is nonpunitive. *Smith*, 538 U.S. at 86; *see also Hudson*, 522 U.S. at 94 ("While petitioners have been prohibited from further participating in the banking industry, this is 'certainly nothing approaching the "infamous punishment" of imprisonment.'") (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

With regard to the second factor, Cephalon argues that the civil penalties sought by the Attorney General have been historically regarded as punishment. Cephalon is incorrect; the Supreme Court has made clear that "neither money penalties nor debarment has historically been viewed as punishment." *Hudson*, 522 U.S. at 104.

As to the third factor, the trial court found that civil penalties could only be assessed upon a finding by the court that it "knew or should have known that [its] conduct was a violation of Section 39-5-20." S.C. Code Ann. § 39-5-110. The Attorney General does not take issue with that determination. However, the trial court found this

[8] Cephalon's considerable reliance on the Second Circuit Court of Appeals' opinion in *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) is misplaced. In *Caronia*, the court reversed a pharmaceutical sales representative's criminal conviction for conspiracy to introduce a misbranded drug into interstate commerce. In determining whether the speech at issue warranted First Amendment protection, the court first noted that, "as a threshold matter, the speech in question must not be misleading and must concern lawful activity." *Id.* at 164. In its analysis, the Court observed that "[w]hile some off-label information could certainly be misleading or unhelpful, this case does not involve false or misleading promotion." *Id.* at 167. *Caronia* is thus easily distinguishable from the underlying case in that the action against Cephalon alleges unfair, deceptive, and misleading marking activity. (R. pp. 75-76, 77-81, 83-85, 149, 151-154, 156-158). This is not a case about truthful, non-misleading off-label promotion. This is a case about unfair, deceptive, and misleading marketing practices, and, as such, Cephalon's First Amendment rights are not implicated by the enforcement action.

factor to be of little weight, given that *scienter* was not required for a threshold finding that a defendant violated SCUTPA or for the entry of a permanent injunction against future unfair or deceptive acts and practices.

Considering the fourth factor, whether the traditional aims of punishment are promoted, the Attorney General recognizes that civil enforcement of SCUTPA may indeed deter other corporations from engaging in unfair or deceptive trade practices, this is far from dispositive. "[T]o find that the mere presence of a deterrent purpose rendered a sanction 'criminal,' would severely undermine the state's ability to engage in effective regulation." *Justin B.*, 405 S.C. at 398, 747 S.E.2d at 778 (citing *Smith*, 538 U.S. at 102). Thus, even a statute which does promote retribution and deterrence—the traditional aims of punishment—does not *per se* do so to the exclusion of the statute's civil goals. "Though deterrence may serve criminal goals, the principle may also support civil goals." *Justin B.*, 405 S.C. at 407, 747 S.E.2d at 782. "[T]he mere presence of a deterrent purpose does not render a sanction 'criminal.'" *Id.* (citing *Smith*, 538 U.S. at 102). As the Supreme Court noted in *Hudson*, "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation[.]" *Hudson*, 522 U.S. at 105.

As to the fifth factor, whether the behavior is already a crime, the trial court found, and the Attorney General does not dispute, that the complaint alleges that "Cephalon's marketing and promotion of its drugs for off-label uses is illegal under federal law and resulted in a federal guilty plea." (R. p. 7). Indeed, of the $425,000,000.00 that Cephalon paid to various federal entities to resolve the civil and criminal claims related to its conduct, $40,000,000.00 was a criminal fine and an

additional $10,000,000.00 was applied as substitute assets to satisfy Cephalon's forfeiture obligations. (R. pp. 82, 93-109). Once again, though, the trial court concluded this factor was of little weight.

Weighing heavily in the Attorney General's favor is the sixth factor—SCUTPA's connection to a nonpunitive purpose of—protecting the public from unfairness and deception. *See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986) ("The legislature intended in enacting the UTPA to control and eliminate 'the large scale use of unfair and deceptive trade practices within the state of South Carolina.'" (citation omitted)). Indeed, the Attorney General is required, prior to commencing an action seeking injunctive relief, to have reasonable cause to believe that such an action "would be in the public interest." S.C. Code Ann. § 39-5-50; *see also* S.C. Code Ann. § 39-5-70 (authorizing the Attorney General to serve an investigative demand "when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article[.]"). Similarly, a private individual must show, in order to recover under SCUTPA, that the defendant's "unfair or deceptive act affected [the] public interest." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)). The public interest purpose of SCUTPA, as recognized by both the statutes and the courts of this state, is clearly nonpunitive. Even if SCUTPA is not narrowly drawn to achieve this purpose, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at

103; *see also Justin B.*, 405 S.C. at 407, 747 S.E.2d at 783 ("Perhaps the General Assembly could have created a scheme more narrow in scope and still accomplished its non-punitive purpose. Perhaps it could not have. In any event, however, a statute is not deemed punitive due to the absence of a 'close or perfect' fit with its non-punitive purpose.") (citing *Smith*, 538 U.S. at 103)).

