

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

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 II OF II**

William W. Wilkins
Kirsten E. Small
Burl F. Williams
Nexsen Pruet, LLC
Post Office Drawer 10648
Greenville, SC 29603
(864) 370-2211

Counsel for Appellant Cephalon, Inc.

Alan Wilson,
Attorney General for the
State of South Carolina
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

Kenneth M. Suggs,
Gerald D. Jowers, Jr.,
Janet, Jenner & Suggs, LLC
Post Office Box 927
Columbia, SC 29202
(803) 726-0050

J. Todd Rutherford
The Rutherford Law Firm, LLC
Post Office Box 1452
Columbia, SC 29202
(803) 256-3003

Counsel for Respondent Alan Wilson

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State of South Carolina

Court of Common Pleas

County of Richland

2012-CP-40-07317

Cephalon, Incorporated

:

-VS-

:

TRANSCRIPT OF RECORD

:

Alan Wilson, et al.

:

April 21, 2014

Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr., Judge.

A P P E A R A N C E S:

Eric W. Sitarchuk, Esquire

Attorney for the Plaintiff

Gerald Jowers, Esquire

C.H. Jones, Jr., Esquire

Jared Libet, Esquire

Johanna Valenzuela, Esquire

Attorneys for the Defendants

Daphne D. Helms

Circuit Court Reporter

1 **The Court:** I assume then that the rest of you are here
2 on Cephalon versus the Attorney General; correct?

3 **Mr. Jowers:** That's correct, Your Honor.

4 **Mr. Sitarchuk:** That's correct, Your Honor.

5 **The Court:** In unison. All right. I have not had an
6 opportunity to fully review all the documentation that you
7 filed. I understand both that the Attorney General and
8 Cephalon have summary judgment motions, and I think based on
9 my perception of what I've read so far that I should hear
10 from Cephalon first. Is that correct?

11 **Mr. Sitarchuk:** Thank you, Your Honor.

12 **The Court:** You are?

13 **Mr. Sitarchuk:** Eric Sitarchuk, Your Honor, for
14 Cephalon.

15 **The Court:** Sitarchuk?

16 **Mr. Sitarchuk:** Sitarchuk. Your Honor, with the Court's
17 permission, I'm going to use a PowerPoint with my argument
18 today.

19 **The Court:** Absolutely.

20 **Mr. Sitarchuk:** And if I may approach the bench, I have
21 a couple of extra copies. I've already provided a copy to
22 counsel. Thank you, Your Honor.

23 **The Court:** Uh-huh.

24 **Mr. Sitarchuk:** May I proceed, Your Honor?

25 **The Court:** You may.

1 **Mr. Sitarchuk:** Your Honor, this case involves the
2 Attorney General exercising his law enforcement functions to
3 endeavor not only to obtain compensation for alleged past
4 wrongs but also to seek injunctive relief to stop future
5 action and most importantly for the issue before the Court
6 today to seek what could be very substantial penalties
7 against Cephalon for something called off-label promotion
8 which I'll get into in a minute.

9 The problem with that, Your Honor, and the problem that
10 brings us before the Court this afternoon is that in pursuing
11 this law enforcement action, the Attorney General has
12 retained private counsel, and in retaining private counsel,
13 the Attorney General has done two things. One, it has
14 promised to private counsel through an agreement up to
15 25 percent of the award in this case, including the award
16 with respect to any civil penalties.

17 And then it's done one more thing on top of that, Your
18 Honor, which is: In addition to the 25 percent to private
19 counsel, it's reserved for itself 10 percent of private
20 counsel's fees, including any award that could come from the
21 imposition of penalties. Now, we're talking about very --
22 potentially very significant money here, Your Honor, because
23 there's another case that came before us, the Jantzen case,
24 where the Attorney General's office claimed that these
25 penalties added up to 300 plus million dollars.

1 So what we're talking about is a contingency fee for
2 private counsel that could be upwards in the tens of millions
3 of dollars, depending on how the case turns out, and a
4 contingency fee for the Attorney General's office of what
5 could be in the millions of dollars. And in doing this, Your
6 Honor, they're asking this Court to bless an agreement of the
7 type that has never been approved by any court in any state
8 in this country before because nowhere other than here do
9 they in South Carolina seek that 10 percent for themselves,
10 and no Court has blessed the use of that 10 percent
11 contingency fee for the Attorney General when applied to
12 civil penalties.

13 And what that does, Your Honor, is that injects an
14 impermissible financial motivation into the law enforcement
15 process, and it's our position, Your Honor, that that
16 impermissible financial motivation, both as it applies to
17 private counsel representing the State and the Attorney
18 General's office itself, violates both due process and the
19 separation of powers, Your Honor.

20 Now, when I was -- when I was in law school in D.C., I
21 remember walking down Pennsylvania Avenue or Constitution
22 Avenue past the Justice Department, and one of the phrases
23 they have on top of that building that goes around the
24 building is that -- words to the effect that the government
25 wins when justice prevails. And I would submit to the Court

1 that this contingency fee agreement directly contradicts that
2 venerable principle.

3 But to fully understand why, Your Honor, allow me just
4 to digress for a moment and explain what the underlying
5 enforcement action is about as it relates to the issues
6 before this Court. The underlying enforcement action:
7 They're bringing an action claiming that Cephalon promoted
8 certain drugs off-label, and the best way to illustrate what
9 that means, Your Honor, is by an example.

10 So, Your Honor, consider a Cephalon sales
11 representative, say back in January of 2001 covered by this
12 case, who goes into a doctor's office in South Carolina, and
13 that sales representative is there to talk to the doctor
14 about one of Cephalon's drugs, Provigil, a wakefulness drug.

15 **Court Reporter:** I'm sorry. What?

16 **Mr. Sitarchuk:** Wakefulness drug. Now, Provigil has
17 been approved by the F.D.A. for a variety of uses, one of
18 which is, for example, excessive sleepiness due to shift-work
19 disorder. Basically, the nightshift can produce a disorder.
20 That's F.D.A. approved.

21 But suppose, Your Honor, in this example that the sales
22 representative says to the doctor, "Well, not only is
23 Provigil approved for shift-work disorder, but it can also be
24 used to treat fatigue associated with multiple sclerosis
25 which is an off-label use," and by an off-label, that's a use

1 that has not been approved by the F.D.A.

2 Now, suppose further that the doctor concludes that he's
3 going to prescribe Provigil to his M.S. patients to help them
4 with the fatigue that M.S. produces, and he may do that
5 because the sales representative told him about this off-
6 label use or he may do that because it so happens that this
7 off-label use for Provigil for M.S., it's the standard of
8 care. It's standard practice; it's well known in the
9 literature. He may be familiar with that.

10 Now, in that scenario, Your Honor, that's the scenario
11 where the State -- one of the scenarios where the State comes
12 forward and says: That off-label promotion -- when that
13 sales representative went in there and talked about that
14 off-label use, that was a violation of the Unfair Trade
15 Practices Act. We're entitled to all these penalties, \$5,000
16 per violation, whatever a violation is, multiplied by that.
17 Perhaps thousands upon thousands of violations they may claim
18 occurred here in terms of this off-label promotion.

19 Well, what does that off-label promotion deal us? With
20 respect to the doctor, it's perfectly legal, and the State
21 concedes as much in its complaint. It's perfectly legal to
22 prescribe a drug for an off-label use. So for the doctor,
23 he's done something that is appropriate for a doctor to do.

