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

RECORD ON APPEAL
VOLUME I OF II

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007317

Cephalon Inc

PLAINTIFF(S)

Alan Wilson
South Carolina State Attorney General

DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Other _____

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RICHLAND COUNTY FILED 2014 JUN -6 AM 9:36

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 6 June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Stephen F. McKinney
I.S. Leevy Johnson
Sarah Patrick Spruill
Brian James Kern
Kenneth M. Suggs
John W. McIntosh
James Todd Rutherford

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
CEPHALON, INC.,)	Civil Action No.: 2012-CP-40-07317
Plaintiff,)	
v.)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
ALAN WILSON, in his capacity as Attorney General for the State of South Carolina,)	
Defendant.)	

FILED
2014 JUL -8 P 3:
RICHLAND COUNTY, S.C.

THIS CAUSE came before me on cross-motions for summary judgment. Oral argument was heard on April 21, 2014. After considering the arguments of both parties, I hereby **GRANT** the Attorney General's motion for summary judgment and **DENY** Cephalon's motion for summary judgment.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004); Rule 56(c), SCRCP. In the matter before me there are no genuine issues of material fact. The only disputed issues are questions of law.

Having carefully considered the motions and memoranda of law submitted by the parties as well as the arguments of counsel, I find as follows:

FACTUAL BACKGROUND

Following unsuccessful settlement negotiations between Cephalon, Inc. ("Cephalon"), a pharmaceutical company, and the Attorney General's Office, Attorney General Alan Wilson filed suit on behalf of the State of South Carolina on June 2, 2011 seeking damages, equitable remedies and civil penalties under the South Carolina Unfair Trade Practices Act ("SCUTPA"). This complaint was filed

solely by the Attorney General and his staff. Cephalon answered on July 5, 2011. On July 26, 2011 the Attorney General entered into a Litigation Retention Agreement with outside counsel.[1] On February 13, 2012, the Attorney General, with outside counsel, filed an Amended Complaint that added a claim for damages on behalf of the State Health Plan. The original claims, remedies, and causes of action were unchanged.

Cephalon filed the present Declaratory Judgment action on October 30, 2012. Specifically, Cephalon seeks a declaration that its due process rights are violated by the contingent fee arrangement in place in the Attorney General's enforcement action, a declaration that the allocation of fees violates the separation of powers doctrine, and an injunction barring prosecution of the enforcement action by the Attorney General and outside counsel under the Litigation Retention Agreement. Both parties moved for summary judgment on Cephalon's claims.

Cephalon advances several arguments as to why the Litigation Retention Agreement violates its constitutional rights. First, Cephalon argues that because the enforcement action is akin to a criminal proceeding, any use of contingent fee counsel is a *per se* violation of due process. Second, even if the enforcement action is not akin to a criminal proceeding, outside counsel must be subject to the control of neutral and conflict-free government lawyers, and the Attorney General's financial interest in the litigation's outcome invalidates his neutrality. Finally, Cephalon asserts that both the Attorney General's retention of attorneys' fees and payment of attorneys' fees to outside counsel does not comply with South Carolina law and thus violates separation of powers.

The Attorney General argues that the enforcement action against Cephalon is not a criminal prosecution, as his claims under SCUTPA are designated as civil by the General Assembly and not so punitive in effect as to be deemed criminal. Further, even if the enforcement action is quasi-criminal in nature, the use of contingency fee counsel is not prohibited *per se*, and both the provisions of the

[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 counsels are Kenneth M. Suggs of Janet, Jenner & Suggs, LLC and J. Todd Rutherford of the Rutherford Law Firm.

Litigation Retention Agreement and the Attorney General's actual control over the litigation satisfy the heightened level of neutrality required in a quasi-criminal case. Finally, the Attorney General maintains that South Carolina law permits the Attorney General to retain attorneys' fees and pay attorneys' fees to outside counsel directly from any recovery, and therefore there is no separation of powers issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the reasons set forth in greater detail below, I agree with the Attorney General that his enforcement action against Cephalon is civil in nature, that he has maintained the requisite control over outside counsel in the handling of that litigation, and that the Attorney General may withhold attorneys' fees from any recovery both for his Office and for outside counsel. I find that based on the facts and the record in this case, there has been no violation of either Cephalon's due process rights under the Federal or State constitutions or the separation of powers doctrine.

A. The Attorney General's Enforcement Action Against Cephalon Is Civil in Nature

Cephalon argues that the underlying case, though nominally civil, is akin to a criminal proceeding because civil penalties are sought pursuant to the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq*. The Attorney General maintains that the clear language of the statute demonstrates the General Assembly's intent to provide for civil, not criminal, remedies and the civil penalties available under SCUTPA do not transform the statute into a criminal one.

In determining whether a statutory scheme is criminal or civil, the South Carolina Supreme Court articulated: "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)).

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

It is clear that the General Assembly wrote SCUTPA as a civil statute providing civil remedies. The penalties for willful violations of SCUTPA that Cephalon complains about are expressly referred to as civil, not criminal. *See* S.C. Code § 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, in part, because "both [statutes], which authorize the imposition of monetary penalties for violations . . . expressly provide that such penalties are 'civil.'"). These penalties are only awarded where the court finds that an entity either knew or should have known that its conduct was a violation of SCUTPA and the Attorney General petitions the court to award civil penalties. S.C. Code § 39-5-110(a). The injunctive relief available to the Attorney General is sought by filing an action in the court of common pleas. *See* S.C. Code § 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 § 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 and filed with and, importantly, subject to the approval of the court of common pleas. *See* S.C. Code § 39-5-60. Actions to enforce or to challenge investigative demands served by the Attorney General are filed in the court of common pleas. *See* S.C. Code §§ 39-5-70; 39-5-100. SCUTPA was codified as part of Title 39, entitled Trade and Commerce, rather than with Title 16, Crime 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."). These and other provisions of SCUTPA all demonstrate 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.

ii. SCUTPA is not so punitive in purpose and effect as to overrule the General Assembly's clear and unambiguous intent.

Because I find the General Assembly intended SCUTPA to be a civil statute with civil remedies, the question then is whether that statutory scheme is so punitive in purpose and effect that the legislature's

intent should be overridden. "Only the ***clearest proof*** will suffice to override legislative intent." *In re Justin B.*, 405 S.C. 391, 399, 747 S.E.2d 774, 778 (2013) (citing *Smith v. Doe*, 538 U.S. 84, 92(2003)) (emphasis added). I find that the penalties available under SCUTPA and sought in the underlying case are not so punitive in purpose and effect that the unambiguous legislative intent to create a civil remedy should be overridden.

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. After carefully considering these factors and the arguments of both parties, I find that Cephalon has not shown by clearest proof that SCUTPA is "so punitive in effect as to negate the intention to deem it civil." *See Justin B.*, 405 S.C. at 405, 747 S.E.2d at 781 (citing *Hendricks*, 521 U.S. at 361).

As to the first factor, SCUTPA does not impose an affirmative disability or restraint. SCTUPA "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 enforcement action against Cephalon, no one will be or can be imprisoned as a result of that litigation. Cephalon argues that the injunctive relief sought in the enforcement action constitutes a disability or restraint. This argument fails for three primary reasons. First, the Attorney General seeks a permanent

injunction only to prohibit Cephalon from committing further violations of SCUTPA. Second, Cephalon is not subject to any physical restraint, nor does an injunction "'resemble imprisonment,' the archetypal affirmative disability." *Justin B.*, 405 S.C. at 406, 747 S.E.2d at 782. Lastly, 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 under S.C. Code § 39-5-110 of up to $5,000 per violation have been historically regarded as punishment. Cephalon is incorrect; the Supreme Court has again made clear that "neither money penalties nor debarment has historically been viewed as punishment." *Hudson*, 522 U.S. at 104.

Cephalon is correct that civil penalties can 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 § 39-5-110. However, *scienter* is not required for a threshold finding that Cephalon violated SCUTPA or the entry of a permanent injunction against Cephalon for future unfair or deceptive acts and practices. As in *Smith*, this factor is "of little weight in this case." *Smith*, 538 U.S. at 87. Analyzing the fifth factor—whether Cephalon's behavior is a crime—I agree that the Attorney General has alleged 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. Again however, this factor is of "little weight" and does not rise to the level of clear proof necessary to override the General Assembly's clear intent to craft SCUTPA as a civil statute.

The fourth and sixth *Mendoza-Martinez* factors are closely linked. While Cephalon is correct that the Attorney General's enforcement of SCUTPA may indeed deter individuals and corporations from engaging in unfair or deceptive trade practices, this is far from dispositive. "[T]he mere presence of a deterrent purpose does not render a sanction 'criminal.'" *Justin B.*, 405 S.C. at 398, 747 S.E.2d at 778 (citing *Smith*, 538 U.S. at 102). "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. Indeed, "to 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; *see also Hudson*, 522 U.S. at 105 ("To 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[.]"). The presence of a deterrent purpose in SCUTPA is in support of civil, not criminal, goals.

SCUTPA has an undeniable connection to a clear nonpunitive purpose—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 § 39-5-50; *see also* S.C. Code § 39-5-70 (authorizing the Attorney General to serve an investigative demand "when he believes it to be in the public interests 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 nonpunitive.[2]

[2] 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).

GOL at 7

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 § 39-5-110(a). This penalty only arises for violations which 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 § 39-5-110(c). While Cephalon is greatly concerned with the magnitude of a penalty award, there is no evidence in the record in this case as to how many violations of SCUTPA may have occurred. While a court may award the maximum penalty per violation, a court may award far less depending on the severity of the conduct. As no penalties have yet to be awarded in the enforcement case against Cephalon, a consideration of the possible total amount of penalty is premature. The injunctive relief available to and sought by the Attorney General in the underlying case is, pursuant to § 39-5-50, is limited to enjoining continued unfair and deceptive acts or practices. Given the importance of the nonpunitive purpose of SCUTPA, these sanctions are not excessive.

The General Assembly drafted SCUTPA with the unambiguous intent that it be a civil, not criminal, statute. Cephalon has not shown, with the clear proof needed, that SCUTPA is so punitive in both purpose and effect that the Attorney General's enforcement action should be treated as a criminal or quasi-criminal case. I find that the enforcement action against Cephalon is a civil proceeding.

B. The Attorney General Has the Authority to Appoint and Compensate Special Counsel on a Contingency Fee Basis

South Carolina Code § 1-7-170 provides that the Attorney General shall approve the engagement of any attorney on a fee basis by any department of agency of state government. The statute further provides that the Attorney General must approve the fee to be paid to an attorney so engaged. S.C. Code § 1-7-170. In addition, § 1-7-85 permits the Attorney General to "obtain reimbursements for its costs . . . in representing the State and its officers and agencies in civil and administrative proceedings." In that statute, costs are defined to include attorneys' fees. S.C. Code § 1-7-85. However, the Attorney General's ability in this regard is not created solely by these statutes. As the South Carolina Supreme

Court recognized in the case of *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445, 447-48 (1943), the Attorney General possesses the authority as the State's chief legal officer 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, 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 quotes and citations omitted). The Supreme Court of Missouri reached the same conclusion in *Missouri ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000), holding that, "[i]n 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."

In short, 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.

C. **Cephalon's Rights to Due Process Are Not Violated by the Attorney General's Use of Outside Counsel on a Contingency Fee Basis.**

Although largely abandoned by Cephalon in its briefing on the cross-motions for summary judgment, because Cephalon's complaint raises the issue of whether the Attorney General is constitutionally permitted to use outside counsel on a contingency fee basis in the enforcement action against Cephalon, I address the issue here and find that no due process violation has occurred.

The parties disagree as to the standard of neutrality required of the Attorney General in both civil enforcement actions and quasi-criminal enforcement actions. The Litigation Retention Agreement provides adequate safeguards which require control over the litigation by the Attorney General. Because the Attorney General has exercised actual control over this litigation throughout, I find that the Attorney General's retention of outside counsel on a contingency fee basis does not violate Cephalon's constitutional right to due process.

i. **There is no *per se* ban on the use of contingency fee counsel in enforcement actions and such arrangements are proper as long as the Attorney General retains control of the litigation.**

Cephalon argues that an Attorney General's contingency fee arrangement with outside counsel in cases that are akin to criminal proceedings is a *per se* violation of due process. I have already ruled that the enforcement action brought by the Attorney General against Cephalon is civil in nature. However, even assuming *arguendo* that the enforcement proceedings are quasi-criminal in nature, Cephalon is incorrect as to what the law requires. Specifically, Cephalon relies on the Supreme Court case of *Young v. U.S. ex rel. Vuitton et. Fils S.A.*, 481 U.S. 787 (1987). *Young* involved an actual criminal contempt proceeding brought by attorneys appointed by the court to prosecute defendants for alleged violations of a court order. *Id.* at 791-92. The appointed attorneys were also the attorneys for the beneficiaries of the court order at issue and civil plaintiffs in a related case against the defendants. *Id.* The court did not decide the case 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 akin to criminal prosecutions.

Instead, the courts that have directly considered whether contingency fee counsel may be employed by state Attorneys General, including in cases where civil penalties are sought, have approved of such arrangements provided that the government attorneys retain control of the litigation. The Texas Court of Appeals considered this issue in *International Paper Co. v. Harris County*, __ S.W.3d __, 2013 WL 3864317 (Tex. App. July 25, 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 *2. 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 *2. The court closely analyzed 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 *7. As 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.* at *15.

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 against Merck relating to Merck's marketing and distribution of a prescription drug—a strikingly similar context. The Attorney General and outside counsel sought the maximum civil penalties of $2,000 per violation and $10,000 per violation targeted to individuals over the age of 65. *Id.* at 735. Merck challenged the use of contingency fee counsel on due process grounds, and both sides filed cross-motions for summary judgment. The court again declined to adopt a *per se*

prohibition. "An attorney general does not necessarily violate a defendant's due process rights by hiring outside counsel on a contingency-fee basis." *Id.* at 739. "Thus, as 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.

ii. The terms of the Litigation Retention Agreement make clear that the Attorney General controls the enforcement action against Cephalon, and the Attorney General has exercised actual control over that action.

After reviewing carefully the terms of the Litigation Retention Agreement, I find that this agreement contains adequate safeguards to ensure that the Attorney General retains control of the enforcement action against Cephalon and serves as the ultimate decision maker. The agreement specifically provides that "[t]he 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." Furthermore, "[a]ll 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." Outside counsel agree to communicate regularly with the Attorney General and his staff to keep them fully informed.

From the record in this case, I find that the Attorney General has exercised actual control over the enforcement action against Cephalon from its inception. Despite taking the depositions of Attorney General Alan Wilson, former Attorney General Henry McMaster, Chief Deputy Attorney General John McIntosh, Assistant Deputy Attorney General Sonny Jones (the head of the consumer protection and

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antitrust division and the Attorney General's "designated assistant" to oversee the litigation) and other members of the Attorney General's office, Cephalon has provided no evidence to suggest otherwise.

Even assuming that a heightened level of neutrality is required because of the nature of the enforcement action against Cephalon, I find that Cephalon's due process rights have not been violated by the Attorney General's retention of outside counsel on a contingency fee basis.

D. The Attorney General Has the Authority to Seek Attorneys' Fees on a Contingency Fee Basis

A key premise of Cephalon's argument is that the Litigation Retention Agreement creates an improper financial interest in the litigation for the Attorney General's office. However, the Attorney General's right to seek attorneys' fees is not created by the Litigation Retention Agreement. Rather, S.C. Code § 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[.]

S.C. Code § 1-7-85. 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 limit the ways in which the attorneys' fees for the Attorney General could be calculated. The Attorney General's authority to seek attorneys' fees is inherent in his powers under the South Carolina Constitution and common law.

The terms of the Litigation Retention Agreement do not create the Attorney General's ability to seek attorneys' fees. 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. 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.

I find that the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85. 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 approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery.

E. Cephalon's Rights to Due Process Are 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.[3] Pursuant to the terms of the Litigation Retention Agreement, the below table breaks down the fees ultimately received by outside counsel and the Attorney General's office in the event of any recovery:

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%

Because of the Attorney General's financial interest in the outcome of the enforcement action, Cephalon argues, the Attorney General cannot satisfy the heightened level of neutrality required in that

[3] Cephalon continually refers to the Attorney General's contingency fee as the "10%." Under the undisputed terms of the Litigation Retention Agreement, the Attorney General receives 10% of outside counsel's fee, not 10% of any settlement or judgment. The Attorney General's fee is thus, at most, 2.5% of the overall recovery. And because the Litigation Retention Agreement operates on a sliding scale, with the contingent fee percentage decreasing as the recovery increases, the Attorney General's ultimate fee as a percentage of the total decreases as well for any settlement or judgment in excess of five million dollars.

action. Although I have already ruled that this enforcement action is civil, not quasi-criminal, in nature, even under that higher standard, the Attorney General's contingency fee interest does not rise to the level of a due process violation.

The Attorney General is "entitled to a presumption that he is pursuing the [enforcement] action in a manner consistent with this duty to seek justice as well as his ethical and professional obligations to the [State]." *Merck*, 947 F.Supp.2d at 744; *see also County of Santa Clara v. Superior Court*, 235 P.3d 21, 38 (Cal. 2010). I find that the Attorney General's contingency fee interest in the enforcement action against Cephalon is constitutionally permissible under the Supreme Court's decision in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

The similarities between the facts in *Marshall* and the present case are readily apparent. In the enforcement action against Cephalon, the Attorney General performs no judicial or quasi-judicial functions. He 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 before me demonstrates that no salaries are tied to the civil penalties received in this or any other enforcement case. Furthermore, the uncontradicted testimony from the Attorney General's office established that, even where money is received by the Attorney General as a result of a settlement or judgment in an enforcement action under SCUTPA, the Attorney General may not spend that money unless and until the General Assembly appropriates it for the Attorney General's use. 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.

Cephalon offers no evidence to the contrary. Indeed, its greatest point of emphasis is that, in the exceptional case, the Attorney General's contingency fee could amount to several million dollars, which could comprise a significant portion of his yearly budget. For that proposition, Cephalon craves reference to 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. However, Cephalon's reliance on this decision is misplaced for four principal reasons. First, the civil penalties in that case were imposed by the neutral finder of fact, not the Attorney General. Second, that penalty award is currently on appeal to the South Carolina Supreme Court, which may reduce or eliminate the penalty altogether. Third, even if the South Carolina Supreme Court affirms the ruling of the trial court, the Attorney General must still seek an award of attorneys' fees from the court, which would have the discretion to reduce the fees awarded. Finally, 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.

Notably, the concept that a prosecutor may retain a portion of the funds received from a successful prosecution arises in several other contexts under South Carolina law. For example, the Attorney General is permitted to retain the first $750,000 of securities fines imposed by his office in enforcement actions. *See* S.C. Code § 35-1-702(c). Similarly, the Attorney General and SLED share equally the first $500,000 of money recovered in insurance fraud cases. *See* S.C. Code § 38-55-560(D). More generally, prosecuting agencies are statutorily authorized to retain 20% of the value of all real or personal property subject to forfeiture that is seized and forfeited. *See* S.C. Code § 44-53-530(e).

In short, Cephalon has 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." *See International Paper*, 2013 WL 3864317, at *14. As in *Marshall*, there is no realistic possibility that the Attorney General's contingent interest will affect his judgment in the enforcement action against Cephalon. As the Texas Court of Appeals stated, "[w]e 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." *International Paper*, 2013 WL 3864317, at *14. If judgment is entered against it,

Cephalon retains the opportunity to challenge the fees awarded to the Attorney General if it believes that this fee is unconstitutionally excessive.

The provisions of the Litigation Retention Agreement pertaining to the retention of attorneys' fees by the Attorney General are not constitutionally defective. As discussed above, there are numerous safeguards that must be satisfied before the Attorney General can actually spend any attorneys' fees it may ultimately acquire from its enforcement action against Cephalon. 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 to be awarded both to the Attorney General and outside counsel. Finally, the General Assembly must appropriate those funds for use by the Attorney General's office. Consequently, Cephalon has not shown any infringement upon its constitutional due process rights.

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

Cephalon argues that 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. I find this argument to be without merit. In support of this argument, Cephalon relies on S.C. Code § 1-7-150(B). This statute 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.

S.C. Code § 1-7-150(B). According to Cephalon's argument, the Attorney General violates this statute—and therefore the separation of powers doctrine—anytime he hires outside counsel because a portion of the proceeds from the settlement or judgment are paid to outside counsel rather than deposited in the general fund. Further, Cephalon argues that the Attorney General violates this statute by retaining a

portion of outside counsel's fees as attorneys' fees for his office.

Cephalon's argument, however, ignores the plain language of the statute itself. The statute provides that all monies, except investigative costs or the costs of litigation, must be deposited into the general fund. As the costs of litigation include attorneys' fees, this statute expressly provides the Attorney General the authority to pay attorneys' fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund. And under the clear and unambiguous terms of § 1-7-85, discussed above, the Attorney General has the statutory authority to seek attorneys' fees "[n]otwithstanding any other provision of law." S.C. Code § 1-7-85.

CONCLUSION

For the reasons set forth hereinabove, Cephalon Inc.'s Motion for Summary Judgment is **DENIED**. The Attorney General's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Columbia, South Carolina
June 2, 2014

G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROUNA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROUNA *ex rel.* Henry McMaster, in his capacity as Attorney General of the State of South Carolina,	)	Case No. 2007-CP-42-1855
Plaintiff,	)	**ORDER**
vs.	)	
ELI LILLY AND COMPANY,	)	
Defendant.	)	

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MARC HITCHENS

THIS CAUSE is before the Court upon the Motion of Defendant Eli Lilly and Company (Lilly) to Disqualify Special Counsel filed on August 21, 2009. This matter was fully briefed by the parties, and was argued to the Court on August 31, 2009. After carefully considering all of the parties' written submissions and the oral arguments made by counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On July 19, 2006, for the purpose of pursuing litigation relating to the Lilly-manufactured drug Zyprexa, Attorney General McMaster entered into a "Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General" signed by three lawyers as "Special Counsel." The three lawyers were John S. Simmons, John Belton White, Jr., and F. Kenneth Bailey, Jr. According to his Affidavit submitted in this matter, Attorney General McMaster's aim in suing was to recoup state funds and penalties related to Lilly's alleged wrongful conduct in marketing Zyprexa.

Under the terms of the Special Counsel Appointment, the three signing lawyers agree to share fees (if any),[1] expenses and, subject to the Attorney General's overall control, responsibility for the work to be done. In effect, they agreed to function as de facto joint venturers, working together as a litigation team on behalf of the Attorney General and the State of South Carolina.

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Under the Retention Agreement, Special Counsel will not be paid out of any award of State funds. They will be compensated, if at all, only out of a portion of such recovery as they are able to win for the State by their efforts. Meanwhile, under the Retention Agreement's terms, they have undertaken to pay all the costs of this lawsuit out of their own pockets. Thus, as part of their appointment by the Attorney General, Special Counsel have agreed to take on all the economic risk of the litigation, including the risk of a defense verdict, and give up to the State the lion's share (at least 77%) of any net recovery (after litigation costs) generated by the civil suit against Lilly. A copy of the Retention Agreement was produced to Lilly on May 22, 2009.

Since July of 2006 to the present, Special Counsel have pursued the investigation and prosecution of civil litigation against Lilly. The fact of appointment of Special Counsel in this matter has been known to Lilly from the time Special Counsel filed this lawsuit and served with the Summons and Complaint in the Spring of 2007, but an actual copy of the agreement was not given to Lilly until the date stated above.

When Lilly answered the Complaint on October 1, 2007, Lilly specifically objected to the Attorney General's use of a contingent fee arrangement in hiring Special

[1] If the lawsuit fails, all of the financial loss will fall on Special Counsel, no expenses will be borne by the State. Under Article V, ¶ B of the Retention Agreement, Special Counsel must look to the Attorney General to reimburse them for advance costs out of "the litigation's gross recovery," if any. The Attorney General, in his sole discretion may refuse to reimburse Special Counsel for "improperly documented, unnecessary, or unreasonable costs or expenses." *Id.*

Counsel. Lilly contended the retention of Special Counsel violated Lilly's due process rights and the separation of powers doctrine. Specifically, Lilly pleaded in its answer two affirmative defenses referencing the retention of Special Counsel on a contingent fee basis, to wit:

> The filing of this lawsuit by private counsel, retained on a contingent fee arrangement, violates the South Carolina Constitution's separation of the powers of the legislative and executive branches, in that the legislature has not appropriated funds for the payment of private counsel to prosecute this action in place of the Attorney General.
>
> The filing of this lawsuit by private counsel, retained on a contingent fee arrangement, violates the due process requirements of the United States Constitution and the South Carolina Constitution, as well as conflict-of-interest rules applicable to attorneys representing the State, by giving the State's counsel a personal financial interest in the outcome of this action.

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Lilly filed a Motion to Disqualify Special Counsel and filed that motion on August 21 2009, with the case at that time being scheduled to go to trial on September 14, 2009. This motion is now before this Court.

ISSUES BEFORE THE COURT AND CONCLUSIONS OF LAW

LILLY'S DUE PROCESS ARGUMENTS

I. Does the Retention Agreement violate Lilly's Due Process Rights?

Lilly contends that the hiring of Special Counsel "violated Lilly's state and federal right to due process because it gave each of these lawyers a direct financial interest in the outcome of this litigation." Lilly Motion at 2. *See also id* at 8-13. Lilly's due process argument flows from Lilly's central premise that all government lawyers must always remain neutral, even in the context of tort litigation against an alleged wrongdoer. The Court is unable to find anything in the relevant Rules of Professional Conduct, statutes, or

controlling case law that supports this argument in the context of tort litigation such as this.

The notion that public officials and their lawyers (whether in-house or outside counsel) must be "neutral" or disinterested in the outcome of civil litigation they bring on behalf of the government is not only unsupported by any authority, it is unsupported in the context applicable here: tort litigation where the government is suing to collect money damages. As the United States Supreme Court explained in a unanimous opinion almost thirty years ago, the Court's "rigid" due process requirements, "designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. . . . Prosecutors need not be entirely neutral and detached. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (citations and internal quotation omitted); *see also Commonwealth v. Gullota*, 716 A.2d 663, 666 (Pa. Super. 1998) (rejecting argument that neutrality principles applied to adjudicative officials apply to prosecutors).

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Indeed, as the Supreme Court held in *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002), the Attorney General, as the chief lawyer for the State, may sue even the Governor- ordinarily his client- when the public interest demands it for the protection of the Legislature's right to appropriate funds in accordance with the state Constitution. See also, 7 Am Jur 2d Attorney General section 18 ("...it is the duty of the Attorney General to zealously advocate the public policy positions of his or her clients in pleadings, negotiations, and the courtroom to avoid even the appearance of impropriety by appearing to be in conflict with the desires of his or her client.")

Government lawyers have no heightened duty of neutrality when bringing civil tort lawsuits. Government officials have a duty to carry out the responsibilities of their positions and an obligation to ensure that funds appropriated for that purpose are not misused. In this lawsuit, the State of South Carolina contends that funds intended to pay for care of the elderly and the poor were misdirected by Lilly's allegedly wrongful acts. As a result, the State of South Carolina has brought suit to recover those funds. The Attorney General maintains that he owes an obligation as a public servant to prosecute this case to the best of his ability, and is doing so. Lilly has introduced no evidence demonstrating that the Attorney General has chosen attorneys that are not fully qualified and competent to handle the responsibilities which have been placed upon them in the Retention Agreement.

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The lawyers representing the State of South Carolina in civil tort cases, whether in-house or outside counsel, have a duty to represent the State of South Carolina's interests to the fullest, advocating the State of South Carolina's position in the litigation brought to vindicate the State of South Carolina's rights and recover the funds expended because of a private party's alleged wrongdoing. Nothing in South Carolina's Rules of Professional Conduct suggests that the State's retained attorneys should have any other responsibility other than pursue their obligations under the agreement that was made between them. Indeed, Lilly specifically denied that it was making any claim of professional wrong doing against the Special Counsel and agreed that the State's legal counsel have not committed any violation of the Rules of Professional Conduct. This is a significant admission, since SCACR 407 Rule 8.4(e) makes it unethical to "engage in conduct prejudicial to the administration of justice." By agreeing that the State's lawyers

have behaved ethically as lawyers, Lilly has conceded that no conduct prejudicial to the administration of justice has occurred in this case. This admission casts a long shadow of doubt over Lilly's contentions that it is the victim of constitutional violations and illegality.

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In contending the State's counsel owe it an obligation to be "neutral," that is, less than unswervingly zealous in furthering the State's contentions, Lilly ignores the large body of controlling law that governs lawyer conduct in the State of South Carolina. It argues, without support in court rules, statutes, or case law that all government attorneys have a responsibility to act neutrally in all cases. In support of this argument, Lilly relies heavily on the contention that when the State of South Carolina acts in its *parens patriae* capacity, it must act as representative of all citizens, including (presumably) the State of South Carolina's adversaries in civil litigation. This argument is flawed for several reasons.

First, this is a tort action plain and simple. The State of South Carolina is out to recover actual damages it suffered from Lilly's allegedly tortious conduct. It is seeking damages for money it claims that Lilly wrongfully caused to be paid from the State treasury. This tort action is not significantly different than one brought by a private corporation or individual who suffered harm as a result of another person or entity's alleged wrongdoing.

Second, when the State of South Carolina does act in its *parens patriae* role, nothing about its duty to protect the public safety and general welfare requires it to ignore wrongdoing by a particular member of the public. Indeed, courts have held that the *parens patriae* role does not require that a state in a civil case be neutral. As one court

has noted, a state "acting in its role as *parens patriae*, has the right and the duty to act to protect its weaker members." *In re Terwilliger*, 304 Pa. Super. 553, 560, 450 A.2d 1376, 1380 (1982). In its *parens patriae* role, the State of South Carolina acts to protect children, charities, and other members of society who need special protection. See, e.g., Mr. T v. Ms. T, 378 S.C. 127, 662 S.E.2d 413 (S.C. App. 2008) ("South Carolina, as *parens patriae*, protects and safeguards the welfare of its children."). In cases where it is fulfilling its *parens patriae* role the State of South Carolina may be adversarial to allegedly abusive or neglectful parents, negligent charitable trustees, or other wrongdoers. This case is no different. The State of South Carolina is adverse to Lilly, and the State of South Carolina's lawyers (whether in-house or outside counsel) are obligated zealously to represent the interests of their client to vindicate its rights.

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Finally, Lilly's due process argument ignores the reality that the State of South Carolina has not ceded its *parens patriae* role to outside counsel. As Article III (D) of the Special Counsel Contract makes clear, the State of South Carolina retains overall control of the present litigation.[2] And there is no question that the Attorney General has

[2] The Retention Agreement in question here is replete with verbiage attesting to it being consistent with sound public policy, with control over this litigation being reposed firmly in the Attorney General's hands. Thus, the retention agreement states in the first recital clause that the litigation "is in the best interest of South Carolina." The third recital clause sets forth the premise (unchallenged by Lilly) that Special Counsel "has the skill, experience, expertise, and competence necessary for the meaningful prosecution" of the matter. The Agreement further states in Article II, ¶ A, that due to the "personal nature of the services rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services," and that "[t]he Attorney General shall have final authority over all aspects of this litigation." To quote the Agreement,

> [t]he 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 . . . to oversee the litigation, which appointment the Attorney General may modify at will. *Id.* Art. II, ¶ A(1).

The Agreement expressly provides that "[t]he Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation." Article VI, ¶ A. Special Counsel "may terminate its duties and obligations under the Appointment and this Agreement upon

authority to hire legal counsel to protect the State's interests. In order to effectuate the broad authority given to the Attorney General under the Constitution, statutes and common law, the General Assembly has empowered the Attorney General to appoint the Assistant Attorneys General. S.C. Code Ann. § 1-7-30. Indeed, the South Carolina Supreme Court has recognized that the Attorney General, as the State's chief legal officer, possesses the authority to appoint and approve private counsel to represent the State. *See* Cooley *v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445 (1943).

Courts have almost universally recognized that Attorneys General possess broad authority to appoint private attorneys as special counsel on a contingent fee basis to assist in the representation of the public interest. Indeed, as was stated in *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000) (en banc),

> [t]he 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 attorneys 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.

And, in *State of Rhode Island v. Lead Industries Association, Inc.*, 951 A.2d 428, 474-475 (R.I. 2008), the Supreme Court of Rhode Island stated:

> [i]t is our view that the Attorney General is entitled to act with a significant degree of autonomy, particularly since the Attorney General is a constitutional officer and is an independent official elected by the people
>
> . . . .
>
> Although we are keenly aware of the gravity of the issue and of the fact that thoughtful and potent policy-based arguments have been made on both sides of the issue, in the end we have concluded that, in principle, there is nothing unconstitutional or illegal or inappropriate in a contractual

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thirty (30) days written notice to the Attorney General." Id. However, "[t]ermination on the part of Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina." *Id.*

> 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 contractual relationships may well, in some circumstances, lead to results that will be beneficial to society results which otherwise not have been attainable. However, due to the special duty of attorneys general to seek justice and their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations. In short, it is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee arrangement in order to assist in certain civil litigation, so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into.

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The claim to proceeds by attorneys appointed by the Attorney General to represent the State on a contingent fee basis is not a "claim against the State." *People v. Philip Morris*, 759 N.E.2d 906 (Ill. 2001). *See, also*, ' 1-7-170 (agency may not *engage* on a fee basis an attorney at law except upon the written approval of the Attorney General and a fee must be approved by him").

Thus, should the State of South Carolina conclude that its purported obligation to act neutrally toward all parties (even the one that caused it harm) requires it to drop this lawsuit, the State of South Carolina through the Attorney General, not any outside law firms, will make that decision. *See also* SCACR 407, Rule 1.2, requiring that clients, not their legal counsel, make decisions as to the resolution of a matter. In short, there is nothing about the State of South Carolina's *parens patriae* role that requires its attorneys to act completely neutral instead of advocating zealously on behalf of their client.

Lilly's attempt to hold all government lawyers to the same neutrality standards as judges or neutral arbitrators is misguided and thus unavailing. Lawyers — even government lawyers — have never been treated as neutral parties in litigation. They are advocates. Judges, on the other hand, must be held to the highest standards of neutrality

and impartiality. See Code of Judicial Conduct Canon 2, requiring judicial independence. Thus, the longstanding jurisprudence invoked by Lilly in its brief (at 8-10), beginning with *Tumey v. Ohio*, 273 U.S. 510 (1927), and carrying through to the recent decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), stands for the proposition that the judicial officer who acts as the decision-maker in an adversarial proceeding must be neutral and impartial. But none of those cases extend the neutrality principle encompassed in the Due Process Clause to the lawyer representing one side of a contested issue, even if those lawyers happen to represent the government. See Motion to Disqualify at 10-11 (citing cases involving personal financial interest of "a judicial officer or administrative fact-finder or decision-maker").

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The few cases Lilly cites not involving judicial or other neutral adjudicators either disprove its arguments or are easily distinguishable from the present situation. The first case, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), involved a federal statute under which civil penalties collected by an agency of the Department of Labor for violations of the law were used to reimburse that agency for its costs of determining violations and assessing penalties. *Id.* at 239. A corporation that was assessed penalties under the statute challenged the statute on due process grounds, arguing that the assistant regional administrator who made the decision to assess the penalties had an improper incentive to find violations and assess penalties in order to increase revenues for the agency. *Id.* at 241-42. The Supreme Court unanimously rejected this argument:

> The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and [*Ward v. Village of Monroeville*, 409 U.S. 57 (1972)] 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. If the employer excepts

> to a penalty — as he has a statutory right to do — he is entitled to a de novo hearing before an administrative law judge. In that hearing the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. . . . It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations.

Id. at 247-48 (citation and footnote omitted).

The same is true here. As in *Marshall*, the law firm here "performs no judicial or quasi-judicial functions [and] hears no witnesses and rules on no disputed factual or legal questions." *Id.* at 247.

Strong language from *Marshall* directly forecloses Lilly's attempt to rely on cases like *Tumey* and *Ward* for its due process argument:

> The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a . . . plaintiff-like capacity. . . . The distinction between judicial and nonjudicial officers was explicitly made in *Tumey*, 273 U.S., at 535, where the Court noted that a state legislature "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."

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Id. at 248-49 (citation omitted).

The United States Supreme Court thus has approved precisely the situation that Lilly alleges is present here: the attorney for the State of South Carolina has an incentive to zealously advocate for its government client and seek to vindicate the government's interests against an alleged violator of the law. *Marshall*, a case relied on by Lilly, is directly on point and cuts against Lilly's due process argument.

Similarly, *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787 (1987), relied on by Lilly at p. 10 of its brief, offers no support for Lilly's due process argument. In *Young*, the Supreme Court disapproved a federal trial court's appointment of counsel for an interested party to prosecute a criminal contempt proceeding against its

litigation opponent. *Id.* at 790. Notably, the Court based its holding not on the Due Process Clause, but on its supervisory powers over lower federal courts, *id.* at 802, 808-09, an issue not involved here.

In reaching its conclusion, the Supreme Court emphasized the criminal nature of the proceeding and the special protections afforded the accused criminal contemnor in such situations. Noting that the prosecutor in a criminal contempt proceeding "is appointed solely to pursue the public interest in *vindication of the court's authority*," the Court found an inherent conflict between the prosecuting attorneys' dual roles as advocate for one party in an ongoing civil dispute and criminal prosecutor of the opposing party "for affronts to the Judiciary." *Id.* at 804-05 (emphasis added).

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These principles have no application here. The team of Special Counsel employed by the Attorney General have not been appointed by the State of South Carolina to prosecute a criminal case against Lilly, or a criminal contempt action as the lawyers were appointed to do in *Young*. They have not been appointed to "vindicate the court's authority." They have been appointed to seek to recover money in a tort case. The underlying matter here is a civil action for damages, not a criminal contempt proceeding. Special Counsel are not acting to vindicate the court's authority or punish affronts to the judiciary. They are seeking only to recover damages for the State. Nor have the private law firms, operating as de facto joint venturers, been hired to represent the State of South Carolina in a dispute in which any venture member has a preexisting vested interest, as the prosecuting attorneys did in *Young*. Rather, Special Counsel's allegedly improper interest arises from the fact that, as in all contingent fee cases, the venture members will be paid only if it wins — and the larger the judgment in favor of its

client, the greater the possible fee to the firm. *Young* is thus readily distinguishable from this case.

Indeed, the key cases involving lawyer conduct relied on by Lilly involve lawyers acting as criminal prosecutors, a situation different from the one here. The criminal proceeding cases Lilly cites are simply inapposite here, where outside counsel has been hired not to prosecute Lilly criminally, but to bring a civil proceeding for recovery of damages. *See, e.g., Appeal of Nicely*, 130 Pa. 261, 270, 18 A. 737, 738 (1889) (noting the special duty of a criminal prosecutor to act impartially so that justice is done and commenting that, when private counsel aids a criminal prosecutor, he "should be governed by the same rules of propriety"); *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that the U.S. Attorney is the representative of a government whose interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (noting that a prosecutor in a criminal case should not be "an architect of a proceeding that does not comport with standards of justice").

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The cases Lilly cites that involve non-criminal prosecutions are inapplicable (because they are decisions of lower federal courts or other state courts) and distinguishable. In *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45 (D.C. Cir. 1992), the court, in *dicta* (after vacating the administrative orders under review), condemned as uncivil the arrogant behavior of lawyers representing a federal agency. The other federal circuit court case relied on by Lilly, *Douglas v. Donovan*, 704 F.2d 1276 (D.C. Cir. 1983), is also distinguishable. The opinion in *Douglas* was written by the same judge that authored *Freeport* and also, as in *Freeport*, resulted in the vacatur of

the order under review (on mootness grounds). *Id.* at 1277. Once again in *dicta*, the court contended that government lawyers "have special responsibilities to both this court and the public at large." *Id.* at 1279. As in *Freeport*, the court's statement was made in the context of rebuking an arrogant, uncivil government lawyer; the court was upset it had not been informed of the settlement of the underlying dispute: "As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation." *Id.*

In short, Lilly's due process argument finds no useful support in the well-established case law holding that judges and other decision-makers must be neutral and impartial, or gleaned from a handful of cases noting the special responsibilities of criminal prosecutors. Criminal prosecutors do owe special duties, but this is not a criminal prosecution. These cases do not apply here.

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Here, in contrast, Special Counsel is representing a client in a civil case and should be held to the same high standards that all lawyers are held under the South Carolina's Rules of Professional Conduct. Lilly concedes those duties have all been discharged by the Attorney General and Special Counsel. The fact that the Special Counsel team's client is the State of South Carolina does not alter this analysis or require the Special Counsel to neglect the contractual and ethical duty to zealously represent its sovereign client and obtain the best recovery possible for that client in the underlying litigation here. The applicable ethics rules and the controlling case law compel this conclusion. Because Lilly's entire due process argument is based on the faulty premise that civil tort lawyers owe a duty of neutrality when suing for the sovereign, Lilly's main due process argument fails.

Lilly also contends that the use of contingent fee representation against it violates its due process rights. This argument is meritless. Even if government lawyers were generally held to a higher standard than private counsel and were required to act neutrally (rather than as advocates for their clients), Lilly's argument would fail. Indeed, given the high standard for finding a Due Process violation in this context (*see, e.g., Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009)), if Lilly is correct that a contingent fee lawyer's financial interest in a government case violates the Due Process Clause, then doubt would be cast on every contingent fee arrangement, even those involving private parties, because of their supposed improper influence on an attorney's incentives and motivations in representing his or her civil client. Yet, contingent fee contracts have been held proper for many years. *See, e.g., Perry v. Atlantic Coast Life Ins. Co.*, 166 S.C. 270, 164 S.E. 753 (1932) recognizing lawyers were "collecting compensation due them in cases where they are employed on a contingent basis." *See also,* SCACR Rule 407, Rule 1.5(d), allowing contingent fees generally, except for domestic cases and criminal cases, neither of which is involved here.

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Lilly cites only a single decision adopting its view that contingent fee arrangements by government entities are improper, *People ex rel. Clancy v. Superior Court of Riverside County*, 705 P.2d 347 (Cal. 1985). In *Clancy*, a city attorney retained outside counsel on a contingent fee basis to bring an action to shut down an adult bookstore as a nuisance. *Id.* at 349. The bookstore's owner challenged the contingent fee arrangement, arguing that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." *Id.* at 350. In accepting this argument, the court focused on the well-accepted principle that a prosecuting attorney in

a criminal case should not have a vested interest in the outcome of that case. *Id.* at 350-52. Relying on a handful of secondary authorities (primarily the same ABA Model Code provision cited by the D.C. Circuit in *Freeport* and *Douglas*), the court also found that in some non-criminal situations, government attorneys must be neutral as well. *Id.* at 352. Ultimately, the court concluded that an action to abate a public nuisance shared sufficient characteristics with criminal prosecutions to require such actions to be brought by attorneys without any interest in the outcome of the case. *Id.* at 352-53.

The California Supreme Court's decision in *Clancy*, which was not grounded in the Due Process Clause (or separation-of-powers concerns), stands alone in terms of case law supporting Lilly's contention that government attorneys in non-criminal actions may not be paid on a contingent basis. In presenting *Clancy* as precedent to be followed, Lilly failed to point out that as *Clancy* is read and applied in California, it "does not bar the public entities from engaging private counsel under a contingent fee arrangement to assist in [public nuisance] litigation, so long as the public entities' in-house counsel retain control over all decision-making." *County of Santa Clara v. Superior Court*, 161 Cal.App.4th 1140, 74 Cal.Rptr.3d 842, 853 (2008). Here, the *Santa Clara* test is met, for Attorney General McMaster has absolute control over the disposition of this case. Article III (D) of the Special Counsel agreement makes this clear:

> 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.

Contrary to Lilly's unsupported speculation, evidence in the record reflects that the State of South Carolina's Attorney General retains control and ultimate decision-making

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authority over this litigation. Indeed, General McMaster's affidavit makes clear he personally has spoken directly with Lilly's counsel about possibly resolving this case.

Lilly's discussion of the interplay between contingent fees and due process also does not deal with persuasive adverse authority such as *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D.1998) ("In view of th[e] long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistants attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute."), and *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) (upholding the Rhode Island Attorney General's right to enter into contingent fee agreements with private counsel appointed to bring civil suits). *See also Philip Morris v. Glendening*, 709 A.2d 123 (Md. 1998) (upholding a contingency fee agreement between private lawyers and the Maryland Attorney General in a civil case). As to the defendant's separation of powers claim, the court agreed with the Attorney General's conclusion that the situation was extraordinary and deemed his decision to hire contingent fee counsel non-reviewable; "[p]rinciples behind constitutional separation of powers place limits on a court's power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority." *Id.* at 1239 (*quoting Hamilton v. Verdow*, 414 A.2d 914, 921 (Md. 1980)). For another example of a state court rejecting challenges to a contingency fee agreement, *see Kinder v. Nixon*, No. WD 56802, 2000 WL 684860 (Mo. App. W.D. 2000).

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In sum, Lilly's contingent fee due process/constitutional violation claim is rejected. At present, only "[a] few state attorneys general's offices, notably California's

make it a practice not to hire outside counsel on a contingent fee basis." Donald G. Giffort, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C.L. REV. 913, 964 n.323 (2008). In other words, if the practice of hiring private lawyers in special cases by States' Attorneys General was actually unconstitutionally improper, one would expect that some authoritative court would have definitively ruled that way by now. Instead, the evidence is to the contrary. See Richard O. Faulk & John S. Gray, *Alchemy in The Courtroom? The Transmutation of Public Nuisance Litigation*, MICH. ST. L. REV. 941, 968 n.140 (2007) ("the majority of state attorneys general [had] contingent fee arrangements in the tobacco litigation, the mayors of over thirty cities signed contingent fee contracts to sue gun manufacturers").

Lilly's purported due process constitutional challenge is inconsistent with South Carolina's Rules of Professional Conduct; and finds no support in the controlling case law of this Court or the United States Supreme Court.

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Thus, under the Contract and in fact, the Attorney General is in control of the litigation, both on an ongoing basis and in terms of its ultimate resolution. Special Counsel must follow the Attorney General's directions and cannot take important actions without the Attorney General's approval. Any claim that the State of South Carolina is not adequately controlling this litigation is contrary to evidence in the record. The hearing in this motion included reliance on an uncontradicted affidavit from the Attorney General testifying to his office's involvement in this case, plus oral argument from a lawyer on the Attorney General's staff. Both the Special Counsel Agreement and the actual conduct of this litigation make clear that the Attorney General is in charge of this case; its outside counsel is fulfilling the same role outside counsel for the State of South

Carolina always fulfills, regardless of how they are paid: assisting the State of South Carolina in vindicating or defending its rights. After due consideration of the parties arguments and the authorities they cite, the Court concludes there is nothing in the Attorney General's Special Counsel Appointment arraignment deprives Lilly of its right to due process.

LILLY'S SEPARATION OF POWERS ARGUMENTS

Lilly contends the separation-of-powers doctrine is violated on the ground that payment of fees to Special Counsel is unauthorized under S.C. Ann. § 1-7-150(B). The flaw with this argument is that the statute expressly authorizes payment of "the costs of litigation" out of litigation proceeds, and a "cost of litigation" is precisely what legal fees are. Lilly's separation-of-powers argument rests on case law from a single jurisdiction, Louisiana, which is readily distinguishable. The leading Louisiana case is *Meredith v. Ieyoub*, 700 So.2d 478, 482 (La. 1997), followed by *Ieyoub v. W R. Grace & Co.*, 708 So. 2d 1227 (La. Ct. App. 3d Cir. 1998). The statute under which those two cases were decided required that "all sums recovered" by suit or settlement "be paid into the state treasury." La. R.S. 30:2205. The Louisiana statute did not recognize the possible need to pay litigation costs; the South Carolina statute, under S.C. Ann. § 1-7-150(B) does. *See* Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 867 (2009) (listing "legal fees" as one of the "costs of litigation"). Thus, the Louisiana case law relied on by Lilly has no application here.

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Another problem not mentioned by Lilly with its *Meredith* separation-of-powers precedent is that the Louisiana cases stand alone—they represent the only defense win on

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the point. Aside from Louisiana cases interpreting the narrow Louisiana statute, courts that have considered the issue uniformly have rejected Lilly's argument:

> [N]umerous courts have heard challenges to contingency fee arrangements based on the separation of powers doctrine, but the Supreme Court of Louisiana is the sole court that found it persuasive enough to overturn a contract. The doctrine has failed to gain any significant traction.

Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?* 42 COLUM. J.L. & SOC. PROBS. 587, 612 (2009) (citing as examples, *State v. Hagerty*, *supra* and *Kinder v. Nixon*, *supra*. In *Kinder*, the Court stated that "Appellants' fundamental contention is erroneous and the contract is not void.").

As part of its separation-of-powers argument, Lilly contends that, under the Retention Agreement, should the State recover of money from Lilly, the Attorney General would distribute the lawsuit proceeds in an unconstitutional way. This argument is speculative and it is not ripe for adjudication.

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SC Code of Laws Section 1-7-150 gives the Attorney General the right to withhold certain funds (investigative costs and costs of litigation) from the proceeds of litigation such as this. There has been no recovery at this time and there is no showing that investigative costs will not exceed or be equal to the 10% of recovery provided for in the contract to be retained by the Attorney General's office. Additionally, it is the Court's finding that the Defense has not shown any evidence amounting to adverse prejudice as to this issue.

The tort case is yet to be tried. A judgment has yet to be entered against Lilly and, depending on the trial's outcome, may never be. Any contention that the Attorney General will act in an unconstitutional way is thus based on events that have yet to occur. Moreover, any provision of the Special Counsel Retention Agreement that would call for

the Attorney General to commit an illegal act is severable under the terms of Article VII (H) of the agreement. Hence, upon a timely and meritorious challenge, any offensive provision would simply be stricken without causing the entire agreement to fail. Lilly's attack on the Special Counsel Retention Agreement based on its separation of powers argument simply is not ripe at this time. Lilly's contentions are premised on alleged future wrongful acts by the Attorney General are hypothetical, lack substance, do not prove the Agreement's invalidity, and hence are rejected.

LILLY'S ILLEGALITY ARGUMENTS UNDER SECTION 1342

Citing S.C. Code § 8-13-1342, Lilly seeks a ruling that, in essence, the State's case must be derailed on the eve of trial because it is being advanced illegally by Special Counsel. The Court has carefully considered Lilly's argument on this novel point, and rejects it for multiple reasons.

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I. The Illegality Contention Has Not Been Affirmatively Pleaded

First, unlike Lilly's due process and separation of powers arguments, Lilly's illegality contentions have not been affirmatively pleaded in its answer. Illegality contentions by way of a defense or avoidance are required to be affirmatively advanced under SCRCP Rule 8(c). In *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005), the South Carolina Supreme Court emphasized the "importance of the right to one's preferred attorney," noting that an order determining the "right to be represented by an attorney of one's choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case." The Court concludes that a

legal position premised on alleged illegality calculated to stymie a plaintiff's chosen path to trial represent a form of defense or avoidance that needs to be affirmatively pleaded under Rule 8(c).

Here, the campaign contribution data on which Lilly relies have long been in the public domain. Lilly has known from the start of this case about Special Counsel's appointment. In its answer filed in October of 2007, Lilly raised due process and separation of powers contentions attacking Special Counsel's appointment and the contingent fee arrangement under which Special Counsel was hired.

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In view of the great importance attached to a party's right to counsel of one's choosing, and the possibility that, as stated in *Hagood*, losing counsel "could determine . . . or discontinue an action," the Court concludes that an attack seeking to disqualify counsel based on alleged illegality needs to be specifically pleaded under Rule 8(c). Lilly has not done so here. The instant motion was made on the eve of trial and only after the Court denied Lilly's motion for a continuance. Under the circumstances, the motion is not timely. Because it rests on a contention that has not been properly pleaded, and in view of the undue delay in raising the issue, Lilly's motion to disqualify based on section 1342 must be rejected.

It appears that no complaint has been filed with the State Ethics Commission by Lilly or its counsel concerning the post-retention political contributions by two of the Special Counsel lawyers. At the oral argument Lilly's counsel made clear that the only forum in which the question of compliance with section 1342 had been raised was in this case, and specifically in the context of the disqualification motion.

Further, it should be noted that it appears that all local counsel both for the State and Lilly have made similar contributions to the campaigns of the Attorney General.

II. Lilly Has Offered No Competent Evidence Of Actual Prejudice

The Court also rejects Lilly's motion to disqualify due to Lilly's failure to show that Lilly will suffer actual prejudice unless relief is granted. In *State v. Bell*, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007), the Court of Appeals analyzed what needs to be shown in order to win a disqualification motion against a solicitor. Bell's contention that the trial court erred in denying his disqualification motion was rejected on the ground that when making a disqualification motion attacking the State, the movant must demonstrate actual prejudice suffered due to the allegedly unethical conduct. The court in *Bell* explained that proof of actual prejudice is required in disqualification motions filed against the State:

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> In *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), our supreme court addressed the standard for disqualification of a Solicitor's Office where an attorney in that office had been employed by the Public Defender's Office during the pendency of charges against the appellant. There, the court rejected the standard of a presumption of betrayal from mere allegation of successive adverse representation resulting in a per se disqualification. *Id.* at 518, 299 S.E.2d at 688. Instead, the court adopted the requirement of a showing of actual prejudice to the defendant's case. *Id.* at 518-19, 299 S.E.2d at 688. Finding no evidence that any secrets or confidences of Smart were revealed, the court affirmed the denial of Smart's motion for disqualification. Id. at 520-521, 299 S.E.2d at 689. Thereafter, in *State v. Chisolm*, 312 S.C. 235, 439 S.E.2d 850 (1994), our supreme court again articulated that an appellant who seeks disqualification of a Solicitor's Office must show actual prejudice. *Id.* at 238, 439 S.E.2d at 852.

Bell, 374 S.C. 141-42, 646 S.E.2d 891 (emphasis added).

Even assuming the validity of Lilly's illegality charge, it is clear that no actual prejudice whatever has been shown here. At the motion hearing, Lilly contended that it was suffering "actual prejudice" at the hands of Special Counsel due to their alleged

failure to comply with Lilly's discovery needs. No competent evidence was offered on this point, and the charge is at odds with Lilly's repeated admission during the hearing that Lilly was not asserting any violation of Special Counsel's professional obligations as lawyers. This is a significant concession by Lilly.

The Court notes that SCACR 407, Rule 3.4(d) makes it unethical for counsel "in pretrial procedure . . . [to] fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Lilly's concession that Special Counsel have acted ethically as lawyers in this matter disposes of its purported actual prejudice contention. In sum, the Court finds that in a disqualification motion under these circumstances, proof of actual prejudice must be shown by the movant. No showing of actual prejudice has been made here. Lilly's failure to prove that it would suffer actual prejudice but for disqualification of opposing counsel is an additional reason why Lilly's motion to disqualify based on section 1342 is overruled.

III. Lilly's Motion Cannot Not Reach Special Counsel Bailey

Lilly's illegality argument made under section 1342 does not rest on the contention that the Appointment of Special Counsel violated the statute when the Retention Agreement was entered into. Lilly appears to concede the Agreement did not violate section 1342 at the time of Special Counsel's appointment. Lilly also concedes that one of the three Special Counsel, F. Kenneth Bailey, Jr., never made any post-appointment contribution reached by section 1342. Thus, the statute can provide no justification for his disqualification at all.

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IV. Section 1342 Does Not Require Disqualification of Special Counsel

As for the two Special Counsel who did make post-appointment contributions to Attorney General McMaster, the Court finds, for the reasons set forth below, that their contributions are not made illegal by the statute and that, further, even if the contributions were covered by the statute, they still would not suffice to justify disqualification on the facts of this case.

It is well understood in South Carolina that a basic rule of statutory interpretation requires that, where possible, statutes receive a construction which will render them valid. *Last v. MSI Construction Co.*, 305 S.C. 349, 409 S.E.2d 334 (1991); *Mitchell v. Owens*, 304 S.C. 23, 402 S.E.2d 888 (1991) (statutes are presumed to be constitutional and will be construed so as to render them valid). "[A] statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object . . . ." *Crescent Mfg. Co. v. South Carolina Tax Comm'n*, 129 S.C. 480, 493-94, 124 S.E. 761, 765 (1924); *Poinsett Constr. Co. v. Fischer*, 301 S.C. 343, 391 S.E.2d 875 (Ct. App. 1990). Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation. *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331 (1977).

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Applied here, this rule of statutory construction requires that this Court refrain from construing § 8-13-1342 as Lilly seeks to have it interpreted, namely as an ethical prohibition covering the practice of law and lawyer-client contractual dealings usable by adverse parties to drive a wedge between the Attorney General and his Special Counsel, appointed to represent the State in litigation.

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V. Control Over the Ethics of Lawyer-Client Dealings Rests with the Court

A major reason Lilly's illegality arguments fails is because neither the General Assembly nor the State Ethics Commission controls the subject of legal ethics in South Carolina. That function belongs to the Supreme Court. Lilly has repeatedly informed this Court that no Court-created ethics rule has been violated here.

At page 5 of its Motion to Disqualify, Lilly explains that the Campaign Reform Act "gave the State Ethics Commission . . . responsibilities over . . . ethical rules of conduct," with section 8-13-1342 prohibiting persons awarded contracts with the State from contributing to campaigns of officials in a position to act on those contracts." *Id.* Insofar as the statute regulates relationships outside the practice of law, it is unexceptionable. Insofar as the statute purports to impose unique and unfair obligations restraints on Special Counsel hired by the State, it raises grave constitutional questions which should be avoided by this Court.

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The General Assembly possesses no constitutional role in defining, regulating or punishing otherwise proper and ethical dealings between lawyers and their clients. Pursuant to Article I, Section 5 of South Carolina's Constitution, the South Carolina Supreme Court possesses the ultimate responsibility for ruling on attorneys' ethical matters. *See In re Okpalaeke*, 374 S.C. 186, 193, 648 S.E.2d 593, 597 (2007), *citing In re Rushton*, 286 S.C. 543, 544, 335 S.E.2d 238, 238 (1985).

An express provision in the Rules of the Supreme Court Rule makes it clear that attorneys' ethics are determined by ethical rules established by the Court, not the General Assembly. See SCACR 407, Rule of Professional Conduct Preamble, ¶ 11, which declares: "To the extent that lawyers meet the obligations of their professional calling,

the occasion for government regulation is obviated." Lilly has conceded that plaintiff's lawyers here have met the obligations of their professional calling; nowhere does Lilly charge them with a violation of any provision of the Rules of Professional Conduct. Reading section 1342 to create unethical behavior in the attorney-client setting is improper.

When it comes to setting rules of behavior for Special Counsel appointed by the Attorney General, the General Assembly's regulatory power is limited. Thus, in *Williams v. Bordon's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980), the Supreme Court struck down a statute aimed at guaranteeing continuances for lawyer-legislators while the South Carolina General Assembly was in session. The Court relied on separation of powers principles in holding the statute invalid, unequivocally rejecting the notion that the General Assembly has the right to assume control over the rendition of legal services. *Williams v. Bordon's Inc.*, 274 S.C. 275, 278, 262 S.E.2d 881, 883-84 (1980). Likewise, the authority to regulate the relationship and the dealings between Special Counsel and Special Counsel's client, the State *ex rel.* the Attorney General, fall within the inherent power of the Supreme Court to control all aspects of the practice of law in South Carolina. *See also, Gmerek v. State Ethics Commission*, 751 A.2d 1241 (Pa. 2000) (Lobbying Disclosure Act, though it applied to nonlawyers as well as lawyers, is unconstitutional in regulating the professional activities which are regulated solely by the judicial branch).

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Because of the Supreme Court's special role in policing attorney-client relationships, and because such a specially regulated relationship is involved in the Attorney General-Special Counsel setting, the Court concludes the Legislature did not

intend to include such relationships within section 8-13-1342's sweep. The Court concludes that the proper way to avoid adjudicating the unconstitutionality of section 1342 is to construe it to be pre-empted by legal ethics rules to the extent it would apply to lawyers.

Pertinent case law supports this policy choice. In the words our Supreme Court used in *Hagood v. Summerville*, 362 S.C. 191, 196, 607 S.E. 2d 707, 710 (2005), "the attorney-client relationship . . . demands a confidential, trusting relationship that often develops over time." The Supreme Court's ethical rules have been written to "require attorneys to maintain the highest professional and ethical standards in their dealings with clients." *Matter of Conway*, 305 S.C. 388, 393, 409 S.E.2d 357, 360 (1991). The attorney-client relationship has long been viewed as sacrosanct. As was stated in *Martin v. Camp*, 219 N.Y. 170, 173, 114 N.E. 46 (1916),

> [n]otwithstanding the fact that the employment of an attorney by a client is governed by the contract which the parties make, the peculiar relation of trust and confidence that such a relationship implies injects into the contract certain special and unique features.

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As was stated in *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 57 (Mo. 1982), the relation between a lawyer and his client is a delicate and exacting one, highly personal. (quoting *Craig v. Jo B Gardner*, 586 S.W.2d 316 (Mo. banc 1979) (quoting 7 AM.JUR.2D *Attorneys* at Law ' 92 at 105 (1963)). The Court concludes section 1342 has not application in the attorney-client setting.

VI. Section 1342 Yields an Unfair and Inequitable Result if Applied as Lilly Requests.

Besides pre-emption of the regulation of attorneys by virtue of the separation-of-powers doctrine and Court Rule, another problem with section 1342, is the unfair result

the statute would yield, if Lilly's section 1342 argument prevails. According to Lilly the statute criminalizes campaign contributions made to a government official by lawyers he hires, but the statute turns a blind eye to campaign contributions made to the same official by lawyers for the other side. The lawyer who signed Lilly's motion to disqualify, and the political action committee for the local law firm representing Lilly have both made significant campaign contributions to the Attorney General within the last year, i.e., while this case is pending. The corrupting potential flowing from adverse lawyers' contributions is certainly no different from that flowing from payments by counsel hired by the government official in question.

It simply is bizarre to say that the lawyers an official is working with cannot show their support for the official (and exercise their First Amendment rights) by making a contribution to him or her, but the lawyers on the other side (who may be seeking from the official a favorable deal for their client) can make contributions calculated to further their client's agenda. The facts before this Court show this is not merely a hypothetical problem.

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A statute which prohibits a government official's litigation allies from contributing to him, but permits his litigation adversaries to do so is inordinately unfair. It is obvious that section 1342 was written without contemplating the practicalities of the litigation setting or the special role played by the Supreme Court in policing attorney-client relationships. This is another persuasive reason the statute should not be construed as applicable here. To the extent it discriminates against campaign contributors aligned in litigation with a government official, but allows contributions by the official's

adversaries, it is illogical and unfairly deprives the official's retained counsel of equal treatment, that is, equal protection under the law.

VII. An Ethics Commission Opinion Supports Reading § 1342 Narrowly

The Court notes in passing that even the State Ethics Commission tends to read section 1342 narrowly. Ethics Opinion SEC A092-019 (Dec. 18, 1991), analyzes Section 1342 and concludes:

> The Commission does not believe that the General Assembly intended to restrict campaign contributions to the extent that employees of companies that contract with the State would be prohibited from making a campaign contribution. Accordingly, the Attorney General's campaign may accept campaign contributions from lawyers and employees that receive contracts to provide legal services under the Attorney General=s Associate Counsel Program.

Special Counsel points out that under the Retention Agreement by which they were appointed, any fees received by the Special Counsel will be paid to them as joint venturers. There is some merit in this analysis, for if the suit succeeds, the Retention Agreement makes it clear Special Counsel will share the profits, if any, flowing from their work as co-venturers. The Retention Agreement evidences a joint undertaking by Special Counsel, subject to the Attorney General's overall control, of a single project (the Lilly lawsuit) for profit, a commitment to share profits as well as losses, a contribution of skills and property by the co-venturers, and a community interest and control over the subject matter of the enterprise. It appears that as a result of the Retention Agreement, Special Counsel did in fact form a joint venture to prosecute this case on behalf of the State in this case. *See Berger v. Mead*, 127 Mich. App. 209, 338 N.W.2d 919, 922 (1983). Under the Campaign Reform Act relied on by Lilly, joint ventures are covered persons. See S.C. St. Ann. 8-13-1300 (25) defining person to include a "joint venture."

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The above-quoted 1991 Opinion rendered by the State Ethics Commission expresses the belief that the General Assembly did not intend "to restrict campaign contributions to the extent that employees of companies that contract with the State would be prohibited from making a campaign contribution." Opinion SEC A092-019 (Dec. 18, 1991), *supra.* Here, it is possible to view the "company" the Attorney General appointed as a de facto joint venture formed by Special Counsel for purposes of undertaking the Lilly case. This is significant, because the joint venture itself has never contributed anything to Attorney General McMaster; two of the joint venture's members, two of the members' firms, and employees of two members' firms have, but such contributions are plainly permitted under the Ethics Commission's ruling that "the Attorney General's campaign may accept campaign contributions from lawyers and employees that receive contracts to provide legal services."

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Moreover, as noted above, it would be anomalous in the extreme to construe a statute to criminalize unsolicited campaign contributions by lawyers toiling on behalf of the State against a litigant like Lilly, while permitting Lilly's lawyers to make campaign contributions to the lawyer leading the attack against them and their client.

VIII. Appointment and Use of Special Counsel Is Properly Within the Attorney General's Powers and Unaffected by § 1342

The Attorney General is a constitutional officer, and is charged with the duties of the State's chief legal officer, possessing broad constitutional, statutory and common law authority to represent the State, to enforce the laws of South Carolina, and to protect "public rights." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 240, 562 S.E.2d 623, 627 (2002). See also § 1-7-10 *et seq.*, including § 1-7-30 [Attorney General appoints assistants]; § 1-7-85 [Office of Attorney General may obtain reimbursement for attorneys

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fees or investigative costs or costs of litigation awarded by court order or settlement]; § 1-7-170 [a "department or agency of state government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him . . . ."] It is the Attorney General who is responsible "for vindicating wrongs against the collective citizens of the State." *Condon v. Hodges, supra.*

As the chief law officer of South Carolina, the Attorney General is authorized not only to appoint assistant attorneys general to carry out these duties, see § 1-7-30, *supra*, but to employ special counsel from the private sector "to represent and protect the interests of the state." *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445, 448 (1943). It is generally acknowledged that "[a] determination by the attorney general of the extraordinariness of a case calling for outside counsel is a decision within his or her discretionary authority ... and it has been stated there is no limit on the attorney general's ability to appoint a special prosecutor." 7 Am.Jur.2d, *Attorney General, § 14.*

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In view of the great latitude given to decisions by the Attorney General in prosecuting and staffing cases, it is appropriate to read section 1342 narrowly. Section 1342 is best read to not reach the dealings between Special Counsel and the Attorney General relates to the unique role of the Attorney General as chief prosecutor of the State and as the state's chief legal officer. The Supreme Court has consistently recognized that certain constraints normally imposed by ethical requirements are inapplicable to the Attorney General's representation of the public interest. For example, in *State ex rel. McLeod v. Snipes*, 266 S.C. 415, 223 S.E.2d 853 (1976), the Court held that representation by the Attorney General of a public officer in a criminal case did not

ethically conflict with the Attorney General's role in prosecution of that case. As the Court noted,

> [w]e find no mandated conflict of interest in the role occupied by the Attorney General under the Constitution [as chief prosecutor] and the statute [requesting the Attorney General to defend public officers]. The Attorney General is not required to sit at both the prosecution and defense table in the prosecution of a public official, in the sense that he or all of his staff equally participate in the prosecution or defense .... [The Attorney General has] ample latitude to designate an individual or individuals who could independently represent the public official, if the Attorney General found that he could not do so because of a conflict with his duties as chief prosecuting officer.

223 S.E. 2d at 855. *See also, Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977) (Attorney General's representation of municipal officials in criminal prosecution did not result in inherently conflicting or unethical duties upon Attorney General, including requirement that prosecuting officer not accept fees in civil action based upon same facts); *State ex rel. McLeod v. McInnis*, 266 S.C. 415, 223 S.E.2d 853 (1976) (Attorney General represented adverse parties in case brought to declare JARC statutes unconstitutional). Clearly, as the State's top lawyer, the Attorney General must shoulder special duties and responsibilities imposed by statute in order properly to represent the State in court and to oversee the State's litigation. With these provisions in mind, the Court does not believe that § 8-13-1342 is applicable to the situation here, a situation which involves the Attorney General's retention of private counsel in complex litigation to represent the State on a contingency fee basis.

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Examination of the precise language of § 8-13-1342 demonstrates the great difficulty in applying this statute in this instance. Section 8-13-1342 is expressly applicable to an award of a "contract with the state . . . ." However, as has been noted,

outside counsel's rights to the proceeds of the contingent fee for performance of his or her work is not a "claim against the state," but one against the fund paid by the defendants (if any). *People v. Philip Morris*, 759 N.E.2d 906 (2001). Moreover, courts have held that such proceeds are not state funds or "public funds" since they never are deposited in the State Treasury. *Conant v. Robins, et al.* 603 N.W.2d 143 (Minn. 1999).

Further, § 1-7-170 expressly authorizes the Attorney General to approve any engagement "on a fee basis [of any] attorney at law" to represent an agency or department of state government and to approve the fee of that private attorney or attorneys. This statute, which for many years appeared each year as a Proviso in the Appropriations Act, was codified by the General Assembly as § 1-7-170 in 2008, long after § 8-13-1342 was enacted in 1991 as part of the State Ethics Act. The Court notes that Section 1-7-170 gives virtually unlimited discretion to the Attorney General to approve private counsel and the fee arrangement for such counsel's services. Such would, of course, include a contingency fee arrangement with the Attorney General's own designated attorneys to act as special counsel on his behalf.

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On the other hand, § 8-13-1342 imposes clear constraints upon the award of contracts with the State by requiring that no campaign contributions may be given to any person awarding a contract with the State. Under ordinary rules of statutory construction, § 1-7-170, a specific statute enacted later in time to the more general § 8-13-1342, would be deemed controlling. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000).

The Court also finds the Supreme Court's decision in *S.C. Coastal Council v. State Ethics Commission*, 306 S.C. 41, 410 S.E.2d 245 (1995) to be persuasive. In *Coastal Council*, the Ethics Commission had concluded that the Coastal Council was

governed by a provision in the Ethics Act forbidding any person from serving as a member of a body regulating business with which that person is associated. However, the Court concluded that such provision was inapplicable to the Coastal Council. In the Court's view, the separate body of statutory law governing the Coastal Council was controlling. According to the Supreme Court, "[a]fter reviewing the Act, which defines Coastal Council's regulatory duties, and after examining Coastal Council's regulations, we conclude that Coastal Council regulates the preservation and utilization of coastal resources." 410 S.E.2d at 247.

Likewise, the various statutes and common law relating to the powers and duties of the Attorney General bestow upon him broad discretion to appoint or engage attorneys to assist him in the representation of the State and to determine the fees for such representation rather than to award a contract with the State in the ordinary course of state business. Further, special ethics rules specifically tailored to policing the propriety of attorney-client dealings exist under the Rules of Professional Conduct and apply to the relationship between the Attorney General and the Special Counsel he appointed. Thus, based upon the same type of reasoning as in *Coastal Council*, the Court finds that § 8-13-1342 is inapplicable to the situation where the Attorney General appoints private counsel on a contingency fee basis to assist him in the representation of the State in this matter.

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Finally, as an additional reason in support of the Court's finding that section 1342 offers no grounds for Lilly's disqualification motion, the Court notes that the special confidential fiduciary relationship embraced by the Retention Agreement falls outside the type of standard type of commercial contract award at which section 1342 is targeted. Unlike a normal state contract with a supplier or goods or a service-provider, here no

payment has been made or will be made out of State funds to Special Counsel. They will be paid, if at all, purely out of any fund they are able to generate for the State's benefit. The fiduciary and adversary pressures involved in this case make the setting very different from that encountered in the standard commercial context. Without denying that there is a financial aspect to the dealings between Special Counsel and the Attorney General, the Court concludes that the appointment of Special Counsel by the Attorney General reflects a relationship different in kind and degree from the contract-award setting envisioned by section 1342. See, *Kinder v. Nixon*, 2000 WL 684860 (Mo. App. W.D. 2000) (Athe Attorney General has the authority to appoint special assistants unless the Legislature has expressly forbidden the exercise of that power.").

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Stated differently, there are numerous huge differences between retainer agreements between Special Counsel and the Attorney General and commercial contracts between a municipality and its vendors. Supreme Court rules thoroughly regulate the former relationship not the latter. Intense, well understood fiduciary obligations permeate the former; the latter concerns mostly business as usual. Most importantly, the special attorney-client relation that arises when the Attorney General appoints a law firm or group of lawyers in whom he has absolute confidence is far different in scope and content from those generated when contracts are awarded to commercial entities by the State through other processes such as the State Procurement Code.

No provision of law expressly forbids the giving of a campaign contribution by a joint venture member to the Attorney General by whom he was appointed, unless there is a *quid pro quo* or some other unique circumstance. No such charge has been made here.

IX. A Balancing of Equities Supports Denial of the Motion to Disqualify

As noted above, Lilly has not presented competent evidence of any adverse prejudice it has suffered due to the behavior of Special Counsel. There has been no "meaningful showing that the trial process here will be tainted in any way" due to Special Counsel's participation. *See Reilly v. Computer Assoc. Long-Term Disability Plan*, 423 F. Supp.2d 5, 10 (E.D. N.Y. 2006). It is appropriate to weigh the foreseeable lack of taint against the hardship that disqualification in this very hard-fought and difficult case would place on plaintiff on the eve of trial. *Id.* Weighing the parties' relative hardship is appropriate here. *See In re Bohack Corp.*, 607 F.2d 258, 263 (2d Cir.1979) (stating in the bankruptcy context that "[t]he delay and additional expense created by substitution of counsel is a factor to which we have attached considerable significance in these cases."). A weighing of the parties' relative hardship provides further justification for denial of the motion to disqualify based on Lilly's § 1342 illegality claim. *See also*, SCACR 407, Rule 3.7(a)(3) (listing "substantial hardship on the client" as a factor to be evaluated in determining whether a lawyer-witness must be disqualified).

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X. Administrative Remedies Have Not Been Exhausted

Lilly has invoked the Ethics Act and cited an opinion by the State Ethics Commission interpreting section 1342 in its brief. Conspicuously absent from the record is any sign that Lilly has presented its ethics charges based on section 1342 to the attention of the Ethics Commission for its consideration. This Court is disinclined to mete out severe punishment to lawyers and their client based on a novel application of a statute that even the Ethics Commission seems to agree needs to be narrowly construed.

In any event, to repeat, there has been no showing that there has been any prejudice to the Defendant and the court finds that the Special Counsel Retention Agreement contract does not constitute a denial of equal protection or due process in this case. If the Defendant wishes to complain about the behavior of Special Counsel in light of section 1342, it has access to the same Commission established to investigate and rule on such matters as any other citizen.

Alternatively, if Lilly wishes to test the legality of Special Counsel's service, the Court believes that subject should be more properly addressed in a declaratory judgment action, which has not been filed at this point, not through a motion to disqualify counsel filed at this late hour in this case. The Court's consideration of the matter on the eve of trial is particularly inappropriate since it is not an issue which has been presented to the court by pleading as required under Rule 8(c)..

SUMMARY

For all of the foregoing reasons, Lilly's Motion to Disqualify is hereby DENIED. AND IT IS SO ORDERED.

Roger L. Couch
Circuit Court Judge

September 22, 2009
Spartanburg, South Carolina

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2011 WL 2185861 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Spartanburg County

Ex. Rel. Alan Wilson in his capacity as Attorney General of the State of South Carolina, Plaintiff,

v.

ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., f/k/a Janssen Pharmaceutica, Inc., And/or Janssen L.P., And Johnson & Johnson, Inc., Defendants.

No. 07-CP-42-1438.
June 3, 2011.

Penalty Order

Roger L. Couch, Judge.

The Jury has determined that Ortho-McNeil-Janssen Pharmaceutica, Inc., f/k/a Jan??n Pharmaceutica, Inc., and/or Janssen L.P. (hereinafter referred to as simply Janssen) have violated the South Carolina Unfair Trade Practices Act (SCUTPA) by willfully engaging in unfair or deceptive practices in the maimer in which they conducted their trade or commerce and in the marketing and labeling of Risperdal in the State of South Carolina. The question now before this Court is: What are the appropriate penalties to be levied against those companies for their actions?

The statutes involved in this action are:

South Carolina Code Section 39-5-20: Unfair methods of competition and unfair or deceptive acts or practices unlawful; application of interpretations of Federal act.

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

South Carolina Code Section 39-5-110: Civil penalties for willful violation or violations of injunction.

(a) If a court finds that any person is willfully using or has willfully used a method, act or practice declared unlawful by Section 39-5-20, the Attorney General, upon petition to the court, may recover on behalf of the State a civil penalty of not exceeding five thousand dollars per violation.

(c) For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 39-5-20.

The South Carolina Unfair Trade Practices Act provides that when it has been determined that willful violations of the Act have occurred, the State may recover a civil penalty not to exceed five thousand dollars per violation. *Id.* It is within the judge's discretion to determine the total amount of the penalty, so long as it does not exceed the statutory limitation. There can be no error of law in imposing a fine within the limits authorized by the Act. Within those limits, the amount of the fine is a matter within the judge's discretion. *State ex rel. McLeod v. C & L Corp., Inc.*, 280 S.C. 519, 313 S.E.2d 334, (S.C. App. 1984).

During the trial of this matter, certain information and testimony presented to this Court was placed on a list of contested evidence. I have reviewed the proffer of this evidence and make the following rulings:

• Evidence of the Louisiana legal action was excluded and not considered by this Court.

• Evidence concerning the Topomax criminal settlement was excluded and not considered by this Court

• Testimony of Dr. William Wecker, I find, did not meet the tests of reliability for expert witnesses established by our courts, and therefore, the testimony should not be entered into the record. Further, I find some of the conclusions reached by him are not supportable. This conclusion is based on other scientifically reliable evidence already entered into the record of this case. Therefore, even if his testimony had been admissible, I would have found his testimony to be totally unreliable, and it would have been given no weight by this Court.

Both the Plaintiff and the Defendants agree that the Court, when exercising its discretion in determining the measure of penalties to be assessed, should consider factors similar to these articulated in *United States v. Reader's Digest Ass'n* 662 F.2d 955, 967 (3rd Cir. 1981)

• The good faith or bad faith of the Defendant;

• The injury to the public;

• The desire to eliminate the benefits derived by a violation;

• The necessity of vindicating the authority of the agency involved; and;

• The Defendant's ability to pay.

I will begin my discussion of these factors by pointing out the Credo of the Defendants' parent company which expresses the standard of conduct to which the Defendants purport to hold themselves.

The Credo of Johnson & Johnson, as published on its website and referred to in its annual reports begins, "We believe our first responsibility is to the doctor, nurses and patients, to mothers and fathers and all others who use our products and services. In meeting their needs everything we do must be of high quality."

This Court is aware that the Defendants are for-profit corporations which are in the business of developing new and better medicines for a whole host of human ailments. In many ways, the competitive environment in which they operate is the engine that drives the research and development of new and evermore effective medicines from which all of mankind benefits. In this case in particular, it is acknowledged by all concerned that Risperdal is an excellent drug for the treatment of mental illnesses. It has been a quality of life saver for millions of patients. It allows those who are treated with it to escape many of the effects of their mental illnesses and live a more open and productive life.

Also, this Court is not so naive so as to not understand that these companies are in this business to generate a profit for their shareholders and investors. Pharmaceutical companies, such as the Defendants, must generate returns on their investments in order to assure their survival and continued vitality. However, as Janssen's parent company points out in its own credo, the first obligation which it owes is to the persons who prescribe, use and consume their products. It is the collision of these competing interests that has created the issues that we consider here. Additionally, it is the loss of the Company's focus, upon the primary objective of its credo, which brings us to this discussion.

A. The good faith or bad faith of the Defendant:

In discussing this factor, I am mindful of the position taken by the Defendants throughout this trial. That position is that what Defendants said about Risperdal was true or was later proven to be true. Therefore, they could not have been unfair or deceptive in their actions.

The statutes provide for punishment for "unfair" or "deceptive" methods, acts or practices in the conduct of trade or commerce. S.C. Code Ann. § 39-5-20 & 39-5-110. This Court has consistently ruled that those issues concerning fairness or deceptiveness must be weighed using the information that was available and existed when the statements were made. The actions must be weighed in light of the intentions that existed when they were made. In considering the issues presented by this defense, I came upon an article by Joel Marks, in a magazine entitled *Philosophy Now,* issue 27; (*http:// philosophynow.org/issue27/The Truth_About_Lying*) in which he discussed the nuances of deception, lies and the truth. I found the following excerpts from that article to be very helpful in my analysis of this case.

"Lying has nothing to do with truth and falsity. It is simply not true that the definition of lying is stating a falsehood. Lying seems instead to be a relation between a belief and an intention. If you utter what you believe to be false (regardless of whether it is false) for the purpose of inducing another to believe that it is true, you have lied." Id.

"But deceiving is a broader category than lying." Mark goes on to explain, "This is important to recognize because it implies that any comparable act of deception, lie or not, is just as wrong." *Id.* It has become clear to me that the act of deception involves engaging in disingenuous actions by which one attempts to manipulate the intended audience into acting upon the deception in a certain desired fashion. Deceiving statements may involve issuing statements which are true but which are issued for the purpose of manipulation. In this Case, the manipulation was to get prescribers and patients to make treatment decisions based upon misleading or incomplete data or concealing data with would have impacted those decisions. Cases in our State have indicated that even true statements may serve as the basis for an action under the SCUTPA if they have the capacity or tendency to deceive. *Wright v. Craft,* 372 S.C. 1, 372 S.E. 2d 486 (2006 S.C. App.).

Here, in this case, the Jury has found the methods, actions and practices of the Defendants to be unfair and deceptive.

i. Label

I will begin this discussion of the good or bad faith of the Defendant as it relates to the labeling of the drug Risperdal. The drug was approved by the FDA in 1994. The FDA approved the initial label for the drug and all subsequent labels. The law allowed the Defendant to unilaterally strengthen Risperdal's warning section of the label as soon as there was reasonable evidence of an association of a serious hazard with the drug. There was no requirement that this should be delayed until a causal relationship was proved. 21 C.F.R. §201.57(e) (2006).

Both Dr. Plunkett and Wirshing testified that the early evidence concerning the adverse events involving this drug, as well as its chemical makeup, should have given Janssen reason to strengthen the warnings in its label concerning diabetes, hyperglycemia and weight gain. During the early years (1994-1998) of marketing, evidence of adverse events began to appear indicating that there may be an increased risk of hyperprolactinemia, diabetes, hyperglycemia and weight gain. Also, during this time there was growing evidence of cardio vascular problems associated with the use of the drug in the elderly. The Defendants conducted and participated in studies specifically designed to shed light on the possible side effects of the drug. Specifically, these studies included RIS USA-113 & 275 and ERI. In the case of ERI and Study 113, the results indicated a substantial relationship between the use of this drug and weight gain and diabetes. Rather than making the information gathered in these studies available to the medical, regulatory and scientific communities, the Defendants chose to use pretenses to keep them hidden. It is apparent to this Court that this information was not disclosed because it did not fit the marketing department's vision for the promotion and marketing of the drug, and ultimately the content of the label. The top line results of Study 113 became available to the Defendants in September of 1999. It is clear to this Court, particularly after the top line results of study 113 became available, that the Company systematically set about in a concerted effort to conceal that information and to manipulate the information available to the public for the purpose of protecting or improving its market share. They characterized the results of the study

as "flawed" and hid the results until 2009. When the results were released, they were not termed as a "flawed study," but were characterized as one that had some problems with its methodology, which problems did not affect the overall results. These reports were only released after the patent on Risperdal had expired.

From 1999 to 2003, the Defendants continued to take actions to avoid the disclosure of information which was in its possession and failed to take action to strengthen the warnings in its label. In 2003, the FDA required a class change in the label, which resulted in the issuance of the Dear Doctor Letter discussed below. Throughout this period of time, the Plaintiffs showed during the trial that up through 2007 there was never a warning for weight gain or hyperprolactinmia. The Plaintiffs showed by ample evidence that labeling issues followed the distribution of this drug throughout the period of its distribution. This Court is keenly?? aware that the issues involving the label vary throughout the period of time from the drugs launch in 1994 through 2007. I have made a conscious effort to average the penalty awarded for the labeling issue and have not awarded a penalty that is close to the maximum penalty available for those violations.

I do note that courts in this State have consistently upheld that medical patients have the right to make informed decisions concerning their treatment. It is elementary that the right to make informed treatment decisions would extend to, and include, the right of a patient to have made available to them, full and complete disclosures of the critical information in the package insert, in the label published on the Physician's Desk Reference or on the company's website. This need for full and complete disclosure of all available information is especially critical when the majority of the patients treated with this drug suffer from conditions which diminish their ability to make such critical decisions to the point that they may rely more heavily on the advice of their physicians or guardians. Because of the diminished mental capacity of the patients being treated, this Court finds the actions of the Defendants, upon this audience, to be detestable.

Based on the reasons stated above, and the considerable volume of evidence presented during the trial, this Court finds that the Defendants exhibited a callous disregard to a patient's right to have all possible information available, and in the hands of their physician, before deciding to use or continue to use the drug. Further, I find that the Defendants allowed the "profit at all costs" mentality to cloud the vision of their own responsibilities as acknow??edged in their credo.

Therefore, I find the bad faith of the Defendant to be considerable during the per?? September 1999 until 2007 as it relates to labeling questions. There is absolutely no doubt in my mind that the desire to protect market share overshadowed the good judgment of those in control at Janssen.

I note that the evidence supplied to this Court concerning the number of Risperdal prescriptions filled in South Carolina, during the applicable time periods, involved those which were filled under State sponsored programs, and it did not contain reliable information as to the total number of prescriptions filled in the State from all sources. Therefore, it would require too much speculation on the part of the Court to attempt to tie the penalties to the total number of prescriptions filled in the State.

ii. Dear Doctor Letter

The Dear Doctor Letter, issued in November of 2003, was clearly an effort by the Company to manipulate the message about Risperdal. Specifically, the letter was sent during the same time period that the FDA was requiring a class label change, which required that all atypical anti-psychotics include in their labels a warning concerning the dangers of these drugs and their increased risk of diabetes. A careful review of the e-mail threads, both before and after the publication of that letter (which are replete in the record), indicate a conscious effort by the company to "spin" the message, driven by marketing considerations, about Risperdal.