The last factor, whether the sanction is excessive in relation to the nonpunitive purpose, also does not transform SCUTPA into a criminal statute. SCUTPA provides for a maximum civil penalty of $5,000 per violation. S.C. Code Ann. § 39-5-110(a). This penalty only arises for violations that are willful—that is, when the offender knew or should have known that its conduct was an unfair or deceptive trade practice. S.C. Code Ann. § 39-5-110(c). The civil penalty is limited to no more than $5,000, regardless of the amount of injury or losses caused by the violation. While Cephalon is concerned with the possible amount of a penalty award, there is no evidence in the record as to how many violations of SCUTPA may have occurred in this case. And, while a court may award the maximum penalty per violation, a court may also award far less, depending on the severity of the conduct. As no penalties have been awarded in the enforcement case against Cephalon, consideration of the possible amount of penalties is premature. Similarly, the injunctive relief available and sought by the Attorney General in the underlying case is, pursuant to S.C. Code Ann. § 39-5-50, limited to simply enjoining continued unfair and deceptive acts or practices.

Accordingly, the circuit court correctly ruled the underlying enforcement proceeding is civil in nature.

iii. Even if the underlying SCUTPA action was quasi-criminal in nature, the Litigation Retention Agreement has adequate safeguards to satisfy due process requirements

As set forth above, the Attorney General strongly disputes Cephalon's argument that the underlying SCUTPA action is quasi-criminal in nature, but even if it is, the Litigation Retention Agreement provides adequate safeguards sufficient to satisfy the requirements of due process.

The courts that have directly considered whether contingency fee counsel may be employed by state Attorneys General, including in cases seeking only civil penalties, have approved of such arrangements provided the government attorneys retain control of the litigation. Cephalon's argument that contingency-fee agreements are barred in quasi-criminal cases and subject to a heightened standard of neutrality in ordinary civil cases misapprehends the law.[9]

Recently, the Texas Court of Appeals considered this issue in *International Paper Co. v. Harris County*, 445 S.W.3d 379 (Tex. App. 2013). Harris County filed an environmental enforcement action relating to contamination of a river and sought "civil penalties of up to $25,000 per day for violations of laws regulating the disposal of industrial waste." *Id.* at 382. The county retained outside counsel on a contingency fee basis. *Id.* The defendants asserted that the use of contingency fee counsel violated their due process right to a fair and neutral prosecution, characterizing the environmental enforcement action as quasi-criminal in nature. *Id.* at 386. The court closely analyzed

[9] In the circuit court Cephalon relied on *Young v. U.S. ex rel. Vuitton et. Fils S.A.*, 481 U.S. 787 (1987) for the proposition that due process imposes a *per se* ban on the use of contingency fee arrangements in quasi-criminal actions. However, the Supreme Court did not decide *Young* on constitutional grounds, but rather used its inherent supervisory power to hold that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging violation of that order." *Id.* at 807. Nowhere did the Supreme Court construct a *per se* bar on the use of contingency fee attorneys in cases determined to be quasi-criminal actions.

the case law and rejected the defendants' argument that the due process clause imposed a *per se* bar on a governmental entity's engagement of outside counsel on a contingent fee basis to pursue civil litigation seeking recovery of civil penalties. *Id.* at 394. Specifically, the court noted, "[n]o court that Defendants have cited, or that we can find, has interpreted the due process clause in the manner urged by Defendants, *i.e.*, as adopting a blanket prohibition against a governmental entity retaining private counsel on a contingent-fee basis to pursue civil litigation in which the only remedy sought is civil penalties." *Id.*