24 Where does it leave the patient? Well, where it leaves
25 the patient is they've gotten a drug that treats their

1 condition and allows them to function better during the day.
2 Now, suppose this patient is an employee of State government,
3 covered by the State Healthcare Plan and suppose that they
4 submit for reimbursement for this drug and it's reimbursed.
5 What has the State Health Plan gotten? Well, it's gotten
6 what it paid for, Your Honor. It's gotten a drug that helped
7 its employee deal with a medical condition.

8 Where does that leave the Cephalon sales representative?
9 Well, the question there is: Did the Cephalon sales
10 representative violate the law?

11 Now, back -- Cephalon pled guilty to a misdemeanor with
12 respect to this off-label promotion, covering a brief period
13 back in 2001. Since that guilty plea, the law has evolved,
14 particularly the law with respect to First Amendment
15 protections for commercial speech in the context of the
16 promotion of pharmaceuticals products. And what the Supreme
17 Court has said in Sorrell (phonetic) and what the Second
18 Circuit has said in a case called Caronia is that that speech
19 by a sales representative may be protected commercial speech
20 under the First Amendment. So it's an open question today
21 whether or not what that sales representative said is
22 protected by the First Amendment or is a violation of the
23 law.

24 Now, let me circle back to the issue before the Court,
25 with that context, because what the State seeks to do is to

1 apply the significant law enforcement tools it has available
2 to it to scenarios such as the one that I just described to
3 Your Honor, and it does that through this contingent fee.
4 The problem is, Your Honor, that the contingent fee agreement
5 -- because the State has a great deal of discretion here.
6 They have a great deal of discretion as to what penalties
7 they ask for, what to pursue, how much they're going to
8 contend they're owed. There is a lot of prosecutorial law
9 enforcement discretion.

10 And what the Supreme Court and what Courts throughout
11 the country have said is that that law enforcement discretion
12 has to be exercised impartially; it cannot be exercised with
13 financial bias. If it is, it can be a violation of due
14 process under certain circumstances and, Your Honor, we would
15 submit that this agreement is a violation of due process
16 here.

17 Now, Your Honor, there's -- there's really sort of a
18 spectrum of civil cases that the State may be involved in.
19 There's the ordinary case where the State's a party in a
20 dispute. Nobody questions that in an ordinary case,
21 contractual dispute, whatever. It's perfectly fine to hire
22 private counsel. It's perfectly fine to hire contingency fee
23 counsel because law enforcement has nothing to do with it.
24 That's not a law enforcement case. That's one class of cases
25 on the spectrum. That's not this case.

1 On the other end of the spectrum are cases that are akin
2 to criminal prosecutions, quasi-criminal cases, and I'll talk
3 about that in a moment. And in those quasi-criminal cases,
4 cases that are nominally civil but, in fact, so punitive that
5 in many ways they resemble a criminal case, contingent fee
6 agreements violate due process in all situations where the
7 State is engaging private counsel.

8 And in between those two markers, Your Honor, there are
9 cases which are not quasi-criminal but still involve the
10 State exercising its law enforcement function. And in those
11 cases, contingent fee agreements are not per se unlawful, but
12 there has to be some checks and balances in place.

13 Specifically, if you're going to hire private counsel as the
14 State and you're going to give them a contingency fee on the
15 recovery, then you as the Attorney General have to closely
16 supervise that case and you have to do so as a neutral law
17 enforcement officer.

18 So let me deal first, Your Honor, with the quasi-
19 criminal akin to a criminal prosecution.

20 **The Court:** In terms of the U.T.P.A. case?

21 **Mr. Sitarchuk:** I'm sorry, Your Honor?

22 **The Court:** In terms of the U.T.P.A. case?

23 **Mr. Sitarchuk:** Yes. Yes, Your Honor. Yes, Your Honor.
24 Exactly. And, Your Honor, it's our position here that the
25 way this case has been brought and the remedies sought, turn

1 this into a quasi-criminal case which means that a
2 contingency fee agreement is impermissible under all
3 circumstances. And you'll see here, Your Honor, on this
4 PowerPoint there are some slides that talk about the fact
5 that there's a class of civil actions where the government
6 has to be absolutely neutral, and those are civil actions
7 that resemble criminal actions to the point where that
8 requirement of neutrality comes into play.

9 And what type of cases are those, Your Honor? Well, the
10 South Carolina Supreme Court talked about that in State
11 versus Price because there are certain cases which are so
12 punitive in nature, so punitive either in purpose or effect,
13 that notwithstanding the fact that the legislature may call
14 them civil cases, but they are, in fact, criminal cases to
15 the degree that certain protections come into place and one
16 of those protections is the neutrality, the absolute
17 neutrality, of law enforcement which is why contingency fee
18 cases are prohibited in that situation.

19 So how do you decide, Your Honor, whether something as
20 nominal as a civil action is one of these quasi-criminal
21 cases? Well, the South Carolina Supreme Court teaches us to
22 look at a U.S. Supreme Court opinion in Kennedy versus
23 Mendoza-Martinez, and I think we agree with the State that
24 the Mendoza-Martinez case is the right analysis for quasi-
25 criminal matters.

1 And that sets forth a number of factors for the Court to
2 consider, not exclusively, but relevant factors for the Court
3 to consider in deciding whether a case is quasi-criminal.
4 And, Your Honor, those factors -- if you go through those,
5 Your Honor, and you look at each and every one of those
6 factors, each and every one of those factors strongly
7 supports the conclusion here and clearly supports the
8 conclusion here that this is, in fact, a quasi-criminal case
9 for which a contingency fee agreement is a violation of due
10 process.

11 The first Kennedy factor is whether the sanction
12 involves an affirmative disability or restraint. That
13 doesn't mean the case has to involve someone going to jail
14 because frankly you can't put corporations in jail. Does
15 this case involve an affirmative disability or restraint?
16 The answer is clearly yes because they're seeking an
17 injunction, Your Honor. And not only are they seeking an
18 injunction, but they're seeking an injunction that not only
19 would prevent Cephalon from, quote, violating the Unfair
20 Trade Practices Act law but would also prevent Cephalon from
21 promoting off-label.

22 So that injunction, Your Honor, seeks what is in essence
23 a prior restraint on potentially free speech, a prior
24 restraint on commercial speech. So that affirmative
25 disability, that affirmative restraint, goes right to the

1 issue of whether or not Cephalon has a constitutional right
2 to promote off-label, to engage in this commercial speech.
3 And, Your Honor, one of the cases that deals with these
4 issues a lot is the Clancy case, and I would submit to the
5 Court that the Clancy case out of California is on all fours
6 here because in that case free speech was also threatened and
7 in that case the Court found that that affirmative disability
8 was a significant factor in concluding that a contingency fee
9 agreement was improper under all circumstances.

10 The second Kennedy factor is whether the sanction has
11 historically been viewed as punishment, and what we're
12 talking about here, Your Honor, is this civil penalty
13 sanction, potentially \$5,000 per violation, potentially
14 hundreds of millions of dollars, depending on how you count
15 it and how the State pursues it. That is pure punishment,
16 Your Honor. Compensation, restitution, those are dealt with
17 in other claims that the State has made. And, Your Honor,
18 monetary fines are the way in which corporations have
19 historically been punished, historically been criminally
20 sentenced. You can't put a corporation in jail; you can only
21 fine them.

22 So these civil penalties -- quote, civil penalties, in
23 fact, are penalties which have presented sanctions that
24 historically have been viewed as punishment because they
25 impose pure fines for a retributive and punitive purpose on

1 the contrary.