The manner in which the letter was written indicates to this Court evidence of a clever effort to deliver a deceptive message to prescribing physicians. Specifically, I am referring to the use of eight studies listed, by themselves, on the final page of the letter, some of which ?? not support the premise of the letter itself. Examples of the clever deception included in this letter include the effort to contrast itself with Zyprexa. This was done after the FDA had directed the Defendants not to do so, and there was

no mention of ERI or Study 113. This is true particularly in light of the information which the Defendants were concealing from public disclosure or consideration. The continued reference by the Defendants to Study 113 as a "failed study" during the ten years that it was concealed; then, after the patent for Risperdal was lost in 2009, to release this as a properly conducted study, illustrated the level of deception to which the Defendants stooped. I note no mention, to the public or the FDA, of the Study 113 during the years that it was concealed. The effort to hide these studies (113,275 & ERI) even continued despite a request from the FDA, in May 2000, for the Defendants to make available all information that they had in possession concerning hyperglycemia and diabetes risks to Risperdal users. The Defendants submitted voluminous responses to that request, but did not disclose the top line results of study 113 or ERI; apparently, because those results were unfavorable to their marketing message. While this is not a "fraud on the FDA" case, this concealment shows that the Company employed procedures and methods which almost guarantee repetition and further endangerment of the public.

I could not agree more with the Janssen executive, Scott Reines, who characterized the Dear Doctor Letter in an unfavorable light and railed against those in the Company who wrote, approved and distributed the Letter. He said in his e-mail of April 28, 2004, referring to the Dear Doctor Letter, "But no competent person would have let it go out." He then went on to say, "It's really a black mark for J&J."

This Court finds that the actions of the Company in regards to this Letter exhibited extreme bad faith. It was a conscious effort to deceive and was unfair in the manner in which it was composed and delivered. Additionally, it was done in such a fashion so as to directly influence the prescribing decisions of doctors. Who knows how many of those mothers, fathers and patients referenced in their Credo, to be owed their best, were influenced into making incorrect decisions concerning their drug therapy?

An example of the subtle manner in which the Letter was used to deliver only a "certain" message to physicians is evident in the fact that the November Letter was placed in the folios of the detail persons who visited the doctors, so that it could be shown and emphasized to each doctor on every visit. However, later, when the FDA required that a corrective letter be mailed, the corrective letter was not placed in the detail person's folios to be shown to the doctors on every visit.

B. Injury to the public

It is noted that the issues involved in this Case do not require direct proof of any specific injury to the public. Rather, the SCUTPA requires a showing that the unfair Or deceptive act is capable of repetition, which shows that the violation would have an effect on the public's interest. I quote from my charge on the subject:

"IN ADDITION, THE PLAINTIFF MUST PROVE THAT THE UNFAIR TRADE PRACTICE OR ACT AFFECTED PERSONS OTHER THAN THE PARTIES TO THE TRANSACTION IN WHICH THE ACT COMPLAINED OF OCCURRED. EXPRESSED DIFFERENTLY, THE PLAINTIFF MUST PROVE THAT THE UNFAIR TRADE PRACTICE OR ACT HAS AN IMPACT ON THE PUBLIC'S INTEREST. THE PLAINTIFF MUST PROVE THE ADVERSE EFFECT OR IMPACT ON THE PUBLIC INTEREST BY SPECIFIC FACTS.

AN ACTION HAS AN IMPACT ON THE PUBLIC INTEREST IF IT IS SHOWN BY THE PREPONDERANCE OF THE EVIDENCE THAT THE UNFAIR TRADE PRACTICE OR ACT IS CAPABLE OF REPETITION. [1]

1 *Burbach v. Investors Mgmt. Corp.*, 326 S.C. 492, 484 S.E.2d 119 (Ct. App. 1997).

SHOWING THAT AN ACT IS CAPABLE OF REPETITION CAN BE SHOWN IN SEVERAL WAYS, BUT IT CAN BE SHOWN IN TWO SPECIFIC WAYS:

(1) BY SHOWING THE SAME KIND OF ACTION HAS OCCURRED IN THE PAST, THUS MAKING IT LIKELY THEY WILL CONTINUE TO OCCUR ABSENT DETERRENCE; OR

(2) THE COMPANY'S PROCEDURES CREATE A POTENTIAL FOR REPETITION. THESE ARE WAYS TO SHOW THE POTENTIAL FOR REPETITION, BUT NOT THE ONLY WAYS, THAT THE POTENTIAL FOR REPETITION MAY BE SHOWN. IT MAY BE SHOWN BY OTHER MEANS."

My charge went on to say, "Since these two ways are not the only means for showing the potential for repetition or public impact, each case must be evaluated on its own merits to determine what a plaintiff must show to satisfy the potential for the repetition/public impact prong of the SCUTPA. *Daisy Outdoor Advertising, Inc. v. Abbott,* 322 S.C. 489, 497, 473 S.E.2d 47, 51 (1996). Nevertheless, a plaintiff has proven an adverse effect on public interests if he proves, by the preponderance of the evidence, and by specific facts, the potential for repetition exists". Id at 493, 473 S.E.2d at 49.

In this Case, the Jury found that the actions of the Defendants did affect the public interest and were capable of repetition. Such a finding was necessary in order for the July, to reach the verdict that they did. In considering the principles that are at issue in this Case this Court finds that these issues involved are of critical importance to the public, which use and consume prescription drugs in general. Additionally, it is the belief of this Court that this group constitutes a large percentage of the total population. The public's interest in requiring that drug manufacturers fully disclose all information available to them concerning the effects of their drugs in a fair and non-deceptive manner is of paramount importance to the health and safety of those using the drugs. Only when full honest and fair disclosure is done, can doctors and patients make fully informed decisions concerning possible side effects that may be suffered as a result of the drug therapy to be used by the patient. Therefore, the public interest affected by the actions of these Defendants is enormous.

C. Desire to eliminate the benefits derived from a violation

Quite frankly, in this Case, it would be virtually impossible to accurately determine the degree to which the Defendants benefitted from their actions. It is clear to this Court, that if the aim of these actions by the Defendants was to protect the market share of Risperdal; then it succeeded, in that the share did not suffer as a result of the ever expanding warnings. The purpose of this Court is to penalize the actions of the Defendants and is not intended to award damages based upon any measure of damages or ill-gotten gain. It is clear from the information stated below that the profits from this drug, to the Defendants, were enormous, and the penalties set by this Court represent a relatively small percentage of the overall profits generated by the companies. In determining this percentage, I note the relatively small percentage of the Defendant's business conducted in South Carolina in comparison to the overall world wide scope of that business.

D. The necessity of vindicating the authority of the agency involved

The SCUTPA was enacted by the legislature as a consumer protection measure. The Attorney General has been granted broad powers to enforce that Act, particularly when a willful violation of the Act has occurred. Here, the Jury determined that a willful violation of the Act occurred. In doing so, the Jury has determined that the public interest was affected by those wrongful actions and that those actions by the Defendants were willful and intentional.

It is clear, that when a company comes into this State and conducts its business in such an unfair manner, so as to deceive the public in the conduct of its trade or commerce, that there is a need for a central authority to challenge those actions and protect the public's interest. This protection of the public's interest should be done in such a manner so as to deter future violations of the Act, and to protect the public's interest to the extent necessary. The Legislature has clearly placed this burden and duty upon the Attorney General and it is the responsibility of that office to vindicate the public's interest in this Case.

E. The Defendant's ability to pay

In setting a penalty, it is necessary to consider what level of penalty is necessary to make the wrongdoer take notice of the problem and correct its future actions. Obviously, the level of the penalty will vary depending upon the financial ability of the wrongdoer to pay. This Court is aware that this is not a case involving the award of punitive damages, where the amount of punitive damages must bear some relationship to the amount of actual damages suffered. In those cases, the financial ability of the defendant alone will not support an award that far exce??ds the actual damages suffered.

In this Case, however, the issue is the level of penalties that is appropriate to punish the wrong. I am limited by the statute as to the amount of penalties that can be assessed per occurrence. Where the number of wrongs is extremely large and the profits derived enormous, the penalties must have a direct relationship to those numbers. Where deterrence and punishment is the aim, the financial ability of the wrongdoer is clearly a factor to be considered

The Defendant's, which were found to have been responsible for the unfair or deceptive acts or practices in the conduct of the defendant's trade or business, are wholly owned subsidiaries of the Johnson & Johnson Corporation. Janssen, itself, reports no separate financial information of which this Court was made aware. Therefore, the publically disclosed financial information, which was made available to this Court, is in the form of the annual report to shareholders of the parent corporation. It does not contain any separate financial information for the Defendants. It does contain information that was specific to Risperdal and some information specific to pharmaceutical operations. Profits for the Corporation and net cash and cash equivalents are reported for Johnson & Johnson and not its individual subsidiaries. The information considered by this Court in making a determination of the ability of the Defendants to pay includes:

Annual Sales of Risperdal worldwide per annual reports of Johnson & Johnson, Inc.:

- 1994 $ 0.172 Billion
- 1995 $ 0.343 Billion
- 1996 $ 0.502 Billion
- 1998 $ 0.588 Billion
- 1999 $ 0.892 Billion
- 2000 $ 1.083 Billion
- 2001 $1.845 Billion
- 2002 $2.146 Billion
- 2003 $2.512 Billion
- 2004 3.05 Billion
- 2005 3.552 Billion
- 2006 4.180 Billion
- 2007 * 4.697 Billion
- 2008 1.309 Billion
- 2009 1.425 Billion
- 2010 1.50 Billion

Total for the..... 29.796 Billion.

Testimony at trial indicated that the profit margin for sales of Risperdal was 97% or $28.90 Billion for the period of 1994-2010.

Earnings: The 2010 Annual report for Johnson & Johnson, the parent corporation, indicates worldwide sales of $61.6 billion which generated a free cash flow of $14 billion. Johnson and Johnson, Inc. Annual Report 2010, p. 1.

The Pharmaceutical Division reported sales and operating profits of $7,086 billion for the year 2010. Form 10-K for 2010, Filed with the Securities and Exchange Commission

Number of Violations:

A. Label

It is clear that the label was published with each sample distributed to the public. Clearly, there were other occasions when the label would have been published, such as through the Physician's Desk Reference or on the Defendants website; however, to find violations from those sources would require this Court to speculate as to the number of violations. Each distributed sample clearly contains a copy of the label and would be the most likely source of information for patients who are considering entering into an ongoing therapy with the drug. For purposes of this discussion, the Court considers each publication of the Risperdal label (package insert), by way of sample, to prescribers in the State of South Carolina until April 23, 2007, to be a separate violation.

• Sample Boxes Distributed 509,499

This court finds the appropriate average penalty to be $300.00 per violation: • $152,849,700.00.

B. Dear Doctor Letter:

•	Letters mailed	7,184
•	Sales calls where letter published	36,372
Total publications of letter		43,556.

The Court finds the appropriate penalty to be $4,000.00 per violation: $174,224,000.00.

Defendants shall pay, to the State of South Carolina, through its Attorney General, Alan Wilson, penalties in the sum of Three hundred twenty-seven million, seventy-three thousand, seven hundred and 00/100 dollars. ($327,073,700.00)

IT IS SO ORDERED.

<<signature>>

Roger L. Couch, Circuit Court Judge

Spartanburg, S.C.

June 3, 2011

Footnotes

* Patent for Risperdal expired in 2007.

End of Document

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

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

Plaintiff(s))

vs.) 2011-CP - 40- 3161

Cephalon, Inc.)

Defendant(s))

(Please Print)
Submitted By: C. Havird Jones, Jr. SC Bar #: 3178
Address: Office of the Attorney General Telephone #: 803.734.3680
1000 Assembly Street, Room 519 Fax #: 803.734.3677
Columbia, SC 29201 Other:
E-mail: agsjones@scag.gov

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☒ Pharmaceuticals (630)
- ☒ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** June 2, 2011

CEPH_DJ00000956

[0067]

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA IN THE COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2010-CP-40-
STATE OF SOUTH CAROLINA, ex rel. ALAN WILSON, in his official capacity as Attorney General for the State of South Carolina, Plaintiff, v. CEPHALON, INC., Defendant.	)	CERTIFICATE OF EXEMPTION FROM ADR

I certify that this action is exempt from ADR because:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is forfeiture proceeding brought by the State;
- ☐ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

*Although not listed as an exemption, this case is exempt from ADR because there is a substantial claim for injunction or declaratory relief requested in this case.

C. Havird Jones, Jr.	
Plaintiff/Attorney(s) for Plaintiff(s)	Defendant/Attorney(s) for Defendant(s)

Date: June 2, 2011.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
STATE OF SOUTH CAROLINA, ex rel. ALAN WILSON, in his official Capacity as Attorney General for the State of South Carolina,	)	Civil Action No.: 2011-CP-40-
Plaintiff,	)	**SUMMONS**
CEPHALON, INC.,	)	
Defendant.	)	

To: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Petition on the subscriber at his office, South Carolina Attorney General's Office, P. O. Box 11549, Columbia, South Carolina, 29211, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Petition within the time aforesaid, the Petitioner in this action will apply to the Court for the relief demanded in the Petition.

C. Havird Jones, Jr.
Assistant Deputy Attorney General
P. O. Box 11549
Columbia, SC 29211
(803) 734-3680

June 2, 2011

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND STATE OF SOUTH CAROLINA, ex rel. ALAN WILSON, in his official Capacity as Attorney General for the State of South Carolina, Plaintiff, CEPHALON, INC, Defendant.	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2011-CP-40- **COMPLAINT** **(Bench Trial Requested)**

CIVIL ACTION COMPLAINT

Plaintiff, the State of South Carolina (hereinafter "the State"), by and through its Attorney General, Alan Wilson, hereby complains of Defendant Cephalon, Inc. ("Cephalon"). This is a civil action for civil penalties and unjust enrichment with restitution through disgorgement, and other legal and equitable relief for violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*, ("SCUTPA") and for other state common law causes of action stated herein. This action is brought by the South Carolina Attorney General, as the chief legal officer of the State, in the exercise of his *parens patriae*, constitutional, statutory, and common law responsibilities to vindicate the State's sovereign interests, as well as the interests of its citizens. This action arises out of Cephalon's wrongful and illegal marketing, sale, and promotion of the drugs sold under the trade names Provigil®, Actiq®, and Gabitril® (hereinafter referred to collectively as "Drugs" or individually as "Provigil," "Actiq," and "Gabitril"). Attorney General Wilson, proceeding in this matter to protect the *public interest* in the State of South Carolina, complains that Cephalon engaged in

repeated unfair and deceptive acts, methods and practices with the purpose of achieving greater sales of Provigil, Gabitril, and Actiq. Cephalon achieved these sales through its wrongful and illegal marketing to physicians, healthcare professionals, consumers, and others about the safety and efficacy of Provigil, Gabitril, and Actiq and about the indications for which Provigil, Gabitril, and Actiq were approved. The relief requested by the Attorney General on behalf of the sovereign interest of the State and the State's citizens is to prevent Cephalon's unjust enrichment by seeking restitution through disgorgement and thereby prohibit Cephalon from reaping the benefits of its illegal promotion and marketing of the Drugs. The requested unjust enrichment amount to be disgorged is the total amount of monies expended, plus interest, for the Drugs in the time period they were deceptively misrepresentative and promoted in the State of South Carolina. Further, pursuant to S.C. Code Ann. § 39-5-110(a), the Attorney General seeks a recovery on behalf of the State a civil penalty not exceeding $5,000.00 for every willful method, act or practice declared unlawful by S.C. Code Ann. § 39-5-20.

PARTIES

1. Plaintiff, the State of South Carolina, is a body politic created by the Constitution and laws of the State of South Carolina and, as such, is not a citizen of any state.

2. The State brings this action, by its Attorney General, Alan Wilson, in its sovereign capacity in order to protect the interests of the State and its citizens. The Attorney General of the State of South Carolina, as its chief legal officer, appears in this action pursuant to his *parens patriae*, constitutional, statutory (S.C. Code Ann. § 1-7-100 and S.C. Code Ann. § 39-5-10, *et seq.*), and common law authority to protect the public interests of the State and its citizens.

3. Defendant Cephalon is a Delaware corporation with its principal place of business in Frazer, Pennsylvania. Defendant Cephalon includes any and all parents, subsidiaries, affiliates,

divisions, franchises, partners, joint ventures, and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives, and other persons acting on their behalf.

4. Upon information and belief, in committing the acts alleged herein, each and every managing agent, agent, representative, and/or employee of the Defendant was working within the course and scope of said agency, representation and/or employment with the knowledge, consent, ratification, and authorization of Cephalon and its directors, officers, and/or managing agents.

JURISDICTION AND VENUE

5. The jurisdiction of this Court is founded upon S.C. Const. Ann. Art. V § 11 which gives the Circuit Court general jurisdiction over civil actions.

6. This Court has personal jurisdiction over Defendant because Defendant does business in South Carolina and/or has the requisite minimum contacts with South Carolina necessary to constitutionally permit the Court to exercise jurisdiction with such jurisdiction also being within the contemplation of the South Carolina "long arm" statute, S.C. Code Ann. § 36-2-803.

7. At all times material hereto, Defendant was engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling, and/or selling Provigil, Actiq, and Gabitril.

8. Defendant did distribute, supply, market, sell, promote, advertise, and otherwise distribute Provigil, Actiq, and Gabitril in South Carolina and specifically in Richland County.

9. Defendant advertised and/or offered Provigil, Actiq, and Gabitril for sale in South Carolina through wholesalers, distributors, physicians, Pharmacy Benefit Managers ("PBM"), clinics, and/or pharmacies.

10. Venue in this Court is proper pursuant to the Rules of the South Carolina Supreme Court and the South Carolina Code.

11. This Complaint does not confer diversity jurisdiction upon the federal courts pursuant to 28 U.S.C. § 1332.

12. Likewise, federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 is not invoked by this Complaint, as it sets forth herein exclusively state law claims against Defendant. Nowhere herein does Plaintiff plead, expressly or implicitly, any cause of action or request any remedy which is founded upon federal law.

13. This Complaint is not an allegation of fraud on the United States Food and Drug Administration ("FDA").

14. This Complaint does not invoke the learned intermediary doctrine.

15. The issues presented in the allegations of the Complaint do not implicate significant federal issues; do not turn on the substantial federal interpretation of federal law; nor do they raise a substantial federal question. Indeed, Plaintiff expressly avers that the only causes of action claimed, and the only remedies sought herein, are for those founded upon the statutory, common, and decisional laws of the State of South Carolina.

16. Further, assertion of federal jurisdiction over the claims made herein would improperly disturb the congressionally approved balance of federal and state responsibilities.

17. Accordingly, any improvident and dilatory attempt by Defendant to remove this case to federal court would be without a reasonable legal basis in fact or law. Such an attempt by defendant would mischaracterize the allegations of this Complaint. This is not a fraud-on-the-FDA case and does not involve the learned intermediary doctrine or preemption issues. This is an action brought pursuant to the *parens patriae* authority of the Attorney General, SCUTPA and

the state common law based upon complaint of the misrepresentation, including intentional and willful misrepresentations, made by Defendant in the marketing of the Drugs. 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 that the penalties provision of SCUTPA applies.

REGULATORY AND LEGAL BACKGROUND

18. Pursuant to the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, the FDA regulates the content of advertisement to consumers, advertisement to physicians and other healthcare professionals, and product promotion directly to physicians and other healthcare professionals.

19. Under 21 C.F.R. § 202.1(k)(2), all marketing efforts, including brochures, handouts or other promotional information, aimed at physicians and other healthcare professionals are deemed to be regulated "product labeling."

20. Under 21 C.F.R. § 201.57, the product labeling must be pre-approved by the FDA and conform to FDA guidelines, including any and all claims of indicated uses.

21. The term "off-label" comes from the FDA labeling requirement that specific drugs be approved for treatment that is "on-label" and, therefore, any prescribing of drugs for a use other than what appears on the label is considered "off-label."

22. Cephalon, or others on behalf of Cephalon, applied for and received approvals from the FDA for Provigil, Gabitril, and Actiq for the treatment of specific medical conditions as follows:

a. In 1998, the FDA approved Provigil to improve wakefulness in patients with excessive daytime sleepiness associated with narcolepsy. In 2004, the FDA approved the expansion of the label to include the treatment of excessive

sleepiness associated with narcolepsy, obstructive sleep apnea/hypopnea syndrome, and shift work sleep disorder. Provigil was not approved for any other purpose.

b. In 1997, the FDA approved Gabitril as an anti-epilepsy drug as adjunctive therapy in adults and children twelve years and older in the treatment of partial seizures. Gabitril was not approved for any other purpose.

c. In 1998, the FDA approved Actiq to treat breakthrough cancer pain in patients with malignancies who were already receiving and who are tolerant to opioid therapy for their underlying persistent cancer pain. Actiq was not approved for any other purpose.

23. The prescribing of drugs by physicians for off-label use is not improper or illegal; however, the marketing and/or promotion of an off-label use is illegal under federal law under 21 U.S.C. § 352(f)(1).

24. In addition to being illegal under federal law, off-label marketing and promotion violates the South Carolina Unfair Trade Practices Act. S.C. Code Ann. § 39-5-20 states, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

25. Off-label marketing and promotion is an unfair and deceptive act or practice in that it tends to deceive and/or mislead physicians, other healthcare providers, and others regarding the indications that a drug can treat safely and effectively.

26. Off-label marketing and promotion is an unfair method of competition in that it disadvantages the many pharmaceutical companies that limit their marketing and promotion to legitimate, on-label indications.

27. Off-label marketing and promotion is an unfair method of competition and unfair and deceptive act or practice in that it results in consumers and third-party payers making payments for prescription drug products that they otherwise would not have purchased and/or reimbursed.

28. In addition, while off-label marketing and promotion violates the South Carolina Unfair Trade Practices Act in and of itself, off-label marketing and promotion is often accompanied by misleading and/or deceptive statements, implications, and/or omissions about the safety and efficacy of the drug.

29. Such conduct that is willful and intentional is subject to a civil penalty of up to $5,000.00 per violation pursuant to SCUTPA.

FACTUAL BACKGROUND

30. In spite of federal and state law prohibitions against off-label marketing and promotion, Cephalon promoted Provigil, Gabitril, and Actiq for unapproved indications from at least January 1, 2001 until at least December 31, 2006 in an effort to expand sales and market share.

31. Specifically, Cephalon marketed and promoted Provigil, Gabitril, and Actiq off-label for the following indications:

a. Cephalon marketed and promoted Provigil as a medication to treat a variety of conditions including sleepiness, tiredness, decreased activity, lack of energy, and fatigue. This marketing was contrary to FDA approval.

b. Cephalon marketed and promoted Gabitril as a remedy for anxiety, insomnia, and pain. This marketing was contrary to FDA approval.

c. Cephalon marketed and promoted Actiq for non-cancer pain uses. This marketing was contrary to FDA approval.

32. In addition, Cephalon made repeated, untrue, deceptive, or misleading representations of material fact to and/or omitted or concealed material facts from physicians, other healthcare providers, and others regarding the safety, efficacy, and/or use of Provigil, Gabitril and Actiq.

33. Cephalon's statements and/or omissions were undertaken with the intent that physicians, other healthcare providers, and others would rely on the statements and/or omissions.

34. Upon information and belief, Cephalon engaged in the following activities in the course of its unfair and deceptive marketing and promotion:

a. Instructing its sales representatives call on doctors who would not normally prescribe the drugs in the course of the doctor's practice;

b. Training its sales representatives on techniques to prompt the doctors into off-label conversations;

c. Designing a compensation and bonus structure that strongly encouraged and incentivized off-label marketing;

d. Instructing its sales representatives to tell doctors how to document their off-label uses of drugs to get these uses paid by insurers, who often will not pay for off-label uses;

e. Using its grants for continuing medical education to promote off-label uses; and

f. Sending doctors to "consultant" meetings at lavish resorts to hear the company's off-label message.

35. Cephalon's unfair and deceptive off-label marketing and promotion was particularly pernicious given the potential for the drugs to cause harmful side effects, such as the following, when used by patients for off-label uses:

a. The use of Gabitril by patients who do not have epilepsy can cause seizures.

b. The use of Actiq by patients who have not developed a tolerance for other opioid products can cause addiction, hypoventilation, and death.

36. Upon information and belief, Cephalon adopted its unfair and deceptive marketing and promotion strategy for Actiq in spite of its CEO's own public acknowledgement that Actiq "is one of those drugs where if you really don't know what you're doing, you're going to run into trouble and physicians have been afraid to use it by and large."

37. Cephalon promoted off-label uses of Actiq fully aware that the clinical support for doing so was lacking. Upon information and belief, its 2002 Actiq Marketing Plan stated, "[W]e offer no data for ACTIQ use outside cancer."

38. In January 2002, the FDA issued a letter stating that certain marketing and promotional materials for Provigil were false and misleading because they promoted Provigil for unapproved indications.

39. In February 2005, the FDA issued a public health advisory warning of Gabitril's propensity to cause seizures in non-epileptic patients.

40. In February 2007, the FDA issued another letter stating that Cephalon's marketing and promotional materials for Provigil were false and misleading because they promoted Provigil for unapproved indications.

41. The purpose of Cephalon's unfair and deceptive marketing and promotion was to deceive and mislead physicians, other healthcare providers, and others about the safety and efficacy of Provigil, Gabitril, and Actiq and about the indications for which Provigil, Gabitril, and Actiq were approved.

42. Cephalon's repeated off-label marketing and promotion was unfair and deceptive under the South Carolina Unfair Trade Practices Act and adverse to the public interest.

43. Based upon Cephalon's unfair and deceptive marketing and promotion plan, Cephalon knew or should have known that any of the Drugs could be prescribed to individuals and/or be purchased through its misrepresentations to citizens of the State of South Carolina and/or prescribed to be consumed and/or used and ingested by citizens of the State of South Carolina for unapproved purposes.

44. Many of the details and facts related to Cephalon's scheme are known only by Cephalon.

THE FEDERAL GUILTY PLEA

45. In November 2003, a federal *qui tam* complaint was commenced against Cephalon alleging various illegal acts. Additional federal *qui tam* complaints were subsequently commenced in or about September 2004, January 2008, and April 2008.

46. These matters were filed under seal in the Federal Court in keeping with the provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA").

47. The United States of America, acting through the United States Department of Justice, intervened in the November 2003 complaint against Cephalon.

48. On September 25, 2008, the Honorable Thomas J. O'Neill, Jr. issued an Order stating that the FCA complaints would be unsealed upon the filing of a Notice of Intervention by the United States Government. That Order is attached hereto as Exhibit A and is incorporated herein by reference.

49. On September 29, 2008, the United States filed its Notice of Intervention for Purposes of Settlement.

50. Cephalon entered into a Guilty Plea Agreement regarding criminal claims with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice. That Guilty Plea Agreement is attached hereto as Exhibit B and is incorporated herein by reference.

51. The Guilty Plea Agreement resolved the federal government's allegations of off-label promotional activities, termed misbranding, by Cephalon regarding Provigil, Gabitril and Actiq.

52. In Paragraph 6.A(1)-(9) of the Guilty Plea Agreement, Cephalon formally pled guilty to engaging in the conduct described in Paragraph 31 of this Complaint with respect to a specific time period.

53. In addition to the Guilty Plea Agreement, Cephalon entered into a Settlement Agreement regarding civil claims with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania, the Department of Justice, the Office of Inspector General of the Department of Health and Human Services, and others.

54. The Settlement Agreement provided for payment of a stipulated criminal fine of $50 million and payment of claims by the United States and state Medicaid programs in an agreed to amount of $375 million. The stipulated criminal fine of $50 million constituted a joint resolution of the charges against Cephalon for misbranding pursuant to 21 U.S.C. § 301, *et seq.*

55. The Guilty Plea Agreement and Settlement Agreement did not include the resolution of the claims described in this Complaint.

COUNT I

Civil Penalties – Provigil

56. Plaintiff re-alleges and incorporates each and every allegation contained in the preceding paragraphs as if fully alleged herein.

57. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Provigil and by its marketing and promotion of Provigil for off-label uses, including sleepiness, tiredness, decreased activity, lack of energy, and fatigue.

58. Every deceptive, unfair, and/or misrepresentative act or practice by Cephalon in marketing Provigil constitutes a separate and distinct violation of S.C. Code Ann. § 39-5-20.

59. Cephalon's conduct described in this Count was willful within the meaning of S.C. Code Ann. § 39-5-110(c).

60. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

61. The Attorney General seeks a civil penalty in the amount of up to $5,000.00 for each violation of S.C. Code Ann. § 39-5-20.

COUNT II

Civil Penalties - Gabitril

62. Plaintiff re-alleges and incorporates each and every allegation contained in the preceding paragraphs as if fully alleged herein.

63. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Gabitril and by its marketing and promotion of Gabitril for off-label uses, including anxiety, insomnia, and pain.

64. Every deceptive, unfair, and/or misrepresentative act or practice by Cephalon in marketing Gabitril constitutes a separate and distinct violation of S.C. Code Ann. § 39-5-20.

65. Cephalon's conduct described in this Count was willful within the meaning of S.C. Code Ann. § 39-5-110(c).

66. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

67. The Attorney General seeks a civil penalty in the amount of up to $5,000.00 for each violation of S.C. Code Ann. § 39-5-20.

COUNT III

Civil Penalties – Actiq

68. Plaintiff re-alleges and incorporates each and every allegation contained in the preceding paragraphs as if fully alleged herein.

69. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Actiq and by its marketing and promotion of Actiq for off-label uses, including non-cancer pain uses.

70. Every deceptive, unfair, and/or misrepresentative act or practice by Cephalon in marketing Actiq constitutes a separate and distinct violation of S.C. Code Ann. § 39-5-20.

71. Cephalon's conduct described in this Count was willful within the meaning of S.C. Code Ann. § 39-5-110(c).

72. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

73. The Attorney General seeks a civil penalty in the amount of up to $5,000.00 for each violation of S.C. Code Ann. § 39-5-20.

COUNT IV

Unjust Enrichment, Restitution, Disgorgement

74. Plaintiff repeats and reiterates the allegations previously set forth herein.

75. Defendant marketed and promoted the Drugs in a false and deceptive manner in South

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Carolina.

76. Defendant withheld information from the State, prescribers, and the citizens of the State of South Carolina regarding the use of the Drugs.

77. The State and its citizens, because of the deceptive and illegal promotion and marketing of the Drugs, paid, reimbursed, or otherwise conferred a non-gratuitous benefit upon Defendant that directly resulted from the Defendant's fraudulent marketing practices.

78. Defendant's fraudulent marketing practices resulted in Defendant improperly realizing value from the non-gratuitous benefits conferred upon the Defendant from the State and its citizens' payments for the Drugs.

79. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

80. It would be inequitable for Defendant to retain the benefits of its violations without paying the State and its citizens for its value.

81. Restitution is an equitable remedy designed to prevent unjust enrichment. A court may grant equitable relief where there is no adequate remedy at law.

82. Plaintiff, the State and its citizens, does not have an adequate remedy at law to provide it with relief from Defendant's deceptive and illegal promotion and marketing of the Drugs. The remedy at law is not as practicable, efficient, and as prompt as a remedy in equity for restitution to prevent Defendant's unjust enrichment. During the time period the Drugs were illegally marketed and promoted in South Carolina, it would be proper to disgorge the Defendant of any improperly obtained gains and profits, plus interest, from such deceptive marketing. Requiring the Defendant to disgorge its illegal gains and profits would appropriately divest Defendant of the proceeds of its misconduct. This requested relief is pursuant to S.C. Code Ann. § 39-5-50(b)

and common law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the State of South Carolina, prays for judgment against Cephalon as follows:

1. For full restitution through disgorgement of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein pursuant to S.C. Code Ann. § 39-5-50(b) and common law;

2. For a civil penalty in the amount of up to $5,000.00 for each method, act or practice deemed to violate the South Carolina Unfair Trade Practices Act under S.C. Code Ann. § 39-5-110(a);

3. For appropriate permanent injunctive relief to protect the public interest in the State of South Carolina in accordance with S.C. Code § 39-5-50;

4. For such other and further relief as may be justified and which Plaintiff may be entitled to by law or equity including, but not limited to, all attorneys' fees, investigative fees, court costs, witness fees, and deposition fees.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Deputy Attorney General
C. HAVIRD JONES, JR.
Assistant Deputy Attorney General
MARY FRANCES JOWERS
Assistant Attorney General
GEOFFREY K. CHAMBERS
Assistant Attorney General
JARED Q. LIBET
Assistant Attorney General

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Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Alan Wilson

By: Alan Wilson
Attorney General

June 3, 2011

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EXHIBIT A

(A 03-627

TON

(22)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
ex rel. LUCIA PACCIONE

Plaintiff

v.

CEPHALON, INC.

Defendant

CIVIL ACTION NO. 03-6268
(FILED UNDER SEAL)

UNITED STATES OF AMERICA,
and the States of CALIFORNIA,
DELAWARE, FLORIDA, HAWAII,
ILLINOIS, LOUISIANA,
MASSACHUSETTS, NEVADA, NEW
HAMPSHIRE, NEW MEXICO, TEXAS,
TENNESSEE and VIRGINIA, and the
DISTRICT OF COLUMBIA
ex rel. JOSEPH PIACENTILE

Plaintiff

v.

CEPHALON, INC.,

Defendants

FILED
SEP 2 3 2008
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

CIVIL ACTION NO. 03-6277
(FILED UNDER SEAL)

file

UNITED STATES OF AMERICA; THE
STATES OF CALIFORNIA,
DELAWARE, FLORIDA, HAWAII,
ILLINOIS, MASSACHUSETTS,
NEVADA, NEW MEXICO, TENNESSEE,
TEXAS, VIRGINIA, THE DISTRICT OF
COLUMBIA, AND NEW YORK;
ex rel. BRUCE BOISE

Plaintiff

v.	:	CIVIL ACTION NO. 04-4401 **(FILED UNDER SEAL)**
CEPHALON, INC.	:	
Defendant	:	
UNITED STATES OF AMERICA, ex rel. MICHAEL MAKALUSKY	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. 05-1904 **(FILED UNDER SEAL)**
CEPHALON, INC.	:	
Defendant	:	

ORDER

Upon the filing by the United States of its Notice of Intervention (for purposes of settlement and dismissal) in the above actions pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4),

IT IS ORDERED that,

1. The following documents only be unsealed:

A. Relator Paccione's Complaint filed on November 14, 2003 in Civil Action No. 03-6268, Docket No. 1;

B. Relator Piacentile's Second Amended Complaint filed on April 18, 2008 in Civil Action No. 03-6277, Docket No. 20;

C. Relator Boise's Second Amended Complaint filed on January 3, 2008 in Civil Action No. 04-4401, Docket Number 22;

D. Relator Makalusky's Complaint filed on April 25, 2005 in the District of Massachusetts and transferred to the Eastern District of Pennsylvania in Civil Action No. 05-1904, Docket # 1 (Complaint only);

E. The Government's Notice of Intervention; and

F. This Order.

2. All other papers or Orders on file in these matters shall remain under seal; and

3. The seal shall be lifted on all pleadings filed in these actions after the filing of the United States' Notice of Intervention.

IT IS SO ORDERED, this 25 day of Sept., 2008.

BY THE COURT:

THO'Neill

HONORABLE THOMAS J. O'NEILL, JR.
Senior Judge, United States District Court

9/25/08
Copy to: M. Kay, AUSA - pkg. of pleadings filed to date
P. Kelsey
M. Kreindler
D. Burak
L. Terry
R. Maganini
D. Stone
R. Kitchengg
D. Jacobs
E. Kapacke
M. Quinlivan
R. Greenbaum

EXHIBIT B

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

EASTERN District of PENNSYLVANIA

UNITED STATES OF AMERICA
V.
CEPHALON, INC.

JUDGMENT IN A CRIMINAL CASE

FILED
OCT 10 2008
MICHAEL E. KUNZ, Clerk
By Dep. Clerk

Case Number: 08-598

USM Number:

Eric W. Sitarchuk, Esquire
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:331(a),333(a)(1) 21:352(f)(1)	Distribution of misbranded drugs: inadequate directions for use	10/1/2001	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/10/08
Date of Imposition of Judgment

Signature of Judge

HARVEY BARTLE III, U.S.D.C.J.
Name and Title of Judge

October 10, 2008
Date 10/10/08 cert copies to counsel AUSA Jusick FLU

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[0093]

DEFENDANT: CEPHALON, INC.
CASE NUMBER: 08-598

PROBATION

The defendant is hereby sentenced to probation for a term of :

None

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with anyadditional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CEPHALON, INC.
CASE NUMBER: 08-598

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 125.	$ 40,000,000.	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
United States of America	40,000,000.	40,000,000.	

TOTALS	$ 40,000,000.	$ 40,000,000.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CEPHALON, INC.
CASE NUMBER: 08-598

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 125. due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Defendant Cephalon, Inc. is to pay agreed upon amount of forfeiture in the amount of $10,000,000. and fine in the amount of $40,000,000. within 10 business days.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:
$10,000,000.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO.
CEPHALON, INC.	:	

GUILTY PLEA AGREEMENT

Under Federal Rule of Criminal Procedure 11(c)(1)(C), the government, the defendant, Cephalon, Inc. (hereinafter "Cephalon"), and Cephalon's counsel enter into the following guilty plea agreement. Any reference to the United States or the government in this agreement shall mean the Office of the United States Attorney for the Eastern District of Pennsylvania, and the Office of Consumer Litigation of the Department of Justice.

1. Cephalon agrees to plead guilty to Count One of an Information, waiving prosecution by indictment, charging it with the introduction into interstate commerce of drugs that were misbranded through off-label promotion, a misdemeanor, in violation of 21 U.S.C. §§ 331(a), 333(a)(1) and 352(f)(1), and not to contest forfeiture as set forth in the notice of forfeiture seeking criminal forfeiture of $10,000,000 in substitute assets, in lieu of the drugs which were promoted off-label and are no longer available, all arising from Cephalon's off-label promotion of its drugs Provigil, Gabitril, and Actiq between January 2001 and October 1, 2001. Cephalon further acknowledges its waiver of rights, as set forth in the attachment to this agreement.

2. The parties agree that this plea agreement is made pursuant to Fed.R.Crim.P. 11(c)(1)(C) and that the following specific sentence is the appropriate disposition

of this case. If the Court rejects this plea agreement, the parties further agree that this agreement shall automatically convert to a plea agreement pursuant to Fed.R.Crim.P. 11(c)(1)(B), and this specific sentence shall be the joint recommendation of the parties, although not binding on the Court. The agreed upon sentence is as follows:

A. Cephalon agrees to pay the special assessment in the amount of $125 on the date of sentencing.

B. Cephalon agrees to pay $50,000,000 to resolve this Information, of which $40,000,000 will be applied to a criminal fine, and $10,000,000 will be applied as substitute assets to satisfy the forfeiture obligation. Cephalon will pay these amounts within 10 business days of the date of sentencing. Cephalon and the government agree that this fine and forfeiture represent a fair and just resolution of all issues associated with loss, fine and forfeiture calculations.

C. Cephalon agrees that as a result of its acts or omissions, the forfeitable property, that is the drugs which were promoted off-label, are no longer available for forfeiture as they cannot be located or have been transferred, sold or deposited with a third party, or otherwise disposed of, within the meaning of federal law. As a result, Cephalon agrees to the entry and satisfaction of a judgment and preliminary order of forfeiture on the date of the guilty plea, forfeiting to the United States the sum of $10,000,000 as substitute assets for the pertinent drugs. Cephalon agrees that, within 10 business days of the date of sentencing, Cephalon will make payment to the United States, by means of a wire transfer to the United States Marshal Service or check payable to same, in the amount of $10,000,000, this amount representing

substitute assets of the offense for which it is pleading guilty, subject to forfeiture in full satisfaction of the judgment and preliminary order of forfeiture.

D. The government agrees that, in light of the Corporate Integrity Agreement executed contemporaneously with this guilty plea agreement, Cephalon will not be placed on probation.

3. In a separate civil settlement among Cephalon, the United States and various States, executed contemporaneously with this guilty plea agreement, Cephalon will pay $375,000,000. Cephalon waives any and all defenses and objections in this matter or in that civil proceeding which might be available under the Double Jeopardy and Excessive Fines clauses of the Eighth Amendment. The parties agree that, in light of this civil settlement, and to avoid complicating and prolonging the sentencing process, the appropriate disposition of this case does not include a restitution order.

4. Cephalon waives any claim under the Hyde Amendment, 18 U.S.C. § 3006A (Statutory Note), for attorney's fees and other litigation expenses arising out of the investigation or prosecution of this matter.

5. Cephalon understands, agrees and has had explained to it by counsel that the Court may impose the following statutory maximum sentence: a fine of $200,000, or twice the gross gain or gross loss, whichever is greater; a special assessment of $125; restitution as ordered by the Court; and a five-year term of Court supervision; in addition, forfeiture may be ordered. Cephalon further understands that the terms and conditions of any Court supervision may be changed, and extended, by the Court if Cephalon violates any of the terms and conditions of that supervision.

6. With respect to Cephalon's conduct:

A. The parties stipulate to the following facts and basis for the plea, criminal fine and forfeiture:

(1) Cephalon marketed Provigil, Gabitril, and Actiq, which were drugs within the meaning of 21 U.S.C. § 321(g)(1).

(2) Shipments of a drug in interstate commerce must be accompanied by labeling bearing adequate directions for use.for each of the drug's intended uses.

(3) In 1998, Provigil was approved by the FDA to treat excessive daytime sleepiness associated with narcolepsy.

(4) Between January 2001 and October 1, 2001, Cephalon promoted Provigil for uses not approved by the FDA, including as a daytime stimulant to treat sleepiness, tiredness, decreased activity, lack of energy and fatigue. Cephalon's promotion of Provigil for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Provigil's labeling did not bear adequate directions for each of the drug's intended uses.

(5) In 1997, Gabitril was approved by the FDA as an anti-epilepsy drug indicated as adjunctive therapy in adults and children 12 years and older in the treatment of partial seizures.

(6) Between January 2001 and October 1, 2001, Cephalon promoted Gabitril for certain uses not approved by the FDA, including as an

agent for anxiety, insomnia, and pain. Cephalon's promotion of Gabitril for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Gabitril's labeling did not bear adequate directions for each of the drug's intended uses.

(7) In 1998, Actiq was approved by the FDA for breakthrough cancer pain for patients with malignancies who were already tolerant to opioid therapy for their cancer pain.

(8) Between January 2001 and October 1, 2001, Cephalon promoted Actiq for uses not approved by the FDA, including for non-cancer pain uses, such as injuries and migraines. Cephalon's promotion of Actiq for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Actiq's labeling did not bear adequate directions for each of the drug's intended uses.

(9) Between 2001 through October 1, 2001, Cephalon profited by misbranding Provigil, Gabitril and Actiq, and distributing these drugs in interstate commerce.

B. The United States contends that, as a matter of relevant conduct, the conduct which forms the basis for this plea agreement, as set forth in subsection (A) above, continued past October 1, 2001. Cephalon does not admit that this conduct extended past October 1, 2001.

7. Cephalon and the United States retain the right to withdraw from this guilty plea agreement, and this plea agreement will be null and void, if the civil settlement

agreement and Corporate Integrity Agreement are not executed contemporaneously with this plea agreement.

8. The government agrees that, other than the charges in the Information in this case, it will not bring any other criminal charges against Cephalon for conduct which (a) falls within the scope of the grand jury investigation in the Eastern District of Pennsylvania relating to Cephalon's drugs Provigil, Gabitril, and Actiq; or (b) was known to the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice as of the date of the execution of this plea agreement, and which concerned the sale, promotion, or marketing of these three drugs in the United States. The non-prosecution provisions of this paragraph are binding on the Office of the United States Attorney for the Eastern District of Pennsylvania, the Office of Consumer Litigation of the Department of Justice, the United States Attorney's Offices for each of the other 93 judicial districts of the United States, and the Criminal Division of the United States Department of Justice. Attached as Exhibit B is a copy of the letter to United States Attorney Laurie Magid from the Assistant Attorney General, Criminal Division, Department of Justice, authorizing this agreement.

9. Cephalon understands that this guilty plea agreement does not bind any other government agency, or any component of the Department of Justice except as specified in paragraph 8 of this guilty plea agreement. Further, Cephalon understands that the United States takes no position as to the proper tax treatment of any of the payments made by Cephalon pursuant to this plea agreement, the civil settlement agreement, or the Corporate Integrity Agreement referenced in this plea agreement.

10. Cephalon agrees to waive the statute of limitations, and any other time-related defense, to the charge to which it is agreeing to plead guilty under this plea agreement. Cephalon understands and agrees that, should it seek to withdraw its plea, it may then be prosecuted for any criminal violation of which the United States has knowledge arising out of this investigation, subject to any applicable statute of limitation or other time-related protection not waived in this paragraph. Cephalon agrees that if it does not enter its plea, or withdraws its plea, after signing this agreement, the time period between the signing of this agreement and its withdrawal shall be excluded from calculation of the limitations or time period.

11. In exchange for the undertakings made by the government in entering this plea agreement, Cephalon voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

If this plea agreement converts to a plea agreement pursuant to Fed.R.Crim.P. 11(c)(1)(B):

A. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of its sentence.

B. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:

(1) the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in this plea agreement;

(2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; and/or

(3) the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

12. Cephalon also waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

13. Cephalon is satisfied with the legal representation provided by its lawyers; Cephalon and its lawyers have fully discussed this guilty plea agreement; and Cephalon is agreeing to plead guilty because Cephalon admits that it is guilty.

14. Cephalon will acknowledge acceptance of this guilty plea agreement by the signature of its counsel and of a responsible corporate officer. Cephalon shall provide to the government for attachment to this plea agreement a notarized resolution by Cephalon's Board of

Directors authorizing the corporation to enter a plea of guilty, and authorizing that responsible corporate officer to execute this agreement.

15. If acceptable to the Court, the parties agree to waive the presentence investigation and report pursuant to Rule 32(c)(1) of the Federal Rules of Criminal Procedure, and ask that Cephalon be sentenced at the time the guilty plea is entered.

16. It is agreed that the parties' guilty plea agreement contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by all parties.

SIGNATURES FOR THE UNITED STATES

GREGORY G. KATSAS
Assistant Attorney General
Civil Division
United States Department of Justice

EUGENE THIROLF
Director, Office of Consumer Litigation
United States Department of Justice

LAURIE MAGID
Acting United States Attorney

JEFFREY STEGER
Trial Attorney
Office of Consumer Litigation
United States Department of Justice

CATHERINE VOTAW
Chief, Health Care Fraud
Assistant United States Attorney

DATED: Sept. 26, 2008

SIGNATURE FOR CEPHALON

DATE: 9/15/08

GERALD J. PAPPERT
Executive Vice President and General Counsel
Cephalon, Inc.

SIGNATURES OF CEPHALON'S ATTORNEYS

DATE: 9/10/08

ERIC W. SITARCHUK, Esquire
Morgan, Lewis & Bockius LLP
Counsel for Defendant

J. SEDWICK SOLLERS III, Esquire
MARK A. JENSEN, Esquire
King & Spalding, LLP
Counsel for Defendant

002

JERRY PAPPERT

09/15/2008 09:20 FAX 610 738 6256 995

Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO.
CEPHALON, INC.	:	

ACKNOWLEDGMENT OF RIGHTS

Cephalon, Inc. ("Cephalon"), through its properly authorized officer, hereby acknowledges that it has certain rights that it will be giving up by pleading guilty.

1. Cephalon understands that it does not have to plead guilty.

2. Cephalon may plead not guilty and insist upon a trial.

3. At that trial, Cephalon understands:

   a. that Cephalon would have the right to be tried by a jury that would be selected from the Eastern District of Pennsylvania and that along with its attorney, Cephalon would have the right to participate in the selection of that jury;

   b. that the jury could only convict Cephalon if all twelve jurors agreed that they were convinced of Cephalon's guilt beyond a reasonable doubt;

   c. that the government would have the burden of proving Cephalon's guilt beyond a reasonable doubt and that Cephalon would not have to prove anything;

   d. that Cephalon would be presumed innocent unless and until such time as the jury was convinced beyond a reasonable doubt that the government had proven that Cephalon was guilty;

   e. that Cephalon would have the right to be represented by a lawyer at this trial and at any appeal following the trial, and that if Cephalon could not afford to hire a lawyer, the court would appoint one for Cephalon free of charge;

f. that through Cephalon's lawyer Cephalon would have the right to confront and cross-examine the witnesses against Cephalon;

g. that Cephalon could call witnesses to testify in its defense if Cephalon wanted to, and Cephalon could subpoena witnesses for this purpose if Cephalon wanted to; and

h. that Cephalon would not have to call witnesses to testify or otherwise present any defense if Cephalon did not want to, and that if Cephalon did not present any evidence, the jury could not hold that against Cephalon.

4. Cephalon understands that if Cephalon pleaded guilty, there will be no trial and Cephalon would be giving up all of the rights listed above, as well as any other rights associated with the trial process arising under statute, common-law, or judicial precedent.

5. Cephalon understands that if Cephalon decides to enter a plea of guilty, the judge will ask Cephalon representatives questions under oath, and that if any of those representatives lie on behalf of Cephalon in answering those questions, those persons could be prosecuted for the crime of perjury, that is, for lying under oath.

6. Cephalon understands that if Cephalon pleads guilty, Cephalon has waived its right to appeal, except as set forth in appellate waiver provisions of the plea agreement.

7. Understanding that Cephalon has all these rights and that by pleading guilty Cephalon is giving them up, Cephalon still wishes to plead guilty.

Gerald J. Pappert 9/15/08

GERALD J. PAPPERT
Exec. Vice President and General Counsel
for Cephalon, Inc, the Defendant

ERIC SITARCHUK, Esquire
Morgan, Lewis & Bockius LLP
Counsel for Defendant.

003

JERRY PAPPERT

09/15/2008 09:20 FAX 610 738 6258 CEPH DJ00000997

[0108]

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

AUG 28 2008

The Honorable Laurie Magid
United States Attorney
Eastern District of Pennsylvania
Philadelphia, Pennsylvania 19106

Attention: Catherine Votaw
Assistant United States Attorney

Re: Global Non-prosecution Agreement for Cephalon, Inc.

Dear Ms. Magid:

This is in response to your request for authorization to enter into a global case disposition agreement with the company Cephalon, Inc.

I hereby approve the terms of the Plea Agreement, including Paragraph 8, in which the United States Attorney's Offices and the Criminal Division of the Department of Justice agree not to initiate further criminal prosecutions as set out therein.

You are authorized to make this approval a matter of record in this proceeding.

Sincerely,

Matthew W. Friedrich
Acting Assistant Attorney General

John C. Keeney
Deputy Assistant Attorney General
Criminal Division

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT
	)	
COUNTY OF RICHLAND	)	Civil Action No. 2011-CP-40-3661
STATE OF SOUTH CAROLINA, ex rel. ALAN WILSON, in his official Capacity as Attorney General for the State of South Carolina	)	
Plaintiff,	)	
CEPHALON, INC.	)	
Defendant.	)	

RICHLAND COUNTY
FILED
2011 JUL -5 PM 4:24
JEANETTE W. McBRIDE
C.C.P. & G.S.

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT

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

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

1. Each and every allegation of the Complaint not hereinafter specifically admitted is denied and strict proof thereof is demanded.

2. After taking office on January 30, 2011, Attorney General Wilson announced that, in facing the challenge of managing his office with less money, his Office had the potential to raise "significant revenue" through investigations and lawsuits. He added that he was "thinking outside the box" on how to bring in more money.

3. Within days of that pronouncement, in early February, 2011, one of plaintiff's deputies called Cephalon's General Counsel, himself a former state Attorney General, to "discuss" claims the Attorney General purported to have against the company. Those claims turned out to be a demand based on matters known to the South Carolina Attorney General's Office ("SCAG") for over six (6) years. As the below demonstrates, however, this case is clearly

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REGULATORY AND LEGAL BACKGROUND

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

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

THE FEDERAL GUILTY PLEA

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT I

Civil Penalties - Provigil

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

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

COUNT II

Civil Penalties – Gabitril

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

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

COUNT III

Civil Penalties – Actia

48. Answering the allegations of paragraph 68 of the Complaint, Cephalon incorporates by reference the foregoing responses as if set forth at length herein.

49. The allegations of paragraphs 69, 70, 71, 72 and 73 of the Complaint are conclusions of law to which no response is required. To the extent they are construed as averments of fact, they are denied.

COUNT IV

Unjust Enrichment, Restitution, Disgorgement

50. Answering the allegations of paragraph 74 of the Complaint, Cephalon incorporates by reference the foregoing responses as if set forth at length herein.

51. The allegations of paragraph 75 are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

52. The allegations of paragraph 76 of the Complaint are denied.

53. The allegations of paragraphs 77 and 78 of the Complaint are conclusions of law to which no response is required. To the extent that they are construed as averments of fact, they are denied.

54. The allegations of paragraph 79 of the Complaint are denied.

55. The allegations of paragraphs 80, 81 and 82 of the Complaint are conclusions of law to which no response is required, and Cephalon denies them. To the extent that they are construed as averments of fact, they are denied.

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

AFFIRMATIVE DEFENSES

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

FIRST AFFIRMATIVE DEFENSE

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

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

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

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

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

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

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

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

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

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

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

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

SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

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

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

FIFTH AFFIRMATIVE DEFENSE

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

SIXTH AFFIRMATIVE DEFENSE

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

SEVENTH AFFIRMATIVE DEFENSE

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

EIGHTH AFFIRMATIVE DEFENSE

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

NINTH AFFIRMATIVE DEFENSE

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

TENTH AFFIRMATIVE DEFENSE

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

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

ELEVENTH AFFIRMATIVE DEFENSE

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

TWELFTH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

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

FOURTEENTH AFFIRMATIVE DEFENSE

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

FIFTEENTH AFFIRMATIVE DEFENSE

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

SIXTEENTH AFFIRMATIVE DEFENSE

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

SEVENTEENTH AFFIRMATIVE DEFENSE

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

EIGHTEENTH AFFIRMATIVE DEFENSE

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

NINETEENTH AFFIRMATIVE DEFENSE

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

TWENTIETH AFFIRMATIVE DEFENSE

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

TWENTY-FIRST AFFIRMATIVE DEFENSE

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

TWENTY-SECOND AFFIRMATIVE DEFENSE

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

TWENTY-THIRD AFFIRMATIVE DEFENSE

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

TWENTY-FOURTH AFFIRMATIVE DEFENSE

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

TWENTY-FIFTH AFFIRMATIVE DEFENSE

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

TWENTY-SIXTH AFFIRMATIVE DEFENSE

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

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

DATED: July 5, 2011

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EXHIBIT A

Cephalon
INSIGHTS INTO MEDICINE®

News Release

Cephalon Announces Strong Third Quarter Financial Results

Company Also Announces Agreement in Principle with U.S. Attorney's Office; Earnings Exceed Company Guidance; Company Again Increases 2007 Earnings Guidance and Introduces 2008 Guidance

FRAZER, Pa., Nov. 8 /PRNewswire-FirstCall/ -- Cephalon, Inc. (Nasdaq: CEPH) today reported third quarter 2007 sales of $428.7 million, compared to adjusted sales of $457.2 million for the third quarter of 2006 and within the company's previously issued guidance. Basic loss per common share for the third quarter of 2007 was $4.58. Excluding the settlement reserve increase, amortization expense and certain other items, basic adjusted income per common share during the quarter was $1.08, which compares to $1.71 for the third quarter of 2006 and exceeds the high end of the company's guidance range of $0.85 to $0.95.

During the third quarter, central nervous system (CNS) franchise sales increased 9 percent to $230.9 million and the pain franchise reported strong sales of $121.8 million, a decrease of only 33 percent despite generic competition to ACTIQ(R). Sales of other products were $76.0 million, an increase of 20 percent over the same period last year.

The company also announced that it has reached an agreement in principle with the U.S. Attorney's Office in Philadelphia and the U.S. Department of Justice with respect to the previously disclosed investigation of the company's sales and marketing practices. The company expects to pay $425 million as part of a comprehensive settlement of Federal and related state Medicaid claims. The company has increased its existing financial reserves for this matter accordingly. In addition, the company will agree to a single misdemeanor violation of the U.S. Food, Drug, and Cosmetic Act and will enter into a corporate integrity agreement with the Office of Inspector General of the U.S. Department of Health and Human Services. The terms of the settlement are subject to the final negotiation and execution of definitive agreements. The previously disclosed investigation by the Connecticut Attorney General is ongoing.

"We are pleased with the strong financial performance we delivered in the third quarter of 2007," said Frank Baldino, Jr., Ph.D., Chairman and CEO. "We also are launching this month our latest product, AMRIX(TM), a once daily extended release muscle relaxant, and are excited about the continued development of our oncology business with TREANDA(R)."

Dr. Baldino continued, "We look forward to finalizing our settlement with the U.S. Attorney's Office. We have always taken seriously our responsibility to conduct our business in accordance with both the letter and spirit of the law. Over the past few years, we have devoted substantial resources to continually enhancing our compliance program and have built a strong foundation for our ongoing compliance efforts."

Based on the strong third quarter financial results announced today, the company is reiterating its guidance for 2007 total sales of $1.675 - $1.725

billion, and increasing its basic adjusted income per common share guidance from $4.40 - $4.50 per share to $4.48 - $4.55 per share.

Basic adjusted income per common share guidance for the full-year 2007 and 2008 is reconciled below and is subject to the assumptions set forth therein.

Cephalon is introducing 2008 sales guidance of $1.80 - $1.85 billion. This includes CNS franchise sales of $975 - $1,000 million, pain franchise sales of $500 - $525 million, which will include sales of AMRIX(TM) (cyclobenzaprine hydrochloride extended-release capsules), oncology franchise sales of $110 - $120 million, and other product sales of $160 - $205 million. SG&A and R&D guidance for 2008 are $710 - $730 million and $340 - $360 million, respectively.

The company also is introducing adjusted net income guidance for 2008 of $344 - $351 million and 2008 basic adjusted income per common share guidance of $5.10 - $5.20.

Cephalon's management will discuss the company's third quarter 2007 performance in a conference call with investors beginning at 5:00 p.m. U.S. EST on Thursday, November 8, 2007. To participate in the conference call, dial +1-913-981-5543 and refer to conference code number 6083046. Investors can listen to the call live by logging on to the company's website at www.cephalon.com and clicking on "Investor Information," then "Webcast." The conference call will be archived and available to investors for one week after the call.

About Cephalon, Inc.

Founded in 1987, Cephalon, Inc. is an international biopharmaceutical company dedicated to the discovery, development and marketing of innovative products in four core therapeutic areas: central nervous system, pain, oncology and addiction. Cephalon has delivered a seven-year compound annual growth rate (CAGR) through 2006 greater than 75% and 2006 revenue of $1.760 billion. A member of the Fortune 1000, Cephalon currently employs approximately 3,000 people in the United States and Europe. U.S. sites include the company's headquarters in Frazer, Pennsylvania, and offices, laboratories or manufacturing facilities in West Chester, Pennsylvania, Salt Lake City, Utah, and suburban Minneapolis, Minnesota. Cephalon's European headquarters are located in Maisons-Alfort, France.

The company's proprietary products in the United States include: PROVIGIL(R) (modafinil) Tablets [C-IV], FENTORA(R) (fentanyl buccal tablet) [C-II], TRISENOX(R) (arsenic trioxide), AMRIX, VIVITROL(R) (naltrexone for extended-release injectable suspension), GABITRIL(R) (tiagabine hydrochloride), and ACTIQ(R) (oral transmucosal fentanyl citrate) [C-II]. The company also markets numerous products internationally. Full prescribing information on its U.S. products is available at http://www.cephalon.com or by calling 1-800-896-5855.

In addition to historical facts or statements of current condition, this press release may contain forward-looking statements. Forward-looking statements provide Cephalon's current expectations or forecasts of future events. These may include statements regarding anticipated scientific progress on its research programs; development of potential pharmaceutical products; interpretation of clinical results; prospects for regulatory approval, including with respect to TREANDA; manufacturing development and capabilities; market prospects for its products, including with respect to AMRIX; sales, adjusted net income and basic adjusted income per common share guidance for 2007 and 2008; and other statements regarding matters that are not historical facts, including the Company's position and expected performance in 2007 and 2008, the final resolution or outcome of the ongoing investigations by the U.S. Attorney's Office and the Office of the Connecticut Attorney General and the final amount of any settlement and/or fines related thereto, and the relative strength of the foundation for the Company's ongoing compliance efforts. You may identify some of these forward-looking statements by the use of words in the statements such as "anticipate," "estimate," "expect," "project," "intend," "plan," "believe" or other words and terms of similar meaning. Cephalon's performance and financial results could differ materially from those reflected in these forward-looking statements due to general financial, economic, regulatory and political conditions affecting the biotechnology and pharmaceutical industries as well as more specific risks and uncertainties facing Cephalon such as these set forth in its reports on Form 8-K, 10-Q and 10-K filed with the U.S. Securities and Exchange Commission. Given these risks and uncertainties, any or all of these forward-looking statements may prove to be incorrect. Therefore, you should not rely on any such factors or forward-looking statements. Furthermore, Cephalon does not intend to update publicly any forward-looking statement, except as required by law. The Private Securities Litigation Reform Act of 1995 permits this discussion.

This press release and/or the financial results attached to this press release include "Adjusted Net Income," "Basic Adjusted Income per Common Share," "Basic Adjusted Income per Common Share Guidance," and "Diluted Adjusted Income Per Common Share," amounts that are considered "non-GAAP financial measures" under SEC rules. As required, we have provided reconciliations of these measures. Additional required information is located in the Form 8-K furnished to the SEC in connection with this press release.

CEPHALON, INC. AND SUBSIDIARIES

CONSOLIDATED STATEMENTS OF OPERATIONS
(In thousands, except per share data)
(Unaudited)

	Three Months Ended September 30,		Nine Months Ended September 30,	
	2007	2006	2007	2006
REVENUES:				
Sales	$428,729	$470,513	$1,287,802	$1,246,825
Other revenues	9,692	11,820	34,865	32,562
	438,421	482,333	1,322,667	1,279,387
COSTS AND EXPENSES:				
Cost of sales	82,258	83,160	251,970	250,613
Research and development	93,527	86,439	274,078	294,899
Selling, general and administrative	186,456	161,108	527,962	470,158
Settlement reserve	369,000	-	425,000	-
Impairment charge	-	-	-	12,417
	731,241	330,707	1,479,010	1,028,087

INCOME (LOSS) FROM OPERATIONS	(292,820)	151,626	(156,343)	251,300
OTHER INCOME (EXPENSE):				
Interest income	8,868	7,046	23,485	16,736
Interest expense	(5,660)	(4,749)	(15,272)	(13,523)
Write-off of deferred debt issuance costs	-	-	-	(13,105)
Gain on extinguishment of debt	5,319	-	5,319	-
Gain on sale of investment	-	-	5,791	-
Other income (expense), net	2,493	895	3,747	(116)
	11,020	3,192	23,070	(10,008)
INCOME (LOSS) BEFORE INCOME TAXES	(281,800)	154,818	(133,273)	241,292
INCOME TAX EXPENSE	24,963	59,077	102,613	91,567
NET INCOME (LOSS)	$(306,763)	$95,741	$(235,886)	$149,725
BASIC INCOME (LOSS) PER COMMON SHARE	$(4.58)	$1.58	$(3.55)	$2.48
DILUTED INCOME (LOSS) PER COMMON SHARE	$(4.58)	$1.43	$(3.55)	$2.17
WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING	66,931	60,762	66,398	60,415
WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING-ASSUMING DILUTION	66,931	67,072	66,398	68,921

Certain reclassifications of prior year amounts have been made to conform to the current year presentation. Amounts reported in prior periods as amortization are included now as a component of cost of sales; amounts previously reported as depreciation (other than depreciation related to facilities used in the production of commercial inventory and previously included in cost of sales) are included as a component of research and development or selling, general and administrative, as appropriate.

CEPHALON, INC. AND SUBSIDIARIES

Reconciliation of GAAP Net Income (Loss) to Adjusted Net Income
(Unaudited)

	Three Months Ended September 30, 2007		Three Months Ended September 30, 2006	
GAAP NET INCOME (LOSS)	$(306,763)		$95,741	
Sales adjustments	-		(13,273)	(6)
Cost of sales adjustments	22,255	(1)	20,804	(1)
Research and development adjustments	15,000	(2)	-	(8)
Selling, general and administrative adjustments	-		2,000	(7) (8)
Settlement reserve	369,000	(3)	-	
Gain on extinguishment of debt	(5,319)	(4)	-	
Income taxes	(21,693)	(5)	(1,278)	(5) (8)
	379,243		8,253	
ADJUSTED NET INCOME	$72,480		$103,994	
BASIC ADJUSTED INCOME PER COMMON SHARE	$1.08		$1.71	
DILUTED ADJUSTED INCOME PER COMMON SHARE	$0.92		$1.55	
WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING	66,931		60,762	
WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING-ASSUMING DILUTION	79,030		67,072	

Notes to Reconciliation of GAAP Net Income (Loss) to Adjusted Net Income

(1) To exclude the on-going amortization of acquired intangible assets.

(2) To exclude the recognition of a milestone related to the FDA's acceptance of our NDA filing for TREANDA(R) (bendamustine HCl).

(3) To exclude the additional reserve established for the agreement in principle reached with the U.S. Attorney's Office in Philadelphia.

(4) To exclude the forgiveness of a mortgage loan by the Pennsylvania Industrial Development Board ("PIDA").

(5) To reflect the tax effect of pre-tax adjustments at the applicable tax rates and certain other tax adjustments primarily related to changes in valuation allowances and other changes in tax assets and liabilities.

(6) To exclude the U.S. Department of Defense ("DoD") Tricare program reversal as a result of the U.S. Court of Appeals September 2006 ruling.

(7) To exclude charges associated with the settlement of the PROVIGIL patent litigation.

(8) Amounts shown no longer exclude the impact of Financial Accounting Standards Board Statement No. 123(R) "Share Based Payment" ("SFAS 123(R)"). The earnings press release issued on November 2, 2006 reflected adjustments of $3.4 million in each of Research and development and Selling, general and administrative expenses and $2.8 million in income tax expense related to SFAS 123(R).

CEPHALON, INC. AND SUBSIDIARIES

Reconciliation of GAAP Net Income (Loss) to Adjusted Net Income
(Unaudited)

	Nine Months Ended September 30,	
	2007	2006
GAAP NET INCOME (LOSS)	$(235,886)	$149,725
Sales adjustments	-	(13,273) (7)
Cost of sales adjustments	64,236 (1)	69,375 (1)
Research and development adjustments	41,500 (2)	45,000 (2) (11)
Selling, general and administrative adjustments	-	9,987 (8) (11)
Settlement reserve	425,000 (3)	-
Impairment charge	-	12,417 (9)
Write-off of deferred debt issuance costs	-	13,105 (10)
Gain on extinguishment of debt	(5,319) (4)	-
Gain on sale of investment	(5,791) (5)	-
Income taxes	(40,659) (6)	(44,060) (6) (11)
	479,167	92,551
ADJUSTED NET INCOME	$243,281	$242,276
BASIC ADJUSTED INCOME PER COMMON SHARE	$3.66	$4.01
DILUTED ADJUSTED INCOME PER COMMON SHARE	$3.09	$3.52
WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING	66,398	60,415
WEIGHTED AVERAGE NUMBER OF COMMON SHARES OUTSTANDING-ASSUMING DILUTION	78,814	68,921

Notes to Reconciliation of GAAP Net Income (Loss) to Adjusted Net Income

(1) In 2007, to exclude the on-going amortization of acquired intangible assets. In 2006, to exclude the reserve for SPARLON capitalized inventory costs ($8.6 million) and the on-going amortization of acquired intangible assets ($60.8 million).

(2) In 2007, to exclude charges related to payments for several research and development collaborations ($26.5 million) and the recognition of a milestone related to the FDA's acceptance of our NDA filing for TREANDA ($15.0 million). In 2006, to exclude charges related to payments for several research and development collaborations.

(3) To exclude the reserve established for the agreement in principle reached with the U.S. Attorney's Office in Philadelphia.

(4) To exclude the forgiveness of a mortgage loan by the PIDA.

(5) To exclude the pre-tax gain related to the sale of certain investments.

(6) To reflect the tax effect of pre-tax adjustments at the applicable tax rates and certain other tax adjustments primarily related to changes in valuation allowances and other changes in tax assets and liabilities.

(7) To exclude the DoD Tricare program reversal as a result of the U.S. Court of Appeals September 2006 ruling.

(8) To exclude charges associated with the settlement of the PROVIGIL patent litigation ($6.0 million) and employee severance costs associated with the European integration and restructuring ($4.0 million).

(9) To exclude charges related to the impairment of an intangible asset.

(10) To exclude the write-off of deferred debt issuance costs related to the Zero Coupon convertible subordinated notes.

(11) Amounts shown no longer exclude the impact of SFAS 123(R). The earnings press release issued on November 2, 2006 reflected adjustments of $11.6 million in each of Research and development and Selling, general and administrative expenses and $8.8 million in Income tax expense related to SFAS 123(R).

CEPHALON, INC. AND SUBSIDIARIES

"ADJUSTED" CONSOLIDATED SALES DETAIL *
(In thousands)
(Unaudited)

	Three Months Ended September 30, 2007		
	United States	Europe	Total
Sales:			
PROVIGIL	$202,202	$14,904	$217,106
GABITRIL	12,952	881	13,833
CNS	215,154	15,785	230,939
ACTIQ	45,946	10,007	56,953
Generic OTFC	32,689	-	32,689
FENTORA	33,193	-	33,193
Pain	111,828	10,007	121,835
Other	19,291	56,664	75,955
	$346,273	$82,456	$428,729

	2006		
	United		

	States	Europe	Total
Sales:			
PROVIGIL	$186,568	$11,081	$197,649
GABITRIL	13,729	723	14,452
CNS	200,297	11,804	212,101
ACTIQ	174,147	7,585	181,732
Generic OTFC	-	-	-
FENTORA	-	-	-
Pain	174,147	7,585	181,732
Other	13,292	50,115	63,407
	$387,736	$69,504	$457,240

	% Increase (Decrease)		
	United States	Europe	Total
Sales:			
PROVIGIL	8%	35%	10%
GABITRIL	(6%)	22%	(4%)
CNS	7%	34%	9%
ACTIQ	(74%)	32%	(69%)
Generic OTFC	100%	0%	100%
FENTORA	100%	0%	100%
Pain	(36%)	32%	(33%)
Other	45%	13%	20%
	(11%)	19%	(6%)

	Nine Months Ended September 30, 2007		
	United States	Europe	Total
Sales:			
PROVIGIL	$593,394	$39,171	$632,565
GABITRIL	39,814	6,268	46,082
CNS	633,208	45,439	678,647
ACTIQ	157,097	28,638	185,735
Generic OTFC	97,562	-	97,562
FENTORA	101,224	-	101,224
Pain	355,883	28,638	384,521
Other	53,867	170,767	224,634
	$1,042,958	$244,844	$1,287,802

	2006		
	United States	Europe	Total
Sales:			
PROVIGIL	$494,047	$29,219	$523,266
GABITRIL	41,291	3,510	44,801
CNS	535,338	32,729	568,067
ACTIQ	452,175	19,213	471,388
Generic OTFC	-	-	-
FENTORA	-	-	-
Pain	452,175	19,213	471,388
Other	41,661	152,436	194,097
	$1,029,174	$204,378	$1,233,552

	% Increase

	(Decrease)		
	United States	Europe	Total
Sales:			
PROVIGIL	20%	34%	21%
GABITRIL	(4%)	79%	3%
CNS	18%	39%	19%
ACTIQ	(65%)	49%	(61%)
Generic OTFC	100%	0%	100%
FENTORA	100%	0%	100%
Pain	(21%)	49%	(18%)
Other	29%	12%	16%
	1%	20%	4%

* For both the three and nine months ended September 30, 2006, amounts exclude the impact of the DoD Tricare program reversal of $13.3 million which reduced GAAP U.S. sales of PROVIGIL, GABITRIL and ACTIQ by $6.9 million, $0.9 million and $5.5 million, respectively.

CEPHALON, INC. AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEETS
(In thousands, except share data)
(Unaudited)

	September 30, 2007	December 31, 2006
CURRENT ASSETS:		
Cash and cash equivalents	$661,982	$496,512
Investments	69,101	25,212
Receivables, net	302,748	270,045
Inventory, net	93,399	85,239
Deferred tax assets, net	204,140	184,518
Other current assets	34,626	47,278
Total current assets	1,365,996	1,108,804
PROPERTY AND EQUIPMENT, net	481,508	453,010
GOODWILL	476,605	467,167
INTANGIBLE ASSETS, net	839,255	793,037
DEFERRED TAX ASSETS, net	103,284	118,192
OTHER ASSETS	132,056	105,287
	$3,398,704	$3,045,497
CURRENT LIABILITIES:		
Current portion of long-term debt	$1,237,285	$1,023,312
Accounts payable	74,528	90,586
Accrued expenses	685,864	263,478
Total current liabilities	1,997,677	1,377,376
LONG-TERM DEBT	4,373	224,992
DEFERRED TAX LIABILITIES, net	66,864	72,491
OTHER LIABILITIES	103,982	61,178
Total liabilities	2,172,896	1,736,037
STOCKHOLDERS' EQUITY:		
Common stock, $0.01 par value	693	678
Additional paid-in capital	1,899,761	1,780,749
Treasury stock, at cost	(151,196)	(151,068)
Accumulated deficit	(668,310)	(425,256)
Accumulated other comprehensive income	144,860	104,357
Total stockholders' equity	1,225,808	1,309,460
	$3,398,704	$3,045,497

Certain reclassifications of prior year amounts have been made to conform to the current year presentation. The NUVIGIL(R) (armodafinil) [C-IV] inventory balance of $89.1 million as of December 31, 2006 has been reclassified from inventory to other assets, as we do not presently intend to launch NUVIGIL commercially until around 2010.

CEPHALON, INC. AND SUBSIDIARIES

CONSOLIDATED STATEMENTS OF CASH FLOWS
(In thousands)
(Unaudited)

	Nine Months Ended September 30,	
	2007	2006
CASH FLOWS FROM OPERATING ACTIVITIES:		
Net income (loss)	$(235,886)	$149,725
Adjustments to reconcile net income (loss) to net cash provided by operating activities:		
Deferred income tax expense	8,750	64,112
Shortfall tax benefits from stock-based compensation	(222)	-
Depreciation and amortization	101,206	94,828
Amortization of debt issuance costs	180	387
Write-off of debt issuance costs associated with convertible subordinated notes	-	13,105
Stock-based compensation expense	34,940	32,436
Gain on extinguishment of debt	(5,319)	-
Gain on sale of investment	(5,791)	-
Loss on disposals of property and equipment	2,873	2,368
Impairment charge	-	12,417
Changes in operating assets and liabilities:		
Receivables	(26,218)	(30,818)
Inventory	(1,881)	15,761
Other assets	(28,552)	(43,731)
Accounts payable and accrued expenses	380,776	(45,820)
Other liabilities	49,465	(13,580)
Net cash provided by operating activities	274,321	251,190
CASH FLOWS FROM INVESTING ACTIVITIES:		
Purchases of property and equipment	(70,887)	(97,122)
Acquisition of intangible assets	(99,152)	(115,000)
Proceeds from sale of investment	12,291	-
Sales and (purchases) of available-for-sale investments, net	(43,186)	242,660
Net cash provided by (used for) investing activities	(200,934)	30,538
CASH FLOWS FROM FINANCING ACTIVITIES:		
Proceeds from exercises of common stock options	74,375	112,794
Windfall tax benefits from stock-based compensation	9,934	21,912
Acquisition of treasury stock	(128)	(433)
Payments on and retirements of long-term debt	(2,902)	(2,528)
Net cash provided by financing activities	81,279	131,745
EFFECT OF EXCHANGE RATE CHANGES ON CASH AND CASH EQUIVALENTS	10,804	11,830
NET INCREASE IN CASH AND CASH EQUIVALENTS	165,470	425,303
CASH AND CASH EQUIVALENTS, BEGINNING OF PERIOD	496,512	205,060
CASH AND CASH EQUIVALENTS, END OF PERIOD	$661,982	$630,363

CEPHALON, INC. AND SUBSIDIARIES

Reconciliation of Projected GAAP Basic Income (Loss) per Common Share

to Basic Adjusted Income Per Common Share Guidance
(Unaudited)

	Twelve Months Ended December 31, 2007		Twelve Months Ended December 31, 2008	
Projected GAAP basic income (loss) per common share	$(3.08) --	$(2.98)	$4.13 --	$4.23
Amortization of current intangibles	$1.35 --	$1.35	$1.52 --	$1.52
Research and development adjustments	$0.62 --	$0.62	$- --	$-
Settlement reserve	$6.38 --	$6.38	$- --	$-
Gain on extinguishment of debt	$(0.08) --	$(0.08)	$- --	$-
Gain on sale of investment	$(0.09) --	$(0.09)	$- --	$-
Tax effect of pre-tax adjustments at the applicable tax rates *	$(0.65) --	$(0.65)	$(0.55) --	$(0.55)
Basic adjusted income per common share guidance	$4.45 --	$4.55	$5.10 --	$5.20

* For the twelve months ended December 31, 2007, we have not yet recognized a tax benefit for the settlement reserve due to the uncertainty associated with the tax treatment of any potential settlement.

The company's 2007 guidance is being issued based on certain assumptions including:

- Adjusted effective tax rate of approximately 36 to 37 percent; and
- Weighted average number of common shares outstanding of 66.6 million shares for the twelve months ended December 31, 2007.

The company's 2008 guidance is being issued based on certain assumptions including:

- Entrance into the market of an additional generic version of ACTIQ by mid-2008;
- Approval of TREANDA and mid-2008 launch;
- Reduction of interest income by $20 million resulting from payment of the settlement with the U.S. Attorney's Office;
- Adjusted effective tax rate of approximately 36 to 37 percent; and
- Weighted average number of common shares outstanding of 67.5 million shares for the twelve months ended December 31, 2008.

SOURCE: Cephalon, Inc. (CEPH)

CONTACT:
Media: Sheryl Williams
+1-610-738-6493
swilliam@cephalon.com
or
Investors: Robert (Chip) Merritt
+1-610-738-6376
cmerritt@cephalon.com
(both of Cephalon, Inc.)

Web site: http://www.cephalon.com

EXHIBIT B

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

(Mark One)

☒ QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended September 30, 2007

or

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to

Commission File Number 000-19119

Cephalon, Inc.
(Exact Name of Registrant as Specified in Its Charter)

Delaware	23-2484489
(State or Other Jurisdiction of Incorporation or Organization)	(I.R.S. Employer Identification No.)
41 Moores Road P.O. Box 4011 Frazer, Pennsylvania (Address of Principal Executive Offices)	19355 (Zip Code)

(610) 344-0200
(Registrant's Telephone Number, Including Area Code)

Not Applicable
(Former Name, Former Address and Former Fiscal Year, If Changed Since Last Report)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☒ Accelerated filer ☐ Non-accelerated filer ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☒

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date.

Class	Outstanding as of November 1, 2007
Common Stock, par value $.01	67,051,500 Shares

In November 2005 and March 2006, we received notice that Caraco Pharmaceutical Laboratories, Ltd. and Apotex, Inc., respectively, also filed Paragraph IV ANDAs with the FDA in which each firm is seeking to market a generic form of PROVIGIL. We have not filed a patent infringement lawsuit against either Caraco or Apotex as of the filing date of this report, although Apotex has filed suit against us, as described above.

ACTIQ Patent Litigation and Settlement

In early 2006, we settled with Barr our pending patent infringement dispute in the United States related to Barr's ANDA filed with the FDA seeking to sell a generic version of ACTIQ ("generic OTFC"). Under the settlement, we granted to Barr an exclusive royalty bearing right to market and sell generic OTFC in the United States. The settlement with Barr related to ACTIQ® (oral transmucosal fentanyl citrate) [C-II] has been filed with both the FTC and the DOJ as required by the Medicare Modernization Act. The FTC has requested from us, and we have provided, certain information in connection with its review of this settlement. The FTC, the DOJ, or a private party could challenge in an administrative or judicial proceeding the settlement with Barr if they believe that the agreement violates the antitrust laws.

U.S. Attorney's Office and Connecticut Attorney General Investigations and Related Matters

In early November 2007, we announced that we had reached an agreement in principle with the U.S. Attorney's Office ("USAO") in Philadelphia and the DOJ with respect to the USAO investigation that began in September 2004. The investigation has focused on our sales and promotional practices with respect to ACTIQ, GABITRIL® (tiagabine hydrochloride) and PROVIGIL. Under this agreement, we now expect to pay $425.0 million as part of a comprehensive settlement of all Federal and related state Medicaid claims. During the third quarter of 2007, we increased our existing reserve by $369.0 million to $425.0 million in contemplation of this payment. In addition, the Company will agree to a single federal misdemeanor violation of the Federal Food, Drug and Cosmetic Act and will enter into a corporate integrity agreement with the Office of Inspector General of the U.S. Department of Health and Human Services. The terms described above are subject to negotiation and the execution of the final settlement and corporate integrity agreements. There can be no assurance that the settlement will be finalized on the terms outlined above.

In September 2004, we announced that we had received a voluntary request for information from the Office of the Connecticut Attorney General that also appears to be focused on our sales and promotional practices with respect to ACTIQ, GABITRIL and PROVIGIL. We are cooperating with this Office, are providing documents and other information in response to these and additional requests and are engaged in ongoing discussions with them. In late October 2007, we also received a civil demand for information from the Office of the Massachusetts Attorney General that is focused on sales and promotional practices with respect to ACTIQ, FENTORA® (fentanyl buccal tablet) [C-II] and certain of our other products. We intend to cooperate with this request as well. Both of these matters may involve civil penalties and/or fines. The payment of any settlement or judgment amount and/or fines could have a material adverse effect on our financial position, liquidity and results of operations. Furthermore, it is reasonably likely that we will face future additional requests for information from other state attorneys general focused on historical sales and promotional practices for our U.S. products. If civil penalties and/or fines were to result from such investigations, it could materially and adversely effect our financial position, liquidity and results of operations.

In November 2007, we were served with a putative class action complaint filed on behalf of entities that claim to have purchased ACTIQ for use in non-cancer patients. The complaint alleges violations of various state consumer protection laws, as well as the violation of the common law of unjust enrichment, and seeks an unspecified amount of money in actual, punitive and/or treble damages, with interest, and/or disgorgement of profits. We believe the allegations in the complaint are without merit, and we intend to vigorously defend ourselves in this matter and in any similar actions that may be filed in the future.

In March 2007, we received a letter requesting information related to ACTIQ and FENTORA from Congressman Henry A. Waxman in his capacity as Chairman of the House Committee on Oversight and Government Reform. The letter cites two articles concerning ACTIQ published in The Wall Street Journal in November 2006 and requests information concerning our sales and marketing practices for ACTIQ and FENTORA, among other things. We are cooperating with this request and are continuing to provide documents and other information to the Committee.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND STATE OF SOUTH CAROLINA, ex rel. ALAN WILSON, in his official Capacity as Attorney General for the State of South Carolina Plaintiff, CEPHALON, INC. Defendant.	)	IN THE CIRCUIT COURT Civil Action No. 2011-CP-40-3661

RICHLAND COUNTY
FILED
2011 JUL -5 PM 4:24
JEANETTE W. McBRIDE
C.C.P. & G.S.

CERTIFICATE OF SERVICE

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

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

Felicia Howle

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND STATE OF SOUTH CAROLINA, ex rel. ALAN WILSON, in his official Capacity as Attorney General for the State of South Carolina, Plaintiff, v. CEPHALON, INC, Defendant.	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2011-CP-40-3661 **FIRST AMENDED COMPLAINT**

RICHLAND COUNTY
FILED
2012 FEB 13 PM 1:40
JEANETTE W. McBRIDE
C.C.P. & G.S.

CIVIL ACTION COMPLAINT

Plaintiff, the State of South Carolina (hereinafter "the State"), by and through its Attorney General, Alan Wilson, hereby complains of Defendant Cephalon, Inc. ("Cephalon"). This is a civil action for civil penalties, restitution, disgorgement, damages, and other legal and equitable relief for violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*, ("SCUTPA") and other state common law causes of action stated herein.

This action is brought by the South Carolina Attorney General, as the chief legal officer of the State, in two capacities: first, in the exercise of his *parens patriae*, constitutional, statutory, and common law responsibilities to vindicate the State's sovereign interests, as well as the interests of its citizens: and second, in his proprietary capacity as the attorney for the State Health Plan ("SHP"). This action arises out of Cephalon's wrongful and illegal marketing, sale, and promotion of the drugs sold under the trade names Provigil®, Actiq®, and Gabitril® (hereinafter referred to collectively as "Drugs" or individually as "Provigil," "Actiq," and "Gabitril"). Attorney General Wilson, proceeding in this matter to protect the public interest in

the State of South Carolina, complains that Cephalon engaged in repeated unfair and deceptive acts, methods and practices with the purpose of achieving greater sales of Provigil, Gabitril, and Actiq. Cephalon achieved these sales through its wrongful and illegal marketing to physicians, healthcare professionals, consumers, and others about the safety and efficacy of Provigil, Gabitril, and Actiq and about the indications for which Provigil, Gabitril, and Actiq were approved.

PARTIES

1. Plaintiff, the State of South Carolina, is a body politic created by the Constitution and laws of the State of South Carolina and, as such, is not a citizen of any state.

2. The State brings this action, by its Attorney General, Alan Wilson, in its sovereign capacity in order to protect the interests of the State and its citizens. The Attorney General of the State of South Carolina, as its chief legal officer, appears in this action pursuant to his *parens patriae*, constitutional, statutory (S.C. Code Ann. § 1-7-100 and S.C. Code Ann. § 39-5-10, *et seq.*), and common law authority to protect the public interests of the State and its citizens.

3. Defendant Cephalon is a Delaware corporation with its principal place of business in Frazer, Pennsylvania. Defendant Cephalon includes any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint ventures, and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives, and other persons acting on their behalf.

4. Upon information and belief, in committing the acts alleged herein, each and every managing agent, agent, representative, and/or employee of the Defendant was working within the course and scope of said agency, representation and/or employment with the knowledge, consent, ratification, and authorization of Cephalon and its directors, officers, and/or managing

agents.

THE STATE HEALTH PLAN

5. The South Carolina Health Plan ("SHP") is a State-sponsored program that administers prescription drug benefits for the State's SHP participants. The SHP is a division of the Employee Insurance Program, which is run by the South Carolina Budget and Control Board. The SHP reimburses pharmacies, doctors and hospitals for prescriptions written for and dispensed to SHP participants.

6. The State relies on persons receiving payments and benefits from the SHP program to "turn square corners" and to provide truthful and accurate information in their dealings with SHP programs and to abide by South Carolina law. However, the State's practical ability to monitor or police every one of the millions of claims submitted each year represents a loophole in the structure of the SHP program.

7. Defendant recognized and exploited this loophole by engaging in a direct, illegal, nationwide marketing program to promote this use of its drugs Provigil, Actiq, and Gabitril for unapproved and off-label uses. This marketing was successful nationwide and in South Carolina. Consequently, the State spent significant sums of money for these drugs based on prescriptions written for the off-label uses Defendant illegally promoted.