Similarly, in *Merck Sharp & Dohme Corp. v. Conway*, 947 F.Supp.2d 733 (E.D. Ky. 2013), the court addressed a challenge to the Attorney General's use of contingency fee counsel to bring a claim under the Kentucky Consumer Protection Act for civil penalties against Merck relating to its marketing of a prescription drug. The Attorney General and outside counsel sought the maximum civil penalties available under the Kentucky Consumer Protection Act. *Id.* at 735. Merck challenged the use of contingency fee counsel on due process grounds, and both sides filed cross-motions for summary judgment. That court also declined to adopt a *per se* prohibition on the use of outside counsel in a civil penalties case. Indeed, "[a]n attorney general does not necessarily violate a defendant's due process rights by hiring outside counsel on a contingency-fee basis." *Id.* at 739. "[A]s long as the required safeguards are in place, a government entity may engage contingency-fee counsel to assist in a civil prosecution without infringing on the defendant's due process rights." *Id.* The key test—according to the judge in *Merck*—was whether the Attorney General retained full control over the litigation. Thus, so long as the retention agreement contained sufficient safeguards to

vest control with the Attorney General, and the Attorney General actually controlled the litigation, the use of contingency-fee counsel to assert consumer protection claims against the defendant was constitutionally permissible. *Id.* at 739 -740. Because both elements of control were present, the court denied Merck's motion for summary judgment and granted the Attorney General's motion for summary judgment. *Id.* at 752.

In this case, even though the Attorney General retained Special Counsel to assist with the civil litigation against Cephalon, the uncontroverted facts in the record demonstrate that the Attorney General's Office has exercised control over the litigation at all times, both in name and in deed. Courts that have analyzed this issue have looked to the agreements between the Attorney General and outside counsel to identify the presence of certain provisions. For instance, the Supreme Court of Rhode Island stated:

> In order to ensure that meaningful decision-making power remains in the hands of the Attorney General, it is our view that, at a bare minimum, the following limitations should be expressly set forth in any contingent fee agreement between that office and private counsel: (1) that the Office of the Attorney General will retain complete control over the course and conduct of the case; (2) that, in a similar vein, the Office of the Attorney General retains a veto power over any decisions made by outside counsel; and (3) that a senior member of the Attorney General's staff must be personally involved in all stages of the litigation.

Lead Indus., 951 A.2d at 477. While courts have noted that "retainer agreements should encompass more than boilerplate language regarding 'control' or 'supervision,'" *id.*, it is equally important that these cases do not set out "binding requirements that the Court must rigidly apply to the contracts in this case," *Merck*, 947 F.Supp.2d at 741. "[T]he contingency-fee contracts need not lay out the specific daily duties that each party to the contract may undertake." *Id.* at 742. "[S]uch language would be unnecessary and even potentially counterproductive . . . . Indeed, a requirement that the contract set out specific

duties for the AG would tend to undermine the principles of neutrality because, on a practical level, specifically delineating the AG's areas of responsibility would cabin his authority, not expand or preserve it." *Id.*

The Litigation Retention Agreement, at set forth in detail above, clearly establishes that the Attorney General is in complete control for all aspects of the underlying action. Cephalon appears to have rightly abandoned its challenge to the adequacy of the Litigation Retention Agreement in that regard or to the Attorney General's actual control throughout the underlying action. The circuit court correctly concluded that even if the enforcement action were quasi-criminal in nature, which it is not, the Litigation Retention Agreement contains adequate safeguards and the Attorney General has maintained the control necessary to satisfy the requirements of due process.

iv. The California cases do not support Cephalon's argument

Cephalon's argument relies, in large part, on two California state court cases. The first, and most important to Cephalon's argument, is *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985). That case was decided under a unique set of facts and was not intended to have the widespread application Cephalon seeks. In *Clancy*, the city of Corona, California, made efforts to close an adult bookstore. *Id.* at 348 - 49. After several failed attempts to force the bookstore to move to another location, the city passed a public nuisance ordinance aimed at sexually explicit businesses and hired a private attorney to pursue abatement actions. *Id.* The city then declared the bookstore a public nuisance and revoked its business license, and the private attorney, on behalf of this city, filed an abatement action. *Id.* at 349. The private attorney's contract of employment provided for an increased hourly rate in successful actions. *Id.* at 350. The action was

filed by the private attorney "in place of, and with no supervision by, Corona's city attorney." *County of Santa Clara v. Superior Court*, 235 P.3d 21, 29 n.6 (Cal. 2010).