2 The next Kennedy factor is whether scienter is required
3 to obtain this sanction, and, Your Honor, in Section
4 39-5-110, the provision in the South Carolina statute that
5 provides for these civil penalties, it requires, before they
6 may be imposed, a finding of willfulness, and willfulness is
7 a classic scienter in a criminal case.

8 Now, the State argues, well, they define willfulness in
9 the statute as that you knew you were violating the Unfair
10 Trade Practices Act or you should have known you were
11 violating the Unfair Trade Practices Act. Well, that doesn't
12 change the fact that that's a requirement of scienter.
13 Knowledge is a scienter requirement; should have known is a
14 scienter requirement in and of itself. And, Your Honor,
15 what's -- what's significant here about this should-have-
16 known requirement is that they're saying you should have
17 known that this was a violation of the law.

18 In most cases, ignorance of the law is no excuse, but
19 here the State actually has to prove that you either knew you
20 were violating the Unfair Trade Practices Act or you should
21 have known. That's a high standard of intent in a criminal
22 case, Your Honor, and certainly a requirement of scienter.

23 We go to the next Kennedy factor: Does the sanction
24 promote the traditional goals of punishment: Retribution and
25 deterrence? I would submit to the Court that it promotes

1 nothing else here. Compensation, damages, those are other
2 claims the State has made. What's left for the civil
3 penalties to do? What's left for the civil penalties to do
4 is to punish, to send a signal to the community in terms of
5 deterrence and to punish the alleged perpetrator of the
6 offense.

7 So, first, we've gotten four -- through four Kennedy
8 factors so far. They all clearly support the conclusion this
9 is quasi-criminal.

10 The fifth factor is whether the behavior involved is
11 also criminal, and the State does not dispute that, Your
12 Honor. They've, in fact, alleged that Cephalon pled guilty
13 to this conduct back in early 2000.

14 So what we're left with, Your Honor, is the final
15 Kennedy factor, and the final Kennedy factor, which really is
16 a combination of the last two there, is whether there's an
17 alternative non-punitive purpose for which the civil
18 penalties may rationally be assigned. In other words, when
19 you look at these \$5,000 per violation civil penalties, is
20 there some other purpose for those besides punishment?

21 And the answer to that, Your Honor, is clearly not
22 because, again, the purposes that one normally sees in a
23 civil case - compensation, damages, restitution, even
24 disgorgement of profits that one should not have had - those
25 are all claims that the State is making here. The civil

1 penalties lay on top of those, and their purpose is the
2 punishment. And really the State in its brief concedes as
3 much because the State in its brief says that, when it's
4 answering this question whether there's an alternative non-
5 punitive purpose, the State says, the alternative non-
6 punitive purpose is, quote, holding offenders accountable for
7 unfair and deceptive acts and practices, putting an end to
8 and holding offenders accountable for unfair or deceptive
9 acts and practices.

10 That's punishment, Your Honor. That's what criminal
11 laws do: They hold offenders accountable. They put an end
12 to misconduct, specific deterrence. Those are punitive
13 purposes; they're not alternative purposes.

14 So, Your Honor, if you look at all of the Kennedy
15 factors as the Supreme Court of South Carolina requires one
16 to do in assessing whether or not a nominally civil statute
17 is punitive in purpose or effect and, therefore, a quasi-
18 criminal statute, all of these factors clearly demonstrate
19 that it is, and because it is, Your Honor, the contingency
20 agreement is a violation of due process.

21 But let's suppose for a moment, Your Honor, just for
22 purposes of argument that we're not in that scenario of
23 quasi-criminal, but we're in that middle area, the middle
24 area of a law enforcement case, not a standard civil case
25 where the State's an ordinary party but a law enforcement

1 case that doesn't rise to the level of quasi-criminal. What
2 happens in that situation? Well, in that situation, Your
3 Honor, the State cannot -- and case after case after case has
4 held this, all of which are cited by the Attorney General.
5 The State cannot just engage private counsel to represent it
6 in such a case under a contingency fee agreement without
7 safeguards in place.

8 And we don't dispute that the State put a lot of
9 safeguards in place here, but there's one overriding
10 safeguard that, if it doesn't exist, renders the rest of them
11 completely and utterly meaningless, and that overriding
12 safeguard is neutrality, that the government lawyers who are
13 supervising private counsel that they are neutral, that they
14 do not have and that their office does not have a financial
15 interest in the outcome of the litigation, so where you have
16 a non-quasi-criminal case that's still a law enforcement case
17 and have a contingent fee agreement but only if that
18 contingency fee agreement requires the A.G. acting in a
19 neutral financially-disinterested capacity to supervise
20 private counsel.

21 Now, the problem here, Your Honor, is there is no
22 neutral financially-disinterested Attorney General's office,
23 and the reason that there's no neutral financially-
24 disinterested Attorney General's office is that you'll
25 recall, Your Honor, that the A.G.'s office takes a cut of 10

1 percent. They take 10 percent of the fee of private counsel.

2 So rather than being financially disinterested, they are
3 very financially interested, and they're very financially
4 interested because the more they get in penalties, the more
5 money goes into their budget. And the more that they press
6 for maximum punishment here as opposed to exercising
7 prosecutorial discretion unfettered by collateral issues, the
8 more money they can bring in. And, Your Honor, no one's---

9 **The Court:** Would that be true---

10 **Mr. Sitarchuk:** I'm sorry?

11 **The Court:** Would that be true of a fee-based
12 arrangement?

13 **Mr. Sitarchuk:** No, Your Honor, because with respect to
14 a non-contingent fee based arrangement, they don't have that
15 motivation to up the penalty to get more money. That's what
16 creates the lack of financial disinterest. That's what
17 creates the lack of neutrality is that being able to kick it
18 up. It would create other problems, separation-of-power
19 problems, which I'll deal with in a minute.

20 And it doesn't matter, Your Honor, that none of this
21 money drops directly into the pocket of the A.G. or anybody
22 in the A.G.'s office. No one is contending that because it's
23 not only personal gain, but as the Supreme Court has
24 explained in the Marshall case, it's also institutional gain
25 that can rob the government of that necessary neutrality.

1 And in this case, Your Honor, the fee could be
2 significant enough, significant enough that it could rob the
3 Attorney General's office of the neutrality. For example,
4 Your Honor, if you look at the prior case they brought, the
5 Jantzen case, the recovery for the State there - if they had
6 this 10 percent provision in place then which I don't think
7 they did - would be upwards of \$3 million. That's 14 percent
8 of the Attorney General's office budget.

9 That's a significant number. That's a -- that's money
10 that can be used for salaries. That's money that can be used
11 for bonuses. That's money that can be used for more
12 resources. That's money that can be used to bring more
13 cases. That's money that can be used to bring credit to the
14 Attorney General for the matters that he is pursuing.

15 These are all considerations, Your Honor, that are not
16 appropriate considerations for a law enforcement agency to
17 have in exercising its law enforcement function, and that's
18 why the courts require neutral control by the Attorney
19 General's office and that's why this 10 percent contingency
20 robs them of that neutral control.

21 So where we are -- where we are is here: That if this
22 case is quasi-criminal, which we respectfully submit that it
23 is, because each and every Kennedy versus Mendoza factor
24 tells us that it is, then the contingency fee agreement is a
25 violation of due process without further analysis. Even if

1 it's not quasi-criminal, even if it's more of a run-of-the-
2 mill law enforcement case, they can't hire private contingent
3 counsel without significant safeguards exercised by neutral
4 government control. Their 10 percent cut robs them of
5 neutrality, and there again in that type of case, even a non-
6 quasi-criminal case, it violates due process because of that
7 lack of neutral control and the supervision.