JURISDICTION AND VENUE

8. The jurisdiction of this Court is founded upon S.C. Const. Ann. Art. V § 11 which gives the Circuit Court general jurisdiction over civil actions.

9. This Court has personal jurisdiction over Defendant because Defendant does business in South Carolina and/or has the requisite minimum contacts with South Carolina necessary to constitutionally permit the Court to exercise jurisdiction with such jurisdiction also being within

the contemplation of the South Carolina "long arm" statute, S.C. Code Ann. § 36-2-803.

10. At all times material hereto, Defendant was engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling, and/or selling Provigil, Actiq, and Gabitril.

11. Defendant did distribute, supply, market, sell, promote, advertise, and otherwise distribute Provigil, Actiq, and Gabitril in South Carolina and specifically in Richland County.

12. Defendant advertised and/or offered Provigil, Actiq, and Gabitril for sale in South Carolina through wholesalers, distributors, physicians, Pharmacy Benefit Managers ("PBM"), clinics, and/or pharmacies.

13. Venue in this Court is proper pursuant to the Rules of the South Carolina Supreme Court and the South Carolina Code.

14. This Complaint does not confer diversity jurisdiction upon the federal courts pursuant to 28 U.S.C. § 1332.

15. Likewise, federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 is not invoked by this Complaint, as it sets forth herein exclusively state law claims against Defendant. Nowhere herein does Plaintiff plead, expressly or implicitly, any cause of action or request any remedy which is founded upon federal law.

16. This Complaint is not an allegation of fraud on the United States Food and Drug Administration ("FDA").

17. This Complaint does not invoke the learned intermediary doctrine.

18. The issues presented in the allegations of the Complaint do not implicate significant federal issues; do not turn on the substantial federal interpretation of federal law; nor do they raise a substantial federal question. Indeed, Plaintiff expressly avers that the only causes of

action claimed, and the only remedies sought herein, are for those founded upon the statutory, common, and decisional laws of the State of South Carolina.

19. Further, assertion of federal jurisdiction over the claims made herein would improperly disturb the congressionally approved balance of federal and state responsibilities.

20. Accordingly, any improvident and dilatory attempt by Defendant to remove this case to federal court would be without a reasonable legal basis in fact or law. Such an attempt by Defendant would mischaracterize the allegations of this Complaint. This is not a fraud-on-the-FDA case and does not involve the learned intermediary doctrine or preemption issues. This is an action brought pursuant to the *parens patriae* authority of the Attorney General, SCUTPA and the state common law based upon complaint of the misrepresentation, including intentional and willful misrepresentations, made by Defendant in the marketing of the Drugs. 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 that the penalties provision of SCUTPA applies.

REGULATORY AND LEGAL BACKGROUND

21. Pursuant to the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, the FDA regulates the content of advertisement to consumers, advertisement to physicians and other healthcare professionals, and product promotion directly to physicians and other healthcare professionals.

22. Under 21 C.F.R. § 202.1(k)(2), all marketing efforts, including brochures, handouts or other promotional information, aimed at physicians and other healthcare professionals are deemed to be regulated "product labeling."

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23. Under 21 C.F.R. § 201.57, the product labeling must be pre-approved by the FDA and conform to FDA guidelines, including any and all claims of indicated uses.

24. The term "off-label" comes from the FDA labeling requirement that specific drugs be approved for treatment that is "on-label" and, therefore, any prescribing of drugs for a use other than what appears on the label is considered "off-label."

25. Cephalon, or others on behalf of Cephalon, applied for and received approvals from the FDA for Provigil, Gabitril, and Actiq for the treatment of specific medical conditions as follows:

a. In 1998, the FDA approved Provigil to improve wakefulness in patients with excessive daytime sleepiness associated with narcolepsy. In 2004, the FDA approved the expansion of the label to include the treatment of excessive sleepiness associated with narcolepsy, obstructive sleep apnea/hypopnea syndrome, and shift work sleep disorder. Provigil was not approved for any other purpose.

b. In 1997, the FDA approved Gabitril as an anti-epilepsy drug as adjunctive therapy in adults and children twelve years and older in the treatment of partial seizures. Gabitril was not approved for any other purpose.

c. In 1998, the FDA approved Actiq to treat breakthrough cancer pain in patients with malignancies who were already receiving and who are tolerant to opioid therapy for their underlying persistent cancer pain. Actiq was not approved for any other purpose.

26. The prescribing of drugs by physicians for off-label use is not improper or illegal; however, the marketing and/or promotion of an off-label use is illegal under federal law under 21 U.S.C. § 352(f)(1).

27. In addition to being illegal under federal law, off-label marketing and promotion violates the SCUTPA. S.C. Code Ann. § 39-5-20 states, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

28. Off-label marketing and promotion is an unfair and deceptive act or practice in that it tends to deceive and/or mislead physicians, other healthcare providers, and others regarding the indications that a drug can treat safely and effectively.

29. Off-label marketing and promotion is an unfair method of competition in that it disadvantages the many pharmaceutical companies that limit their marketing and promotion to legitimate, on-label indications.

30. Off-label marketing and promotion is an unfair method of competition and unfair and deceptive act or practice in that it results in consumers and third-party payers making payments for prescription drug products that they otherwise would not have purchased and/or reimbursed.

31. In addition, while off-label marketing and promotion violates the SCUTPA in and of itself, off-label marketing and promotion is often accompanied by misleading and/or deceptive statements, implications, and/or omissions about the safety and efficacy of the drug.

32. Such conduct that is willful and intentional is subject to a civil penalty of up to $5,000.00 per violation pursuant to SCUTPA.

FACTUAL BACKGROUND

33. In spite of federal and state law prohibitions against off-label marketing and promotion, Cephalon promoted Provigil, Gabitril, and Actiq for unapproved indications from at least January 1, 2001 until at least December 31, 2006 in an effort to expand sales and market share.

34. Specifically, Cephalon marketed and promoted Provigil, Gabitril, and Actiq off-label for the following indications:

a. Cephalon marketed and promoted Provigil as a medication to treat a variety of conditions including sleepiness, tiredness, decreased activity, lack of energy, and fatigue. This marketing was contrary to FDA approval.

b. Cephalon marketed and promoted Gabitril as a remedy for anxiety, insomnia, and pain. This marketing was contrary to FDA approval.

c. Cephalon marketed and promoted Actiq for non-cancer pain uses. This marketing was contrary to FDA approval.

35. In addition, Cephalon made repeated, untrue, deceptive, or misleading representations of material fact to and/or omitted or concealed material facts from physicians, other healthcare providers, and others regarding the safety, efficacy, and/or use of Provigil, Gabitril and Actiq.

36. Cephalon's statements and/or omissions were undertaken with the intent that physicians, other healthcare providers, and others would rely on the statements and/or omissions.

37. Upon information and belief, Cephalon engaged in the following activities in the course of its unfair and deceptive marketing and promotion:

a. Instructing its sales representatives call on doctors who would not normally prescribe the drugs in the course of the doctor's practice;

b. Training its sales representatives on techniques to prompt the doctors into off-label conversations;

c. Designing a compensation and bonus structure that strongly encouraged and incentivized off-label marketing;

d. Instructing its sales representatives to tell doctors how to document their off-label uses of drugs to get these uses paid by insurers, who often will not pay for off-label uses;

e. Using its grants for continuing medical education to promote off-label uses; and

f. Sending doctors to "consultant" meetings at lavish resorts to hear the company's off-label message.

38. Cephalon's unfair and deceptive off-label marketing and promotion was particularly pernicious given the potential for the drugs to cause harmful side effects, such as the following, when used by patients for off-label uses:

a. The use of Gabitril by patients who do not have epilepsy can cause seizures.

b. The use of Actiq by patients who have not developed a tolerance for other opioid products can cause addiction, hypoventilation, and death.

39. Upon information and belief, Cephalon adopted its unfair and deceptive marketing and promotion strategy for Actiq in spite of its CEO's own public acknowledgement that Actiq "is one of those drugs where if you really don't know what you're doing, you're going to run into trouble and physicians have been afraid to use it by and large."

40. Cephalon promoted off-label uses of Actiq fully aware that the clinical support for doing so was lacking. Upon information and belief, its 2002 Actiq Marketing Plan stated, "[W]e offer no data for ACTIQ use outside cancer."

41. In January 2002, the FDA issued a letter stating that certain marketing and promotional materials for Provigil were false and misleading because they promoted Provigil for unapproved indications.

42. In February 2005, the FDA issued a public health advisory warning of Gabitril's propensity to cause seizures in non-epileptic patients.

43. In February 2007, the FDA issued another letter stating that Cephalon's marketing and promotional materials for Provigil were false and misleading because they promoted Provigil for unapproved indications.

44. The purpose of Cephalon's unfair and deceptive marketing and promotion was to deceive and mislead physicians, other healthcare providers, and others about the safety and efficacy of Provigil, Gabitril, and Actiq and about the indications for which Provigil, Gabitril, and Actiq were approved.

45. Cephalon's repeated off-label marketing and promotion was unfair and deceptive under the SCUTPA and adverse to the public interest.

46. Based upon Cephalon's unfair and deceptive marketing and promotion plan, Cephalon knew or should have known that any of the Drugs could be prescribed to individuals and/or be purchased through its misrepresentations to citizens of the State of South Carolina and/or prescribed to be consumed and/or used and ingested by citizens of the State of South Carolina for unapproved purposes.

47. As a direct and proximate result of Cephalon's illegal marketing and promotion plan carried out within the State of South Carolina, the SHP spent millions of dollars on these drugs unnecessarily.

48. Many of the details and facts related to Cephalon's scheme are known only by Cephalon.

THE FEDERAL GUILTY PLEA

49. In November 2003, a federal *qui tam* complaint was commenced against Cephalon alleging various illegal acts. Additional federal *qui tam* complaints were subsequently commenced in or about September 2004, January 2008, and April 2008.

50. These matters were filed under seal in the Federal Court in keeping with the provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA").

51. The United States of America, acting through the United States Department of Justice, intervened in the November 2003 complaint against Cephalon.

52. On September 25, 2008, the Honorable Thomas J. O'Neill, Jr. issued an Order stating that the FCA complaints would be unsealed upon the filing of a Notice of Intervention by the United States Government. That Order is attached hereto as Exhibit A and is incorporated herein by reference.

53. On September 29, 2008, the United States filed its Notice of Intervention for Purposes of Settlement.

54. Cephalon entered into a Guilty Plea Agreement regarding criminal claims with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice. That Guilty Plea Agreement is attached hereto as Exhibit B and is incorporated herein by reference.

55. The Guilty Plea Agreement resolved the federal government's allegations of off-label promotional activities, termed misbranding, by Cephalon regarding Provigil, Gabitril and Actiq.

56. In Paragraph 6.A(1)-(9) of the Guilty Plea Agreement, Cephalon formally pled guilty to engaging in the conduct described in Paragraph 31 of this Complaint with respect to a specific time period.

57. In addition to the Guilty Plea Agreement, Cephalon entered into a Settlement Agreement regarding civil claims with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania, the Department of Justice, the Office of Inspector General of the Department of Health and Human Services, and others.

58. The Settlement Agreement provided for payment of a stipulated criminal fine of $50 million and payment of claims by the United States and state Medicaid programs in an agreed to amount of $375 million. The stipulated criminal fine of $50 million constituted a joint resolution of the charges against Cephalon for misbranding pursuant to 21 U.S.C. § 301, *et seq.*

59. The Guilty Plea Agreement and Settlement Agreement did not include the resolution of the claims described in this Complaint.

COUNT I

Violations of SCUTPA

60. Plaintiff re-alleges and incorporates each and every allegation contained in the preceding paragraphs as if fully alleged herein.

61. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Provigil and by its marketing and promotion of Provigil for off-label uses, including sleepiness, tiredness, decreased activity, lack of energy, and fatigue.

62. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Gabitril and by its marketing and promotion of Gabitril for off-label uses, including anxiety, insomnia, and pain.

63. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Actiq and by its marketing and promotion of Actiq for off-label uses, including non-cancer pain uses.

64. Every deceptive, unfair, and/or misrepresentative act or practice by Cephalon in marketing and promoting Provigil, Gabitril, and Actiq constitutes a separate and distinct violation of S.C. Code Ann. § 39-5-20.

65. Cephalon's conduct described in this Count was willful under S.C. Code Ann. § 39-5-110(c) and willful or knowing under S.C. Code Ann. § 39-5-140.

66. As a result of Cephalon's conduct, South Carolina consumers and third-party payors suffered ascertainable loss.

67. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

68. Pursuant to S.C. Code Ann. § 39-5-110(a), the State seeks a civil penalty in the amount of up to $5,000.00 for each violation of S.C. Code Ann. § 39-5-20.

69. Pursuant to S.C. Code Ann. § 39-5-50 (a) and/or S.C. Code Ann. § 39-5-50(b), the State seeks disgorgement of all of Cephalon's revenues relating to Provigil, Gabitril, and Actiq.

70. Pursuant to S.C. Code Ann. § 39-5-50(b), the State seeks restoration of all ascertainable loss suffered by South Carolina consumers and third-party payors of Provigil, Gabitril, and Actiq.

71. Pursuant to S.C. Code Ann. § 39-5-140(a), the State seeks actual and treble damages on behalf of SHP.

COUNT II

Unjust Enrichment

72. Plaintiff re-alleges and incorporates each and every allegation contained in the proceeding paragraphs as if fully alleged herein.

73. Cephalon marketed and promoted the Drugs in a false and deceptive manner in South

Carolina.

74. Cephalon withheld information from the State, prescribers, and the citizens of the State of South Carolina regarding the use of the Drugs.

75. The State and its citizens, because of the deceptive and illegal promotion and marketing of the Drugs, paid, reimbursed, or otherwise conferred a non-gratuitous benefit upon Cephalon that directly resulted from the Cephalon's fraudulent marketing practices.

76. Cephalon's fraudulent marketing practices resulted in Cephalon improperly realizing value from the non-gratuitous benefits conferred upon the Cephalon from the State and its citizens' payments for the Drugs.

77. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

78. It would be inequitable for Cephalon to retain the benefits of its violations without paying the State and its citizens for its value.

79. Restitution and disgorgement are equitable remedies designed to prevent unjust enrichment. A court may grant equitable relief where there is no adequate remedy at law.

80. Plaintiff, the State and its citizens, does not have an adequate remedy at law to provide it with relief from Cephalon's deceptive and illegal promotion and marketing of the Drugs. The remedy at law is not a practicable, efficient, and as prompt as a remedy in equity for restitution to prevent Cephalon's unjust enrichment.

81. During the time period the Drugs were illegally marketed and promoted in South Carolina, it would be proper to disgorge Cephalon of any improperly obtained gains and profits, plus interest, from such deceptive marketing. Requiring Cephalon to disgorge its illegal gains and profits would appropriately divest Cephalon of the proceeds of its misconduct.

82. Pursuant to common law, the State seeks full disgorgement of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the State of South Carolina, prays for judgment against Cephalon as follows:

1. For full restoration to South Carolina consumers and third party payors of any ascertainable loss, plus interest, resulting from the unlawful and/or wrongful conduct alleged herein pursuant to S.C. Code Ann. § 39-5-50(b);

2. For full disgorgement of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein pursuant to S.C. Code Ann. § 39-5-50(a) and/or S.C. Code Ann. § 39-5-50(b);

3. For full restitution of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein pursuant to common law;

4. For full disgorgement of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein pursuant to common law;

5. For a civil penalty in the amount of up to $5,000.00 for each method, act or practice deemed to violate SCUTPA pursuant to S.C. Code Ann. § 39-5-110(a);

6. For the actual and treble damages of the State Health Plan pursuant to S.C. Code Ann. § 39-5-140(a);

7. For appropriate permanent injunctive relief to protect the public interest in the State of South Carolina pursuant to S.C. Code Ann. § 39-5-50;

8. For such other and further relief as may be justified and which Plaintiff may be entitled to by law or equity including, but not limited to, all attorneys' fees, investigative fees, court costs, witness fees, and deposition fees.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General
C. HAVIRD JONES, JR.
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Columbia, SC 29201
(803) 256-3003

By: Kenneth M. Suggs
Attorney for the Plaintiff

February 13, 2012

EXHIBIT A

(A 03-627

TON

(22)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
ex rel. LUCIA PACCIONE

Plaintiff

v.

CEPHALON, INC.

Defendant

CIVIL ACTION NO. 03-6268
(FILED UNDER SEAL)

UNITED STATES OF AMERICA,
and the States of CALIFORNIA,
DELAWARE, FLORIDA, HAWAII,
ILLINOIS, LOUISIANA,
MASSACHUSETTS, NEVADA, NEW
HAMPSHIRE, NEW MEXICO, TEXAS,
TENNESSEE and VIRGINIA, and the
DISTRICT OF COLUMBIA
ex rel. JOSEPH PIACENTILE

Plaintiff

v.

CEPHALON, INC.,

Defendants

FILED
SEP 2 6 2008
MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

CIVIL ACTION NO. 03-6277
(FILED UNDER SEAL)

UNITED STATES OF AMERICA; THE
STATES OF CALIFORNIA,
DELAWARE, FLORIDA, HAWAII,
ILLINOIS, MASSACHUSETTS,
NEVADA, NEW MEXICO, TENNESSEE,
TEXAS, VIRGINIA, THE DISTRICT OF
COLUMBIA, AND NEW YORK;
ex rel. BRUCE BOISE

Plaintiff

v.	:	CIVIL ACTION NO. 04-4401 **(FILED UNDER SEAL)**
CEPHALON, INC.	:	
Defendant	:	
UNITED STATES OF AMERICA, ex rel. MICHAEL MAKALUSKY	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. 05-1904 **(FILED UNDER SEAL)**
CEPHALON, INC.	:	
Defendant	:	

ORDER

Upon the filing by the United States of its Notice of Intervention (for purposes of settlement and dismissal) in the above actions pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4),

IT IS ORDERED that,

1. The following documents only be unsealed:

A. Relator Paccione's Complaint filed on November 14, 2003 in Civil Action No. 03-6268, Docket No. 1;

B. Relator Piacentile's Second Amended Complaint filed on April 18, 2008 in Civil Action No. 03-6277, Docket No. 20;

C. Relator Boise's Second Amended Complaint filed on January 3, 2008 in Civil Action No. 04-4401, Docket Number 22;

D. Relator Makalusky's Complaint filed on April 25, 2005 in the District of Massachusetts and transferred to the Eastern District of Pennsylvania in Civil Action No. 05-1904, Docket # 1 (Complaint only);

E. The Government's Notice of Intervention; and

F. This Order.

2. All other papers or Orders on file in these matters shall remain under seal; and

3. The seal shall be lifted on all pleadings filed in these actions after the filing of the United States' Notice of Intervention.

IT IS SO ORDERED, this 25 day of Sept., 2008.

BY THE COURT:

T.N. O'Neill

HONORABLE THOMAS J. O'NEILL, JR.
Senior Judge, United States District Court

9/25/08
Copy to: M. Kay, AUSA - picking up at AUSA
P. Kelsey
M. Kreindler
D. Dwyak
L. Terry
R. Maggiano
D. Stone
R. Kitchengg
D. Jacobs
E. Kapsack
M. Quinlivan
R. Greenbaum

EXHIBIT B

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

EASTERN District of PENNSYLVANIA

UNITED STATES OF AMERICA
V.
CEPHALON, INC.

FILED
OCT 10 2008
MICHAEL E. KUNZ, Clerk
By Dep. Clerk

JUDGMENT IN A CRIMINAL CASE

Case Number: 08-598

USM Number:

Eric W. Sitarchuk, Esquire
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:331(a),333(a)(1) 21:352(f)(1)	Distribution of misbranded drugs: inadequate directions for use	10/1/2001	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/10/08
Date of Imposition of Judgment

Harvey Bartle
Signature of Judge

HARVEY BARTLE III, U.S.D.C.J.
Name and Title of Judge

October 10, 2008
Date 10/10/08 cert copies to counsel AUSA Judicial FLU

CEPH_DJ00001021

DEFENDANT: CEPHALON, INC.
CASE NUMBER: 08-598

PROBATION

The defendant is hereby sentenced to probation for a term of:

None

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with anyadditional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CEPHALON, INC.
CASE NUMBER: 08-598

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 125.	$ 40,000,000.	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
United States of America	40,000,000.	40,000,000.	

TOTALS	$ 40,000,000.	$ 40,000,000.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CEPHALON, INC.
CASE NUMBER: 08-598

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 125. due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Defendant Cephalon, Inc. is to pay agreed upon amount of forfeiture in the amount of $10,000,000. and fine in the amount of $40,000,000. within 10 business days.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:
$10,000,000.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO.
CEPHALON, INC.	:	

GUILTY PLEA AGREEMENT

Under Federal Rule of Criminal Procedure 11(c)(1)(C), the government, the defendant, Cephalon, Inc. (hereinafter "Cephalon"), and Cephalon's counsel enter into the following guilty plea agreement. Any reference to the United States or the government in this agreement shall mean the Office of the United States Attorney for the Eastern District of Pennsylvania, and the Office of Consumer Litigation of the Department of Justice.

1. Cephalon agrees to plead guilty to Count One of an Information, waiving prosecution by indictment, charging it with the introduction into interstate commerce of drugs that were misbranded through off-label promotion, a misdemeanor, in violation of 21 U.S.C. §§ 331(a), 333(a)(1) and 352(f)(1), and not to contest forfeiture as set forth in the notice of forfeiture seeking criminal forfeiture of $10,000,000 in substitute assets, in lieu of the drugs which were promoted off-label and are no longer available, all arising from Cephalon's off-label promotion of its drugs Provigil, Gabitril, and Actiq between January 2001 and October 1, 2001. Cephalon further acknowledges its waiver of rights, as set forth in the attachment to this agreement.

2. The parties agree that this plea agreement is made pursuant to Fed.R.Crim.P. 11(c)(1)(C) and that the following specific sentence is the appropriate disposition

of this case. If the Court rejects this plea agreement, the parties further agree that this agreement shall automatically convert to a plea agreement pursuant to Fed.R.Crim.P. 11(c)(1)(B), and this specific sentence shall be the joint recommendation of the parties, although not binding on the Court. The agreed upon sentence is as follows:

A. Cephalon agrees to pay the special assessment in the amount of $125 on the date of sentencing.

B. Cephalon agrees to pay $50,000,000 to resolve this Information, of which $40,000,000 will be applied to a criminal fine, and $10,000,000 will be applied as substitute assets to satisfy the forfeiture obligation. Cephalon will pay these amounts within 10 business days of the date of sentencing. Cephalon and the government agree that this fine and forfeiture represent a fair and just resolution of all issues associated with loss, fine and forfeiture calculations.

C. Cephalon agrees that as a result of its acts or omissions, the forfeitable property, that is the drugs which were promoted off-label, are no longer available for forfeiture as they cannot be located or have been transferred, sold or deposited with a third party, or otherwise disposed of, within the meaning of federal law. As a result, Cephalon agrees to the entry and satisfaction of a judgment and preliminary order of forfeiture on the date of the guilty plea, forfeiting to the United States the sum of $10,000,000 as substitute assets for the pertinent drugs. Cephalon agrees that, within 10 business days of the date of sentencing, Cephalon will make payment to the United States, by means of a wire transfer to the United States Marshal Service or check payable to same, in the amount of $10,000,000, this amount representing

substitute assets of the offense for which it is pleading guilty, subject to forfeiture in full satisfaction of the judgment and preliminary order of forfeiture.

D. The government agrees that, in light of the Corporate Integrity Agreement executed contemporaneously with this guilty plea agreement, Cephalon will not be placed on probation.

3. In a separate civil settlement among Cephalon, the United States and various States, executed contemporaneously with this guilty plea agreement, Cephalon will pay $375,000,000. Cephalon waives any and all defenses and objections in this matter or in that civil proceeding which might be available under the Double Jeopardy and Excessive Fines clauses of the Eighth Amendment. The parties agree that, in light of this civil settlement, and to avoid complicating and prolonging the sentencing process, the appropriate disposition of this case does not include a restitution order.

4. Cephalon waives any claim under the Hyde Amendment, 18 U.S.C. § 3006A (Statutory Note), for attorney's fees and other litigation expenses arising out of the investigation or prosecution of this matter.

5. Cephalon understands, agrees and has had explained to it by counsel that the Court may impose the following statutory maximum sentence: a fine of $200,000, or twice the gross gain or gross loss, whichever is greater; a special assessment of $125; restitution as ordered by the Court; and a five-year term of Court supervision; in addition, forfeiture may be ordered. Cephalon further understands that the terms and conditions of any Court supervision may be changed, and extended, by the Court if Cephalon violates any of the terms and conditions of that supervision.

6. With respect to Cephalon's conduct:

A. The parties stipulate to the following facts and basis for the plea, criminal fine and forfeiture:

(1) Cephalon marketed Provigil, Gabitril, and Actiq, which were drugs within the meaning of 21 U.S.C. § 321(g)(1).

(2) Shipments of a drug in interstate commerce must be accompanied by labeling bearing adequate directions for use for each of the drug's intended uses.

(3) In 1998, Provigil was approved by the FDA to treat excessive daytime sleepiness associated with narcolepsy.

(4) Between January 2001 and October 1, 2001, Cephalon promoted Provigil for uses not approved by the FDA, including as a daytime stimulant to treat sleepiness, tiredness, decreased activity, lack of energy and fatigue. Cephalon's promotion of Provigil for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Provigil's labeling did not bear adequate directions for each of the drug's intended uses.

(5) In 1997, Gabitril was approved by the FDA as an anti-epilepsy drug indicated as adjunctive therapy in adults and children 12 years and older in the treatment of partial seizures.

(6) Between January 2001 and October 1, 2001, Cephalon promoted Gabitril for certain uses not approved by the FDA, including as an

agent for anxiety, insomnia, and pain. Cephalon's promotion of Gabitril for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Gabitril's labeling did not bear adequate directions for each of the drug's intended uses.

(7) In 1998, Actiq was approved by the FDA for breakthrough cancer pain for patients with malignancies who were already tolerant to opioid therapy for their cancer pain.

(8) Between January 2001 and October 1, 2001, Cephalon promoted Actiq for uses not approved by the FDA, including for non-cancer pain uses, such as injuries and migraines. Cephalon's promotion of Actiq for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Actiq's labeling did not bear adequate directions for each of the drug's intended uses.

(9) Between 2001 through October 1, 2001, Cephalon profited by misbranding Provigil, Gabitril and Actiq, and distributing these drugs in interstate commerce.

B. The United States contends that, as a matter of relevant conduct, the conduct which forms the basis for this plea agreement, as set forth in subsection (A) above, continued past October 1, 2001. Cephalon does not admit that this conduct extended past October 1, 2001.

7. Cephalon and the United States retain the right to withdraw from this guilty plea agreement, and this plea agreement will be null and void, if the civil settlement

agreement and Corporate Integrity Agreement are not executed contemporaneously with this plea agreement.

8. The government agrees that, other than the charges in the Information in this case, it will not bring any other criminal charges against Cephalon for conduct which (a) falls within the scope of the grand jury investigation in the Eastern District of Pennsylvania relating to Cephalon's drugs Provigil, Gabitril, and Actiq; or (b) was known to the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice as of the date of the execution of this plea agreement, and which concerned the sale, promotion, or marketing of these three drugs in the United States. The non-prosecution provisions of this paragraph are binding on the Office of the United States Attorney for the Eastern District of Pennsylvania, the Office of Consumer Litigation of the Department of Justice, the United States Attorney's Offices for each of the other 93 judicial districts of the United States, and the Criminal Division of the United States Department of Justice. Attached as Exhibit B is a copy of the letter to United States Attorney Laurie Magid from the Assistant Attorney General, Criminal Division, Department of Justice, authorizing this agreement.

9. Cephalon understands that this guilty plea agreement does not bind any other government agency, or any component of the Department of Justice except as specified in paragraph 8 of this guilty plea agreement. Further, Cephalon understands that the United States takes no position as to the proper tax treatment of any of the payments made by Cephalon pursuant to this plea agreement, the civil settlement agreement, or the Corporate Integrity Agreement referenced in this plea agreement.

10. Cephalon agrees to waive the statute of limitations, and any other time-related defense, to the charge to which it is agreeing to plead guilty under this plea agreement. Cephalon understands and agrees that, should it seek to withdraw its plea, it may then be prosecuted for any criminal violation of which the United States has knowledge arising out of this investigation, subject to any applicable statute of limitation or other time-related protection not waived in this paragraph. Cephalon agrees that if it does not enter its plea, or withdraws its plea, after signing this agreement, the time period between the signing of this agreement and its withdrawal shall be excluded from calculation of the limitations or time period.

11. In exchange for the undertakings made by the government in entering this plea agreement, Cephalon voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

If this plea agreement converts to a plea agreement pursuant to Fed.R.Crim.P. 11(c)(1)(B):

A. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of its sentence.

B. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:

(1) the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in this plea agreement;

(2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; and/or

(3) the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

12. Cephalon also waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

13. Cephalon is satisfied with the legal representation provided by its lawyers; Cephalon and its lawyers have fully discussed this guilty plea agreement; and Cephalon is agreeing to plead guilty because Cephalon admits that it is guilty.

14. Cephalon will acknowledge acceptance of this guilty plea agreement by the signature of its counsel and of a responsible corporate officer. Cephalon shall provide to the government for attachment to this plea agreement a notarized resolution by Cephalon's Board of

Directors authorizing the corporation to enter a plea of guilty, and authorizing that responsible corporate officer to execute this agreement.

15. If acceptable to the Court, the parties agree to waive the presentence investigation and report pursuant to Rule 32(c)(1) of the Federal Rules of Criminal Procedure, and ask that Cephalon be sentenced at the time the guilty plea is entered.

16. It is agreed that the parties' guilty plea agreement contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by all parties.

SIGNATURES FOR THE UNITED STATES

GREGORY G. KATSAS
Assistant Attorney General
Civil Division
United States Department of Justice

EUGENE THIROLF
Director, Office of Consumer Litigation
United States Department of Justice

LAURIE MAGID
Acting United States Attorney

JEFFREY STEGER
Trial Attorney
Office of Consumer Litigation
United States Department of Justice

CATHERINE VOTAW
Chief, Health Care Fraud
Assistant United States Attorney

DATED: Sept. 26, 2008

SIGNATURE FOR CEPHALON

DATE: 9/15/08

GERALD J. PAPPERT
Executive Vice President and General Counsel
Cephalon, Inc.

SIGNATURES OF CEPHALON'S ATTORNEYS

DATE: 9/10/08

ERIC W. SITARCHUK, Esquire
Morgan, Lewis & Bockius LLP
Counsel for Defendant

J. SEDWICK SOLLERS III, Esquire
MARK A. JENSEN, Esquire
King & Spalding, LLP
Counsel for Defendant

002 JERRY PAPPERT 09/15/2008 09:20 FAX 610 738 6256

Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO.
CEPHALON, INC.	:	

ACKNOWLEDGMENT OF RIGHTS

Cephalon, Inc. ("Cephalon"), through its properly authorized officer, hereby acknowledges that it has certain rights that it will be giving up by pleading guilty.

1. Cephalon understands that it does not have to plead guilty.

2. Cephalon may plead not guilty and insist upon a trial.

3. At that trial, Cephalon understands:

   a. that Cephalon would have the right to be tried by a jury that would be selected from the Eastern District of Pennsylvania and that along with its attorney, Cephalon would have the right to participate in the selection of that jury;

   b. that the jury could only convict Cephalon if all twelve jurors agreed that they were convinced of Cephalon's guilt beyond a reasonable doubt;

   c. that the government would have the burden of proving Cephalon's guilt beyond a reasonable doubt and that Cephalon would not have to prove anything;

   d. that Cephalon would be presumed innocent unless and until such time as the jury was convinced beyond a reasonable doubt that the government had proven that Cephalon was guilty;

   e. that Cephalon would have the right to be represented by a lawyer at this trial and at any appeal following the trial, and that if Cephalon could not afford to hire a lawyer, the court would appoint one for Cephalon free of charge;

f. that through Cephalon's lawyer Cephalon would have the right to confront and cross-examine the witnesses against Cephalon;

g. that Cephalon could call witnesses to testify in its defense if Cephalon wanted to, and Cephalon could subpoena witnesses for this purpose if Cephalon wanted to; and

h. that Cephalon would not have to call witnesses to testify or otherwise present any defense if Cephalon did not want to, and that if Cephalon did not present any evidence, the jury could not hold that against Cephalon.

4. Cephalon understands that if Cephalon pleaded guilty, there will be no trial and Cephalon would be giving up all of the rights listed above, as well as any other rights associated with the trial process arising under statute, common-law, or judicial precedent.

5. Cephalon understands that if Cephalon decides to enter a plea of guilty, the judge will ask Cephalon representatives questions under oath, and that if any of those representatives lie on behalf of Cephalon in answering those questions, those persons could be prosecuted for the crime of perjury, that is, for lying under oath.

6. Cephalon understands that if Cephalon pleads guilty, Cephalon has waived its right to appeal, except as set forth in appellate waiver provisions of the plea agreement.

7. Understanding that Cephalon has all these rights and that by pleading guilty Cephalon is giving them up, Cephalon still wishes to plead guilty.

9/15/08

GERALD J. PAPPERT
Exec. Vice President and General Counsel
for Cephalon, Inc, the Defendant

ERIC SITARCHUK, Esquire
Morgan, Lewis & Bockius LLP
Counsel for Defendant.

003

JERRY PAPPERT

09/15/2008 09:20 FAX 610 738 6258

CEPH_DJ00001036

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

CEPHALON, INC.,) CIVIL ACTION COVERSHEET
Plaintiff(s)) 2012 CP 4007317

vs.)

ALAN WILSON, IN HIS CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA)
Defendant(s))

Stephen F. McKinney (SC Bar #11833)
Roopal R. Samuels (SC Bar # 16003)
Sarah P. Spruill (SC Bar # 68337)
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2012 OCT 30 PM 1:40
JEANETTE W. GRIDER
C.C.P. & G.S.
RICHLAND COUNTY
FILED

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

If Action is Judgment/Settlement do not complete

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☒ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** Oct. 30, 2012

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

[0182]

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	**FOR THE FIFTH JUDICIAL CIRCUIT**
Cephalon, Inc.,	Civil Action No.: _____
Plaintiff,	**SUMMONS**
vs.	
Alan Wilson, in his capacity as Attorney General for the State of South Carolina,	
Defendant.	

FILED
2012 OCT 30 PM 1:40
JEANNETTE W. RICHARDSON
C.C.P. & G.S.

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Date: October 30, 2012

Stephen F. McKinney (SC Bar #11833)
Roopal R. Samuels (SC Bar # 16003)
Sarah P. Spruill (SC Bar # 68337)
HAYNSWORTH, SINKLER, BOYD, P.A.
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Attorneys for Plaintiff Cephalon, Inc.

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	**FOR THE FIFTH JUDICIAL CIRCUIT**
Cephalon, Inc.,	Civil Action No.: _____
Plaintiff,	**COMPLAINT (DECLARATORY JUDGMENT ACTION)**
vs.	
Alan Wilson, in his capacity as Attorney General for the State of South Carolina,	
Defendant.	

JEANNE C. McBRIDE C.C.P. & G.S.
2012 OCT 30 PM 1:40
FILED

Cephalon, Inc. ("Cephalon") brings this action pursuant to the South Carolina Uniform Declaratory Judgments Act, S.C. CODE ANN. § 15-53-10 *et seq.*, and 42 U.S.C. § 1983. Cephalon seeks a declaratory judgment that the engagement of private contingent-fee counsel by the Attorney General of the State of South Carolina (the "AG" or "Attorney General Wilson") to prosecute *State of South Carolina ex rel. Alan Wilson v. Cephalon, Inc.*, 2011-CP-40-3661 (the "Underlying Enforcement Action") violates Cephalon's rights to due process of law under both the Fourteenth Amendment of the United States Constitution (the "Fourteenth Amendment") and Article I, § 3 of the South Carolina Constitution, and further violates the separation of powers doctrine set forth in Article I, § 8 of the South Carolina Constitution.

SUMMARY

The Underlying Enforcement Action is an enforcement proceeding, brought by Attorney General Wilson in his capacity as the State's chief law enforcement officer, to obtain sanctions against Cephalon that are punitive in both purpose and effect. It accuses Cephalon of activity that the AG claims to be criminal misconduct and seeks enormous penalties as a consequence. Although nominally styled a civil action, the Underlying Enforcement Action is, in reality, a law enforcement proceeding akin to a criminal prosecution.

In the Underlying Enforcement Action, the AG purports to assert claims against Cephalon for, *inter alia*, statutory penalties under the South Carolina Unfair Trade Practices Act ("SCUTPA").[1] Although the AG is not required to seek penalties in his enforcement of the Act, only the AG is permitted to enforce SCUTPA's penalty provisions. Yet the AG has entered into an agreement engaging private lawyers to pursue those punitive sanctions. But the agreement does not stop there. Instead, it awards the private lawyers richly for maximizing those penalties by allowing them to take a significant percentage of it for themselves as a contingent fee. But the agreement also does not stop there. Instead, the AG also has crafted the engagement so that the AG's Office takes a cut of private counsel's contingent fee for itself.

Specifically, the contingent fees agreement entitles private counsel to keep up to 25% of any civil penalties, restitution or damages, and up to 20% of punitive or exemplary damages, awarded to the State. The agreement then kicks back a 10% cut of private counsel's contingent fee directly to the AG's Office. Thus, both private counsel and the AG's Office have a direct and sizeable financial interest in prosecuting the Underlying Enforcement Action, and in maximizing the penalties levied upon Cephalon.

This contingent fees agreement violates the Fourteenth Amendment and the South Carolina Constitution. It financially incentivizes both private counsel and the AG to advocate for the broadest possible interpretation of prohibited conduct, the maximum number of violations to which penalties are affixed and the maximum penalty for each of those violations. This is true regardless of whether those positions are in the public interest, in the interests of justice or would otherwise reflect the reasoned exercise of prosecutorial discretion.

---

[1] On June 2, 2011, the State of South Carolina filed the original complaint in the Underlying Enforcement Action. In the original complaint, the State sought disgorgement, civil penalties and permanent injunctive relief under SCUTPA. On September 23, 2011, the State sought leave to file an amended complaint, seeking to add claims on behalf of the State Health Plan and to recover damages on its behalf. The amended complaint was filed on February 13, 2012.

Moreover, the contingent fees agreement violates the separation of powers clause in Article I, § 8 of the South Carolina Constitution. It does so by purporting to side-step S.C. CODE ANN. § 1-7-150(B). That section requires the AG to deposit any proceeds from the Underlying Enforcement Action into the State's general fund, and thus precludes him from diverting state monies to his office or private counsel.

In short, the AG has violated Cephalon's federal and state Constitutional rights by entering into this contingent fees agreement with private counsel.

PARTIES

1. The Plaintiff is Cephalon, Inc., a Delaware corporation headquartered in Frazer, Pennsylvania. Cephalon is a pharmaceutical bio-technology company that develops and manufactures innovative medications. Among other products, Cephalon produces Actiq, Provigil and Gabitril – prescription, brand-name medications that have been approved by the United States Food and Drug Administration.

2. Plaintiff here is the defendant in the Underlying Enforcement Action.

3. The Defendant is Attorney General Wilson. Defendant here is a plaintiff in the Underlying Enforcement Action. This action is brought against Attorney General Wilson in his official capacity.

4. The acts alleged herein were authorized, ordered, done or ratified by Defendant while acting in his official capacity as Attorney General of the State of South Carolina under color of state law and pursuant to official policy or custom.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this matter and personal jurisdiction over the parties hereto. Venue is proper in Richland County pursuant to S.C. CODE

ANN. § 15-7-30 because, among other things, a substantial part of the alleged acts or omissions occurred in Richland County.

6. The jurisdiction of this Court is founded upon Article V, § 11 of the South Carolina Constitution, which gives the Circuit Court general jurisdiction over civil actions, as well as the South Carolina Uniform Declaratory Judgments Act, S.C. CODE ANN. § 15-53-10, *et seq.*

FACTUAL BACKGROUND

The Underlying Enforcement Action

7. Attorney General Wilson was sworn in as the Attorney General of South Carolina on January 12, 2011.

8. Less than three weeks later, on January 30, 2011, Attorney General Wilson publicly discussed the budgetary constraints confronting his Office. He stated that he was "thinking outside the box" on how to bring in more money, and that one way to raise "significant revenue" for his Office was through investigations and lawsuits.[2]

9. Pursuant to that strategy, shortly thereafter, in early February, 2011, one of Attorney General Wilson's deputies called Cephalon's then General Counsel to "discuss" SCUTPA claims that Attorney General Wilson purported to have against Cephalon for alleged violations that the AG's Office had known about, but not acted upon, since at least 2005, and for which it had settled state Medicaid claims many years before.

10. Section 39-5-150 of SCUTPA provides: "***No action*** may be brought . . . ***more than three years*** after the discovery of the unlawful conduct which is the subject of the suit." (emphasis added).

[2] A true and correct copy of "Wilson Shares Some Plans for Future," The Post and Courier, Jan. 30, 2011, is attached hereto as Exhibit A.

11. Yet, notwithstanding that SCUTPA's statute of limitations had long since run, in a subsequent telephone call, another of the AG's deputies made a "settlement" demand of Cephalon in the multi-millions of dollars.

12. On June 2, 2011, the AG commenced the Underlying Enforcement Action against Cephalon, a punitive lawsuit intended and designed to extract enormous fines from Cephalon, and in doing so raise significant revenue for the AG while earning handsome fees for the AG's private counsel.

The Unlawful Contingent Fees Agreement with Private Counsel

13. On or before July 26, 2011, Attorney General Wilson entered into an unlawful contingent fees agreement for the Underlying Enforcement Action with private counsel Kenneth M. Suggs and J. Todd Rutherford. It is entitled "Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq," (the "Contingent Fees Agreement").[3]

14. The Contingent Fees Agreement gives both private counsel and the AG's Office a substantial financial stake in the Underlying Enforcement Action and incentivizes them to seek the maximum penalties against Cephalon.

15. Specifically, the Contingent Fees Agreement sets forth a fee schedule that awards private counsel and the AG's Office substantial attorneys' fees based on a sliding percentage of any settlement or judgment obtained:

> (a) Private counsel is to be paid pursuant to a sliding scale beginning with 25% of a recovery up to $5 million and ending with 10% of a recovery over $100 million for civil penalties, restitution and non-exemplary damages awarded. *See* Exh. B, at Art. IV, § A(3).

[3] A true and correct copy of the Contingent Fees Agreement is attached hereto as Exhibit B.

(b) The AG is to retain 10% of private counsel's contingent fee for the amount of civil penalties, restitution and non-exemplary damages awarded. *See id.*

(c) In addition, private counsel is to be paid pursuant to a sliding scale beginning with 20% of a recovery up to $10 million and ending with 10% of a recovery over $100 million for any exemplary damages recovered. *See id.* at § A(4).

(d) The AG also retains 10% of private counsel's contingent fee for exemplary damages. *See id.*

16. On February 13, 2012, the AG filed the First Amended Complaint in the Underlying Enforcement Action.[4] Among other relief, the complaint seeks the maximum statutory penalty of $5,000 for every alleged SCUTPA violation in Cephalon's marketing of Actiq, Provigil and Gabitril. Applying the formula in the Contingent Fees Agreement, and depending on the theories of recovery ultimately pursued by the AG's counsel, the fees sought to be awarded to contingent-fee counsel as the result of the imposition of such penalties easily could be in the multi-millions of dollars. In turn, the AG's Office's share of those enormous fees would likewise be substantial.

17. Attorney General Wilson and private counsel have thus crafted a contingent fees arrangement that allows them to wield the AG's considerable law enforcement authority and discretion in a manner that, in the case of the private lawyers, allows them to earn handsome personal profits, and, in the case of the AG's Office, allows it directly to increase its funding and hence its expenditures, including salaries and other expenses.

18. Conversely, both Attorney General Wilson and private counsel necessarily will consider how much of a potential payday they will forego if the public interest or reasoned prosecutorial judgment would otherwise lead them not to pursue the Underlying Enforcement Action further, or to seek some lower penalty or no penalty at all.

[4] A true and correct copy of the First Amended Complaint (without the accompanying exhibits) is attached hereto as Exhibit C.

19. Cephalon has a due process right to face law enforcement decisions not tainted by substantial financial incentives for those prosecuting claims against it. Furthermore, the South Carolina Legislature has determined that claims for SCUTPA penalties should be pursued only by the AG, and only in the interest of the State of South Carolina and its citizens.

Due Process - Applicable Constitutional and Statutory Framework

20. The Due Process clauses of the Fourteenth Amendment and the South Carolina Constitution, S.C. CONST., Art. I, § 3, guarantee Cephalon the right to due process of law.

21. Section 1983 of Title 42 of the United States Code forbids the deprivation by a person acting under color of state law of any rights, privileges or immunities secured by the United States Constitution. Section 1983 permits civil actions against any such person to redress an official policy or custom that causes the plaintiff to be subjected to a denial of a constitutional right.

22. The Court has the power to declare that the Contingent Fees Agreement violates Cephalon's rights under the Fourteenth Amendment and the South Carolina Constitution pursuant to the South Carolina Uniform Declaratory Judgments Act, S.C. CODE ANN. § 15-53-10, *et seq.*

23. In taking the actions alleged herein against Cephalon, the AG acted under color of state law, and pursuant to official policy or custom, violated Cephalon's constitutional rights to due process of law.

24. As described herein, the financial incentives of the AG's Office and private contingent-fee counsel created by the Contingent Fees Agreement subjects Cephalon to an ongoing deprivation if its federal and state constitutional rights that will result in irreparable

harm unless the AG and private counsel are enjoined from prosecuting the Underlying Enforcement Action under the Contingent Fees Agreement.

The Underlying Enforcement Action is Akin to a Criminal Proceeding for Which Due Process Prohibits Prosecution by Financially Interested Prosecutors

25. Due process prohibits a criminal prosecution, or a prosecution akin to a criminal prosecution, by a financially interested prosecutor.

26. Due process also prohibits a financially interested prosecutor from prosecuting an action which implicates fundamental constitutional rights and the right to continue the operation of an existing business.

27. The Underlying Enforcement Action is akin to a criminal prosecution.

28. It also implicates Cephalon's ability to conduct commercial activity in South Carolina and to engage in free commercial speech as it has a right to under the First Amendment to the United States Constitution and Article 1, § 2 of the South Carolina Constitution. *See Sorrell v. IMS*, 131 S. Ct. 2653 (U.S. 2011).

29. In addition to purporting to act in his capacity "as the chief legal officer of the State," the AG claims to be performing the quintessential law enforcement function of "protect[ing] the interests of the State and its citizens." *See* Exh. C, at ¶¶ 1, 2.

30. The criminal nature of the Underlying Enforcement Action is also underscored by the AG's characterization of Cephalon's alleged conduct in overtly criminal terms, describing it as "illegal," "unlawful," "fraudulent" and "adverse to the public interest." *See id.* at ¶¶ 7, 45, 47, 75, 76, 80, 81, 82.

31. Furthermore, the AG is exercising his law enforcement authority to punish Cephalon's alleged conduct by seeking to extract large financial penalties and other sanctions.

32. In addition, each of the following considerations further and independently supports the conclusion that the Underlying Enforcement Action is akin to a criminal prosecution:

(a) An action for penalties under SCUTPA is reserved exclusively to the law enforcement authority of the AG. Only the AG is empowered to bring an action for an award of statutory penalties under SCUTPA. *See* S.C. CODE ANN. §§ 39-5-110, 39-5-140.

(b) SCUTPA sanctions have historically been regarded as punishments. SCUTPA grants the AG the power to "prosecute" an action for penalties. *See* S.C. CODE ANN. § 39-5-130. The terms "prosecute" and "penalty" are inherently criminal concepts. *See e.g.*, *United States v. LaFranca*, 282 U.S. 568, 575 (1931).

(c) A SCUTPA penalties action is designed solely to promote punishment and deterrence. The statutory penalty can only be sought by the AG in his capacity as the State's chief law enforcer to punish willful misconduct and deter potential future violators from engaging in similar illegal conduct.

(d) In order to impose penalties, SCUTPA imposes a *scienter* standard. The existence of a *scienter* requirement has traditionally distinguished punishment from remediation and criminal from civil. *See Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

(e) The AG alleges misbranding, which, if proven could constitute criminal misconduct under the South Carolina Drug Act, S.C. CODE ANN. §§ 39-23-40, 39-23-80.

(f) The very large SCUTPA penalties that the AG seeks have no rational connection to a non-punitive purpose. Private counsel informed the court in the Underlying Enforcement Action that his preliminary estimate was that Cephalon's liability would "bottom out" at eighty

million dollars. Such an extreme award would be unhinged from any actual harm and is therefore purely punitive.

33. In other litigation, the AG has clearly and explicitly described enforcement actions under SCUTPA as being akin to criminal proceedings. For example in its opening statement in a recent SCUTPA action, *State of South Carolina v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, C.A. No. 07-CP-42-1438, the AG explained: "This is not a civil case like a car wreck or a product liability case where somebody is coming in and saying, hey, I got hurt, give me a lot of money from the defendant . . . **This case is about obeying the law** . . . This is not a fraud case. We don't have to prove reliance. **This is an enforcement case.** The law says you can't do this, **if you do it, you broke the law.** It doesn't matter what – **it's kind of like you go in to rob the 7-Eleven** and it turns out there's no money in there or the clerk pulls out a gun and you have to run away. If the police catch you, the fact that you didn't get any money or the fact that the clerk ran you away and was able to fend off the attack **isn't going to save you from prosecution. If you break the law, you have to pay the consequences.**"[5] Exh. D, at 193; 204-205 (emphasis added).

34. SCUTPA involves an affirmative disability or restraint because it allows the AG to bring an action for an injunction, while another provision allows for dissolution, suspension or forfeiture of the charter of a corporation for violating a SCUTPA injunction. There is no sanction more restrictive than prohibiting a company from doing business in South Carolina by dissolving, suspending or forfeiting its charter. The AG seeks a permanent injunction against Cephalon in the Underlying Enforcement Action.

35. Cephalon has the right to engage in free commercial speech through the truthful promotion of its products. *See Sorrell*, 131 S. Ct. at 2667-72.

[5] True and correct copies of the relevant excerpts from the March 8, 2011 are attached hereto as Exhibit D.

36. A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). As such, a prosecutor's interest is not that the government "shall win a case, but that justice shall be done." *Id.*

37. It is a fundamental precept under the Due Process clauses of both the Fourteenth Amendment and South Carolina Constitution that a prosecutor shall not have a financial stake in the outcome of a criminal prosecution since such interest could taint the prosecutor's judgment and inhibit the prosecutor's duty to seek justice and further the public interest.

38. South Carolina law also expressly forbids a prosecutor from having a financial interest that creates a conflict with his or her official duties. *See* S.C. CODE ANN. § 17-1-20; *see also Langford v. McLeod*, 269 S.C. 466, 472 (1977) ("[Section 17-1-20] is clearly directed at the evil of a situation where the pecuniary interests of a prosecutor come in conflict with his official duties.").

39. The Contingent Fees Agreement holds substantial financial opportunity for both private counsel and the AG, and incentivizes them to maximize that opportunity by aggressively pursuing the maximum number of violations and the maximum amount of penalties without regard to whether such actions further justice or are in the public interest.

40. Private counsel is motivated to pursue such a strategy for enormous personal profit. The AG's Office is motivated to pursue such a strategy to capture its own cut of private counsel's payday, which can then be used to increase office spending and reward lawyers in the office with pay increases or bonuses.

Even if not Akin to a Criminal Prosecution, Insufficient Countervailing Safeguards Render the Contingent Fees Agreement Improper

41. Due process also limits a private or public prosecutor's financial interest in other types of law enforcement actions, even those that are not tantamount to criminal actions. *See e.g.*, *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980).

42. Thus, even if the Underlying Enforcement Action is not akin to a criminal prosecution, the Contingent Fees Agreement nevertheless violates Cephalon's due process rights under the United States and South Carolina Constitutions because the Contingent Fees Agreement vests an enormous financial interest in private counsel and the AG's Office. This creates a constitutionality impermissible risk of bias and improper enforcement of SCUTPA.

43. This is especially pernicious where significant rights and interests of Cephalon are at stake including its ability to conduct commercial activity in South Carolina and to engage in free commercial speech as it has a right to under the First Amendment to the U.S. Constitution and Article 1, § 2 of the South Carolina Constitution. *See Sorrell*, 131 S. Ct. at 2667-72.

44. Due process requires that there be sufficient safeguards to mitigate against the impermissible risk of bias.

45. The Contingent Fees Agreement gives the AG and his Office a direct interest in increasing private counsel's contingent fee. It also lacks the key safeguards that are necessary to ensure that the discretionary authority of government lawyers who are required to act in the public interest is not eclipsed by the profit motive of private counsel.

46. Among these minimum safeguards are: (1) neutral, conflict-free government attorneys must personally oversee the litigation; (2) government attorneys must retain complete control over the course and conduct of the case; (3) government attorneys must retain veto power over any decisions made by outside counsel; (4) decisions regarding settlement of the case are

reserved exclusively to the discretion of the government's own attorneys; and (5) the defendant must be permitted to directly contact neutral, conflict-free government attorneys without the involvement of private contingent-fee counsel. *See e.g.*, *Marshall*, 446 U.S. at 250-52; *see also County of Santa Clara v. Superior Court*, 235 P.3d 21, 36 (Cal. 2011).

47. The Contingent Fees Agreement does not contain sufficient safeguards and does not sufficiently mitigate the risk of bias and improper enforcement of SCUTPA.

48. Among the reasons that the Contingent Fees Agreement does not sufficiently mitigate the risk of bias and improper enforcement of SCUTPA, are the following:

(a) The Contingent Fees Agreement does not require that a neutral, conflict-free government attorney oversee and control the conduct of the Underlying Enforcement Action. Instead, the entire AG's Office is financially interested in the Underlying Enforcement Action as a result of the 10% to be kicked back to the Office, but there is no provision that requires the AG to appoint a neutral government lawyer, with no financial interest, to supervise the Underlying Enforcement Action. Further, while the Contingent Fees Agreement gives the AG "the right to appoint a designated assistant . . . to oversee the litigation," it does not ***require*** him to do so. *See* Exh. B, at Art. II, § A(1).

(b) The Contingent Fees Agreement does not specify that Cephalon may contact the lead government attorney without the involvement of private contingent-fee counsel. The ability of a defendant to interface directly with the lead government attorney is of paramount importance in an enforcement action where the primary remedy is monetary in nature. The ability to negotiate a reasonable settlement with an impartial, conflict-free public representative serves as a key check on the potential bias created by an overzealous private attorney with a pecuniary motive.

The Contingent Fees Agreement Violates the Separation of Powers Doctrine

49. Article I, § 8 of the South Carolina Constitution provides that, "[i]n 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."

50. In an exercise of its legislative powers, the State Legislature enacted S.C. CODE ANN. § 1-7-150(B), which provides:

> "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. . . ."

51. Through the Contingent Fees Agreement, the AG purports to allocate the State's recovery to his Office and private contingent-fee counsel in contravention of the express requirements of S.C. CODE ANN. § 1-7-150.

52. The Contingent Fees Agreement provides that "[a]t least 75% of the remaining or net settlement or judgment proceeds (but not including punitive or exemplary damages, if any) shall be paid or applied to or for the State or the people of South Carolina or the victims ***in a manner to be determined by the Attorney General in his sole discretion***." Exh. B, at Art. IV, § A(2). (emphasis added). Thus, through the Contingent Fees Agreement, Attorney General Wilson has evaded the statutory restrictions on his authority to expend State funds.

53. The Contingent Fees Agreement also sets forth the percentage of fees to be awarded to contingent-fee counsel based on the net settlement or judgment proceeds.

54. South Carolina law expressly provides that investigative and litigation costs that would otherwise inure to the benefit of the State, must be awarded by court order or settlement. *See* S.C. CODE ANN. § 1-7-150(B).

55. The Contingent Fees Agreement violates the separation of powers restrictions in the South Carolina constitution by purporting to evade the statutory restrictions on the award of attorneys' fees.

56. Moreover, in the case of a settlement or judgment involving a combination of monetary and non-monetary relief (*i.e.*, injunctive relief), the Contingent Fees Agreement purports to allow the AG to "determine the monetary value to the State."

57. The Contingent Fees Agreement impermissibly diverts State funds to contingency-fee counsel and constitutes a violation of the separation of powers by usurping powers of both the legislative and judicial branches.

COUNT I — FOR A FIRST DECLARATION
(First Due Process Violation)

58. Cephalon incorporates by reference the foregoing allegations as if set forth at length herein.

59. The Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of the South Carolina Constitution, S.C. Const., Art. 1, § 3, restrict the personal and financial interests that a prosecutor, like Defendant, pursuing statutory penalties, may have in the outcome of a lawsuit.

60. A government attorney's personal or financial interest in the outcome of a statutory-penalties lawsuit is a due process violation when there is a sufficient risk that such an interest will lead to a biased prosecution.

61. Defendant's prosecution of the Underlying Enforcement Action against Cephalon is akin to a criminal prosecution because Attorney General Wilson is acting in a law enforcement capacity and seeking primarily statutory penalties.

62. Cephalon seeks a declaration pursuant to 42 U.S.C. § 1983 that the AG's use of contingent-fee counsel in the Underlying Enforcement Action violates Cephalon's rights to due process of law under the Fourteenth Amendment of the United States Constitution.

63. Cephalon also seeks a declaration pursuant to the South Carolina Declaratory Judgments Act, S.C. CODE ANN. § 15-53-10 *et seq.*, that the AG's conduct violates Cephalon's rights to due process of law under the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution.

COUNT II – FOR A SECOND DECLARATION
(Second Due Process Violation)

64. Cephalon incorporates by reference the foregoing allegations as if set forth at length herein.

65. The Underlying Enforcement Action is a law enforcement proceeding in which the contingent fee arrangement agreed to in the Contingent Fees Agreement is improper.

66. The Contingent Fees Agreement does not have adequate safeguards to mitigate the corrupting influence of private counsel's and the AG's financial interests.

67. Cephalon seeks a declaration pursuant to 42 U.S.C. § 1983 that the AG's actions in the Underlying Enforcement Action violate Cephalon's rights to due process of law under the Fourteenth Amendment of the United States Constitution.

68. Cephalon also seeks a declaration pursuant to the South Carolina Declaratory Judgments Act, S.C. CODE ANN. § 15-53-10 *et seq.*, that the AG's actions violate Cephalon's

rights to due process of law under the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution.

COUNT III — FOR A THIRD DECLARATION
(Separation of Powers)

69. Cephalon incorporates by reference the foregoing allegations as if set forth at length herein.

70. As a result of the AG's prosecution of the Underlying Enforcement Action through contingent-fee counsel pursuant to the Contingent Fees Agreement, Cephalon is a person who is interested under a written contract and whose rights are affected by the Contingent Fees Agreement and state law. Accordingly, Cephalon may obtain a declaration of rights pursuant to S.C. CODE ANN. § 15-53-10 *et seq.*

71. By entering into the Contingent Fees Agreement to prosecute the Underlying Enforcement Action, Attorney General Wilson's actions are outside the course and scope of his lawful duties. Attorney General Wilson's attempt to allocate any recovery in the Underlying Enforcement Action and set the amount of recoverable attorneys' fees violates the separation of powers doctrine set forth in Article I, § 8 of the South Carolina Constitution.

72. Cephalon also seeks a declaration pursuant to the South Carolina Declaratory Judgments Act, S.C. CODE ANN. § 15-53-10 *et seq.*, that the AG's actions violate the separation of powers doctrine set forth in Article I, § 8 of the South Carolina Constitution.

WHEREFORE, Cephalon prays:

1. For an Order by this Court declaring that Alan Wilson, in his capacity as Attorney General of the State of South Carolina, has violated Cephalon's rights to due process of law, under both the United States Constitution and the Constitution of the State of South Carolina;

2. For an Order by this Court declaring that Alan Wilson, in his capacity as Attorney General of the State of South Carolina, has violated the separation of powers doctrine set forth in Article I, § 8 of the South Carolina Constitution;

3. For a preliminary and permanent injunction barring the AG and private contingent-fee counsel from prosecuting the Underlying Enforcement Action under the Contingent Fees Agreement; and

4. For any other additional relief this Court deems just and proper.

Respectfully submitted,

Date: October 30, 2012

Stephen F. McKinney (SC Bar #11833)
Roopal R. Samuels (SC Bar # 16003)
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Attorneys for Plaintiff Cephalon, Inc.

EXHIBIT A

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The Post and Courier

Wilson shares some plans for future

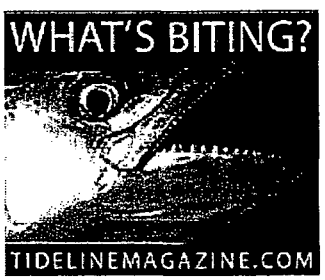
BY JOHN MONK
The State

Posted: Sunday, January 30, 2011 12:01 a.m.
UPDATED: Friday, March 23, 2012 12:24 p.m.

/File/Mary Austin/Staff Attorney General Alan Wilson

New Attorney General Alan Wilson can't get his watch fixed. He hasn't used the Kindle he got for Christmas. He has stopped regular jogs.

"I just don't have the time," said Wilson, 37, sworn in Jan. 12 to a four-year term.



His life never stops now. He shares some child care duties for two preschool-age kids with his wife, Jennifer, the public relations manager at Lexington Medical Center, getting home in time to read the children books such as "Goodnight Gorilla."

He's also a major in the National Guard who spends one weekend a month and two weeks each year on duty.

Extra Photos

In his new $92,007-a-year post as South Carolina's top legal officer, Wilson is still getting his mind around the job, reading law cases and white papers, talking to members of the House and Senate and

S.C. Attorney General Henry McMaster was sued by Craigslist in 2009. The online classified ads giant is asking a federal judge to reconsider dropping that lawsuit.

Related story

McMaster's future

trying to figure out how to best run his office in lean budget times.

His office gets some $3.7 million a year in state funds -- about $4 million less than several years ago. That money, along with several million more from various fees and federal grants, has to pay for a 169-person staff, including 69 attorneys, and associated expenses. The office's total budget is about $7.6 million.

In an interview last week, Wilson shared some plans:

He will continue initiatives begun by predecessor Henry McMaster to spotlight and prosecute criminal domestic violence cases, Internet sexual predator offenders and animal cruelty cases.

With other states, he will fight in the courts against President Barack Obama's national health care plan, attacking it on constitutional grounds.

Also with several other states, he is ready to fight a court battle over the National Labor Relations Board's effort to stop South Carolina from adopting a constitutional amendment backed by voters in November, guaranteeing workers the right to a secret ballot in union elections.

Although an unabashed conservative Republican, Wilson is clear about the tone he wants to set -- someone who reaches out to people on different sides of a controversy, who is open to all interest groups, and who won't hold grudges.

"This is a Republican state, but you can't get things done without Democrats in the House and Senate," he said. "And there are so many issues this office deals with that are not partisan."

Sometimes he may compromise, sometimes he may not, but, "Someone who is with me 70 percent of the time is not my 30 percent enemy."

As South Carolina politicians have done for centuries, Wilson makes it clear he will go toe-to-toe with federal officials he says are usurping authority.

For example, after Lafe Solomon, the National Labor Relations Board acting general counsel, threatened to sue South Carolina earlier this month over the union secret ballot issue, Wilson said he got ready to fight Solomon not only legally but politically.

This is how, explained Wilson. After Obama nominated Solomon, an NLRB career attorney, to be that agency's top investigative and prosecutorial officer, Wilson contacted the office of U.S. Sen. Lindsey Graham, R-S.C., to talk about holding up Solomon's nomination. (Senate rules allow single senators to sometimes place "holds" to people and laws, effectively freezing any

action on the matter.)

"This individual's (Solomon's) confirmation needs to be slowed down. I'm not going to say halted," Wilson said. "But we need him on the record marking out his position ... If it's not a sufficient explanation, I'm going to ask our senators to hold him up."

It's too early to know how state budget cuts might hamstring Wilson's office.

But people like Vicki Bourus, executive director of the S.C. Coalition Against Domestic Violence and Sexual Assault, said she hopes Wilson can carry on with one of McMaster's signature programs -- working against violence against women. South Carolina has one of the highest rates in the country of women killed and beaten by their partners.

"McMaster was probably the very best state leader we've ever had in this arena," Bourus said.

Not only did McMaster use his office as a bully pulpit to speak out, he got grants and used set lements in lawsuits to set up programs like shelters for battered women and hire specially trained prosecutors to press domestic violence cases in court. It takes trained prosecutors to fight these cases, Bourus said.

Wilson said, "Right now my primary concern is to offer the same most services at the same level with far less money. ... I'm going to do as much I can with each of those things without cannibalizing the other."

Money woes already bedevil the office.

"We don't have the money or ability to go out and make ... new insurance fraud cases," Wilson said as an example.

Wilson said the attorney general's office has the potential to raise significant revenue through some investigations and lawsuits. He may seek additional funds from the General Assembly for resources that would generate a big return.

The payoff can be big. In the 1990s, former Attorney General Charlie Condon reluctantly joined attorneys general from other states who sued tobacco companies to recoup damages from health care losses. The state got $2 billion. And McMaster won a $45 million settlement in a drug company case.

"We are thinking outside the box," Wilson said. That includes exploring ways to get more money and working with other agencies and private law firms, he said.

EXHIBIT B

LITIGATION RETENTION AGREEMENT FOR SPECIAL COUNSEL APPOINTED BY THE SOUTH CAROLINA ATTORNEY GENERAL AS TO PROVIGIL, GABITRIL, AND ACTIQ

This litigation retention agreement ("Agreement") is by and between South Carolina Attorney General Alan Wilson ("Attorney General") and the below-signed attorney(s) ("Special Counsel").

RECITALS

WHEREAS, the Attorney General has concluded that it is in the best interest of the State of South Carolina to retain Special Counsel specifically for this litigation matter; and

WHEREAS, the Attorney General hereby engages Special Counsel to provide legal representation including, but not limited to, all preparation for, settlement of and/or actual litigation arising from the sales and marketing of Provigil, Gabitril, and Actiq by Cephalon; and

WHEREAS, Special Counsel specifically represents that he has the skill, experience, expertise, and competence necessary for the meaningful prosecution of this matter;

NOW THEREFORE, in consideration for the mutual promises and covenants set forth herein, and for other valuable consideration, the Attorney General and Special Counsel hereby agree to the following terms and conditions:

Article 1. TERM

This Agreement, which shall serve as the appointment of the attorneys whose signatures are affixed below as Special Counsel to the Attorney General, commences on July 26, 2011, and terminates on December 31, 2014, unless this work is concluded earlier or the Attorney General or Special Counsel terminates the appointment earlier pursuant to Article VI of this Agreement. If the work for which this appointment is made is not completed by the date above, then the Attorney General may re-appoint Special Counsel for an additional term or terms to be determined at that time. The Attorney General shall not be liable to compensate Special Counsel for any services rendered after termination of the Agreement.

Article II. SERVICES

A. Scope of Appointment

Special Counsel shall provide legal services, advice, and consultation to the Attorney General for this litigation in a manner consistent with accepted standards of practice in the legal profession. In view of the personal nature of the services to be rendered under this appointment, the Attorney General shall be the sole judge of the adequacy of those services. The parties agree:

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.

6. Special Counsel shall provide sufficient resources, including attorney time, to prosecute this litigation in accordance with Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules.

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. Special Counsel agrees to accept full responsibility and liability for the work of any delegate.

C. Employment status

Special Counsel will render services pursuant to this Agreement as an independent contractor. Neither Special Counsel nor any employee of Special Counsel shall be regarded as employed by, or as an employee of, the Attorney General or the State of South Carolina.

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.

At a minimum, status reports must include a description of the current status of the matter, any significant events that have occurred since the previous status report, and a prospective analysis of any significant future events.

B. Notices and Correspondence

All notices, demands, requests, consents, approvals, and other instruments required to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have been properly given when: (1) hand delivered; (2) sent by U.S. Registered or Certified mail, return receipt requested, postage prepaid; (3) if certified or registered mail is either refused or unclaimed, then by regular U.S. Mail; (4) by overnight delivery service with receipt (Airborne, FedEx, UPS, etc.); (5) by email; or (6) by fax, followed by one of the other methods of delivery described herein. Fax delivery shall be deemed to be on the date of receipt of the fax, and the parties hereto agree that a fax with confirmation shall be adequate proof of receipt of the fax.

Both Special Counsel and the Attorney General may designate a representative to receive such instruments and correspondence as described herein. While both parties recognize this designation may be changed at any time, and without consent of the other party by giving written notice of the new designated representative, until further notice, such instruments and/or correspondence should be addressed to:

Name:	Alan Wilson
	Attorney General
Address:	P. O. Box 11549
	Columbia, SC 29211
Phone:	803-734-3970

Fax:	803-253-6283
Name:	C. Havird Jones, Jr. Senior Assistant Attorney General
Address:	P. O. Box 11549 Columbia, SC 29211
Phone:	803-734-3970
Fax:	803-734-3677
Email:	agsjones@scag.gov
Name:	Kenneth M. Suggs Janet, Jenner & Suggs, LLC
Address:	500 Taylor Street Columbia, SC 29201
Phone:	(410) 653-3200
Fax:	(410) 653-9030
Email:	ksuggs@medlawlegalteam.com
Name:	J. Todd Rutherford Rutherford Law Firm
Address:	2113 Park Street Columbia, SC 29201
Phone:	(803) 256-3003
Fax:	(803) 256-9698
Email:	trutherford@sc.rr.com

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 Attorney General's Office personnel when and where requested by the Attorney General in furtherance of this 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.

E. Appeals

It is important that the Attorney General receives early notice of any potential appellate litigation in any way affecting the State. Therefore, Special Counsel agrees to give prompt oral and written notice to the Attorney General when receiving: (1) any dispositive decision by any appellate court affecting the litigation in any way; or (2) a Notice of Appeal from a court's decision filed by any party to this litigation.

F. Public Records

Any material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment, shall be considered the exclusive property of the State of South Carolina. Special Counsel agrees to adhere to South Carolina's Freedom of Information Act, South Carolina Code of Laws §30-4-10 *et. seq.*, and maintain all public records in accordance with State law; provided, however, that Special Counsel shall consult with, and obtain the approval of, the Attorney General before responding to any public records request. Special Counsel agrees to comply with the Attorney General's policy on document retention and to refrain from destroying documents unless otherwise permitted under this policy. Special Counsel agrees to comply with Rule 417 of the South Carolina Appellate Court Rules. Special Counsel agrees to request written confirmation from the Attorney General's Office prior to destroying any documents. This Agreement shall be considered a public document.

Article IV. COMPENSATION

A. Fee Schedule

This is a contingent fee case. Special Counsel shall receive no compensation for any services rendered unless the State of South Carolina receives a settlement or award in connection with this litigation. If the State receives such a settlement or award, Special Counsel will be compensated for his services pursuant to this Article, as follows:

1. Special Counsel shall be reimbursed all reasonable, normal, and verified "out of pocket" costs and expenses as specified in Article V below.

These costs and expenses necessary for conducting this litigation, as defined in Article V of this Agreement, shall initially be advanced by Special Counsel and shall be deducted from the litigation's gross or total recovery, if any, before any further distribution is made.

Provided, further, that as to any federal Medicaid portion of a settlement or award, no reimbursable cost may be deducted, and no settlement or award amount shall be included in calculating the gross or total recovery for the purposes of fees to the Special Counsel, without the additional approval by the Center for Medicaid and Medicare Services (CMS); and

2. At least 75% of the remaining or net settlement or judgment proceeds (but not including punitive or exemplary damages, if any) shall be paid or applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the Attorney General in his sole discretion; and

3. Special Counsel shall be paid the remaining 25% or less in fees of said remaining or net settlement or judgment proceeds including civil penalties, restitution, or damages (but not including punitive or exemplary damages), as follows:

Amount of net proceeds of judgment or settlement (in millions)	Contingent percentage
First $0 to $5	25%
Excess over $5 up to $10	22%
Excess over $10 up to $25	18%
Excess over $25 up to $50	15%
Excess over $50 up to $100	12%
Excess over $100	10%

The structured contingent fee schedule set forth herein shall operate cumulatively so that, in relation to each successive category or level of recovery, Special Counsel shall be paid an aggregate sum or value equivalent computed by multiplying the percentage applicable to each successive category or level of recovery by the incremental dollar amount falling within each such category, and the separate products so derived shall be added together to compute the aggregate fee to be paid to Special Counsel.

Provided, however, that the Attorney General shall retain 10% of Special Counsel's fees awarded under this section 3.

4. Special Counsel shall be paid 20% or less of any punitive or exemplary damage proceeds (including the trebled portion of any trebled damages, but not including civil penalties) as follows, with the remaining 80% or more to be paid or applied to or for the

State or the people of South Carolina or the victims in a manner to be determined by the Attorney General at his sole discretion:

Amount of punitive or exemplary proceeds (in millions)	Contingent percentage
First $0 to $10	20%
Excess over $10 to $100	15%
Excess over $100	10%

The structured contingent fee schedule set forth herein shall operate cumulatively so that, in relation to each successive category or level of recovery, Special Counsel shall be paid an aggregate sum or value equivalent computed by multiplying the percentage applicable to each successive category or level of recovery by the incremental dollar amount falling within each such category, and the separate products so derived shall be added together to compute the aggregate fee to be paid to Special Counsel.

Provided, however, the Attorney General shall retain 10% of Special Counsel's fees awarded under this section 4.

5. All settlement or judgment proceeds shall be paid by or on behalf of the defendant(s) to the Attorney General's office, which shall distribute them or have them distributed.

6. It is strictly agreed and understood by Special Counsel that if the proposed or actual defendants in this matter agree to a settlement or resolution prior to or upon commencement of the action or shortly thereafter, upon negotiation or consultation or upon only initial responses, then Special Counsel's compensation shall be one-half of that specified in sections 3 and 4 above.

7. This distribution and compensation calculation shall be included in a final order in the case.

B. Settlement or Judgment

The above Fee Schedule applies to any settlement or judgment, whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief. Should the litigation be resolved by settlement or judgment involving a combination of monetary and non-monetary relief (such as injunctive relief, non-monetary payment, the provision of goods and/or services or any other "in kind" terms, or any combination of those), the Attorney General shall determine the monetary value to the State.

C. Payment of Fees, Costs and Expenses

Neither the State of South Carolina nor the Attorney General shall be required under this Agreement, or otherwise, to compensate or reimburse Special Counsel for his work in this matter, other than as set forth in Articles IV(A), and IV(B), and V herein. Accordingly, except

for the fee schedule, expenses, and costs enumerated and outlined herein, Special Counsel shall not be entitled to and shall not accept compensation or reimbursement from any other source.

Article V. EXPENSES AND COSTS

A. Advancement of Expenses and Costs

Special Counsel shall advance all costs, expenses, and disbursements, including expert witness fees and costs, deposition costs, and costs of document production. Special Counsel's agreement to advance all litigation expenses and costs, as well as its agreement to defer fees while any and all litigation (including appeals and enforcement actions) is pending has been taken into consideration in establishing the fee schedule above.

B. Expenses and Cost Reimbursement

Special Counsel shall be reimbursed solely from the litigation's gross recovery as approved by the Attorney General for certain reasonable expenses and costs enumerated below. Proper documentation by receipts or otherwise shall be submitted with all invoices and all documentation shall be retained by Special Counsel for at least one full year following this Agreement's termination. All expenses must be itemized and no reimbursement may be applied for or requested for "miscellaneous" listings. The Attorney General in his sole discretion may decline to reimburse Special Counsel for improperly documented, unnecessary, or unreasonable costs or expenses.

1. Experts

Special Counsel shall be reimbursed for retention of experts, including fees and other reasonable costs, only when expressly authorized by the Attorney General.

2. Lodging

Receipts are required. In-state overnight lodging shall be reimbursed at actual cost up to a maximum of $75.00 plus tax per day. Any expenses incurred due to out-of-state lodging greater than $75.00 plus tax per day shall be approved in advance by the Attorney General. If circumstances render Special Counsel unable to obtain the prior approval of the Attorney General in this situation, as soon as thereafter practicable, Special Counsel shall notify the Attorney General of the location, the hotel, the daily rate, and the reasons for not obtaining prior approval. Failure to follow these procedures shall result in such lodging costs being borne by Special Counsel.

3. Meals

There is no reimbursement for meals.

4. **Travel**

Receipts are required. Airfare shall be reimbursed at actual cost based on coach fares.

5. **Mileage**

Automobile travel shall be reimbursed at the maximum state mileage rate of the State of South Carolina in effect at the time. Travel by car shall not exceed coach fares on commercial airlines. Mileage is to be itemized on the invoice as "Mileage" (number of miles @ rate per mile).

6. **Photocopying**

In-house photocopying (including color copies) shall be reimbursed at the Special Counsel's actual expense, not to exceed 15 cents ($0.15) per copy and is to be itemized on the invoice as "Photocopies" (number of copies @ rate per copy). Reasonable amounts for outside photocopying shall be reimbursed at actual cost if receipts are provided.

7. **Priority/Overnight Mail**

Charges for priority or overnight mail services shall be reimbursed only if a justifiable basis exists for using the service. In no event shall the Special Counsel be reimbursed for the cost of sending invoices or status reports to the Attorney General by overnight or priority mail services.

8. **Secretarial or Staff Overtime**

There shall be no reimbursement for secretarial or staff overtime unless expressly authorized in writing by the Attorney General prior to invoicing.

9. **Other Expenses**

Actual costs shall be reimbursed for certain routine expenses including transcripts, deposition costs, witness fees, subpoena service, postage, printing, cab and bus fares, parking, and long-distance telephone calls when itemized and receipts are provided. Expenses for office space, word processing, secretarial, and paralegal costs are not reimbursable. Westlaw expenses shall be reimbursed only when authorized in advance by the Attorney General.

C. **One Invoice**

At the conclusion of the litigation, Special Counsel agrees to submit one original invoice to the Attorney General for expenses and costs.

Article VI. TERMINATION

A. Termination by the Parties

The Attorney General reserves the right to terminate this Agreement at any time, in his sole discretion, and without cause or duty of explanation. Special Counsel may terminate its duties and obligations under the Appointment and this Agreement upon thirty (30) days written notice to the Attorney General. Termination on the part of the Special Counsel shall not be effective if the Attorney General finds in his sole discretion that such termination prejudices or has a material adverse effect on the State of South Carolina. Upon termination, all material, data, files, discs, or documents created, produced, or gathered by Special Counsel, or in Special Counsel's possession in furtherance of this litigation, or which fulfills an obligation of this appointment shall be immediately delivered to the Attorney General as directed by him, and without encumbrance or lien or any cost or charge to the Attorney General.

B. Compensation Upon Termination

In the event this Agreement is terminated by Special Counsel, Special Counsel shall be reimbursed only from the litigation's gross recovery and only for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination; there shall be no payment of any attorneys' fees unless the Attorney General agrees in writing to the payment of fees for work performed under such terms and conditions as may be set by him in his sole reasonable discretion. In the event the Attorney General terminates this Agreement without cause, Special Counsel shall be reimbursed only from the litigation's gross recovery for all properly documented expenses and costs, as defined in Article V of this Agreement, rendered prior to termination, and Special Counsel shall be awarded appropriate attorneys fees on a quantum meruit basis as determined by the Attorney General. If this Agreement is terminated for cause, Special Counsel will not be reimbursed for any expenses and costs or paid any fees or other compensation for any services relating to the litigation.

Article VII. OTHER TERMS AND CONDITIONS

A. Media Statements

The parties agree that neither Special Counsel nor any partner, associate, employee, or any other person assisting with the legal work contemplated by this Agreement shall speak to any representative of a television station, radio station, newspaper, magazine, or any other media outlet concerning the work outlined or contemplated by this Agreement without first obtaining approval of the Attorney General. This Agreement specifically prohibits Special Counsel from speaking on behalf of the Attorney General or the State of South Carolina to any representative of the news media.

B. Jurisdiction and Choice of Law

This Agreement shall be administered in the State of South Carolina and shall be interpreted under the laws of the State of South Carolina. Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina. This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. Any litigation arising out of or relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

C. Code of Professional Responsibility

If, during the appointment as Special Counsel, a complaint is filed against Special Counsel or Special Counsel's firm, alleging a violation of Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, or the applicable rules governing the state bar in which Special Counsel has been admitted, or the Code of Professional Responsibility, Special Counsel shall give prompt written notice of such complaint to the Attorney General. The Attorney General retains the right, in his sole discretion, to immediately terminate this Agreement if he deems the complaint to adversely affect in any way Special Counsel's ability to perform his duties required herein, or to adversely affect this litigation, the Attorney General, or the State of South Carolina.

D. Insurance

Special Counsel agrees to carry adequate professional liability insurance and to provide proof of same to the Attorney General promptly upon request.

E. Conflict of Interest

Special Counsel represents that neither he nor his firm has any conflict of interest with the State of South Carolina, its agencies, or subdivisions at this time. Special Counsel agrees that if a conflict of interest, potential or otherwise, arises, as defined by Rule 407, Rules of Professional Conduct, South Carolina Appellate Court Rules, during the term of this litigation, then Special Counsel will give timely written notice to the Attorney General. Special Counsel must request and obtain a written authorization from the Attorney General prior to undertaking any representation against or adverse to the State of South Carolina, its offices, boards, departments, or institutions during the term of this appointment.

F. Equal Opportunity

Special Counsel hereby represents that neither he nor his law firm discriminates on the basis of race, religion, color, sex, age, national origin, or disability against any person in the employment of personnel in their offices.

G. Entire Agreement/Integration

This Agreement constitutes the entire understanding of the parties. Both parties agree that there is no other understanding or agreement other than the terms expressly stated herein.

H. Severability of Terms and Conditions

If any provision of this Agreement shall be held invalid, illegal, or unenforceable in any respect, said provision shall be severed. The validity, legality, and enforceability of all other provisions of this Agreement shall not in any way be affected or impaired unless such severance would cause this Agreement to fail of its essential purpose.

I. Amendment or Modification

No amendment or modification of this Agreement shall be effective against either party unless such amendment or modification is set forth in writing and signed by both parties.

J. Headings

The headings herein are for reference and convenience only. They are not intended and shall not be construed to be a substantive part of this Agreement or in any other way to affect the validity, construction, interpretation, or effect of any of the provisions of this Agreement.

K. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

Attorney General of South Carolina

Alan Wilson

Alan Wilson

Date: July 26, 2011

Special Counsel

Kenneth M. Suggs

Date: 7/25/11

J. Todd Rutherford

Date: 7/26/11

EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND STATE OF SOUTH CAROLINA, ex rel. ALAN WILSON, in his official Capacity as Attorney General for the State of South Carolina, Plaintiff, v. CEPHALON, INC, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2011-CP-40-3661 **FIRST AMENDED COMPLAINT**

FILED
2012 FEB 13 PM 1:40
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY

CIVIL ACTION COMPLAINT

Plaintiff, the State of South Carolina (hereinafter "the State"), by and through its Attorney General, Alan Wilson, hereby complains of Defendant Cephalon, Inc. ("Cephalon"). This is a civil action for civil penalties, restitution, disgorgement, damages, and other legal and equitable relief for violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*, ("SCUTPA") and other state common law causes of action stated herein.

This action is brought by the South Carolina Attorney General, as the chief legal officer of the State, in two capacities: first, in the exercise of his *parens patriae*, constitutional, statutory, and common law responsibilities to vindicate the State's sovereign interests, as well as the interests of its citizens: and second, in his proprietary capacity as the attorney for the State Health Plan ("SHP"). This action arises out of Cephalon's wrongful and illegal marketing, sale, and promotion of the drugs sold under the trade names Provigil®, Actiq®, and Gabitril® (hereinafter referred to collectively as "Drugs" or individually as "Provigil," "Actiq," and "Gabitril"). Attorney General Wilson, proceeding in this matter to protect the public interest in

the State of South Carolina, complains that Cephalon engaged in repeated unfair and deceptive acts, methods and practices with the purpose of achieving greater sales of Provigil, Gabitril, and Actiq. Cephalon achieved these sales through its wrongful and illegal marketing to physicians, healthcare professionals, consumers, and others about the safety and efficacy of Provigil, Gabitril, and Actiq and about the indications for which Provigil, Gabitril, and Actiq were approved.

PARTIES

1. Plaintiff, the State of South Carolina, is a body politic created by the Constitution and laws of the State of South Carolina and, as such, is not a citizen of any state.

2. The State brings this action, by its Attorney General, Alan Wilson, in its sovereign capacity in order to protect the interests of the State and its citizens. The Attorney General of the State of South Carolina, as its chief legal officer, appears in this action pursuant to his *parens patriae*, constitutional, statutory (S.C. Code Ann. § 1-7-100 and S.C. Code Ann. § 39-5-10, *et seq.*), and common law authority to protect the public interests of the State and its citizens.

3. Defendant Cephalon is a Delaware corporation with its principal place of business in Frazer, Pennsylvania. Defendant Cephalon includes any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint ventures, and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives, and other persons acting on their behalf.

4. Upon information and belief, in committing the acts alleged herein, each and every managing agent, agent, representative, and/or employee of the Defendant was working within the course and scope of said agency, representation and/or employment with the knowledge, consent, ratification, and authorization of Cephalon and its directors, officers, and/or managing

agents.

THE STATE HEALTH PLAN

5. The South Carolina Health Plan ("SHP") is a State-sponsored program that administers prescription drug benefits for the State's SHP participants. The SHP is a division of the Employee Insurance Program, which is run by the South Carolina Budget and Control Board. The SHP reimburses pharmacies, doctors and hospitals for prescriptions written for and dispensed to SHP participants.

6. The State relies on persons receiving payments and benefits from the SHP program to "turn square corners" and to provide truthful and accurate information in their dealings with SHP programs and to abide by South Carolina law. However, the State's practical ability to monitor or police every one of the millions of claims submitted each year represents a loophole in the structure of the SHP program.

7. Defendant recognized and exploited this loophole by engaging in a direct, illegal, nationwide marketing program to promote this use of its drugs Provigil, Actiq, and Gabitril for unapproved and off-label uses. This marketing was successful nationwide and in South Carolina. Consequently, the State spent significant sums of money for these drugs based on prescriptions written for the off-label uses Defendant illegally promoted.

JURISDICTION AND VENUE

8. The jurisdiction of this Court is founded upon S.C. Const. Ann. Art. V § 11 which gives the Circuit Court general jurisdiction over civil actions.

9. This Court has personal jurisdiction over Defendant because Defendant does business in South Carolina and/or has the requisite minimum contacts with South Carolina necessary to constitutionally permit the Court to exercise jurisdiction with such jurisdiction also being within

the contemplation of the South Carolina "long arm" statute, S.C. Code Ann. § 36-2-803.

10. At all times material hereto, Defendant was engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labeling, and/or selling Provigil, Actiq, and Gabitril.