The California Supreme Court considered the propriety of this contingent fee arrangement. Significantly, the court did not apply a constitutional analysis, but instead considered the issue under the court's inherent authority to disqualify counsel when justice so requires. *Clancy*, 705 P.2d at 745, 750. The court made it clear that "[n]othing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a case." *Id.* at 748. Thus, the court did not find that the bookstore's constitutional rights were violated. However, the court in *Clancy* did find the contingency fee arrangement to be improper because of the strong similarities between public nuisance abatement actions and criminal prosecutions—similarities which simply are not present in the enforcement action against Cephalon. *See id.* at 749. For example, the court noted that a person who committed a public nuisance was guilty of a misdemeanor, and that lawsuits to abate a public nuisance can trigger a criminal prosecution. *Id.* By contrast, violations of S.C. Code Ann. § 39-5-20, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," are not criminal offenses.[10] And the Attorney General's investigative powers under SCUTPA "shall not be applicable to any criminal proceedings, nor shall any information obtained under the authority of this section or Section 39-5-80 be admissible in evidence in any criminal prosecution." S.C. Code Ann. § 39-5-70. For these reasons, *Clancy* is inapposite.

[10] Indeed, the only violations of SCUTPA for which the Attorney General can impose criminal liability—price gouging and misleading charitable solicitations during emergency circumstances—are not applicable here. *See* S.C. Code Ann. §§ 39-5-145; 39-5-147.

In the second California case, *County of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010), The California Supreme Court recognized that its holding in *Clancy* was too broad and limited its scope accordingly. Like *Clancy*, *Santa Clara* involved public nuisance abatement actions against lead paint manufacturers brought by contingency fee private attorneys on behalf of city governments. This time, though, the California Supreme Court found that its analysis in *Clancy* was "unnecessarily broad and failed to take into account the wide spectrum of cases that fall within the public-nuisance rubric." *Santa Clara*, 235 P.3d at 31 - 32. The court noted that the concerns over neutrality, fairness, and abuse of the justice system which underpinned its decision in *Clancy* were influenced by several specific facts; namely, that the City of Corona undertook several attempts to close the adult bookstore, that there was a "profound imbalance" between the resources of the government and the limited resources of the defendant, and the constitutionally protected free speech rights of the adult bookstore. *Santa Clara*, 235 P.3d at 32 - 33. By way of contrast, the court noted under the present facts that the defendants would not be enjoined from continuing their current business operations and that no one would be precluded from exercising any First Amendment rights. *Id.* at 34. Furthermore, the court recognized that the defendants were "large corporations with access to abundant monetary and legal resources," and thus the court was not concerned about an outmatched defendant. *Id.* For these reasons, the court found that it was not appropriate to treat the present actions as akin to criminal prosecutions. The court did note that, because these cases were brought on behalf of the public rather than to enforce the government's own contract and property interests,[11] they were not ordinary civil

[11] As noted, Cephalon omitted from its brief any reference to the claim for damages the Attorney General brought on behalf of the State Health Plan.

cases and a higher standard of neutrality applied. *Id.* at 34 - 35. Even under that higher standard, though, the court ruled that the contingency fee agreements were acceptable as long as "neutral, conflict-free government attorneys retain the power to control and supervise the litigation." *Id.* at 36. Similarly, the only injunction sought against Cephalon is to prevent future violations of SCUTPA, not to shut down Cephalon's business. (R. pp. 86, 160). As previously stated, Cephalon has no First Amendment right to engage in the false or misleading marketing of prescription drugs. And finally, Cephalon is, like the lead paint manufacturers in *Santa Clara*, a large corporation "with access to abundant monetary and legal resources." *See Santa Clara*, 235 P.3d at 34. Because government attorneys with no personal financial interest in the litigation retain control of the enforcement action, Cephalon's due process rights are not violated even under the higher standard of neutrality in a quasi-criminal action.

The circuit court appropriately interpreted the applicable precedent and rejected Cephalon's argument.

III. The Litigation Retention Agreement Does Not Violate Separation of Powers

Cephalon argues the contingency fee agreement violates the separation of powers doctrine in that it allegedly diverts state funds to the Attorney General's office and to private counsel. However, the Attorney General has the authority to recover attorneys' fees and costs for both outside counsel and his Office under S.C. Code Ann. § 1-7-85, quoted above.