8 Now, Your Honor, they've cited cases like -- and I'm
9 sure they'll talk about cases likes Marshall versus Jerrico
10 where the Supreme Court found that the fact that the
11 government office potentially could gain some money from a
12 favorable resolution of the case did not violate due process.
13 But the Marshall case -- the facts of that case demonstrate
14 really that the facts of this case compel a different
15 conclusion because there the potential recovery was merely
16 one percent of the State's -- of the government's budget
17 rather than here which it could be upwards of 14, 15 percent.

18 But the other thing there was: That agency in the
19 Marshall case, they were always over budget, so they were
20 always getting the money back. It had no impact on it.
21 Here, the Attorney General's office, they don't have to give
22 the money back. If they're in excess of budget, they can
23 roll that over to the next year. So unlike Marshall where,
24 in fact, when you drilled down into the arrangement it
25 provided no financial motivations, just the opposite is true

1 here.

2 Now, they'll cite Your Honor to the Lilly case, the
3 Lilly case with Judge Couch, and they spent a lot of time
4 talking about the Lilly case. But the one thing that they
5 don't say about the Lilly case that renders it completely
6 irrelevant to the situation before this Court is that in the
7 Lilly case the 10 percent and private counsel's contingency
8 fee did not apply to civil penalties. It only applied to the
9 compensatory claims.

10 Unlike the Lilly case, here the contingency fee applies
11 to the very thing that makes this case punitive, that makes
12 this case quasi-criminal, that makes this case a significant
13 law enforcement case and that's the big number - and they had
14 that in their e-mail - to private counsel. The civil
15 penalties are the big number. They're the motivator to being
16 involved in this case.

17 So the Lilly case is completely different and, in fact,
18 Your Honor, there was another case before Judge Couch where
19 the contingency fee did apply, this 10 percent contingency
20 fee did apply to penalties, to civil penalties. That was the
21 AstraZeneca case, and in that case, Your Honor, the State
22 filed a motion to dismiss, a motion to dismiss a complaint
23 raising the very allegations that we raise here, and Judge
24 Couch denied that motion to dismiss, saying there needed to
25 be fully development of the record, that on its face their

1 complaint stated a claim.

2 I respectfully submit that here, Your Honor, with this
3 full development of the record, a due process violation has
4 been established. There is one final thing, Your Honor. If
5 you put aside these questions of due process and instead turn
6 to the separation of powers provisions in the South Carolina
7 Constitution and the legislation, what Your Honor will see is
8 that this agreement violates the separation of powers
9 provisions because it usurps the General Assembly's role in
10 deciding how to appropriate funds.

11 Now, it's the legislature, according to the Supreme
12 Court, that has the duty and authority to appropriate funds
13 and to specify the conditions under which appropriated money
14 shall be spent. So then you look at what does the
15 legislation say about recoveries by the Attorney General in
16 litigation. Well, it specifically deals with it, Your Honor,
17 and in Section 1-7-150(b), the legislature has said that all
18 monies - and there's an exception which I'll deal with in a
19 minute, but putting that exception aside just for a moment -
20 all monies awarded the State of South Carolina by judgment or
21 settlement in actions or claims brought by the Attorney
22 General on behalf of the State - that's this case - must be
23 deposited in the general fund of the State, must be deposited
24 in the general fund of the State.

25 Now, this agreement violates that requirement because it

1 doesn't take that money and deposit it in the general fund of
2 the State. In fact, if there's a recovery in this case, by
3 agreement they're splitting it up. The State gets a piece.
4 Private counsel gets a piece, and the Attorney General's
5 office gets a piece. And the pieces for private counsel and
6 the Attorney General, they're not deposited in the general
7 fund of this state.

8 So really then the issue before the Court is: Does this
9 exception apply, this exception for investigative costs or
10 costs of litigation in 150, the exception of 1-7-85 for those
11 same things in attorneys' fees? But there's a very -- I
12 think a key provision here, Your Honor, that will require the
13 Court to interpret it in deciding whether the provision
14 applies and that's this: Except investigative costs or costs
15 of litigation awarded by Court order or settlement. Same
16 thing in 85: Awarded by Court order or settlement.

17 Now, Your Honor, it's our position that what that means
18 is that this exception to the general rule only applies where
19 the final resolution of the case awards the State attorneys'
20 fees and litigations costs from the other party because
21 that's what we're talking about here, Your Honor. We're
22 talking about awards. We're talking about an exception to an
23 award obtained from the other side, an award obtained from
24 the other side that has to go in the general fund of the
25 State.

1 So the exception only applies to those attorneys' fees
2 and costs awarded by a Court or in a settlement from the
3 defendant to the Attorney General. They get to keep those;
4 that's it.

5 But that's not what we have here. What we have here is
6 a private agreement, a private agreement which is between the
7 Attorney General and private counsel which says, hey, we'll
8 give you a piece of whatever we get. They're not allowed to
9 do that. That usurps the role of the legislature. That's
10 not an award by a Court. That's a private deal. That
11 doesn't fall within this exception. They can't do that
12 without violating the separation of powers.

13 Now, they appreciate they have a problem here. So what
14 they do is they go through their agreement page by page,
15 paragraph by paragraph, seeing if they can find some phrase
16 in there which they think will try to sort of help them out
17 when dealing with this fact that it's got to be an award of
18 attorneys' fees. But the only thing they can come up with is
19 a quasi that has nothing to do with it which is this: This
20 distribution -- and that's talking about the attorneys' fees
21 to private counsel under the contingency fee agreement. This
22 distribution and compensation calculation shall be included
23 in the final order of the case.

24 Now, they say that magically converts their private deal
25 with respect to attorneys' fees into somehow an award of

1 attorneys' fees by the Court that gets them into that
2 exception, but, Your Honor, it doesn't do that at all.

3 This doesn't talk about an award of attorneys' fees.
4 This doesn't even talk about Court approval. What this says
5 is that the compensation calculation shall be included in the
6 final order. It doesn't say that the Court will have to
7 decide whether to award attorneys' fees. It doesn't say
8 whether the Court will have to decide whether to award
9 attorneys' fees from the defendants, as the statute would
10 require. Instead, it just says: We've cut this deal and
11 it's going to get included in the final order.

12 Now, why would they have something like that? Well, I
13 don't know, Your Honor, and we couldn't figure that out in
14 discovery. But the only thing I could come up with is that
15 by including it in the final order, that gives them a final
16 order that they can -- private counsel could act on if they
17 didn't get their money, under Section 15-39-10 would give
18 them a final order to seek judgment based on. It's the only
19 way that provision is logical.

20 And the fact is, Your Honor, there's nothing about how
21 they handle their attorneys' fees that would allow the Court
22 to make a meaningful review in any event because the
23 contingent fee agreement doesn't require private counsel to
24 keep track of their time. The State doesn't keep track of
25 their time. It's all been established in discovery in this

1 case; it's not disputed.

2 And so, Your Honor, where that leaves us is that we have
3 a situation in which they have created an agreement that
4 allocates money that's awarded to the State, not by putting
5 the money in the general fund of the State but by dividing it
6 up between three parties and only the State is one of those.
7 And it doesn't fall within this exception because it's not
8 attorneys' fees awarded by the Court or by a settlement from
9 the other side to go to the State. There's no award about
10 this at all.