11. Defendant did distribute, supply, market, sell, promote, advertise, and otherwise distribute Provigil, Actiq, and Gabitril in South Carolina and specifically in Richland County.

12. Defendant advertised and/or offered Provigil, Actiq, and Gabitril for sale in South Carolina through wholesalers, distributors, physicians, Pharmacy Benefit Managers ("PBM"), clinics, and/or pharmacies.

13. Venue in this Court is proper pursuant to the Rules of the South Carolina Supreme Court and the South Carolina Code.

14. This Complaint does not confer diversity jurisdiction upon the federal courts pursuant to 28 U.S.C. § 1332.

15. Likewise, federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 is not invoked by this Complaint, as it sets forth herein exclusively state law claims against Defendant. Nowhere herein does Plaintiff plead, expressly or implicitly, any cause of action or request any remedy which is founded upon federal law.

16. This Complaint is not an allegation of fraud on the United States Food and Drug Administration ("FDA").

17. This Complaint does not invoke the learned intermediary doctrine.

18. The issues presented in the allegations of the Complaint do not implicate significant federal issues; do not turn on the substantial federal interpretation of federal law; nor do they raise a substantial federal question. Indeed, Plaintiff expressly avers that the only causes of

action claimed, and the only remedies sought herein, are for those founded upon the statutory, common, and decisional laws of the State of South Carolina.

19. Further, assertion of federal jurisdiction over the claims made herein would improperly disturb the congressionally approved balance of federal and state responsibilities.

20. Accordingly, any improvident and dilatory attempt by Defendant to remove this case to federal court would be without a reasonable legal basis in fact or law. Such an attempt by Defendant would mischaracterize the allegations of this Complaint. This is not a fraud-on-the-FDA case and does not involve the learned intermediary doctrine or preemption issues. This is an action brought pursuant to the *parens patriae* authority of the Attorney General, SCUTPA and the state common law based upon complaint of the misrepresentation, including intentional and willful misrepresentations, made by Defendant in the marketing of the Drugs. 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 that the penalties provision of SCUTPA applies.

REGULATORY AND LEGAL BACKGROUND

21. Pursuant to the Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, the FDA regulates the content of advertisement to consumers, advertisement to physicians and other healthcare professionals, and product promotion directly to physicians and other healthcare professionals.

22. Under 21 C.F.R. § 202.1(k)(2), all marketing efforts, including brochures, handouts or other promotional information, aimed at physicians and other healthcare professionals are deemed to be regulated "product labeling."

23. Under 21 C.F.R. § 201.57, the product labeling must be pre-approved by the FDA and conform to FDA guidelines, including any and all claims of indicated uses.

24. The term "off-label" comes from the FDA labeling requirement that specific drugs be approved for treatment that is "on-label" and, therefore, any prescribing of drugs for a use other than what appears on the label is considered "off-label."

25. Cephalon, or others on behalf of Cephalon, applied for and received approvals from the FDA for Provigil, Gabitril, and Actiq for the treatment of specific medical conditions as follows:

a. In 1998, the FDA approved Provigil to improve wakefulness in patients with excessive daytime sleepiness associated with narcolepsy. In 2004, the FDA approved the expansion of the label to include the treatment of excessive sleepiness associated with narcolepsy, obstructive sleep apnea/hypopnea syndrome, and shift work sleep disorder. Provigil was not approved for any other purpose.

b. In 1997, the FDA approved Gabitril as an anti-epilepsy drug as adjunctive therapy in adults and children twelve years and older in the treatment of partial seizures. Gabitril was not approved for any other purpose.

c. In 1998, the FDA approved Actiq to treat breakthrough cancer pain in patients with malignancies who were already receiving and who are tolerant to opioid therapy for their underlying persistent cancer pain. Actiq was not approved for any other purpose.

26. The prescribing of drugs by physicians for off-label use is not improper or illegal; however, the marketing and/or promotion of an off-label use is illegal under federal law under 21 U.S.C. § 352(f)(1).

27. In addition to being illegal under federal law, off-label marketing and promotion violates the SCUTPA. S.C. Code Ann. § 39-5-20 states, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

28. Off-label marketing and promotion is an unfair and deceptive act or practice in that it tends to deceive and/or mislead physicians, other healthcare providers, and others regarding the indications that a drug can treat safely and effectively.

29. Off-label marketing and promotion is an unfair method of competition in that it disadvantages the many pharmaceutical companies that limit their marketing and promotion to legitimate, on-label indications.

30. Off-label marketing and promotion is an unfair method of competition and unfair and deceptive act or practice in that it results in consumers and third-party payers making payments for prescription drug products that they otherwise would not have purchased and/or reimbursed.

31. In addition, while off-label marketing and promotion violates the SCUTPA in and of itself, off-label marketing and promotion is often accompanied by misleading and/or deceptive statements, implications, and/or omissions about the safety and efficacy of the drug.

32. Such conduct that is willful and intentional is subject to a civil penalty of up to $5,000.00 per violation pursuant to SCUTPA.

FACTUAL BACKGROUND

33. In spite of federal and state law prohibitions against off-label marketing and promotion, Cephalon promoted Provigil, Gabitril, and Actiq for unapproved indications from at least January 1, 2001 until at least December 31, 2006 in an effort to expand sales and market share.

34. Specifically, Cephalon marketed and promoted Provigil, Gabitril, and Actiq off-label for the following indications:

a. Cephalon marketed and promoted Provigil as a medication to treat a variety of conditions including sleepiness, tiredness, decreased activity, lack of energy, and fatigue. This marketing was contrary to FDA approval.

b. Cephalon marketed and promoted Gabitril as a remedy for anxiety, insomnia, and pain. This marketing was contrary to FDA approval.

c. Cephalon marketed and promoted Actiq for non-cancer pain uses. This marketing was contrary to FDA approval.

35. In addition, Cephalon made repeated, untrue, deceptive, or misleading representations of material fact to and/or omitted or concealed material facts from physicians, other healthcare providers, and others regarding the safety, efficacy, and/or use of Provigil, Gabitril and Actiq.

36. Cephalon's statements and/or omissions were undertaken with the intent that physicians, other healthcare providers, and others would rely on the statements and/or omissions.

37. Upon information and belief, Cephalon engaged in the following activities in the course of its unfair and deceptive marketing and promotion:

a. Instructing its sales representatives call on doctors who would not normally prescribe the drugs in the course of the doctor's practice;

b. Training its sales representatives on techniques to prompt the doctors into off-label conversations;

c. Designing a compensation and bonus structure that strongly encouraged and incentivized off-label marketing;

d. Instructing its sales representatives to tell doctors how to document their off-label uses of drugs to get these uses paid by insurers, who often will not pay for off-label uses;

e. Using its grants for continuing medical education to promote off-label uses; and

f. Sending doctors to "consultant" meetings at lavish resorts to hear the company's off-label message.

38. Cephalon's unfair and deceptive off-label marketing and promotion was particularly pernicious given the potential for the drugs to cause harmful side effects, such as the following, when used by patients for off-label uses:

a. The use of Gabitril by patients who do not have epilepsy can cause seizures.

b. The use of Actiq by patients who have not developed a tolerance for other opioid products can cause addiction, hypoventilation, and death.

39. Upon information and belief, Cephalon adopted its unfair and deceptive marketing and promotion strategy for Actiq in spite of its CEO's own public acknowledgement that Actiq "is one of those drugs where if you really don't know what you're doing, you're going to run into trouble and physicians have been afraid to use it by and large."

40. Cephalon promoted off-label uses of Actiq fully aware that the clinical support for doing so was lacking. Upon information and belief, its 2002 Actiq Marketing Plan stated, "[W]e offer no data for ACTIQ use outside cancer."

41. In January 2002, the FDA issued a letter stating that certain marketing and promotional materials for Provigil were false and misleading because they promoted Provigil for unapproved indications.

42. In February 2005, the FDA issued a public health advisory warning of Gabitril's propensity to cause seizures in non-epileptic patients.

43. In February 2007, the FDA issued another letter stating that Cephalon's marketing and promotional materials for Provigil were false and misleading because they promoted Provigil for unapproved indications.

44. The purpose of Cephalon's unfair and deceptive marketing and promotion was to deceive and mislead physicians, other healthcare providers, and others about the safety and efficacy of Provigil, Gabitril, and Actiq and about the indications for which Provigil, Gabitril, and Actiq were approved.

45. Cephalon's repeated off-label marketing and promotion was unfair and deceptive under the SCUTPA and adverse to the public interest.

46. Based upon Cephalon's unfair and deceptive marketing and promotion plan, Cephalon knew or should have known that any of the Drugs could be prescribed to individuals and/or be purchased through its misrepresentations to citizens of the State of South Carolina and/or prescribed to be consumed and/or used and ingested by citizens of the State of South Carolina for unapproved purposes.

47. As a direct and proximate result of Cephalon's illegal marketing and promotion plan carried out within the State of South Carolina, the SHP spent millions of dollars on these drugs unnecessarily.

48. Many of the details and facts related to Cephalon's scheme are known only by Cephalon.

THE FEDERAL GUILTY PLEA

49. In November 2003, a federal *qui tam* complaint was commenced against Cephalon alleging various illegal acts. Additional federal *qui tam* complaints were subsequently commenced in or about September 2004, January 2008, and April 2008.

50. These matters were filed under seal in the Federal Court in keeping with the provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA").

51. The United States of America, acting through the United States Department of Justice, intervened in the November 2003 complaint against Cephalon.

52. On September 25, 2008, the Honorable Thomas J. O'Neill, Jr. issued an Order stating that the FCA complaints would be unsealed upon the filing of a Notice of Intervention by the United States Government. That Order is attached hereto as Exhibit A and is incorporated herein by reference.

53. On September 29, 2008, the United States filed its Notice of Intervention for Purposes of Settlement.

54. Cephalon entered into a Guilty Plea Agreement regarding criminal claims with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice. That Guilty Plea Agreement is attached hereto as Exhibit B and is incorporated herein by reference.

55. The Guilty Plea Agreement resolved the federal government's allegations of off-label promotional activities, termed misbranding, by Cephalon regarding Provigil, Gabitril and Actiq.

56. In Paragraph 6.A(1)-(9) of the Guilty Plea Agreement, Cephalon formally pled guilty to engaging in the conduct described in Paragraph 31 of this Complaint with respect to a specific time period.

57. In addition to the Guilty Plea Agreement, Cephalon entered into a Settlement Agreement regarding civil claims with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania, the Department of Justice, the Office of Inspector General of the Department of Health and Human Services, and others.

58. The Settlement Agreement provided for payment of a stipulated criminal fine of $50 million and payment of claims by the United States and state Medicaid programs in an agreed to amount of $375 million. The stipulated criminal fine of $50 million constituted a joint resolution of the charges against Cephalon for misbranding pursuant to 21 U.S.C. § 301, *et seq*.

59. The Guilty Plea Agreement and Settlement Agreement did not include the resolution of the claims described in this Complaint.

COUNT I

Violations of SCUTPA

60. Plaintiff re-alleges and incorporates each and every allegation contained in the preceding paragraphs as if fully alleged herein.

61. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Provigil and by its marketing and promotion of Provigil for off-label uses, including sleepiness, tiredness, decreased activity, lack of energy, and fatigue.

62. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Gabitril and by its marketing and promotion of Gabitril for off-label uses, including anxiety, insomnia, and pain.

63. Cephalon violated S.C. Code Ann. § 39-5-20 by its misrepresentations in marketing and promoting Actiq and by its marketing and promotion of Actiq for off-label uses, including non-cancer pain uses.

64. Every deceptive, unfair, and/or misrepresentative act or practice by Cephalon in marketing and promoting Provigil, Gabitril, and Actiq constitutes a separate and distinct violation of S.C. Code Ann. § 39-5-20.

65. Cephalon's conduct described in this Count was willful under S.C. Code Ann. § 39-5-110(c) and willful or knowing under S.C. Code Ann. § 39-5-140.

66. As a result of Cephalon's conduct, South Carolina consumers and third-party payors suffered ascertainable loss.

67. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

68. Pursuant to S.C. Code Ann. § 39-5-110(a), the State seeks a civil penalty in the amount of up to $5,000.00 for each violation of S.C. Code Ann. § 39-5-20.

69. Pursuant to S.C. Code Ann. § 39-5-50 (a) and/or S.C. Code Ann. § 39-5-50(b), the State seeks disgorgement of all of Cephalon's revenues relating to Provigil, Gabitril, and Actiq.

70. Pursuant to S.C. Code Ann. § 39-5-50(b), the State seeks restoration of all ascertainable loss suffered by South Carolina consumers and third-party payors of Provigil, Gabitril, and Actiq.

71. Pursuant to S.C. Code Ann. § 39-5-140(a), the State seeks actual and treble damages on behalf of SHP.

COUNT II

Unjust Enrichment

72. Plaintiff re-alleges and incorporates each and every allegation contained in the proceeding paragraphs as if fully alleged herein.

73. Cephalon marketed and promoted the Drugs in a false and deceptive manner in South

Carolina.

74. Cephalon withheld information from the State, prescribers, and the citizens of the State of South Carolina regarding the use of the Drugs.

75. The State and its citizens, because of the deceptive and illegal promotion and marketing of the Drugs, paid, reimbursed, or otherwise conferred a non-gratuitous benefit upon Cephalon that directly resulted from the Cephalon's fraudulent marketing practices.

76. Cephalon's fraudulent marketing practices resulted in Cephalon improperly realizing value from the non-gratuitous benefits conferred upon the Cephalon from the State and its citizens' payments for the Drugs.

77. These unfair and deceptive acts or practices are capable of repetition and affect the public interest.

78. It would be inequitable for Cephalon to retain the benefits of its violations without paying the State and its citizens for its value.

79. Restitution and disgorgement are equitable remedies designed to prevent unjust enrichment. A court may grant equitable relief where there is no adequate remedy at law.

80. Plaintiff, the State and its citizens, does not have an adequate remedy at law to provide it with relief from Cephalon's deceptive and illegal promotion and marketing of the Drugs. The remedy at law is not a practicable, efficient, and as prompt as a remedy in equity for restitution to prevent Cephalon's unjust enrichment.

81. During the time period the Drugs were illegally marketed and promoted in South Carolina, it would be proper to disgorge Cephalon of any improperly obtained gains and profits, plus interest, from such deceptive marketing. Requiring Cephalon to disgorge its illegal gains and profits would appropriately divest Cephalon of the proceeds of its misconduct.

82. Pursuant to common law, the State seeks full disgorgement of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the State of South Carolina, prays for judgment against Cephalon as follows:

1. For full restoration to South Carolina consumers and third party payors of any ascertainable loss, plus interest, resulting from the unlawful and/or wrongful conduct alleged herein pursuant to S.C. Code Ann. § 39-5-50(b);

2. For full disgorgement of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein pursuant to S.C. Code Ann. § 39-5-50(a) and/or S.C. Code Ann. § 39-5-50(b);

3. For full restitution of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein pursuant to common law;

4. For full disgorgement of the Defendant's unjust enrichment, benefits, and ill-gotten gains, plus interest, acquired as a result of the unlawful and/or wrongful conduct alleged herein pursuant to common law;

5. For a civil penalty in the amount of up to $5,000.00 for each method, act or practice deemed to violate SCUTPA pursuant to S.C. Code Ann. § 39-5-110(a);

6. For the actual and treble damages of the State Health Plan pursuant to S.C. Code Ann. § 39-5-140(a);

7. For appropriate permanent injunctive relief to protect the public interest in the State of South Carolina pursuant to S.C. Code Ann. § 39-5-50;

8. For such other and further relief as may be justified and which Plaintiff may be entitled to by law or equity including, but not limited to, all attorneys' fees, investigative fees, court costs, witness fees, and deposition fees.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General
C. HAVIRD JONES, JR.
Assistant Deputy Attorney General

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By: Kenneth M. Suggs
Attorney for the Plaintiff

February 13, 2012

EXHIBIT D

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS
SEVENTH CIRCUIT

STATE OF SOUTH CAROLINA
Ex rel. Henry McMaster, in his
Capacity as Attorney General of the
State of South Carolina,

Plaintiffs,

vs. CASE NO. 2007-CP-42-1438

ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS,
INC., f/k/a JANSSEN PHARMACEUTICA, INC.,
JANSSEN, L.P., AND JOHNSON & JOHNSON, INC.,

Defendants.

VOLUME II

TRIAL BEFORE: THE HONORABLE
ROGER L. COUCH

DATE: March 8, 2011

TIME: 9:04 a.m.

LOCATION: Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, SC

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR 14 PM 12:19
M. HOPE BLACKLEY

A. WILLIAM ROBERTS, JR., & ASSOCIATES
Fast, Accurate & Friendly

Charleston, SC (843) 722-8414
Hilton Head, SC (843) 785-3263
Myrtle Beach, SC (843) 839-3376
Columbia, SC
Greenville, SC
Charlotte, NC

business with the public in The State of South Carolina?

If you believe it was, the second question you have to answer is, was it willful. In other words, was it an accident, or did they know they were doing wrong. Did they know they were doing something wrong at the time.

If you answer yes to those questions, then there will be a separate proceeding that involves Judge Couch to determine whether or not any civil penalties or fines are imposed.

This is not a civil case like a car wreck or a product liability case where somebody is coming in and saying, hey, I got hurt, give me a lot of money from the defendant. This case is simply about right and wrong, doing the right thing. This case is about obeying the law, following the rules and regulations instead of twisting them around so that you can try to make some kind of obscene profit.

This case is about corporate responsibility, being a good corporate citizen, not going out and trying to break the rules and lie to people and deceive people all in pursuit of the almighty dollar. At the end of the day, this case

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changes in labeling and the dissemination of this letter at a time critical to educating healthcare providers is a serious public health issue.

Every time somebody sells a car and doesn't tell the other person that the brakes are bad, every time somebody sells a house and tells the other person that the roof doesn't -- doesn't tell them that the roof leaks, the attorney general doesn't come running into court and file an unfair trade practice claim. It is only for cases that have significant public impact. And, folks, there is the public impact.

Now, having said that, I would caution you about one thing. There is no requirement in the act that we prove that any doctor relied on that letter or relied on what they said in writing a prescription.

This is not a fraud case. We don't have to prove reliance. This is an enforcement case. The law says you can't do this, if you do it, you broke the law. It doesn't matter what -- it's kind of like you go in to rob the 7-Eleven and it turns out there's no money in there or the clerk pulls out a gun and you have to run away. If the police catch you, the fact that you

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didn't get any money or the fact that the clerk ran you away and was able to fend off the attack isn't going to save you from prosecution. If you break the law, you have to pay the consequences.

Now, here is what the letter says from the FDA in more detail: The FDA is not aware of substantial evidence or substantial clinical experience to support Janssen's claim, that evidence also suggests that Risperdal is associated with a lower risk of diabetes than some other studied atypical antipsychotics.

In other words, the FDA says the science we have access to doesn't support this.

If you have data to suggest this claim, please send it to us.

The FDA also says, the FDA's conclusion regarding the lack of evidence to support a ranking of risk among the atypical antipsychotics is reflected in the following statement from the warning section of the package insert for Risperdal.

This is right out of the label that is going with their medication into South Carolina at this time.

And it says: Precise risk estimates

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Cephalon, Inc., Plaintiff, vs. Alan Wilson, in his capacity as Attorney General for the State of South Carolina , Defendant.	Civil Action No. 2012-CP-40-7317 **ANSWER**

2012 NOV 29 AM 10:54
C.C.P. & G.S.

Defendant Alan Wilson, in his official capacity as Attorney General of the State of South Carolina (the "Attorney General") Answers the Complaint of Cephalon, Inc. ("Cephalon") as follows:

I. INTRODUCTION

This declaratory judgment action is based on Cephalon's flawed premise that all government lawyers must always remain neutral, even in the context of tort litigation against an alleged wrongdoer. Contrary to Cephalon's arguments, there is no controlling law that supports its position in the context of litigation such as the Underlying Action.

The notion that public officials and their lawyers (whether in-house or outside counsel) must be "neutral" or disinterested in the outcome of civil litigation they bring on behalf of the government is not only unsupported by any authority, it is unsupported in the context applicable here: tort litigation where the government is suing to collect money damages. As the United States Supreme Court explained in a unanimous opinion, the Court's "rigid" due process requirements, "designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity...Prosecutors need not be

entirely neutral and detached. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Marshall v. Jerrico, Inc.* 446 U.S. 238 (1980)(citations and internal quotation omitted); *See also Commonwealth v. Gullota*, 716 A.2d 663, 666 (Pa. Super. 1998)(rejecting argument that neutrality principles applied to adjudicative officials apply to prosecutors).

Cephalon's allegations that it is the victim of constitutional violations and illegality are frivolous.

II. ANSWER TO THE INTRODUCTORY PARAGRAPH AND SUMMARY

Cephalon's introductory paragraph and "Summary" in its Complaint set forth a number of conclusory and unsubstantiated claims regarding the Underlying Action. To the extent that the introductory paragraph and Summary constitute allegations purportedly supporting its Complaint, these allegations are specifically denied unless admitted or explained as follows.

In further response to the Summary, the Attorney General responds that he is charged by state statute to investigate and pursue violations of the South Carolina Unfair Trade Practices Act ("SCUPTA") and empowered by the state Constitution and common law to pursue other civil remedies on behalf of the state, its agencies, and its citizens against persons or entities for violations of statutory and common law. Further, pursuant to state law, the Attorney General is empowered to retain special counsel to assist in the bringing of such actions. Any penalties and damages resulting from the trial of the Underlying Action will be completely dependent upon the decisions of the judge and jury at the trial of this case.

This action arises out of Cephalon's illegal marketing, sale, and promotion of prescription drugs sold under the trade names Provigil®, Actiq®, and Gabitril® (the "Drugs" or individually as "Provigil," "Actiq," and "Gabitril"). Cephalon promoted these drugs for unapproved uses

from at least January 1, 2001, until at least December 31, 2006, in an effort to expand sales and market share. Federal and state law prohibits pharmaceutical companies from promoting prescription drugs for uses that have not been approved as safe and effective by the FDA. Despite federal and state law prohibitions, Cephalon promoted the off-label uses of these drugs while fully aware that: 1) the drugs had not been approved as safe and effective for those uses, and 2) scientific studies establishing the safety and efficacy of those uses were inadequate. These drugs are associated with serious side effects including seizures and death.

In November 2003, a federal *qui tam* complaint was commenced against Cephalon alleging various illegal acts. Additional federal *qui tam* complaints were subsequently commenced in or about September 2004, January 2008, and April 2008. These matters were filed *under seal* in the Federal Court in keeping with the provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA"). The United States of America, acting through the United States Department of Justice ("USDOJ"), intervened in the November 2003 complaint against Cephalon. The complaints remained under seal. It was not until September 25, 2008, that the Honorable Thomas J. O'Neill, Jr. issued an Order stating that the FCA complaints would be unsealed upon the filing of a Notice of Intervention by the United States Government. On September 29, 2008, the United States filed its Notice of Intervention for Purposes of Settlement. Consequently, the entire matter remained under seal until September 29, 2008.

Thereafter, Cephalon entered into a criminal guilty plea agreement with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the USDOJ. That guilty plea agreement resolved the federal government's allegations against Cephalon for illegal, off-label promotional activities, termed misbranding of the drugs. Additionally, Cephalon entered into a settlement agreement

regarding civil claims with the United States of America through the United States Attorney's Office for the Eastern District of Pennsylvania, the DOJ, the Office of Inspector General of the Department of Health and Human Services, and others. The Settlement Agreement provided for payment of a stipulated criminal fine of $50 million and payment of claims made to the United States and state Medicaid programs in an agreed to amount of $375 million. The above stipulated criminal fine of $50 million constituted a joint resolution of the charges against Cephalon for misbranding pursuant to 21 U.S.C. § 301, *et seq.* However, the guilty plea agreement and settlement agreement did not include the resolution of the claims Attorney General Alan Wilson brought in this case, on behalf of the State of South Carolina.

Cephalon's Summary fails to recognize that any remedies awarded in the Underlying Action are only available 1) if a jury decides that its conduct violated the law, and 2) any such remedy imposed is determined by the Court and/or jury after a full and fair hearing. The Attorney General and outside counsel, contrary to Cephalon's argument, have no authority or power to impose any penalties or remedies. Any penalties or damages awarded in the Underlying Action will be the result of a trial in which the evidence will be presented to an impartial judge and jury.

III. FOR A FIRST DEFENSE TO THE ALLEGATIONS OF THE COMPLAINT

Any allegations in the Complaint not specifically admitted are denied.

1. The allegations in paragraph 1 are admitted.

2. The allegations in paragraph 2 are admitted.

3. The allegations in paragraph 3 are admitted.

4. The Attorney General admits that the Underlying Action was brought, and the Retention

Agreement with Special Counsel was entered into, by him while acting in his official capacity as Attorney General for the State of South Carolina. The remaining allegations in paragraph 4 are denied.

JURISDICTION AND VENUE

5. The allegations in paragraph 5 are admitted.

6. The allegations in paragraph 6 are admitted.

FACTUAL BACKGROUND

7. The allegations in paragraph 7 are admitted.

8. The Attorney General admits that the articles referenced in paragraph 8 and footnote 2 of the Complaint report such statements. The remaining allegations of paragraph 8 are denied.

9. The allegations in paragraph 9 are denied as stated. The Attorney General admits that a member of his office contacted Cephalon's then General Counsel to offer to resolve certain claims on behalf of the State of South Carolina arising from Cephalon's illegal marketing activities within this state. The Attorney General admits that the South Carolina Medicaid Fraud Control Unit had knowledge of Cephalon's illegal conduct by virtue of its involvement with the investigation and prosecution of a False Claims Act (FCA) case. However, the FCA case was kept under federal seal until September 29, 2008. Because of the federal seal, no information regarding the FCA case was shared with the civil division, or any other division within the Attorney General's office. Because of the federal seal, the state was prevented from pursuing the Underlying Action until such time as the seal was lifted.

10. S.C. Code Ann. § 39-5-150 speaks for itself and the Attorney General craves reference thereto.

11. The Attorney General admits that his office made a settlement demand to resolve the

claims pending in the Underlying Action. All other allegations in paragraph 11 are denied.

12. The Attorney General admits that the Underlying Action began on June 2, 2011, when the Summons and Complaint were filed. All remaining allegations in paragraph 12 are denied.

13. The Attorney General admits that he entered into a Litigation Retention Agreement with attorneys Kenneth M. Suggs and J. Todd Rutherford on or about July 26, 2011. The remaining allegations in paragraph 13 are denied.

14. The allegations in paragraph 14 are denied.

15. The Litigation Retention Agreement speaks for itself and the Attorney General craves reference thereto. The remaining allegations are denied.

16. The Attorney General admits that he filed the First Amended Complaint on February 13, 2012 and that the Amended Complaint seeks, among other relief, statutory penalties as provided by the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et. seq.*, ("SCUPTA"). Article IV of the retention agreement specifies the manner in which special counsel will be compensated. The amount of penalties and damages imposed against Cephalon in the Underlying Action is a matter solely within the discretion of an impartial judge and jury. The remaining allegations in paragraph 16 are denied.

17. The allegations in paragraph 17 are denied.

18. The allegations in paragraph 18 are denied.

19. Paragraph 19 is a legal conclusion to which no responsive pleading is required, and the Attorney General asserts that SCUTPA speaks for itself.

20. Paragraph 20 is a legal conclusion to which no responsive pleading is required.

21. The Attorney General asserts that Section 1983 of Title 42 of the United States Code speaks for itself. The remaining allegations in paragraph 21 are denied.

22. The Attorney General admits that the Court has the statutory authority to rule on this Declaratory Judgment action.

23. The allegations in paragraph 23 are denied.

24. The allegations in paragraph 24 are denied.

25. The Attorney General asserts that the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of the South Carolina Constitution speak for themselves. All other allegations in paragraph 25 are denied.

26. The Attorney General asserts that the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of the South Carolina Constitution speak for themselves. All other allegations in paragraph 26 are denied.

27. The allegations in paragraph 27 are denied.

28. The allegations in paragraph 28 are denied.

29. The Attorney General's First Amended Complaint speaks for itself. Any remaining allegations in paragraph 29 are denied.

30. The allegations in paragraph 30 are denied.

31. The allegations in paragraph 31 are denied.

32. As to each of the subparts in paragraph 32:

a) The plain language of SCUPTA speaks for itself; the remaining allegations are denied;

b) The plain language of SCUPTA speaks for itself; the remaining allegations are denied;

c) The plain language of SCUPTA speaks for itself; the remaining allegations are denied;

d) The plain language of SCUPTA speaks for itself; the remaining allegations are denied;

e) The allegations are denied;

f) The allegations are denied;

33. The transcripts of other proceedings speak for themselves and are irrelevant to the present action. The remaining allegations of paragraph 33 are denied.

34. The remedies sought in the Underlying Action are set forth in the Amended Complaint. The remaining allegations of paragraph 34 are denied.

35. Paragraph 35 is a legal conclusion to which no responsive pleading is required.

36. Paragraph 36 is a legal conclusion to which no responsive pleading is required.

37. The plain language of the Due Process clause of the Fourteenth Amendment to the United States Constitution and South Carolina Constitution speaks for itself. Further, this paragraph states a legal conclusion to which no responsive pleading is required.

38. S.C. Code Ann. § 17-1-20 speaks for itself and the Attorney General craves reference thereto.

39. The allegations in paragraph 39 are denied.

40. The allegations in paragraph 40 are denied.

41. The allegations in paragraph 41are an incorrect statement of law and as such are denied.

42. The allegations in paragraph 42 are denied.

43. The allegations in paragraph 43 are denied.

44. Paragraph 44 is a legal conclusion to which no responsive pleading is required.

45. The allegations in paragraph 45 are denied.

46. The allegations in paragraph 46 are denied.

47. The allegations in paragraph 47 are denied.

48. The subparts contained within paragraph 48 are addressed as follows:

a) The Litigation Retention Agreement speaks for itself and the Attorney General craves reference thereto. The remaining allegations are denied;

b) The Litigation Retention Agreement speaks for itself and the Attorney General craves reference thereto. The remaining allegations are denied.

49. The South Carolina Constitution speaks for itself and the Attorney General craves reference thereto.

50. S.C. Code Ann. § 1-7-150(B) speaks for itself and the Attorney General craves reference thereto.

51. The allegations in paragraph 51 are denied.

52. The Litigation Retention Agreement speaks for itself and the Attorney General craves reference thereto. The remaining allegations are denied.

53. The Litigation Retention Agreement speaks for itself and the Attorney General craves reference thereto.

54. S.C. Code Ann. § 1-7-150(B) speaks for itself and the Attorney General craves reference thereto.

55. The allegations in paragraph 55 are denied.

56. The Litigation Retention Agreement speaks for itself and the Attorney General craves reference thereto. The remaining allegations are denied.

57. The Litigation Retention Agreement speaks for itself and the Attorney General craves reference thereto. The remaining allegations are denied.

COUNT I - FOR A FIRST CAUSE OF ACTION
(First Due Process Violation)

58. Paragraph 58 requires no response.

59. The plain language of the Due Process clause of the Fourteenth Amendment to the United States Constitution and South Carolina Constitution speaks for itself and the Attorney General craves reference thereto. The remaining allegations of paragraph 59 are denied.

60. Paragraph 60 states a legal conclusion. The Attorney General denies that the Underlying Action is a criminal prosecution and denies that Cephalon's due process rights are implicated in the Underlying Action.

61. The allegations in paragraph 61 are denied.

62. Paragraph 62 requires no response. The Attorney General denies that Cephalon is entitled to the relief sought.

63. Paragraph 63 requires no response. The Attorney General denies that Cephalon is entitled to the relief sought.

COUNT II - FOR A SECOND CAUSE OF ACTION
(Second Due Process Violation)

64. Paragraph 64 requires no response.

65. The allegations in paragraph 65 are denied.

66. The allegations in paragraph 66 are denied.

67. Paragraph 67 requires no response. The Attorney General denies that Cephalon is entitled to the relief sought.

68. Paragraph 68 requires no response. The Attorney General denies that Cephalon is entitled to the relief sought.

COUNT III - FOR A THIRD CAUSE OF ACTION
(Separation of Powers)

69. Paragraph 69 requires no response.

70. The allegations in paragraph 70 are denied.

71. The allegations in paragraph 71 are denied.

72. Paragraph 72 requires no response. The Attorney General denies that Cephalon is entitled to the relief sought.

IV. FOR A SECOND DEFENSE

73. The Attorney General asserts that Cephalon's Complaint fails to state a claim upon which relief can be granted.

74. Cephalon's Complaint should be dismissed pursuant to S.C. R. Civ. Pro. 12(b)(6).

V. FOR A THIRD DEFENSE

75. Because Cephalon's Complaint is couched in conclusory terms and misstatements of the applicable law and facts, the Attorney General cannot fully anticipate all affirmative defenses that may be applicable to this action. Accordingly, the Attorney General reserves the right to assert any additional affirmative defenses that may be applicable.

WHEREFORE, having fully answered Cephalon's Complaint, the Attorney General prays that this honorable Court consider the matters presented herein and issue its order in accordance with the law and evidence presented.

Respectfully submitted,

ALAN WILSON, Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
C. HAVIRD JONES, JR.
Assistant Deputy General
JARED Q. LIBET
Assistant Attorney General
Post Office Box 11549
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KENNETH M. SUGGS
GERALD D. JOWERS, JR.

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J. TODD RUTHERFORD
Rutherford Law Firm, LLC
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Columbia, SC 29201
(803) 256-3003

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Janet, Jennet & Suggs, LLC, attorneys for the Plaintiff, do hereby certify that I have served the foregoing document, Plaintiff's Answer, on the below listed counsel via first class mail.

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Stephen McKinney, Esq.
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P.O.B. 11889
Columbia, S.C. 29211

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Hal Ray, Paralegal

Columbia, South Carolina
November 29, 2012

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF COMMON PLEAS
SEVENTH CIRCUIT

STATE OF SOUTH CAROLINA
Ex rel. Henry McMaster, in his
Capacity as Attorney General of the
State of South Carolina,

Plaintiffs,

vs. CASE NO. 2007-CP-42-1438

ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS,
INC., f/k/a JANSSEN PHARMACEUTICA, INC.,
JANSSEN, L.P., AND JOHNSON & JOHNSON, INC.,

Defendants.

VOLUME II

TRIAL BEFORE: THE HONORABLE
ROGER L. COUCH

DATE: March 8, 2011

TIME: 9:04 a.m.

LOCATION: Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, SC

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

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A. WILLIAM ROBERTS, JR., & ASSOCIATES
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Myrtle Beach, SC (843) 839-3376
Columbia, SC
Greenville, SC
Charlotte, NC

business with the public in The State of South Carolina?

If you believe it was, the second question you have to answer is, was it willful. In other words, was it an accident, or did they know they were doing wrong. Did they know they were doing something wrong at the time.

If you answer yes to those questions, then there will be a separate proceeding that involves Judge Couch to determine whether or not any civil penalties or fines are imposed.

This is not a civil case like a car wreck or a product liability case where somebody is coming in and saying, hey, I got hurt, give me a lot of money from the defendant. This case is simply about right and wrong, doing the right thing. This case is about obeying the law, following the rules and regulations instead of twisting them around so that you can try to make some kind of obscene profit.

This case is about corporate responsibility, being a good corporate citizen, not going out and trying to break the rules and lie to people and deceive people all in pursuit of the almighty dollar. At the end of the day, this case

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changes in labeling and the dissemination of this letter at a time critical to educating healthcare providers is a serious public health issue.

Every time somebody sells a car and doesn't tell the other person that the brakes are bad, every time somebody sells a house and tells the other person that the roof doesn't -- doesn't tell them that the roof leaks, the attorney general doesn't come running into court and file an unfair trade practice claim. It is only for cases that have significant public impact. And, folks, there is the public impact.

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In other words, the FDA says the science we have access to doesn't support this.

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And it says: Precise risk estimates

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND

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

Plaintiff,

vs. CASE NO: 2011-CP-40-3661

CEPHALON, INC.,

Defendant.

VIDEOTAPED
DEPOSITION OF: C. WILLIAM GAMBRELL, JR.

DATE: February 28, 2013

TIME: 10:08 AM

LOCATION: Office of the Attorney General
1000 Assembly Street
Columbia, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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Charlotte, NC (704) 573-3919

APPEARANCES OF COUNSEL:

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bvaldes@hsblawfirm.com

ALSO PRESENT:
Jay W. Smith, Director of Consumer Protection & Antitrust
Beth Valdes, Paralegal
Alan Metts, Videographer

(INDEX AT REAR OF TRANSCRIPT)

THE VIDEOGRAPHER: We are now on the record.

Today's date is February the 28th, 2013. The time is 10:08 AM. This is the video deposition of Charles William Gambrell, Jr.

Will counsel now introduce yourselves for the record.

MR. JOWERS: Gerald Jowers for the state of South Carolina.

MR. JONES: C.H. Jones, Jr., Attorney General's Office. South Carolina Attorney General's Office.

MR. SMITH: Jay W. Smith. I'm the director of Consumer Protection & Antitrust at the AG's office.

MR. McKINNEY: Steve McKinney for Cephalon.

MR. SITARCHUK: Eric Sitarchuck for Cephalon.

THE VIDEOGRAPHER: And would the court reporter now please swear in the witness.

(Whereupon, the witness was placed under oath by the court reporter.)

MR. SITARCHUK: Jerry, are we reserving all objections except as to form?

MR. JOWERS: Yes.

C. WILLIAM GAMBRELL, JR.
being first duly sworn, testified as follows:

EXAMINATION

BY MR. SITARCHUK:

Q. Mr. Gambrell, good morning.

A. Good morning, sir.

Q. Appreciate you being here today. Have you been deposed before?

A. Yes, I have.

Q. How many times?

A. Only one, I believe, that I recall.

Q. Was that in connection with your duties within the Attorney General's Office?

A. Yes, sir, it was.

Q. What was the general subject matter of that deposition?

A. It was in connection with some average wholesale price litigation in which the state had engaged.

Q. What was the name of that case?

A. I don't recall.

Q. Who was the defendant or defendants?

A. I'm sorry. I don't recall that either.

Q. Was it Abbott?

certain areas of the country, and you would want to have someone there.

Q. Did those factors come into play here?

A. I don't know because I wasn't involved. I would suspect in a pharma case that there's typically a broad impact. And so the issue of regionality -- I don't know this for sure, but I would suspect didn't play a major role in that.

Q. Now, the --

A. And lastly, just if I may.

Q. Yeah, go ahead.

A. We always try to use this as a teaching experience. So historically they try to put a couple of experienced people on and a couple of younger up-and-comers, for lack of a better description. Because this is a somewhat unique process, and it's hard to get education in it if you don't participate in it. So typically, when a team is formed, there are a couple of experienced people and a couple of less experienced people.

Q. And it's fair to say you were one of the experienced people.

A. I think it's fair to say that, yes, sir.

Q. And the answers to our interrogatories

that the Attorney General's Office provided said that you were appointed to the Cephalon NAMFCU team in -- around May of 2005.

Does that sound right to you?

A. It certainly sounds right, yes, sir.

Q. And then the answers to interrogatories also said that on September 26th of 2006 you were appointed to head up that team.

Does that sound about right to you as well?

A. Sounds about right, yes, sir.

Q. Just briefly, how did it come about that you were appointed head of the team?

A. John Guthrie was head of the team initially. And there came a time when the -- it was either an election cycle or some issue had happened, and a number -- the attorney general apparently -- the status of the office was a little bit in flux.

A couple of senior -- a lot of senior management people had apparently moved on, and John was asked to assume a higher position within the Attorney General's Office.

And as I pointed out earlier, given the grant restrictions, you can't be -- run the MFCU

and be doing other things. So he had to leave the Ohio Medicaid Fraud Control Unit. It would sort of be analogous to John McIntosh leaving and Sonny being asked to take his role.

It was -- my understanding was, it was pretty much understood it was a caretaker circumstance, but it was going to extend for a period of a year or 18 months. And I don't recall the precipitating event, but an election or some issue in Ohio occurred, so John had to leave the team.

Q. So what are the responsibilities of a team leader?

A. Generally, the responsibilities are he's responsible for coordinating all of the activity of the team. The team participates in conjunction with the federal government, most of the time -- and it certainly was true in Cephalon -- most of the time more in a damaging modeling end of things, so...

But the team leader's responsible for coordinating interaction with the federal government and everyone. The team leader's responsible. He's the captain of the ship of that particular venture but with the assistance of the

other team members.

Q. And when you say damaging modeling, am I correct in concluding that that refers to gathering data to try to come up with an analysis of the potential financial impact of the misconduct that's under investigation?

A. That's exactly correct.

Q. Was there a point in time that Mr. Smith was assigned to the South Carolina MFCU unit?

A. Yes, there was.

Q. And that's Jay Smith we're referring to?

A. Yes, sir.

Q. Who's down at the table there; is that right?

A. Yes, sir.

Q. And when was that?

A. I don't recall when that was. It was -- I just don't recall. We -- Jay worked with us part time in sort of what I call a data capacity, primarily, an analyst's capacity.

And I don't recall when that happened. Six, seven, eight, some -- I just don't recall. It wasn't -- it wasn't a particularly lengthy period

Attorney's Office; right?
A. Yes, sir.
Q. And the company was in the process of complying with that subpoena; is that correct?
A. Yes, sir.
Q. Now, when this e-mail refers to Mr. Guthrie securing a copy of the complaint, what does the complaint refer to there?
A. I assume it's the copy of the qui tam complaint that had been filed in the matter.
Q. What about the reference to disclosure documents? What's that referred to?
A. And that typically refers to the fact that with the filing of a qui tam complaint, Q-U-I, T-A-M, that it's typically a disclosure statement attached to that complaint.
Q. It also talks about -- refers to other relevant information.
What was the other relevant information here?
A. I don't recall.
Q. Now, Mr. Guthrie goes on to write: I offered -- and this is the third line from the bottom.
I offered our help to Marilyn to do any

field investigative work that would be helpful in the case.
I thought you testified that this was a settlement team, not an investigative team.
A. Well, that's what it was as far as I was concerned.
Q. But Mr. Guthrie did offer to Ms. May that the team could do investigative work?
A. He made that offer. In fact, at this time we didn't even have anything called an investigative team. They were all called settlement teams.
Q. But I assume, from Mr. Guthrie's offer, that the NAMFCU team had the ability to do field investigative work if that's something the US Attorney's Office had felt was appropriate.
A. Yes, sir.
Q. Or if that was something that NAMFCU felt was appropriate.
A. Yes, sir.
(GAMBRELL EXH. 3, Medicaid Fraud File Control Sheet Opened 5-19-05, marked for identification.)
BY MR. SITARCHUK:
Q. Showing you what's been marked as

Exhibit No. 3, what is that form?
A. This is a form we call the MFCU 1 in the upper left-hand corner. It's just a tracking form to when we open an official file within our office.
Q. So this form then, if I'm reading this correctly, reflects that the Cephalon global matter was opened in your office on May 19th, 2005?
A. That's correct, sir.
Q. Now, there's an AG file number there. What is that?
A. That's the number -- whenever -- whenever we open a file -- I'm not a hundred percent sure I understand this.
Whenever we open a file, there's some mechanical process that our support staff goes through, and a number is just assigned to the file name. And that would have been the number that my secretary would have gotten from our file area that Cephalon was going to carry throughout the Attorney General's Office life.
Q. Now, is that -- tell me if I have this right, but I assume 2005 on that number reflects that it was open in 2005?
A. Yes, sir.

Q. And then the 2,418, is that a sequential assignment of numbers?
A. I've understood it to be. Within the entire AG's office, though, not the Medicaid Fraud Control Unit.
Q. So this AG file number is a general AG office's file number?
A. Yes, sir.
Q. Of which this was the 2,418th AG case opened that year.
A. I assume that, yes, sir.
Q. Now, Mr. Gambrell, turning to the last page, it says file closed, 1-23-09; is that correct?
A. Yes, sir.
Q. And is that your signature?
A. Yes, sir.
Q. And what -- what caused the file to be closed in January of 2009?
Is that after the case was completed, all documents were signed, moneys delivered?
A. Yes, sir. That would have been the typical trigger.
(GAMBRELL EXH. 4, E-Mail Correspondence to Mr. Gambrell, et al. from Mr. Guthrie dated

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2007 from you entitled Cephalon update, call with Marilyn May.

Are you with me?

A. Yes, sir.

Q. It says in here that there will be a meeting on May 31st in Philadelphia with defense counsel?

A. Yes, sir.

Q. Would that have been the first meeting?

A. I believe so, yes, sir.

Q. And you say here that you convinced Marilyn that the NAMFCU team needed to be at the meeting?

A. Yes, sir.

Q. Did she resist your presence?

A. Not resist it so much as -- my recollection was Marilyn's concern, she didn't want to have a production. You know, there were six or seven. She didn't want to have a huge meeting.

And she also thought this would be a meeting where -- my recollection, where -- sort of just going to be just an information sharing and something that she could relay to us. But we always -- it's always my preference that we get involved early on.

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This hasn't happened with Marilyn, but there have been occasions where I've gotten a call and asked to be on a team, gotten a call from the United States Attorney saying we've got a settlement and your share is X. And, of course, oftentimes we had concerns about how those numbers had been determined.

And so my preference was always to get involved early on once negotiations started, not to -- just to make sure I had a finger on the pulse of what was happening, not necessarily to actively participate.

Q. And that level of involvement was your experience in this case.

A. Yes, sir.

Q. Now, it says here in Exhibit 26, about two-thirds of the way down, normally at these meetings, these initial meetings we do what I call NAMFCU team 101.

What is NAMFCU team 101?

A. It's just a checklist we've sort of -- I put together we sort of started using where we can discuss with defense what we can and, more importantly, what we can't do.

You know, as I say in this we're -- the

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federal government has all of its arms -- has its arms around all of its agencies. The state government, the MFCUs only deal with Medicaid exclusively. So that's one of the important things we want to explain.

We can do Medicaid only, and there's another part I always think is important, which is managed care. You know, there just -- because of the vehicle of managed care, the states can't calculate managed care. It's very complicated. And I think it's important for defense counsel to understand going in what we think we can do.

I also think it's helpful that there are some things the state team can do that facilitates a settlement such as with CIAs. Instead of having 51 CIAs, you know, if the teams involved -- there typically is a CIA in these matters. There could be one CIA with the federal government, and there isn't a necessity of having to involve agencies in 51 states to negotiate another set of 51 different documents.

So it's mostly just a laundry list of what we've learned have been issues -- what I had learned had been issues up to that date that I wanted to get on the table early on.

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Q. So when you describe NAMFCU team 101, that's really a presentation to defense counsel.

A. Yes, sir. Well --

Q. To get --

A. Well, actually, we do one to the federal government sort of and sometimes to relaters' counsel, because there -- just to make sure we're all on the same page.

Q. Everybody needs the 101.

A. Well...

Q. But it includes defense counsel.

A. Yes, sir, it's primarily for defense counsel. No question about it.

Q. And if I understood your testimony correctly, it's a way that you can flag for defense counsel certain issues that may come up and how they can be worked through.

A. Yes, sir.

Q. There is also in this e-mail the following reference. It says:

Connecticut has brought a state specific lawsuit. Has anyone heard of any other state specific suits?

What do you mean by state-specific suit?

A. I don't know. I mean, Marilyn had Connecticut there, and I -- and if Marilyn was all right with them being there, I didn't see it as any seal issue from my perspective.
Q. Now, am I correct that on August 29th the government made a formal dollar demand of Cephalon?
A. Yes, sir.
Q. $961 million stands out in my mind.
A. I don't remember, but it was a big number.
Q. And am I also correct that at the end of that session, an agreement had not been reached?
A. That's correct.
Q. That there was a number on the table from the government that was still higher than Cephalon said it was willing to accept.
A. Yes, sir.
Q. Does 648 million sound about right?
A. Yes, sir, it does.
Q. And then at some point after that the negotiations with Cephalon continued; is that correct?
A. Right. If that was the last meeting, we had a somewhat abrupt parting at the end of that

meeting. And then Marilyn and I talked, and she was going to reengage. And at that time there was some further conversation. And then Marilyn and I were talking about my number, the bottom-line number, and Marilyn called me back after her further discussions with Cephalon.
Q. So I take it then there were further negotiations with Cephalon to which you were not a party.
A. Correct.
Q. All right. And at some point is the information reported back to you that an agreement in principle has been reached?
A. Yes.
Q. How is that information reported back to you?
A. It's basically reported back to me that Marilyn reported back to me that they'd come up with a number, that they had agreed to a number that fit our bottom line, the state's bottom line.
Q. They had agreed to a number, meaning whom?
A. Cephalon. And there were a couple, three moving parts in this. Because of the criminal resolution, there was also going to be

financial matters relative to that, relative to that resolution, and so my focus was on making sure the state number was met.
I mean, to the extent that there was negotiation as to the criminal number, negotiation as to the federal number, while I was certainly interested, my focus was, has the Medicaid bottom line been met. And I was advised it had been.
Q. And that agreement, in principle, was, in total, criminal, civil, Medicaid, federal, $425 million?
A. 425 million, yes, sir.
Q. Not including any separate state settlement for Connecticut or Massachusetts.
A. Correct, sir.
Q. When -- when did you learn of that global settlement?
A. It was not -- it wasn't length -- a lengthy time after that negotiation. It was -- but it was -- I just don't recall. It was some time, but it wasn't many months.
Q. Let's see if we can try to pinpoint it a little bit with a document.
(GAMBRELL EXH. 39, E-Mail Correspondence to Mr. Helmandollar, et al. from

Mr. Gambrell dated 9-19-07, marked for identification.)
BY MR. SITARCHUK:
Q. 39 is an e-mail from you to the NAMFCU team; is that correct?
A. Yes, sir.
Q. With a carbon copy to Marilyn May?
A. Yes, sir.
Q. And that's on September 19th of 2007?
A. Correct.
Q. And is this e-mail informing the NAMFCU team of the global settlement?
A. Yes, sir.
Q. And, in fact, you say here we have a global settlement of $425 million in Cephalon; right?
A. Yes, sir.
Q. And that was as of September 19th of 2007.
A. Correct.
Q. Was that the agreement in principle?
A. Yes, sir.
Q. Did you report that agreement to Mr. McIntosh?
A. I don't recall that I did.

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND

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

Plaintiff,

vs. CASE NO: 2011-CP-40-3661

CEPHALON, INC.,

Defendant.

(Caption Continues on Page 2)

VIDEOTAPED
DEPOSITION OF: JOHN W. McINTOSH

DATE: April 11, 2013

TIME: 10:02 AM

LOCATION: Office of the Attorney General
1000 Assembly Street
Columbia, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
CEPHALON, INC.,
Plaintiff,
vs. CASE NO: 2012-CP-40-7317
ALAN WILSON, in his Capacity as Attorney General for the State of South Carolina,
Defendant.

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ALSO PRESENT:
Beth Valdes, Paralegal
Steve Barksdale, Videographer

(INDEX AT REAR OF TRANSCRIPT)

THE VIDEOGRAPHER: We are now on the record. Today's date is April 11th, 2013. The time is approximately 10:02 AM.

This is the video deposition of John W. McIntosh taken by counsel for the defendant and the plaintiff.

The location is 1000 Assembly Street, Suite -- Columbia, South Carolina 29201, Office of Attorney General.

My name is Steven Barksdale, legal videographer representing A. William Roberts, Jr. & Associates.

This deposition is taken in the matter of State of South Carolina, et al. versus Cephalon, Inc., et al., and Cephalon, Inc., et al. versus state of South Carolina, et al.

Counsel, please introduce yourselves for the record.

MR. JOWERS: Gerald Jowers for the State of South Carolina.

MR. KATSIFF: Tim Katsiff for Cephalon.

MR. McKINNEY: Steve McKinney for Cephalon.

THE VIDEOGRAPHER: Would the court reporter please swear in the witness.

JOHN W. McINTOSH
being first duly sworn, testified as follows:
EXAMINATION
BY MR. KATSIFF:
Q. Good morning, sir.
A. Good morning.
Q. Again, my name is Tim Katsiff. I'm representing Cephalon in this case. Thank you for coming this morning.
Have you been deposed before, sir?
A. Yes, I have.
Q. On how many different occasions?
A. I can only recall one.
Q. And did that involve your official duties in the Attorney General's Office?
A. Yes, it did.
Q. Okay. What was the subject matter of that action?
A. That was involving a criminal case that the office was involved in, and I had some participation in that case.
Q. Okay. Well, sir, just -- I know you're an experienced lawyer, and not to be presumptuous, but just to make sure that we're all operating on the same page today, I just wanted to go over some

ground rules for depositions, which I'm sure you're familiar with.
A. That's fine.
Q. Okay. So I'll be asking you a series of questions today, and you'll be providing answers. You understand that?
A. Yes, I do.
Q. Okay. And if my question is somehow unclear or if you don't understand my question, just ask me to repeat it or rephrase it and I'll try to do so. Do you understand that?
A. I understand that.
Q. Okay. And if at any time you want to take a break, just please let me know and we'll take a break.
A. Thank you.
Q. Okay. Did you do anything to prepare for your deposition today?
A. I've looked at some documents and records.
Q. When did you look at those documents and records?
A. Over the past two weeks.
Q. And who -- did you choose which documents and records to look at, or did your

counsel provide them to you?
A. They were provided to me by counsel and by the finance director of the office.
Q. Okay. What documents did the finance director provide to you?
A. It was a whole big stack of documents. It included some financial information, budgets for different years, budget request. That's just -- you know, budget information.
Q. Okay. Did you ask him to provide those documents for you in connection with your deposition?
A. No, I did not.
Q. Okay. Do you know why he was providing those documents to you?
A. Because I think they were the subject of some areas of interest in the depositions.
Q. Okay. Did you meet with counsel to prepare for your deposition today?
A. Yes, I did.
Q. Who did you meet with?
A. Mr. Jowers, and there was some other attorneys in the office who were present.
Q. By "the office" you mean the Attorney General's Office?

A. Correct.
Q. Okay. Who were the other attorneys present?
A. Well, Sonny Jones, Bob Cook. There were some non-attorneys. Jay Smith, who's a non-attorney, was present. That's all I recall at the moment.
Q. How long did this meeting last?
A. I think there were probably two meetings, and the first one might have been an hour and the second one might have been an hour, hour and a half.
Q. Okay.
A. I didn't time them.
Q. Okay. And when did these meetings occur?
A. One was this week. Probably Tuesday, I guess. And one was -- I don't know -- last week or the week before.
Q. Okay. Now, am I correct that you -- your current job is Chief Deputy Attorney General; is that right?
A. That's correct.
Q. How long have you had that position for, sir?

Q. Yeah, why don't you get them now, if you don't mind. We'll take a second. Thank you.
THE VIDEOGRAPHER: Off the record at 10:36 AM.
(A recess transpired from 10:36 until 10:41.)
THE VIDEOGRAPHER: We are back on the record at 10:41 AM.
BY MR. KATSIFF:
Q. Okay, sir. Before we broke you were handed -- you were handed two documents, McIntosh 2 and McIntosh 2.1.
A. That's correct.
Q. Let's focus on McIntosh 2 first. Is this a document you recognize, sir?
A. I've seen it, yes.
Q. What is it?
A. Well, I'm not sure what the finance director calls it. It lists three different areas of funding. One is state funding, one is federal funding, and one is other funding.
Q. Okay. Is this -- does this appear to be -- let's look at the first page, for instance, which is entitled Office of Controller General, Original Chart of Accounts, 2011 to 2012

Appropriations.
So does this appear to be a summary of the appropriations for this office for the fiscal year 2011 to 2012?
A. The state appropriation, yes, 3.55.
Q. Okay. I see. The state -- the state appropriations --
A. That's the 100 code, as I understand it.
Q. I see. And what are the state appropriations?
A. What the -- what the state General Assembly appropriates for the office.
Q. Okay. Well, let's, you know, just -- why don't -- this might clear some stuff up if we look at -- why don't you go to 2.2.
A. 2.1?
Q. I'm sorry. 2.1. I'm sorry. Which, just so the record's clear, I understand, is actually two separate documents. But let's focus on the second page, which is the page Bates labeled SCAG 000098. Do you see that one, sir?
A. Yes, I do.
Q. Okay. So are you familiar with this document?

A. I've seen it, yes.
Q. Okay. This is a summary of appropriations to the Attorney General's Office since 2000 -- since fiscal year 2002-2003?
A. Appropriations that come to or through the Attorney General's Office. Some is not for us to spend individually. Like the Savannah River money, we don't spend that money.
Q. Okay.
A. That was $3 million for litigation where outside counsel has been employed, and that money comes through this office, but it's not spent by this office per se.
Q. That $3 million that you're referring to, that was a nonrecurring item in the 2013-2014 fiscal year budget, wasn't it?
A. I believe it was in the 2012-13. It shows up here on the first page of that as $3 million. If you'll look at Line 1337 on Page 1.
Q. Sure. Okay. Okay. I see the line that you're talking about. I was actually focused on the next page.
A. All right.
Q. But let's look at -- and I'm glad you mentioned that, because it might -- it may clarify

something. So --
A. See, but that's not the only onetime item. There's a couple, but that's one of them.
Q. Okay. But -- okay. So if you look at the next page of the document. Are you with me?
A. Yes.
Q. Okay. So let's focus on that fiscal year that we just -- we were just looking at, which was 2012-2013?
A. Yes.
Q. Okay. And the total -- the budget appropriated total listed there is $17.861 million; is that right?
A. Well, I wouldn't call that appropriated. The 4.378's appropriated. There's the federal funds, which is 1.868, and then the eleven six one three is other funds.
Q. Okay. Well, I mean, the --
A. I mean, there's funds available. I just wouldn't call it appropriated.
Q. Well, the document says these are the beginning appropriation balances. Would you agree with me on that?
A. That's what the document says.
Q. Okay.

A. It depends on your definition of appropriation.
Q. Okay. And there's three categories: general funds, other funds and federal funds.
A. Correct.
Q. And then there's a total.
A. Correct.
Q. And the total is 17.861 million and change for that fiscal year; is that right?
A. Correct, including some of these onetime balances like the Savannah River.
Q. Okay. Well, that's what I want to -- that's what I want to talk to you about. If you go back to the previous page.
A. Um-hum.
Q. Okay. So --
THE VIDEOGRAPHER: Sir, we have to go off the record for a second.
MR. KATSIFF: Okay.
THE VIDEOGRAPHER: Off the record at 10:47 AM.
(Off-the-record conference.)
THE VIDEOGRAPHER: Back on the record at 10:47 AM.
BY MR. KATSIFF:

Q. Let's just start from the beginning again. Okay. So go to the second page of 2.1. Okay. And actually, I think we should be focused on fiscal year 2011 through 2012. Okay. And the total you see for that fiscal year is $17,181,790; is that right?
A. That's correct.
Q. Okay. Now, you mentioned this $3 million for the Savannah River fund; is that right?
A. Correct.
Q. Okay. So go back to 2.1 for me for a second, the first page. Okay. Now, if you go to Line 1335, right?
A. Correct.
Q. There's a total there of approximately -- a little over $17 million; is that right?
A. That's correct.
Q. Okay. Now, this $3 million that you -- that's before this $3 million that you're referring to gets added in; isn't that right?
A. It appears so.
Q. Okay. So this -- this 17 million -- 17,181,790 on SCAG 0098 doesn't include that $3 million, correct, for fiscal year 2011 to 2012?

A. That appears to be correct.
Q. Okay. So let's -- let's then stay on that document 0098 for a second. Now, we've got the general funds category; is that right?
A. Correct.
Q. What -- what kind of funds are in that category?
A. That's what the state appropriates, the 3.555.
Q. Okay. And the 3.555, you're referring to fiscal year 2011 to 2012?
A. That's correct.
Q. Okay. So that's what the state appropriates.
A. Correct.
Q. How about other funds?
A. Other funds is a combination of a number of other items.
Q. Okay. Does that include recoveries that the state of South Carolina might receive in connection with unfair trade practices claims that are filed?
A. It does.
Q. What else does it include?
A. I believe it includes the $2 million in

securities fine money. I believe it includes 800 -- 750,000 -- excuse me. The $2 million in securities fee money, the $750,000 in securities fine money and some of that is carried over, as I understand it, from year to year if it's not expended.
It would include what we call ticket money. There's a surcharge in South Carolina, anybody that gets a ticket. And we get some small percentage of that, as do other agencies, which I think is somewhere around $600,000 a year.
Complex criminal litigation moneys, until this year, and that was somewhere 3 to $400,000 a year. There would be drug forfeiture money. There would be insurance fraud money. There would be some other smaller onetime moneys that come from state grand jury filing fees. Those are small amounts.
Q. Okay.
A. And there may be some other.
Q. Okay. And federal funds, that's money that the federal government has specifically earmarked to a --
A. Those are federal grants.
Q. Federal grants?

A. (Witness moves head up and down.)
Q. And the MFCU unit is funded, in part, in that; is that correct?
A. I believe it's 75/25.
Q. 75 from the feds and 25 from the state?
A. Correct.
Q. Okay. So when we -- when we look at other funds -- well, let's just start out with the general funds for a second.
I mean, you'll agree with me that the appropriation of the general funds has declined quite significantly and steadily during the period 2000 -- fiscal year 2002 to 2003 to 2011 to 2012; is that right?
A. That's correct.
Q. Okay. And, in fact, you know, there was -- it looks -- it appears as if there was a greater than a 50 percent decrease in the budget during those years; is that right?
A. That appears to be correct.
Q. Okay. Looks like you had a little bit of an uptick recently.
A. Last year?
Q. Yeah.
A. Yes.

Q. Okay.
A. We got approximately $750,000 more last year from the state, roughly.
Q. And why was that? The state has more money or --
A. You'd have to ask those people. I don't know why.
Q. Okay. And by those people you're pointing over to the capitol?
A. General Assembly. General Assembly.
Q. Okay. Now, in the other funds column -- now, General McMaster was Attorney General up until fiscal year 2009 to 2010; is that right?
A. Well, until January of 2011.
Q. Okay.
A. So it was in the middle of that fiscal year.
Q. Right. Okay. And during that time period it appears that there was more than a six-fold increase in other funds; is that right?
A. I haven't done the math, but I'll take your word for it.
Q. Okay. Well, since General Wilson has taken office, you'll agree with me that that

category of funding has increased from 6.7 million to 11.6 million?
A. I don't believe that's correct. Now, he took office in January of 2011, which would be, I believe, the '11-12 fiscal year.
Q. Okay.
A. So that would be 11.6, I believe.
Q. Okay.
A. Because he took office January of 2011.
Q. Okay.
A. He's been in office slightly over two years. And I believe fiscal year '11 and '12 would be from July 1st -- let me get this straight. July 1st of 2011 until June 30th, 2012.
Q. Well, okay. I mean, general -- general -- general -- so it's fiscal year 2009 to 2010, right, would be, what, June 2009 through --
A. July 1st.
Q. -- July of 2010?
A. July 1st through June 30th.
Q. Okay. July 1st, 2009 to June 30th, 2010; is that right?
A. I believe that's correct.
Q. Okay. And fiscal year -- so General Wilson took office in fiscal year 2010-2011; is

that right? Because that would have been -- that would have been July 1st, 2010 to June 30th, 2011.
A. I believe that's correct, yes.
Q. Okay. Now, you'll agree with me, will you not, that General Wilson has made statements to the press indicating that -- that the office is required to think out of the box to gain additional funding?
A. I've seen one such newspaper article.
Q. Okay. Has he made any such statement to you?
A. I don't -- I have no way of recalling. I talk to him several times every day. So I would have no specific recollection.
Q. Okay. Well, has he told you that we've got to increase activity in contingent fee cases in order to generate money for this office?
A. No.
Q. Okay. Has he told you we've got to think about ways to generate money for this office?
A. I have no recollection of that conversation.
Q. Okay. Has he ever told you that one way to generate money for this office is to bring cases alleging violations of consumer protection

laws?
A. But that's not why we bring cases.
Q. I'm just asking --
A. He's never made that comment to me, but that's not why we bring these cases.
Q. Okay. Have you ever made -- have you ever made a comment to him that we can increase revenue by bringing contingency fee cases?
A. I have no recollection of that.
Q. Okay. Do you have a recollection of anyone ever making a comment in this office that we can increase funds by bringing contingency fee cases?
A. Not per se, no. I mean, obviously, that is a byproduct. If you bring a contingency fee case and that case is successful that's a byproduct, obviously.
Q. Okay.
A. But we don't bring them for that purpose.
Q. Yeah. And again, I mean, I'm not asking you -- I'm not asking you if you bring them for that purpose. I'm asking you whether or not you've heard such a comment, and you said not per se. What does that mean?

A. I don't recall.
Q. Okay. You don't recall one way or another whether or not you've heard one or you didn't hear one?
A. I don't recall one way or the other.
Q. Okay. Now, if I were looking at the budget in terms of where recoveries from contingency fee cases appeared, is it in -- is it in earmarked funds?
A. I don't know.
Q. Okay.
A. I mean, I don't know the accounting details. I don't know how the finance director does that. It would be in other funds, but I don't know whether they call that earmarked. I don't know.
Q. Okay. It's in other funds on the Bates labeled document 98 that we were looking at.
A. Correct.
Q. Okay. And I guess, you know, we were talking a little bit about earmarked funds. If you could turn to -- in the first exhibit there, 2, if you could turn to Page SCAG 00086. And the numbering is off to the left here.
A. I'm sorry.

Q. That's okay. It's a little hard to --
MR. JOWERS: You mean 96, the next page?
MR. KATSIFF: No. I mean 86.
THE WITNESS: Which page of --
MR. JOWERS: Mine starts with 93.
MR. KATSIFF: It does? Okay. That's fine.
THE WITNESS: Page 4 of Exhibit 2? Is that --
MR. KATSIFF: Yeah, you know what? It may not be in your document. Just give her a second there. I tell you what, just to speed this up because I don't think it's too controversial, I'll just show him mine and then we'll just substitute it, if that's okay, with a nonhighlighted version.
MR. JOWERS: That's fine. All right. 2009 to '10? Sure.
MR. KATSIFF: Yeah. Thanks.
MR. JOWERS: Is the section you're looking for not in this one too? Because they're all the same in terms of formatting.
MR. KATSIFF: It's not. Yeah, it's not, unfortunately.

MR. JOWERS: Okay.
MR. KATSIFF: Let's just -- we'll mark this as 2.2, and we'll substitute -- the highlighting is mine and we'll substitute an unhighlighted version later.
(McINTOSH EXH. 2.2, Office of Comptroller General Original Chart of Accounts 2009-2010 Appropriations dated 6-9-09, marked for identification.)
BY MR. KATSIFF:
Q. Sir, if you could -- this looks like a similar document.
A. (Witness moves head up and down.)
Q. And if you could just turn to Page 2 of the document, please. And you'll see at the very top it says earmarked funds.
A. I see earmarked fund.
Q. And I'm wondering, does that -- would that include the other category that we've been talking about?
A. I believe that's what the 300 code is. If I recall, 100 is state funds, 300 is other, and 500 is federal grant money.
Q. Okay. Okay. Is there a 200 code too?
A. Not that I'm aware of.

Q. Okay.
A. 1, 3 and 5 is all I've ever heard.
Q. Okay. I see. And what you're looking at here is where it says -- and it's a little hard to read, but it looks like sub fund? And you see like there's a -- there's a 3,000. Is that what you're looking at?
A. Yes. Which line? Yes, but which?
Q. I'm looking at -- it's really the column, and there's program number, mini code and sub fund.
A. I don't see sub fund. I see mini sub, object, program title.
Q. Sub. Under sub does it say 3,000? Is that what you're looking at?
A. Yeah, I see 3,000.
MR. KATSIFF: Here's one.
MR. JOWERS: Thanks.
MR. KATSIFF: It still doesn't have it.
MR. JOWERS: There are lots of documents.
MR. KATSIFF: Yeah, I know. We'll just substitute it afterwards. Okay. I think we have better copies of this, but we only have two, so --
MR. JOWERS: Okay.

MR. KATSIFF: And this one is just slightly different than the one you have in just the way it printed.
MR. JOWERS: Oh, all right. All the same information's there, the same view?
MR. KATSIFF: Yep.
MR. JOWERS: Okay. This is 3?
MR. KATSIFF: Yes.
(McINTOSH EXH. 3, Spreadsheet Representing Cases Handled by the Consumer Protection Division, marked for identification.)
BY MR. KATSIFF:
Q. I'll give you a moment to look at that spreadsheet, sir. Thanks. And my first question after you're done looking at it is just whether or not this is something that you've seen before.
A. Not in this format, but I'm sure I've seen this information.
Q. Okay.
A. Or I think I have.
Q. Why do you think you've seen it before?
A. Because it looks like it's a representation of cases that the consumer protection section has been involved in.
Q. Okay. Do they provide you with

periodic updates of the cases they've been involved in and the recoveries that have been received, both for the state and for this office?
A. Yes, I do.
Q. Okay. Did you ask them for that information?
A. I don't know whether I asked or they provided it, but I get it.
Q. How often do you get it?
A. I think Mr. Smith -- I'm not sure. Bimonthly, quarterly. On some periodic basis.
Q. Okay. Okay. So -- and you review it when you get it, I assume?
A. I look at it, certainly.
Q. Okay. Okay. You see why -- while we're getting this other document, if you could just look over to Column O on that spreadsheet.
A. Column --
Q. O.
A. -- O? All right.
Q. Okay. Are you able to make that out, attorneys' fees and costs for South Carolina AGO?
A. Now that you've read it, I think, yes.
Q. Okay. What's your understanding of what that represents?

A. Moneys the office has received from various types of cases.
Q. Okay. Where does the money that the office receives from these cases go?
A. As I understand, it goes into general operating account. I couldn't tell you the specifics, and it's spent officewide.
Q. Okay. And that would -- it would go into the other category that we looked at in Exhibit 2.2; is that right?
A. That's my understanding.
Q. I'm sorry. 2.1; is that right?
A. That's my understanding.
Q. Okay. And that money is also reported to the legislature every year; is that right?
A. I assume so. I don't know.
Q. Okay.
A. It would show up in cash balances. It shows up in our cash balances. So it's available. Exactly in what format or how it's made, that I'm not sure.
Q. Okay. So your -- your understanding is, is that it goes into the operating budget for the office?
A. That's my understanding.

Q. Okay. And as part of the operating budget it can be spent on anything?
A. That's correct.
Q. Okay. And the office spends it on things like salary?
A. Sometimes, um-hum. Expenses. I mean, we have two general categories: salaries, fringe, plus expenses, so...
Q. And it could be spent on any of those categories.
A. Correct.
(The proceedings were interrupted.)
MR. JOWERS: I think I need to take this.
MR. KATSIFF: Okay. Let's take -- let's take -- go off record.
THE VIDEOGRAPHER: Off the record at 11:10 AM.
(A recess transpired from 11:10 AM until 11:21.)
THE VIDEOGRAPHER: We are back on the record at 11:21 AM.
MR. KATSIFF: Okay. I'm going to mark -- we'll mark these in consecutive order for exhibits.

(McINTOSH EXH. 4, FY 2010 30350007 Itemization, Bates SCAG 001158, marked for identification.)
(McINTOSH EXH. 5, FY 2011 30350007 Itemization, Bates SCAG 000150, marked for identification.)
(McINTOSH EXH. 6, FY 2012 30350007 Itemization, Bates SCAG 001160, marked for identification.)
(McINTOSH EXH. 7, FY 2013 30350007 Itemization, Bates SCAG 001161, marked for identification.)
BY MR. KATSIFF:
Q. Give you a second to look at those. Have you seen these documents before, sir?
A. They don't look familiar to me. I may have, but I have no recollection.
Q. Okay.
A. I might have, but...
Q. Are you familiar with -- look at, if you could, McMaster Exhibit 4.
A. McIntosh.
Q. I'm sorry. I'm sorry about that. McIntosh Exhibit 4, fiscal year 2010 on the top. Do you see that?

A. I see it.
Q. Okay. And it has an Account No. 30350007?
A. Correct.
Q. Okay. Now, is your understanding that that is the account to which contingency fee payments are placed?
A. I have no idea. I mean, it may be. I just don't know. I just don't keep up with the details of the finance.
Q. Okay. Well, let's just, you know, look down this list a little bit. Do you see anything on the items that are -- and I guess before we do that, on the left-hand side it says GL account. I assume that that stands for general ledger account?
A. I don't know.
Q. Okay.
A. You may be correct. I just don't know.
Q. Okay. Are you familiar with the term general ledger?
A. Generally, but, I mean, in terms of our office and how we function, I couldn't tell you exactly what that means.
Q. Okay. And Mr. Osmer would be the person I'd talk to to figure out what all this

means?
A. Yes, he or somebody in finance, correct.
Q. Okay. Well, if I -- if I look at this document it says GL account and then it has what looks to be account numbers and then it looks to be a description; is that right?
A. That's correct.
Q. Okay. So if I look at the first one, classified positions.
A. Correct.
Q. What does that refer to?
A. I'm assuming that's what we call FTEs, full-time equivalent. Those are full-time employees, whether they're lawyers or nonlawyers.
Q. Okay, okay. And is -- you're assuming, but you don't -- you don't know for sure; is that --
A. I mean, I think that's what it is, but I don't keep up with those sort of details.
Q. Okay. Paying full-time employees is something that contingency recoveries by South Carolina Attorney General's Office could be used to fund; correct?
A. Could be used, correct.

Q. Okay. Is there -- if you could just take a quick look down this list, is there anything on this list that a contingency recovery by the Attorney General's Office for an unfair trade practices case could -- money recovered could not be used for?

A. You'd have to ask the finance director. I don't know the answer to that.

Q. Okay.

A. I mean, I see many things that I would assume it's used for. But like Teri — second annual leave payout, I have no idea.

Q. Do you know what retirement SRS is?

A. Where? Where is that one?

Q. That one --

A. Oh, I see it now.

Q. Yeah.

A. Retirement. SRS retirement. I do -- no, I do not know what SRS or ORP or ORP furlough stands for.

Q. Okay.

A. I'm assuming that's state retirement system, but that would be a guess on my part.

Q. Okay. Health, I-N-S, dash, state employee, is that --

A. That would be health insurance.

Q. Okay.

A. I would assume that's the employer's share of health insurance.

Q. And the employer's share of health insurance is something that a recovery of contingency funds could be -- could be used to pay for?

A. I assume so.

MR. KATSIFF: Okay. Well, I guess we'll ask somebody in finance about this then.

This is -- this has just been handed to me, so I'm just going to mark this. There's no other copies of it.

(McINTOSH EXH. 8, Total Authorized FTEs, Includes State, Federal and Other, 2004-2012, Bates SCAG 001185, marked for identification.)

BY MR. KATSIFF:

Q. You've just been handed Exhibit 8. Are you familiar with this exhibit, sir?

A. Yes.

Q. Okay. This appears to be a listing of full-time employee equivalents in the Attorney General's Office; is that right?

A. Correct.

Q. Okay. And it's an equivalent because if somebody -- it's adding up people who are working on part-time status, too, and adding those people to what a full-time equivalent would be?

A. I don't think so, but I could be wrong. I think this is full-time people who work 30 hours or more.

Q. Okay.

A. Part time would be on a contractual basis, which I believe is a separate category, though I'm not positive.

Q. Okay.

A. But this is full-time staff attorneys, non-attorneys.

Q. Okay. It says FTE, though, doesn't it?

A. Right, full-time equivalent.

Q. Okay.

A. Right. Which is what the state gives you. You have to have an FTE in order to employ somebody on a full-time basis. Contractual part time is different.

Q. I see. And you'll agree with me that this office has hired additional people during the time period that's reflected on that document; isn't that right?

A. That's correct. It's gone from 153.9 to 179.2.

Q. Okay. And the state funds have -- appropriations have gone down. So what funding source has allowed you to hire additional people?

A. Those that I mentioned earlier: securities fee moneys, securities fine money, ticket money, complex criminal litigation money. The drug forfeiture money and insurance fine money doesn't allow you to hire people, but it pays expenses that frees up money that could be used for our purposes as well as some other. And, of course, it would include recoveries from contingency fee contracts, certainly.

Q. Okay. So, I mean, contingent -- recoveries from contingency fee contracts are at least one reason that you've been able to hire additional people in this office; is that correct?

A. Yes.

Q. Okay. Can you -- while we're looking for these, can you explain to me what a budget proviso is?

A. A budget proviso is a temporary authorization. It's something that's good for one year and has to be renewed in order to be effective

sir, to Page 5. Article IV again, which is compensation.
A. Okay.
Q. And what's your understanding of how special counsel gets compensated in this matter?
A. They get compensated in accordance with the fee schedule like in Article IV.
Q. Okay. They only get compensated if there's a recovery; is that right?
A. That's correct.
Q. Okay. And if there's a recovery, costs are paid back off the top of the recovery; is that right?
A. That's right.
Q. Okay. And they -- the remainder of the recovery is divided between punitive -- well, let's state it this way: Punitive and exemplary damages are put off to one side; is that right?
A. That's correct.
Q. And then everything else, including civil penalties, they get a recovery based upon the sliding scale in 3; is that right?
A. That's correct.
Q. Okay. And then for punitive and exemplary damages they get a recovery based upon

the sliding scale in 4; is that right?
A. That's correct.
Q. Okay. And the Attorney General's Office gets 10 percent of all of the fees awarded under both Sections 3 and 4; is that right?
A. Of the special counsel fee, that's correct.
Q. Okay. Now, you'll agree with me that the larger the award of civil penalties is, the more money paid to special counsel.
A. Certainly.
Q. Okay. And the more money that the -- will also be paid to the Attorney General's Office; is that right?
A. Of course.
Q. Okay. Now, you see in 2, and we're still in Section 4 here on Page 6:
At least 75 percent of the remaining or net settlement or judgment proceeds, but not including punitive or exemplary damages, if any, shall be paid or applied to or for the state or people of South Carolina or the victims in a manner to be determined by the Attorney General in his sole discretion.
A. That's correct.

Q. What gives the Attorney General the legal authority to pay or apply those amounts in his sole discretion?
A. I think common law authority and his role as the chief legal officer for the state gives him that authority.
Q. Okay. Does that include civil penalties?
A. I would think so.
Q. Have you looked into that issue?
A. Personally, I have not, no.
Q. Have you been informed about that issue by somebody?
A. I don't recall any discussion about it.
Q. Okay.
(McINTOSH EXH. 36, Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril and Actiq, Bates SCAG 1009-1010, marked for identification.)
BY MR. KATSIFF:
Q. Now, you've been handed Exhibit -- McIntosh Exhibit 36.
A. Correct.
Q. This appears to be an amendment to the

litigation retention agreement in this matter; is that right?
A. That's correct.
Q. Okay. Do you have a recollection of this amendment being signed?
A. Not independent, no. I probably was aware of it. I would think so.
Q. Do you remember what the rationale for it was?
A. Well, when they decided -- these companies decided to start suing us, we don't have the resources to defend the litigation.
Q. So the state -- and you mean decide bringing declaratory judgment actions?
A. Correct.
Q. So there's -- this case also involves, your understanding, a declaratory judgment action brought by Cephalon alleging that the retention agreement is violative of the South Carolina Constitution and the United States Constitution?
A. That's correct.
Q. Okay. And making some other claims as well.
A. (Witness moves head up and down.)
Q. And so you entered into a retention

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
CEPHALON, INC.,
Plaintiff,
vs. CASE NO: 2012-CP-40-7317
ALAN WILSON, in his Capacity as
Attorney General for the State of
South Carolina,
Defendant.

VIDEOTAPED
DEPOSITION OF: THOMAS M. OSMER, JR.
DATE: June 13, 2013
TIME: 10:07 AM
LOCATION: Office of the Attorney General
1000 Assembly Street
Columbia, SC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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Beth Valdes
Emily Bridges
Douglas Brown, Videographer

(INDEX AT REAR OF TRANSCRIPT)

THE VIDEOGRAPHER: We are now on the record. Today's date is June 13th, 2013. The time is approximately 10:07 AM.

This is the video deposition of Thomas M. Osmer, Jr. taken by counsel for the plaintiff. The location today is 1000 Assembly Street in Columbia, South Carolina.

My name is Douglas Brown, legal videographer representing A. William Roberts, Jr. & Associates. This deposition is taken in the matter of Cephalon, Inc. verse Alan Wilson, Case No. 2012-CP-40-7317.

Counsel, please identify yourselves for the record.

MR. KATSIFF: Sure. Tim Katsiff from Morgan Lewis representing Cephalon.

MR. McKINNEY: Steve McKinney, Haynsworth Sinkler Boyd for Cephalon.

MR. JONES: Sonny Jones from the Attorney General's Office representing the state.

MR. JOWERS: Jerry Jowers for the state of South Carolina.

MR. KATSIFF: And I should also mention on the phone is Tyler Brody, also with my office representing Cephalon.

THE VIDEOGRAPHER: Would the court reporter please swear in the witness.

THOMAS M. OSMER, JR.

being first duly sworn, testified as follows:

EXAMINATION

BY MR. KATSIFF:

Q. Good morning, sir.

A. Good morning.

Q. Again, my name is Tim Katsiff. So, Mr. Osmer, have you been deposed before?

A. No.

Q. Okay. Well, let me go over some ground rules, which I'm sure your counsel has already gone over with you, but I'll go over some ground rules for the deposition today.

I'm going to be asking you a series of questions. The court reporter's going to take down everything that we talk about, so it's important that you wait for my question to finish, and I'll wait for your response before I ask my next question. Is that okay?

A. Yes.

Q. Okay. And if you don't understand a question, please ask me to rephrase it or tell me what it is about it you don't understand, and I'll

do my best to try to clarify it. Is that all right?

A. Yes.

Q. Okay. Otherwise, I'll assume that you understand my question. Is that fair?

A. Yes.

Q. Okay. And, you know, if you want to take a break at any time today just let me know, and we'll take a break. Is that all right?

A. Fine. Yes.

Q. Okay. Did you do anything to prepare for your deposition today?

A. I produced some of the material that was requested, and I've talked to some of our staff about depositions since I've never participated in one before.

Q. Okay. And I'm not asking for what you talked about with counsel, but did you meet with counsel to talk about --

A. Yes.

Q. -- your deposition?

A. Yes.

Q. Okay. How -- how many times did you meet with counsel?

A. I believe it was -- the first time was

last Friday, and yest -- I believe last Friday was the only time I met with -- do you want names? Mr. Jowers --

Q. Yes, please.

A. -- and other staff. And then yesterday we had a brief meeting just to go over what is involved in a deposition again since I've never participated in one before.

Q. Okay. By other staff who are you referring to?

A. Sonny Jones; the chief deputy, John McIntosh. I believe Bob Cook was in the room, and Jared Libet.

Q. Okay.

A. There may have been another few staff members present coming and going, but I can't recall, really.

Q. Did you review any documents outside the presence of your attorneys?

A. Yes.

Q. What did you review?

A. I looked over again what we provided you from your first request, and I also read a deposition given by John McIntosh. Parts of it. I didn't read the complete deposition; just the very

beginning, I think, where there was some financial matters discussed.

Q. How did you determine what to read and what not to read in Mr. McIntosh's deposition?

A. I just browsed it. I mean, if I saw the word finance or -- you know.

Q. And you say that you reviewed documents that you provided to us.

A. Yes.

Q. What documents were those?

A. There's a list of them somewhere. Budgets from two thousand and -- I'm trying to go on memory here. I think it was two thousand -- I know it was 2003 to 2013. It might have gone back to 2000 or 2001. Expenditures in that time period, revenue, and I believe authority or budgets. And there was some more.

I think you asked for an FTE count per year. That's -- accountability reports. I did not look at each one of those individually, though. Whatever else was in the packet you asked to be disclosed to you.

Q. Okay.

A. I don't remember specifically. That's the main parts.

right?
A. Yes, in varying degrees, depending on -- I mean, you're talking about a 12-year period or 10-year period.
Q. I see.
A. Some years we received information in a little different formats, but primarily they give us these numbers. This is the general base budget of the office for each of these years.
Q. I'm just trying to understand what you used to create it. And I think I understand now.
You looked at the budget, you looked at what you were provided for each of these years from 2003 to two thousand and -- fiscal year 2003 to 2013. And then you created this summary based upon what -- the information that was in -- that was in the -- what was provided to you by the General Assembly; is that right?
A. Yes.
Q. Okay. So the -- the summary has three broad categories of revenue; is that right?
A. Yes.
Q. General funds. We talked about that a little bit. Can you explain what that source of revenue is?

A. Those are funds appropriated by the General Assembly each year for an agency.
Q. Okay. Is that the base budget?
A. Yes.
Q. Then federal funds, which are federal grants?
A. Yes.
Q. Okay. And the -- Mr. Gambrell's group would be a recipient of that; is that right?
A. Yes.
Q. Anything besides federal grants that would be in the federal funds category?
A. It's just -- it's strictly federal money that is -- the source is the federal government.
Q. And the other funds category, what revenue is in the other funds category?
A. That's any other revenue that we might have that's not state general fund and not federal grants or federal funds.
Q. And what are the sources of that revenue?
A. It's a long list. I mean, do you want me to quote them or go down them?
Q. Well, just generally.

A. Insurance fraud, drug forfeiture, civil litigation. There's a ticket surcharge we receive money from. Complex criminal litigation court fees. There's just a multitude of them. Security fees, security fines. Private donations. Private grants from, you know, private companies. Memorandums of understanding. Contracts with other state agencies. And that about covers it.
Q. Okay. And when you say civil litigation, that includes the work that Mr. Jones is doing?
A. It includes the work he does, plus other groups.
Q. Okay. Now, I noticed, you know, between fiscal year 2003 and fiscal year 2013 there's approximately a 10-fold increase in that source of revenue; is that right?
A. In which source of revenue?
Q. Other funds. It goes from --
A. Yes.
Q. -- 1.1 million to 11.6 million, approximately.
A. Yes, yes.
Q. What do you -- do you have an understanding as to -- as to why that revenue has

increased so dramatically?
A. Yes.
Q. Why?
A. Between fiscal year '03 and fiscal year '09, during that time frame, the budget -- the base budget -- oh, how can I put this?
When we did the other funds budget, it -- you -- the Budget Control Board informed us to put what we thought the revenue for each one of those sources would be in the budget, in the base.
Then on the first week of the new year, you know, first week of July, second week of July, that new fiscal year, we would file additional appropriations through a BD-100, which is the document used to increase appropriations, and that would be for the amount we thought we might spend during the year.
Then in fiscal year '10 that process changed. And they asked us to put the entire amount in the base budget, not just what we thought we would receive the next fiscal year. So the entire amount went in there, and that's why it increased so dramatically.
Q. The entire amount went into other funds?

listing, but those are probably the ones we use the most of. So those are your basic -- what, one, two, three, four, five -- six things that you have to have to make a document process through the system.

Q. Okay. So as I'm -- as I'm looking at this chart -- and I think I understand you. But as I'm looking at this chart and I'm looking at fund No. 30350007, civil litigation; right?