Cephalon's argument that separation of powers is violated anytime proceeds from a settlement or judgment are paid to outside counsel or retained by the Attorney

General's Office ignores the plain language of the statute. S.C. Code Ann. § 1-7-85 expressly gives the Attorney General the authority to seek costs for representing the State and its agencies in civil proceedings. Costs are defined broadly to include, among other things, attorneys' fees. *See* S.C. Code Ann. § 1-7-85. This statute, unlike others considered by this Court, does not specify the manner in which attorneys' fees should be calculated, nor does it require an itemized accounting of time expended. *Cf. Revels*, 2014 WL 6967590 at *4; *see also Layman v. State*, 376 S.C. 434, 454, 658 S.E.2d 320, 330-31 (2008). "[F]ee-shifting statutes are interpreted according to their own terms." *Revels*, 2014 WL 6967590, at *4 (quoting *Oklahoma ex rel. Dept. of Transp. v. Norman Indus. Dev. Corp.*, 41 P.3d 960, 965-66 (Okla. 2001)). Cephalon now contends that the last sentence of that section specifies the only two sources from which the Attorney General may seek to recover attorneys' fees and costs.[12] As an initial matter, this argument was not presented to the trial court, nor did the trial court address this language. *See Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510 - 11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.") (citations omitted)); *see also Ex parte Bland*, 380 S.C. 1, 12 - 13, 667 S.E.2d 540, 546 (2008). Considered on the merits, this language is clearly discretionary, rather than mandatory. The Attorney General ***may*** seek reimbursement from these identified sources, but he is not required to do so. Indeed, the previous sentence clearly references attorneys' fees and costs "awarded by court order or settlement." S.C. Code Ann. § 1-7-85.

[12] That sentence provides that "[r]eimbursement 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 § 1-7-85.

S.C. Code Ann. § 1-7-150(B), provides, in pertinent part,

> 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 . . . where some other disposition is required by law.

Thus, the statute explicitly carves out investigative costs or costs of litigation awarded by court order or settlement. Cephalon's argument that attorneys' fees were excluded by implication is unavailing. The trial court correctly found that costs under S.C. Code Ann. § 1-7-150(B) includes attorneys' fees. (R. p. 19). S.C. Code Ann. § 1-7-150(B), when read in conjunction with S.C. Code Ann. § 1-7-85, gives the Attorney General the authority to retain attorneys' fees for the Office and outside counsel, and to pay costs of the litigation without first depositing those monies in the general fund.

Finally, Cephalon ignores, and apparently does not dispute, that any attorneys' fees and costs must be approved by a court before they can be awarded to the Attorney General and Special Counsel. *See Nibert*, 744 S.E.2d at 638 ("[T]he Petitioners appear to not fully understand that the issue of the amount of attorney's fees is purely discretionary with the trial court . . . . The trial court determines the amount, if any, of attorney's fees to be awarded."). Cephalon may challenge any such award if it believes that the 2.5% of any judgment which the Attorney General could at most receive is disproportionate to the time and effort invested by the Attorney General in the enforcement action. Even if Cephalon is unsuccessful in that challenge, the Attorney General's Office cannot spend any of the attorneys' fees or costs it retains without an appropriation by the General Assembly. (R. pp. 294-295). Because of the oversight that must occur by both the judicial and legislative branches of South Carolina government before the Attorney

General may retain and spend attorneys' fees or costs recovered in the enforcement action, the circuit court was correct in finding no violation of separation of powers in this case.

CONCLUSION

For the reasons set forth above, Alan Wilson, in his Official Capacity as Attorney General for the State of South Carolina, respectfully asks this Court to affirm the circuit court's order entering summary judgment in his favor.

Respectfully submitted,

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April 14, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2014-001465

Cephalon, Inc., ...Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the foregoing Brief of Respondent on Appellant, Cephalon, Inc., and on Amici Curiae, The Chamber of Commerce of the United States of America and Pharmaceutical Research and Manufacturers of America by depositing a copy of same in the United States Mail, postage prepaid, on April 14, 2015, addressed to their attorneys of record:

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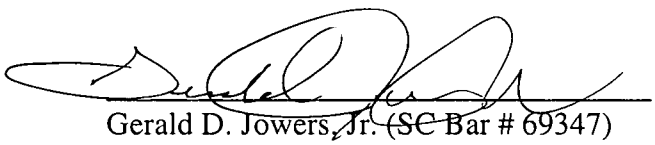

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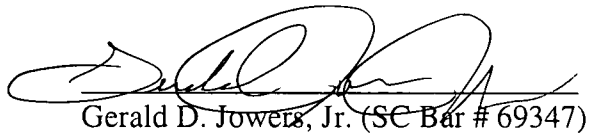
RULE 211(b) Certification

I certify that the final brief of Respondent, Alan Wilson, in his official capacity as Attorney General for the State of South Carolina complies with Rule 211(b), SCACR.



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