11 So, Your Honor, in conclusion we have three reasons why
12 this agreement is unlawful. One is that the claim that the
13 State is pursuing in this case is a quasi-criminal complaint.
14 Therefore, certain due process protections kick in, including
15 the protection against being -- against having government
16 lawyers having a financial interest in the case. So that's
17 problem number one, that due process in quasi-criminal cases
18 does not allow a representative of the State, whether it be a
19 private party or the Attorney General's office themselves, to
20 get a cut.

21 The second reason why this agreement is a violation of
22 the law is because even if it's not a quasi-criminal case,
23 even if it's a standard civil law enforcement case, you can't
24 bring in private counsel to represent the State unless
25 they're controlled and supervised by a neutral financially

1 disinterested Attorney General's office. The Attorney
2 General's office here is not neutral or financially
3 disinterested because it gets a 10 percent cut.

4 And then the third reason, Your Honor, which has nothing
5 to do with due process is because when the Attorney General
6 took it upon himself to allocate the award that he could
7 receive in this case rather than deposit it in the general
8 fund of the State, he violated the legislation and,
9 therefore, he violated separation of powers. Thank you, Your
10 Honor.

11 **The Court:** All right. Mr. Jones or...

12 **Mr. Jowers:** Thank you, Your Honor.

13 **The Court:** You are?

14 **Mr. Jowers:** Gerald Jowers.

15 **The Court:** Mr. Jowers.

16 **Mr. Jowers:** Yes, sir. Ken Suggs and I, along with Todd
17 Rutherford, are outside counsel for the Attorney General.
18 Seated at the table with me is Assistant Deputy Attorney
19 General Sonny Jones and Assistant Deputy Attorneys General
20 Jared Libet and Johanna Valenzuela.

21 **The Court:** You swallowed the last...

22 **Mr. Jowers:** Johanna Valenzuela. Your Honor?

23 **The Court:** Go ahead.

24 **Mr. Jowers:** The claims that Cephalon makes in this case
25 are routinely raised by corporate defendants in cases brought

1 by State Attorneys General with outside counsel, and we can
2 be assured that in every one of those cases, corporate
3 counsel stands up and says that there is some fact about this
4 particular case that distinguishes it from everything that
5 came before. But the fact of the matter is: No Court has
6 ever found that the Attorney General's contingency fee
7 agreement with private counsel violates the Constitution.

8 In this case, Cephalon is asking this Court to be the
9 first. Just over three years ago, Judge Couch heard similar
10 arguments in a similar case involving a pharmaceutical
11 company and rejected it and we believe rightly so. We would
12 distinguish the AstraZeneca opinion because that was a
13 12(b)(6) motion subject to a different standard of decision
14 at the time.

15 Now, based on Cephalon's argument, there doesn't appear
16 to be any disagreement that in certain cases the Attorney
17 General has the authority and can legally enter into
18 contingency fee agreements with outside counsel, so I won't
19 address that.

20 Cephalon's argument, instead, is that the litigation
21 retention agreement in this case is unconstitutional because
22 there's a financial incentive for both outside counsel and
23 the Attorney General to seek the broadest application of the
24 Unfair Trade Practices Act here. As an initial matter, that
25 argument is undermined by the very procedural history of this

1 case, and that's because this case began before outside
2 counsel was involved. It began before there was a litigation
3 retention agreement.

4 In 2011 and before, the Attorney General approached
5 Cephalon attempting to settle this case without ever filing
6 suit. When those negotiations broke down and were
7 unsuccessful, the Attorney General on his own filed suit
8 through the attorneys in his office without involving outside
9 counsel in any event.

10 It was not until Cephalon answered when the Attorney
11 General learned that there were two large law firms appearing
12 on Cephalon's behalf, one in Philadelphia and one locally,
13 that he made the decision that it was in the best interest of
14 the State to associate outside counsel in the subordinate
15 role in this litigation. I think the key---

16 **The Court:** Why? Why?

17 **Mr. Jowers:** Sir?

18 **The Court:** Why?

19 **Mr. Jowers:** Because of the time and the resources
20 necessary to prosecute this case. The case began in 2011 and
21 we're still going. In the underlying case, we don't even --
22 we haven't even begun discovery in the merits of the case.
23 We've been litigating the statute of limitations for more
24 than two years, and that was only recently decided.

25 So I was somewhat taken aback that Cephalon began with

1 the defense of off-label marketing in its conduct in this
2 case because that's hard for us right now to rebut because we
3 haven't been able to do discovery on that. We don't have any
4 information on that. We have what we believe the evidence
5 will eventually show, but there's still considerable work to
6 be done.

7 Now, the significant thing, the decision about what
8 claims to assert, the scope of the conduct covered by the
9 claims and the time period at issue, those decisions were all
10 made by the Attorney General before there was a litigation
11 retention agreement, before outside counsel was involved in
12 any respect. After outside counsel appeared in the case,
13 there was an amended complaint, but the only thing it added
14 was a damages claim with the State Health Plan. Didn't
15 change anything about the civil penalties being smaller.

16 Cephalon today and throughout its briefing makes an
17 argument that the use of contingent fee counsel in civil
18 cases that are akin to a criminal proceeding is per se
19 unconstitutional. There is no case standing for that
20 proposition. Cephalon is asking this Court to create it.

21 Indeed, that position was recently rejected by two other
22 courts. First is the Court of Appeals in Texas, and the case
23 is International Paper versus Harris County, both of which
24 are cited in our brief. That was a strictly civil penalties
25 case in an environmental context brought by an Attorney

1 General with outside counsel on a contingency fee basis, and
2 the Court found that the arrangement was constitutional
3 despite the defendant's objections.

4 The second case comes from the Eastern District of
5 Kentucky in the district court. That was the case of Merck
6 versus Conway, a pharmaceutical case brought as a consumer
7 protection action by the State Attorney General with the
8 assistance of outside counsel seeking civil penalties under
9 the Consumer Protection Agreement. The same argument was
10 made in that contest and once again rejected by the Court.

11 **The Court:** Both of those cases have a provision for
12 recovery by the Attorney General?

13 **Mr. Jowers:** They do not, and that is a distinction that
14 I'm glad you brought up because I intend to address that. So
15 in the underlying case here, the State seeks actual damages,
16 equitable remedies, and civil penalties under the Unfair
17 Trade Practices Act. This case is brought in the court of
18 common pleas. Cephalon argues, however, that the civil
19 penalties sought under the Unfair Trade Practices Act are so
20 punitive that they're not civil, as the legislature has
21 indicated within the statute, but they're, in fact, a
22 criminal penalty, that this is a criminal proceeding, and
23 it's not.

24 Our Supreme Court has addressed the question of whether
25 civil actions and civil statutes can be deemed criminal under

1 certain circumstances. Those cases are In Re Justin B.,
2 State v. Dykes, and State v. Price. In State v. Price the
3 Court wrote that where the legislature deems a statutory
4 scheme civil, only the clearest proof would transform a civil
5 regulatory scheme into a criminal action.

6 The Court instructed that a two-part analysis was to be
7 undertaken. The first is look to the face of the statute to
8 determine legislative intent. Secondly, then determine if
9 the statutory scheme is so punitive and purposed for effect
10 so as to transform what was intended to be civil into a
11 criminal proceeding, and in this case I would submit the
12 analysis is simple. The Unfair Trade Practices Act is on its
13 face a civil act.