A. Yes.

Q. That's kind of just -- that's the only reference point for that particular fund number; right? The functional area is something different. That column is something different; is that right?

A. That's correct.

Q. Okay. So those are all the different functional areas within the office?

A. That's some of them. There may be more.

Q. And then grant numbers, those are all the grant numbers in the office?

A. It looks to be all of them. There may be more.

Q. Okay. So now the functional area numbers, the E200, that's the Attorney General's

area?

A. Yes.

Q. And that's assigned by the state?

A. Yes.

Q. Okay. And then what are the different subareas? Who assigns those?

A. The SCEIS management assigns these numbers.

Q. I see. Okay. And you think there's more subareas than are listed here?

A. Subareas or functional areas?

Q. Functional areas.

A. It's possible.

Q. Where would -- and how would -- the functional area, how would that work in relation to paying an expense?

A. As you can see, there's different functional areas with different names. What they're used for is to -- it's another area that you can pay an expense and capture it in one of these codes.

Q. Okay.

A. For instance, the E200 0014 is fiscal year '12 information technology project -- projects.

Q. Um-hum.

A. I believe, if I'm not mistaken, that the IT project we discussed in 2012 fell under that functional area.

Q. I see. And then the first two, we have state litigation, fringe benefits, is that?

A. Yes.

Q. Okay. So that -- those are the fringe benefits for everybody that works in this office; is that right?

A. That's correct, yes.

Q. Okay. Now, internal order. How is that number used? Those are general ledger numbers, you said?

A. No. Internal orders --

Q. Oh, I'm sorry. The revenue numbers are general ledger numbers. What's an internal order?

A. An internal order is an -- an agency can request an internal order to track certain expenses or deposits.

Q. Okay. I see. So for -- it looks like there's several of them relating to the NAMFCU unit?

A. Yes.

Q. And those are -- are those tracking

expenses for NAMFCU?

A. They were designed to track expenses. I do not know if they are currently tracking expense.

Q. Okay. Are there any internal orders relating to tracking of expenses for any of the work that Mr. Jones' group is doing?

A. No.

Q. Okay. Do you track any of the expenses relating to any of the work Mr. Jones' group is doing?

A. No.

Q. Okay. Now, the revenue numbers, those are the general ledger account numbers?

A. Yes.

Q. Could you explain for a layperson what a general ledger is?

A. It's a category in which an expense or a revenue is deposited using that code. And it tracks that expense and revenue per fiscal year per month, and it's found in these Exhibit 6 and 7 general ledger accounts, expenditure and revenue codes.

Q. Okay. And that's the backbone -- general ledger accounts are the backbone of

Q. Okay. Because it's the SABAR system.
A. Yes.
Q. I see. Because it's entitled SABAR Chart of Accounts.
A. Yes.
Q. I see. Okay. There's an account about halfway down the page, 10140. I'm sorry. Not an account. A department number called carry forward.
A. Yes.
Q. What is that?
A. That was designed to house the carry forward an agency might have that's allowed by law to be carried forward any -- any moneys in your base budget that you would have left over after our operations during the year. State -- state moneys.
Q. I see. Not the other category.
A. No.
Q. Okay. Now, is there -- is the agency -- and by -- the Attorney General's Office. Is the agency entitled to carry forward recoveries that it receives in consumer protection cases going forward from year to year?
A. Repeat the first part of that question.
Q. Sure. Is the agency entitled to carry forward funds that it receives in consumer

protection cases going forward year to year?
A. We may by law.
Q. Okay. And what law entitles you to do that?
A. Well --
Q. Or is it a proviso?
A. -- it's -- we base it on many laws. The fact that we were allowed to retain a deposit, expend it would allow us to carry it forward.
Q. Now, do you have a particular account that those funds are housed in?
A. Which funds?
Q. Funds that you receive in -- from the consumer protection group that you're carrying forward.
A. They're all housed in, I believe, the 30350007 and the 30350088.
Q. I see. Well, and let's -- the 3500 -- I'm sorry. The 30350088; right?
A. Yes.
Q. My -- I thought your testimony was that that account, to the best of your knowledge sitting here today, is only used to pay attorneys' fees and costs to outside counsel.
A. To the best of my knowledge.

Q. Okay. So why would you need to carry that forward?
A. I don't follow the question. Why would I need to carry forward cash in an account that cash was in?
Q. Well, you're using that account to pay attorneys' fees and costs --
A. Right.
Q. -- incurred by outside counsel; right? And you're -- you know, as the recoveries come in to the state, those moneys are due to outside counsel when the money comes in; right?
A. No.
Q. They're not?
A. No.
Q. When are they due?
A. Some of that money may be due to outside counsel. Some of it might be retained by this office.
Q. I see. Okay. So what portion of it would be retained by this office?
A. Whatever portion was told to me by the unit that did the litigation.
Q. Okay. How much money is in that account right now?

MR. JOWERS: I'm sorry. Which one are we talking about?
MR. KATSIFF: 30 --
MR. JOWERS: The 88?
MR. KATSIFF: The 88, yeah.
BY MR. KATSIFF:
Q. Can we call it the 88 account --
A. 88 account and 07 account.
Q. -- and 07 account?
A. I agree.
Q. Okay. How much money is in the 88 account?
A. I don't have that available right with me. I mean, I do not look at the balances every single day.
Q. Okay. Do you know how much is in the 07 account?
A. Not to the dollar.
Q. Do you know generally?
A. I'd be speculating.
Q. You don't have -- you don't have a estimate of what's in there based upon your knowledge?
A. I don't know what paid last night. I could -- I could speculate.

recover reimbursement for fees and costs; right?
A. Yes.
Q. Okay. And now in this particular case that we're talking about, this 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.
Q. So you'll agree with me that, you know, it's possible that the office spent far less than that amount, the $3.6 million, prosecuting that case; isn't that right?
A. That would be speculative. I don't know. We don't track per case.

Q. I'm asking if it's possible.
A. I would think anything's possible.
Q. Well, because you don't track by case --
A. Right.
Q. -- it's certainly possible they spent less than that, isn't it?
A. Yes.
Q. Okay. Does the consumer protection group have a budget every year?
A. No.
Q. Okay. Is there any basis upon which you can track the costs for -- the cost that it cost the office to employ the -- to employ the lawyers that are in that group and to provide them with support and, you know, to pay for the, you know, equipment and real estate that they're using?
A. We have a mechanism that we use. I would not call it an accurate mechanism. So, therefore, it is not included in the budgeting process. But these -- what we refer to as a cost center.
Q. Um-hum.
A. You've perused these reports and seen a civil litigation cost center.

Q. Um-hum.
A. Payroll is based on a cost center. Mr. Jones' salary would be loaded -- or located under that cost center. Is it a hundred percent? No. If we can tie something directly to that department, we will use that cost center as a mechanism to load -- for the expense to be paid.
Q. You'll use the civil litigation cost center?
A. Well, yes. But everybody -- there's many different departments that has one. I mean, securities has one, administration has one, finance has one. If you've got an organizational chart, just about every group that's broken out on there has a cost center.
Q. But is there a specific civil litigation consumer protection cost center?
A. Yes.
Q. And where would I find that?
A. On your organization chart. Or actually -- I'm sorry.
Q. I mean, where would I find the tracking of the costs for that?
A. In the SCEIS accounting system.
Q. Okay. Not -- in none of the documents

we already looked at.
A. No.
Q. Okay.
A. And there may -- may or may not be a actual report in SCEIS. I've never tried to run it by the cost center. I don't know if it's even available. It would be an ad hoc report, at best.
Q. Okay. Okay. So let's look at Line 118. Do you see that, sir?
A. Yes.
Q. Okay. So that's the AstraZeneca settlement involving Seroquel? Are you familiar with that one, sir?
A. I've heard the name AstraZeneca and Seroquel.
Q. Do you know whether or not that one was a contingency case or not?
A. No, I don't understand. Contingency is --
Q. Meaning there are outside lawyers prosecuting that case and they were getting --
A. I don't remember.
Q. Okay. And they're getting --
A. It may have been.
Q. And they're getting a portion of the

recovery as their fees, and the Attorney General is getting a portion of the fees as its recovery as well?

A. I mean, I'm basing it on memory. I don't know. It's possible.

Q. Okay. You just don't remember.

A. I don't remember, because I don't -- that's not my job. I don't --

Q. Okay.

A. I simply disburse and deposit money.

Q. Okay. Well, you know, if I were to look at the -- if I were to look at the column, you know, total attorneys' fees kept by AGO not including MFCU, and I would just go down this list that we have here; right?

A. Let's clarify which column we're talking about.

Q. Sure. I'm talking about column AG.

A. AG.

Q. Yep. All of those funds on that list would be deposited into the 07 account?

A. Yes.

Q. Okay.

A. Let me rephrase. It's possible that now, this current fiscal year, some could be in the

88 account.

Q. Well, let's -- let's drill down on that, because why don't you look at Column AC. And you see that one is total settlement -- I'm sorry. I'm directing you to the wrong column. Hold on.

MR. JOWERS: Looking for outside counsel fees?

MR. KATSIFF: Yeah.

MR. JOWERS: M.

MR. KATSIFF: M. That's it, yep.

MR. JOWERS: Or N, actually. Outside fees and costs would be N.

MR. KATSIFF: Yep.

BY MR. KATSIFF:

Q. So if you look at column M and N, aren't those the columns that would be deposited into the 88 account?

A. No.

Q. Where would those funds be deposited?

A. This is not my spreadsheet, but I would assume that that is the actual cost that is going to the attorney for -- outside counsel for providing their services.

Q. Okay.

A. Their services and their costs such as

travel. That would be a cost. We wouldn't call that an attorney fee.

Q. Well, why don't -- why don't we -- why don't we take it this way, okay, because I think -- you don't have familiarity with this spreadsheet. So it's probably fair -- is it fair to say that you have really no idea, for the most part, where most of these things are being deposited on the spreadsheet?

A. I don't know what's -- the formulas behind these numbers and how they add up. I've never -- I didn't create it.

Q. Okay.

A. So yes. The answer is yes, I would not have knowledge.

Q. Okay. So let's think about it this way: If there's a -- if there's a recovery in a case that Mr. Jones' group is working on, okay, the portion of that recovery that is being kept by the AG's Office would go into the 07 account; correct?

A. Yes.

Q. Okay. And the portion of that recovery that's going to be used to pay for outside counsel fees and costs would go into the 88 account; is that right?

A. Repeat that question one more time.

Q. Sure.

MR. KATSIFF: Can you read it back, please.

(The Court Reporter read the question commencing on Page 115, Line 22.)

THE WITNESS: I'm trying to find a easy way to explain this to you, because I can't answer that with a yes-or-no question.

BY MR. KATSIFF:

Q. Okay. Well, why don't you answer it the best you can then.

A. The 88 account is a brand-new account --

Q. Yep.

A. -- this year.

Q. Yep.

A. To my knowledge, I don't believe we received anything this year and said, oh, that's going to be what's going to pay the attorneys and put that in 88 and the rest would go into 07.

We use the 88 account for outside counsel attorney fees and associated costs, but that money is a pot of money. The settlement coming in isn't necessarily funding directly those

sir?
A. Yes.
Q. Okay. So this is -- these are all of the expenses being paid out of the 07 account; is that right?
A. Yes.
Q. Okay. By general ledger account number.
A. Yes.
Q. Now, just to be clear, if there were a recovery in the state's action against Cephalon, the portion of the recovery that was retained from the Attorney General's Office would go right into this 07 account; right?
A. If I was instructed by a document like Exhibit 18 by the civil lit unit, that's where it should be disbursed or deposited to. Yes, that would be correct.
Q. Funds that are retained for one of Mr. Jones' matters -- funds that are retained by the Attorney General's Office for one of Mr. Jones' matters, has there ever been a case where you've deposited those funds into something other than the 07 or 88 account? And I'm only talking about funds that are being retained by the Attorney General's

Office.
A. Those are the only two accounts, to my knowledge.
Q. Okay. So then it would be fair to say, if you were following -- go ahead.
A. Let me rephrase.
Q. Yep.
A. Other than those two accounts, the escrow account. And when we use an escrow account is when there is not a clear instruction to the finance department on what to do with the funds that have arrived. We can get a check or we can get a wire.
And if there's any question on how the funds are to be disbursed, maybe to different state agencies, general fund, retained in the office, outside counsel fees, we will put it into escrow and await our instruction on how to disburse the money.
Q. Okay. And then the money would be disbursed into an account?
A. Yes, it could. Or it could go straight from escrow to -- I mean, if we're retaining that portion of it, it would go from the escrow account to the 30357 or 303588, depending on our

instruction.
Q. Well, the 3588 is just very recent; right?
A. Right.
Q. Okay. So, I mean, my question -- I mean, back to my question is: Funds that are being retained by the Attorney General's Office -- so you know that these funds are being retained by the Attorney General's Office.
A. Um-hum.
Q. Has there ever been a case involving funds recovered by the consumer protection group that are being retained by the office that were not deposited into the 07 or 88 account eventually?
A. Eventually, no.
Q. Okay. Now, the uses of funds in the 07 -- the uses of funds from the 07 account, are there any limitations on the uses of funds from the 07 account?
A. Other than within state law, no.
Q. Okay. So funds in the 07 account can be used generally for the operating budget for the office; isn't that right?
A. Yes, any legal expense.
Q. Okay. And, in fact, let's just look at

SCAG 1161. It's the last page of the document you have, sir. And this is the most recent completed fiscal year, is that right, 2013?
A. Actually, it's not completed yet.
Q. Not completed yet.
A. Right. We're currently in that, yes.
Q. Okay. So these are -- this is money that you've currently expended out of that account; is that right?
A. That's correct.
Q. And you've used it for -- to fill temporary positions; right?
A. It looks that way, yes.
Q. Used it to pay for telephone?
A. Yes.
Q. Used it for management consultants?
A. What line is that, management consultants?
Q. It's three-quarters of the way down.
A. I see it, yes.
Q. I'm sorry. Quarter of the way down. Do you see that?
A. Yes.
Q. Used it to pay retirement; right?
A. Well, that's a fringe benefit.

Q. Yeah. Well, you used it for fringe benefits; right?
A. Right.
Q. Which include, what, retirement?
A. All these at the bottom starting with 513.
Q. Okay. So we've got retirement. Various retirement accounts. We've got Social Security; right?
A. Yes.
Q. We have healthcare for people in the office -- I mean, health insurance for people in the office; right?
A. Yes.
Q. Okay. So use it for payroll too?
A. Yes.
Q. And that's payroll and fringe benefits for the whole office; right? It's not just --
A. Define whole office.
Q. Well, it's not just the consumer protection group.
A. No. It's all kinds of different people doing different jobs.
Q. So if I were to add up all these for each of these years, it would show me how much

you've spent in each of these years out of that account?
A. It should, yes.
Q. Okay.
A. I will say that fiscal year '13 is an unaudited year --
Q. Okay.
A. -- just for the record.
Q. What are classified positions?
A. Classified positions are positions that are FTEs or full-time equivalents. They're permanent positions. Full-time permanent positions authorized by the General Assembly.
Q. Well, I'm just looking at -- let's look at 2013. You see the top line there, classified positions?
A. Yes.
Q. So -- and, I mean, in layman's terms that's people's salaries; right?
A. Yes.
Q. Okay. So $2.5 million towards salary so far this year; is that right?
A. Yes.
Q. Okay. And if we look at the -- if we look at, you know, 2011, it was $3 million in

salaries; is that right?
A. Yes.
Q. What's the -- do you know what the total classified position budget is for 2013?
A. Not off the top of my head. I'm --
Q. What document would it be in?
A. I'm not sure there's a document here that would show it.
Q. Okay.
A. It would be -- I mean, it's a number that you can go in and accrue and be able to report that.
Q. Um-hum.
A. It's just I don't think I have it in front of me here. I don't memorize the budget every year.
Q. Um-hum.
A. I'm sure it's available.
Q. Would it be in the -- would it be in the South Carolina Office of Attorney General fiscal year 2000 and whatever budgets, these books?
A. Well, the '13 won't. We're talking about '11. Yes, it may. I'm not sure it's in there either.
Q. Okay. It would be in the computer

system?
A. Would you like me to get you close?
Q. Yeah, sure. Oh, I see. So if you go to -- if you go to the controller reports that we were looking at -- if you go to the controller reports we were looking at, it looks like for -- in 2011 it looks like it was -- it was -- well, why don't you show me.
A. Yeah, I'm trying. I don't think I have -- what did I do with the 2011? I have everything but that. What document number is the '11?
Q. 11. Happy circumstance.
A. All right. My document 11 is fiscal year '12.
Q. So then it would be 10.
A. My document 10 is fiscal year '10. I do not have fiscal year '11.
MR. KATSIFF: Do you have it in your pile?
MR. JOWERS: I'm sorry. What?
MR. KATSIFF: 11.
THE WITNESS: It looks like that.
MR. KATSIFF: It says McIntosh 2 on it. What do you have it marked as? 11.

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
CEPHALON, INC.,
Plaintiff,
vs. CASE NO: 2012-CP-40-7317
ALAN WILSON, in his Capacity as Attorney General for the State of South Carolina,
Defendant.

VIDEOTAPED
DEPOSITION OF: ALAN WILSON
DATE: August 27, 2013
TIME: 10:05 AM
LOCATION: Office of the Attorney General
1000 Assembly Street
Columbia, SC
TAKEN BY: Counsel for the Plaintiff
REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

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ALSO PRESENT:
Beth Valdes
Douglas Browne, Videographer

(INDEX AT REAR OF TRANSCRIPT)

THE VIDEOGRAPHER: We are now on the record.

Today's date is August 27th, 2013. The time is approximately 10:05 AM. This is the video deposition of Alan Wilson taken by counsel for the plaintiff. The location today is 1000 Assembly Street in Columbia, South Carolina.

My name is Douglas Browne, legal videographer representing A. William Roberts, Jr. & Associates.

This deposition is being taken in the matter of Cephalon, Inc. verse Alan Wilson in his capacity as Attorney General for the state of South Carolina, Case No. 2012-CP-40-7317.

Counsel, please identify yourselves for the record.

MR. KATSIFF: Sure. Good morning. My name is Tim Katsiff. I'm representing Cephalon. And on the phone with me is my colleague, Tyler Brody.

MR. McKINNEY: And I'm Steve McKinney with Haynsworth Sinkler Boyd here in Columbia. We're representing Cephalon as well.

MR. JOWERS: Jerry Jowers for the state of South Carolina.

MR. JONES: Sonny Jones for the state of South Carolina.
MR. LIBET: And Jared Libet for the state of South Carolina.
THE VIDEOGRAPHER: Would the court reporter please swear in the witness.
ALAN WILSON
being first duly sworn, testified as follows:
EXAMINATION
BY MR. KATSIFF:
Q. Good morning, General Wilson.
A. Good morning.
Q. Thank you very much for taking time to be with us here today. Just -- have you ever been deposed before?
A. I have not.
Q. Okay. So -- and not to be presumptuous, because I know that you're an accomplished lawyer, but just to go over a couple ground rules for the deposition today. I'll be asking a series of questions. It's important that you give verbal answers in response. Is that okay?
A. Sure.
Q. Okay. And if for some reason you don't understand what I'm asking you, please let me know

and I'll try to rephrase it.
A. Okay.
Q. And, of course, at any time if you want to take a break or stop for whatever reason, just let me know and we will -- we will take a break. Is that all right?
A. Absolutely.
Q. Okay. What did you do to prepare for your deposition today?
A. I think I had two meetings last week and one yesterday.
Q. Okay. And who attended those meetings?
A. Mr. Jowers, Sonny Jones, Jared Libet were in those meetings. I believe Bob Cook was in one or two of those meetings.
Q. And approximately how long did they last?
A. The total of the three meetings was probably no more than three hours total.
Q. And did you review any documents in connection with your preparation for the deposition?
A. I skimmed the depositions of Mr. Osmer, Mr. McIntosh. I was shown a stack of financial documents, I believe documents y'all had shown to

others you deposed, and I read the pleadings of the underlying action and the DJ action.
Q. And what's your understanding of the underlying action?
A. Well, this is a SCUTPA case brought against Cephalon, your client, regarding the off-label marketing of three drugs.
Q. And was that the first time that you had looked at the pleadings in the underlying action, or had you looked at them before?
A. Oh, I had looked at them a little over two years ago.
Q. Okay. So that was just to refresh your recollection?
A. That's correct.
Q. And the -- you also reviewed the pleadings in this declaratory judgment action?
A. I did.
Q. Okay. And had you reviewed those pleadings before?
A. I had.
Q. Okay. And did you review those pleadings for the first time right around the time the action was filed?
A. I don't recall specifically when I

reviewed them.
Q. But the first time you reviewed them was some time ago or --
A. Yes, yes.
Q. Okay. Did you -- in connection with -- well, you said that you looked at some documents that you think were produced to us — by "us" I mean Cephalon — in this action; is that right?
A. I believe so, yes.
Q. Okay. In connection with documents produced in this action, did you or someone at your direction review your files for potentially responsive documents?
A. I was told that someone had reviewed my files. I did not know it at the time that it occurred.
Q. Okay. So you were told that someone reviewed your personal files in connection with production; is that right?
A. That's correct.
Q. If you could, just give us a couple minutes on your professional background.
A. Let's see. I graduated law school in 2002. Prior to that I had worked for the Drug Enforcement Administration as an intel analyst. I

had worked in the insurance industry briefly. I went back to law school. Graduated in '02. I was a law clerk for a circuit judge in Lexington. Then I went to work in the solicitor's office. Had a brief break in service to go serve in Iraq with my National Guard unit. Came back. Prosecuted some more. Came to the Attorney General's Office. Left the Attorney General's Office in, I believe, 2009 and came back -- went into a brief stint in civil practice but ran for Attorney General, was elected in 2011. I've been here since.

Q. Okay. So while you were -- before you became Attorney General and while you were working at the Attorney General's Office, what were your job responsibilities here?

A. When I was working here before?

Q. Yeah. Correct.

A. I worked in the state grand jury and prosecution division.

Q. Okay. And that was the only division that you worked in while you were here?

A. Also, I had been an intern in this office in the '90s. I was in victim services back then, which was also in the prosecution section at that time.

Q. Okay. So you have a long history?

A. Yeah. I've been an intern, a lawyer and the AG.

Q. Okay. You've run the gamut.

A. I have.

Q. Okay. Now generally, in your role as AG, you're responsible for supervising the office; correct?

A. Correct.

Q. Okay. Do you review major cases before they're filed?

A. Yes, sir.

Q. Okay. And do your subordinates come to you and ask for permission to file major cases?

A. Yes, sir.

Q. Okay. What do you consider to be a major -- major matter that they would -- well, let's back up for a second. Do they request your permission to file any action?

A. Anytime the state's name is being used in a suit it is brought to my attention and it is discussed at that time.

Q. Okay.

A. And so what is considered major is obviously subjective.

Q. Um-hum.

A. There might be some case in the upstate that people on the coast don't care about and vice versa. There might be some industry that's more attentive to a suit, as obviously yours is.

But, you know, major is a subjective term. So anytime my name is being signed -- you know, when I'm signing my name to a document or this office is being used, the case is brought to my attention.

Q. Okay. So anytime that the -- that the state would be named as the plaintiff the case would be brought to your attention before it was filed?

A. Generally, yes.

Q. Okay. Was the underlying action against Cephalon brought to your attention before it was filed?

A. Yes, it was.

Q. And do you recollect approximately when the first time you heard about a potential claim against Cephalon was?

A. It would have been in the first few months that I was in office. I distinctly remember Gerry Pappert approached me in March of 2011 — and

I remember it because it was a national AG conference — and handed me a letter, wanted to set up a conference call.

I know that we -- the case had been discussed before because I got a briefing of all cases that were being looked at at that time when I came into office. I don't recall when it was. But the first time I really focused on this case was when Mr. Pappert approached me and we had a subsequent conference call with that.

Q. And Mr. Pappert was the former general counsel of Cephalon?

A. That's correct.

Q. And the former Attorney General of Pennsylvania?

A. Yes, sir.

Q. Okay. So before Mr. Pappert approached you, you said that you had had a prior discussion regarding this case with your staff?

A. I know that I had lots of conversations. The first time that I recall really focusing on this case was around the time that I communicated with Mr. Pappert or that he communicated with me, rather.

Q. Okay. Now, I think you said that, you

know, this -- the underlying action against Cephalon was part of -- you learned about it first as part of other actions that were presented to you that were being considered.

A. That's correct.

Q. Okay. And were those other actions consumer protection actions, or were there additional actions besides consumer protection actions?

A. Well, when we had the conversation with Mr. Pappert on the phone there was a discussion about a NAMFCU case that existed prior to me taking office.

Q. Okay. How about the discussion that you had prior to the discussion with Mr. Pappert?

A. I don't recall.

Q. Okay. So do you recall anything about hearing about a potential action against Cephalon before your discussion with Mr. Pappert?

A. It was all in that period of time. I can't tell you which came first.

Q. Okay.

A. What I can tell you is that Mr. Pappert approaching me handing me the letter is an event that I remember distinctly. As to what

conversations happened when or around that time, I couldn't tell you what came first.

Q. Okay. At the time that you took office, did you have any discussions with Mr. Jones or anyone else in the consumer protection group about potential matters that might be brought?

A. I had many conversations with Mr. Jones, because during the first month or so that I was in office, very, very busy.

Q. Um-hum.

A. The General Assembly had come into session. Obviously, being in the first month, I'm learning all the sections, the people in the sections. And so I was asking to be briefed up during that time on what was going on in each of the sections.

I do not recall specifically what was discussed in all of those meetings; only that at the time that I was being briefed -- and I remember having a series of meetings with all of the section leaders to discuss what was going on, what was pending, what was currently going on at that time. But today I cannot recall the specifics of those meetings; only that they occurred.

Q. So there are cases where the state

hires outside contingency counsel -- the Attorney General's Office hires outside contingency counsel to assist it; is that right?

A. Yes, sir.

Q. Okay. And the underlying action against Cephalon was such a case where the Attorney General's Office decided to hire contingency counsel; is that right?

A. Yes, sir.

Q. Okay. Could you tell us what kinds of cases generally the Attorney General's Office decides to engage contingency counsel for?

A. Generally speaking, more complex cases are the cases that usually go to outside counsel.

Q. And why is that?

A. Complex cases usually require a large number of hours. They require larger or more resources than this office has.

And oftentimes, sometimes the level of complexity is so specific that it might require someone who spends -- has spent more time in that area. So oftentimes we will consider bringing outside counsel on to assist us.

Another thing that we factor into it is the -- when we bring outside counsel cases, they

assume all of the risks for the state and for this office. That has always been a factor.

Also, they front all of the cost of litigation if it's complex. We don't oftentimes have the ability to front the cost.

And those are things that we discuss at that time as to whether or not we're going to use outside counsel and why we would use them.

Q. Does the office ever hire outside counsel to represent it on a noncontingency basis, on an hourly basis?

A. Oh, yes.

Q. Okay. And what kinds of cases does it hire outside counsel to represent it in hourly cases?

A. We have hired firms in the past to represent other agencies, to represent this office for -- like, for instance, before I came into office, the water -- water war, as we call it, the Catawba issue with North Carolina. We had the voter ID lawsuit. We had the Savannah River Maritime Commission recently where we engaged an attorney to represent the commission. Cases like that.

Q. And has it ever hired outside counsel

to represent it in a consumer protection case?
A. We also -- I'm sorry.
Q. Sure.
A. The Affordable Care Act. I was with numerous other states. And Dodd-Frank was another one, the Financial Reform Act we were in. Back to your other question. Have we ever -- could you restate the question?
Q. Yeah. Sure. Absolutely. So do you ever hire outside counsel? Does the Attorney General's Office ever hire outside counsel to represent the state in cases that are seeking to enforce South Carolina's consumer protection laws?
A. We -- as I just said --
Q. Yeah.
A. -- occasionally we will hire outside counsel if we think we need the help on the case involving SCUTPA or consumer protection law.
Q. And I apologize because I think I bungled that question. What I was really trying to ask is: Does the Attorney General's Office ever hire outside counsel on an hourly basis for -- to enforce unfair trade practice laws?
A. I don't -- I don't believe so.
Q. Okay.

A. I know that in our contract we have a provision that allows us to use -- pay outside counsel an hourly fee for defending us if there's a suit against us as a byproduct of the underlying litigation.
Q. And is there a reason why the Attorney General's Office does not hire outside counsel on an hourly basis to enforce South Carolina's consumer protection laws?
A. Well, when we designed or when we looked at the litigation retention agreement, the contingency fees, I always approached it from when a law firm is fronting all of the cost of the litigation and absorbing 100 percent of the risk of the litigation, oftentimes for more than months, but years at a time, that I have to do a balancing test.
What is -- what is in the best interests of the state, the consumers, the taxpayers is what I'm thinking. And when I engage outside counsel, I have to balance those two interests so that they intersect at the right place.
And so if I pay a firm hourly to represent the interests of the state and assist us

in the litigation, it cuts against the very concept that they're absorbing the risk. So they probably won't be able to absorb the risk at that time. So the hourly -- and we don't have the ability to pay them hourly also.
Q. And you don't have the ability to pay them hourly because you don't have the budget resources to pay them hourly? Is that the issue?
A. Yes.
Q. Now, at some point you made the decision to hire outside counsel in this matter; is that right?
A. That's correct.
Q. And that was your decision, I assume?
A. The final decision was mine. Discussion was had and consensus was reached and then I made the decision.
Q. Okay. And who was part of that discussion?
A. John McIntosh would have always been part of it. Sonny Jones would have always been part of it. Sometimes Bob Cook was there.
Q. And Mr. Cook just -- is in a new position; isn't that right?
A. He --

Q. Solicitor?
A. He is the solicitor general. He has always been over the opinions section or division of this office. But as solicitor general, we just gave him that title because he also helps the state with a lot of its appellate issues. And in outside cases we usually go to him. He's kind of our chief legal adviser internally in the office. Probably our best constitutional lawyer in the state.
Q. So why did you decide to hire outside counsel in this particular case?
A. Well, like I said before --
Q. Yeah.
A. -- the level -- the complexity of the case was a factor. Very complex case. And that would have probably been one of the main reasons.
Q. Now, you ultimately decided to hire Janet Jower & Suggs and Mr. Rutherford; is that right?
A. Yes.
Q. Okay. So did you consider any other law firms?
A. I know we talked about a number of law firms. I can't recall who we discussed at that time, but I know we discussed others.

Q. Okay. And let's start with Mr. Suggs' firm, because Mr. Suggs is the lead lawyer that you hired; is that right?
A. That's correct.
Q. Okay. So what were the reasons why you hired Mr. Suggs' firm?
A. Reputation. The folks on our staff had a long-standing relationship with him. I knew him by reputation to be a very competent and capable attorney. And so in those discussions, that came out. He was recommended as one of the firms we'd consider. So he was one of the firms we went with.
Q. Okay. And did you have any discussions with him before the office engaged him personally?
A. I don't recall. I know that the office had conversations with him prior to us engaging him, but I can't recall where I came into that.
Q. Sure. Fair enough. Who made the -- do you recall who made the suggestion?
A. I do not recall who made the suggestion.
Q. Okay.
A. I just know that it was suggested.
Q. Okay. Now, Mr. McIntosh testified, I think, that the retention of Mr. Rutherford was at

your suggestion. Is that consistent with your recollection?
A. I believe so.
Q. Okay. And why did you suggest Mr. Rutherford?
A. I had known Todd Rutherford years and known him to be an extremely capable and competent attorney. He's got a good reputation in the legal community here in Richland County. And so I believed that he was someone that I would -- I think would represent the state well. So I called him up and asked him if he'd be interested.
At one point before I recall discussing the Cephalon case, he had said, if you ever need counsel here in this area of the state and you think I could be helpful, I would like to be considered. And I said, well, Todd, I don't have anything. But if a case ever arises and if we need to go to an outside counsel to assist us, I will keep you in mind.
I know later on when this case came to be and we were discussing the attorneys, I had referenced that conversation I'd had with Mr. Rutherford and threw his name in there for consideration, and there was no objection to him

that I recall.
Q. What was the rationale to have two different law firms work together to represent the state in this case?
A. That's usually what we do. It's not something we always do, but it -- you know, we've often engaged firms. I believe it's always good to have two sets of eyes, two different perspectives looking at an issue. I think it's good for the case and for the state for us to have two firms that can discuss the case, along with us.
Q. Now, did you discuss with either Mr. Rutherford or Mr. Suggs or anybody else how those two firms were going to divide labor between them?
A. No, sir.
Q. Okay. Did you discuss with anybody how those two firms would split the recovery of any attorneys' fees that were recovered in the underlying action?
A. We have not discussed. I have not personally discussed that and would not have any reason to discuss it until there were a fee to split.
We would obviously, as an office, have

to approve any fee split, but there has not been a discussion at this time. I'm sure they have spoken about it, but that would be speculation on my part.
Q. Now, were -- at the time you hired outside counsel, had the decision already been made to file the action?
A. I know that we had already drafted a complaint and that the decision had been made after numerous meetings that this was a case that was meritorious. And so the decision had been made to go forward at that time.
Q. Excuse me one second, sir.
A. No, take your time.
(WILSON EXH. 1, Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq, marked for identification.)
BY MR. KATSIFF:
Q. If you could just take a moment to look at that, General Wilson, and my first question is, is have you seen it before?
A. Yes, sir.
Q. Okay. And could you tell me what it is?
A. It is the litigation retention

agreement for this case with Mr. Suggs and Mr. Rutherford.
Q. And that's an agreement that you signed?
A. Yes, sir.
Q. And you read it before you signed it, I assume?
A. Yes, sir. Well, I mean, I reviewed the contract, so...
Q. Yeah. Okay. And this is the -- this is the standard form litigation retention agreement that was in -- that was in effect, basically, at the time for outside counsel?
A. Yes, sir.
Q. Okay. And you've revised it since this one was entered into; is that right?
A. We have.
Q. The standard form?
A. Yes, sir.
Q. Okay. If you could turn, please, to -- just get a copy. That will be easier. If you could turn to Page 2 of the agreement, please. Now, you -- if you -- if you look at 2 A1:
The Attorney General shall have final authority over all aspects of the litigation.

Then it goes on the second sentence to say:
The Attorney General at its sole discretion has the right to appoint a designated assistant, defined as designated assistant, to oversee the litigation, which appointment the Attorney General may modify at will.
A. That's correct.
Q. Have you appointed a designated assistant for this litigation?
A. I have. Mr. Jones, who is over our Consumer Protection Section in the Civil Division, he is my designated person to oversee the litigation.
Q. What's the rationale for this particular provision in the agreement?
A. I think it's -- I think it's self-explanatory. I'm not trying to be evasive. I just think that it says that -- that the Attorney General shall have final authority and that we will have a designated person on the -- to oversee the litigation.
Q. Okay. I mean, are you aware of, you know, any rationale, any requirement that the Attorney General shall have, you know -- shall

supervise sort of all aspects of the litigation as opposed to just turning it over to outside counsel?
A. I have -- I have a Chief Deputy who reports to me, and all of the senior supervisors in the office report to him. Mr. Jones reports to the Chief Deputy. And I don't know if this is directly in answer to your question, but I'm just trying to explain.
Q. Sure.
A. Mr. 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. I don't know if that addresses your question.
Q. Yeah. No. Thank you very much.
A. Okay.
Q. I think it does.
A. Okay.
Q. So I guess the question, just so I

understand it then, I mean, there's -- you know, so Mr. Jones is, you know, the person you have designated to oversee the litigation; is that right?
A. Yes, sir.
Q. Yeah.
A. And if you turn to Page 4.
Q. Sure.
A. Which is under B, III B, notices and correspondence, he's the named party above the two outside counsel. So, I mean, he's the person that I'd generally have as the point of contact. And he may have an attorney assigned within his section to assist him on it, but he is generally the point of contact.
Q. Okay. And all major decisions in the litigation are decisions that get elevated up to you; is that right?
A. Yes, sir.
Q. Okay. And that would include -- I mean, obviously the case is already filed. And you've testified --
A. Yes.
Q. -- that you were part of that decision.
A. Yes.

Q. And you were also part of the decision to hire outside counsel. That -- so the other major decisions would be settle; right? Is that a decision that would go up to you?
A. Yeah. Any disposition.
Q. Okay.
A. Any strategic decisions would be brought to my attention. Sometimes asking what to do, sometimes giving me a recommendation and then a discussion of that recommendation. But yes, the final decision is mine.
Q. Okay. If you look at -- if you could turn to III A. It's on Page 3 --
A. Yes, sir.
Q. -- at the top.
The Attorney General may at any time request status reports from special counsel regarding any aspect of the litigation.
A. Um-hum.
Q. Have you ever requested status reports or has someone acting at your direction requested them?
A. What I ask for are generic tables tracking where we are on a particular case. That's more a work product for me specifically.

My understanding is that Mr. Jones and the attorneys are in constant communication with Mr. McIntosh or outside counsel. And if they need to memorialize any of those meetings, they do. But I'm not aware of a status report.
Q. Okay.
A. But I know that they talk all the time.
Q. Now, and I don't -- obviously, I'm not asking you to sort of reveal the substance of what's in the report that you described but just the general format. You know, you mentioned a report that identifies sort of, as you said, where we are in the litigation?
A. It's really -- it's like an Excel spreadsheet. I asked at the time — I believe it was Jay who worked in this office at the time — to produce a sheet, a one page, two, three page, something quick that has the very basics. You know, cases that we have.
And I do this with all sections, you know, because I want to be able to have a quick reference guide that tells me just the specs of the case.
It doesn't tell anything about the merits of the case. It's just what cases we have,

what attorneys in the office are -- or within that section are working on it, what -- if outside counsel, if any, who they are and maybe a one-sentence description of the case.
Because I have between 7- and 8,000 cases across several divisions and a multitude of other issues I deal with on a daily basis.
And as much as I'd like to think that I can remember the specifics of every case that I talk about, I can almost assure you within a day or two of leaving a case and going on to another issue, I have to come back and be able to reference what I did.
So that's what that was for. It's kind of my cheat sheet to remind me of where things are.
Q. Okay. Now, you said you've looked at the complaints in both cases.
A. Yes, sir.
Q. The underlying case in this declaratory judgment action.
A. Yes, sir.
Q. Have you looked at any of the other pleadings?
A. I'm sure I have.
Q. Okay.

A. I have looked at so many things in so many cases, I'm sure that I have.
Q. Okay.
A. But I'm speculating if I'm telling you what I looked at.
Q. Sure. You just -- you may have, but you don't have a recollection sitting here today.
A. This is two years ago.
Q. Yeah.
A. I couldn't possibly remember everything I've looked at.
Q. Yeah. Now, have -- were you advised of any settlement discussions that were occurring in the underlying case?
A. Yes.
Q. Okay.
A. I was advised. I remember talking about it. The specifics I can't recall, but I do recall.
Q. And when do you recall that?
A. It was -- God. Year, year and a half ago, two years ago.
Q. Okay. So initially, when Mr. Pappert was still at Cephalon; is that right?
A. Yes, sir.

Q. Okay. So were you advised of any more recent settlement discussions?
A. I'm -- I would be speculating. I can't recall.
Q. Okay.
A. I do actually -- and I apologize for stopping you. It seems like I recently remember talking about a settlement discussion with Cephalon, but I don't want to be confusing it with another case because there's so many cases that I'm monitoring. But it seems like I do remember discussing something recently, but it was -- you know, it was not a settlement that both parties would agree to.
Q. Okay. Fair enough. And feel free to --
A. I'll go back and answer that question.
Q. Yeah. And I should have told you this in the beginning. But if -- you know, as oftentimes, if something clicks and you remember something and want to modify one of your previous answers, feel free to do so.
A. Thank you.
Q. If you could turn, please, to the -- if you could turn to section Article IV of the

agreement, compensation.
A. Yes, sir.
Q. And if you could just briefly describe your understanding of how these provisions under compensation are supposed to work, how contingency counsel is supposed to be compensated for their efforts in the event that there's a recovery in the case.
A. It's a fee schedule that starts with a percentage based on the amount recovered. The higher the amount recovered goes, the lower the percentage drops at that level of what the outside counsel would retain or would be paid in their fee.
Q. Okay. So -- and now the underlying case is a case, as you said initially when we started our discussion today, to -- that makes allegations that there were violations of South Carolina's consumer protection laws by marketing three pharmaceutical products; correct?
A. That's correct.
Q. Okay. And the damages that the state seeks in the case are both potentially actual damages and civil penalties; is that right?
A. Correct.
Q. Okay. And the civil penalties would be

for a violation of South Carolina's consumer protection act; is that right?
A. Yes.
Q. Okay. So if you look at Page 6 and specifically on No. 3:
Special counsel shall be paid the remaining 25 percent of [sic] less in fees of said remaining or net settlement or judgment proceeds including civil penalties, restitution, or damages as follows, and then it has the schedule.
A. Correct.
Q. So I take it from that that outside counsel will receive a percentage of any recovery of civil penalties that are awarded in this case; is that right?
A. That's what it says, yes.
Q. Okay. And that's what you intended?
A. That's what I understand it, yes.
Q. Okay. And that's the way you intended it to work when you entered into the contract; isn't that right?
A. Yes.
Q. Okay. So just -- the way the contingency provision works, as I understand it, is if there's a recovery in the action, either a

judgment or settlement, right, then costs are subtracted from the recovery, right, and they're paid separately; is that right?
A. I'm not sure. I believe so.
Q. Okay. So if you look at -- if you look at 1:
Special counsel shall be reimbursed all reasonable, normal, and verified out-of-pocket costs and expenses as specified in Article IV -- I'm sorry -- V below.
A. Um-hum.
Q. Okay. And then -- and then it -- 2 says at least 75 percent of the remaining net settlement or judgment shall be paid to the state. And then the 25 percent of [sic] less goes to outside counsel. Do you see that?
A. Yes.
Q. So, I mean, take a moment to look at it, but doesn't this all suggest that out-of-pocket costs and expenses come out off the top?
A. It suggests that.
Q. Okay. Now, why were these particular percentages used in 2 and 3? And the percentages I'm referring to are, you know, at least 75 of the remaining net settlement is paid to the state and

25 percent goes to outside counsel. Was there a reason for those percentages?

A. I'm sure there was a reason when we discussed this contract. Especially in the revisions since then it was discussed. I can't recall all the specific details.

But I can say that when I look at this and the subsequent revisions, I am trying to find a way to -- and I said it before -- balance the interests of the state, the consumers.

When we hire outside counsel to represent -- help us represent those interests, we also have to be cognizant of the reality that they are absorbing a large amount of cost up front that this office and the taxpayer doesn't have to absorb. At the same time they are doing it at the risk of never being able to recoup that money.

And so I have to deal with the reality of human nature; that their ability to adequately represent the interests of the consumers and the taxpayers are balanced against their own interests in surviving.

And so I don't want to line -- my intent was to try to find a balance of those competing interests but do it in a way that -- the

purpose of this is not to -- first off, the purpose of this is not to fund this office. That is actually something I disagree with vehemently. I would never do it for that reason. And I very much do not want to line the pockets of lawyers.

But when we have to go use lawyers and they -- we are asking them to absorb all of the risk and front a large amount of money in this litigation, which we don't have to do.

So I'm trying to find a way to adequately compensate them for that absorption of risk and that fronting of money without overly compensating them. And that is the philosophical reason.

Now, when this was being drafted, Sonny and Jay and others, and John, would come into my office numerous times to discuss this. And all of the provisions in here that have been tweaked or changed were discussed with me at some point.

I don't today want to go back and give you my mental reflections on why each of those provisions were written the way it was because I'm going on old recollections, and I don't want to misrepresent what I was thinking at the time.

But I know that the overall theme of

why we did what we did was the -- that was -- what I just told you was the driving force.

Q. Okay. But just to -- and I appreciate that. Thank you.

A. Yes, sir.

Q. The -- if we could look at 3 again, and the last provision I just wanted to also ask you about.

Provided, however, that the Attorney General shall retain 10 percent of special counsel fees awarded under Section 3.

A. Um-hum.

Q. So the way that that works is, is that whatever the contingent fee payment is to special counsel, the AG's office gets 10 percent of that fee for use by the AG's office; is that right?

A. That's correct.

Q. And what's the rationale for that provision?

A. Well, we are heavily involved in the control of the litigation, the authorization of all the decisions in the litigation. We are engaged in every step of the process. We're not absentee landlords. We are very much involved.

And so we are authorized -- first off,

let me say this: In writing this, one of the things that I take into consideration is attorney fees. Or let me take one step back.

Q. Sure.

A. We have certain laws, statutes that authorize us to even get the money. It's in the code. So we have to have a law that allows us to retain that money.

Then a court has to approve the attorneys' fees in addition to assessing any penalties. That's fully in the court's discretion.

And last, we have to make an accounting of every -- of all the moneys we retain to the General Assembly, so -- and then the General Assembly has to authorize us to be able to spend any money that we keep. We can keep all the money, but if we don't have General Assembly's authorization to spend it, it's just sitting there. It might as well be in a hole in the ground.

So 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. And so that is the reason for that.

Q. Okay. Now, in talking about a court approving the settlement, right, that would only be in the case of a settlement, right, not in the case of a judgment.

A. I believe -- my understanding is that it's subject to a court approving -- yeah, in a settlement, obviously.

Q. Yeah.

A. At least in a settlement. In a judgment, I'm not sure how that would work, but I believe a court would have to approve it.

Q. Okay.

A. I do know this: The law -- we have to be authorized by the General Assembly to spend it. We just can't spend it. So we still have to be authorized by the General Assembly.

Q. Okay. Now, what statutory basis was the office relying on in deciding that it was -- it

was legally authorized to keep 10 percent of outside counsel fees?

A. I'm sorry, Mr. Katsiff. Can you rephrase or explain that question? I don't understand it.

Q. Yeah. Sure. I'm sorry. It was probably because I was inarticulate in saying it.

But my question is: I thought you, in your prior answer, said that there was a statutory basis that allowed the Attorney General's Office to retain 10 percent of the contingency recovery of outside counsel. And is that something that you said, or did I mishear that?

A. I didn't say 10 percent. I just said authorized to keep some portion.

Q. Okay.

A. And I can't recall the code section off the top of my head.

Q. Okay.

A. But we'd have to have statutory authority to even do that. And then we'd have to have legislative authorization to spend, to spend it.

Q. Okay. So did -- at the time you entered into the fee agreement, did anyone examine

whether or not -- well, let's take a step back for a second.

You'll agree with me that having a 10 percent interest in the contingency fee that outside counsel has is -- gives the Attorney General's Office a financial stake in the outcome of the litigation, wouldn't you?

A. It's a byproduct. But that's no different than a solicitor's office or district attorney prosecuting someone and there being a criminal fine collected which goes back to the general fund of that government, that county government or state government. And then that state government then reappropriates the money back to the solicitor's office or all the other offices under its jurisdiction. It's a byproduct, but it would -- certainly not an incentive.

Q. Well, let's break it down this way: So when we were having a discussion regarding why you allocated percentages to outside counsel that you allocated -- and I think rightly you were recognizing, you know, human nature being what it was and trying to strike a balance between the state's interest and outside counsel's interest and giving outside counsel a financial incentive to do

a good job for the state; is that right?

A. I've never tried to incentivise them to do more than absorb the cost and assume the risk. That -- there's no incentive beyond that.

Q. Well, would you agree with me that outside counsel has a financial incentive in the outcome of the litigation?

A. I believe all parties have a financial interest. Everybody all the time has an interest.

Q. Okay. So Cephalon has a financial interest, the outside counsel has a financial interest, and the AG's office has a financial interest; is that right?

A. Well, you're saying financial interest. I said interest.

Q. Okay.

A. We all have an interest. Even if no money is recovered, the amount of time spent on something that could be spent on something else, that's a finite number of hours in a day and only so many people that can do so much work in this office.

So anytime we spend money -- or excuse me -- spend time, rather, on this, we're not spending it on something else that we could be

doing. So we're all interested parties.
And I'm not trying to be evasive. I'm just saying that that is a reality. That just because something is a byproduct, you know -- go ahead. I'm sorry. You were going to ask a question.
Q. No. I don't mean to interrupt you. Please finish.
A. Well, no. You go ahead. I'll wait. I think you're going to tie my answer for me, so...
Q. No. I was going to ask you -- let's -- I was going to ask you what you meant by byproduct.
A. Well, a police officer in a municipal town pulls over a person for committing a traffic violation. Speeding, parking illegally, whatever. That traffic ticket is paid.
A small percentage of that traffic ticket goes to the municipal government, and that municipal government then reappropriates all those moneys, and some portion of it comes back to the police department.
A byproduct of arresting someone or ticketing someone for committing a traffic violation is that you will get a percentage of that ticket fine that is paid by the motorist, but that

is not necessarily incentive for pulling them over. They first have to violate the traffic law. But a byproduct of the ticket is that a fee goes back to the general fund.
We are a state agency. It is impossible for us to avoid the byproduct of fees or moneys coming back to us as a byproduct of our work product.
The only thing I dispute is the insinuation that we are motivated to go out and, like the police officer, arrest people who haven't done anything wrong or sue people who haven't done anything wrong for the sole purpose of funding this office. That has never been an incentive of this office. But a byproduct is the fact that a percentage will come back to this office.
Q. Okay. But in your example with the police officer, that's -- you'll agree with me that's not a direct -- it's a byproduct because it happens indirectly; right? But it's not a direct --
A. It's an unavoidable byproduct.
Q. Right. But it's not a direct payment to the office; right? It's not a direct payment to the police department, the percentage of the fine.

A. Yes.
Q. Okay. Whereas in this case, there's a direct percentage payment to the Attorney General's Office; isn't that right?
A. Well, I view it there's a direct payment to the general fund. A small -- by this contract a small percentage of what the outside counsel gets is retained by this office, which we then have to go ask the General Assembly for authorization to spend, and we have to do it in an accountable way and in a transparent way.
So we -- even if we get the money through the 10 percent, which really is -- you know, instead of -- I mean, if someone -- if outside counsel and this office recovers $5 million, we get 2.5 percent. You know, I don't know many private sector firms that would work for that.
But we have to then go to the General Assembly and say this has been what's recovered to the general fund. This is what we have gotten from the outside attorney fees. We then have to ask permission to spend that money, which the General Assembly has to give.
Q. Right, and I understand that. But if

the money's not there, there's nothing to spend; isn't that right?
A. That's correct.
Q. Yeah. Now, and just so we're clear on the payments, I mean, there is a portion of the recovery that goes to the general fund; right?
A. I'm sorry. Say it again?
Q. So let's use your hypothetical example. There's a $5 million recovery; right?
A. I was using that because it's here.
Q. Yeah. And it's sort of nice and round. 75 percent of that does go to the general fund; right?
A. And I don't want to go ahead and do the math with this contract in front of me --
Q. Sure.
A. -- because I'd be speculating how it would come out.
Q. Well, let's look at it this way rather than to use precise percentages. The way it would work, if there were a $5 million recovery, is you'd subtract the costs of outside counsel off the top, right, and they'd get reimbursed the reasonable and verifiable costs; is that right?
A. I think so.

Q. Okay.
A. Again, I haven't studied this provision outside of just reading it in front of you or --
Q. Okay.
A. I'm reluctant to say it. Not because -- just because I haven't read it in a while.
Q. Okay. Well, is it your understanding that of that $5 million, a portion of that $5 million --
A. Yes, sir.
Q. -- would go to the general fund?
A. Yes.
Q. A portion would go to pay whatever the costs have been of outside counsel.
A. Yes.
Q. A portion would go to pay outside counsel their contingency fee; right?
A. Um-hum. Yes.
Q. And then a portion of that contingency fee would go to the Attorney General's Office.
A. Yes.
Q. Okay. Now, do you know whether or not any other states' Attorney General's offices have similar retention agreements where the Attorney

General's Office itself receives a portion of contingent fees that are recovered by outside counsel?
A. I can only speak to our state. So I can't tell you what other states do specifically. I'd be speculating.
Q. Yeah. So the answer is you're not aware of any, but there might be.
A. There could be, but I'm not aware.
Q. Okay. Now, did -- at the time that you entered into this agreement or subsequently, have -- has the Attorney General's Office researched or looked into the issue as to whether or not it's constitutional for the Attorney General's Office to retain a percentage of outside counsel's contingency fee?
A. I'm not sure if we have or haven't. I know that it has been upheld before.
Q. And where was it upheld?
A. Well, courts have approved our fees in the past in cases.
Q. Okay. So when you say it's upheld --
A. Yes.
Q. -- you're referring to the settlement agreements --

A. Yes.
Q. -- that are approved by the court?
A. Um-hum.
Q. Okay. Now, would you agree that the majority of damages that the state seeks in the underlying action are civil penalties?
A. I don't know, because I don't know what percentage -- what amount a court would award in civil penalties, and I don't know what the total damages would be until it's litigated and determined.
MR. KATSIFF: Okay. We've been going about an hour. Why don't we take five minutes, if that's okay.
THE WITNESS: Sure.
MR. KATSIFF: Okay.
THE WITNESS: Okay.
MR. KATSIFF: Thank you.
THE VIDEOGRAPHER: We will now go off the record. The time is approximately -- excuse me. The time is approximately 11:04 AM.
(A recess transpired from 11:04 until 11:13.)
THE VIDEOGRAPHER: We will now go back on the record. The time is approximately 11:13 AM.

BY MR. KATSIFF:
Q. So one of the things we were talking about was court approval of fees. Do you recollect that?
A. Yes, sir.
Q. Okay. Now, you'll agree with me that there's no requirement in the contingency fee agreement that the court approve any allocation of fees.
A. I don't know that that's not the case.
Q. Okay. Now, does the Attorney General's Office track the time that its lawyers spend on -- working on consumer protection cases?
A. Not to my knowledge.
Q. Okay. Do they track any costs at all that are incurred by this office in working on consumer protection cases?
A. I'm not sure.
Q. Okay.
A. You would have to ask the folks in the Consumer Protection Division, because they supervise the litigation for me and the day-to-day minutia gets handled by them.
Q. Did you ever have any discussions with Mr. Jones on how to allocate fees and costs that

were incurred by this office in prosecuting consumer protection cases?
A. I'm afraid I don't follow you.
Q. Sure. Did you ever have any discussions with Mr. Jones regarding how many -- how much fees and costs this office had spent on a particular consumer protection case?
A. We have had so many conversations, Mr. Katsiff, about so many things similar to that question. I'm sure we did, but I can't recall specifically.
Q. Okay. Well, let's think about it this way: So there -- you know, there have been consumer protection cases that the state has settled and received money as a result of the settlement; is that right?
A. Yes.
Q. Okay. And then there are -- you know, out of those funds there's been money paid to outside counsel and then a percentage of outside counsel's fees retained by this office; is that right?
A. Yes, sir.
Q. Okay. Has there been any -- have you been a part or a party to any discussions regarding

whether or not the retention of funds by this office corresponded in any way to the costs incurred by this office in prosecuting a case?
A. I don't recall that specific discussion.
Q. Okay.
A. It could have happened, but I can't recall it.
Q. Now, are you aware that there was a prior version of the litigation retention agreement that was in effect before you took office --
A. Yes, sir.
Q. -- that did not provide for award of contingency fees for civil penalties?
A. I believe that's correct.
Q. Okay. And do you have any understanding as to why civil penalties were included in the -- eventually included in the contingency fee calculation?
A. I know that we -- I can say this truthfully. We have had numerous discussions on this contract. Because I remember last year when we tweaked it, and we went into details as to provisions that were being amended, but I can't recall at this time today why that was.

Q. Okay. So sitting here today, you can't recall if -- as to why the contract would have been changed to include civil penalties in the contingency fee calculation?
A. I cannot recall specifically as to that. I look at this from a 30,000 foot and delegate to Sonny and his team to come up with a contract that keeps in line with my philosophy of a balancing test, as I've talked about earlier in one of my earlier answers, which is to try to align the interests of protecting the state's interests and the harsh realities that firms that are doing work for this office front costs and absorb risk and trying to align those interests in a way that adequately compensates them without overcompensating them while still keeping the best interests of the state at heart.
As to the numerous discussions on the minutia of each provision, I can't comment or recall specifically what was discussed at that time; only that it was discussed at that time.
Q. Yeah. And just so we're clear, the provision that I'm talking about, as I think I mentioned, was in place prior to you taking office.
A. Okay.

Q. So, you know, it's just -- what I'm hearing is, is you don't have -- you don't have any knowledge that you can remember as to why that change occurred; is that right?
A. Yes, sir.
Q. Okay. Now, are you aware of any effort whatsoever to match or only retain a portion of the recovery in a consumer protection case that reimburses the office for actual fees and costs spent in prosecuting that case?
A. Could you say that again? I'm sorry.
Q. Yeah. Sure. So the 10 percent portion of the contingency fee that is kept by the Attorney General's Office, does that have any correlation whatsoever to the amount of fees and costs that the office has actually spent in prosecuting that particular case?
A. When you start to bleed over into finance questions like that as to accounting and what, that is never a discussion I would have without my finance director here. And I don't want to tell you incorrectly. I certainly don't want to tell incorrectly for my purposes. I want to be honest with you. But that is a question you'd have to ask the finance director or that I would myself

ask the finance director.
Q. Okay. So the finance director would know. Mr. Osmer is the finance director; right?
A. That's correct.
Q. And Mr. Osmer would know whether or not there was a mechanism in place to track fees and costs and whether or not that corresponded to what the state actually recovered.
A. That is a conversation I would have with Mr. Osmer and probably the folks in consumer protection.
Q. Okay. But sitting here today, you can't recollect being part of a conversation where you actually discussed we're only going to keep X amount of money because that's the amount of money that we actually spent in fees and costs prosecuting the case.
A. Yeah, I can't recall specific conversation. I don't dispute that one occurred. I just don't recall it.
Q. Okay. And sitting here today, you're not aware of any mechanism that the office actually has to track fees and costs incurred in a particular case; isn't that right?
MR. JOWERS: Object to the form.

BY MR. KATSIFF:
Q. Okay. Sitting here today, are you aware of any mechanism in the Attorney General's Office whereby the office could track the amount of fees and costs actually incurred in a particular consumer protection case?
A. I recall in the past on another case with other counsel seeing an accounting of -- a spreadsheet, rather, of fees and costs incurred by outside counsel. And I have seen such a document before.
In this one, is there one going on right now? I would be speculating. Again, that is something I delegate to the consumer protection section in the Civil Division to track and monitor.
Q. Yeah. And just so we're clear, I'm not talking about outside counsel fees and costs.
A. Okay.
Q. I'm talking about -- I'm talking about the costs actually incurred by this office in prosecuting a particular consumer protection case.
Is there any mechanism to get down to that level of detail where you can track the amount of cost that is incurred by this office for a particular consumer protection case?

A. I believe that is more a question directed for the finance director as it relates to litigating consumer protection cases.
Q. Okay. So you have -- if Mr. Osmer testified that there was no such mechanism in place that he was aware of, you would have no reason to doubt that testimony.
A. I would defer to Mr. Osmer, yes, sir.
Q. Okay. Now, funds that are recovered in a consumer protection case by the Attorney General's Office, the funds that the Attorney General's Office retains, those funds are used for general operating expenses; isn't that right?
A. You'd have to ask the finance director that question.
Q. Do you have any knowledge, sitting here today, as to how funds that the Attorney General's Office receives in connection with consumer protection cases are used?
A. Meaning when we -- are you talking about our portion, the 10 percent that comes in?
Q. Correct.
A. How that's distributed internally?
Q. Correct.
A. That would be a finance director

question.
Q. Okay.
A. And this is -- this is exactly what I would do in a real-world environment. If you were in this office and came and asked me that question, we would walk down to Tom's office and get the answer. So I'm not treating you any differently than I would treat someone else asking me that same question.
Q. No. I understand.
A. Yes, sir.
Q. Thank you. Sorry. She's just getting this exhibit.
A. No problem.
Q. And it's a large one so we can all see it.
MR. KATSIFF: Thanks. It's like rolling out some ancient Sanskrit document.
(WILSON EXH. 2, Master Settlement Log for SCUTPA Cases - Confidential, marked for identification.)
BY MR. KATSIFF:
Q. So, General Wilson, this is a document that was provided by your office to us. Is it a document you've seen before? Probably not in this

form if you've seen it.
A. I have not seen it in this form with the colors and everything and this size, obviously. So I'm sure I've seen it, but I'm speculating.
Q. Okay. This is -- this document is called Master Settlement Log for SCUTPA Cases.
A. Okay.
Q. And it's confidential, so the record can reflect that. And do you have an understanding of what the document is?
A. Well, let me -- before I answer that question --
Q. Sure.
A. -- let me say this: And I have had hundreds, probably more, meetings with our director of finance, Tom Osmer, where we reviewed these documents.
And I can say with 100 percent accuracy in nearly every meeting and every time I've looked at a financial document, I've looked at it, read it and looked at the numbers on it, looked at what it says, and then I'd turn around and ask Mr. Osmer and he explains it to me, and it inevitably tells me a different story than what I'm looking at.
So I guess back to your question is, is

that I would never go over a document like this and interpret it without the finance director with me. Because when I'm making a decision or an accounting for the office that involves a financial accounting, I always have Mr. Osmer with me so that I have a fail-safe.
So when I'm looking at something, I'll say, okay, this is what I'm seeing, Tom. This is what I interpret it to be. He'll either say yeah or actually no, this means something different. Let me explain to you why that number is. There's a story behind every number. And he's taught me that over and over and over again. So I wanted to give you that disclaimer on the front end.
Q. Okay.
A. So this is the first time I've ever been asked to make -- to look at a financial document of this size without having Mr. Osmer with me. So if you'll restate your question, I'll be happy to do my best.
Q. Sure. So I guess -- and it was really -- and I appreciate that, and it was -- I was just interested in -- so this -- this, as it was described to us, is a listing of settlements or, I suppose, judgments by Mr. Jones' group.

A. Okay.
Q. The consumer protection group. And it lists -- you know, it lists the amount of the judgments and the amounts that went to outside counsel and the amounts that went to the general fund and the amounts that were retained by the Attorney General's Office.
A. Okay.
Q. Among other items.
A. Okay.
Q. So is this something that you've had the opportunity to see before?
A. Again, I've seen lots of documents that look like this. Never anything this big in this type of format. So I probably have seen it.
They usually cut my meat for me and bring me just what I'm asking for or just what I need to know. They don't ever show me everything, because that's a lot. They just give me what I'm asking for or what I need to go -- when I'm speaking to the General Assembly, I'll go before the committee, and I just need them to show me what specifically I need to know. Nothing more.
Q. Okay. Well, if -- you know, and I appreciate that, and we'll just -- we'll take it --

A. Okay.
Q. I don't have a lot of questions about this particular document.
A. Okay.
Q. But I have some. If you look down at Line 118, you see that that is -- and the column, the first column says cases. That's AstraZeneca - Seroquel. Do you see that, sir?
A. Um-hum.
Q. Okay. And then if you go over to Column K, it has total funds for South Carolina at 26 million. Do you see that?
A. K?
Q. Yep.
A. Okay. I see that number.
Q. Okay. Now, you're familiar with the action that this office brought against --
A. Yes, sir.
Q. -- AstraZeneca for Seroquel?
A. Yes, sir.
Q. And you recollect that the settlement in that matter was $26 million?
A. Yes, sir.
Q. Okay. Now, if you go to Column O --
A. Okay.

Q. -- you see there's a number of -- it says attorneys' fees and costs for South Carolina AGO.
A. Yes, sir.
Q. Okay. And then there's a number for Seroquel in Column O on Line 118 of just over half a million dollars.
A. Yes, sir.
Q. Okay. Now, is that consistent with your recollection as to what this office received out of the Seroquel settlement?
A. Again, I want to say that if I were to have Tom Osmer here and ask him that very question, he would give me the back story of that number and explain it to me.
Today I can tell you that's the number that's on the paper. I don't dispute the number. But I don't know the story behind the number.
Q. Okay. Well, let's -- let me ask it this way then.
A. Okay.
Q. You do have a recollection, do you not, that this office received a portion of the settlement with Seroquel?
A. Of course. Yes, sir.

Q. Okay, okay. And, you know, while you may not have a recollection of exactly what that number was as you sit here today, you have a recollection that the office did receive money.
A. Yes.
Q. Okay. And that that was money that was, you know, to be retained by this office; correct?
A. I would -- I would assume so, yes, sir.
Q. Okay. And do you have an understanding as to how that money was used?
A. Again, I would have to have the finance director here to give you the most accurate answer.
Q. Do you know whether or not there was any effort made in the Seroquel case to determine the actual costs that the Attorney General's Office had incurred in prosecuting that action?
A. In the Seroquel litigation, you're asking if there had been an effort made to account for --
Q. The actual costs. Not outside counsel.
A. Our cost.
Q. The actual cost this office had incurred.
A. That would probably be a question for

John McIntosh, because he is my -- he is over the legal operations, and that would be a question I would go to him for.
Q. Okay. Did you go to -- did you ask him that question?
A. I have not asked him that question.
Q. Okay.
A. Are we through with this?
Q. Yeah. You can put that -- just leave that in front of you for a second.
Now, would you agree with me that there are other cases in addition to the Seroquel case where this office proceeded with those cases on a contingency -- pursuant to contingency fee agreements where it retained a percentage of the contingency payment for the office; isn't that right?
A. Yes, sir.
Q. Okay. And do you -- if the state were successful in the underlying action against Cephalon, it would retain -- the Attorney General's Office would retain a portion of whatever fee was awarded to outside counsel; isn't that right?
A. That would be a byproduct of the contract, yes.

Q. Okay. Well, more than just a byproduct. The contract specifically provides for it; isn't that right?
A. Yeah. Correct.
Q. Okay. So, I mean, there's a specific provision in the contract that says this office gets 10 percent of attorneys' fees recovered by outside counsel.
A. That's correct.
Q. And how would those fees be used by this office?
A. Again --
Q. Yeah.
A. -- director of finance question.
Q. Okay.
A. And I would be involved, but I would always have him and the Chief Deputy with me, as well as consumer protection folks.
Q. Now, when you took -- you took office in January of 2011; is that right?
A. Yes, sir.
Q. So when you took office, there had been a series of budget cuts, is that right, to this office?
A. Correct. Well, to all of state

government.
Q. Okay.
A. All of us.
Q. Okay. So with respect to this office in particular, the base budget had been cut repeatedly; is that right?
A. Yes.
Q. Okay. So could you just briefly describe what kind of budget realities you were dealing with as you took office?
A. Well, I mean, it was -- we just had a tough financial time in 2008. We were two years removed from that at the time. Or three. And I know that the general appropriations were lower than they had been in years past.
Q. At the time that you took office, were you struggling with the ability to provide the same services for less money?
A. I believe everybody was struggling. But yes.
Q. Okay.
A. I mean, it's obviously -- that was a reality.
Q. Okay.
MR. KATSIFF: Let's mark this as 3.

(WILSON EXH. 3, News Article from GoCharleston.net dated 1-30-11, marked for identification.)
THE WITNESS: Thank you.
BY MR. KATSIFF:
Q. If you could take a moment to look at that, sir.
A. Okay.
Q. And is that an article you've seen before?
A. Yes, sir.
Q. Okay. And when did you see it first?
A. Well, I saw it when it came out my first month in office.
Q. Okay.
A. I obviously reviewed it, as I told you earlier in the deposition. Last week, in preparation for this, I re-read it for the first time in as many years.
Q. Okay. Now, if you look on Page 2, and it's sort of down towards -- you know, a little bit more than three-quarters of the way down the page where it says -- the sentence begins Wilson said.
A. Yes.
Q. Wilson said, quote/unquote:

Right now my primary concern is to offer the same most services at the same level with far less money...I'm going to do as much as I can with each of those things without cannibalizing the other.
A. Um-hum.
Q. Is that quoting you accurately?
A. The way that it quotes me, I wouldn't have -- I don't think I would have said it that way, most services, but he's got quotes around it.
Q. Yeah.
A. So I would have to defer to that comment.
Q. Okay. But in sum or substance --
A. Yes, yes.
Q. Okay. And I'm sorry. Just let me finish. I'm sorry about that. But in sum or substance, was that one of your concerns at the time?
A. Yes.
Q. This quote?
A. Yes, it was.
Q. And this related to the budget cuts that we were discussing previously?
A. It related -- yes, it did, but it also

related to having been a lawyer in this office and an intern in this office, I had a unique perspective that I don't think any modern AG has ever had.
I saw from the trenches looking up inefficiencies and ways that we could be more efficient in how we run this office and stretch a dollar. And when I ran for office, I ran on a platform of being more efficient with the resources we are provided. And in the long-term, that would be a cost savings to the taxpayer.
Q. And what were some of the areas in which you tried to increase efficiencies?
A. Little things at first. For instance, this office had subscriptions totaling, I think, north of $2,500 a year just in newspaper subscriptions when you could get it for $20 a year online with a PDF of the paper. We cut out that.
Ultimately, I did an audit and found out that there were six lawyers out of 60-something lawyers who used WordPerfect. WordPerfect cost us $28,000 a year. No judge requires us anymore in their preferences to use WordPerfect. So we had to change the culture of WordPerfect and convert over to Word for those other six lawyers and to save

money there. You know, little cost-cutting things like -- those are two that spring to mind.

Q. Um-hum.

A. But just -- there were others that I can't recall at this time, but there were other little things that we were able to do to kind of be more efficient.

When I met with all of the section supervisors, I asked them for ideas on how they could run their offices more efficiently. They gave me numerous ideas, and many of those ideas we implemented and are now running more efficiently and saving the taxpayers money with, arguably, you know, less overall head.

Q. Okay. Thanks for that. So just -- if we go a little further in the article, it says another quote from you -- and again, there's an ellipse in this quote, so I assume there's more and this was cut out.

But we don't have the money or ability to go and make -- and then there's an ellipse -- new insurance fraud cases.

Did that quote you accurately?

A. Well, that was something I talked about a lot. So yeah, I mean, I would stand by that

comment.

Q. Okay. And what -- and that -- you were saying -- you were particularly singling out insurance fraud cases because the Attorney General's Office collects money from insurance fraud cases?

A. Well, we -- people who commit insurance fraud, they get prosecuted --

Q. Yep.

A. -- and there's a criminal component. That is the criminal case. And we obviously recover moneys. There's a deterrent effect.

There's the consumer effect, which is insurance goes down when insurance laws are enforced because people don't have to subsidize the fraud. The insurance companies pass it on to the consumers when people defraud them.

So this office used to have a robust insurance fraud division. A former director of SLED reprioritized his resources and took investigators away from that as a priority. And, therefore, we were not able to go after people who were -- say, you know, arson, you know, or committing insurance fraud.

So those were one of the things that I

wanted to focus on and actually have spoken to the new SLED chief, who's been in as long as I have, and we are now -- they are giving us the investigators to go and start making insurance fraud cases in the future.

Q. Okay. But in this discussion where you're talking about budgetary issues in the Attorney General's Office, was the reference to insurance fraud cases made because insurance fraud cases generate money for the office?

A. Well, insurance fraud cases are important because of what I just said.

Q. Yeah.

A. And that was how I was speaking of it. But just like -- just like Medicaid recipient and Medicaid provider fraud, which are partially grant funded or funded from other agencies, just like insurance fraud or securities fraud cases they are able to protect the public good. And yes, they -- as a byproduct of bringing those criminal cases, they do pay for themselves under statute.

Q. Um-hum.

A. So that is a byproduct of it.

Q. Okay. And that byproduct was one of the -- was the reason that you were talking about

it in this article; isn't that right?

A. Well, I wanted to get law enforcement adequately engaged on enforcing the criminal laws of the state. And I believe -- and the way you justify the appropriation for -- let me start over.

Q. Yeah. Sure.

A. When you go to the General Assembly and you say I need funding for these investigators or these prosecutors, they will say we don't -- you know, they will say, well, why do you need it? And I'm like, well, if we get it, we can, A, promote public safety. B, this does pay for itself.

Medicaid fraud, for instance, pays for itself. It's partly grant funded. And the fraud that they commit against people who commit Medicaid fraud more than adequately pays for the grant to operate and then some. It goes back to the agency that gives us the money.

So I'm able to justify to the appropriator or the other agency who's loaning us the investigator that I can -- we can pay for ourselves, recover the fraudulent money and give it back to you and give it back to the taxpayer. So that's what -- that was where my thinking was with that.

Q. Okay. And that is why, you know, the next sentence says:

He may seek additional funds from the General Assembly for resources that would generate a big return.

That's --

A. Yes.

Q. -- part of the thinking you just articulated?

A. That's right.

Q. Okay. Why then not go to the General Assembly and if -- you know, if it's going to, you know, pay for itself, as you said, why not go to the General Assembly and ask the General Assembly for funds, additional funds to prosecute consumer cases as opposed to getting contingency counsel?

A. Mr. Katsiff, you keep saying prosecute consumer cases.

Q. Yeah.

A. That's a civil. That's a civil action, not a criminal action. And I did go and ask for extra FTEs from the General Assembly. I've also asked for extra funding for investigators for SLED, not even my agency.

I've asked for extra FTEs for other

sections in our office that help this office meet its core function. And it does -- it does pay for itself because it does recover fraud, and that does get returned to the general fund, and that is good for the consumer and the taxpayer.

Q. And then if you go down to the last sentence of this article, it says, quote/unquote:

We are thinking outside the box, Wilson said. That includes exploring ways to get more money and working with other agencies and private law firms, he said.

A. Yeah.

Q. Is that accurate?

A. Absolutely. First off, let me say this: At the time that I did this interview with -- I believe it was John Monk -- I believe it was done before I took office, but a couple weeks after I took office it was published. That's my recollection.

Q. Okay.

A. At the time that I did this, I was reiterating to Mr. Monk what I had stated in my campaign for the last six, seven, eight months.

There were several things that the former Attorney General had done that I really

liked. He had a criminal domestic violence pro bono program where he utilized private firms.

By utilizing private firms to prosecute those cases, it frees up prosecutors to prosecute the most serious cases, which is what we do. So it's leveraging the private sector.

By going to the Department of Health and Human Services and get more funding from them for Medicaid recipient fraud, I'm able to get more investigators to go out and recover more fraud. And we've actually done that in the last year.

By going to SLED and asking them to replace the investigators that were moved into the prior administration with new investigators, it helps us to recover the fraud on the insurance side.

At the time of this article, I had never read the Unlawful Trade Practices Act. I was unaware of the ability that I'm now being alleged to be doing this for, of using SCUTPA, as we call it, to go out and raise revenue for this office. It was never even in my psyche.

Politically, philosophically, I would never agree with that philosophy of suing a business solely to fund this office. That is

against what I believe.

I was talking at 30,000 feet about finding ways to utilize resources in other agencies, bring back resources from other agencies that have been taken from us, utilize the private sector to do some of the work that frees up my prosecutors to do the more important work that we need to do. So at 30,000 feet, that's what I was conveying to Mr. Monk.

At no point in those discussions was bringing civil actions ever even in my psyche, because I didn't know I could do it. And even though I know that it can be done as you're alleging, I don't agree with it.

Q. Okay. And so the article itself references a large settlement that General McMaster achieved with a drug company. A $45 million settlement, it says.

A. Um-hum.

Q. So is that something that you didn't know about at the time?

A. Well, the article talks about that, and it talks about the tobacco case.

Q. Right.

A. Those were editorializations by

Mr. Monk.
Q. Okay.
A. That never came up in our talk, in our interview.
Q. So that wasn't something you discussed.
A. I wasn't even thinking about that.
Q. Okay.
A. I was aware of it. Obviously, I read the paper.
Q. Right.
A. But I was unaware of it. And I was unaware about the provisions in the contract that allow this office to retain that money.
Q. Okay. When did you first become aware of those provisions?
A. Well, obviously in the first couple of months of being in the office I was learning the intricacies of the consumer protection section. It was sometime during the first, you know, couple months of being in the office where I learned about it.
Q. And do you recollect the circumstances under which you learned about it?
A. No, sir. Just -- just reading the contract, learning about it. I remember talking

about -- you know, I think in here it mentions lawsuits. Investigations and lawsuits.
I don't remember the specifics of the interview, but I remember the specifics of what I talked about on the campaign trail, which was, you know, forfeitures, which are civil actions, you know. And that is a way of recovering ill-gotten gains from criminal activity and returning it to the state. That was another thing that I was thinking of.
But I was thinking specifically as a byproduct of a criminal prosecution. I do not view unlawful trade practices, consumer protection in any way a criminal matter. Completely different. And I never thought to use that function to fund this office. Now, I'm aware that is a byproduct, but that is not an incentive.
Q. Um-hum.
MR. KATSIFF: So, Jerry, it looks like we don't have extra copies of this. You've seen it many times.
MR. JOWERS: Yes.
MR. KATSIFF: If it's okay, we'll just use this --
MR. JOWERS: Do you want it mark it?

MR. KATSIFF: We'll use this one, and then we'll just substitute a nonhighlighted one later, if that's all right.
MR. JOWERS: That's fine.
MR. KATSIFF: Thanks.
(WILSON EXH. 4, Attorney General Budget History - Appropriations, Fiscal Years 2002-2003 through 2012-2013, marked for identification.)
THE WITNESS: Thank you.
BY MR. KATSIFF:
Q. If you could just take a moment to look at that, sir.
A. Okay.
Q. And just let me know if it's a document you've seen before.
A. I have.
Q. Okay. And have you seen it outside of preparation for the deposition today?
A. I have.
Q. Okay. And this is a document that depicts the Attorney General's Office's budget over a 10-year period; is that right?
A. Yes. Yes, I've seen that.
Q. Okay. So there -- if you -- and you'll excuse me if I share with you.

A. Yeah, please. Yes.
Q. Thank you so much.
A. No problem.
Q. So we've got -- we've got three categories of revenue and then a total. Do you see that?
A. Yes, sir.
Q. Okay. So the general funds portion of revenue, that's the portion of revenue that's appropriated by the state? Well, it's all appropriated every year or authorized every year.
A. Correct. Yes.
Q. Okay. And the general funds are the actual -- the funds that come from the state legislature; is that right?
A. Correct.
Q. Okay. And that has decreased dramatically over the 10-year period from fiscal year 2002-03 to fiscal year 2012-13; is that right?
A. Yes, sir.
Q. Okay. Now, the other funds column, those are other funding sources that are received by the Attorney General's Office that don't come from the federal government and don't come from the base state appropriations; is that right?

A. That is correct.
Q. Okay. And the other fund category includes as a component funds that the Attorney General's Office might receive as a result of a contingency recovery; is that right?
A. Are you talking about specifically to other funds?
Q. Yes.
A. Let me give my little quick disclaimer.
Q. Sure.
A. Generally, when I read these things I've got my budget director and my finance director here, and I've gone over this with him before in the past. So when I go over it without him, understand that he usually corrects my understanding of a number.
Q. Um-hum.
A. But my recollection of reviewing this with him before is -- what you just said is accurate.
Other funds include -- it does include moneys brought by lawsuits involving outside counsel, but it also involves cases involving in-house counsel. It also involves multistates. It involves ticket money that's collected across

the state. It involves fees and fines from securities cases. It involves recoveries from state grand jury. It involves other private grants this office may have received. It's other funds, which could be numerous. And I'm probably missing some right there.
So yes, that is what I understand other funds to be with the caveat that Mr. Osmer would probably have a more accurate representation of it.
Q. Fair enough.
A. Yes, sir.
Q. But you'll agree that one of the other components of other funds -- while there might be many components, one component is money that's received from contingency cases.
A. Yes, sir.
Q. Okay. And you'll also agree that the state -- the Attorney General's Office actual overall budget has actually gone up since 2002.
A. Well, there were some onetime moneys, like big chunks of moneys. There was, I think, $3 million last year with Savannah River Maritime litigation, which is a very big issue for the General Assembly, and they gave us a huge appropriation for that.

This is also -- my understanding, this is appropriations, not revenue-generated. So that would have to be accounted for in that number, I would imagine, as well.
Q. Appropriations and not revenue, meaning, for instance, in the case of contingency fee cases, you could have generated more revenue in a particular year than you would have spent and carried it forward to the next year; is that right?
A. And I would -- I'm only saying this because I don't want to tell you wrong.
Q. Yeah.
A. The director of finance is who I would go to to get that answer.
Q. Okay. So just as a matter of simple arithmetic here, you'll agree with me that, you know, had the other funds portion of the budget not increased, the Attorney General's Office could not have maintained increases in the total budget; isn't that right?
A. I would -- with the caveat, I would have to say that that would be a question for the finance director, because I don't want to go outside of his expertise in this area.
Q. Okay.

A. I don't want to be evasive, but I don't want to tell you wrong. And I know that he has been deposed. I don't even know if he's looked at this document, but that is a question I would have to ask him. If he told me that, it would be something that I would be cognizant of.
Q. And I understand and appreciate that, but I guess my question is really just based upon arithmetic by looking at the document itself.
If you took out the other fund category, let's say, for this most recent fiscal year, the overall Attorney General budget, the total would be much less; right?
A. I mean, looking at this, these numbers, without knowing the story behind them, I would say yes in the four corners of the document.
Again, last time I had a conversation with him and I looked at numbers on the four corners -- within the four corners of the document, I said something and he corrected me because he sees things in these numbers that none of us see. So I tell you that with that caveat.
But yes, I will bite and say that that would appear to me to be the case, but he might see something different.

Q. Okay. So, I mean, just, I think -- is it fair to say that, you know, for matters of finance, budget and expenditures, he's the authoritative voice in this office?
A. Yes, sir.
Q. Okay.
THE VIDEOGRAPHER: Approximately 10 minutes left, counselor.
MR. KATSIFF: Okay. Why don't we take a quick break now. I don't know that I have -- I've tried to expedite this. I'm not sure I have all that much left. So let's take a quick break.
THE VIDEOGRAPHER: This concludes Video No. 1 in the video deposition of Alan Wilson. The time is approximately 12:04 PM. We are now off the record.
(A recess transpired from 12:04 until 12:14.)
THE VIDEOGRAPHER: We are now back on the record. Today's date is August 27th, 2013. The time is approximately 12:14 PM. This is Video No. 2 in the video deposition of Alan Wilson.
BY MR. KATSIFF:
Q. So just a couple more questions for you, General Wilson.

A. Yes, sir.
Q. Going back to when we were talking about the contingent fee agreement and settlements that are approved by court order, you would agree with me, would you not, that there is a contractual obligation by the Attorney General's Office to pay contingent fee counsel a fee award based upon the percentages specified in the agreement, regardless of whether or not it's approved by a court, wouldn't you?
A. I don't know that it can't be approved by a court. I would assume that it's laid out in the contract. I said I don't know to that question earlier, and I still don't know. But I believe that we would have to follow the contract, which is, obviously, a transparent document.
Q. Okay. So, I mean, you'd have to follow whatever the contract said; isn't that right?
A. Yeah. Yes.
Q. Okay.
MR. KATSIFF: Nothing else at this time.
MR. JOWERS: Okay. Let's take a quick break then, and we'll have some follow-up.
MR. KATSIFF: Sure.

THE VIDEOGRAPHER: We will now go off the record. The time is approximately 12:15 PM.
(A recess transpired from 12:15 until 12:18.)
THE VIDEOGRAPHER: We are now back on the record. The time is approximately 12:18 PM.
EXAMINATION
BY MR. JOWERS:
Q. General Wilson, I'd like to direct your attention back to Exhibit 1, the litigation retention agreement. And if you would, please turn to Page 5, Article IV titled Compensation. Do you see that?
A. Yes.
Q. I'd like to move ahead several pages within the same section to Paragraph 7 on Page 7. Do you see that?
A. Okay.
Q. It reads:
This distribution and compensation calculation shall be included in a final order in the case.
Do you see that?
A. Yes.
Q. And is it your understanding that the

distribution and compensation calculation would be, pursuant to this section, included in a court order in a case?
A. Yes.
Q. Do you have an awareness or understanding of how many contingency fee cases with outside counsel you have entered into since taking office?
A. I have signed five contracts, two of which complaints have been signed, this case and another case, and three other cases we are still working to avoid litigation.
Q. Since you've taken office, have any contingency fee contracts with outside counsel produced revenue in any form for the office?
A. No.
Q. In the event the office does take in money pursuant to a special retention agreement with outside counsel, are there -- can the office just spend the money without permission from the legislature?
A. No. We have to get permission from the General Assembly. We have to be authorized to spend that money.
Q. All right. Is that called an

appropriation?
A. Yeah, I think you could call it an appropriation, yeah.
Q. Or authorization?
A. Authorization or appropriation.
MR. JOWERS: Okay. That's it. Thank you.
MR. KATSIFF: Just one or two follow-ups.

EXAMINATION

BY MR. KATSIFF:
Q. So Mr. Jowers' question was since you've taken office, have any contingency fee contracts with outside counsel produced revenue in any form for the office. And your answer was no. But, of course, we looked at the AstraZeneca case; right?
A. Um-hum.
Q. Which was a contingency fee case. The contract was entered into before you took office. But you recognized the revenue, you realized the revenue when you were in office; isn't that right?
A. That's correct.
Q. Okay.
A. We -- but I think that was the

question. Of the contracts that I have signed, we have not realized revenue.
Q. Okay. And fair enough.
A. I inherited that case.
Q. Right. Fair enough. But I just want to be clear that this office, while you've been Attorney General, has realized revenue from contingent cases; isn't that right?
A. Yes, we have realized revenue from cases that were begun under my predecessor, Mr. McMaster.
Q. Okay. Now, while this office has to receive authorization from the legislature to spend money in the form of an appropriation, if there's no money in a fund to be spent to receive authorization on, then there's no money to be spent; isn't that right?
A. Well, obviously, yes.
Q. Yeah. I mean, you have to have the money in order to get the authorization; isn't that right?
A. Yes.
Q. Okay.
MR. KATSIFF: Nothing else.
THE VIDEOGRAPHER: We will now go off

the record. The time is approximately 12:22 PM.
(A recess transpired from 12:22 until 12:23.)
THE VIDEOGRAPHER: We will now go back on the record. The time is approximately 12:23 PM.
MR. JOWERS: No further questions.
MR. KATSIFF: Thank you very much for your time, sir.
THE WITNESS: You're welcome.
THE VIDEOGRAPHER: This concludes the video deposition of Alan Wilson. The time is approximately 12:23 PM. We are now off the record.
(The witness, after having been advised of his right to read and sign this transcript, does not waive that right.)
(The deposition was concluded at 12:23 PM.)

SIGNATURE OF DEPONENT
DEPONENT: ALAN WILSON
DEPOSITION DATE: August 27, 2013
REPORTER: Sandra K. Bjerke
CASE CAPTION: Cephalon vs. Alan Wilson

(Please return both Signature of Deponent pages.)
I, the undersigned, ALAN WILSON, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)
DEPOSITION DATE: August 27, 2013
REPORTER: Sandra K. Bjerke
CASE CAPTION: Cephalon vs. Alan Wilson

PAGE LINE CHANGE REASON

ALAN WILSON Date

I, Sandra K. Bjerke, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent page within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

Sandra K. Bjerke, RMR, RDR, CRR
My Commission Expires
June 18, 2020

CERTIFICATE OF REPORTER

I, Sandra K. Bjerke, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 3rd day of September, 2013 at Charleston, Charleston County, South Carolina.

Sandra K. Bjerke, RMR, RDR, CRR
My Commission Expires
June 18, 2020

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
STATE OF SOUTH CAROLINA, ex rel.
ALAN WILSON, in his Official Capacity
as Attorney General for the State of
South Carolina,

Plaintiff,

vs. CASE NO: 2011-CP-40-3661

CEPHALON, INC.,

Defendant.

(Caption Continues on Page 2)

VIDEOTAPED
DEPOSITION OF: C. HAVIRD "SONNY" JONES, JR.
Volume I

DATE: April 10, 2013

TIME: 9:08 AM

LOCATION: Office of the Attorney General
1000 Assembly Street
Columbia, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
CEPHALON, INC.,
Plaintiff,
vs. CASE NO: 2012-CP-40-7317
ALAN WILSON, in his Capacity as Attorney General for the State of South Carolina,
Defendant.

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ALSO PRESENT:
Doni Gibson
Jay Smith
Paul Ahearn
Beth Valdes, Paralegal
Jeff Jacobs, Videographer

(INDEX AT REAR OF TRANSCRIPT)

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THE VIDEOGRAPHER: Good morning. We're now on the record. Today's date is Wednesday, April 10th, 2013, and the time is 9:08.

This is the videotaped deposition of Jay Havird Jones taken by counsel for the defense in the matter of the State of South Carolina versus Cephalon, Incorporated, and Cephalon, Incorporated versus Alan Wilson, in his capacity as Attorney General for the State of South Carolina, filed in the State of South Carolina, County of Richland, Court of Common Pleas for the Fifth Judicial Circuit. The case number is 2011-CP-40-3661.

Our location is the office of the South Carolina Attorney General, Rembert Dennis Building, 1000 Assembly Street, Columbia, South Carolina.

My name is Jeff Jacobs, the legal videographer, and the court reporter is Sandra Bjerke. We both represent A. William Roberts, Jr. & Associates.

Would all counsel present now please state your name and appearance for the record.

MR. JOWERS: Jerry Jowers for the state of South Carolina.

MR. KATSIFF: Tim Katsiff for Cephalon.

MR. McKINNEY: Steve McKinney for

Cephalon.
THE VIDEOGRAPHER: Will the court reporter now please swear in the witness.
C. HAVIRD "SONNY" JONES, JR.
being first duly sworn, testified as follows:
EXAMINATION
BY MR. KATSIFF:
Q. Good morning, sir.
A. Good -- need to correct that it's C. Havird Jones, Jr. rather than Jay -- morning.
Q. Good morning. Thanks for coming here today.
A. Yes.
Q. Just briefly, and I know you're an experienced litigator, so I don't mean to be presumptuous, but I just want to, you know, state what the instructions are for the deposition as we begin today.
And you've been involved in a lot of depositions, I assume?
A. Yes, sir.
Q. Okay. And you understand that I'm going to ask you a series of questions, and you're going to answer to the best of your abilities?
A. Yes, sir.

Q. Okay. And you understand that if for some reason my question is confusing or you don't understand it, just ask me and I'll repeat it or try to rephrase it?
A. Yes, sir.
Q. Otherwise, I'll assume you'll understand?
A. Yes, sir.
Q. Okay. Have you been deposed before?
A. Yes, sir.
Q. On how many different occasions?
A. Once.
Q. Okay. Was that in connection with your responsibilities --
A. Yes --
Q. -- as --
A. -- sir.
Q. Sure. That was in connection with your responsibilities in the Attorney General's Office?
A. Yes, sir.
Q. Okay. And when was that deposition taken?
A. That was taken probably 2008 or '09.
Q. And what kind of matter was that in connection with?

A. FTC case. Pyramid case.
Q. And I'm sorry. I didn't hear that.
A. I said pyramid. Pyramid.
Q. Oh. Like a Ponzi scheme?
A. Yes.
Q. And why was your deposition taken in that case?
A. Our office's involvement initially in the matter. The FTC brought it, and they brought it, actually, in Los Angeles.
Q. Okay.
A. And I testified there also.
Q. Who requested your deposition?
A. Burn Lounge did, the target. Defendant.
Q. Was the statute of limitation at issue in that case?
A. No, sir.
Q. Did you do anything to prepare for your deposition today?
A. Yes, sir.
Q. What did you do?
A. I met yesterday with counsel.
Q. Okay. Did you do anything else?
A. In meeting with my counsel, I looked at

some documents, but not all the documents that were going to be the subject of deposition today. I was here in the past depositions, though.
Q. Right. You've sat through every deposition that's been taken in this case so far, isn't that right, sir?
A. Yes. Yes, sir.
Q. How long did you meet with your counsel for?
A. Hour and a half.
Q. Okay. And was that Mr. Jowers?
A. Yes.
Q. Okay. And Mr. Jowers is representing you in this deposition today?
A. Yes, sir. And we might have met the day before also. I can't really recall. Things are running together with that. But I met with Mr. Jowers on at least one occasion, and I've been in on all the depositions so far.
Q. Okay. Now, do you understand that there -- you're testifying today in two matters; right?
A. Yes, sir.
Q. Okay. You're testifying in a action that the state of South Carolina has commenced

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against Cephalon alleging unfair marketing and trade practices; is that right?
A. Yes, sir.
Q. Okay. And you're also testifying in a matter that Cephalon has brought against General Wilson in his official capacity for a declaratory judgment that the retention of outside counsel in this matter violates South Carolina's Constitution and the Constitution of the United States of America. Do you understand that?
A. Yes, sir.
Q. Okay. Now, do you understand that there have been -- there has been discovery served in both of those cases by Cephalon?
A. Yes, sir.
Q. Okay. There have been document requests served in both cases?
A. Yes, sir.
Q. Okay. Did you have any role in collecting documents responsive to those document requests?
A. I would have reviewed and discussed with Mr. Libet, Jared Libet in our discussion. He was primarily responsible for responding to discovery requests. And I would discuss with

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our -- our counsel, Mr. Jowers.
Q. Okay.
A. And probably Mr. Smith in our office, Jay Smith.
Q. What's Mr. Libet's role in connection with these matters?
A. He is the attorney in our group, Consumer Protection & Antitrust group that has been assigned the Cephalon case in addition to myself.
Q. Any other attorneys assigned to the Cephalon case?
A. No, sir, not right now.
Q. And when you say Cephalon case, you're referring to both cases?
A. Yes, sir.
Q. So it's your testimony that Mr. Libet was primarily responsible for collecting documents from the Attorney General's Office?
A. Yes, sir. That, in conjunction with Mr. Smith.
Q. Okay. Do you know what they did to collect documents that they believed were responsive to the document request that Cephalon served?
A. I think they did e-mail searches,

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computer searches, hard copy file searches. And I believe on the state health plan they would have -- in the process, if that's not one of the requests, of getting data from the state health plan, EIP, Employee Insurance Program.
Q. Did you search your own files in connection with Cephalon's document request?
A. No, sir. I did a word search, I think, on Cephalon, but I had a backup. Either IT or Mr. Smith came in to check my files in case I missed something.
Q. And when you say you did a word search, what do you mean by that?
A. Personally I just did Cephalon.
Q. Okay. In what?
A. In my e-mails.
Q. Okay. And what kind of e-mail platform does the Attorney General's Office use?
A. We use Outlook.
Q. Okay.
A. We transferred from Groupwise probably last year, late last year.
Q. I see. Are your old e-mails that were maintained in Groupwise now in your Outlook e-mail folders?

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A. Yes, sir. I got about 40,000 of them.
Q. Okay. Sounds like you don't regularly delete e-mails; is that right?
A. No, sir. No, sir.
Q. Okay. Now, you say that Mr. Smith and Mr. Libet, along with IT, the IT group in the Attorney General's Office did the primary electronic review of documents; is that right?
A. Right.
Q. Okay. Do you know how they accomplished that review?
A. No, sir.
Q. Okay. Now, how are files maintained in -- let's just back up for a second.
You are -- what's your job responsibilities in the Attorney General's Office?
A. Well, I'm the chief of the Antitrust/Consumer Protection section, and I have responsibilities in other matters outside of those.
Q. How long have you been chief of that section?
A. Well, in the late '90s I was probably the only person doing it. And as time has passed, I would say the chief -- my title is actually of assistant deputy attorney general.

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Q. Okay.
A. So I don't know if you actually call me chief.
Q. Okay. So since the late '90s, you've been in charge of the consumer and antitrust section; is that right?
A. Yes, sir. It was not really a section back then. It was just me.
Q. Okay. Since the late '90s, you've been responsible for overseeing all of the consumer antitrust matters that have been brought by the Attorney General's Office; is that fair?
A. Not necessarily true. There may be some other attorneys in the office that were involved in the consumer matters.
Q. What other attorneys?
A. I recall Ken Woodington was handling some matters involving Ford Motor Company, and Warren Ganjeshin was involved in a consumer matter concerning some spyware, but predominantly would have been me.
Q. Since 2003 have there been any other lawyers in the Attorney General's Office that were responsible for overseeing consumer and antitrust claims besides yourself?

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A. Well, there probably were a couple SCUTPA, unfair trade practice cases brought. I think Tracy Green might have been involved with one. Then Warren Ganjeshin would have been another. But chiefly, I was the person -- go-to person on unfair trade practice, consumer protection and antitrust.
Q. Okay. The matters -- the SCUTPA matters that you just mentioned --
A. Um-hum.
Q. -- while there are other attorneys involved in those matters, were you still responsible for supervising those matters?
A. No, sir.
Q. Okay. How long have you worked for the Attorney General's Office?
A. 1976.
Q. Quite a while.
A. Been a while.
Q. And if you could just briefly let us know the various responsibilities you've had since you've worked at the Attorney General's Office.
A. I would say it's mostly -- almost entirely civil. I've done some DUI cases earlier on.

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Q. Um-hum.
A. Condemnation cases, child support cases, election cases, gambling cases, charitable trust cases, extradition, postconviction relief. Done about everything in the office. Appellate work. Argued in the federal court, state court, et cetera.
Q. So your work has pretty much run the gamut.
A. Yes, sir.
Q. But you've concentrated principally, at least for the last, you know, 20 years, on unfair trade practices and antitrust? I'm sorry. Consumer protection and antitrust?
A. No, sir.
Q. Okay.
A. I would say my work consists probably half, half of consumer protection and antitrust. It could be 60 percent, depending on what's going on that day or week.
Q. What are your other job responsibilities then?
A. I have a lot of responsibility. I'm the head of the -- any charitable trust issues.
Q. Okay.

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A. We have two cases now pending: one for a rehearing request in the Supreme Court on a charitable trust matter, and I have a gambling case appeal before the Court of Appeals scheduled.
I did voting rights a lot, but that's been transferred. And I get calls on different matters at different times, just from my experience in the office.
Q. Who do you currently report to?
A. Steve Lynch is the head of our section, civil section. I would say that I report to -- although I report to him, my main reporting is to the Chief Deputy and Attorney General.
Q. And the Chief Deputy is Mr. McIntosh?
A. Yes, sir.
Q. And how long have you reported to Mr. McIntosh for?
A. Oh, he's been here late '90s. I would say starting in the late '90s on matters that I would need to get review or approval, I would go to Mr. McIntosh. Maybe starting in 2000.
Q. And what kinds of matters are those that you need to get his review or approval for?
A. Any decisions being made. I've worked here long enough to know that any decision you make

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is really the decision of the Chief Deputy and Attorney General. So I get constant review and approval from Mr. McIntosh or the Attorney General.
Q. By any, any decision to be made, are you referring to major decisions or any decision whatsoever?
A. It's almost any decision whatsoever.
Q. Okay.
A. It's a matter that I see Mr. McIntosh -- it could be four times a day, it could be every other day. But even granting extensions for opposing parties to, of course, any type of settlement, so forth is almost a full gambit.
Q. And was that the practice prior to Mr. McIntosh assuming the role as Chief Deputy?
A. I think it's evolved. Early on it would be the person that assigned you the case. Could be a deputy. Over the years you'd be responsible to them. But most of my work now involves being assigned work from the Chief Deputy.
Q. Okay.
A. Or having cases that would come to my section that I would look to him, because Mr. McIntosh has a lot of experience. Plus, he is

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the Chief Deputy.
Q. Okay. And you said that you meet with him approximately four times a day every day?
A. No. No, sir, I don't. I didn't say that.
Q. Okay.
A. What I said was I can meet with him sometimes four times a day.
Q. I see.
A. Sometimes we'll do a call with his secretary and walk up to run through some things with him, and sometimes I might not -- I might not see him for a couple days. But he walks through the section. I saw him this morning. But he's available. If I don't see him in person, it could be by phone.
Q. Sounds like he's pretty hands-on?
A. Yes, sir.
Q. Who's his secretary?
A. Deb Staberg.
(JONES EXH. 1, Organization Chart, Revised 6-28-07, marked for identification.)
(JONES EXH. 2, Organization Chart, Revised 7-14-08, marked for identification.)
(JONES EXH. 3, Organization Chart,

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Revised 6-30-09, marked for identification.)
(JONES EXH. 4, Organization Chart, Revised 10-20-10, marked for identification.)
(JONES EXH. 5, Organization Chart, Revised 9-16-11, marked for identification.)
(JONES EXH. 6, 6-30-12, marked for identification.)
BY MR. KATSIFF:
Q. Okay. Mr. Jones, I'll give you a second to look at those. You've been handed Exhibits Jones 1 through 6, which are organizational charts for the years 2007 --
A. Yes, sir.
Q. -- through 2012.
A. Yes, sir.
Q. Have you seen these before?
A. Yes, sir.
Q. Okay. Do these look reasonably accurate to you as of those years? And you can see the years on the bottom right-hand corner.
A. I see the charts, and I see the dates on the charts. I couldn't tell you, if you asked me who was in our group, who was in my group in 2010 or '11 specifically. But I don't have any reason to quarrel with the charts as they are

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before me.
Q. Okay. Well, let's start with 2007.
A. Okay.
Q. In 2007, your group, which is Consumer Protection & Antitrust; right?
A. Yes, sir.
Q. Okay. It shows yourself and Mr. Smith; is that right?
A. Yes, sir.
Q. Okay. Does that comport with your recollection as to who was in your group during that time period?
A. Yes, sir. I probably had a legal assistant at the same time, secretary. I don't do typing.
Q. Okay. Now, if you turn to 2008 --
A. Um-hum. Yes, sir.
Q. -- again it shows yourself and Mr. Smith and then Suzanne Ballington, who's the -- listed as administrative assistant.
A. Yes, sir. Suzanne Ballington.
Q. Ballington. I'm sorry.
A. Yes, sir. Now, keep in mind, as I said before, we're doing a lot of other things outside of consumer protection and antitrust.

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Q. Understood.
A. Understood.
Q. Okay. But at this point in time it's just, you know, yourself and Mr. Smith in the group, along with an assistant; is that right?
A. Yes, sir. Yes, sir.
Q. Okay. Now, has there been growth in your group since that time period?
A. Yes, sir. Yes, sir.
Q. Okay. And when did that growth start?
A. Well, I would say it started when the James Brown case started.
Q. And what case is that?
A. That's a charitable trust case.
Q. Okay.
A. That would have been -- we got involved in the James Brown case September 25th, 2007. Could be the 24th. I'm not really sure. I can't remember that.
Q. Was that James Brown the singer?
A. Yes, sir.
Q. Okay. And you got involved in that case in '07, you're saying?
A. Yes, sir. The Attorney General's Office moved to intervene in that case in '07 in

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September. The order was issued October 3rd or 1st, 2007.
Q. And why did that case require growth in your group?
A. It required a lot of time.
Q. Okay.
A. A lot of time. Typically, on the charitable trust cases, I would handle those myself. The AG, the Attorney General at the time was Henry McMaster. He was very active in charitable trust cases.
We had the Bull Street case, the mental health case he argued himself, and we had the Epworth case I argued. Many other cases we had going on with charitable trust. It could be 30 or 40 or 50 cases in charitable trust.
At the time that the Brown case came up, we also had another one, another case that was about a hundred million dollar case we were involved in. The cases take a lot of time.
Q. And what case was that, sir.
A. Muller case. It was the Muller case at the beach concerning some 800-and-some acres of property that some residual beneficiaries wanted to sell to get money.

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Q. And are those cases ongoing?
A. No. The Muller case has been resolved.
Q. How about the James Brown case?
A. No, sir. We've got a rehearing request before the Supreme Court.
Q. Now, as I look at these charts I see that the first person -- the first attorney it looks like that you've added -- that you added to the group was in approximately 2009. At least that's when they appear in the organizational chart.
A. That would be Mary Frances?
Q. Yes.
A. Okay. That's what it says.
Q. Does that comport with your recollection?
A. Right. I think that -- I'm not sure if anybody else commented on this, but how it usually worked is that if I needed somebody I would go to my division head, Steve Lynch, or the Chief Deputy and say, like, for example, in James Brown case, I need an auditor to look at some orders.
Or with Mary Frances I need somebody to help me in the James Brown case. She went with me on the first hearing.

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JC Nicholson was also involved in that. He might have been in my section for -- I don't know officially, but he dealt with the James Brown case. He's involved in a mediation in that case.
So Mary Frances is there. She came over. I think she was hired initially for gambling. I did some gambling. And I needed her for the charitable trust cases. She's not a full time. She doesn't work full time.
Q. Let's look at the complement in your group right now as of 2012.
A. Okay.
Q. Now, so there -- is this accurate, that there are currently approximately 10 people working in your group?
A. No, sir, this is not accurate.
Q. Okay. What's inaccurate about it?
A. Geoff Chambers left in February. We have just recently hired someone to fill his position that will come in on May the 2nd.
Mary Frances is still there.
Mr. Libet's still there. Of course, Jay is there. Mr. Libet, as of June the 30th of '12 -- he was hired for gambling, although he's reflected in my section. He was doing gambling

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cases through December. So he has not been really full time in our section except for the last three months.

Mary Frances' responsibilities, mostly charitable trust, nonprofits, appellate work.

Jay is not full time in our section.

Mr. Quattrone was in our section, and he did voter ID and one consumer case. He's no longer there. He's in law school.

Susan, my administrative assistant, is there.

Patricia Simmons, she did work on fee contract costs, review those, and -- and voting rights. She's no longer there.

Doni Gibson is there.

Kari Ormiston was kind of an intern, and she's not there anymore.

Q. Okay. So if my math is right, with the new individual that you just hired to replace Mr. Chambers, who left --

A. Right.

Q. -- you'll have seven folks working in your group; is that right?

A. And we got Jenny Smith. Excuse me. Jenny Smith was hired in August to work in our

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section. And she is full time in our section, but she is eight months pregnant. And so she'll be leaving shortly in our section.

Q. Okay. But that makes eight then with Ms. Smith.

A. Yes. See if the number's right. Eight then. Nine, including me?

Q. Nine? By my math it's eight including you, but maybe I'm wrong.

A. We got myself.

Q. Yep.

A. Susan Ballington, my administrative assistant.

Q. Yep.

A. Mary Frances, Jenny Smith, Jared Libet, Doni Gibson. Now, Paul Ahearn is also in our section. He was hired recently in -- I'm not sure. Then he left for three months to work on a political campaign. And he's going to go to law school in the fall, I think.

Q. Okay.

A. So there's a lot of traffic in and out of our section.

Q. Um-hum.

A. He's a nonlawyer, of course.

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Q. Okay. And then Doni Gibson; right?

A. Yes. She has a pharmacy background. She's full time in our section, as of -- as of this time she works -- I think she's been working there at least a year.

Q. Okay. So it looks to me -- will you agree that you've experienced tremendous growth in your session -- section from 2007 to the present time?

A. I -- the work that we've done, the reason -- one of the reasons -- we've done a lot of consumer protection and antitrust work, but the charitable trust work we've done has -- a lot of these people would have been working with me anyway. I would go as the -- my civil chief about it. So I would say during this time period that probably 50 percent of my time has been on charitable trust work.

Mary Frances had charitable trust work. Mr. Libet is not. He's on gambling. Patricia Simmons was not really a full time in our section. Doni has got a pharmacy background. So I've had growth, but the workload I've had has been consistent from '07 to now.

Q. Okay. I mean, my question was just

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simply looking at the organizational charts, you'll agree with me that from 2007 to the present time you've experienced a multifold growth in the individuals listed as working in your section; is that right?

A. The number of people from '07 to now are a lot more, yes.

Q. Yeah. Okay. In fact, they're a multiple of what they were in '07; is that right?

A. Listed in my section, yes, sir.

Q. So now you were talking about some of the reasons for that.

A. Yes, sir.

Q. Okay. And isn't one of the reasons for that that your section has brought more unfair trade practices claims than it has in the past?

A. Well, there have been, starting with Henry, Henry McMaster's fee contract approval, he did -- I believe in '05 we first started the AWP cases. There were actually probably 12 of those suing Medicaid and EIP. So probably get six companies each. So there's supervision of outside counsel involved, more involvement. I was assigned that.

There have been more multistate cases

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that we've done, more active. As I've got more people in my group we can get more involved in the multistate cases. Instead of being a participant, we can be -- be one of the main people to go to in a case.

Q. Okay. So you'll agree with me that having more people in your group increases your ability to either bring unfair trade practices claims on your own by the office or to supervise outside counsel who's bringing those claims on your behalf on behalf of the Attorney General's Office; is that right?

A. More people would help. Let me qualify that that we have not had a full line-up of these people yet because of the charitable trust cases, the gambling situation with Mr. Libet, Mary Frances working on charitable trust. We haven't had a full line-up yet of people that are working specifically on consumer protection cases. We work on a variety of things. I needed help on the charitable trust cases. That required one or two more people.

Q. Why haven't you had a full line-up, to use your words, for people working on consumer protection cases?

A. Well, I don't have a full line-up

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myself. I work -- it could be one week a hundred percent, the next week could be 30 percent.

Geoff Chambers, he had cases like river shacks and other cases he brought with him. He was gambling and extradition when he came in. He was full time in our section probably a year and a half.

Jared -- Mary Frances is not a full-time employee.

Jared Libet, as I mentioned, until December, he had gambling responsibilities.

Jay is now going to school, because he's going to go to med school next year.

Anthony was a part-timer in the sense of he did projects for the Attorney General. And when the voter ID case came up, he was almost strictly the go-to person on the stats on that.

Patricia Simmons was not a full time in our group, and she just did voting rights and review costs.

And Doni has been full time because she has a good pharmacy background.

So we haven't had the number of employees -- these employees work full time on consumer protection/antitrust.

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Q. Um-hum. Well, I mean, just -- I understand that you're saying that they don't work full time on consumer protection/antitrust.

Some of them spend part of their time on consumer protection/antitrust; correct?

A. Yes, sir.

Q. Okay. So having more people allows you to not only supervise more consumer protection/antitrust cases, but allows you to supervise the other matters, including the estate cases that you were talking about; is that right?

A. Yes, sir. More people -- the more people you have, competent people, the better you can do your job.

Q. Now, who's required -- whose approval is required to hire more people for your section?

A. It would be the Chief Deputy.

Q. Okay. Would it also be the Attorney General?

A. Yes, sir. Chief Deputy and Attorney General. When I say the Chief Deputy, I mean the Chief Deputy and the Attorney General. The Attorney General, of course, is the one that hires people.

Q. Did you go to them and ask them to hire

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more people?

A. Yes, sir. I've asked for people for a good while. Because the James Brown case started off with two people, and I would say it involved 25 people in our office now. I'd be gone a lot on that, working on that a lot. So I would ask for more people.

And then as consumer protection matters developed and we got outside counsel, 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. So you can't do your job without having people to help you with that responsibility.

Q. Are you familiar with public statements by General Wilson that he was thinking of ways to get revenue from outside the box?

A. I would refer to that article. I was -- I'm familiar with the article.

Q. Okay. What's your understanding of what he was quoted as saying in the article?

A. The article says what it says.

Q. Okay. That he was looking for ways,

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additional ways to raise revenue for the office?
A. The article says what it says.
Q. Okay. Well, what do you recollect the article saying in that regard?
A. That he was thinking -- he had to think outside the box.
Q. Think outside the box to do that?
A. I think you'd have to ask him for that. I don't --
Q. I'm asking what you recollect the article saying.
A. The same thing you said, that you think outside the box. Now, what that means, you have to talk to Attorney General Wilson about that.
Q. Was it your understanding from reading the article that Attorney General Wilson was saying he was thinking outside the box to gain additional revenue sources?
A. You'd have to talk to Attorney General Wilson on that.
Q. I'm asking for your understanding, sir.
A. My understanding would be in the article. I think there's been some issues about the article as to grant programs, et cetera, other matters that you can get revenue from the office

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through legislation and so forth. I couldn't tell you what he meant by the article.
Q. Well, you read the article; right?
A. I read it. I haven't read it since it was produced in the AstraZeneca case.
Q. Did you have an understanding of the article after you read it?
A. I just read the article. My understanding was that anytime you get quoted in an article, half of it's wrong. I've had many articles written about me. Not me, but written about the office in which I was involved, and they're misquoted. So I read the article. I understand how the office works, and I didn't think much more about it.
Q. Yeah, and I'm not -- my question was not did you have an opinion as to whether or not Mr. -- General Wilson was accurately quoted or whether or not the article was right or wrong.
My question was pretty simple, which was: Did you have an understanding as to what was written in the article after you read it?
A. It's not a simple yes-and-no answer because of this: In this very conference room a while back he was thinking about a program that

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would bring additional revenue to the office from a grant program that didn't come about. So he has a lot of things he thinks about. And I can't tell you specifically what he said, what he meant.
Q. Did he ever have discussions with you about bringing in revenue to the office of the Attorney General?
A. That would be privileged.
Q. Why would it be privileged?
A. Because I'm talking to my Attorney General. Any discussions I have with my Attorney General are privileged.
Q. Well, was he seeking legal advice in those discussions?
A. Very well could be. Usually when I talk to him it's concerning legal or factual concerning matters that are involved in the office.
Q. Well, let's -- let's start with yes or no, okay?
A. Okay.
Q. Did he have discussions with you regarding bringing additional revenue in to the Attorney General's Office?
A. I think I need to take a break and talk to my counsel about that.

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MR. KATSIFF: Okay. Thank you.
MR. JOWERS: We'll talk about a privilege assertion.
MR. KATSIFF: Sure.
THE VIDEOGRAPHER: We're going off the record at 9:44.
(A recess transpired from 9:44 until 9:48.)
MR. JOWERS: I'll just say we took a break so we could discuss whether to assert a privilege, and we're going to give you some leeway on these questions.
MR. KATSIFF: Okay. So I appreciate that.
BY MR. KATSIFF:
Q. So did you have any discussions --
THE VIDEOGRAPHER: Hold on.
MR. KATSIFF: Sorry.
THE VIDEOGRAPHER: Stand by.
MR. KATSIFF: Oh. Well, she got it. That's fine.
MR. JOWERS: Yeah.
THE VIDEOGRAPHER: We're going back on the record at 9:49.
BY MR. KATSIFF:

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Q. Okay. So before the break -- and I'll just restate the question that I had.
A. Yes, sir.
Q. So my first question is, is did you have any discussions with Mr. Wilson or Mr. McIntosh about the need to raise additional funds for the Attorney General's Office through bringing unfair trade practices claims?
A. I've had discussions with the Chief Deputy and the Attorney General about the money that our section brings in but not the need to bring money in by filing cases.
They are aware of -- the chart, I think, has been produced to you. I'm sure that the Attorney General has that same chart, show the revenue of the section and how it's increased over the years.
Q. Okay.
A. But predominantly -- for example, I think you had 13 million from July the 1st to current in our section. That is -- about 6 or 7 percent of that is outside counsel cases.
Q. Okay. Have they congratulated you on bringing additional money in to the Attorney General's Office?

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A. I think they appreciate it, but they appreciate everybody in this office. You see up there? The employees of the year are probably up there along with maybe 20 others. I don't look at my section being any better than the criminal appeals section or the other civil sections. It's just a matter that I'm in unfair trade and I enjoy it, plus I enjoy the charitable trust also.
Q. Have they expressed their appreciation to you for bringing in additional money for the office?
A. I -- in what sense?
Q. Well, what do you understand that to mean by expression of appreciation?
A. I've probably gotten an attaboy. A lot of people in the office have with different things they've done.
Q. Has General Wilson ever communicated to you the need to explore ways to get more money for the Attorney General's Office?
A. No, sir, he never has directly told me to go out and explore more ways to get more money for the office.
Q. Has he ever talked to you about thinking about ways that you could get more money

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for the office --
A. No, sir.
Q. You got to let me finish. I'm sorry.
A. Okay.
Q. Just make it a lot easier for the court reporter.
A. Okay.
Q. Have you ever had discussions with Chief Deputy McIntosh about thinking about ways to bring cases to raise money for the Attorney General's Office?
A. No, sir. It's -- the discussions I've had with the Attorney General and the Chief Deputy would be resources I need to have to do the job that we have. And that would include charitable trust and gambling matters or whatever else it might be.
To answer your question, we're more active in the consumer protection/antitrust section is because over the years we've gotten better at it, and we -- we have a very good law on our unfair trade. We've got indirect purchaser ability that some states don't have. You can actually sue for indirects. In antitrust that's Illinois Brick repealer matter.

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So we got a good law. We have a good understanding of it. And as it developed through the AWP cases and you get more involved in the law, that you understand the law better and you can do more things.
You will see predominantly, far predominantly the revenue from the office comes from multistate or in-house cases. I would say as the number I gave you earlier, back of the envelope would be over 90 percent -- 90 percent of the funds coming in would be nonlitigation retention money. We lose money by -- by hiring outside counsel for the office, but we get more money for the state by hiring outside counsel.
Q. Well, I mean, we'll go over the chart a little later today.
A. Yeah.
Q. But, you know, it's your testimony that you get more money for the state by hiring outside counsel?
A. No, sir. Yes, sir. Yes, sir. For example, if the Janssen case was 327 million.
Q. Um-hum.
A. Okay. If this office was involved in a multistate with Janssen, based upon the 180

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million, I believe, settlement, we would have gotten 5 to 6 million for the office of consumer protection. That's how the multistate matters are fashioned.

If the verdict is upheld for 327 -- that's on appeal -- the office's portion would be $1.9 million on attorney's fees. Our -- and it's not really -- you -- the 2 percent and down is what we get of the gross. Could be 2 percent, could get down -- over a hundred million, I believe it's .04 percent.

So if the office was looking for ways to make money, we wouldn't hire outside counsel. We would do multistates and gotten more money for the office but less for the state.

Q. Well, you get 10 percent of what outside counsel gets, the Attorney General's Office; correct?

A. Correct, per the fee agreement.

Q. And you don't get -- the Attorney General's Office doesn't get 10 percent of what the state gets when the state recovers through multistate litigation; is that right?

A. What it amounts to is there's a certain allocation for each state, depending on how

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involved in it and depending on what the settlement is that you get that the language of the settlement agreement typically is for consumer protection purposes in the office, the AG's office keep them, keep that money.

What's happened over the last four -- three or four years, those have gotten bigger because of unfair trade cases that have been brought, and typically the ones in South Carolina -- we got one in Louisiana and one in Arkansas that had high verdicts.

Q. In the multistate cases --

A. Yes, sir.

Q. -- does the Attorney General's Office collect money out of the settlement?

A. Yes, sir.

Q. Okay. And what kind of money does the -- how is it determined what percentage of the settlement or award the Attorney General's Office collects?

A. It's set forth in the settlement document, and it's approved by a court, usually. That consumer protection purposes and usually the office keeps that money, but I don't get involved in the finances. The language allows the office to

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keep, across the nation, AG's office can keep consumer protection money.

Q. And what language are you referring to?

A. The language in the settlement document --

Q. Okay.

A. -- in each of these cases. It would be a group of attorneys from different states that do consumer protection work. You could have a settlement of 50,000 and, depending upon how much work you did in the case, your state could get more money.

So, for example, if -- if the AG was targeting more money for the office, he would have me hiring everybody to get on the multistate and get on the executive committee of the multistate, which we would do all the work. Like five or six on the executive committee, you'd have 30 more states involved, and you could get a higher reward for that.

And the reason these matters have gone up, because of the qui tam being unsealed and pharmaceutical cases trying to -- companies are getting hit pretty hard with the qui tams and the DOJ. So these multistate volumes in the last

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couple years have gone up.

Q. Well, just focusing on the multistate cases that you're talking about for a second.

A. Yes, sir.

Q. Now, the multistate -- the multistate actions are brought by -- are they brought by NAAG?

A. No, sir. What it amounts to is you'll have a group of states that you might have one state or two states that have an interest in certain things. And then they would present that to the other group through NAAG as a communication vehicle.

And if there's an interest, they would do investigations concerning the alleged improprieties of the company they're looking at. And some of those could result in financial settlements in addition to injunctive relief. It could be from mortgage to retail price maintenance to PBMs, pharmacy benefit managers. It could be anything.

Q. Okay. We'll come back to this. The spreadsheet printed out in a funky way on the exhibit, so we'll come back to that. Okay. We'll come back to the -- we'll come back to the settlements.

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A. Yes, sir.
Q. I want to go back for a second to the discovery in this case.
A. Yes, sir.
Q. How are the files organized in your section?
A. You mean the hard copies?
Q. Yes.
A. Jay, I would -- anything that comes in I would initial. Usually everything I initial and hand it to Jay.
Q. Okay. And Jay holds the files?
A. Jay has the file now. In this case I couldn't tell you if Jared has the hard copy of the Cephalon case or if Jay has the hard copy. But usually I give it to Jay, and he will give it to the attorney that's assigned to the case.
Q. Okay. And you have files on specific investigations?
A. We have files on matters we're working on in the office.
Q. Okay.
A. My documents would -- in my office would be duplicates of copies I would have.
Q. What are Mr. Smith's responsibilities?

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A. He is -- he's called -- he's been designated as director. He schedules matters. He's a jack-of-all-trades and a master-of-all-trades.

He understands -- he's been here working with me since '07, and he works closely with the Attorney General and the Chief Deputy. He understands how things in our group work from the charitable trusts to the consumer protection matters.

Q. How has his role changed over time?
A. He's gotten more active. We do more work. And so he and I work very well together. And so he's just -- we do a lot of things.
Q. What was he responsible for in 2007?
A. 2007, I had a paralegal that worked with me, and she did -- she did -- she did a lot of the file work on the voting rights. Voting rights was -- is a big issue for us when the legislature's in session.
Q. Um-hum.
A. When she left I needed someone, and Jay was recommended. And I think Jay at that time was just here for a little bit of time to decide what he wanted to do. And I think he developed an

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interest in what we were doing, so...
Q. Okay. But what were his responsibilities?
A. Well, his responsibility would be to assist me.
Q. Okay. To assist you in anything you asked him to do?
A. Yes, sir, from James Brown. And he actually went to some hearings in James Brown to any other matters I need assistance with.
Q. Okay. What kinds of matters did you ask him to work on? What kind of consumer protection matters did you have him work on?
A. Well, he may be on calls. We had some multistate calls. Anything that I would do he would know what I would be doing. So very few things that I worked on that he was not working on.
Q. Now, did he work for the MFCU unit for a period of time?
A. Yes, sir. He -- they wanted to hire, I'm recalling, a couple people. Jay had an interest in data and doing different things with data.

And so my recollection is that John McIntosh said, okay, why don't you go there, Jay,

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and just see if you like that. And he was there, and I don't think he stayed that long. I think he did the job of two people in a couple hours a day or something. I don't know. But he didn't stay very long.

I was busy on James Brown, so I don't -- I don't check in with Jay and I walk in to make sure he's in his office, so -- but he worked -- to answer your question, he worked in Medicaid for whatever time period it was that he talked about the other day.

Q. By the other day you're referring to in his deposition?
A. Yes, sir.
Q. Okay. Now, are you responsible for reviewing the performance of the individuals that report to you every year?
A. Yes, sir.
Q. Okay. Is there an annual performance review in the office?
A. For years there was not one, and we just started one. Alan did. Back up. Recently. Alan being the Attorney General.
Q. Yep.
A. This past year. I did two or three in

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the last four months, and I got one to do probably this month.
Q. Okay.
A. But before that I had -- I had not done one -- it had been 10 years --
Q. Okay.
A. -- I guess. Long period of time.
Q. Did anybody solicit your views on performance increases or bonuses from subordinates that worked for you?
A. I'm not responsible or have the authority to give bonuses. But if the AG or the Chief Deputy asked me are people doing well, I would tell them. And if they can get -- I'm all for anybody getting any money they can get, but they made the final decisions on those matters.
Q. Now, lawyers in the Attorney General's Office have the opportunity to receive up to a $2,000-a-year bonus; is that right?
A. Until I saw the bonus sheet that you got, I never knew about the bonuses. I got a bonus in the '90s for like 800 bucks, and the taxes take most of that. So I was unaware of that. But I don't do that. That's not -- that was through the Attorney General or the Chief Deputy.

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Q. Okay. Now, the Attorney General is responsible for enforcing South Carolina's consumer protection law; is that right?
A. He's the chief legal officer in South Carolina.
Q. Okay. Is he responsible under the consumer protection law for enforcing that law?
A. Well, which section are you talking about? In the 39-5-50 he is the person in charge in the public interest. Under 140 section, it gives the private section.
Q. Okay.
A. So he -- the 50 section addresses him directly, and there are several other sections that talk about CID responsibility, capability and it's got a private part of it too. So he's involved a lot in the unfair trade in the law.
Q. Okay. Well, just to -- just to break it down, private individuals can avail themselves of the law to file lawsuits based upon wrongs to them; right?
A. Yes, they got a certain criteria under unfair trade in the public interest subject to repetition, et cetera. But the 39-5-140 section allows them to sue for damages and get treble

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damages if it's willful, pursuant to the definition in the section.
Q. All right. If the conduct has been directed to -- towards them; correct?
A. Correct.
Q. Okay. The Attorney General's powers under the unfair trade practices law is much broader than that; correct?
A. Yes, sir.
Q. Okay. The Attorney General has the power to sue generally for wrongs in the state; right?
A. Yes, sir, he has broad powers.
Q. Yeah.
A. And the Supreme Court has said that. Our state Supreme Court has said that. He protects the public interests. It could be the charitable public interest, it could be the consumer public interest. You got issues with boundary disputes, you got issues with water rights. That was a big case recently.
So he -- the Attorney General has a lot of responsibility and a lot of power. He's the chief legal officer of the state.
Q. What are the Attorney General's powers

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under the unfair trade practices law to investigate potential violations of that law?
A. His powers are addressed in the statute.
Q. Okay. And what are those powers? Are they broad?
A. Yes. You could -- under the 39-5-70 section -- I believe that's the CID section, civil investigative demand? -- he can issue a discovery request, so to speak, to a company.
Q. Um-hum.
A. And under the 80 section, I believe, 39-5-80 he has subpoena powers. I could get those sections -- I could be off, but he does have investigatory power under those sections. And we do use those in certain cases.
Q. What kinds of cases do you use those in?
A. Multistate cases.
Q. And specifically in multistate cases what do you do with those powers?
A. Well, we send out CIDs to companies and ask them for information. And usually we get -- it's not a statute of limitations issue.
If there is a statute of limitations

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issue, the sending out a CID does not total it. We ask the company for a tolling agreement like we asked for Cephalon and Cephalon declined.

So while we have powers under the CIDs and multistate use those and we got some that we're using now without a multistate, when it's a statute of limitations sensitive issue, we aren't -- we don't have that option, so to speak.

Q. Okay. By CID what are you referring to?

A. Civil investigative demand. Discovery type request.

Q. Okay. So the civil investigative demand, that's something short of a subpoena; is that right?

A. Yes, sir. I think the subpoena would be you bring in witnesses under that section. We haven't done that.

Q. Okay.

A. But we have sent out CIDs.

Q. And you say you've sent out CIDs in connection with the multistate cases?

A. Yes, sir. Or cases that we're looking at on our own and maybe not a multistate.

Q. Okay.

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A. We've used it before. Excuse me.

Q. I'm sorry. I didn't mean to interrupt. I apologize.

Now, when you say you've sent out CIDs in connection with the multistate cases, were those multistate cases that South Carolina was involved in?

A. Yes, sir.

Q. Okay.

A. There is always an issue of -- well, we send them out in multistate cases.

Q. There's always an issue of what? I'm sorry.

A. An issue of each state needs to send a CID if you got 40 states. Or if you've got two or three states, they send out the CID so the company won't get 40 requests, and we'll share them. So there's an issue in each case of how that works, depending on the case, depending on who's the lead state in the multistate.

Q. Now, you've said you also send out CIDs outside of the multistate cases.

A. Yes, sir.

Q. What kinds of circumstances are -- do you send out those sorts of CIDs?

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A. Well, it could be a case that we're looking at ourself and -- and we don't know if -- to what level if we want to proceed or not. So we get permission from the Attorney General and Chief Deputy to send out inquiries.

Q. Um-hum.

A. And typically, we do that with -- in combination with the tolling agreement. So that gives a little more time period to get the information back to us.

Q. And what kinds of information would you receive?

MR. KATSIFF: Well, strike that.

BY MR. KATSIFF:

Q. What are the sources of information that would cause you to send out a CID?

A. Could you rephrase that?

Q. Sure. So you said you send out -- you said you send out CIDs outside of the multistate process; right?

A. Um-hum.

Q. And you're sending out CIDs to investigate potential violations of SCUTPA; is that right?

A. Yes, sir.

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Q. Okay. And how does information concerning potential violations of SCUTPA find its way to the Attorney General's Office?

A. Example would be a qui tam matter with NAMFCU comes unsealed. It could be like the recent settlement in the national settlement in the mortgage settlement. There's a lot of spin-offs as far as possible deceptive practices.

Q. Um-hum. Could it be, you know, another state? Like, let's say, you know, the state of New York brings an action.

A. Could be.

Q. Okay. That you think has potential to have, you know, national sort of practice ramification?

A. Well, we -- if we know about it we might look into it, depending on what -- what the matter is. A lot of factors go into our decision to do anything. We're involved in a lot of matters, and we can't do CIDs in everything, can't get involved in everything.

Q. Now, the mortgage matter that you just referred to.

A. Yes, sir.

Q. Okay. That's another matter that

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you've hired outside counsel for; is that right?
A. Spin-offs of that, yes, sir.
Q. Okay.
A. We have people come into our office, outside firms, and pitch cases.
Q. Okay.
A. I say pitch cases. They come in and talk to the AG about possibly bringing it on behalf of the state of South Carolina or agencies. That's another area that we come up with the information.
And it could be also that we get scammed on something like a download of something on your iPhone and they charge you 9.99 a month after that and you don't even get the download and never tell you. So that's something personal that we have. So it could be different things.
Q. That's one that's close to my heart.
A. Yes, close to everybody's heart.
Q. Okay. How about press reports?
A. Could be.
Q. Well, you say could be. Could be that you read something in the press that discloses a potential violation of SCUTPA that you want to investigate; is that right?
A. Could be.

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Q. Yes or no?
A. It could be. I mean, you have to look at something to see the impact on South Carolina.
Q. Okay. So my question is: It's possible you could read something in the press that would give rise to you sending out a CID.
A. Something in the press could be the first step to take to investigate a matter.
Q. Okay.
A. Could be.
Q. Now, are you familiar with the National Association of Attorney Generals?
A. Yes, sir.
Q. Okay. Could you describe that group?
A. That's a group of national -- of attorney generals.
Q. Okay. Also known as NAAG?
A. NAAG, yes, sir.
Q. Okay. Does that group have, you know, various subdivisions in it of people working in attorney generals' offices who focus on particular topics?
A. Yes, sir. That really you got antitrust section, you got a consumer protection section. So they're -- in our office they're

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together. Some offices they're separate.
And there could be subgroups underneath that that do certain things like the health fraud or the antitrust or the retail price maintenance or pharmacy benefit manager, privacy.
Q. What's the Health Fraud Group?
A. Health Fraud Group is a group -- we have a call -- I have not participated in those for a good while. I'd say at least a month, once a month, every two months. I don't know how frequent or infrequent it is. That they would -- calls be -- that would be an agenda to discuss matters that would be of interest to the Health Fraud Group.
Q. And what kinds of matters are of interest to the Health Fraud Group?
A. Well, health and fraud would be typically something to do with pharmaceuticals or it could be a retail price maintenance -- not a retail price maintenance, but a PBM that involves like a CVS, Caremart, Medco issue. Anything to do with health. You could bring up hospital issues there. So it's a broad spectrum.
Q. What's a PBM?
A. Pharmacy benefit manager, like Medco.

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So it's a go-between. CVS, Caremart. I believe CVS has bought Caremart. I can't remember now.
Q. So allegations regarding alleged off-label marketing by pharmaceutical company would be one thing that would be discussed in that group?
A. It could be. Excuse me. Yes, sir.
Q. Now, you said that that group, the Health Fraud Group has monthly calls; is that right?
A. I can't tell you how often they have them. They have scheduled calls. It could be every two weeks or every two months. I'm not sure.
Q. Now, are you a member of that group?
A. I get e-mails on that.
Q. Okay. Anyone else in your office get e-mails on that?
A. I would think that Jay does, and maybe somebody else in the group does.
Q. Um-hum.
A. The e-mail string would tell you who in our office is on it.
Q. How long have you participated in that group?
A. Several years. I would say the Health Fraud Group, we're probably on the e-mail list

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early 2000.
Q. Okay.
A. I could be off, but it's been a while.
Q. Does that group ever have face-to-face meetings?
A. There are meetings, yes, sir. If you're working on a case in multistate, you can have face-to-face meetings. Also, the consumer protection group of NAAG meets twice a year like in DC or somewhere else for a couple days. Antitrust meets twice a year also.
Q. Okay. So consumer protection meets approximately twice a year, you said?
A. Yes, sir.
Q. Okay. How long has consumer protection been meeting twice a year for?
A. Before I was involved in it.
Q. Okay.
A. A good while.
Q. So before 2000. As long as you can remember.
A. Yes, sir. It's been a while.
Q. Okay. And is it your practice to generally attend those meetings?
A. Yes, sir. When -- when you have the

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finances to do it, I would recommend to the AG or Chief Deputy. It would benefit us to go to those meetings to meet people in other offices to gain from their experience.
Q. Um-hum. So did you attend those meetings in 2007?
A. I don't recall.
Q. Okay.
A. I don't recall about 2007. Don't recall. But typically, we go -- to answer your question, I would say we've been going for a good while. For example, there's an antitrust meeting that I'm not attending and canceled because of this.
Q. That was the meeting in Washington that you canceled?
A. Yes, sir. And I've missed that two other years like a consumer protection because of the James Brown case. You just have to cancel things sometimes when other matters come up.
Q. Generally, if you don't go does Mr. Smith go?
A. Mr. Smith has gone, I think, twice. Typically, it's for lawyers.
Q. Um-hum.

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A. But he works on a lot of the cases, so I've recommended that he go, and he goes two -- he's gone a couple times or one time. I'm not really sure. And other attorneys in our group, we try to rotate and make sure they go.
Q. Now, the multistate cases that you're working on, the multistate state consumer protection cases, they're in conjunction with the NAAG group?
A. Yes, sir, they're with other states.
Q. Okay.
A. Yeah. You would say it's through NAAG, yeah.
Q. Now, do you keep any notes of any of the healthcare fraud group meetings that you have?
A. I don't -- I probably have taken notes. Usually I can't read them after I've taken them.
Q. Um-hum.
A. I just moved my office in January from being in a certain location for 20 years.
Q. Um-hum.
A. I had to go through everything. And in preparation of this, I don't recall seeing any consumer protection notes.
Q. Okay. You don't recall seeing any NAAG

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consumer protection meeting --
A. Yes, sir.
Q. -- minute notes; is that right?
A. That's correct.
Q. Okay. So the monthly calls that occur in the NAAG group, one of the purposes of those calls is to advise other NAAG members about cases that are of general interest --
A. Could be.
Q. -- to the states?
A. Yes, sir. Yeah.
Q. Okay.
A. Matters are discussed that are of interest to the group.
Q. Okay. And the matters that are of interest to the group are matters that -- that concern practices that may have been carried out by a company throughout the nation so that there may have been violations of specific members -- member state consumer protection laws?
A. They're matters of concern to the group that could involve violation of consumer protection laws. Matters that are not confidential.
Q. Are you familiar with a system inside the Attorney General's Office known as LawBase?

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A. I've heard of it.
Q. What is it?
A. I think it's where you got to put all your cases on there so you know what cases we got in the office. I don't -- I don't mess with that.
Q. Who does it? Who messes with it?
A. Messes -- my -- either my secretary or if we open a case, I don't know if Jay has done it or not. When I have a new case on any matter I give it to my secretary or a person responsible to put it on LawBase.
Q. Do you have access to LawBase?
A. I probably do. I haven't looked.
Q. Okay. Sitting here today, do you know whether or not you have access?
A. I can't tell you because I never went there.
Q. Okay. Is LawBase the same thing as CDV?
A. I have no idea.
Q. Okay. Have you heard of CDV database?
A. No, sir. If I had it didn't register with me.
Q. Any other databases that you're aware of in the Attorney General's Office that capture

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cases being worked on?
A. With all due respect, you're talking to the wrong person on that one. I -- I wouldn't know.
Q. Why is that?
A. I don't go to LawBase. I got either hard copies of files and I work on files, and I depend on somebody else to do that.
Q. Okay.
A. And I -- my understanding is they do the job they're supposed to do on that.
Q. Now, is one of the areas that your group follows to determine whether or not there have been violations of consumer protection laws, MFCU settlements?
A. Yes, sir. When the matters come unsealed, that's of interest to us.
Q. Now, Mr. Gambrell is head of the MFCU unit in the AG's office?
A. Yes, sir.
Q. Okay. You've known him for many years, I assume?
A. Yes, sir.
Q. Do you -- how often do you interact with Mr. Gambrell?

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A. I would see him on the elevator. He's moved from this office. He was in this office. So I periodically see him on the elevator. Periodically would be once a month, once every two months. He travels a lot.
Q. Okay.
A. Now I don't see him at all except at a supervisors' meeting, which are every few months. I saw him at the deposition.
Q. Okay. During the time period of 2006 to 2008, he was located in the -- this office, which is the main AG's office; is that right?
A. Correct.
Q. Okay. So you both were located in the same office; right?
A. Different floors, yes, sir.
Q. Okay. And you say you saw him in the elevator periodically?
A. I would see him once in a while.
Q. Okay.
A. Not that often, really, but if I needed Gambrell on something, for whatever it might be and I can't remember what I'd need him on, you know, I could call. But very few -- any conversations, we talk about football, stuff like that. He's a

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Gamecock fan, I'm a Clemson fan, so we didn't have too many good conversations.
Q. Okay. Now, you also said you see him at supervisor meetings.
A. Yes, sir. That started recently with Alan.
Q. Okay. When did those start?
A. I'd say they started when Alan came into office. That would be over two years ago.
Q. Okay.
A. A few years ago. I wasn't a supervisor until two years ago.
Q. Okay.
A. I didn't go to the meetings.
Q. Um-hum.
A. I mean, the chart shows I had people, but I wasn't a supervisor.
Q. Okay. Were there -- was there any kinds of senior staff meetings that you're aware of while General Wilson was in charge of the office? I'm sorry. General McMaster was in charge of the office?
A. No, sir, not that I attended I can recall. We didn't have senior staff meetings, no, sir. There may have been some, but I was not in

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attendance.
Q. Who's Valerie Hampton?
A. Don't know.
Q. Okay.
A. I heard that name maybe yesterday, but I couldn't -- I don't remember what the answer was. I don't know who she is.
Q. Okay. What's the name of General Wilson's assistant?
A. Kristi Quattrone.
Q. Okay. Did Mr. Gambrell ever communicate to you that one of the matters he was working on had settled?
A. He would send -- the matters we'd find out would be typically he'd send something to Mac and we would get a copy.
Like in the Cephalon case I believe it came out -- out of seal in September of '08, and I think we got an e-mail on it and we saw it in this case in October of '08. That was the first of my knowledge of it.
Q. Okay. So the first time you heard about the Cephalon case you think was in October of 2008; is that --
A. That's the -- the e-mail reflects that

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I got something. I couldn't tell you today that I remember receiving that.
Q. Okay. Was it Mr. Gambrell's general practice to alert you when one of his matters had settled?
A. Since we -- we were doing the AWP cases with the state agencies, I think that -- I don't know. We started being contacted when matters were settled, because he does Medicaid and we'd be doing the state health plan. It could be something that we needed to look at for the state health plan, so to speak.
Q. So, you know, he would -- he would let you know about it because the conduct at issue in his investigation which concerned Medicaid could have equal application to conduct that you would be interested in in protecting the interests of the state health plan; is that right?
A. Yes, sir. We'd have to review it. It could be a best price, which we'd have no interest in. It could be something else involved in the -- in the unsealing document we'd look at. But we would typically, after it's unsealed, get a copy as a matter of course, I think.
Q. And you said that that started with the

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AWP litigation?
A. No. I was just mentioning that in the AWP we were -- we started suing for state agencies.
Q. Okay.
A. It could have occurred before that. I could be wrong. It could have occurred before AWP cases -- AWP cases started, and they started in '05, '06.
Q. Okay.
MR. KATSIFF: Well, I see our tape is about to run out here, so why don't we take a little break.
THE WITNESS: Okay.
THE VIDEOGRAPHER: This will bring us to Tape No. 1. We're going off the record at 10:34.
(A recess transpired from 10:34 until 10:46.)
(JONES EXH. 7, E-Mail Correspondence to Mr. McIntosh from Mr. Gambrell dated 10-8-08, marked for identification.)
THE VIDEOGRAPHER: This is continuation of the videotaped deposition of C. Havird Jones beginning on Tape No. 2. Going back on the record at 10:46.

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BY MR. KATSIFF:
Q. Okay. Mr. Jones, you've just been shown what's been marked as Exhibit 7. Have you seen this document before?
A. I think I saw it as one of the documents in the earlier -- one of the earlier depositions. I don't recall receiving this, but I'm on the e-mail list. I don't independently recall receiving it. I don't deny receiving it. I just don't remember seeing it.
Q. Yeah. Okay. So this is a -- this was the memo that you were referring to earlier today in your deposition --
A. Right.
Q. -- from Mr. Gambrell to Mr. McIntosh to which you and Mr. Smith were cc'd?
A. Yes, sir.
Q. Okay. And if you look at Exhibit 7 there's a little check mark above your name. Do you see that?
A. Yes, sir. Yes, sir.
Q. So does that indicate that you got it at the time?
A. I'm not sure where the check mark came from.

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Q. Okay. Do you have any reason to doubt that you received it?
A. No, sir.
Q. Okay. Now, I believe your testimony was that this memo was the first instance that you can recall about -- of hearing about the Cephalon settlement with the United States and the NAMFCU members; is that right?
A. Yes, sir. When it came out from under seal, we got this copy.
Q. When what came out from under seal?
A. The Cephalon case. In looking back at the case before we filed the action, you know, I reviewed this memo again.
Q. Okay.
A. I think this memo. I saw something like this.
Q. Now, another cc on this memo is Valerie Hampton.
A. I don't know who Valerie -- she never worked for me. It may be someone in Gambrell's office. I don't know.
Q. Okay. Now, the memo outlines the total South Carolina share of the settlement, is that right, 5.3 million --

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A. That's what --
Q. -- approximately?
A. That's what it says, yes, sir.
Q. The federal share. And that's the federal share of, what, the South Carolina Medicaid dollars?
A. Yes, sir. I think it's -- is it a 70/30 split? I'm not quite sure if it's 75/25 or 70-30.
Q. And then the share of the Medicaid dollars the state gets?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. 1.5?
A. That's what it says, yes, sir.
Q. Now, have you -- you say that, you know, Mr. -- settlements in Mr. Gambrell's MFCU unit are of interest to your unit because of your unit's responsibilities in connection with the state health plan; correct?
A. Yes, sir.
Q. Okay. Now, when structuring or when considering what the possible damages to the state health plan might be --

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A. Um-hum.
Q. -- in connection with alleged unfair marketing practices of pharmaceutical products, do you look at what the dollar amount of the settlements were in the -- with Mr. Gambrell's MFCU unit?
A. Well, we look at it if -- in this case we offered to resolve it with Cephalon on what we call a me too.
We look at the volume of drugs that were involved in the -- in the Medicaid settlement and use that proportionate on the size of the EIP to make an offer.
But typically, it's our experience that the damages are very low for the dollar in a Medicaid NAMFCU settlement going to the states. So if we -- we don't say that's the amount of damages.
We would say on EIP you gave us a hundred thousand in Medicaid, and the state health plan is 55 percent of that. So we'll look at our drugs and say, okay, about 55,000 if you want to get a release from us.
Q. And that's because the conduct -- is that because the conduct that is being settled in connection with the MFCU unit is the same conduct

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that's being settled on behalf of the state health plan?
A. Well, typically, the -- if a company is doing something to harm Medicaid outside of best price, it would be the same type of deceptive practice with EIP, typically. You have to look at it and make a determination on a case-by-case.
Q. And what does EIP stand for?
A. Employee Insurance Program. State health plan. SHP. Or now it's PEBA. I can't tell you what PEBA stands for right now.
Q. And the state health plan is self-insured; is that right?
A. Yes. And its volume is a very large volume compared to other states' programs. So it is of some consequence in South Carolina.
Q. Now, when you received this memo in October of 2008, did you discuss with Mr. Smith the possibility of asserting a claim against Cephalon?
MR. JOWERS: Why don't -- maybe we can take a break to resolve it, because I see a whole category of questions that we may have to claim work product on. So why don't we talk about that.
THE VIDEOGRAPHER: We're going off the record at 10:53.

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(A recess transpired from 10:53 until 10:55.)
THE VIDEOGRAPHER: We're going back on the record at 10:55.
MR. KATSIFF: Okay. Shortly before we got back on the record, Mr. Jowers, you asked that we re-read the question; is that right?
MR. JOWERS: Right. I just want to be sure what the question was. I forgot.
MR. KATSIFF: Okay. Could you -- could the court reporter please re-read the question.
(The Court Reporter read the question commencing on Page 77, Line 17.)
THE WITNESS: When we received this, I gave it to Jay to put on his calendar, so to speak. Because if a claim like this became unsealed, we had three years under the unfair trade to bring a claim.
And this was about the time, 10-8-08, that we had settled the James Brown case and now were going before the court, actually, that month. So it was a big month.
But I would give it to Jay for review and to calendar it to bring to my attention at a point in time.

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BY MR. KATSIFF:
Q. Okay. During the break, the brief break that we just had, did you discuss anything -- and this is just yes or no.
Did you discuss anything besides whether or not there was a privilege objection to be raised with respect to my last question?
A. No, sir.
Q. Okay. Okay. So you say that you would have asked Mr. Smith to calendar this three years in the future?
A. No, sir.
Q. Is that right?
A. No, sir. I apologize.
Q. Okay.
A. I would have told Jay, okay, we got this NAMFCU settlement.
Q. Yeah.
A. Okay. Bring it -- look at it, get back with me at a later point in time, because we had several matters probably going on at all times, and -- okay. Get back with me later on so we can discuss it.
Q. Okay. Now, why -- why did you -- why did you believe that you had three years to bring

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the case from this point in time?
A. Well, it's my thought it came out from under seal, and that's the first time I knew about it. I didn't know what Cephalon was until I looked at the disk. Typically, when matters come out from under seal, that's the first information we get, so...
Q. At this point in time did you instruct Mr. Smith or anyone else to do anything to investigate the allegations?
A. I don't specifically remember instructing him, but typically on cases like this we get I'd ask him to review it. And we have to look at the claims and also the EIP volume. And he would typically mark it, do some work on it, a case, and then get with me later on.
Q. Do you remember whether or not he got together with you later on regarding claims against Cephalon?
A. I remember him having tickled the file and telling me we got the Cephalon matter to look at.
Q. When do you remember that being?
A. I'm just -- he usually is pretty persistent about it. I'd say every six months.

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Q. Okay. So you think approximately six months after October 2008, so roughly April 2009 he would have come to you and said, we've got to do something about Cephalon?
A. Or a Cephalon -- I don't independently remember that, but how it works, like other cases we have, he would have matters that we need to talk about, matters that we got issues, statute of limitations issues, we need to do something quickly or we got time to do it or this is not a meritorious claim.
Q. Do you remember speaking with him about this matter again?
A. I remember on a couple of occasions him bringing up Cephalon.
Q. Okay. And what was the decision at that point?
A. The first thing I would have said was, why do we have to do it right now? I was in the middle of James Brown. It was seven days in '09 of hearings on approval of the settlement. And we had other matters going on also in '09. He might -- see, we had a lot of matters going on and could be a staff issue. Could be anything.
Q. Um-hum. Did you have any discussions

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in 2008 with Mr. McIntosh --
A. Don't recall.
Q. You got to let me finish. I'm sorry.
A. Okay.
Q. Because I'm sure you had discussions with Mr. McIntosh.
A. Yes.
Q. Did you have any discussions in 2008 with Mr. McIntosh regarding a potential action against Cephalon for a violation of South Carolina's Unfair Trade Practices Act?
A. Don't recall.
Q. Okay. You don't recall whether you did or you didn't; right?
A. Yes, I don't recall if I did or didn't.
Q. Okay. How about in 2009? Did you have any discussions with Mr. McIntosh --
A. I don't recall when the --
Q. -- regarding that subject? I'm sorry.
A. I don't recall when my next -- my first conversation with Mr. McIntosh concerning Cephalon would be. It would be before we contacted you. I mean, Cephalon.
Q. Um-hum. Okay. Did you ever instruct Mr. Smith to call Mr. Gambrell to find out what

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kind of information Mr. Gambrell had regarding Cephalon?
A. Don't recall that. Typically, we wouldn't call Bill to -- Bill Gambrell to get his information. My thought, his information was -- might be -- still be confidential. I didn't talk to Gambrell about information. All I would look at is the court records or this summary.
Q. It was your understanding that all information that Mr. Gambrell had was somehow confidential?
A. Yes.
Q. Okay.
A. This is a office of lawyers, and we all know what's confidential. I've done attorney agreements before, and I'm aware of the state grand jury, and I'm very conscious of confidential matters or matters that are kept confidential.
Q. And why did you think Mr. Gambrell's information he had was confidential?
A. I didn't think about it. I just don't contact him about information.
Q. Did you -- okay. I'm sorry.
A. I just -- if it's -- we get our -- the issue we're looking at would be the order in the

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plea, and then we would look at the volume of EIP to get an idea of -- about the case.
Q. When you say the issue that we're looking at would be the order, what are you referring to?
A. The order that came out from under seal. I believe it was signed September-ish '08.
Q. So the order unsealing the complaints; is that what you're referring to?
A. Well, it's the order. I think it's the plea and the order. Whatever came public. Going back and looking at the docket, you have the docket in '03, and then the next thing that comes out is September of '08. Nothing's in between. So we'd probably pull that last document that came off and looked at it.
Q. Did you consider whether or not Mr. Gambrell had any investigatory information that was not subject to the seal?
A. I didn't.
Q. Okay. Why not?
A. Just didn't. I just -- I don't talk to Bill Gambrell about his files.
Q. Why not?
A. I just don't. It's -- it's my

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experience that if you got matters that were confidential, that the only thing that's not confidential is what is -- is in the court docket.
Q. Okay. Well, let's be precise about what you mean about confidential.
A. Okay.
Q. So what's -- what's your -- how are you using the word confidential with respect to the files Mr. Gambrell has?
A. It's my -- it's my experience with him and also with this case that the matter was under seal, looking back at it, and it came out from under seal in September of '08.
When we looked at it as far as the merit of what we should do, I would look at the order and also look at the volume of EIP used in this time period and see if they got reimbursed for these type drugs. I just wouldn't contact Mr. Gambrell. I wouldn't.
Q. Okay. Now, and what I'm trying to understand is: Was it your understanding at the time that all information that Mr. Gambrell had in his possession concerning the NAMFCU and US Attorney's investigation into Cephalon was subject to the court's sealing order?

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A. I don't know. I just didn't -- I never contacted him about information. I don't contact him about information.
Q. So you didn't have a view one way or another.
A. Yes, sir. I just don't contact him, because the practice would be to me that this matter's under seal. And if it comes out, I never addressed the issue. His files were still confidential.
Q. And you've done nothing to consider whether or not all information contained in his files is -- is confidential pursuant to a federal seal.
A. No, sir, I haven't.
Q. Okay. And your understanding that -- well, let's just take this one step at a time.
Is it your understanding that all matters that Mr. Gambrell had in his possession concerning Cephalon were subject to the seal that was in place in the qui tam actions?
A. At what time period?
Q. Before 2008.
A. It would be my understanding that until it came out from under seal, everything in his file

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was confidential.
Q. Okay.
A. I wouldn't even -- I didn't even ask him that. If a matter is under seal and he's investigating, I have no idea what he's doing, and I don't want -- I don't want a part of his file.
Q. And that understanding that you had, it's -- what is that understanding based on?
A. Well, if he has a matter that a federal court has placed under seal --
Q. Yeah.
A. -- then he can't share the information. Seal means that's -- something is closed, and he has no right to share it with me. No authority to share it with me.
Q. He can't share information that's otherwise in the public domain?
A. In the public domain?
Q. Correct.
A. I was thinking that you were talking about the matters he was reviewing and during the course of investigating the Cephalon case.
Q. Yeah. I mean, we're talking about all the matters that he's looking at in the course of investigating Cephalon.

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Do you think the seal covers everything regarding his investigation and all information he's learned from being involved in those matters?
A. That's a broad question. I would say that any matters that he got through the course of his investigation that would be subject to the seal he couldn't tell me.
Now, if he got matters independent of that, I don't know. I don't have an opinion whether he could share it with me or not. He never has in the past. I never asked for it. I don't say, you got a case going on? Have you got something in the public domain? Can you tell us? Although you can't tell us what the name of the case is and what it's about.
Q. Now, in reaching your opinion that any matters that he got through the course of his investigation that would be subject to the seal were covered by the seal, did you examine the False Claims Act to see what the sealing provisions of that act were?
A. No, sir.
Q. Did you look at the court order concerning the seal of the qui tam complaints in the Cephalon action?

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A. When the matter was under seal?
Q. Yes.
A. No, sir. I didn't even know it was there. I didn't know what Cephalon was.
Q. Did you -- did you do any legal research?
A. I didn't know the case was there. Like you asked me to do research on something I didn't know it even existed.
Q. Well, you're talking about generally. Let's say generally your practices with respect to Mr. Gambrell, okay?
Have you done any -- did you do any research during that time period -- and we're talking about 2006 through 2008 -- to make a determination whether or not what the -- what the reach of a seal provision entered pursuant to the False Claims Act was?
A. No, sir. My experience would be that when matters are confidential, they're not to be shared.
And I remember a case, AWP case that somebody said, well, that matter may be under seal. And, of course, you're talking about federal courts and matters being sealed, I don't ask questions.

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Q. Information that Cephalon provided during the course of that investigation was not under seal; correct?
A. I have no opinion on that.
Q. No opinion one way or another?
A. No, sir.
Q. Okay. Well, let's -- let's talk about it a little bit more broadly.
Information that the -- that a company provides in connection with a qui tam action that's being investigated by the Attorney General's Office and NAMFCU is not subject to the seal provisions of the qui tam actions; correct?
A. I don't -- I don't know.
Q. Okay.
A. My testimony is that this matter was under seal, and it came out from under seal, it was public information. We could look at it at that time. I did make a determination if we'd advise the Chief Deputy or the Attorney General to proceed on behalf of the EIP or other parts of the state.
Q. When you received this memo from Mr. Gambrell in October of 2008, did either you or Mr. Smith do anything to investigate whether or not there were other allegations against Cephalon

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concerning the same alleged off-label marketing practices that were out in the public domain?
A. I don't recall.
Q. Okay. Did you ask Mr. Smith to conduct any such research?
A. I don't recall if -- if I gave the matter to him, I would think he would review it and get back with me at a later point in time on what his review disclosed.
Q. Well, did he ever get back to you at a later point in time concerning any review regarding Cephalon?
A. Yes.
Q. When?
A. Before we contacted you and probably a couple times in between.
Q. In between what?
A. In between coming out in '08 and us contacting Cephalon in late '10 or early '11. I'd have to -- I might be wrong on those dates.
Q. Um-hum.
A. My -- I don't independently recall this, but I would say, okay, he says I need to talk to you about Cephalon and maybe three or four other matters. Okay. Well, you got your information.

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What is the statute of limitations issue? Because we are constantly aware of that with tolling agreements and whatever else it might be.
And with what I had else going on, other cases, you got '09, you got Lilly. That was being tried in '09. So there was really a ramp-up for trial. They filed a motion to disqualify counsel in the summer of '09.
And so from March to -- to -- until ultimately it was dismissed and agreed on a settlement of 10-1-09, because I remember that, the date, I think, right. It would be, okay, which ones do we have to handle right now? And if Cephalon is -- or Acme pharmaceutical is not something we need to move on, I got to focus on the Lilly case because a lot going on with that, and I got to keep my Chief Deputy and Attorney General apprised.
Q. Okay. So then you asked Mr. Smith to look into the statute of limitations issue; is that right?
A. No, sir.
Q. Okay. Well, you said -- one of the things you said in response to my last question is what is the statute of limitations issue, because

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we are constantly aware of that with tolling grievances -- tolling agreements, I think, and whatever else it might be.
A. Okay.
Q. So what did you mean by that?
A. Okay. What I meant by that would be if he asked me about the Cephalon case, I would say, okay, what's that case about? And he'd show it to me. I'd say, well, it came out from under seal in October. We can go until October of '11.
And he might have three or four other matters that we had to address prior to that. So while he would be ready to go with this, we might have to handle matters that we had six months left on the statute of limitations.
Q. Um-hum.
A. Although in this case, disgorgement, we have a thought that it's actually 10 years, but -- and it's also an equitable claim. So we're developing those as we go. But the hard and fast three years would be 2011, in October.
Q. Okay. And you were calculating three years from the date the seal was lifted over the qui tam complaints?
A. Yes, sir.

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Q. Okay. And did you do any research to determine whether or not that was the correct triggering point when the seal was lifted?
A. I don't recall any research. That was my understanding.
Q. And what was your understanding based on?
A. My understanding was based upon my experience as a lawyer for over 30 years, if a matter is under seal, it's not public information. So, therefore, when it comes out from under seal, it's general public information and you can do what you want to with it.
Q. Even when the fact that the matters exist is part of the public domain?
A. Well, I guess to answer --
MR. JOWERS: Object to the form.
THE WITNESS: To answer your question would be we -- and I think this has been discussed on some of the earlier depositions.
That we have firms coming in to pitch cases to us that are, in fact, under seal, but there's enough information, maybe a products liability case or something else that they come in and say, okay, this is a claim that you need to

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look at.
BY MR. KATSIFF:
Q. Um-hum.
A. And we actually may proceed in one of those cases, and then it comes out that it was under seal. So there could be information out there and some of these private law firms presented to us, independent of what's under seal.
Now, your question in this one, I don't have any information outside of what I got here as to the first time that the Cephalon matter came to my attention.
Q. And when you say outside of what you got here, you're referring to Exhibit 7?
A. Yes, sir.
Q. Okay.
A. There was an e-mail that came out in '07 that had Cephalon, and it had something from a guy from Connecticut on it. But Cephalon didn't ring a bell to me, and -- and it doesn't say anything about South Carolina.
And also, that could have been a side issue that came up in a health fraud call. So I would have sent that to Jay if he was not already on the list to say, okay, here's some information.

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Put this away.
Q. And that e-mail that you're referring to, we'll talk about it soon, but is that -- the recollection that you just counted, is that your recollection from the time, or is that speculation based upon looking at the e-mail now?
A. Well, I -- I would look at it now and determine, No. 1, why I sent it to Jay, and, No. 2, what's in the e-mail. And I don't independently review it -- remember reviewing it at the time. That was, I'm thinking -- was that November of '07?
It's a sad situation. I pigeonhole everything on the James Brown case. But the judge sent out a note that day saying that the trustee should resign, and that was a Thursday. It was a Friday, and I think it was a -- Thursday was the -- we were in Barnwell, and we met at Barnwell the following Tuesday, so -- but I would have looked at it, saw Cephalon, didn't know what Cephalon was, didn't ring any bells, sent it to Jay and...
Q. Just give me one second while we get a document.
A. Yes, sir.
Q. Thank you, sir.
(JONES EXH. 8, E-Mail Correspondence to

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Mr. Jones, et al. from Mr. Saadi dated 11-15-07, Bates AG893-894, marked for identification.)
BY MR. KATSIFF:
Q. I'll give you a moment to look at what's been marked by the court reporter as Exhibit 8.
A. I have it in front of me.
Q. Okay. So let's start with the second page.
A. Okay.
Q. Which is, chronologically, the first e-mail.
A. Okay.
Q. Okay. And this is an e-mail from Mr. Saadi?
A. Yes, sir.
Q. Am I pronouncing that right?
A. I don't know. I may have -- I don't know. I don't know how you pronounce his name.
Q. Okay. And this is an e-mail dated November 15th, 2007. Do you see that, sir?
A. Yes, sir. Yes, sir.
Q. Okay. Is this the e-mail that you were referring to a few moments ago?
A. Yes, sir.

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Q. Okay. So this is an e-mail from Mr. Saadi to you; is that right?
A. Yes, sir.
Q. Okay. Among other people.
A. Yes, sir.
Q. Okay. And do you recognize any of the other names on that e-mail?
A. Yes, sir. I recognize some names of people that were in the AG's office in other states.
Q. Okay. Are those also -- those members of other states' AG's offices, were those also members of the Health Fraud Group?
A. I couldn't tell you. I just know Debbie Hagan, she's in consumer. Lianopoulos, he's with Oregon, I think, and he's in consumer. Julie Brill is now on the FTC. Jack Norris is a consumer. But I don't know a lot of these people.
Q. Okay.
A. Lipson I knew.
Q. Do you have a list anywhere of who's in the Health Fraud Group?
A. Not that I know of. I would -- I would just look at the e-mail chain on the -- on an agenda if I wanted to check. But see, you could

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get this and not be -- you could be -- some states had people that didn't have a consumer section that still would be on the Health Fraud Group for whatever reason because of the staffing.
Q. Okay. Let's -- you can keep that in front of you because we're going to look back at it.
A. Okay.
MR. KATSIFF: I want to mark this as Jones 9, please.
(JONES EXH. 9, Attorney General's Statement on Tentative $425 Million Cephalon Settlement dated 11-9-07, marked for identification.)
BY MR. KATSIFF:
Q. Okay. Jones 9 which the court reporter just placed in front of you is a press release from the Attorney General's Office of the state of Connecticut, is that right, sir?
A. Yes.
Q. Okay. This is a document that's been marked in prior depositions. So I know you've seen it before in connection with those depositions.
A. Yes, sir.
Q. When's the first time you recollect

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seeing this document?
A. When it was produced in this case.
Q. Okay. You didn't see it at the time it was issued?
A. No, sir.
Q. Okay. This is a November 9th, 2007 press release; is that right?
A. That's what it's dated, yes, sir.
Q. Okay. And this is an announcement of an agreement in principle that has resulted between NAMFCU, the United States government and Cephalon for $425 million?
A. Document speaks for itself.
Q. Well, is that your understanding of what this is?
A. I would just read the document, and it speaks for itself.
Q. Well, why don't you read the document, and let me know whether or not that's what your understanding is.
A. Okay. Let's see. We got -- it looks like a Cephalon settlement involving Medicaid programs.
Q. Okay. And it's a settlement for $425 million, is that right, sir?

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A. Yes, sir. That's what it says at the top.
Q. And this is the same settlement that Mr. Gambrell sent Mr. McIntosh a memo about to which you were copied in October of 2008; is that right?
A. Well, they both have the same figure and the same companies. I -- we -- the one that we have over here that is Exhibit No. 7 talks about South Carolina. Let me see if it's got 425 million on it.
I have no reason to quarrel with you that they probably aren't. They are the same, but I don't see 425 million on this one. There's Cephalon, and it involved drugs. And this is a Medicaid program, and this is a Medicaid program.
Q. Well, sir, from being involved in this case and reviewing documents, you know that Exhibit 7 concerns the settlement that was entered into by NAMFCU and the United States and Cephalon for $425 million; correct?
A. Yes, sir.
Q. Okay. And you also know that Jones 9, the press release from the Attorney General's Office in Connecticut, concerns the same settlement

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for $425 million; is that right?
A. Well, the one -- I'm not quarreling with you. I'm just saying it's Cephalon, it's a Medicaid settlement. I didn't know -- I've never seen this one before until this matter started. I got a copy of this one in October of '08.
Q. Okay. That's not my question. My question is a very simple one.
Is it your understanding that Jones 9 and Jones 7 relate to the same settlement?
A. I have -- I have no reason to quarrel with you about that. I would say they do refer to the same settlement.
Q. Okay. Now, so in this press release the Attorney General's Office of Connecticut says -- they announced the agreement -- the first paragraph I'm reading from.
This agreement in principle — the result of an unprecedented investigative partnership between Connecticut and the US Attorney's Office in Philadelphia — will return millions of dollars to the Medicaid program. If it becomes final, the Cephalon -- the Cephalon settlement by no means ends Connecticut's intensive ongoing investigation into the company's off-label

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marketing.
Do you see that, sir?
A. Yes, sir.
Q. Okay. So is it your understanding that the state of Connecticut is saying we've settled a piece of the allegations against Cephalon, but the state still has other allegations that have not been settled?
A. I --
MR. JOWERS: Object to form.
THE WITNESS: Once again, I'd refer to the document. It says what it says. I have never seen the document before outside of when this case was brought. I mean, this case was -- discovery was brought. So it -- it says what it says. And you read it, so...
BY MR. KATSIFF:
Q. What's your understanding of that paragraph?
A. AG -- the Medicaid program at -- let's see here. My understanding is that this agreement is, in principle, the result of unprecedented investigative partnership between Connecticut and the US Attorney's Office in Philadelphia, will return millions of dollars to the Medicaid program.

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If it becomes final, the Cephalon settlement no way ends Connecticut's intensive ongoing investigation into the company's off-label marketing.
So they're saying that Connecticut is continuing their investigation and the Medicaid program has got millions -- is going to get millions of dollars.
Q. Okay. So again, this was November 9th, 2007. Then if you turn to -- if you turn to Jones 8 --
A. Yes, sir.
Q. -- Mr. Saadi writes to you on November 15th, 2007, just a little over a week after the press release is issued; correct?
A. Yes, sir.
Q. Okay. And he writes:
As you may know, Connecticut has been engaged in an investigation of Cephalon for the -- well, before we get into that, do you have any recollection of receiving this e-mail at the time?
A. No, sir.
Q. Okay. Okay. Now, he writes:
As you may know, Connecticut has been engaged in an investigation of Cephalon for the better part of three years. Over the past two days

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several states have contacted me regarding this case and, as such, I wanted to broadly inform the Health Fraud Group to please contact Mike Cole in Connecticut, okay, with any questions regarding this matter, and he gives his e-mail address.
A. Yes, sir.
Q. Okay. So was it your understanding at the time that states were contacting Mr. Saadi because they had seen the press release by the state of Connecticut?
A. No, sir. I had no understanding. I got this e-mail, and it says Cephalon, which I'm not sure what Cephalon is at the time because I didn't see Jones Exhibit No. 9. I wasn't aware of it. And it doesn't say anything about South Carolina. So that don't tell me anything. This just tells me that Cephalon and the call, Mike Cole.
Q. Now, it says that Mike and I will be in touch with each of you as soon -- with you soon regarding further information. Do you see that?
A. It says that.
Q. Okay. Do you have a recollection of either -- and he's referring to Mike Cole; is that right?

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A. Mike Cole, yes, sir.
Q. Okay. Do you know Mike Cole?
A. Yes, sir.
Q. Who is Mike Cole?
A. He works in the Connecticut AG's office, I believe.
Q. What's his responsibility, as far as you know, in the Connecticut AG's office?
A. I've seen -- I've seen him at meetings before. So I would think he's -- I'm not sure if it's antitrust or consumer protection. It could have been some pharmaceutical meeting we met. Nice guy.
Q. Okay. You've worked with him in the past?
A. I've talked to him.
Q. Okay.
A. He might have been involved in one of these PBM multistates we have.
Q. Okay.
A. I'm familiar with him.
Q. And Saadi you haven't worked with in the past?
A. I remember the name, but I can't -- can't remember his face.

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Q. Okay. Do you have any recollection of what his responsibilities were at the time --
A. No, sir.
Q. -- in the Connecticut office?
A. No, sir.
Q. Okay.
A. I'm hesitant because this Valerie Hampton -- he could be a Valerie Hampton as far as I know. I don't -- a secretary or something. I don't think he is, but I can't recall him.
But Mike Cole I know is -- works for the -- well, as I recall works for the Connecticut AG's office, and that's what it says on his e-mail.
Q. Okay. Now, you don't have a recollection of either Mr. Cole or Mr. Saadi contacting you?
A. No, sir. The only -- the only time -- on the Cephalon matter about Mike Cole and me was after you guys, Cephalon, brought up the -- the fact that Connecticut knew about him. I called Mike Cole and left a message. Never called me back.
Q. Okay.
A. That was after you brought up the fact that Connecticut knew.

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Q. Okay. So you've never talked to Mr. Cole about Cephalon; is that right?
A. No, sir. He has not returned the call.
Q. Okay. Have you talked to anyone in the state -- in the attorney -- state Attorney General's Office of Connecticut about Cephalon?
A. What time period?
Q. Any time period.
A. No, sir, not that I recall.
Q. Okay. Now, you said a few moments ago that this e-mail doesn't tell you anything; is that right? Is that what you said?
A. It doesn't tell me what Cephalon is, it didn't trigger anything as far as information. I don't know if Cephalon is a company, a drug. It could have been related to other matters that people on the health fraud call had.
It didn't trigger anything, and it doesn't say anything about South Carolina. So it wouldn't have registered. I just sent it on to Jay.
Q. Okay. Well, I mean, this e-mail does say that -- you know, at least Mr. Saadi is saying he wanted -- I wanted to broadly inform the Health Fraud Group.

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A. Right.
Q. Right?
A. Right.
Q. So you'll agree with me that Mr. Saadi at least thinks that Cephalon's investigation has some interest generally to the Health Fraud Group; right?
A. That's what it says. I want broadly -- to broadly inform the Health Fraud Group to please contact. But see, you could have the Health Fraud Group on a PBM, and they did a lot of PBM work. Because back in this time period there was a lot of issues with PBMs and pricing and so forth. I'm telling you, looking at that I did not know what Cephalon was and -- and --
Q. Well, PBM is still -- allegations involving PBM, those are unfair trade practice allegations; is that right?
A. Yes, sir.
Q. Okay. So this could have been Cephalon had some involvement with PBM, and they were telling people about that; is that what you're saying?
A. It could have been a lot of things.
Q. Okay. But it's -- they're

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communicating to you, to the Health Fraud Group; right?
A. They're communicating to the people listed on the e-mail about Cephalon, and they have some information on Cephalon.
Q. Okay. And Mr. Saadi says he wants to broadly share the information that he has to the Health Fraud Group; is that right?
A. That's what it says.
MR. JOWERS: Object to the form.
BY MR. KATSIFF:
Q. And the things that are important to the Health Fraud Group are -- one of the things important to the Health Fraud Group are allegations concerning unfair trade practices; is that right?
A. Yes, sir, but --
Q. Relating to healthcare providers, pharmaceutical companies or other marketing relating to the healthcare industry; is that right?
A. Well, a lot of -- I say a lot. It's not unusual to have health fraud issues with states that only occur in that state.
Q. Well --
A. So this does not tell me about South Carolina.

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Q. Okay. If -- if it -- now, Mr. Saadi obviously -- I mean, he's share -- he wants to share this with everyone; correct?
MR. JOWERS: Object to the form.
THE WITNESS: Let me see here again. Well, that's what it says. But if I was sending that e-mail out, it could have been I said something on a health fraud call I got a seal issue. When I went to a meeting recently I said, I got a seal issue. This is what I think the seal says and asked people. Or it could be a statute of limitations issue. It could be disgorgement on --
I mean, a lot of issues could come up. We're not necessarily talking about a company and a drug. It could be a defense, it could be time periods, it could be evidence, it could be AG's powers, could be civil penalties.
If I got it today, I would -- I would think -- I don't know what this is, but it could involve any of the issues.
Now, it does come on a Health Fraud Group, apparently part of an e-mail chain, but it could be a lot of issues. It could be legal issues as opposed to a pharmaceutical issue.
BY MR. KATSIFF:

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Q. Well, he says in the e-mail:
Over the past two days several states have contacted me regarding this case.
A. Yes, sir.
Q. So, you know, he's indicating that other states are interested in Connecticut's investigation; is that right?
A. Well, it says that a couple of states have contacted him. That's what it says.
Q. Okay. So other states are interested in Cephalon -- in Connecticut's investigation of Cephalon; correct?
A. That's what it says.
Q. Okay. And because other states are interested, he goes on to say that he wants to broadly inform the Health Fraud Group; correct?
A. I want to broadly inform the Health Fraud Group to please contact Assistant AG Mike Cole in Connecticut. That's what Saadi or Saadi is saying.
Q. And it was your understanding, was it not, when you read this that Mr. Saadi is trying to communicate that some states have contacted them because they're interested in Connecticut's investigation regarding Cephalon, and he wants to

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broadly tell everyone about the investigation and the Health Fraud Group because he thinks it will have general interest to everybody; correct?
MR. JOWERS: Object to the form.
THE WITNESS: As I said, I don't recall receiving the e-mail. I looked at the e-mail in retrospect. It doesn't tell me anything. That's probably why I don't recall getting it.
It says Cephalon, it says broadly inform the Health Fraud Group. That doesn't tell me anything. So that's why I probably don't recall it, because it doesn't tell me anything.
It doesn't say Cephalon pharmaceuticals, deceptive trade practice or it doesn't say Cephalon and statute of limitations or anything that would trigger anything. It just says Cephalon. And so it didn't trigger anything.
Looking at it now, without knowing Cephalon, if I didn't know Cephalon, I still wouldn't know the impact in South Carolina. Connecticut does a lot of stuff that involves Connecticut alone.
BY MR. KATSIFF:
Q. Well, you said you don't remember receiving the e-mail; right?