14 It is in Title 39 of the civil code, Trade and Commerce,
15 the underlying cases filed in the court of common pleas.
16 Within the penalties section, 39-5-110, it is specifically
17 designated a civil penalty. That's what the Attorney General
18 is seeking here. The penalties are subject to a three-year
19 statute of limitations unlike a criminal penalty, and
20 information obtained pursuant to civil investigative demands
21 is prohibited from being used in a criminal proceeding.
22 That's in the act.

23 So I think it's clear on the face of the act that the
24 legislature intended this to be a civil remedy, a civil
25 penalty. So going into the Mendoza factors - by the way,

1 none of which our Supreme Court has said are dispositive,
2 that they're only guideposts - it's not necessary. The
3 legislature deemed it as civil, so the next question is: Is
4 the statutory scheme so punitive as to override the
5 legislature's clear intent? And on that point Cephalon bears
6 the burden, what our Supreme Court has described as the
7 clearest proof.

8 The civil penalty sought is a maximum of \$5,000 per
9 violation. It's from zero to \$5,000 per violation at the
10 discretion of the fact finder, the judge in this case. If
11 the Unfair Trade Practices Act imposes a criminal penalty,
12 despite the legislative intent, then all civil monetary
13 penalties could be treated the same way.

14 In this action under the act, there's -- no one is
15 subject to going to jail. The injunction sought is only to
16 stop violations of the act. The -- no one will be prevented
17 from conducting business within this state, and Cephalon is
18 not in jeopardy of going out of business because of the
19 action.

20 So using the Supreme Court's framework from State v.
21 Price, I would submit that Cephalon's effort to transform
22 what the legislature has indicated is a civil action with a
23 criminal penalty fails. But for the sake of argument, if the
24 Unfair Trade Act penalties are treated as criminal or quasi-
25 criminal, the fee contract in this case has substantial

1 safeguards to satisfy any concerns, and it doesn't sound like
2 there's any dispute on this point.

3 Throughout the agreement it is apparent by the clearest
4 language that the Attorney General is in control of all
5 aspects of the litigation. Whether the case is brought,
6 whether the claims are made, all pleadings, motions,
7 documents filed with the Court, all go through the Attorney
8 General's office, and I don't think there's any dispute about
9 that.

10 Secondly, the Attorney General has exercised actual
11 control throughout these cases. Numerous members of the
12 office have given deposition testimony. Thousands of pages
13 have been produced in discovery, and there's no argument that
14 the Attorney General is not in actual control of the
15 litigation. But Cephalon argues that the Attorney General
16 cannot be cleared because of what's described as a 10 percent
17 financial stake in the outcome.

18 The litigation retention agreement provides that the
19 Attorney General may retain, if the Court approves it,
20 subject to Court approval, up to 10 percent of outside
21 counsel's fee. Outside counsel's fee in this case is a
22 contingency based on a sliding scale so that the more money
23 recovered, the lower the percentage available to outside
24 counsel as a fee.

25 So the -- that translates to a maximum payment to the

1 office of 2.5 percent that they will recover in this case.
2 And, of course, the greater the recovery, the lower the
3 percentage available to the Attorney General. And it's
4 important that in Article 4, Paragraph 7 - and that is the
5 article on compensation - provides that the calculation be
6 included in a final order of the Court. I don't know any
7 other way to get the fee calculation in a final order of the
8 Court other than by motion or petition which I think would
9 necessarily involve Court review and approval.

10 I think this is no different than cases involving
11 wrongful death claims and minor settlements, both of which go
12 to the court for approval despite private contracts. The
13 Court has a final say in the attorneys' fees and costs.

14 I think the most important case on these issues is
15 Marshall versus Jerrico, the U.S. Supreme Court case. That
16 case involved a federal statute which a government employee,
17 a regional administrator, actually determined violations of
18 the Child Labor Protection Act and imposed penalties,
19 assessed the fines. A portion of the penalties collected by
20 the regional administrator were returned to the office by the
21 statute for use as reimbursement for the activities of the
22 office, and that's an important distinction here in that in
23 this case the Attorney General doesn't determine the
24 violations. The attorney doesn't determine the amount of
25 penalties to be imposed. Those decisions are rightly left to

1 a neutral, impartial judge.

2 In Jerrico, like here, the corporate defendant argued
3 that the assistant regional administrator who assessed the
4 fines had an improper motive to find violations and assess
5 penalties in order to raise revenue for the office. The
6 Supreme Court rejected that argument, the same argument
7 Cephalon advances here. The Supreme Court in Jerrico
8 recognized that the prosecutors are not held to the same
9 standards of neutrality as judges. Due process entitles a
10 person to a fair and impartial tribunal, but attorneys are
11 not subject to -- even government attorneys are not subject
12 to the same neutrality requirements as due process requires
13 of judges.

14 Significantly, under the statute at issue in Jerrico,
15 while the government employee determined violations and
16 assessed penalties, the final determination was left to a
17 judge, an administrative law judge. The Court noted that the
18 assistant regional manager performed no judicial functions
19 and no quasi-judicial functions, didn't determine facts in
20 dispute or legal questions in dispute, and moreover, the
21 Court recognized that no one in the office's salary was
22 dependent upon the money obtained through penalties assessed
23 and that the challenged funds resulted in no additional funds
24 available to the agency over the amount appropriated by
25 Congress. So---

1 **The Court:** Do you think that's good policy? I
2 understand what you're arguing, but is it good policy for a
3 government agency to have a financial stake in the outcome of
4 litigation? Why does that not sort of pass the smell test?

5 **Mr. Jowers:** In this state we have a statute that allows
6 it, and that is Section 1-7-85 which the legislature
7 specifically allows the Attorney General to obtain
8 reimbursement for its costs in representing the State in
9 civil proceedings, including attorneys' fees. That's spelled
10 out in the statute. It doesn't specify how the Attorney
11 General is expected to calculate its fees or what method
12 would be used. And this is not fundamentally different from
13 other sources of revenue for the agency such as securities
14 fees and fines, forfeitures, drug forfeitures, and other
15 sources that we discussed in our brief.

16 In Jerrico, here, of course, the Attorney General is not
17 deciding any factual or legal issues. That's left to a
18 Court. This case proceeds like any other civil case. The
19 due process principles don't apply because the A.G. is not
20 acting as a judge or in a quasi-judicial capacity and,
21 further, no one in the office has a personal financial stake
22 in the outcome. No one's compensation is tied to money
23 recovered in this case or a case like it, and the office does
24 not depend on revenue derived from these cases to support
25 itself.

1 Indeed, the office doesn't consider potential revenue
2 from these cases in determining its budget. So just like the
3 Court found in Jerrico, any possible biasing influence is too
4 remote here and insubstantial to implicate the due process
5 concerns.

6 Another case the defendant relies on is the California
7 state case of Clancy. That case is easily distinguishable,
8 first, because it wasn't decided on due process grounds. It
9 was based on the Court's inherent authority to disqualify
10 counsel as justice requires. Secondly, Clancy was a
11 factually-driven decision based on a city's repeated efforts
12 to put a single store out of business.

13 Further, other courts have noted that a critical feature
14 missing in Clancy was a government-controlled private
15 attorney. Indeed, in a subsequent case from California, the
16 Court noted that the opinion in Clancy - and that's the Town
17 of Santa Clara - that the opinion in Clancy was not intended
18 to be -- have a broad application.

19 So in this case the litigation retention agreement
20 doesn't implicate due process for a number of reasons. The
21 action doesn't seek to deprive anyone of liberty or prevent
22 Cephalon from doing business. Outside counsel operates under
23 the complete control of the Attorney General. All final
24 decisions about the case are made by the Attorney General.
25 The A.G. serves no judicial or quasi-judicial functions.