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A. Yes, sir.
Q. Okay. So how do you know whether or not it triggered anything in your mind at the time? You don't know; correct?
A. You're asking me -- if you're -- well, correct. Looking at it now, it doesn't tell me anything. Looking at it then is the reason that maybe -- I'm just speculating. You don't want me to speculate of why I didn't do anything at the time.
Q. Well, you did do something; right? You forwarded it to --
A. Forwarded to Jay.
Q. To Mr. Smith; correct?
A. Yes, sir.
Q. Do you have a recollection of why you forwarded it to Mr. Smith?
A. I forward him everything.
Q. You forward him every single e-mail you get.
A. Probably would be a hundred percent accurate. If it's a case involving consumer protection/antitrust I forward it to him.
This was received on the Friday after the Thursday and I got to prepare for the following

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Tuesday in the Brown case. I would send it to him and say, okay, I got this from the Health Fraud Group call or Saadi.
Q. Did you expect him to do anything with it?
A. I can't speculate on what I expected him to do with it at the time.
Q. So you don't know whether or not you expected him to do anything with it.
A. No, sir, I don't.
Q. Now, wasn't Mr. Smith in charge of investigating potential consumer protection claims at this time?
A. What do you mean by investigate?
Q. In 2007 was Mr. Smith sort of your go-to guy to look into allegations concerning suspected unfair trade practice claims?
A. I can't recall specifically in '07 what he would be doing as a responsibility at that time. He is -- he and I worked together. He was the only person outside of my legal assistant that I had, my little group, so to speak, and we're working on a lot of things.
He's working on, as I mentioned, voting rights act, having election issues or whatever else

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he's working on. If I would ask him to do something, he would -- he would do it. But I don't know -- this doesn't tell me I asked him to do anything. I don't recall.
Q. Yeah. I mean, my question was: Was Mr. Smith in charge of researching potential violations of the South Carolina's unfair trade practices law in 2007?
A. He's not a lawyer. He doesn't do research.
Q. Well, he investigates facts; correct?
A. He would do things like get volumes from EIP, things along those lines. Talk with me about it, on the cases on what the next step would be.
Q. He would investigate facts, underlying facts of alleged unfair trade practices?
A. Typically, it would be a lawyer in our section.
Q. Okay.
A. We didn't have a lawyer in our section. But I would -- we didn't have a lawyer in our section at the time.
Q. Well, there was a lawyer. It was you; right?

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A. Yeah.
Q. Yeah. But you were the only lawyer in the section at the time.
A. Yes, sir.
Q. Okay. So if there was an investigation of facts underlying an alleged claim for a violation of South Carolina's unfair trade practices law, you were the one who would look into those issues?
A. Yes, sir.
Q. You wouldn't have Mr. Smith assist you in that?
A. Yes, sir. If I was looking into something, I would probably ask him to assist me.
Q. Okay. Did you send this to Mr. Smith to ask him to look into it?
A. No. I did make sure he got a copy of the Exhibit No. 7 so he could look at it. That's the October of '08.
Q. Well, Mr. Gambrell copied him on Exhibit 7, didn't he?
A. Right, but I made sure he got a copy of this.
Q. You didn't think Mr. Gambrell sending to him was sufficient enough?

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A. Probably so.
Q. Have you talked about this e-mail with Mr. Smith?
A. Yes. I asked him this morning what was his testimony at the deposition about it.
Q. Okay. Why did you ask him what his testimony was?
A. Because I didn't want to read the deposition.
Q. Okay. So what did he tell you about his testimony?
MR. JOWERS: Why don't we go ahead and stop there about discussions within the office about the issues involved in an ongoing case. Because I think that's work product and probably covered by attorney-client privilege too.
THE WITNESS: Okay.
MR. KATSIFF: Well, so you're -- and I don't want to -- you know, I mean, we can brief this out. No need to argue about it here, but my question is just -- you know, he's a fact witness. He had a discussion with another fact witness. So you're instructing him not to answer the question? We can read back the question.
MR. JOWERS: Go ahead and read it back.

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MR. KATSIFF: Well, why don't --
THE WITNESS: I'm going to answer it. He said -- he said he didn't remember. I think that's what he said in his deposition. Whatever it is. Whatever it says in the, you know...
MR. JOWERS: We don't have to brief that.
MR. KATSIFF: Okay.
BY MR. KATSIFF:
Q. Any other discussions with Mr. Smith about this e-mail?
A. No, sir.
Q. Okay. Any other discussions with Mr. Smith about his deposition?
A. No, sir, outside he was worn out.
Q. And why did you pick this e-mail in particular to discuss it with Mr. Smith?
A. Because it's been brought up in the other depositions, and I looked at it again, didn't recall it. I sent it to him, and I just asked him what -- what his response was, which I told you what he said.
Q. Do you think it was brought up in other depositions besides Mr. Smith's deposition?
A. Maybe only in his. I don't know. I

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can't remember now. I know it was brought up in his.
Q. Okay.
A. Because like it was to Mr. Smith from me. So I guess it would only be in his deposition.
Q. Do you recall whether or not there were any discussions during the healthcare fraud group NAAG call in November 2007 or December 2007 regarding Connecticut's investigation of Cephalon?
A. No, sir. I don't recall anything. I don't recall if I was on the call.
Q. Okay. Do you recall any discussion during any of those NAAG calls about any investigation into Cephalon?
A. No, sir.
Q. Did Mr. Cole or Mr. Saadi ever provide any other additional information regarding Connecticut's investigation into Cephalon after this November 15th, 2007 e-mail?
A. Not that I know of.
Q. Did you search your files to see whether or not --
A. Yes, sir. Yes, sir. I searched my e-mails, and I didn't have a hard file.
BY MR. KATSIFF:

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Q. Take one second to get these exhibits together. I'm just going to mark these all at once as separate exhibits.
A. Okay.
Q. And feel free to look at them when the court reporter gives them to you.
A. Okay. Because I'm already looking at it; right?
Q. Yeah.
(JONES EXH. 10, News Release by Cephalon dated 9-7-04, marked for identification.)
MR. JOWERS: Is that the same one from The Wall Street Journal article that we used in the other depositions just in a different format? I believe it is.
MR. KATSIFF: I think that that's -- let me tell you, because I think that this is the one we've used in prior.
MR. JOWERS: This is the one that we used in prior. It looks the same. Is the text the same?
MR. KATSIFF: No. This one is earlier. This is November 3rd, '06, and this is November 21st, '06.
MR. JOWERS: Okay.

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MR. KATSIFF: I'm sorry. You've got me all confused.
MR. JOWERS: That's 13.
MR. KATSIFF: That's 13. This is 14.
MR. JOWERS: Do you mind if we go off the record while he reviews these so I can run to the restroom?
MR. KATSIFF: Yeah. Sure.
THE VIDEOGRAPHER: We're going off the record at 11:48.
(JONES EXH. 11, Company News; Cephalon Receives Subpoena Over Marketing Practice from The New York Times dated September 2004, marked for identification.)
(JONES EXH. 12, United States Securities and Exchange Commission Form 10-Q for the Quarterly Period Ended 9-30-04, marked for identification.)
(JONES EXH. 13, Narcotic Lollipop Becomes Big Seller Despite FDA Curbs from The Wall Street Journal, marked for identification.)
(JONES EXH. 14, Cephalon Used Improper Tactics to Sell Drug, Probe Finds from The Wall Street Journal dated 11-21-06, marked for identification.)

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(JONES EXH. 15, Cephalon Used Improper Tactics to Sell Drug, Probe Finds from The Wall Street Journal dated 11-21-06, marked for identification.)
(JONES EXH. 16, Cephalon Announces Strong Third Quarter Financial Results, marked for identification.)
(JONES EXH. 17, Unites States Securities and Exchange Commission Form 10-Q for the Quarterly Period Ended 9-30-07, marked for identification.)
(JONES EXH. 18, E-Mail Correspondence to Mr. Gambrell, et al. from Ms. Bailey dated 11-15-07, Attaching TAF False Claim Act Update & Alert dated 11-14-07, Bates AG 671-73, marked for identification.)
(JONES EXH. 19, Cephalon CEO Looks Ahead after Settlement dated 11-20-07 from Business & Financial News, marked for identification.)
(A recess transpired from 11:48 until 12:01.)
THE VIDEOGRAPHER: We're going back on the record at 12:01.
BY MR. KATSIFF:
Q. Okay. Mr. Jones, during the break we

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marked a series of exhibits, Exhibits 10 through 19, which are a series of press reports and press releases and securities filings regarding the $425 million settlement that Cephalon entered into with the United States and NAMFCU and the various states.
Have -- my first question is: Have you seen any of these press releases or securities filings before this action by the state of South Carolina against Cephalon was filed?
A. No, sir.
Q. Okay. Now, could you turn to Exhibit 18, please, for a second, sir?
A. Yes, sir.
Q. Okay. Now, this is a -- this is an e-mail. The top of it, at least, is an e-mail from Ms. Bailey to, among others, Mr. Gambrell. Do you see that?
A. Yes, sir.
Q. Okay. Have you seen this e-mail before, sir?
A. Not -- not until Gambrell's deposition.
Q. Okay. Are you familiar with the TAF bulletin?
A. No, sir.

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Q. That's not something that you follow?
A. No, sir.
Q. Okay. Did the seal order prevent Mr. Gambrell from forwarding this e-mail to you?
A. I don't know. That's speculation. I have no answer to that question.
Q. You have no opinion one way or another?
A. No opinion one way or the other. You can ask Mr. Gambrell.
Q. Now, you'll agree with me, would you not, sir, that Mr. Gambrell could have told you about -- if he was aware of any of these numerous public filings regarding the allegations against Cephalon by the United States and NAMFCU, he could have told you about them or forwarded these to you; correct?
MR. JOWERS: Object to the form.
MR. KATSIFF: What's your objection?
MR. JOWERS: What do you mean by could have? As in did it possibly happen, or did he have the legal ability to?
MR. KATSIFF: My question is did he have the legal ability to.
MR. JOWERS: Okay.
MR. KATSIFF: And does that clarify the

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objection?
MR. JOWERS: Um-hum.
THE WITNESS: I don't know how to answer that question. I would say that Mr. Gambrell could forward me anything he wanted to that was in the public domain.
I don't know -- with relation to his responsibilities under the seal, I couldn't tell you what Mr. Gambrell was restricted or not restricted to do.
BY MR. KATSIFF:
Q. Okay. So let's just break that down, though. Is it your testimony that Mr. Gambrell could have forwarded anything to you that was in the public domain?
A. Mr. Gambrell, if he wanted to send me something in the public domain, I would say he has -- he could.
Q. Now, if you had reviewed any of these exhibits, which -- well, first of all: Do you have any reason to doubt that any of these exhibits were in the public domain at the time that they were issued?
A. I couldn't say one way or the other.
Q. Okay.

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A. They are what they are.
Q. Okay. Well, I mean, let's just go through them. Exhibit 10, this is a Cephalon press release; right?
A. Yes, sir.
Q. That was in the public domain; right?
A. It says news release. All I can tell you -- I don't know what you say public domain is. Did they send it out? I don't know. It says -- I'm not being difficult with you. It just says news release, Cephalon.
Q. What do you understand something to -- you used the term public domain, not me.
A. Okay.
Q. So what did you mean by that term?
A. Something that would be -- say on the Internet.
Q. Um-hum.
A. I would say this would probably be on the Internet.
Q. Well, and, in fact, the line at the bottom indicates that somebody printed it from the Internet; is that right?
A. Right, right, right.
Q. Okay. So something's in the public

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domain if it's on the Internet; correct?
A. I wouldn't quarrel with you. I would agree.
Q. Is something also in the public domain if it's in a newspaper?
A. I would say so, yes, sir.
Q. Okay. Is something also in the public domain if it's filed as a public record with the United States Securities and Exchange Commission?
A. I couldn't tell you that.
Q. Why?
A. Because I don't know the answer. I never have taken the occasion to go to the Securities and Exchange Commission. I don't know if this document is confidential or not. Or was.
Q. Okay. Well, are you familiar with what a form 10-Q is, sir?
A. I've heard it before.
Q. What's your understanding of what a Form 10-Q is?
A. Some kind of reporting of a potential liability, I guess.
Q. Well, isn't, sir, a Form 10-Q a quarterly report that's required, pursuant to the Securities Exchange Act of 1934, to be filed in the

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public domain with the Securities and Exchange Commission by public companies?
A. Couldn't tell you that. Don't know.
Q. You don't know. Do you investigate in any securities?
A. No.
Q. Okay.
A. No, sir.
Q. Okay. So we've established 10 was in the public domain.
11, this is an article from The New York Times. That's clearly in the public domain; correct?
A. New York Times. I would -- I would say it's in the public domain.
Q. Okay. 12, which is the foreign 10-Q filing by Cephalon, you're not sure about. Is that your testimony?
A. Not sure about. Sir?
Q. Is that your testimony, you're not sure about it?
A. Yes, sir. I wouldn't know about that.
Q. Okay. 13 is another newspaper article. This one's from The Wall Street Journal.
A. Um-hum.

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Q. Is The Wall Street Journal public domain?
A. Yes, sir.
Q. Okay. Do you read The Wall Street Journal, sir?
A. Not very often at all. Unless I go to Washington. I get a free copy, I'll look at that.
Q. But you do read it sometimes?
A. Very infrequently.
Q. Okay.
A. It would be very infrequent.
Q. Okay. So that's in the public domain.
A. Um-hum.
Q. The next exhibit, which is also a Wall Street Journal article, that's in the public domain; right?
A. Um-hum. That would be No. 14? I got two 14s here. I got a 14 and a 15.
Q. Yeah. I'm sorry. Okay. Right. And they're both Wall Street Journal articles.
A. Okay.
Q. And they're both in the public domain?
A. My question is why we got two of the same.
Q. I think they're two of the same. I

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think you're right. I think that they are two -- the same article.
A. Yeah, it's in the public domain.
Q. Yeah. November 21st, 2006.
A. Yeah.
Q. Okay. Okay. Now, the next is a press release by Cephalon.
A. Yes, sir.
Q. Is that -- that's also in the public domain; right?
A. Looks like it is, yes, sir.
Q. Okay. Then we've got another -- we've got an excerpt, I think, from another Form 10-Q filing.
A. Yes, sir.
Q. And you're -- and that's Exhibit 17.
A. Yes, sir.
Q. And you're not sure about that one?
A. I'm not sure about that. I couldn't tell you. It looks like it should be, but I'm not sure.
Q. Okay. The TAF False Claims Act update, is that in the public domain?
A. It looks like it's been on the Internet. That's all I can tell you.

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Q. Okay. So you don't know one way or the other?
A. Don't know one way or the other.
Q. And finally, 19 we've got a Reuters article. Are you familiar with Reuters?
A. Yes, sir. That's the public domain.
Q. Okay. So any of these exhibits that we've discussed that are in the public domain Mr. Gambrell could have told you about what was disclosed in those exhibits; correct?
A. If it's in the public domain, Mr. Gambrell could tell me. Anybody could tell me.
My thought -- only thought would be that if the matter's under seal and somebody breached the seal and talked and he saw it, he'd probably be very hesitant on telling me.
So, I mean, if I had a matter under seal and the information got out, I wasn't going to share it with somebody else when I was wondering how in the world it would get out from under seal because I can't talk about it.
But to answer your question, if a -- if you want to send me something, or Mr. Gambrell or Mr. Jowers, something that was public domain, you could.

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Q. And the Attorney General's Office is free -- the South Carolina Attorney General's Office is free, under its broad powers granted by the Unfair Trade Practices Act in South Carolina, to investigate any allegations that they see regarding matters that are in the public domain; isn't that right?
A. Yes, sir, we have authority to investigate an unfair trade.
Q. Okay. And, you know, had you seen any one of these exhibits -- and by these exhibits I'm referring to Exhibits 10 through 19 -- at the time, you could have issued a subpoena or issued a letter requesting documentation pursuant to the South Carolina Attorney General's powers to investigate -- to Cephalon to provide documents and ask about its marketing practices; right?
A. You said could rather than would; right?
Q. Yes.
A. If we wanted to issue under the broad powers of the Attorney General any type of CID, we could during this time period.
Q. Now you were making a distinction between could and would. Why were you making that

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distinction?
A. Because you said could, and I wanted to make sure that you said could than would. Didn't make any -- would have been speculation. I have no idea what we would have done at the time.
Q. Okay. And had you been aware of conduct by Cephalon prior to 2008 that you thought was violative of South Carolina's Unfair Trade Practices Act, there would have been nothing legally preventing this office from filing a complaint against Cephalon; isn't that correct?
A. You're talking about independent of the seal information or just in the public domain?
Q. Yeah, let's start with the public domain.
A. If we got information in the public domain, we could proceed. We've had cases in which we have sued and later come to find out that there was a matter under seal we didn't know about.
Q. What are those cases?
A. Antipsychotic cases. It would be the -- I'm not sure when Lilly came out and AstraZeneca came out. But those matters, I think, came out after we filed.
Q. Well, you -- the Attorney General's

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Office filed -- filed a complaint against AstraZeneca involving the drug Seroquel; is that right?
A. Yes, sir.
Q. Okay. And how did the office come to know of the alleged unlawful conduct alleged in that case?
A. As I recall, we had some outside counsel come in and talk to us about it.
Q. Okay. Did the office do any other kind of investigation?
A. As a matter of course we would have, but I don't remember.
Q. Did outside counsel tell you that there was a qui tam investigation underway at the time?
A. I don't recall. If there's a matter under seal, they shouldn't be telling us. I don't recall them telling us. No one talks about sealed matters.
Q. They don't?
A. No, not matters under seal. They don't talk about the matters.
Q. Well, let's look at Exhibit 11 for a second. This is a New York Times article; right?
A. Um-hum.

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Q. Okay. And in the article it says:
The drug maker Cephalon said yesterday that it had received a subpoena from the United States Attorney's Office in Philadelphia over its marketing practices.
A. Um-hum.
Q. Do you see that? Do you see that, sir?
A. Where are you reading from?
Q. First sentence.
A. Okay. I got it.
Q. Yep.
A. Okay.
Q. Okay. So there Cephalon's disclosing that it's received a subpoena from the US Attorney's Office; right?
A. Yes, sir.
Q. Okay. And that subpoena involved qui tam cases that were under seal; is that right?
A. I don't know. The fact that somebody else might have breached the seal doesn't make -- doesn't make me willing to accept the information. I'm cautious of -- cautious of matters that are under seal.
But I don't know what -- and what authority that Cephalon had to make this statement.

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I don't know. The fact they made a statement, they did it.
Q. Okay. So let's turn to Exhibit 13 --
A. Okay.
Q. -- which is a Wall Street Journal article.
A. Yes, sir.
Q. Okay. And if you turn to the second page of the exhibit --
A. Okay. I'm with you.
Q. -- the US Attorney's Office in Philadelphia is investigating Cephalon's marketing practices in connection with Actiq.
A. Yes, sir.
Q. And two other of its products, the popular narcolepsy drug, Provigil, and the epilepsy medicine, Gabitril. No charges have been filed. Do you see that?
A. Yes, sir, I see that.
Q. Okay. So it's disclosed at this point in time in The Wall Street Journal that the US Attorney's Office is conducting an investigation of Cephalon into those three pharmaceutical products; right?
A. Yes, sir. That's in this article.

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Q. Okay. And Mr. Gambrell, who was also involved in that investigation, could have told you that that investigation was occurring, couldn't he?
A. See what the date of the article is. '06? I don't know how The Wall -- I don't know how The Wall Street Journal got this information, and I don't -- he -- I don't know if he would pass this along to us or not. If the matter's under seal, he might be worried that somebody breached the seal and he doesn't -- doesn't make -- that he could breach the seal.
Q. Well, Cephalon received a subpoena, correct, from the United States Attorney's Office?
A. In probably '07 sometime; right?
Q. Well, according to The New York Times article that we just -- that we just saw, they received a subpoena at least by the date of that article, which was 2004.
A. Okay, okay.
Q. Okay. And it's not a violation of the seal to disclose the fact that you've received a subpoena; correct?
A. I don't know.
Q. You've done nothing to investigate whether it's a violation or not?

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A. No, sir.
Q. Okay.
A. I just -- matters are under seal, like the -- the documents that you circulated to us yesterday with all the orders in the Cephalon case, it said seal on all of them, that I looked at them.
And to me, if a thing's under seal, I'm not going to go -- if it's on the fringe, I can get that information or if -- if I'm in -- if the state grand jury -- if I get on the elevator and somebody mentions something about somebody in the state grand jury, then to say, well, I heard it now, I can talk about it. I'm just very cautious about matters that are confidential and under seal.
Q. Okay. Yeah, but you don't know whether or not the fact that a company's received a subpoena in connection with the US Attorney's investigation into its alleged -- you know, alleged False Claims Act claims is -- is -- is protected by the seal, do you?
A. No, sir, I don't.
Q. Okay.
MR. KATSIFF: Why don't we go off the record.
MR. JOWERS: Yeah. Sure. Do you want

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to break for lunch?
MR. KATSIFF: Yeah.
THE VIDEOGRAPHER: This brings us to the end of Tape No. 2. We're going off the record at 12:21.
(A recess transpired from 12:21 until 1:20.)
THE VIDEOGRAPHER: This is a continuation of the videotaped deposition of C. Havird Jones, beginning of Tape No. 3. We're going back on the record at 1:20.
BY MR. KATSIFF:
Q. Okay. Good afternoon, Mr. Jones.
A. Good afternoon.
Q. Did you discuss your testimony at all during the break?
A. No, sir.
Q. Okay. Just -- I wanted to clarify something we talked about earlier today, which was the NAAG group, the NAAG healthcare fraud group.
A. Yes, sir.
Q. That -- that was a collaborative group; is that right?
A. Yes, sir.
Q. Okay. One of the purposes of that

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group is to -- is to share matters that various states are working on; is that right?
A. Yes, sir.
Q. One of the other purposes of that group is to coordinate joint prosecution of matters by the various states; is that right?
A. I wouldn't use prosecution. It would be a joint proceeding under their consumer protection laws.
Q. Okay. To coordinate lawsuits that are brought by various states' attorneys generals under the various state consumer protection laws; is that right?
A. Yes, that and along with legal issues. They can discuss legal issues. Like I mentioned statute of limitations, civil penalties, public interest, whatever else it might be that could be the experience -- somebody had an experience with in their state.
Q. Did you discuss any statute of limitations issues?
A. I'm sure you could.
Q. Did you?
A. I don't recall.
Q. Now, we talked about the case that the

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Attorney General's Office -- South Carolina Attorney General's Office filed against AstraZeneca involving Seroquel.
A. Yes, sir.
Q. Was there also a case that was filed against Janssen involving Risperdal?
A. Yes, sir.
Q. And was that case filed while there were qui tam cases under seal?
A. I don't recall.
Q. Okay. Do you know, sitting here today, whether or not?
A. No, sir.
Q. Okay.
A. I know some do and some don't. I can't remember which ones or which.
Q. How did South Carolina become aware of the allegations that Janssen had engaged in unfair marketing practices concerning Risperdal?
A. As I recall, the anti -- outside counsel came in and made a pitch for all -- all two or three, three of them total. So it was -- contract was signed. And I'm not sure if the contract said antipsychotic cases or it had each individual case with three -- probably were three

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different agreements.
Q. Okay. So was that -- that was also -- that presentation by outside counsel also involved the case against Lilly?
A. Same counsel. I can't tell you when the -- if they all were talked about initially. I know Lilly was filed first, AstraZeneca second, Janssen third, as I recall.
Q. And the Attorney General's Office became aware of all three of those actions, AstraZeneca, Janssen and Lilly, through discussions with outside counsel?
A. Yes, sir.
Q. Do you recollect what outside counsel told you in those cases?
A. No, sir.
Q. Okay.
A. It would be what would be in the complaint, basically.
Q. Okay. Was there a presentation made?
A. Yes, sir, in person.
Q. Okay. Did you attend?
A. I'm sure I did.
Q. Any kind of PowerPoint presentation?
A. Don't think so. Those are not usual,

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but not unusual. I don't recall if there was a PowerPoint or not.
Q. And do you recollect whether or not there was any discussion in those meetings about actions being pursued against those companies, Janssen, Lilly and AstraZeneca, by the federal government?
A. No, sir, I don't recall.
Q. Okay.
A. I do know that the Chief Deputy, John McIntosh, worked for US Attorney's Office during the time that Henry was there, and they were well aware of the matters of the seal. So that's all I could -- as far as any information, I don't know.
Q. You don't remember one way or another?
A. No, sir.
Q. Now, are you aware that there were other actions brought against Cephalon by various private litigants alleging unfair --
MR. KATSIFF: Well, strike that.
BY MR. KATSIFF:
Q. Against other -- that there were various actions brought against Cephalon in the Eastern District of Pennsylvania by litigants alleging unfair trade practices in connection with

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the marketing of the three Cephalon drugs that are at issue?
A. I came aware of it -- aware of that when you produced it here at one of the depositions.
Q. Okay. You weren't aware of it before that point?
A. No, sir. No, sir.
Q. Okay. Did you do any investigation at any point to see if anyone else had brought claims against Cephalon?
A. What time period are you talking about?
Q. Well, any time period.
A. Before we brought an action against Cephalon, we had discussions with Cephalon which talked about some other actions that were brought in Connecticut or whatever.
But I don't know if we -- what -- I don't independently recall what resources of information we did -- when we started doing our investigation to file a claim, we looked at.
Q. Well, did the Attorney General's Office conduct any kind of investigation during any period of time to determine whether or not there had been actions brought against Cephalon involving unfair

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marketing practices concerning any of the drugs at issue in this matter?
A. I would say when we just pulled it up for review in late '10 or early '11 that we probably searched around to find what we could find on it in addition to the qui tam order to apprise our front office.
Q. Did you find anything?
A. I don't -- I don't recall what we found outside of the qui tam, but there very well could have been some other stuff.
Q. Did you look at the qui tam complaints at that period in time?
A. I don't recall.
Q. Okay. And you say you pulled it up for review in 2010.
A. I think so. It was '08, and then we looked at in '10 to see what we could do to bring resolution and closure for South Carolina on it.
We reviewed it and presented it to the front office, and it was decided that it would be meritorious for us to contact Cephalon about a tolling agreement and possible resolution.
Q. When did General Wilson take over as Attorney General?

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A. Two years ago.
Q. Okay. So 2010 or 2011?
A. 2011. 1st of January.
Q. So it's your testimony you looked at it -- by "it," you looked at Cephalon -- prior to the time that General Wilson took over as Attorney General?
A. Yes, sir. Yes, sir.
Q. And why did you decide to look at it in 2010?
A. Well, it was coming up as one of the ones we need to work on. The statute of limitations of three years was coming up. And I'm not sure if we had more time or what, but it was -- it was there. It had been presented by Jay for us to look at as we meet and talk about cases.
And so we decided to go ahead and put some energy behind Cephalon to see if it was something meritorious for us and pass it along to the Attorney General and Chief Deputy.
Q. By -- who's the "us" you're referring to?
A. Jay and I and anybody else on the staff.
Q. Did anyone else participate in those

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discussions?
A. I think Geoff Chambers, he took the main role on drafting the complaint. And he put a lot of work into that. I'd review it, did some case law work on it, so -- and Jay was involved in kind putting it together.
Q. Now, you say it came up for review in 2010. Was there some sort of electronic or other kind of tickler that let you know that it came up for review?
A. No, sir. It would be Jay. He -- we had these cases, and we would look at them periodically to see what the best use of our resources and time. And this one was about two years old, so we thought that we needed to proceed to see if we need to move forward on the case or not.
Q. Okay. So Jay would look at stuff to decide what the best use of your resources and time were?
A. No. We discuss it. He'd have the cases there and we'd discuss the cases and we'd figure out -- plus talking to the front office, what -- what our energies would be best spent on.
Is it -- initially we were going to do

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this in-house. If we couldn't get it resolved with Cephalon, we were going -- we actually filed the complaint ourself, and we were going to proceed to try to resolve it in-house.
My thought was that if we could keep it with a -- Mr. Pappert, in-house counsel. With Cephalon the issue was the seal and the statute of limitations. We could probably resolve that. And if we passed that, it would probably be resolved otherwise. We wouldn't need an outside law firm.
Q. When in 2010 was this?
A. Late 2010, I believe.
Q. Okay. And when did you first contact Cephalon?
A. I don't remember.
Q. Okay. Was it 2011?
A. Don't remember.
Q. Okay.
A. That would be the three-day letter that went out sometime. I don't know when that would be. We called first before we sent anything.
Q. How did Jay know to look again at the Cephalon case?
A. We -- we have a list of potential cases, I would say, and he would look at them and

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say, okay, this is a matter that we need to talk about. For example, we have a matter that comes out from under seal and do we need to move on it now, later. It would be a priority list.
Q. So there are cases on that list where matters are under seal and you've decided not to move on them --
A. No, sir. No, sir.
Q. -- because you're waiting for them to come out from under seal?
A. No, sir. I said matters that have come out from under seal would be on the list, and we could review those. Those would be a list of things we need to do.
Q. Is this a written list?
A. Probably a written list. He's got a list of cases somewhere to look at.
Q. This is a list of potential cases, though.
A. Yes, sir.
Q. And Jay maintains this list? That's your testimony?
A. Yes, sir.
Q. And it's your testimony that Cephalon was on this list?

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A. Yes, sir.
Q. Did anyone look for this list when they were searching for documents?
A. Don't know. If it's Cephalon, we probably looked for it. It may have been an e-mail notice of sort, but it's typical that with -- you see the turnover we've had in our section.
And with my responsibilities being outside of consumer protection/antitrust, we'd have to say okay, who can we assign this to. And we've got to balance out the caseload. So it's current cases and cases that may come in.
MR. KATSIFF: Okay. I'd ask that you would produce the list, please, Mr. Jowers.
MR. JOWERS: Why are you asking here?
MR. KATSIFF: I'm just --
MR. JOWERS: Send a discovery request.
MR. KATSIFF: I just -- well, I think it's covered by the discovery request, but I'll ask --
MR. JOWERS: I'm not so sure about that. We'll take a look at it.
MR. KATSIFF: Okay.
BY MR. KATSIFF:
Q. Now, you say that Geoff Chambers

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drafted the initial complaint?
A. I'm not sure who first put the pen to paper. I was involved. I know Geoff wanted to do some work on it, did some edits. Jay might have done some work on it to be reviewed by Geoff and myself. That's my recollection.
Q. Do you have a recollection of when the drafting process started?
A. No, sir. It would be sometime '10. Well, we found out that -- well, after communications with Cephalon, they weren't amenable to a tolling agreement, and so we had no other choice but to get -- start getting prepared, and that's what we did.
Q. Okay. So did the commencing of the complaint start before or after Cephalon told you that they weren't interested in the tolling agreement?
A. Well, I would -- see, first we contacted people with permission from the AG or the Chief Deputy.
Q. Um-hum.
A. We would have figures together on our EIP claim. And so we'd approach Cephalon on possible resolution on it on a me too comparable.

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Q. Um-hum.
A. We wouldn't be drafting a complaint at that time, because a lot of companies -- a lot of companies -- and we're dealing with some even now, they want to do a tolling agreement and try to resolve it informally.
And so when Cephalon did not want to do a tolling agreement, it was either hire outside counsel or proceed on our own.
Q. Okay. But my question was -- so you listed a bunch of points in time there.
A. Um-hum.
Q. At what point in time did the drafting of the complaint start?
A. When we had to file an action as opposed to resolving informally. I don't know when it would be.
Q. So this would be after Cephalon said we're not interested in the tolling agreement?
A. We might have put pen to paper before then, but --
Q. You don't remember one way or another?
A. No, sir. But ultimately, we did file something.
Q. And how long before you contacted

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Cephalon did this matter come up on the tickler?
A. I don't recall.
Q. Okay.
MR. KATSIFF: I don't think that this was on our list, Jerry, so if you want to take a moment, you're welcome to.
MR. JOWERS: Yeah, we'll take a minute.
MR. KATSIFF: Okay.
THE VIDEOGRAPHER: We're going off the record at 1:37.
(A recess transpired from 1:37 until 1:38.)
(JONES EXH. 20, E-Mail Correspondence to Mr. Pappert, et al. from Mr. Jones dated 3-4-11, Attaching Code of Laws and Spreadsheet of Damages, marked for identification.)
THE VIDEOGRAPHER: We're going back on the record at 1:38.
BY MR. KATSIFF:
Q. Okay. You've been handed Exhibit 20, which is a -- excuse me -- a March 4th, 2011 e-mail from yourself to Mr. Pappert, Mr. Sitarchuk and a copy to Mr. Smith.
A. Right.
Q. Does this refresh your recollection as

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to the timing of when the complaint was drafted?
A. I think the complaint was filed in June. This is in March. I can't tell you from this if we had a complaint drafted at the time or not. Looking at it, I don't think it says that in here. But typically, we would not have a complaint drafted before we contacted somebody about discussions about trying to resolve a complaint.
Q. So it's possible the complaint was drafted after this point in time in March of 2011?
A. It's possible.
Q. Okay.
A. I can't recall one way or the other without some documentation you've got or I've got.
Q. Is it also possible that you didn't start looking into Cephalon until early 2011?
A. I'm recalling October, but I don't -- I don't have any independent -- now '11 -- '11 is when Alan's in the office.
Q. Um-hum.
A. It was brought up when Henry was in office.
Q. How do you know that?
A. Because I remember.
Q. You remember having a conversation with

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Henry about it?
A. No. Remember it being brought up. You got a transition of attorney generals, and a lot of times attorney generals don't want to go out and file claims that the next one would be saddled with.
They want to make sure, if it's proper with the statute of limitations, that the new AG review it, because he's going to be saddled with it for a while.
Q. Um-hum.
A. So if this is the period of time that Henry was running for governor, plus my recollection is if a matter's appropriate to be filed in 2011, that September date, that he would leave it to Alan to make sure that that's something Alan wanted to do. Because AGs, my experience, are very sensitive of filing lawsuits with outside counsel.
Q. Okay. So and -- so is it your testimony that you discussed this matter with Mr. McMaster?
A. Or Chief Deputy McIntosh.
Q. No. Let's just focus on -- did you discuss this matter -- before you contacted

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Cephalon did you discuss this matter with General Wilson?
A. Yes.
Q. Okay. Or Mr. McIntosh?
A. Yes.
Q. Okay. Is that who gave you approval --
MR. KATSIFF: Well, strike that.
BY MR. KATSIFF:
Q. Did you get approval during the time that Mr. Wilson was Attorney General to contact Cephalon?
A. My recollection, it came up for review the last part of Henry's term.
Q. Um-hum.
A. And there are a few things that we had to do during Henry's term that went ahead and got done. And this was a matter that -- as I recall, that the AG, the former AG wanted to make sure that it would be something that the new AG would want to do. So it came up in '10, we talked with General Wilson about it and got approval to proceed in '11 --
Q. Okay.
A. -- through -- and with Chief Deputy McIntosh, who was the Chief Deputy both times.

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Q. Okay. So when it came up in 2010, I understand that your testimony is that you and Mr. Smith had a discussion about it in 2010. Did you have a discussion with Mr. McIntosh about it in 2010?
A. Anything -- anytime we do something to move forward on a case we talk to the Chief Deputy or the Attorney General.
Q. Okay. That's not my question. Because I thought you had just testified a moment ago that you got authorization from Mr. Wilson to proceed in 2011; correct?
A. Yes, sir.
Q. Okay. So in 2010 did you talk to Mr. McIntosh about this matter?
A. I would say if I talked to Cephalon in -- my recollection is that I -- we talked to the Chief Deputy, we're working on the case and it was carried over to the next AG.
Q. Okay. So just -- again, just in terms of timing -- and look, you may not remember whether or not you talked to Mr. McIntosh in 2010 or 2011. But did you talk to him in 2010? Do you remember?
A. My recollection is that I talked to him in 2010.

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Q. Okay. And what did he say to you in -- what did he say to you during that discussion in 2010?
A. That would be privileged. It would be about strategy on any part of the case.
Q. Well, did you have authorization from him in 2010 to call Cephalon?
A. I had authorization from him at the time we called Cephalon to call Cephalon.
Q. That's not my question.
A. Well, I have to have a date.
Q. I asked you a date. I said did you have -- I'm sorry. I apologize. Maybe I didn't. Did you have authorization from him in 2010 -- by the "him" I mean Mr. McIntosh -- to contact Cephalon?
A. I don't recall.
Q. Did you have discussions directly with Mr. Wilson about potential claims against Cephalon?
A. The AG was involved in discussions about Cephalon.
Q. Okay. Mr. Wilson.
A. Attorney General Wilson.
Q. Okay. I'm sorry. General Wilson.
A. Yes, sir. I think he actually was also

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on a call with Mr. Pappert. That he actually called Mr. Pappert while I was -- I was away from the office at an antitrust meeting that time I made. That would be the same period as right in here. March, end of March.
Q. 2011.
A. Yes. That's what my recollection is.
Q. Okay. Now, we've talked about this a little bit, but there are matters in which the Attorney General hires outside counsel to assist the office.
A. Yes, sir.
Q. Okay. What kind of matters are those?
A. Matters that we can't handle internally and matters that would be in the best interests of the state to pursue with a lawsuit as opposed to trying to resolve them multistate.
Q. Now, there was a decision made at some point to hire outside counsel in this case; correct?
A. Yes, sir. Yes, sir.
Q. When was that decision made?
A. It was made right after you made an appearance, being Morgan Lewis, and right after Nexsen Pruet made an appearance.

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Q. And why was that?
A. As I mentioned earlier, the thought was that we would pursue that within our section. You might see on the signature block it was all hands on deck with everybody in our little group that signed on to the complaint. And that we could do it with talking with Cephalon through Mr. Pappert and see if we can get it resolved on the simple issue of statute of limitations or a seal.
And when it came back that Morgan Lewis and Nexsen Pruet were involved, which we were involved with them in AstraZeneca, it was not going to be an easy resolution. So it's best to use our resources on other matters and get outside counsel.
Q. Well, Morgan Lewis was involved from the very beginning of your discussions with Mr. Pappert, weren't they?
A. Correct. They were. I see Eric's name. He's copied here, yeah.
Q. Okay. And you had discussions with Eric Sitarchuk about this matter even without Mr. Pappert before the action was filed; right?
A. That's correct.
Q. Okay. So, you know, you knew that Morgan Lewis was involved when you filed the

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initial complaint; correct?
A. I knew I had talked to Eric on several occasions, but it was my thought at that time we could handle it in-office. But when it came out to be Morgan Lewis and then -- we deal with outside firms all the time that don't get involved in -- I say all the time. Wouldn't necessarily get involved in litigation. But when it came up with Nexsen Pruet and with Morgan Lewis, my recommendation is that we get outside counsel.
Q. And you say it was your recommendation. Who did you make that recommendation to?
A. Chief Deputy, and I don't think -- I don't know if I talked to Alan or not. I talked to the Chief Deputy.
Q. And so this recommendation -- was this recommendation made then after the complaint was filed?
A. Yes, sir.
Q. And who -- and you ultimately hired outside counsel; correct?
A. Yes, sir.
Q. Who did you hire?
A. We hired Ken Suggs' firm.
Q. Did you hire other outside counsel too?

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A. Todd Rutherford, I believe, also is an attorney of record in this case.
Q. What's his role in this case?
A. He's a counsel in this case.
Q. What has he done?
A. That's privileged.
Q. Has he reviewed any pleadings involved in the case?
MR. JOWERS: That's privileged.
THE WITNESS: That's privileged.
MR. KATSIFF: Whether or not he's reviewed pleadings?
MR. JOWERS: Um-hum.
MR. KATSIFF: Okay.
THE WITNESS: We've had several statutes conferences. I believe, as your guys would say, that he was there.
BY MR. KATSIFF:
Q. Why did you need two -- two law firms?
A. That's the AG's decision.
Q. Well, who made the decision?
A. AG made the decision.
Q. Okay. Who made the decision -- who suggested Mr. Rutherford for the case?
A. That would be Chief Deputy and the AG.

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I mean --
Q. They suggested that he be contacted for the case?
A. You're asking matters that are privileged with any discussions I might have had with my Chief Deputy and the Attorney General. Todd Rutherford is on the case. He's appeared at status conferences along with Ken Suggs' firm.
Q. I mean, I'm not thinking that I'm asking something that's privileged. I'm just asking who suggested that Mr. Rutherford be hired to assist the state in the case.
A. The AG makes the final decision on who to hire.
Q. Yeah.
A. So I would say the AG, but yet I -- but a lot of these cases, the decision is made who's hired, they choose the best person, expertise, getting along with, et cetera. So that's a decision that the AG makes.
Q. I understand that the AG makes the decision.
A. Um-hum.
Q. My question is: Who suggested him?
A. I don't know who suggested him.

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Q. Okay. Who suggested Mr. Suggs' firm?
A. I did.
Q. And why?
A. Ken Suggs is a good Clemson guy. He's also very well known in the legal circles of pharmaceuticals and products liability cases.
I had talked -- and I had talked with Jerry Jowers on another pharmaceutical matter when I realized he'd done some -- written some articles, and I liked his demeanor.
So I suggested that Ken Suggs' firm, that everybody knows is a good firm, to be hired, and although -- and ultimately, they were considered. We sent them information, and they reviewed it and they decided to sign a contract.
Q. Did you consider any other firms?
A. I didn't, but we had several firms that the AG's office -- the AG's office -- the AG makes the decision. He's ultimately the one charged and responsible for hiring, and he made the choice.
Q. Okay. Now, you entered into a fee agreement with both firms; right?
A. Yes, sir.
Q. Okay. And do you know whether or not Mr. Rutherford's firm and Mr. Suggs' firm have any

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agreement on how to split the attorneys' fees --
A. No, sir.
Q. -- if any are awarded in this case?
A. No, sir.
Q. Did you ever ask them --
A. No, sir.
Q. -- if they had such an agreement?
A. No, sir.
Q. Did you ask them how they intended to split attorneys' fees?
A. No, sir, I didn't.
(JONES EXH. 21, E-Mail Correspondence to Mr. Suggs from Mr. Smith dated 7-8-11, Attaching a Litigation Retention Agreement for Special Counsel, Appointed by the South Carolina Attorney General, marked for identification.)
BY MR. KATSIFF:
Q. If you could take a moment to look at that, sir.
A. Okay. I'm familiar with this.
Q. Okay. So this is a series of e-mails?
A. Yes, sir.
Q. And if we start on the second page of the document and go in chronological order of the e-mails, the first one is an e-mail from Mr. Smith

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to Mr. Suggs. You're copied on that?
A. Um-hum.
Q. And it starts out: Sonny asked that I forward some additional information -- well, actually I think it starts out at the bottom. It's hard to know who copied it. But it's dated July 7th, 2011, 6:13 PM. Do you see that? Hey Ken. Per our conversation a couple minutes ago, attached are our --
A. I see that part, yes.
Q. Yeah. Okay. So had you had any prior conversations with Mr. Suggs before this conversation, this e-mail that Jay Smith sent to him?
A. I don't recall if -- if the Chief Deputy had told me to go ahead and call Ken, that was fine, or if they had contacted Ken already.
But this is a little unusual because we are actually seeking outside counsel as opposed to outside counsel coming to us.
Q. Um-hum.
A. But it says per our conversation a couple minutes ago. That's with Jay, I guess. I know we contacted them, and they had to get information to review to see if they want to do the

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case. It was a --
Q. And they wanted to see if there was -- you said they had to get information to review if they wanted to do the case. They wanted to see if there was -- if it was economically viable for them to take on the case; is that right?
A. I would think meritorious, yes.
Q. Okay. Don't you also -- didn't they also want to look at whether or not there was sufficient damages available in the case to pay them attorneys' fees since this was a contingency case?
A. That would be -- I can't tell you what they did, but that would be a fair statement. Because I think we attached the penalties order in the Janssen case; is that right? Yes. That was a recent -- that would have been June the 3rd, 2011, and we contacted them on July -- this -- on one of the e-mails. So that was right in the same time period.
Q. Okay. So Mr. Smith is sending Mr. Suggs an overview of the US DOJ NAMFCU settlement. Did you tell him to send that?
A. Which e-mail are you referring to?
Q. The one we were still looking at, this

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e-mail dated 7-7-2011.
A. Right.
Q. Okay. So did you tell him to forward that link so he could see a quick overview of the US Department of Justice NAMFCU settlement with Cephalon?
A. Which part are you referring to now?
Q. I'm referring to --
A. The quick overview?
Q. Yeah.
A. Yes, sir. Yes, sir, that was in there. We would get as much information as we could to them to make a determination if they wanted to proceed in the case. So this information would be included.
Q. Why would you have included that information?
A. That came out in September of '08. I don't have that pulled up, but I would say that's probably -- I can't independently remember what was in that link.
Q. Okay.
A. But that would be after it came out from under seal.
Q. Well, my question, though, is, you

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know, what -- did you instruct Mr. Smith to send information regarding the US Department of Justice NAMFCU settlement to Mr. Suggs?

A. No, he would not have sent it unless he ran it by me.

Q. And why did you think that would be important for Mr. Suggs to review?

A. Just to support -- I think we also sent him our complaint, and a lot of information in our complaint was in that. Just information to make a decision on.

Mr. Suggs is quite capable of looking at information and making his own decision, but we gave him some information we reviewed. He has great expertise, in my mind, in this area.

So he could look at our stuff, this stuff and any other stuff he might find to make a determination if he thought it would be appropriate for his firm to proceed.

And the penalties order was sent because that was a recent order, but that, in effect, you got to have willful to have penalties, and that's not often the situation, so -- but that was included because that was fresh.

Q. Okay. That was included because

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Mr. Suggs was very interested in the anticipated damages in the case, wasn't it?

A. I'm sure, like this office was. I'm sure Mr. Suggs would be.

Q. Okay.

A. But once again, you got to go through a jury and a judge to get anything.

Q. Well, in fact, Mr. Suggs says that; right? I mean, if you look -- look at the top of that page, the e-mail dated July 8th, 2011 at 12:05 PM.

A. Okay.

Q. Do you see that one? Mr. Suggs is reacting to you sending the motion for complex designation. He says it looks fine to him. Can you guys get together sometime Monday afternoon? I'll have one partner on video conference and another by phone. We'll be able to make a decision that day.

Now, the decision he's referring to that he's going to make that day is whether or not to take the case; right?

A. I think that's what it says.

Q. Okay. Then he says: Do you have a ballpark figure on anticipated damages, question

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mark.

A. Um-hum.

Q. Now, he's asking about the ballpark figure on anticipated damages because he's making a determination about whether or not it's in his economic interests to take the case; correct?

A. I can't speak for Mr. Suggs. We did send him this e-mail about anticipated damages. We review all cases on anticipated damages, and -- but we're not going to proceed on any case that is not meritorious because it has the Attorney General's name on it.

If it -- it could have been a billion dollars in potential, but if it was not meritorious, the AG is not going to -- not going to hire outside counsel, not going to do it in-house.

So we've got a meritorious case. Then you figure out what's the case, what's the ballpark figure on what the damages are. You have two parts to that. You got the 50 section, then you got the 140 section. I think --

Q. And what's the 50 section?

A. 50 is the AG section like a parens patriae public interest section that has -- the B section is ascertainable losses, equitable. The

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140 section is damages. The thought -- well, anyway, those two sections.

Q. The AG is the only -- private litigants aren't allowed to collect civil penalties under the consumer protection law; correct?

A. That's correct.

Q. Okay. The AG, however, is allowed to collect civil penalties under the consumer protection law; is that right?

A. Yes, sir. Appropriate.

Q. Okay. So the AG is the -- is the only entity that's allowed to file an action and ask for civil penalties; is that correct?

A. Under the Unfair Trade Practice Act.

Q. Correct.

A. (Witness moves head up and down.)

Q. Yes or no?

A. Yes.

Q. Okay. Now, so when Mr. Suggs asks do you have a ballpark figure on the anticipated damages, and I just want to go back to my initial question.

I mean, he's -- your understanding was, is he's asking that because he's trying to determine whether or not this case merits him

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taking it; is that right?
A. That would be fair.
Q. Okay. And then you write back to him, and you say: Jay will get you a figure. And this is -- you write back to him -- I don't know -- about 18 minutes later.
A. (Witness moves head up and down.)
Q. Jay will get you a figure on the disgorgement amount.
A. Right.
Q. And ellipse. The civil penalties would be the big number.
A. That's correct.
Q. Okay. So you're telling him the big damage number in this action are the civil penalties; is that right?
A. Right, per the -- yes, per the Judge Couch order it could be a large number.
Q. Um-hum.
A. But there's also the issue you might not ever get the civil penalties.
Q. Okay.
A. It's got to be willful.
Q. Okay. But the reason then Mr. Smith then goes on further in this first e-mail in the

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chain that we've been looking at where he attaches Judge Couch's order is because Mr. Smith is letting Mr. Suggs know, look, you know, there's a large amount of civil penalties that is possibly awarded in cases like this.
A. That would be -- that would be right.
Q. Okay. And that was to get -- that was to entice Mr. Suggs to take this case, because you were trying to demonstrate to Mr. Suggs that it was worth his while to do so.
MR. JOWERS: Object to the form.
THE WITNESS: You're speaking of what I thought.
BY MR. KATSIFF:
Q. Yeah.
A. Okay. I presented a civil penalties order from Judge Couch that came out a month before. Okay. It's probably at that time a very large -- in addition to the one up in Arkansas that came out, and I think Louisiana came out before that. Been the largest award in South Carolina if it's going to be awarded.
But Mr. Suggs has to make a decision if it's worth his firm's time and energy to do it. And there are sufficient -- sufficient damage and

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equitable relief in the disgorgement, in my opinion.
Q. Okay. Now, if you turn to the first page of the document, sir.
A. Um-hum.
Q. The e-mail in the middle of the page, Mr. Suggs suggests a conference call at 3:30 Eastern time; is that right?
A. Yes, sir.
Q. Okay. And he gives a call-in number for that call.
A. Yes, sir.
Q. Did that call take place?
A. I remember talking to Mr. Suggs on the phone. I don't remember if it was this time period or not. And I remember him taking the case, his firm. So something happened from the e-mails we sent to his review to agreeing with the office to take the case.
Q. Okay. Well, he then goes to say -- Mr. Smith's e-mail above that one says per our conversation earlier today.
A. Um-hum.
Q. His e-mail is set at 4:24, which is obviously after 3:30. So that seems to suggest

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that the call took place at 3:30; correct?
A. I couldn't tell you. Earlier. It could be earlier that day or earlier another time. I would -- I would think we -- if a call was planned, it's probably addressing that one, but I can't tell you.
Q. Okay. Do you recollect discussing Judge Couch's order and the civil penalties that were awarded against Janssen with Mr. Suggs during this time period?
A. Yeah, the civil penalties order was included, and this is -- that was a straight civil penalties case, which this one is not.
And I think we probably discussed the fact that on Johnson & Johnson they came back with zero. And they came back with Janssen with the award. So they didn't get anything against Johnson & Johnson. The first award written out by the jury was zero for verdict for Johnson. All the air left the room. Then they came back for Janssen. This would just be on the jury's decision, not on Judge Couch's award.
Q. My question -- I mean, so you had a conversation with Mr. Suggs outside these e-mails.
A. Right.

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Q. About the civil penalties that were awarded against Janssen; correct?
A. Yes.
Q. Okay.
A. We probably had a conversation with Mr. Sitarchuk and saying we got a civil penalties order here that could be of issue to you. Do you want to look at it? But everybody knew about the civil penalties order. It wasn't something that we were hiding. The whole nation knew about it, because it was a large verdict against Janssen. They got dinged three times in a row.
Q. Yeah, because it was over $300 million; is that right?
A. Yes.
Q. So people know about -- in the healthcare fraud arena people know about awards or settlements that are, you know, several hundred million dollars; is that right?
A. Yes, sir. Yes, sir.
Q. Okay. And people generally knew about the, you know, $425 million settlement against Cephalon with the US Department of Justice and the NAMFCU group; isn't that right?
MR. JOWERS: Object to the form.

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THE WITNESS: They knew about it afterwards, after it came out under seal.
BY MR. KATSIFF:
Q. I think what your testimony is, is several hundred million dollar awards and settlements are things that people who practice in your area pay attention to, aren't they?
A. Yes, sir. They also pay attention to the litigation retention agreement on what funds they'll get for that. And I haven't done the figures on this one, but in the Janssen case you could do the figure from the fee agreement, and it's -- not counting costs is $19 million. Louisiana got $70 million for their attorneys because it's separate.
Our take, if the Janssen decision was upheld for 327, about 1.9, which, if we'd done a multistate on it, on Janssen, we'd have gotten $6 million.
So the reason we -- we don't go to litigation retention agreements for our outside counsel to bill moneys for our office when there are easier ways to do it. It's just sometimes the state needs to recover, the agencies need to recover, so...

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Q. Is there a -- since you brought up the multistate cases, is there a mechanism in those multistate cases where fees are determined for attorney generals' offices? I mean, you mentioned previously that -- that as the -- more fees go to offices that have greater involvement in the -- in litigating the action; right?
A. Yes, sir.
Q. Okay. So how is it determined in those actions how much money the Attorney General's Office gets who's litigating the action?
A. Much discussion. You got issues of states that would -- they go by population or it could go by involvement, it could go by the volume of drugs in your state. Several factors could be considered in each case.
Q. I'm talking specifically about the amount of money awarded to the Attorney General's Office itself for reimbursement of fees and costs.
A. The consumer protection section is different than the antitrust section. Antitrust section we do an hourly. I've done cases -- there are about two or three we've done, had to keep hours.
Q. Okay.

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A. But in a consumer protection you don't do hours.
Q. What do you do? How do you make the determination?
A. Oh, what goes to each state?
Q. Yeah.
A. You figure out -- well, you got a matter of what -- the harms done, you figure out the harm, you figure out what the settlement amount is. Then you got to go through and figure out how to divide it up.
Q. Divide up what, what's left?
A. Well, no. You -- if you get a recovery for a million dollars and you got 50 states, you got to figure out what goes where.
Q. Well, yeah. But, okay. Let's take your example. We have a recovery. Let's say 50 million dollars, okay?
A. Yes, sir.
Q. Okay. And we've got 50 states. All right?
A. Yes, sir.
Q. Now, that $50 million recovery, let's say you allocated it evenly, a million dollars a state.

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A. Yes, sir.
Q. Okay. Now, my question is, is out of that million dollars, is there a determination made of how much goes to the particular state's general fund and how much goes to the Attorney General's Office?
A. Well, it is designated in the settlement orders or agreements that it goes to the AG's office for his determination.
Q. So it's your testimony then the AG has -- in South Carolina, for instance, if South Carolina got a million dollars from a $50 million settlement, the Attorney General has complete discretion on how to use those funds?
A. Per the language of the settlement agreement. And I don't know how -- it's accountable, I'm sure, to the -- through the finance part, which I don't know how that works.
Q. So the settlement agreement then, in those multistate cases, gives the Attorney General the authority to spend any money recovered by South Carolina any way that the Attorney General wants to.
A. It does limit it. Usually consumer protection purposes. In some cases it's on -- if

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it's a drug issue it could be -- if it's settled for something to do with poverty, something could be in there that restricts how he uses it or how it's used.
We had something with one settlement that had to do with a drug, I think Lorazepam with Mylan, and the AG cy prèsed some to the Carroll Alzheimer's Association, which was the former governor, because we had to give -- do charity.
Q. What statutory authority in South Carolina gives the Attorney General the ability to spend one of those -- to spend settlement proceeds it receives from one of those multistate cases any way that the Attorney General wishes?
A. You got 1-7-85 that talks about court orders and settlements.
Q. 1-7-85 --
A. Right.
Q. -- deals with reimbursement of fees and costs; correct?
A. I don't have it in front of me, but it does address that issue.
Q. Okay. Doesn't 1-7-85 address the issue of reimbursement of reasonable fees and costs?
A. I have to see the section. It would be

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1-7-85, and we settled per 39-5-50. Be part of that in the multistate.
Q. Are you aware of any other sections besides 1-7-85?
A. In the general section of 39-5-50 which talks about ascertainable loss to the citizens, and you have the court orders themselves that direct how funds are to be used.
Q. Okay. So after you had a -- after the e-mail that we've been talking about with --
A. Yes, sir.
Q. The e-mail chain with you and Mr. Suggs and Mr. Smith, Mr. Suggs came in for a meeting with Mr. McIntosh and the Attorney General; is that right?
A. I'm sure he came in. I can't recall when he came in. Have you got something there that says he came in? Let me look at it. I'm sure he came in to sign the agreement, meet with the AG.
MR. KATSIFF: Just give me one second.
(JONES EXH. 22, E-Mail Correspondence beginning with an E-Mail to Mr. Suggs from Mr. Smith dated 7-8-11, marked for identification.)
BY MR. KATSIFF:
Q. Okay. Just take a moment, if you

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could, to look at this e-mail chain.
A. Okay.
Q. Okay. So we've looked at some of these e-mails before, so let's just pick up on the first page of --
A. Okay.
Q. Well, we'll pick up on the second page of the e-mail. We looked at this one, this e-mail dated July 8th, 2001. And then above that -- and this is before the conference call that's referenced in the e-mail on 7-11 at -- 2011 at 3:30.
A. Yes, sir.
Q. Then there's an e-mail from you the next day, which is a Thursday, at 3:55 where you -- and you send it to Mr. Suggs, and you copy Janet -- I'm sorry -- Howard Janet and Harrell Ray, Robert Jenner and Jay Smith. Do you see that?
A. Um-hum.
Q. Okay. And you say:
Got your voice mail. Excellent. Are you in town Friday for a possible meeting with the AG?
A. Um-hum.
Q. What was the voice mail?

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A. I don't recall.
Q. Okay. Was the voice mail that Mr. Suggs said that he was interested in taking the case?
A. I don't recall, but apparently he's interested because he's coming in to meet the AG and he did sign a contract.
Q. Okay. Who are Howard Janet, Harrell Ray and Robert Jenner?
A. Ray Harrell --
Q. I'm sorry. So it's Janet Howard, Ray Harrell.
A. Janet Howard is part of Ken Suggs firm.
Q. Uh-huh.
MR. JOWERS: It's Howard Janet.
THE WITNESS: Excuse me. I got it wrong. Is it Harrell Ray?
MR. JOWERS: He goes by Hal.
THE WITNESS: Okay.
MR. KATSIFF: I thought maybe I had them reversed for a second. I'm sorry.
THE WITNESS: So Howard Janet -- I apologize.
BY MR. KATSIFF:
Q. That's okay.

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A. -- does work with Ken Suggs and Harrell Ray is -- works with Ken Suggs and Jenner works with Ken Suggs.
Q. Okay.
A. And Jay Smith works here.
Q. Okay. Now, you hadn't mentioned Mr. Jowers before, but at this point, at least as of 7-13-2011, Mr. Suggs, in the e-mail above the one we were just looking at, says he wants to get both Howard and Rob ph -- phvd into the case.
So is that who he was intending on using in the case at that point in time?
A. I have no idea.
Q. Okay. Now, he also tells you that he can meet any time on Friday, and -- and did you eventually schedule a meeting on Friday?
A. I don't recall.
Q. Okay.
A. I would -- this would -- made -- say if he came in when he came in. 9:15 to 10 on Friday the 15th.
Q. Okay. And then Victoria. Who's Victoria?
A. That was the Attorney General's secretary at the time.

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Q. Okay. Do you remember what her last name was?
A. McDermott.
Q. Okay. So Victoria put it on the AG's schedule, so he'll be there for a while. And was he there?
A. I don't recall.
Q. Okay. Do you recall what was discussed at the meeting?
A. No, sir.
Q. Okay. Now, in the -- in this case against Cephalon, the case of State of South Carolina versus Cephalon, the -- one of the things that's being pursued is civil penalties; is that correct?
A. Yes, sir.
Q. Okay. And those civil penalties are being pursued by the Attorney General's Office pursuant to his law enforcement capacity; correct?
MR. JOWERS: Object to the form.
THE WITNESS: It's a civil law enforcement matter.
BY MR. KATSIFF:
Q. Okay. So under your interpretation, pursuant to his civil law enforcement capacity.

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A. That's what -- it's a consumer protection statute, is our -- my interpretation, that it's a civil action, civil penalties, the intent of the act to be civil.
Q. It's still the -- the Attorney General is responsible for -- as we talked about before, the Attorney General has the sole authority to bring an action for civil penalties under SCUTPA; right?
A. Yes, sir.
Q. Okay. And private counsel in this case is prosecuting this action pursuant to the Attorney General's powers to bring civil penalties under SCUTPA; correct?
MR. JOWERS: Object to the form.
MR. KATSIFF: What's objectionable?
MR. JOWERS: Prosecuting. I don't know what you mean by prosecuting.
MR. KATSIFF: Well, I mean, I'll tell you, all cases are prosecuted; right?
MR. JOWERS: Well, you might also say pursued since -- whether there is a criminal prosecution or not is an issue in the case, so that --
MR. KATSIFF: Okay. Fair enough. You

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can substitute pursue for prosecuting.
THE WITNESS: Yeah. The AG's Office in this case hired Ken Suggs' firm and Todd Rutherford to give assistance to the AG in bringing this action against Cephalon. If it -- if civil penalties are issued or it could not be issued. I don't know. Well, they're pursued -- every action we have are going to be pursuing civil penalties as a remedy.
BY MR. KATSIFF:
Q. Well, private counsel would have no legal authority to pursue civil penalties under SCUTPA unless they were acting on behalf of the Attorney General; isn't that right?
A. Yes, sir, because if -- they have to go through being retained by the AG under the 39-5-50 section or the 110 section.
Q. Okay. Now, there's been some prior testimony, which you were here for because you were here for all the prior testimony, about model litigation retention agreements.
A. Yes, sir.
Q. Okay. Models drafted by the AG's office in South Carolina.
A. Yes.

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Q. Were you involved in drafting those model agreements?
A. No, sir.
Q. Why not?
A. That's something Henry did.
Q. Okay.
A. I was not in that circle.
Q. Okay. Were you involved in the retention of private counsel to assist the Attorney General's Office in its action against AstraZeneca?
A. I was in control. I was the one assigned to the case.
Q. So you were involved.
A. Yes, sir.
Q. Okay. Were you -- were you involved in -- in drafting that agreement?
A. No, sir.
Q. Okay.
A. The agreement would be a form agreement outside of the -- changing the names of who it's for. And there -- I believe in that -- in the AstraZeneca case and the Janssen case it was changed to allow fees to come out from civil penalties.
Q. It was changed to allow attorneys' fees

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to --
A. Yes, sir.
Q. Well, in -- with respect to the AstraZeneca case -- we'll just mark the agreement just so we have it in front of us.
A. Yeah.
(JONES EXH. 23, Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General dated October 2006, marked for identification.)
BY MR. KATSIFF:
Q. Give you a moment to look through that.
A. Okay. I'm fairly familiar with it.
Q. Okay. So you were familiar with this at the time it was signed?
A. Yes, sir. It was a form agreement. I mean, I got to look at it. Some things have been changed on it periodically for different reasons.
Q. Okay. And was it your responsibility to make sure this agreement was signed by General McMaster and outside counsel in this case?
A. Yes, Jay and I.
Q. Okay. Jay and you.
A. (Witness moves head up and down.)
Q. Okay. So you read this agreement

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thoroughly at the time it was executed, I assume?
A. Yes, sir. I would say that is a standard form agreement. I'm familiar with it. I might miss a line or a word or something, but if you've got a question, I'd be more than happy to --
Q. Sure. And we were discussing, you know, the calculation of attorneys' fees pursuant to this agreement --
A. Right.
Q. -- a second ago.
A. Right.
Q. And you were making the observation -- and if you turn to Page -- if you turn to Page 6 of the agreement, which is the article, Article IV, compensation, is the article which discusses --
A. Yes, sir.
Q. -- compensation of outside counsel?
A. Yes, sir.
Q. Okay. And you were making the observation that pursuant to this article outside counsel got paid -- one of the ways they got paid was a sliding scale of the -- a percentage of the gross recovery minus costs; is that right?
A. Cost comes out first.
Q. Yep, cost comes out first.

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A. Yes, sir.
Q. Okay. So you've got a gross recovery, okay?
A. Um-hum.
Q. Punitive damages are put into one bucket.
A. Right.
Q. Right?
A. (Witness moves head up and down.)
Q. Costs come out; right? Costs come out first. I'm sorry.
A. Cost comes out first.
Q. Cost comes out first. Then punitive damages are put into a bucket, and other damages are then put into another bucket; right?
A. Right.
Q. But the buckets under which the outside counsel can recover fees under this original agreement did not include civil penalties; is that right?
A. Yes, sir. It was amended.
Q. Okay. I'm just talking about the original agreement.
A. Yes, sir.
Q. Okay. So under the original agreement,

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private counsel could not get paid a contingency fee based upon any civil penalties awarded; right?
A. That's correct.
Q. Okay. And you referred to the addendum to the agreement.
A. Um-hum.
Q. There's an addendum to the agreement which is towards the back there. And the addendum to the agreement references the section that we talked about before, 1-7-85, but the import of the addendum, the one that's signed by General McMaster December 2nd, 2009, is that it includes civil penalties in the calculation of damages for which the -- excuse me -- for which outside counsel can receive payment; is that right?
A. Yes, sir.
Q. And were you involved in drafting this addendum?
A. I don't recall. I know I saw it before it was signed. I think someone else drafted this, not me.
Q. Okay.
A. The 1-7-85 being effective July the 1st, 2009 was -- I recall something like that, putting that in there.

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Q. Okay.
A. The effective date of the act, but it might have been that I read it. I can't recall.
Q. Okay. So you think you may have provided comments to this section, but you can't recall whether or not you drafted it?
A. Well, that section came effective in 2008.
Q. Yep.
A. It was a proviso before then. So it ends every year. It came -- it was enacted in '08. It became effective July the 1st, '09.
The Lilly lawsuit was going on in that time period with the attack on outside counsel. That was ultimately resolved with a dismissal of the action in the Supreme Court in October of '09. Right after that was this time period here.
Q. Okay. I mean, my question is: Were you involved in drafting or commenting on the draft that was presented regarding this section? I'm sorry. By this addendum, not section.
A. I wasn't the drafter of the section. I probably had some input in it.
Q. Okay.
A. I mean, that's a decision by the AG and

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the Chief Deputy.
Q. Do you know who drafted it?
A. No.
Q. Okay. And what was the reason to have this addendum to the AG retention agreement?
A. That would probably be privileged discussions in discussions on it. I could say objectively there's case law that allows fees out of civil penalties. That could have come up. But as far as any discussions on this, I'm not at liberty to tell you.
Q. You're not at liberty to tell me because you're claiming a privilege?
A. Yes, any discussion with the AG and Chief Deputy on why this should be done or it needs to be done or the case law allowing it to be done or the statute allowing it to be done.
Q. Okay. You recollect that the AG already testified about this matter; right?
A. Um-hum. Well, it depends. You had -- you had -- you had Henry.
Q. Yep.
A. Okay. So I might have had discussions with the Chief Deputy that Henry didn't have. I don't know. But if he's -- if he's answered the

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question, then you don't need to ask me the question. I mean, you can ask me the question.
But I remember it taking place, I remember the time frame that it took place, I remember the Lilly issue. And once that died down in October, then we had December. This followed.
It would be difficult to amend anything on July the 1st of '09 when Lilly is attacking your fee contract on its face in July of '09.
Q. Okay. Because Lilly was attacking the fee contract, your testimony is Lilly was attacking the fee contract too? I'm confused about what you just said.
A. I'm saying this is -- if the substance -- if the fee contract on its face was being attacked, it would be a little bit much to try to amend it to add something while it's being attacked, even if it's in another action. That's my thought.
Q. Okay. Do you remember what the rationale was --
MR. KATSIFF: Well, strike that.
BY MR. KATSIFF:
Q. Do you remember what the reason was why the AZ agreement was amended in this way?

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A. Well, if the AZ agreement didn't have it in there and they wanted to make it in there, you amend it to put it in there.
Q. Why did they want to put it in there?
A. That would be -- you'd have to listen to what Henry said, but there's no law prohibiting getting money from civil penalties.
Q. I'm not asking you to recount what Henry said. I'm asking you for your knowledge as to do you know why --
A. Well --
Q. And do you know why, you know, either the Attorney General's Office or AZ -- I'm sorry -- the Attorney General's Office or Mr. Simmons' firm wanted to amend the AZ retention agreement?
A. Not that I can tell you.
Q. And you're saying -- this is a yes-or-no question. Do you know, yes, or do you not know?
A. I probably don't know.
Q. Okay. Was the agreement amended? Do you know whether or not the agreement was amended because actual -- the pursuit of actual damages in the action against AZ was abandoned by the Attorney General's Office and the only damages that were --

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remained that the AG's Office was claiming were civil penalties?
A. Don't know. I wasn't involved in the decision to make -- to amend the agreement.
Q. Okay. And who was involved in the decision then?
A. That would be the Attorney General and the Chief Deputy.
Q. Okay. But you were involved in this case; right?
A. Yes, sir.
Q. Okay. So did they have -- in making that decision, were you involved in any discussions with Mr. Simmons or anybody else from his law firm?
A. Not that I recall, and I recall that the -- the conversations they had with the Attorney General and the Chief Deputy.
Q. You recall the conversations?
A. No. I recall they had conversations with the Attorney General and Chief Deputy. I heard of conversations. I wasn't involved in the conversations to change that part of the agreement.
Q. What did you hear about the conversations?
MR. JOWERS: I think that's going to be

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privileged.
THE WITNESS: Privileged.
MR. KATSIFF: What -- what privilege are you claiming over it?
MR. JOWERS: Well, that would be attorney-client. The agreement clearly specifies there's an attorney-client relationship between the office and the Simmons Law Firm, and you're asking about conversations related to the retention agreement for that case, so --
MR. KATSIFF: I mean, I don't want to get into an argument on the record. I just simply wanted you to specify what the basis, whether it was attorney-client or some other privilege. So I'm just asking.
MR. JOWERS: Okay. That's it.
MR. KATSIFF: Okay. So you're going to instruct him not to answer then?
MR. JOWERS: Sure.
MR. KATSIFF: Why don't we take a quick break, if you don't mind. Thanks.
THE WITNESS: That's good.
THE VIDEOGRAPHER: This brings us to the end of Tape No. 3. We're going off the record at 2:40.

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(A recess transpired from 2:40 until 2:49.)
MR. JOWERS: I'll just put on the record that two members of the AG's Office just came in: Doni Gibson and --
THE VIDEOGRAPHER: This is a continuation of the videotaped deposition of C. Havird Jones, beginning on Tape No. 4. We're going back on the record at 2:51.
MR. JOWERS: Did you get it? Do I need to say it again?
THE REPORTER: I got Doni Gibson.
MR. JOWERS: And Paul Ahearn.
BY MR. KATSIFF:
Q. Okay. I just want to make sure the record's clear in terms of the questions that we've asked here.
What -- did you have any conversations with anyone from Mr. Simmons' firm about the reasons why the AZ agreement, retention agreement was being amended?
A. I don't recall.
Q. Did you have any conversations with anyone in the Attorney General's Office about the reasons why the AZ agreement was being amended?

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A. Yes, sir.
Q. Who did you have conversations with?
A. Probably be Chief Deputy. If I had a conversation, that would be probably who it was from -- with.
Q. With Mr. McIntosh.
A. Yes.
Q. Sitting here today, do you remember such a conversation?
A. No, sir.
Q. So -- well, okay. I mean, my -- and I'm sorry for the confusion on this, but my question was: Did you have -- did you have conversations with anyone in the Attorney General's Office about the reasons why the AZ agreement was being amended, and you said yes, sir.
So do you remember having a conversation with anyone in the Attorney General's Office about the reasons why the agreement was being amended?
A. Let me, I guess, correct my answer or restate. I knew it was going to be amended. I didn't have any conversation with anybody initially of why it was going to be amended. And I saw this document before it was finalized or at the time it

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was finalized.
Q. Okay.
A. So I knew it was amended to include it. Probably more accurate.
Q. Well, you said you may have given a comment on the addendum too; right?
A. Yes.
Q. But you don't remember who you gave that comment to?
A. No. No, sir.
Q. Okay. And did you have any conversations with anyone in the Attorney General's Office about the reasons why the agreement was amended subsequent to the amendment being executed?
A. I don't recall.
Q. Okay. How about similar conversations with anyone in Mr. Simmons' office?
A. No, sir.
(JONES EXH. 24, Spreadsheet Tracking Cases Produced the Attorney General's Office, marked for identification.)
BY MR. KATSIFF:
Q. Okay. I'll give you a moment to look at that, sir, but this is a spreadsheet that was recently produced to us on Friday.

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MR. KATSIFF: And I should just note for the record that there's -- that Mr. Jowers has requested that a confidential designation be placed on the spreadsheet.
MR. JOWERS: Thanks.
BY MR. KATSIFF:
Q. But this is a spreadsheet that was produced to us on Friday. You know, unfortunately, because of the way Excel documents print, it's a little difficult to follow.
But the first three pages are the first 82 lines of the spreadsheet, and then if you broke them out and put them, you know, starting with -- the first page would be to the left and then the second page would be in the middle and then the third page would be on the -- on the right as you looked at the spreadsheet. And then the remaining three pages are the remainder -- remaining lines of the spreadsheet, which is Lines 83 through 129.
A. Okay.
Q. Is this a spreadsheet that you're familiar with, sir?
A. Actually, I never studied it. I probably lived it, but I never studied it. Jay would have it as an ongoing spreadsheet. But to

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sit down and have studied it, the answer is no, and I really haven't studied it since it was produced or before it was produced.
Q. Okay. Well, this is -- you were here for Mr. Smith's testimony; correct?
A. Right.
Q. Okay. And Mr. Smith testified about a spreadsheet of -- containing settlements in the unfair trade practices arena that he created at your behest; right?
A. Yes.
Q. Okay.
A. Running total. Running total of our cases and what recoveries were.
Q. Okay. And is this that spreadsheet?
A. Yes, sir, I think this is.
Q. Okay. And why did you ask Mr. Smith to create this spreadsheet?
A. Well, we just need to track about our cases and recoveries we've had in our cases. It's just documentation to show what we've done, including monetary, including time spent, kind of a time spent thing too. Although we don't have hours on this, we could -- I could recall a lot of time spent in these type cases. But I think it's

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appropriate that we -- we kept a running total of the cases.
Q. Okay. And does he forward this spreadsheet to you periodically?
A. I recall him forwarding it. I might have opened it but didn't look at it. It's got so many tabs on it and different -- you know, different things you can get from it, and I think -- so I haven't studied it. I know that he said he did it and this would be it, but I haven't studied it.
Q. Okay. If you could, let's look at the spreadsheet and maybe you can help me with -- a little bit with how to understand the spreadsheet.
A. Okay.
Q. So if we look at column A.
A. Okay.
Q. Which is case. I assume that that's the case name or the party that the Attorney General office is bringing the case against; right?
A. Yes, sir.
Q. Okay. Case summary. What's that? Just a brief summary of --
A. Of what the case is about.
Q. Okay. And sometimes that's blank. Is

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there a reason for that?
A. The problem, he did it, he wasn't here and he doesn't -- he didn't ask me or I didn't tell him what the case was about.
Q. Okay. Do you provide information to him to be filled into this spreadsheet?
A. Ongoing. He knows what the cases are about.
Q. Okay. Okay. Then we -- go over to method of representation.
A. Where's that?
Q. That's Column C.
A. Okay.
Q. Okay. And so what does that refer to?
A. It refers to the method of representation. Be multistate. Looks like a private class action. We got moneys from -- came in for our Visa and MasterCard having to do with the fees, and it's got outside counsel there toward the bottom on AWP.
Q. Okay. And multistate is a coordinated action that we were discussing previously?
A. Yes, sir.
Q. Okay. And what does form of agreement refer to?

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A. It talks about -- it's consent judgment, assurance of voluntary compliance, et cetera. Designates what it was.
Q. Okay. Now in Column K, total funds for South Carolina.
A. Um-hum.
Q. That's, what, total funds -- what does that refer to, total funds recovered for South Carolina?
MR. JOWERS: On this exhibit we're not able to read those columns.
THE WITNESS: I can't read what it is.
MR. KATSIFF: Okay. Well, if it's okay with you, what we could do is use mine where you can read the columns.
MR. JOWERS: Sure.
MR. KATSIFF: And then we'll just substitute a readable version of it after the deposition.
MR. JOWERS: That's fine.
MR. KATSIFF: Okay.
BY MR. KATSIFF:
Q. And you can ignore all of my question marks.
A. Okay.

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Q. Okay. So Column K.
A. That's total recovery for --
Q. South Carolina, SC?
A. Yeah. Sir, I'll have to take your word for it on that one.
Q. You can't read it?
A. I'm trying to focus on it. Yeah, it looks like what it is. You must have 25 vision. I got 20/20 and I can't read that.
Q. And what does that refer to, sir?
A. I would say it's the total recovery for the state that came in in the resolution of the matter.
Q. And that would include recovery for South Carolina and -- recovery for the whole state, including any agencies that might have gotten a recovery --
A. I would think so.
Q. -- and the Attorney General's Office?
A. Yeah. Total amount.
Q. Okay.
A. And I'm looking here at -- some of these other sessions might disagree with me on that. But my take to start off, that's the total amount, which the next, over to AB, talk about how

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the funds were distributed.
Q. Do you see Column O, sir?
A. Column O.
MR. JOWERS: He does now. We have a magnifying glass.
MR. KATSIFF: Oh.
THE WITNESS: Tell me what it says.
BY MR. KATSIFF:
Q. I'm going to need to look at it again, but Column O is attorneys' fees and costs for SCAGO.
A. Okay.
Q. Okay. Why don't you take a look with the magnifying glass and see if I said that right.
A. Let's see here. That says money paid to Morgan Lewis. No. That says -- Q. Excuse me. O, O, O. Attorneys' fees and costs for SCAG.
Q. So that's attorney's fees and costs that are recovered by the Attorney General's Office of South Carolina; is that right?
A. That's what that would be, yes.
Q. Okay. Could I have that back for a second?
A. You want this or this?
Q. I just need the chart. Thanks. And

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Column P, attorney -- says attorney's fees and costs for consumer protection fund for other use? Do you see that?
A. Which one's that now?
Q. Column P.
A. P?
Q. Yeah.
A. Attorney's fees and costs for -- is that word other funds? You got a mark over it.
Q. Let me see, sir.
A. Look at that again. What's it say?
Q. Does it say attorney's fees and costs or consumer protection fund or other use?
A. Okay.
Q. See if you can confirm that.
A. If that's what it says. Okay.
Q. Do you have any idea what that's referring to?
A. No, sir, outside of it's costs for consumer protection, other use. Let me see if I can find one here I can read. It looked like -- I would say at first blush here it would be the funds retained by the office. I'm looking at -- let's just say right now that's would what it would be. It's attorneys' fees and costs.

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Q. Attorney's fees and costs or consumer protection fund or other use.
A. Okay.
Q. Do you have any idea what that refers to?
A. Let me pick out here. No, without studying it, and I can't really read it. Because I was looking over here at an AWP one to see what was in that one. To answer your question, no. No, sir.
Q. Okay. If I could take that back. Okay. Now, I think we can probably -- you can hopefully use the one that's in front of you for this.
A. Okay.
Q. But I think that we established that at least Column O was attorneys' fees and costs for South Carolina AGO, which is the South Carolina Attorney General Office. If you want to look at this again you can.
A. Okay. I'm looking -- okay. You got total recovery. I have no reason to disagree with you right now.
Q. So now is there a reason why the South Carolina Attorney General's Office recovered

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nothing for many of the multistate cases listed here?
A. There is in the K column moneys; right?
Q. There's moneys for South Carolina, yeah.
A. Okay. And you're looking at the O, why there's a blank?
Q. I'm looking at why there's a blank in the attorney's fees and costs column for the South Carolina Attorney General's Office in many of them, not all of them.
A. Don't know. I'd have to look further down and see if -- where the funds went. This goes back to before I got involved. It was close to the -- I think the -- Publishers Clearing House, that was probably Ken Woodington's case. US Purchase Exchange. That might have been what that was. The Microsoft, Ken Woodington was involved in that, not me. I come on with Mylan. And it could be how it's structured. It goes straight to an agency, straight to the general fund, straight to the office. It depends on language of the documents, I would say.
Q. Okay. Why don't you look down, and I think it will be on the fourth page of your

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document, actually, which would be Line 118. You might need the magnifying glass to read the lines.
A. I tell you what. That's AstraZeneca, Seroquel.
Q. Correct.
A. Um-hum.
Q. And you were involved -- you were intimately involved in the settlement of that action, weren't you?
A. Correct.
Q. Okay. And you have a -- you were involved in the drafting of the settlement agreement?
A. Don't think I was.
Q. You were involved in the approval process for the settlement agreement?
A. I recall -- I don't think we -- I drafted that agreement. I knew about the agreement but didn't draft the agreement.
Q. Did you read the agreement?
A. Yes, I read the agreement.
Q. Okay. Were you involved in negotiating the agreement?
A. It was handled -- I was involved, but it was handled between outside counsel and the AG

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and the Chief Deputy.
Q. Now, if you look at Column K under Line 118 it shows that the total recovery for South Carolina is $26 million. Do you see that?
A. Yes, sir.
Q. Okay. And if you look at Column O for Line 118 it shows that outside counsel recovered approximately $4.8 million in fees and costs. Do you see that?
A. I see that figure there. Above that is the fees and costs for the outside counsel? Is that the column?
Q. We already talked about that being Column O, yeah.
A. Okay, okay. Okay. I gotcha.
MR. JOWERS: Is it Column N? Maybe I'm looking at it wrong.
MR. KATSIFF: No. It's Column O. I'm sorry. You're -- you're -- you're right. I'm sorry. Column N. I'm sorry. Column N, outside counsel fees and costs. You're right. I apologize, Jerry.
THE WITNESS: Right.
BY MR. KATSIFF:
Q. And that was 4.8 million?

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A. I see that. Yes, sir.
Q. Does that comport with your recollection as to what outside counsel got in that case?
A. Yeah, I wouldn't have any reason to dispute that.
Q. Okay. And then in Column O, attorneys' fees and costs for South Carolina AGO, $529,000, approximately. Do you see that?
A. Yes, sir.
Q. Now, in Column P there's -- which the $529,000, I guess, is approximately 10 percent of the 4.8 million; right? More than 10 percent, but --
A. Well, I think it comes -- you add the --
Q. Costs.
A. You add the five twenty-nine back into the four eight two three and that's -- and then you take 10 percent of that. That comes out to be five two nine and that results in four eight.
Q. I see. Okay. So the 529,761.75 there in Column O was 10 percent of the original fee award; right?
A. Yes, sir.

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Q. Okay. Then Column P there's 1.534 million in -- in attorneys' fees and costs. In Column P, which is attorneys' fees and costs or consumer protection fund for other use, do you see that?
A. This would be -- what figure are you looking at? What's the number?
Q. 1.53 --
A. Yes, sir.
Q. I'm sorry. 1,534,000, approximately.
A. Okay. I gotcha.
Q. Okay. So where did that money go?
A. Well, what was the title of P?
Q. Attorneys' fees and costs or consumer protection fund or other use.
A. Okay. Well, it appears to be that this was a civil penalties straight action.
Q. Um-hum.
A. It was settled to include EIP and Medicaid and consumer protection. Because they didn't settle it for civil penalties. They settled it to get releases on everything. Although it might have been out of time on the three-year statute of limitations, there's always the fear of the disgorgement issue and you can bring another

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action.
So to get a release the settlement was reformed to -- to give releases, and the 1.5 would probably be the amount if we anticipated a multistate we'd have gotten. It released our consumer protection claims, it released the -- it probably continues over. It's got something in here to do about Medicaid and EIP, I would think.
The only straight case we've had on civil penalties at the conclusion was Janssen, and it's not concluded.
Q. Well, here. Why don't you look at mine and tell me what column -- if you can read it, what column AG says.
A. Which one?
Q. Column AG.
A. AG.
Q. Yeah.
A. Attorneys' fees and cost, all. That's what it seems to say.
Q. For South Carolina AG's office?
A. I can't read it. See if you can read it.
Q. Total attorneys' fees kept by SCAGO, not including MFCU.

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A. Okay. I can tell you, if you give me the number, that -- that matches up with that for AstraZeneca if it matches up.
Q. Well, Sure. You can look down at the number too. It's column -- on that page, on the page that has AG on the top which would be the last page, probably.
A. Last page?
Q. Yeah.
A. I got A-T-A-U-A-V. That's not the right page, is it?
Q. Nope. So the third page then. The number on Line 118 is $2,064,585.
A. That would be a combination of the fee in the consumer protection.
Q. Okay. So that's the sum of Columns O and P that we were looking at earlier?
A. Correct.
Q. Okay. And what happened to that money? That was kept by the Attorney General's Office?
A. I would think so. That would be here, and I don't know in accounting where it went after that.
Q. Do you know what it was used for?
A. No, sir. I think in the Lilly case, if

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you match up the Lilly case, we didn't get any consumer protection money in that case, and that was settled.
Q. Now, we were talking about the multistate cases a little bit.
A. Right.
Q. And do you see in Column P that there are -- there are many multistate cases for which there was no consumer protection funds awarded?
A. Okay. Let's see what we got. There are some. Here you got a Dish Network. Is that one of them?
Q. Well, I'm just looking, you know --
A. You got gaps. And it's in P? You're talking about the P column?
Q. Yeah. Right.
A. There are gaps in there. Probably 12 percent, 10 percent, 20 percent of the numbers. You know, is not half, not a third. So you've probably got four, six, eight. I don't know. It's -- it's -- some got gaps in there, and the chart would reflect that.
Q. Well, I'm just focused on just the multistate cases themselves.
A. Okay.

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Q. And it looks like -- and I don't know if this comports with your recollection, but it looks like the multistate activity decreased after September of 2008.
A. Okay. Where are my dates here? Dates are in H?
Q. Column E.
A. Which one?
Q. Column E.
A. I don't -- that doesn't harmonize with my memory. This would be the cases. We've been involved in a lot of multistate cases.
Q. Okay.
A. Okay. So the chart says what it says.
Q. Okay. But if we look, you know, let's say, at columns -- at lines, let's say, you know, 2 through -- you know, halfway down the page, 2 through, you know, 60 -- 62, let's say, there are a lot of gaps there in Column P; right?
A. And which page are we looking at? Because I was at something that had 83 and 129. What page are we on?
Q. Okay. I'm looking at -- look at the first page, which is what, 1 through 83, is it, on your --

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A. Yes, sir.
Q. So you'll agree with me that there are a lot of gaps in Column P?
A. Yeah, there are gaps in -- like Toys R Us, that was toys. Household Finance. That could have been -- I think the Household Finance one was money going back to consumers. It was a hundred thousand for the office. So it may not have been.
Some of these were restitution to consumers. The Mylan one was. Checks were mailed out to consumers. Some of these we got sample drugs to give out to homeless or to certain pharmacies, nonprofits.
It depends on the case. You got restitution cases for consumers, you got just resolving it and having injunctive relief, which is a service to consumers.
Q. So there are a lot of times when there's no recovery of attorneys' fees and costs or consumer protection fund or other use in a multistate case?
A. I would go by what the chart says.
Q. Okay.
A. In the time period of '02 and '03, all the states are getting better from expertise on

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doing these matters. And some of these, it could have been product back to consumers.
Like the CD settlement, you could go online and get a refund because of retail price maintenance. That was a compact disk. That was an antitrust case. So it depends on the case.
But I would say, like I mentioned to you earlier, this has the total that we got for up to this year from July the 1st.
Q. Um-hum.
A. Which column is that in?
Q. I don't believe it is in any of these columns.
A. Okay.
Q. We'll look at another chart that has it.
A. Yeah. It would be -- we got 13 million, as I remember, from July the 1st to April. And the attorneys' fees we got are 887. And you put the consumer protection on top of that on the AstraZeneca you get two three. So '11 would be nonlitigation retention cases, and that included the mortgage settlement and a few other things that came in.
Q. Well, let's just take a look at that.

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A. Okay.
(JONES EXH. 25, Summary by Calendar Year, marked for identification.)
MR. JOWERS: Maybe we could put on the record this, too, is confidential, even though it's not as marked as such.
MR. KATSIFF: Yeah, absolutely. You just put it on the record.
THE WITNESS: Hold on one second.
MR. KATSIFF: Sure.
THE WITNESS: Okay.
BY MR. KATSIFF:
Q. Okay. So this is a -- one of the tabs that was --
A. Okay.
Q. -- on the larger spreadsheet that Mr. Smith created.
A. Right.
Q. Does this look familiar to you? It's a little more understandable.
A. Yes, sir, this would be something I would look at, more so than the other one.
Q. Okay. So this has a column, if you look at it, which says sum of total attorneys' fees kept by SCAGO not including MFCU. Do you see that?

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A. Yes.
Q. Okay. And that has a total from 2002 which is approximately $36 1/2 million?
A. Yeah, that -- now what -- you apparently -- you clicked on something and you got a total from January to December. Because the total that I had that Jay came back with was actually July the 1st to June the 30th. That's where I was getting my 13 million from.
Q. Okay. Yeah, I mean, I didn't click on anything. I just opened this as it was created, you know.
A. Okay, okay. But I notice the 13 million on the one I had, and I said, well, why is it 13 million? And he said, well, it's July the 1st to now. That's the fiscal year as opposed to -- I use from January 1st to December 30th.
Q. Okay. Well, I mean, let's just look at this document.
A. Okay.
Q. We've got -- we've got a column, which is the year, which is self-explanatory. Then we've got sum of total funds for South Carolina; right?
A. Um-hum, um-hum.
Q. So that's the total amount of money

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gotten for South Carolina regardless of where the money's going, to the AG's office or some other state agency or administrative body; is that right?
A. Um-hum. Yeah.
Q. Okay. Then we've got total -- sum of total attorneys' fees kept by South Carolina AGO, not including MFCU, okay? So that's the total recovery by your office, not including MFCU; right?
A. That would be -- that would be the total amount we brought in for the consumer protection, and included in that would be any fees we got in the fee contract.
Q. Okay. And then that -- all of these columns are then broken out by year, and then there's a grand total from 2002 to 2013; right?
A. Right.
Q. Okay. So the total amount of fees recovered since 2002 by the Attorney General's Office is $36 million. 36 1/2 million, approximately; correct?
A. Well, that would be consumer protection and attorneys' fees per fee contract included.
Q. Okay. That doesn't include the column P that we were looking at before, which is attorneys' fees and cost for consumer protection?

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A. I think it does include that.
Q. You think it does?
A. Yes.
Q. Okay.
A. That would be the total amount.
Q. What's the column called sum of consumers?
A. That would be moneys going to consumers. Like 2012 was a mortgage settlement. You have --
Q. Okay.
A. '03 would be the Mylan settlement. So those would be funds on distributions to consumers.
Q. And what's sum of South Carolina EIP?
A. That's state health plan.
Q. Okay.
A. That would be damages.
Q. Okay. So the total recovery for the state health plan since 2002 has been approximately 32.6 million?
A. That's what it says, yes, sir.
Q. Okay. Now, it shows that you -- the South Carolina Attorney General's Office recovered a very significant sum of money, really since two thousand -- really since 2007, but particularly

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significant since 2012. Do you see that?
A. Yes, sir.
Q. Okay. So in 2012, in that year alone the recovery was approximately $15 1/2 million.
A. Yes, sir. And you had the mortgage settlement, which allocated, I think, 3 million to the office or about that amount. And the AstraZeneca would have come in at the 500,000, plus the 1.5.
Q. So that's two million.
A. And the rest of it, we had Depakote, had another Pfizer settlement. They're multistates or in-house settlements. There's -- go ahead.
Q. I'm sorry. The Depakote, it was Abbott?
A. Yes, sir. That was a multistate settlement. So we had -- yeah, so that was about 3 million to the office.
Q. Okay. And this $36 1/2 million, do you know where it goes?
A. It goes to the office. I'm not sure where it goes when it goes to the office. It's turned over to the office, and they're supposed to do what they're supposed to do with it. I'm not sure where it goes.

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Q. Do you know what they do with it?
A. No, sir. I've heard what they do with it, but I'm not the person to tell what -- where it went.
Q. What have you heard about -- where did it go?
A. I mean, it's -- uses some -- some expense of the office, I'm sure, all parts of the office. But when they start talking about finances, where the money goes, what is used, I'm not the person to -- to ask that.
Q. Who's the person to ask that?
A. I think John McIntosh would be fairly well up on it.
Q. Um-hum. Anybody else?
A. Tom Osmer would. But you had mentioned earlier that the multistate cases have been dropping off. I don't know where you get that from. I looked at the chart. I can't read it very well.
But the -- that 15 million that goes from January to -- 2012, from January the 1st to December 30th, I don't have those figures in my head, but from July the 1st to now it's 13 million. So that 15 will drop down because that's another

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year. The fees out of the fee contract this office retains is $887,000. AWP case and AstraZeneca case.
We do more for the office when we do multistate. But we get far more -- if you look at the first column, you see the 110 million for the state. That was AstraZeneca and the mortgage. Got 53. That's 45 for the state with Lilly.
In fact, these earlier matters for the state, we got very little. I say little. 2 million and 5 million is not little, but when you got to have -- make a decision to sue for state agencies, you got to get outside counsel.
Q. Okay. Why do you have to get outside counsel if you're going to sue for state agencies?
A. Because it's -- if you sue a pharmaceutical company or any other company, you're up against a manpower situation and sometimes expertise situation.
Q. Well, there's multistate cases that are brought against pharmaceutical companies like this office has brought; right? Like, I mean, Merck, Vioxx is an example of that.
A. That we had outside counsel.
Q. Okay.

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A. It was a Medicaid settlement, I believe, and we also had -- no, it was not a Medicaid settlement. We sued outside counsel, and that case was settled with outside counsel.
Q. Okay. Well --
A. That was Vioxx.
Q. Look at --
A. That wasn't consumer -- excuse me. That was consumer protection Part 2 on multistate, and we sued also for EIP multistate Medicaid.
Q. And you had outside counsel in that case?
A. In the straight damages for Medicaid and EIP, yes.
Q. Okay. Look at Columns 68 and 69.
A. 68 and 69.
Q. Oh, I see. You're -- so we've got 68 and 69 and we've also got 108, and they all involve Vioxx; is that right?
A. Seems to be. Yes, sir. We had a -- we settled out the consumer protection first, and as I -- my recollection, we didn't settle out the NAMFCU, didn't join it. And we sued and we ultimately settled out for like 1.7 million or 2 million, something like that.

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Q. Well, none of the things on this chart involve NAMFCU; right?
A. No, sir.
Q. Okay. So, I mean, I'm just talking about this chart.
A. Okay.
Q. And you made a statement that when you're suing a pharmaceutical company, you need to hire outside counsel.
A. That's a general statement, yes, sir.
Q. Okay. And I see lots of instances on this chart where large companies are sued by this office that are listed as being multistate, meaning that there's not -- they're not outside counsel agreements.
A. But we got no money for our state agencies.
Q. I'm sorry?
A. We got no money for the state agencies. When you do a -- you settled a consumer protection case, you get money for the office or the general fund. You don't get money for state agencies.
So in the Lilly case, we could have settled -- if we got a NAM -- if we got in a multistate and a NAMFCU -- in a multistate in the

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Lilly case we would have gotten approximately 2 million for the office based upon the settlement value and us being active in the EC. We got $600,000 you showed the other day on the Lilly settlement.

So we lost a million four if you're looking at -- it's better to go multistate for the office. You get more money. But the AG makes the decision that he can't do that, I would say, and he sues to get money for the state agencies or in the public interest.

Q. He can't do what?

A. Well, if you --

Q. He can't exercise his powers and bring a case directly as the Attorney General's Office?

A. Well, what it amounts to is if you settle a multistate case --

Q. Yeah.

A. -- you're basically settling your 50 A and B responsibilities, which is civil penalties. So, therefore, if -- if you sue a -- for a state agency outside of that if you don't release it, the clout you have is the civil penalties part. So you don't -- you -- it's very difficult to get cases resolved. And outside counsel would look at a case

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and may not want to take the case. Like the Vioxx case, it was piecemeal.

Q. I mean, we started this discussion -- my question, which I don't think I got an answer to, was: You know, this office sues large companies without outside counsel; correct?

A. No, sir.

Q. Okay.

A. What that chart shows is in multistate you get a tolling agreement.

Q. Yeah.

A. You don't file a lawsuit. At the end of the case, when the multistate's resolved, you either do assurance of voluntary compliance or do a complaint and consent judgment at the end. So those cases go on for two to three years with a tolling agreement, but you don't use those investigative authority in the multistate.

Q. So in those cases, the multistate cases, you're relying on another state AG's office to carry the laboring oar; is that right?

A. No, sir. Earlier on we would be part of a group, anticipate. And as we gained some expertise, then we participated more in multistates.

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Q. Well, you said that in a multistate you don't file a lawsuit.

A. Until the end.

Q. Until the end.

A. Yes, sir.

Q. So what do you do? What does this office do in the multistate case?

A. Okay. For example, you're from Philadelphia.

Q. Um-hum.

A. You're in Pennsylvania. We get together with you and a few other states and we start looking into something that we consider to be in the matter of public interest. We contact the company. Usually get a tolling agreement. And then we think there's a problem.

As we talk back and forth we figure out if there's a problem or not. If there is a problem, we think we're harmed we say, well, okay. We got our group together. You want to settle with us, or do you want us to not settle and go out and maybe some will sue you and some not sue you.

Ultimately, if they want to settle and we find that the matter -- they settled with -- like with Depakote, was appropriate after

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hard-fought negotiations. Then we settled with them, and then we get it on file with the court. We either file a complaint and follow that with a consent judgment. Some we do AVCs, assurance of voluntary compliance.

Q. Okay. There's nothing preventing the Attorney General's Office from going out and bringing cases on its own and not hiring outside counsel; correct?

A. Do you mean legally or factually?

Q. Let's start legally.

A. The AG's Office has the authority to go out and -- under the unfair trade and sue --

Q. Right.

A. -- if there's merit to the case.

Q. Okay.

A. But realistically, we can't do that.

Q. Why?

A. We don't have the resources.

Q. Okay.

A. You don't have the resources for -- and the money. You have to -- and you pointed out in the Lilly case to Henry that the fees were -- the costs were like 800,000. Close to it. We don't have that money to front these type cases. So we

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don't have the manpower and we don't have the money to do the cases.
Q. You have over a hundred lawyers in this office; right?
A. I think we have close to 70 something.
Q. Okay. 70 lawyers. That's not enough?
A. No, sir. I'm going to use all 70 lawyers. I used probably 10 on the James Brown case, and it was unheard of to do that much. You don't have the resources.
We got postconviction, you got criminal appeals, you got death penalty cases, you got securities, you got Medicaid fraud, you got, you know, every different aspect in this office. And you don't have the resources or the money to bring all these claims.
Q. There was no multistate case brought regarding the allegations that the Attorney General's Office has currently asserted against Cephalon; correct?
A. Not that I know of.
Q. Okay. So there was no opportunity for the state to participate in a multistate case against Cephalon; isn't that right?
A. Unless we started one on our own. No,

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sir, we didn't have an opportunity to be a member of one.
Q. Okay. Did you consider starting one on your own?
A. I can't answer that.
Q. Why?
A. Because that involves discussions within the office.
Q. Okay. Well, I'll tell you what. I think that we should stick, if you don't mind, to -- you know, you're the witness, you're represented by counsel. Let's let your counsel make the privilege objections.
A. But I'm also a counsel of record in the case.
Q. Okay. So you're here testifying as a witness. So if --
MR. JOWERS: I'll make the objection.
THE WITNESS: Okay.
MR. KATSIFF: Okay.
MR. JOWERS: I object. That's deliberations, thought processes within the office related to an ongoing case in this matter. So we will claim work product, attorney-client privilege.
BY MR. KATSIFF:

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Q. Okay. My question, just to go back to the question was: Did you consider starting one on your own, and starting one was a multistate case, and your -- you said you couldn't answer that. It's a yes-or-no question.
A. Repeat the question.
Q. Did you consider -- did South Carolina Attorney General's Office consider initiating a multistate litigation against Cephalon for alleged unfair marketing practices of the drugs at issue in this case?
A. I would say it was considered.
Q. When?
A. The fact of when? At the time that we started making discussions or having discussions about what to do.
Q. Did you talk to any other states about it?
A. No, sir, I don't recall. I don't recall talking to any states about it. The me too approach that you've heard me say about before, we have had -- we've been very successful with that to avoid litigation. And my thought earlier on was that would be the way to go in this case, so...
Q. Who participated in those discussions?

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A. In our office?
Q. Yeah.
A. It would be the Chief Deputy. And we don't do anything without the Chief Deputy or the Attorney General's approval. And Jay and any attorney in our section that I talked with about it.
Plus the fact, continuing, that if we had no tolling agreement with you, it would be very difficult to get a multistate together and organized on the statute of limitations issue coming up. It went past October of '11. You left us no choice. Cephalon didn't.
Q. Was that a factor that you considered?
A. Yes.
(JONES EXH. 26, Litigation Retention Agreeemtn for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq from July 2011, marked for identification.)
BY MR. KATSIFF:
Q. Okay. So this is the litigation retention agreement that was entered into by the Attorney General's Office and Mr. Suggs' firm and Mr. Rutherford's firm; is that right?

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A. Yes, sir. No. 26, yes, sir.
Q. Okay. Were you in charge of ensuring that this document got signed?
A. Yes, sir. Myself -- our section, myself or Jay --
Q. Okay.
A. -- coordinated it.
Q. Did you review this document in detail before Mr. Wilson signed it, General Wilson signed it?
A. Yes, sir, I would say I did. It's a standard agreement. I think some changes have been made. This might have been the first one that General Wilson had signed. I'm not sure.
Q. Do you recollect what the changes were?
A. I think his compensation or contingency percentage went up.
Q. And why was that?
A. Don't know. He made that decision.
Q. The "he" being?
A. Attorney General. Attorney General and Chief Deputy make decisions like that.
Q. If you could turn to Article II C, please.
A. II C. Yes, sir.

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Q. Okay. This is the employment status?
A. Yes, sir.
Q. Okay. One of the -- do you recollect from the AstraZeneca agreement that it used to say an attorney-client relationship shall exist between the Attorney General and special counsel?
A. Um-hum.
Q. Okay. That was deleted from this section?
A. Okay.
Q. Do you know why?
A. No, sir.
Q. Okay. Next article, case management.
A. Um-hum.
Q. Do you recollect that there -- in the AZ agreement there was a requirement that detailed time and cost records be maintained by special counsel? And you can turn back to the agreement if you'd like to.
A. Yes, sir, I recall the time records, and I think Henry mentioned this. If -- I think the agreement addresses that if a -- an attorney or a law firm is terminated without cause, they get a quantum meruit, and they would need, therefore, to -- I would think to keep their own time records.

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For us reviewing it, it wouldn't be of any consequence for us to review it to see what time they put on the case.
The fee does -- this agreement does address that if a settlement is reached after outside counsel is retained before a complaint's filed, I think it's a half fee and shortly thereafter at the discretion of the AG.
So once you get further out than that on a contingency fee matter, the issue of time records would not be important to us. It would be important to the outside counsel.
Q. Okay. So you're saying that the section regarding outside counsel keeping time records was dropped because there was discretion taken away from the Attorney General as to whether or not they would -- if counsel -- outside counsel was terminated for some reason for cause, without cause, whether or not they'd receive some sort of reimbursement?
MR. JOWERS: Objection to form.
THE WITNESS: No, discretion wasn't taken away from the AG.
BY MR. KATSIFF:
Q. Okay.

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A. What it amounts to is -- I don't know why. I think Henry mentioned somebody complained about keeping all the time records. I don't remember.
But the fact of the matter is we don't review their hourly records. We review their cost, but not their hourly records. But if I were an outside counsel and I got terminated with a new AG coming in without cause, I would want to show something on quantum meruit, and I think that would help.
Also, in the DJ actions that are brought against us, they do have to keep hourly records because they're paid per hour. I'm not sure if that's -- I think this agreement had to be amended to that.
Q. Okay. So I just want to make sure I understand this. The reason that the requirement to keep time records was deleted was because there was no reason for the Attorney General's Office to require time records?
A. Well, that's my thought.
Q. Okay.
A. You know, the AG makes the ultimate decision. If there's anything that has ownership

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in this office more than anything else, the litigation retention agreement is the AG and the Chief Deputy's.

Q. Okay. So let's focus on the Cephalon agreement. Now, the -- on Page 11 --

A. Yes, sir.

Q. -- the agreement requires that special counsel -- special counsel represents that it doesn't have a conflict of interest and requires that it notify the AG's office if a conflict of interest develops?

A. Yes, sir.

Q. Has anyone notified you from either Mr. Suggs' firm or Mr. Rutherford's firm that there's a conflict of interest?

A. Not aware of any.

Q. Okay. Now let's look at Page 2 of the agreement, if you don't mind.

A. Yes, sir.

Q. A1. The Attorney General at his sole discretion has the right to appoint a designated assistant to oversee the litigation, which appointment the Attorney General may modify at will.

A. Um-hum.

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Q. Has the Attorney General appointed a designated assistant to oversee this litigation?

A. I'm going to point you to Page 4.

Q. Okay.

A. And that basically -- my name is under the AG. That's the understanding. I think Henry said we don't go out and have an official handshake in front of the American flag, but I'm designated in our section to take charge of this litigation for the office with the understanding that the Chief Deputy and the AG, of course, are also involved.

And also, it would be he doesn't have to appoint anybody because he could take charge of it himself from the beginning, but that's a rare occasion.

Q. Okay. So it's your understanding that you were designated as the designated assistant pursuant to the notice section, which is -- starts on Page 3 of this agreement?

A. Yes, sir, plus I was given the case by the AG or the Chief Deputy.

Q. Do you review all pleadings in the case?

A. Yes, sir.

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Q. Okay. Has the Attorney General's Office signed all -- been -- been on all pleadings in the case?

A. Yes, sir, I would say so. There may have been a pleading that went out in one of the cases we had that we didn't sign. Discovery motions. Not pleadings, necessarily. So we don't necessarily sign those, review them. But we review everything.

We even -- we don't like letters going out on any type of concession or position in the case or even an extension that we don't know about. And we will contact outside counsel to say, listen, you know, a letter went out. We didn't know about it. We need to see the letters before they go out.

Q. Okay. Now, if you look at -- if you look at 3 under Services, A3.

All pleadings, motions, briefs, formal documents, and agreements must bear the signature of the Attorney General or his designated assistant.

A. Yes, sir.

Q. Now, there have been pleadings, motions and other formal documents in this case that you haven't signed, right, personally?

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A. Well, they should have been signed by me or another member of the office. And if there weren't, we reviewed them, because we review all the pleadings.

Q. Okay. But -- but you told me a moment ago that you were the Attorney General's designated assistant; right?

A. Yes, but now your question is if -- if I am in -- I'm in charge of it, and I'm in charge of, say, Jared Libet, and Jared Libet signs it, we can have a designated assistant working on it. I'm responsible. And so I don't know if you're quarreling about Libet signing something instead of me.

Q. Yeah. Well, I mean -- I mean, you're the designated assistant --

A. I'm in charge of it.

Q. -- right?

A. I'm in charge of the case with the people above me also being involved in the case. But if Mr. Libet signed something at my request and the A -- and the Chief Deputy knows about the fact we're doing that, it's no problem to me.

Q. Okay. So with respect to the case against Cephalon, Scope of Appointment 3 says:

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The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General.

So what has the Attorney General -- who has the Attorney General assigned to work on this matter? Yourself, obviously.

A. You mean in this case?

Q. Yes.

A. Okay. Right now it is myself and Jared.

Q. Anybody else?

A. No. If we need somebody I'll get somebody.

Q. Okay. Now, Mrs. Jowers was on the initial pleadings of the case; right?

A. Yes, sir.

Q. Is she working on the case?

A. No, sir.

Q. Okay.

A. What she was on the case for was, it was we were going to do it in-house, and we needed -- in case some motions would come up or something that we need to have -- as busy as we are, have somebody else available. So when we were doing in-house, she was put on there and I think

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everybody else was on there I could find.

But when we got Ken Suggs' firm, she's not been working on this case. I don't see a problem with it, but she's not been working on this case.

Q. Okay. Have you screened her from the case, given the fact that Mr. Jowers is involved?

A. I haven't seen any need to screen her from the case. But she hasn't worked on the case.

Q. Okay.

A. She did some work earlier on on some research issues.

Q. Earlier on before Mr. Suggs' firm was hired?

A. Yes, sir.

Q. Now, if you go to Page 3, sir.

A. Um-hum.

Q. Status reports.

A. Yes.

Q. The Attorney General may at time to time request status reports from special counsel regarding any aspect of the litigation.

A. Right.

Q. Have they ever been requested?

A. No, sir. I think Henry answered that

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question. We pick up the phone, we talk to them. We're in constant contact with them. If he asks for a written report, I can't -- we don't -- I don't remember getting one, but a status report is a what's going on, and either they come in the office and give us an update or talk to them on the phone about it.

Q. Well, you know, General McMaster was answering questions, you know, while he was Attorney General, and he was not Attorney General while this case was brought; is that right?

A. Good point.

Q. Okay.

A. Excellent. He was not. Now Alan is. We don't -- we have not requested -- I have not requested on cases I'm overseeing any status report.

Keep in mind that if I'm in charge of a case, that doesn't prevent the Chief Deputy and the Attorney General from talking to the outside counsel.

I haven't seen a need for that, and I'm trying to think of all the cases we got, because we just -- we talk to them enough and in contact with them that we don't need a status report.

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Q. Okay. So you haven't asked for one.

A. No, sir.

Q. Okay.

A. We just talk to them all the time.

Q. Okay. Okay. If you could turn to Page 5 of the agreement, please, sir.

A. Okay.

Q. Okay. And this is the compensation section of the agreement; is that right?

A. Yes, sir.

Q. Okay. So if you look under the fee schedule:

Special counsel shall receive no compensation for any services rendered unless the state of South Carolina receives a settlement or award in connection with this litigation.

Do you see that?

A. Yes, sir, I see it.

Q. Okay. So unless there's money or a settlement resulting in money, special counsel doesn't get anything; right?

A. Yes, sir.

Q. Okay. Now, if you go to Page 6 under 2.

A. Yes, sir.

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Q. At least 75 percent of the remaining net settlement or judgment proceeds, but not including punitive or exemplary damages, shall be paid or applied for the state or the people of South Carolina or the victims in the matter to be determined by the Attorney General in his sole discretion.
A. Um-hum.
Q. What statutory authority gives the Attorney General the ability to determine how to apply funds awarded in -- if any, awarded in this case in his sole discretion?
A. I didn't draft that section, but the Attorney General is the chief legal officer of the state. He can -- when he -- the case law and the statute says when he comes into a case with the states of interest, he can take over litigation in the case in the public interest, he can settle the cases. So, therefore, he can -- he's only answerable to the court.
And here it would be that the -- he can settle out and determine what is appropriate for the agencies and represent that to the court, and the court would either not approve it or approve it. In the Lilly case and the AstraZeneca case,

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both those orders were approved by the court.
Q. So the statutory authority you're relying on is the unfair trade practices statute; is that right?
A. No, sir. You got unfair trade practice, and you also got the AG is the chief legal officer of the state under 1-7-100. He comes into a case, he takes over the case if the case is about the public interest.
There is case law that we have actually -- bringing out is -- is a history of case law that the AG is only accountable to the court about any type of settlements or litigation he's doing. So that would be here.
He -- he would -- he can make a decision on what he thinks is fair and would present it to the court, and the court will either approve or disapprove it. That's how I read that.
Q. Well, okay. I mean, there are two things: One is making a decision on whether or not to settle the case; right?
A. Yes, sir.
Q. Which, as chief legal officer of the state, you're saying the Attorney General has the authority to do that; right?

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A. Yes, sir.
Q. And the other one is if there's funds awarded in a settlement or a judgment, how -- how those funds are paid or applied.
A. Yes, sir.
Q. And you're saying that the statutory authority gives the Attorney General the right in his sole discretion to make that decision as well?
A. Well, historically the AG has had -- when he settles a case he can make a determination of what value to what entities.
Q. Um-hum.
A. He is accountable to the court, he's accountable to the general assembly, he's accountable to the public. But he -- and his -- he has authority in -- from my reading of the cases, to make decisions like this.
But he is answerable. He is answerable to the court, he is answerable to the public, he is answerable to the General Assembly.
Q. Okay. Well, this says he has sole discretion.
A. That's right, he has sole discretion on determining it, but his approval officially would come from the court. He's always answerable to the

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General Assembly. He's also answerable to the public.
Q. Well, when you get a judgment in an unfair trade practices case for penalties, isn't the judgment -- he's suing on behalf of the state of South Carolina; correct?
A. Right.
Q. So the judgment is entered on behalf of the state of South Carolina; right?
A. And releases are granted on behalf of the state or the appropriate statute it's proceeded under.
Q. I'm just talking about cases with respect to a judgment, all right?
A. Yes, sir.
Q. There's no releases when you get a judgment --
A. Okay, okay.
Q. -- unless you settle it; right?
A. Okay.
Q. Okay. So in the trial court -- and let's just use the Janssen example, okay? In Janssen the judgment was entered in favor of South Carolina, right, the $320-some million dollars?
A. Correct.

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Q. Okay. And did that judgment have any order from the court about how that money should be applied other than it should be paid to South Carolina?
A. No, because that matter is on appeal and --
Q. I'm just asking about the judgment itself.
A. No, no, the judgment didn't have -- it said penalties to the state of South Carolina.
Q. Okay. So, I mean, you'll agree with me when there's a judgment in an unfair trade practices case, you know, regarding civil penalties, the judgment -- the civil penalties are awarded to the state of South Carolina.
A. Correct.
Q. Okay. And so then what you're saying is that then under this agreement, even if there's a judgment for civil penalties, the Attorney General, in his sole discretion, has the ability to apply that judgment in the manner that he -- that he's determined.
A. Well, I think that would be in harmony with the case law. There's case law out there in South Carolina that you can get moneys from civil

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penalties for litigation retention agreements.
There's also -- the forfeiture statutes historically have allowed you to go get money for forfeitures. And there's a lot of areas of law that allow you to get money from what you might call penalties.
I would say sole discretion would be in conjunction with the statute and case law. That's me. Now, you might want to ask somebody else about it.
Q. Okay. Sitting here today, are you aware of any -- any statute that gives the Attorney General this authority?
A. I already referred you to 1-7-85 and referred to you to the 1-7-100. I think it's B, control of litigation, and the general case law that the AG takes the public interest. Any decision he would make would be in harmony with those provisions.
MR. KATSIFF: Why don't we take a quick break.
MR. JOWERS: Sure.
THE VIDEOGRAPHER: This brings us to the end of Tape No. 4. We're going off the record at 4:03.

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(A recess transpired from 4:03 until 4:14.)
THE VIDEOGRAPHER: This is a continuation of the videotaped deposition of C. Havird Jones, beginning of Tape No. 5. We're going back on the record at 4:14.
BY MR. KATSIFF:
Q. Okay. So let's -- we're still on Page 6, I think, of the agreement when we left it.
A. Okay. I'm back there.
Q. Okay. So Section 3 has part of how -- Paragraph 3, I should say, has part of how special counsel's paid; right?
A. Yes, sir.
Q. Okay. So it says:
Special counsel shall be paid the remaining 25 percent or less in fees of said remaining or net settlement or judgment proceeds including civil penalties, restitution, or damages, but not including punitive or exemplary damages, as follows.
A. Yes, sir.
Q. And then it goes on to list a sliding scale; is that right?
A. Yes, sir.

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Q. Okay. So as more money is recovered, the contingency percentage decreases.
A. Yes, sir.
Q. Okay. And it decreases from 25 percent for the first 5 million, and it goes down to 10 percent for anything over a hundred million; is that right?
A. Yes, sir.
Q. Okay. And then it goes -- you go down a little bit, and the last paragraph before you get to 4 says:
Provided, however, the Attorney General shall retain 10 percent of special counsel's fees awarded under this Section 3.
A. Yes, sir.
Q. Okay. So that -- so any amount that special counsel is awarded under Section 3, the Attorney General's Office gets to keep 10 percent of that; is that right?
A. Yes, sir.
Q. Okay. Now, what's the authority for the Attorney General to be able to do that?
A. Well, you can look at 1-7-85 that does talk about fees and costs. And we typically have these approved by the court anyway.

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Q. Okay. So anything besides 1-7-85 and court approval?
A. Court approval. There may be some other law out there that I can't recall that allows the AG to keep fees. But this fee agreement would allow us to keep fees to reflect our involvement in the case. It could be less or more than 10 percent. 10 percent is what's there, but our work could go far past 10 percent.
Q. Okay. So --
A. Plus, we're counsel of record in the case also.
Q. Is there any reason why punitive or exemplary damages are exempted from this Section 3?
A. Not that I know of.
Q. Okay.
A. I think that's back to Henry's draft, and I -- I don't know if it's been changed since Henry's draft.
Q. Okay. Well, this goes on in 4. 4 addresses punitive and exemplary damages; right?
A. Um-hum, um-hum.
Q. Okay. So -- and you don't know why those two were separated?
A. No, sir.

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Q. Okay. And under Section 4 the Attorney General's Office also retains 10 percent of any counsel -- special counsel fees that are awarded for punitive or exemplary damages; is that right?
A. Yes, sir. Yes, sir.
Q. Okay. So pursuant to this agreement, the retention agreement for this case; right?
A. Yes, sir.
Q. You'll agree with me that as more fees are awarded to private counsel, more fees are also awarded to the Attorney General's office; right?
A. Yes, sir.
Q. Okay. You'll also agree with me that as more civil penalties are awarded, more fees are awarded to private counsel.
A. Yes, sir.
Q. Okay. And as more civil penalties are awarded, more fees are awarded to the Attorney General's Office.
A. Yes, sir.
Q. Now, we talked a little bit about the Janssen case.
A. Yes, sir.
Q. Which is one of the cases that you sent to Mr. Jowers' partner, Ken Suggs --

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A. Yes, sir.
Q. -- to try to get him to -- interested in taking this matter; right?
A. Yes, sir.
Q. Okay. And the penalties that were awarded in that case were in excess of 320 million; is that right?
A. 327.
Q. Okay. So -- and it sounded like you had done some sort of calculation as to what the attorney's fees, if that -- if that judgment is upheld on appeal, what the attorney's fees will be in that case.
A. Yes, sir.
Q. And what is that number?
A. Not counting interest, if you stayed at 327 plus interest, it's 327 -- my back of the envelope was about 1.9 -- excuse me. 19 for outside counsel and 1.9 for our office.
Q. Okay. And --
A. Million.
Q. 19 million for outside counsel?
A. And the -- excuse me. 19 million. It may be that 1.9 would come out of that so they'll get actually 17.1. It's close in there. We don't

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get but 1.9, as I remember.
Q. Well, do you know the costs that have been incurred in that case, though?
A. No, sir, I don't.
Q. Let's just take the 327 million for a moment, okay?
A. Um-hum.
Q. Now, the -- you know, for the portion of the 370 million that's less than a hundred million dollars, they get -- counsel in that case would get a greater percentage, of course; right?
A. One more time with that question.
Q. Okay. So the way -- under this sliding scale for attorneys' fees, the amount of that 327 million under a hundred million, special counsel would get a larger percentage of that, of those -- of that money; right?
A. Yes, sir. It's a sliding scale and the more you recover, the next bracket is lower.
Q. Right, right. But the lowest bracket is 10 percent; right?
A. In this case, yes, sir.
Q. Okay. What was the lowest bracket in that case; do you remember?
A. Janssen, I don't recall. Could have

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been 4 percent.
Q. Okay. The percentages have increased?
A. If it has. I don't know. I haven't looked at the agreement.
Q. Did you do the calculation for what the potential recovery would be in the Janssen case?
A. I did it top of my head.
Q. Okay.
A. I may have used a piece of paper too. So I was thinking it was 19 million and we get 10 percent. So it would be they'll get 17.1, and we'll take away 1.9 or 1.8 or something like that. Compared to the Janssen multistate, we would have gotten more. About three times more in Janssen multistate.
Q. And why do you think that?
A. Because it settled out at like 182, and we'd have been involved in a EC because we're getting expertise in these matters. So if we're in the EC with that 182, which is probably the highest multistate settlement --
Q. That's for all states, 182?
A. 182. I say all states. I'm not sure if it's a 50-state settlement. You usually have 30 or 35 participate, and then they try to wrap up the

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others along with it.
But we would have gotten between -- if you use the Lilly case, we would have gotten 1.8. You would go -- that's 60 million. So three times that. So you're looking at 5 1/2.
Q. Okay. Walk me through that again. You were saying that the -- if you were -- the multistate settlement was for 182 million; right?
A. Yes, sir, I think that's correct.
Q. Okay.
A. And Lilly was 62 million.
Q. I'm just talking --
A. Janssen 182.
Q. 182. Okay. So -- and you don't -- do you know how many states participated in that multistate?
A. No, sir.
Q. Okay. So -- but you were assuming that there were approximately 35 states?
A. Well, typically, there are 30 to 35, and then they'll add on a few at the end.
Q. Okay. And that 182 would be divided up between the states?
A. Yes, sir, but not equally.
Q. Okay. And what do you think South

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Carolina's share of the 182 would have been?
A. Between 5 1/2 and 6 million.
Q. Okay. And how much of that 5 1/2 to 6 million would have gone to the Attorney General's Office?
A. If it's fashioned with its normal settlement, it would have gone straight to our office.
Q. All of it?
A. Yes, sir.
Q. Why?
A. Consumer protection settlements are fashioned with the language it goes to the Attorney General's Office.
Q. Fashioned by who?
A. The settling parties and it's approved by the court. Now, if we'd have gotten that much here, I'm sure they got it figured out how to do it with the finances. If it would come here, I'm not sure where it would go from here, but it's drafted as such the AG's office keeps it.
Q. Well, I just would like you to go back to Exhibit 24 for a second.
A. Okay. I got 25. You got 24. Okay. I got 24.

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Q. Okay. So, I mean, you know, let's -- let's take as an example Line -- Line 16, which is the Household case. Do you see that?
A. Um-hum.
Q. And that was predatory mortgage lending; is that right?
A. Yes, sir. Yes, sir.
Q. That was an unfair trade practices case?
A. Yes, sir.
Q. Okay. And that's a multistate state case; right?
A. Subprime loans, yes, sir.
Q. Okay. And this chart shows that the total funds for South Carolina in that case were --
A. Hundred thousand.
Q. I'm sorry?
A. Does that say hundred thousand?
Q. I think it says -- I think it says 5.2 million?
A. Where's that?
Q. I'm looking at Line 16.
A. For Household, that would probably be restitution to consumers.
Q. Okay.

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A. So there was a restitution program that was sent out to consumers. So the consumers got 5 million because it was geared to a restitution, and our office got a hundred thousand for participating.
Q. Okay. So the office only got a hundred thousand, and then 5.2 million, you're saying, went to consumers.
A. Correct.
Q. Okay. Consumers being the actual individuals?
A. Yes, sir.
Q. Okay. So why is it -- that listed at 5.2 under total funds for South Carolina?
A. Because you get 5.2. You get a hundred thousand and you get 5.14 --
THE REPORTER: Say that slower.
THE WITNESS: You got 5.14 for consumers and a hundred thousand for our office. The total is, for the state of South Carolina, 5.24.
BY MR. KATSIFF:
Q. Okay.
A. I'm not -- I'm not following where the -- where the total you get from, but that's

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how -- if you add a hundred thousand to 5,140,000, that's what you get.
Q. Let's look at Line 35, Medco.
A. Medco. Okay. 35. Okay. I'm looking at it.
Q. Okay. Total funds for South Carolina there is listed as -- and there's two Medcos, I should say. There's Line 35 and Line 36. Do you see that?
A. Yeah, I can read them. I remember the case. That's the one about 3.3 million?
Q. There's a line for 3.126, and then there's a line for a hundred thousand.
A. Yes, sir.
Q. Added together, you're right. About 3.3.
A. Yes, sir. That was -- that went to -- I think the three million one twenty-six went to EIP.
Q. Okay.
A. Hundred thousand went to the office.
Q. Okay. So in that case -- that was a multistate case; right?
A. That was a case that was resolved multistate, but we were not in the multistate.

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Q. Okay. You have it listed here as multistate.
A. Well, what we did after it was -- after it settled, we -- we got information on it late. So we called Medco and said, would you like to settle with us?
Q. Okay. But in that case the total recovery, you're saying, was approximately 3.3 million; right?
A. Yes, sir.
Q. Of that, only a hundred thousand went to this office, the AG's office.
A. Because the damage was to EIP.
Q. Okay. And the rest went to EIP.
A. Yes, sir. It was damage to EIP. Medco was the PBM for EIP. It was their damages. We looked at the volume of their drugs that caused it as their damage, state agency's damage.
Q. Similarly, the Household case was a -- was a multistate case; right?
A. Multistate case.
Q. Okay. Total recovery, if you add both of those two lines up -- and I'm talking about Lines 16 and 17.
A. Um-hum.

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Q. You -- you get about 5.3 million; right?
A. Which one?
Q. Household.
A. Yes, sir.
Q. Hundred thousand goes to the AG's office.
A. Yes, sir.
Q. And 5.2 million goes to -- goes to --
A. Homeowners. Subprime.
Q. Okay.
A. Participants, so to speak.
Q. And did you identify the participants?
A. Yes. We had -- the Household consumers in South Carolina were identified. They received letters, and they could participate in the settlement. And it had several factors in determining how much money they would get.
Q. Okay. So let's look at the Ford Explorer case. What was that?
A. I think it was unsafe vehicle, turnover. I don't know if that was Bridgestone tires or not. We had two. One was a turnover, one was Bridgestone tires with them.
Q. That's Line 18.

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A. Bridgestone?
Q. No. I'm sorry. Ford Explorer is Line 18.
A. Okay. We got 37,000 for the office? How much you get for that? 18, 18, 18.
Q. It's Line 18 and 19.
A. Okay. I'm seeing 18 and 19. I'm trying to see it. What's the question?
Q. The question is, okay, so on Line 18 it looks like there's a 2 -- that's the Ford Explorer case, which you said was -- you think was turnover of the vehicle.
A. Could be. Mr. Woodington handled one of those one time. I handled another one.
Q. And that was unfair trade practices?
A. Yes, sir, consumer. Consumer. Consumer protection.
Q. Yeah. But it was -- it was under SCUTPA?
A. Yes, sir. That would be our -- our law in the case.
Q. Okay. And there's a $260,000 recovery? Do you see that?
A. Yes, sir.
Q. And that went into the general fund.

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A. Yes, sir. I guess is what it says. Is that K?
Q. S. Here, take a look at S. Tell me if that's --
A. Okay. That's general fund. That's general fund.
Q. Okay. So that goes right into the general funds of South Carolina?
A. Yes, sir.
Q. Okay. And that's a multistate consumer protection case; right?
A. Yes, sir.
Q. Okay. And then if you go down --
A. That was how that agreement was drafted.
Q. Okay. Then if you go down a little bit to Line 19, the Ford Explorer as well, and this is a $40,000 recovery. And that goes right to the AG's office; right?
A. Yes, sir.
Q. Okay. So out of this multistate case, 260,000 goes to the state, and 40,000 goes to the AG's office.
A. Yes, sir.
Q. Okay. Okay. So, I mean, in these

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multistate cases, it's not necessarily the case that all the money in the case goes to the South Carolina Attorney General's Office; right?
A. That's correct. At different -- the CD case we got some fees for attorney's fees. Compact disk. And we let consumers -- consumers participated in getting refunds because of the retail price maintenance holding the price of CDs up. I actually got some money out of that myself. About 40 bucks.
Q. Okay.
A. My family did.
Q. Okay. And if you could look down for me to Line 107, which I guess would be on the fourth page of your document.
A. Okay.
Q. This is a fairly significant one.
A. 107?
Q. Yeah.
A. Okay. That's Page 4. You're probably right on that one. That's national mortgage settlement.
Q. Yep.
A. Okay.
Q. Okay. So $47 million is recovered;

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right?
A. Um-hum.
Q. The AG's office gets 3.1 million.
A. Um-hum.
Q. 28.2 million goes into the state's coffers into the general fund; right?
A. Um-hum, um-hum.
Q. And then approximately 15.9 million goes to consumers?
A. Yes. That was -- I'm not sure about the 15.9. It went through kind of a restitution program. That one was one that came in at -- it was a national settlement, and that was with the General Assembly getting to -- knowing about 28 million and the 3 million, so...
Q. That was a multistate case?
A. No. That was -- actually, that was a national mortgage settlement. As I remember, it was more of a DOJ type settlement that we could participate in after it got resolved, and which moneys came to the state.
We had -- we -- we had responsibilities under that one that required foregoing -- forth going or futuristic resources. So we actually had to, I think, hire somebody to -- to -- to work on

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that as it -- monitored it.
But yeah, that was -- that was not one that we were involved in from genesis. That's one that came out for all states to participate or not. The DOJ had been involved in that a while, and it was a question do we participate or not.
Q. Okay. But it's listed here as a multistate case; is that right?
A. Yes, sir. There were multistates in it. But each of these multistates are kind of different. Some are the same, but some are different.
Q. So each multistate settlement is different; is that right?
A. Well, you just pointed out the one with Ford, you pointed out the one with the mortgage settlement. That's different. You got the CD one I brought to your attention. You got Direct TV.
Some of these cases you can't get money to consumers. There is a -- there's a line of diminishing return if you can locate the consumers and you -- it costs more to get money to consumers than not, it's -- it's difficult to do that.
Q. And some of the cases just go directly to the state coffers; right?

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A. Yes, depending on the settlement.
Q. Okay. So how about if civil penalties are a component of the settlement? Where does that money go?
A. Civil penalties --
Q. That doesn't go to consumers; right?
A. No. It would go to the state. And depending on the fee agreement, we'd take fees out of that.
Q. Well, I'm talking about civil penalties in the multistate context.
A. Well, the consumer protection money is -- you've basically given up your -- your civil penalties claim. So typically, those would go to the office or, if not designated, designated to the general coffers. Depends on each agreement.
Q. Under the -- under SCUTPA, SCUTPA provides for civil penalties; right?
A. Yes, sir.
Q. Okay. And under SCUTPA, civil penalties get paid to the state; correct?
A. That's what the language says, yes, sir.
Q. Okay. So it doesn't get paid to the Attorney General's Office. It gets paid to the

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state.
A. The language of the statute is that civil penalties to the state.
Q. Okay. So if you're settling a case in the multistate context for civil penalties, would you agree with me that the portion of civil penalties that are being settled, that portion of the settlement that is allocated towards civil penalties goes to the state under the statute?
A. There's a provision in the Unfair Trade Practice Act that any subsequent pieces of legislation need to be considered. 1-7-85 came after that. So you could read 1-7-85 into the SCUTPA as far as penalty -- as fees. And 1-7-85 talks about court orders.
Q. Well, 1-7-85 -- I mean, again, you're citing 1-7-85. But 1-7-85 talks about recovery of attorneys' fees and costs --
A. Right.
Q. -- in the Attorney General's Office; right?
A. Um-hum.
Q. So is your interpretation under 1-7-85 that the Attorney General's Office could cover -- recover attorneys' fees and costs in excess of what

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its actual attorneys' fees and costs are?
A. I think our -- to answer your question, if our fees and costs for consumer protection purposes are approved by the court, that -- now, our office has to account for that. I don't account for that. It comes in to the office, and the office accounts for that.
But I think you can see we get more from the scenario you -- you proposed or posed than we do from fee contracts.
Q. Who's the "we" that you're talking about?
A. What did I say?
Q. You said you think we get more.
A. AG's office. AG's office on litigation that we've had outside counsel, our share is -- is -- is less than we do the multistates.
Q. No. I'm just talking about civil penalties; right?
A. Okay.
Q. I mean, you agreed with me that civil penalties have to be paid directly to the state's coffers.
A. No. I'm --
MR. JOWERS: Object to form.

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THE WITNESS: I would refer you to the statute.
BY MR. KATSIFF:
Q. Okay.
A. We can take fees out of civil penalties. That's the case law.
Q. Okay.
A. And you have some room in 1-7-85 to take litigation costs and fees out of there, which would include outside counsel.
Q. Okay. Okay. Well, let's just break this down then.
You agree with me that under SCUTPA civil penalties have -- are paid to the state of South Carolina; is that right?
A. I would agree with what the language says in 110. I don't have it in front of me. You can read it back if you've got it. 39-5-110. It says what it says.
Q. I mean, you're an expert in this area. And, I mean, if you don't recollect or don't remember, just tell me you don't remember.
But my question is a simple one: Do you agree with me that under SCUTPA civil penalties are to be paid to the state of South Carolina?

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A. I would agree the language of 110 says where they'll be paid. The language of 110 says that. Because as the public interest is paid to the state because of the public interest aspect of the 50 section.
Q. Okay.
A. So the AG proceeds as parens patriae capacity under the 50 section to remedy something for the state. And with that, if it's willful, it involves a civil penalty. So you're recovering money for the state.
Now, you would have to read that 110 section in conjunction with the other statutes that I cited to you, plus you got to do an accounting also to the General Assembly.
Q. Okay. But the payment of civil penalties is made to the state; right? It's not made to the Attorney General's Office.
A. Well, I think the actual payment comes through our office.
Q. Okay. The funds are for the state; right?
A. We're going around and around with this. 110 says that civil penalty is for the state. The AG proceeds under the 50 section as

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parens patriae statutory capacity in the public interest to remedy a state's nuisance, so to speak. And if it's willful, he's entitled to go to court and get civil penalties up to 5,000 for each violation.
And even if a matter is started under 140 in a private action and that private action prevails and it's willful, he can take that order and petition the court and get civil penalties for the state if it's appropriate.
Q. Civil penalties for the state.
A. Right.
Q. Okay. And that's all I was asking. The question is, is the civil penalties are for the state of South Carolina.
A. But -- yes, and you asked about where is the money paid. And the civil penalties are for the state. The same way we get recovery for EIP and Medicaid is for the state. The same way we get ascertainable loss is for the state and consumers. So it's not as easy as say what goes to the state and what do you do with it. You're accountable for the state. AG's accountable.
Q. And so, I mean, I just want to go back to the multistate context.

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A. Yes, sir.
Q. Are civil penalties recovered as part of a settlement in the multistate context?
A. In a multistate context you are releasing your SCUTPA claims that the AG could bring. You're not releasing your agency claims. You're releasing your basic -- your 50 A and 50 B and 110.
Q. Okay. So you're releasing claims for civil penalties.
A. Correct.
Q. So is part of the funds you're receiving for civil penalties?
A. Yes, sir, release for that. So part of the funds were received for that, yes, sir.
Q. Do you ever allocate, as part of the settlements in that context, what portion of the settlement is for civil penalties and what portion is for restitution or other damages?
A. We send a copy of the -- our group sends a copy of the settlement order defining what the funds will be used for to finance per the settlement order.
Q. Okay. And does the settlement order allocate why the funds are being paid?

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A. There's a section that -- we send a copy of the settlement agreement to finance which says how the funds can be used. And we go to court and get these ABCs or consent judgments approved by a court, and we point out to them when they ask us or we tell them where the funds are going to be going.
Q. Okay. Let's go back to the -- to the retention agreement.
A. Okay.
Q. With -- concerning this case.
A. Okay.
Q. Mr. Suggs' firm and Mr. Rutherford's firm.
A. Yes, sir.
Q. Okay. Could -- now, this is a legally binding contract, I assume.
A. I would think so.
Q. Okay.
A. We've heard that before.
Q. Okay.
MR. JOWERS: I'm banking on it.
BY MR. KATSIFF:
Q. Now, you're talking about, you know, approval and settlements that are approved by court

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order and the court order itself giving justification for the payment of attorneys' fees; right?
A. Yes, sir.
Q. Okay. So I -- that leaves open the possibility that a court may not approve --
A. That's right.
Q. -- of attorneys' fees; is that right?
A. That's right. That's right.
Q. So if a court doesn't approve that attorneys' fees be allocated in this way, isn't Mr. Suggs and Mr. Rutherford free to sue the state of South Carolina for recovery of their fees?
A. I can't speculate on that.
Q. Okay.
A. I'm just saying that we've had the fee contract, we go to court and it's whether to show the reasonable fees or the fact that it's in the public interest to get it approved. The court reviews it.
In the AstraZeneca case they approved the DJ action payments, because now there's a provision in the litigation retention agreements when you guys sue us that they have to agree they're going to represent us, our counsel. And we

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have a hourly rate for them to get paid. And it comes out of the recovery if there is any. And that, in the AstraZeneca case, was approved by the court.
Q. Okay. Well, I mean, my question was a simple one, and it's just really, you know -- so you would agree with me that the Attorney General had the -- has the legal authority to enter into agreements on behalf of the Attorney General's Office; right?
A. Yes, sir.
Q. Okay. And agreements that the Attorney General enters into in his official capacity are enforceable; right?
A. Yes, sir.
Q. He has the authority to bind the office; correct?
A. Yes, sir.
Q. Okay. And he is an elected official in the state; right?
A. Yes, sir.
Q. Okay.
A. And he's a nice guy.
Q. Okay. And, you know, so if a court -- if a court disagreed with the allocation of the

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settlement proceeds, as is reflected in this retention agreement, then could special counsel file a claim for breach of contract?
A. Well, I would -- to answer your question is this: I can't tell you what outside counsel would do.
I would say that if a matter is settled and it is presented to the court on distribution of funds, the case law in South Carolina is, outside of fraud or overreaching, the court gives due deference to the AG's recommendation. I consider it not window dressing. I consider it as a -- as a appropriate thing to do to get court approval.
And this is a contract. The same way it says in here we can terminate them without cause. I would think that they would probably want to say that if it's without cause, they're due some money if there's a recovery. That would be an issue. So I don't know if I answered your question or not, but came close.
Q. I mean, my question was just simply could they sue for breach of contract.
A. I don't know. I mean, would they or could they?
Q. Could they.

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A. People can sue anybody for anything, I've learned. To answer your question, I -- if the terms are not in agreement with the contract, I can't tell you what would happen.

(JONES EXH. 27, Senate Amendment dated 2-16-11, marked for identification.)

BY MR. KATSIFF:

Q. If you could take a quick look at that, sir.

A. I'm familiar with what the document is. I'm not really familiar with the document.

Q. Okay. Well, it looks like -- if you look at the bottom of this it says user\sjones\appdata.

A. Probably sent to me.

Q. Okay.

A. But I didn't draft it.

Q. Okay. Okay. You didn't draft it?

A. No. That would be somebody else in our office when the issue came up about making it statutory. Some people liked it, as I remember, but I wasn't directly involved in this, this proposal to the General Assembly.

Personally, I -- you aren't able to amend it very well. If you got an issue with costs

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or fees or appeals, if you're locked in, it's difficult to appeal to the General Assembly. But I've seen this, but another attorney in our office was -- took the lead on this.

Q. Was this something that -- was this something that the Attorney General's Office was lobbying for?

A. I don't recall. I know it came up. I'm not sure if we were pushing it or somebody else liked the agreement so well they wanted to do it. I'm not sure.

Q. What was the -- what was the rationale as to why this needed to be made part of the laws of South Carolina?

A. Well, the thought would be if -- quarreling like you are with us, that if it was a statute, the General Assembly approved it and you wouldn't have a quarrel with us.

Because this is in 2011. We went through the Lilly and the AstraZeneca. If you made it a statute, then what quarrel would you have with us on a violation of due process right, so to speak. That could be a thought.

So there were those who thought it was probably a good idea and those who think it's a bad

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idea. But it didn't pass, so it wasn't enough thought it was a good idea.

Q. What camp were you in?

A. I like -- I like the AG to have discretion. And we've seen little things that had to be changed like the appeals and certain other things, and it would be difficult to get something passed through the General Assembly to allow us to do that.

He -- it's on the website. Everybody that wants to look at it can. They can call the AG and talk to him if they want to about it, give their input. And trust me, I think they have.

So the answer to your question is: I wouldn't want it law if I was -- it's -- couldn't make changes. But I liked the fact that if it was law, it would probably decrease these DJ actions that we're up against.

Q. Now, has the Attorney General's office entered into other contingency agreements since the agreement regarding Cephalon?

A. Yes, sir.

Q. Okay. Other was with Mr. Suggs' firm?

A. No, sir.

Q. Others did you enter into an agreement

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with one of the former attorney general's firms?

A. Yes, sir. There was one we entered here recently that Travis was a -- was a member of.

Q. Travis who?

A. Medlock. He's a former Attorney General.

Q. Okay.

(JONES EXH. 28, Amendment to the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril and Actiq, Bates SCAG 1009, marked for identification.)

THE WITNESS: I have it. 28.

BY MR. KATSIFF:

Q. Okay. So this is the amendment to the litigation retention agreement for this case that you talked about earlier?

A. No. This is -- this is the Cephalon case here.

Q. Yeah.

A. Yeah. This is amendment -- yeah, that I talked about earlier about the DJ actions.

Q. Yeah.

A. Yes.

Q. I mean, you referred to this amendment

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earlier. I'm sorry.
A. Yes, sir.
Q. Okay. So this is the amendment to the Cephalon litigation retention agreement; right?
A. This is an amendment because of the DJ action, yes, sir.
Q. Okay. So pursuant to this amendment, Mr. Suggs and Mr. Rutherford have agreed to an hourly billing arrangement for work that they do in the declaratory judgment action; is that right?
A. Correct.
Q. Okay. And the rates are based upon years of experience; is that right?
A. Yes, sir.
Q. Okay.
A. They're based upon, yes, years of experience, not that they're high or low. They're from years of experience. To answer your question, yes.
Q. Okay. Now, whatever -- so I assume even though this doesn't say it that there are detailed time records being kept in connection with the declaratory judgment action?
A. I would assume that they're doing that because otherwise they won't get paid.

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Q. Okay.
A. In the AstraZeneca case they had detailed time records.
Q. Yeah, but the AstraZeneca case had a provision in the agreement requiring that detailed time records be kept; right?
A. But -- but --
Q. Correct?
A. I don't recall.
Q. Okay.
A. But the DJ action required them to actually produce them and become into effect. The reason for this is in the Lilly case a motion was filed to disqualify counsel. Of course, a motion is filed, our counsel we hired would be opposing the motion because they didn't want to be disqualified.
In that penalty -- in that order upholding the fee agreements that Judge Couch wrote, the last paragraph he said: I don't understand. Why don't you do a DJ action.
So now we were faced with the issue of we had outside counsel. And if it's a motion, they got to handle it. But if it's a DJ action, who's going to handle it? So we had to come up with some

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type of an arrangement. Because when AstraZeneca filed their matter, it was a separate action, like you've done.
Q. Um-hum.
A. So any -- any of these rates here are to be -- they have to produce time records, and it would come out of any recovery that we might have.
Q. Okay. It comes -- it's treated as a cost in the recovery; right?
A. Yes, sir. Yes, sir.
Q. Okay.
A. Excuse me.
Q. Sure. Take a moment.
A. How about an hour? No. I'm ready. Go ahead.
Q. Okay. So any fees that are expended by special counsel in connection with this case are treated as a cost to be recovered that comes off the top of any recovery if there is any recovery in this case; right?
A. Right.
Q. Okay. So if there is no recovery in this case -- and by this case I mean the South Carolina action against Cephalon --
A. Yes, sir.

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Q. -- then Mr. Suggs and Mr. Rutherford won't receive any payment for the work that they've spent defending the declaratory judgment action; is that right?
A. Correct.
Q. Okay. Now, if you look at Mr. Rutherford's signature, his -- the date that he says he signed this is November 21st, 2012? Do you think that that's just a typo?
A. Yeah, it probably should be 1-21-12.
Q. You mean 1-21-13?
A. Yes, yes, yes. I don't know why that date says that.
Q. Okay.
A. I'm -- it could have been -- I can't tell you why, if it's an error or not an error. When did you -- do you recall when you filed our -- your DJ action?
Q. Well, I'm just looking at the other signatures on this, and they're all in the second week of January, 2013.
A. I didn't pick up on that. It was a good observation on your part. Don't know if he got it first and circulated it, then Alan came back and signed it later and Ken signed it later. I

don't know.
Q. Okay.
A. The important thing is he did -- he did sign it.
Q. Did -- okay.
MR. KATSIFF: Why don't we -- why don't we break now.
MR. JOWERS: Okay with you?
THE WITNESS: That's fine with me.
MR. KATSIFF: We can go off the record.
MR. JOWERS: Are we off?
THE VIDEOGRAPHER: We're going off the record at 5 o'clock.
(The witness, after having been advised of his right to read and sign this transcript, does not waive that right.)
(The deposition was adjourned at 5:03 PM.)

SIGNATURE OF DEPONENT
DEPONENT: C. HAVIRD "SONNY" JONES, JR.
DEPOSITION DATE: April 10, 2013
REPORTER: Sandra K. Bjerke
CASE CAPTION: State of SC vs. Cephalon

(Please return both Signature of Deponent pages.)
I, the undersigned, C. HAVIRD "SONNY" JONES, JR., do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)
DEPOSITION DATE: April 10, 2013
REPORTER: Sandra K. Bjerke
CASE CAPTION: State of SC vs. Cephalon

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C. HAVIRD "SONNY" JONES, JR. Date

I, Sandra K. Bjerke, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent page within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

Sandra K. Bjerke, RMR, RDR, CRR
My Commission Expires
June 18, 2020

CERTIFICATE OF REPORTER

I, Sandra K. Bjerke, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.
I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.
Witness my hand, I have hereunto affixed my official seal this 17th day of April, 2013 at Charleston, Charleston County, South Carolina.

Sandra K. Bjerke, RMR, RDR, CRR
My Commission Expires
June 18, 2020

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND

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

Plaintiff,

vs. CASE NO: 2011-CP-40-3661

CEPHALON, INC.,

Defendant.

(Caption Continues on Page 2)

VIDEOTAPED
DEPOSITION OF: C. HAVIRD "SONNY" JONES, JR.
Volume II

DATE: April 11, 2013

TIME: 2:44 PM

LOCATION: Office of the Attorney General
1000 Assembly Street
Columbia, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: SANDRA K. BJERKE, RDR, CRR, CBC

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
CEPHALON, INC.,
Plaintiff,
vs. CASE NO: 2012-CP-40-7317
ALAN WILSON, in his Capacity as Attorney General for the State of South Carolina,
Defendant.

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ALSO PRESENT:

Beth Valdes, Paralegal
Steve Barksdale, Videographer

(INDEX AT REAR OF TRANSCRIPT)

THE VIDEOGRAPHER: This begins Volume 2, Tape 1 in the deposition of C.H. Jones. The date is April 11th, 2013.

Would the court reporter please swear in the witness.

(Whereupon, the oath was administered to the witness by the court reporter.)

THE VIDEOGRAPHER: We are on the record at 2:44 PM.

C. HAVIRD "SONNY" JONES, JR.
being first duly sworn, testified as follows:

EXAMINATION

BY MR. KATSIFF:

Q. Okay. Good afternoon, Mr. Jones.

A. Good afternoon. Good to see you.

Q. Good to see you again. We've been together most of the day. You sat through Mr. McIntosh's deposition; right?

A. Yes, sir.

Q. Okay. So we're going to continue your deposition from yesterday, and I just have a few more questions for you to wrap things up, if that's okay.

A. Yes, sir.

Q. Okay. So the -- the amended complaint

filed by the State of South Carolina against Cephalon in this action purports to assert claims on behalf of the state health plan; is that right?

A. Yes, sir.

Q. Did anyone contact the state health plan?

A. It's a policy and procedure that we contact them as a matter of courtesy. Whether or not we, in fact, did in this case, that was something that Jay would usually do.

Q. Okay. So you don't know whether or not anyone contacted the state health plan?

A. We're in constant contact with them because we receive information on their drug usage or purchases. And we're in contact with them and usually let them know.

Q. Okay. I guess I'm asking -- my question is: In connection with this case do you have a specific recollection as to whether or not anyone contacted the state health plan before the amended complaint was filed?

A. No, sir. Excuse me. No, sir. I wouldn't have done it. Jay would have done it.

Q. So the answer is you don't have a recollection.

A. Correct.
Q. Okay.
A. But the Attorney General as the chief legal officer in the state would go ahead and sue on behalf of state Medicaid without their consent or approval, but it's a matter of courtesy.
Q. Okay. Have -- to your knowledge, has -- did anyone have any conversations at all with the state health plan regarding this case?
A. I don't have any independent recollections.
Q. Okay. There were documents produced in this case in connection with -- purportedly on behalf of the state health plan; is that right?
A. Yes, sir.
Q. Okay. Do you know whether or not anyone contacted the state health plan to obtain their documents?
A. I'm sure they did.
Q. Okay.
(JONES EXH. 29, First Amended Complaint dated 2-13-12, marked for identification.)
BY MR. KATSIFF:
Q. If you could take a moment to look at that, sir.

A. I have Jones 29 in front of me.
Q. Okay. This is the amended complaint that was filed by the state of South Carolina in this action?
A. Yes, sir.
Q. Okay. Did you review this before it was filed?
A. Yes, sir.
Q. Who drafted it?
A. I'm thinking that probably it was in conjunction with our office and -- and with Ken Suggs' office. The difference between this one and the first one is the thought in the first one that disgorgement would be for all prescriptions in South Carolina, which would include the state health plan.
Q. Okay.
A. Now it's more specific because it's treble damages. Potential treble damages.
Q. Okay. You'll agree with me that no one from the Attorney General's Office signed this amended complaint?
A. I see that. It's got Mr. Suggs signed it.
Q. Okay.

A. But we reviewed it.
Q. Okay. But the -- you'll also agree with me that the engagement agreement for special counsel requires that somebody from the Attorney General's Office sign all pleadings; right?
A. Yes, sir. Yes, sir.
Q. And you consider an amended complaint a pleading; right?
A. Yes, sir, I would.
Q. Okay. And I see my name is on it, so that means that I would have reviewed it.
(JONES EXH. 30, South Carolina Office of Attorney General Fiscal Year 2010-2011 Agency Accountability Report, marked for identification.)
BY MR. KATSIFF:
Q. Now, you've just been handed an exhibit which is the South Carolina Office of Attorney General Agency Accountability Report?
A. Yes, sir.
Q. Have you seen reports like this in the past?
A. Yes, sir. I think I've seen them in this -- in these depositions. Be the first time I've really looked at them.
Q. Okay. So -- well, I'd ask you if you

could turn, please, to Page 36 of the document, sir.
A. Okay. I have it.
Q. Okay. You see where it says Consumer Protection & Antitrust?
A. Um-hum. Yes, sir.
Q. That's your section; correct?
A. Correct.
Q. Okay. Now, do you see the last sentence in that paragraph?
While the majority of cases handled by this section involve pharmaceuticals and unfair trade practice claims, other cases which are the focus of this section include those concerning charitable trusts, elections, and certain gambling-related issues.
A. Correct.
Q. Okay. So do you agree that the majority of cases handled by your section involve -- involve pharmaceuticals and unfair trade practices?
A. That's what it says, but with this time period in the charitable trusts, my time would have been spent over half the time with charitable trusts. It says that, but it's probably pretty

close to being 50 percent. 50 percent or -- or 55 percent other.

Q. Okay. So your testimony is that at least half of your time, approximately -- let's say half of your time is spent involving unfair trade practice claims; is that right?

A. That's a good guesstimate. We got Mary Frances, who does not work on anything really except charitable trust, nonprofits.

Jenny is brand new, and she wasn't in the section at that time.

So I'm looking at probably at this time period of '10 and '11, me. I would say myself and Mary Frances with the James Brown case, we were probably looking at 55 to 60 percent on other things. I can look at the chart. I think I saw who was in the section at that time.

Q. Okay.

A. We got Geoff, Anthony just came in, Susan, Doni Gibson. That's about right. It was, I'd say -- I would say half. It could be 40, it could be 60, but that area. We do a lot of other things outside of unfair trade practice.

Q. Now, on the NAAG calls that you had --

A. Yes, sir.

Q. -- there were discussions on those NAAG calls about the antipsychotic cases against AstraZeneca, Lilly and Janssen?

A. Yes, sir. I didn't -- I didn't participate in those calls, but I think there were discussions on those.

Q. Why do you think that there was discussions on those?

A. I think I saw a list, an agenda that came around that I looked at that had the multistate cases listed.

Q. Okay. And those discussions took place while those cases were under seal; isn't that right?

A. I have no idea about that now.

Q. Okay.

A. I don't know the dates that would match up when they came out from under seal, when the discussions took place.

Q. Well, the state of South Carolina obtained that $327 million award in the matter against Janssen while that case was still under seal; right?

A. I don't know. I can't remember the date it came out. But I can't recall independently

when -- when the matter came out under seal. And I think the decision, the penalty order was in June of '11 or something.

Q. Okay. So you remember seeing an agenda that came around for a NAAG call about the antipsychotic cases; is that right?

A. I remember seeing the antipsychotic cases listed on there.

Q. Do you remember seeing Cephalon listed on any NAAG call agenda?

A. No, sir.

Q. Okay. Have you looked through all your NAAG call agendas?

A. I looked through everything that had Cephalon in it.

Q. Okay. And how do you know you looked through everything that had Cephalon in it?

A. I just did a word search on Cephalon.

Q. In Outlook.

A. Outlook and Groupwise.

Q. Okay. You understand that doing a word search in Outlook doesn't necessarily pull up every document?

A. That could be true.

Q. Okay. The agendas that come around

from NAAG, are they typically attachments to an e-mail, or are they included within the e-mail itself?

A. As I remember, there's an e-mail with an attachment.

Q. Okay. Do you know whether or not word searches pick up attachments?

A. No, sir.

Q. Okay. Do you know whether or not anyone has -- do you know how the IT group within the Attorney General's Office searched for electronic documents in this case?

A. No, sir. No, sir. I don't know if they checked -- used help fraud or not, to answer your question.

Q. Okay. Actually, my question is: Do you know whether -- do you know whether or not they used some sort of search, electronic search tool to search for documents, or did they just do word searches in Outlook?

A. I would -- I don't know, but I would think they used what you suggested we use if you, in fact, suggested we use something. It was agreed upon. If that's not true, I wouldn't know. I don't know what they used.

Q. Okay. So you don't know.
A. No. Now, I -- if I search for Cephalon, which I did, I wouldn't be the backstop on what we turned over to you.
Q. Um-hum.
A. Somebody else would be in charge of that.
Q. Now, you said, I think, that you -- that you called -- in connection with this case you called Mr. Saadi at the Connecticut state Attorney General's Office; is that right?
A. No, sir, I didn't say that.
Q. I thought you said you called the Attorney General's Office in connection with this case after you saw the e-mail more recently.
A. I called after we contacted you, and you being Cephalon.
Q. Um-hum.
A. And Cephalon said, well, you -- something about Connecticut or something. So for some reason I called Cole, and he has not called me back. That would be somewhere in '11.
Q. Okay. My mistake. You called Cole, not Saadi.
A. Yeah.

Q. Okay, okay. And I didn't mean to suggest that you were saying that you called him during the time period.
A. Yeah.
Q. I was just saying you called him in connection with this case; is that right?
A. The same way I called Mr. Sitarchuk and Mr. Pappert. Our office did. I think I talked to Mr. Pappert also.
Q. And you could have called Mr. Cole. I understand you called him more recently, but you could have called him back in 2007 when you received that e-mail from Mr. Saadi; correct?
A. I could have called him, but I had no reason to call him at the time, based upon what I said about the e-mail. It didn't ring any bells. I didn't know what Cephalon was.
Q. You could have called him, but you didn't call him.
A. Yes, sir. I could have called anybody else on that e-mail list.
Q. And you didn't.
A. Didn't.
Q. Did you have any discussions at all with Mr. Wilson or Mr. McIntosh about the money

that your group brings in to this office?
A. I think they -- they knew the money we have because we -- because we sent a memo up to finance.
Q. Um-hum.
A. I would say that they -- they probably gave us an attaboy for doing hard work.
Q. Yeah.
A. But that would have been about it.
Q. Do you recollect any discussions with Mr. Wilson about bringing additional cases for alleged violations of South Carolina's consumer protection law to raise additional funds?
A. No, sir. Dealing with the Attorney General on a fee contract is a very delicate situation in the sense that that's usually, in my opinion, I've seen a hotbed on any case, any matters they do. So there was no push to -- by them to get me to do -- our section to do more cases. No question about that.
Q. You had no discussions with either of them whatsoever about doing more cases?
A. No, sir. It would be the cases that we have. I'd always -- I'm always interested in this area and always liked to do this area. And the

more involved we get, the more time it takes. And the more that the other issues that I work on in charitable trust and whatever else there might be takes time up.
I'm very sensitive to the fact that we have to be on top of issues at all times. More so in the last four or five years than ever before, I think. So we need more people to do that.
Every litigation that's filed now, we just need more people, because we have to -- the issues we have to research, we have outside counsel we have to control and monitor. We have to meet with them, talk with them. So you need more people with that, along with being assigned other things. I work on other things in the office outside of unfair trade.
Q. Now, you say they may have given you an attaboy?
A. Well, I'm saying that they -- it's like -- an attaboy being that's good work, no different than anybody else in this office gets good work.
Q. Okay. And do you get those when you bring in these settlements?
A. Well, it would be -- they know that

we're bringing the funds in because we report the funds with the memo. So I would say. They don't seem displeased with what I'm doing.

Q. You report the settlements as they're agreed to in a memo up to the Attorney General?

A. When -- when the funds come in, we send a memo.

MR. KATSIFF: Okay. I'll pass the witness.

MR. JOWERS: Okay. Get these in order.

EXAMINATION

BY MR. JOWERS:

Q. All right. Mr. Jones, I'm passing you Exhibits 10 through 17 which have previously been shown to you. Would you take a minute to refresh yourself on the contents of those exhibits.

A. Okay. I reviewed Jones 10 through 17.

Q. Okay. Do you have any memory of having seen any of those SEC filings, media reports or press releases prior to this case, the State of South Carolina versus Cephalon?

A. I don't recall seeing any of these prior to this case being filed in this -- the course of this discovery and these depositions.

Q. All right. Then you can set those

aside. And there's one more, Exhibit 9. That is a press release from the Connecticut Attorney General's Office; is that right?

A. Yes, sir. No, sir, I don't recall seeing this before this matter was filed.

Q. Okay. Then you can set that aside as well. Let me pass you Exhibit 7, an e-mail from Mr. Bill Gambrell to Mr. McIntosh on which you and Jay are copied. Do you see that?

A. Yes, sir.

Q. And the date of that is November 2008; is that right?

A. Yes, sir. Yes, sir.

Q. Prior to that date had you gotten any information regarding claims or potential claims against Cephalon by the state of South Carolina?

A. I don't recall any.

Q. Do you recall having -- receiving any information whatsoever from Bill Gambrell regarding an investigation he was involved in with respect to the company Cephalon or the drugs Actiq, Provigil or Gabitril?

A. No, sir, I don't recall.

Q. Does Bill Gambrell discuss with you ongoing MFCU investigations in which he is

involved?

A. No, sir.

Q. All right. Let me show you, on Exhibit 7 again, prior to the date of that e-mail, November of two thousand --

MR. JOWERS: Or strike that.

BY MR. JOWERS:

Q. -- October of 2008, did you have information from any source that would have caused you to investigate a potential South Carolina Unfair Trade Practices Act case against Cephalon with respect to any of the three drugs Actiq, Provigil or Gabitril?

A. No, sir.

Q. Do you recall having heard of those three drugs before you saw the e-mail from Mr. Gambrell?

A. No, sir.

Q. Exhibit 26, which you've previously been shown, is the litigation retention agreement.

And does the agreement specify the Attorney General's control of the matter for which outside counsel is retained?

A. Yes.

Q. Would you describe for us the control

the office has over the litigation?

A. I would analogize it to the control that the Chief Deputy has over me in my activities with any case I have in the office. I don't do anything of any consequence at all without making sure that the Chief Deputy is aware of it. Or the Attorney General. So we have complete control. We know. We review pleadings.

It's been pointed out we didn't sign the amended complaint, but there's no question that was probably the first thing that your firm did. And I would say -- I can't remember, but we probably said we can't let that happen again. But our name is on the listing of attorneys.

We review all documents, all pleadings. We're in -- our section is involved in all the works of the cases. And it's -- my level and above, it's not uncommon for outside counsel in e-mail strings to be talking to the Attorney General or the Chief Deputy and we're copied on matters that are involved in either proceeding in cases or settlements.

But I would say there's no question that the AG has control, and he exercises control. And no decision of any consequence is made without

conferring with the Attorney General or the Chief Deputy.

Q. Even if there was a pleading or a discovery response that may have gone out without a actual signature by you or someone under your supervision, is there any doubt in your mind that you, on behalf of the Attorney General, reviewed and authorized those filings?

A. Right, because -- no doubt. In fact, when they're submitted to us, we have expressed a concern sometimes that we need to get them before the last -- last hour and minute because we have to review. And it is not unusual for us to edit these memos and -- that are proposed by outside counsel. In fact, that's going on as we speak with a matter before the Supreme Court.

And it takes -- and I would add that with the cases we have going, maybe four, five or six cases and with different outside counsel, it is important that -- that we're consistent in how we handle matters through the office. And so that takes time to make sure that everybody is acting consistently and properly, even down to the tone of memorandums.

Q. In 2006, '07, '08, '09 was there ever

an employee within the Attorney General's Office tasked with monitoring SEC filings?

A. No, sir, not from me. Not that I knew of.

Q. All right. Was there -- during --

A. Not reporting to me.

Q. Was there anyone, to your knowledge, tasked with monitoring SEC filings or statements in the media looking for potential South Carolina unfair trade practices cases?

A. No, sir.

Q. There's been some discussion at your deposition as well as the others about the antipsychotic cases that the office brought against Eli Lilly, Janssen and AstraZeneca.

Do you recall that discussion in these depositions?

A. Yes.

Q. Did you come to find out at some point that there was, at the time the office was pursuing its own cases, a separate MFCU action?

A. We would have found out about it when the matter came out from under seal. The issue would have been that the NAMFCU for, say, Bill Gambrell's section couldn't settle out his part

because we were suing on -- them on that Medicaid part or EIP part.

I don't independently remember when counsel comes in about whether matters are under seal or not. I could probably look back and tell you.

But I would tell you a hundred percent that if counsel came into this conference room or the AG's conference room and said, I'm going to show to you matters that are under seal, I would -- I would remember that and that would be a concern of mine. I'd tell my AG and Chief Deputy.

But you've heard what John McIntosh says about the same thing. So there's no question that anybody comes in, I don't know if they had sealed stuff or not. They never presented anything to us that was under seal. A big concern of mine.

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

A. That is my understanding.

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

A. No, sir. The first information that I looked back and see as we had was when -- the memo from Bill Gambrell coming out from under seal in '08.

Q. All right. Is that Exhibit 7?

A. Yes, sir.

Q. Okay. All right. And just in case I'm not clear on this point, is Exhibit 7 the first information you received whatsoever from Bill Gambrell regarding Cephalon?

A. Yes, sir. And this tells me what Cephalon is, and it tells me that it could be a matter to be considered for the state of South Carolina and for EIP. Cephalon is a -- apparently is a pharmaceutical company, and there's some drugs mentioned.

Q. All right. And was the complaint in the underlying civil enforcement action brought within three years of your learning of the conduct?

A. Yes, sir. No question.

Q. Okay.

A. We were -- we were very conscious of statute of limitations issues, and we were aware of the statute of limitations issue for the unfair trade in this case.

MR. JOWERS: Okay. Thank you.
THE WITNESS: Um-hum.
EXAMINATION
BY MR. KATSIFF:
Q. You had information in November of 2007 that Cephalon was being investigated by the state of Connecticut; isn't that correct?
A. What are you speaking of?
Q. I'm asking you if that's correct.
A. No, sir, I didn't.
Q. Okay. Well, why don't you turn --
MR. KATSIFF: Can I -- can I just have the exhibits, please?
MR. JOWERS: They're out of order.
BY MR. KATSIFF:
Q. Okay. Can you turn to Exhibit 8, please, sir?
MR. KATSIFF: Thanks, Mr. Jowers.
MR. JOWERS: I didn't have a chance to put them back in order before you started going.
THE WITNESS: No. 8?
BY MR. KATSIFF:
Q. Yes, sir.
A. As I think I've already --
Q. I just asked you to turn to it. I

didn't ask a question.
A. Okay. Well, let me get it open here.
Q. Okay. Okay. So --
A. It says that Cephalon has been investigated by Connecticut. It doesn't tell me what -- what it's about.
Q. Okay. So --
A. It does say that, though.
Q. Okay. But my prior question was whether or not you knew, in November of 2007, that Cephalon was being investigated by the state of Connecticut, and the answer now is is that you knew that; correct?
A. No. My answer is: From this e-mail, it doesn't tell me anything, but I don't remember this e-mail.
Q. Okay.
A. Getting this e-mail.
Q. Well, you have no reason to doubt that you received this e-mail at the time; correct?
A. I forwarded it on to Mr. Smith.
Q. Yeah. So that means you received the e-mail; correct?
A. Correct.
Q. And you read it before you forwarded it

on to Mr. Smith; correct?
A. I would typically read it, read it before I forwarded it on to Mr. Smith.
Q. Okay. And when you read it, you would have learned that the state of Connecticut had been engaged in the investigation of Cephalon for the better part of three years; isn't that correct?
A. That's what the first line says, yes, sir.
Q. Okay. So that's something you would have known in November of 2007.
A. Yes, sir. But it doesn't tell me the impact in South Carolina, it doesn't tell me what Cephalon is, it doesn't tell me what the drugs are.
Q. Well, the e-mail certainly tells you that other states are interested in this investigation; correct?
A. Well, apparently in the past some other states have contacted Connecticut, but it doesn't say South Carolina has. So apparently they had a reason to contact them. We had no reason because I didn't know what Cephalon was.
Q. Well, it says over the past two days, not in the past. Over the past two days several states have contacted me regarding this case.

A. Apparently they had a reason to contact him. I didn't have a reason to contact him.
Q. Well, and this was less than a week after the press -- Connecticut's press release came out that you already testified about; right?
A. The one I testified I didn't see.
Q. Yeah.
A. Yes.
Q. Other states apparently saw it and called the state of Connecticut.
A. Okay. So they knew, apparently, what it was about. I don't know what other states called.
Q. Okay.
A. It could have been a conversation that Saadi had with them. I don't know. Based upon this e-mail, there was no information in there that South Carolina would be interested in Cephalon.
Q. And this is being sent to the healthcare fraud group; isn't that correct?
A. Correct.
Q. Okay. And that's a -- that's a group of NAAG; isn't that right?
A. Correct.
Q. And NAAG is an organization. It's --

it's of attorney generals, and part of the purpose is so attorney generals can jointly work on matters; right?

A. Correct.

Q. And the healthcare fraud group is formed so people who concentrate in that area like you do can collaborate with their colleagues in other states' attorney general's offices to jointly work on cases and to share information; isn't that right?

A. Well, you summarized what you think it is, and I think that would be, within reason, a summary. I don't dispute that. But I'm not sure what the mandate of the Health Fraud Group is outside of AGs getting together and discussing potential cases.

Q. Okay. Well, let's just talk about what your experience was with the Health Fraud Group. In your experience with the Health Fraud Group, the Health Fraud Group shared information about matters that might be of general interest to people in other states doing what you do; isn't that right?

A. No question.

Q. Okay. And, I mean, one of the -- one of the reasons why you're a member of that group is

because you get valuable information from that group; isn't that right?

A. That's right.

Q. Okay. And you get valuable information about investigations, ongoing investigations in other states; isn't that right?

A. That's right.

Q. Okay. And this is information -- at least Mr. Saadi thought was valuable information to share with the group, isn't it?

A. But he just mentioned the name. He didn't mention what the information was. He could have used Acme, and I wouldn't have known what it would have been about.

It was the Health Fraud Group, but that doesn't tell me anything about what I just saw from the first page of Mr. Gambrell's memo in October of '08. It tells me that Cephalon's a pharmaceutical company, that South Carolina has an interest in it because it settled with South Carolina Medicaid, and it tells me about the three drugs.

Okay. Now, that -- that puts me on notice. Whether I remember it or not, I'm on notice right there because I look at it. It's sent to me. This doesn't tell me anything.

Q. Okay. Well, Mr. McIntosh knew all that information in 2007; isn't that right?

MR. JOWERS: Object to the form.

THE WITNESS: I would refer to Mr. McIntosh's deposition.

BY MR. KATSIFF:

Q. Okay. Well, you were quoting from his deposition -- or you were referring to his deposition previously in your testimony.

A. And you would have corrected me if I was wrong.

Q. I'm just saying, you know -- let's just take a step back for a second.

The Health Fraud Group, one of the things that is of interest to the Health -- the Health Fraud Group investigates allegations of healthcare fraud; isn't that right?

A. Yes, sir. You and I talked about it could be pharmaceuticals, it could be PBMs.

Q. Okay. Anything else that it could be besides pharmaceuticals and PBMs?

A. I just think of those two because I remember off the top of my head those two areas.

Q. Okay. So you'll agree that one of the principal areas that the Health Fraud Group

investigates are off-label marketing cases against pharmaceutical companies?

A. I wouldn't say -- I wouldn't say principal. I would say it would be included.

Q. Okay. Isn't that one of the primary areas of their concentration, sir?

A. I couldn't tell you. I would say that it would be a fair statement that they're very interested in off-label uses of pharmaceuticals or deceptive practices, but you also have -- some states have issues with hospitals and issues there with pricing in hospitals.

Some states have -- are really hot on PBMs. And so it could be even a merger. I doubt a merger would be in the Health Fraud Group, but there are a lot of things involved with -- relating to pharmaceuticals and drugs and hospitals and physicians and delivery systems.

And it wouldn't be uncommon, I would think -- I say uncommon. You could probably hear that the Health Fraud Group called, that the FTC is after North Carolina about dental hygienists. Lot of things could come up in a health fraud call.

But to answer your question, it would not be uncommon for deceptive marketing of

prescription drugs to be an issue on the Health Fraud Group call agenda.
Q. Okay. Deceptive marketing of prescription drugs are a area of principal interest in the Health Fraud Group; isn't that right?
A. Principal being 50 percent?
Q. Principal being it's a matter that comes up very frequently; isn't that right?
A. Yes, sir. It would not be -- it would not be -- it would be a fair statement to say it's of interest to the group. A major interest.
Q. Okay. So now you got this e-mail --
A. Um-hum.
Q. -- in November of 2007. And from this e-mail you knew that Connecticut was investigating Cephalon; correct?
A. That's what it says.
Q. Okay. And you also knew that Cephalon was Connecticut -- investigating -- I'm sorry.
You also knew that Connecticut was investigating Cephalon in connection with an alleged health fraud; isn't that right?
A. That doesn't tell me that.
Q. Well, why else would he be -- why else would he --

A. I don't know. I don't know. You have to call him and ask him why he did it. It didn't come across to me. It came across to me as it's Cephalon, that several states have contacted me and if you -- if you are interested for the same reasons as several states have contacted me, you may contact me too. Cephalon. That doesn't mean anything to me.
Q. Well --
A. It does now.
Q. Okay. But Mr. Saadi, you'll agree with me -- I mean, Mr. Saadi sending an e-mail regarding an investigation with Cephalon that he's saying in the e-mail that he wants to broadly inform the Health Fraud Group about; correct?
A. Yes. And apparently the vehicle he's using to do that is you call him. The person call him on the e-mail list. I didn't know about Cephalon. I didn't inquire. And if I had an interest or I knew something about it, I might have called.
Q. Okay.
A. But it's Cephalon. I don't know what Cephalon is.
Q. It's Cephalon relating to -- it's

Cephalon -- an investigation of Cephalon being sent to the Health Fraud Group, doesn't that indicate that the investigation involves a health fraud?
A. That would be fair. Health fraud could be PBMs, could be hospitals, could be physicians, could be dental hygienists. Could be a lot of things.
Q. Some kind of health fraud.
A. Some kind of health fraud.
Q. You're familiar with Google; right?
A. Yes, sir.
Q. Okay. So you could have certainly just typed Cephalon in Google and seen what it was in a nanosecond; correct?
A. Well, I could have Googled in Mike Cole and see if he's been out there for a while in '07, but I didn't. If I sit around doing that, I couldn't go out and control the litigation that we got in cases like Cephalon.
MR. KATSIFF: That's it. Thank you.
MR. JOWERS: All right. One follow-up then.
EXAMINATION
BY MR. JOWERS:
Q. To your knowledge, was there ever,

within the NAAG group, a multistate investigation into Cephalon?
A. Not to my knowledge.
Q. Was there ever a task force or working group set up through NAAG into Cephalon?
A. Not that I recall or knew of.
MR. JOWERS: Okay. That's it.
THE WITNESS: Okay.
MR. KATSIFF: Thank you, sir.
THE WITNESS: Thank you very much.
THE VIDEOGRAPHER: This concludes the video deposition of C.H. Jones. The time is approximately 3:23 PM. We are now off the record.
(The witness, after having been advised of his right to read and sign this transcript, does not waive that right.)
(The deposition was concluded at 3:23 PM.)

SIGNATURE OF DEPONENT

DEPONENT: C. HAVIRD "SONNY" JONES, JR.
DEPOSITION DATE: April 11, 2013
REPORTER: Sandra K. Bjerke
CASE CAPTION: State of SC vs. Cephalon

(Please return both Signature of Deponent pages.)

I, the undersigned, C. HAVIRD "SONNY" JONES, JR., do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

DEPOSITION DATE: April 11, 2013
REPORTER: Sandra K. Bjerke
CASE CAPTION: State of SC vs. Cephalon

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C. HAVIRD "SONNY" JONES, JR. Date

I, Sandra K. Bjerke, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent page within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

Sandra K. Bjerke, RMR, RDR, CRR
My Commission Expires
June 18, 2020

CERTIFICATE OF REPORTER

I, Sandra K. Bjerke, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 17th day of April, 2013 at Charleston, Charleston County, South Carolina.

Sandra K. Bjerke, RMR, RDR, CRR
My Commission Expires
June 18, 2020

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