1 Determinations of violations and penalties are made by a
2 judge.

3 State law under 1-7-85 permits the Attorney General to
4 receive a portion of the recovery. No member of the office
5 personally benefits from any recovery in this case; no
6 employee's salary is tied to recovery. The contract requires
7 fees to be approved by the Court. The office doesn't
8 anticipate funds from suits like this in planning its budget,
9 and any money recovered - and this is an important point -
10 any money recovered can't be spent without appropriations and
11 without authorizations from the General Assembly.

12 So the justification legally for the Attorney General's
13 up to 2.5 percent interest in the recovery is threefold:
14 There's statutory authorization, 1-7-85. Also 1-7-150(b).
15 There's review by the Courts and there's accountability and
16 appropriations by the General Assembly before any of that
17 money can be spent.

18 So Cephalon then argues that the agreement violates the
19 separation of powers, and it does it for two very simple
20 reasons. The authority -- the complaint Cephalon makes is
21 that by paying outside counsel, you're invading the province
22 of the legislature. In fact, the legislature has
23 specifically authorized the Attorney General to do just that
24 in 1-7-150(b) which provides that all monies, except
25 investigative costs and costs of litigation awarded by Court

1 order or settlement, must be deposited in the general fund.
2 So there's the exception for costs of litigation. I think
3 clearly attorneys' fees paid to outside counsel is considered
4 a cost of litigation.

5 In the Eli Lilly case, Judge Couch considered the exact
6 scenario and held -- ruled in that case that attorneys' fees
7 are certainly within the cost of litigation.

8 **The Court:** Did that also have the 10 percent provision?

9 **Mr. Jowers:** Not an issue in that one, but the issue as
10 to the separation of powers by paying outside counsel was
11 that---

12 **The Court:** I understand.

13 **Mr. Jowers:** Was the same -- was the same issue there.
14 Next, Cephalon argues that the separation of powers prevents
15 the Attorney General from seeking a portion of the recovery
16 for his office. That's easily addressed, too, and that's
17 1-7-85 where the legislature has specifically authorized the
18 Attorney General to retain reimbursement for its costs in
19 representing the State in civil proceedings and that the
20 statute specifically delineates attorneys' fees as an
21 acceptable cost to be reimbursed. In addition, 1-7-150(b)
22 applies to that as well because that authorizes the Attorney
23 General to withhold investigative costs and costs of
24 litigation.

25 So, in summary, the Attorney General has the common law

1 and statutory authority to hire outside counsel and determine
2 their compensation. The Attorney General has the authority
3 to pay outside counsel from the proceeds of litigation
4 pursuant to 1-7-150(b), and the Attorney General has
5 statutory authority to seek payment for his office costs
6 including attorneys' fees pursuant to 1-7-85 and the
7 statutory authority to retain those fees.

8 So there's statutory authority reviewed by the Court and
9 legislative authorization to spend. There is no separation
10 of powers issue in this arrangement, and it doesn't violate
11 due process. This is a civil proceeding, seeking civil
12 penalties and damages. It is not a criminal proceeding.
13 There is no case mandating the result that Cephalon seeks
14 here.

15 Respectfully, the Attorney General would request that
16 Cephalon's motion be denied, and his motion for summary
17 judgment be granted.

18 **The Court:** Has the Attorney General entered into these
19 types of private counsel contracts before?

20 **Mr. Jowers:** He has, Your Honor.

21 **The Court:** In all cases is there a provision for the 10
22 percent -- a portion of the attorneys' fees payable to the
23 Attorney General?

24 **Mr. Jowers:** There is now. That wasn't always the case,
25 but that over the years has evolved.

1 **The Court:** Well, in many cases? How often is that
2 done? I mean, is it routine on behalf of the Attorney
3 General to enter into these types of outside contracts with a
4 provision for reimbursement or splitting of fees with the
5 outside counsel?

6 **Mr. Jowers:** It is today.

7 **Mr. Jones:** It always has been.

8 **Mr. Jowers:** And always has been.

9 **Mr. Jones:** The 10 percent in civil penalties was added
10 after the Lilly case.

11 **The Court:** What?

12 **Mr. Jones:** Your Honor, excuse me. Sonny Jones with the
13 A.G.'s office.

14 **The Court:** Mr. Jones? Yes, sir?

15 **Mr. Jones:** The civil penalties provision for getting
16 fees from civil penalties for outside counsel and for the
17 office was added after the Lilly case which was added after
18 1-7-85 became enacted.

19 **The Court:** When was that? 2009?

20 **Mr. Jones:** Yes, sir, 2009. Lilly was settled
21 10/1/2009.

22 **The Court:** All right.

23 **Mr. Jowers:** One other final provision to point out in
24 the retention agreement is there is a severability clause:
25 In the event that any part of the agreement was found

1 unlawful, the contract provides that it may be severed.

2 **The Court:** I understand. Anything further? All right.
3 Thank you.

4 **Mr. Jowers:** Thank you, Your Honor.

5 **The Court:** Mr. Sitarchuk?

6 **Mr. Sitarchuk:** Thank you, Your Honor. Just a couple of
7 points. With regard to the procedural history of this case -
8 and I don't think Mr. Jowers is aware of all of it - but I
9 don't think it quite tells the tale that he describes. The
10 Attorney General's office knew that outside counsel was
11 involved from the get-go because frankly when they called
12 Cephalon, they called them back. So it wasn't like outside
13 counsel just appeared later on and then they decided to bring
14 in outside counsel for themselves.

15 The complaint was filed in June of 2011. The agreement
16 was executed in July of 2011. So the bringing in of outside
17 counsel has been in the works from the get-go. Of course,
18 outside counsel was long in the case prior to the operative
19 complaint being filed and the amended complaint in February
20 of 2012, and there's many decisions left to be made in this
21 case, Your Honor, decisions with respect to whether to pursue
22 the -- where between zero and 5,000 a penalty to ask for, how
23 to calculate the violations. All these things require
24 important law enforcement discretion, and outside counsel is
25 involved in all of that.

1 Your Honor, with respect to the International Paper case
2 and the Merck case that were cited by Mr. Jowers, there's
3 four very significant distinctions in those cases. One is
4 what Your Honor touched upon. In neither of those cases did
5 the Attorney General's office have a contingency fee for
6 themselves; there was no 10 percent.

7 Neither of those cases implicated the constitutional
8 concerns that are implicated here because in neither of those
9 cases was there ever any effort to enjoin -- enjoin commercial
10 speech, enjoin speech that could be protected by the First
11 Amendment. In neither of those cases---

12 **The Court:** Is that issue in front of me? Is that issue
13 the injunction?

14 **Mr. Jowers:** Yes.

15 **Mr. Sitarchuk:** Yes. That issue is -- because that's
16 part of the remedy that they're requesting here in the
17 underlying case, Your Honor, and, therefore, it goes to
18 whether or not the Kennedy factors apply here. That's why
19 that matters, Your Honor: Affirmative disability. And also
20 that's why this case is on all fours with the Clancy case out
21 of California.

22 Another difference between Texas -- the Texas decision
23 and the Merck decision in this case is that those were
24 penalties-only cases. They didn't involve a request for the
25 panoply of remedies that are being requested here:

1 Disgorgement, trebled damages, damages, injunction plus civil
2 penalties on top of that.

3 One other final distinction, Your Honor, between those
4 cases and this case is: Those cases did not involve matters
5 that there was a contention that the conduct was otherwise
6 criminal, which is a contention here. Those distinctions,
7 Your Honor, are what distinguishes those cases from this case
8 in terms of whether this is a quasi-criminal case. And I
9 note that Merck did -- despite all those distinctions, Your
10 Honor, the judge in Merck did characterize that case as a
11 penal case.

12 Your Honor, with respect to just two more points -- and
13 then I'll conclude. With respect to the Marshall case which
14 Mr. Jowers said was -- if any case was a significant case for
15 the Court, it's that case. I would submit that there's
16 actually two cases: The Clancy case and the Marshall case
17 that -- that warrant this Court's particular attention.

18 What's significant about the Marshall case, Your Honor,
19 is the Supreme Court of the United States says that scheme-
20 injecting personal interest, financial or otherwise, into the
21 enforcement process may bring irrelevant or impermissible
22 factors into the prosecutorial decision and in some contexts
23 raise serious constitutional questions. That's exactly the
24 case we have here, Your Honor.

25 And Marshall went on to say -- in this case, in the

1 Marshall case, we need not say with precision what limits
2 there may be on the financial or personal interest of one who
3 performs a prosecutorial function, for here the influence
4 alleged to impose a bias is exceptionally remote. But in
5 this case it's not exceptionally remote. It's not
6 exceptionally remote because there is a 10 percent fee which
7 goes directly to their office. Your Honor, and in that 10
8 percent fee---

9 **The Court:** He said it's 2.5.

10 **Mr. Sitarchuk:** It's 10 percent -- it's 10 percent of
11 the 25 percent, 2.5 -- again, if you take the Jantzen case
12 which is a predecessor case by way of an example and the
13 recovery there, that would bring to them over \$3 million
14 which would be over 14 percent I think of their budget for
15 last year as opposed to the Marshall one percent that they
16 gave back in any event.

17 So in Marshall the government agency never benefitted at
18 all from the arrangement. Here they could benefit
19 substantially and significantly. In Marshall there was no
20 contingent fee; here there is a contingency fee.

21 So, Your Honor, they're essentially asking Your Honor,
22 this Court, to be the first Court in the country to approve a
23 contingency fee for a law enforcement agency in a law
24 enforcement proceeding that applies to penalties. No other
25 Court has done that.

1 And, Your Honor, finally -- and I would suggest that the
2 types of financial interests that are at play here are
3 uniformly condemned in proceedings of this nature that are
4 quasi-criminal or they go directly into the Attorney
5 General's pocket with regard to the office and the 10
6 percent. But even putting that aside, Your Honor, even
7 putting that aside, taking out the 10 percent -- even if they
8 wanted Your Honor to invoke the severability provision, there
9 is still a fundamental due process problem with respect to
10 the contingent fee for private counsel here because of the
11 application of the Kennedy factors, and there's still a
12 violation of separation of powers because the exception
13 doesn't apply, and the exception doesn't apply because these
14 attorneys' fees would not be awarded by the Court or by a
15 settlement, and nothing in this agreement changes that.
16 Nowhere does this agreement say that the Court gets to
17 approve that award. Thank you, Your Honor.

18 **The Court:** Address 1-7-85.

19 **Mr. Sitarchuk:** Your Honor, 1-7-85 -- I think there are
20 two issues to keep in mind with respect to 1-7-85. The first
21 is that it only carves out attorneys' fees awarded by Court
22 order or settlement, and again these attorneys' fees are not
23 awarded by Court order or settlement. They're awarded by an
24 agreement between the Attorney General's office and private
25 counsel. So that's the first reason why 1-7-85 does not

1 apply.

2 The second reason it doesn't apply is that it talks
3 about obtaining reimbursement of attorneys' fees. We're not
4 talking about obtaining reimbursement of attorneys' fees
5 here, Your Honor. We're talking about getting a contingent
6 fee, a contingent fee which could be, depending on how things
7 turn out, well in excess of the attorney time that the State
8 puts into place well in excess of what this case costs them,
9 but we'll never know that for sure, Your Honor, because they
10 don't even keep track of their attorney time. So there's no
11 way to know that. So Section 1-7-85, it simply doesn't apply
12 here, Your Honor.

13 **The Court:** All right.

14 **Mr. Sitarchuk:** Thank you, Your Honor.

15 **The Court:** Anything further, Mr. Jowers?

16 **Mr. Jowers:** Briefly, Your Honor. Now, we again heard a
17 defense of off-label promotion, calling it commercial --
18 commercial speech. I know of no case that has found that a
19 violation of the food, drug, and cosmetic act, false and
20 misleading pharmaceutical promotion is protected commercial
21 speech. I do not believe and we do not believe that the
22 First Amendment is implicated in these proceedings.

23 Secondly, I think that's a tortured reading of Section
24 1-7-85 to suggest that attorneys' fees have to be awarded by
25 a Court order or settlement when the plain language of the

1 statute states that these costs may include but are not
2 limited to attorneys' fees or investigative costs or costs of
3 litigation awarded by Court order or settlement. The Court
4 order or settlement applies to costs of litigation, not the
5 attorneys' fees, but even -- even if you want to read it his
6 way, the fact that the fee agreement, Article 4, Paragraph 7
7 requires a Court order, including the calculation of fees,
8 satisfies that reading of 1-7-85.

9 Cephalon says that this Court will be the first Court to
10 approve this arrangement. Well, it's never gotten to this
11 level before. This is the first time the South Carolina
12 Attorney General's office fee contract in this case or one
13 like it has been brought before a Court. There are numerous
14 reported cases where contingency fee contracts with outside
15 counsel have been challenged, raising constitutional
16 arguments, and no Court has ever determined that a fee
17 contract in a contingency fee arrangement with outside
18 counsel violates the Constitution. That hasn't been done.
19 That's what Cephalon is asking this Court to do.

20 So, in summary, we've got statutory authority for the
21 Attorney General to seek a portion of the fee. It must be
22 approved by the Court and he can't spend any of it without
23 legislative authorization. So those three aspects of the
24 case satisfy any concerns about financial motivation on
25 behalf of the office. Thank you.

1 **Mr. Sitarchuk:** Your Honor, the opinion that says that
2 off-label promotion is protected by the First Amendment is
3 the Caronia decision out of the Second Circuit. It's in my
4 brief.

5 I would also note that with respect to 1-7-85, nowhere
6 in there does it say that a contingency fee agreement is
7 approved by the legislature. In fact, there's legislation
8 pending now where I think the question is whether the
9 legislature will approve contingent fee arrangements. That
10 has not been yet approved by the legislature. The existing
11 law does not provide for contingent fee arrangements. Thank
12 you, Your Honor.

13 **The Court:** All right. Somebody tell me -- it doesn't
14 matter. The Cephalon brief talks about a Medicaid settlement
15 in 2008? Is that correct?

16 **Mr. Sitarchuk:** That's correct, Your Honor.

17 **The Court:** Does that have anything to do with what
18 we're talking about here?

19 **Mr. Sitarchuk:** No. That was part of the underlying
20 case in the federal settlement. It was both State Medicaid
21 -- states around the country. That has nothing to do with
22 what we're talking about here.

23 **The Court:** All right. There's no issue of preemption
24 or anything of that nature.

25 **Mr. Sitarchuk:** There's not, not that we have... That's

1 a battle that's been fought and lost by other companies.

2 **The Court:** All right.

3 **Mr. Sitarchuk:** Would Your Honor entertain proposed
4 orders in 10 days?

5 **The Court:** You just beat me to the punch. Ten days
6 proposed orders.

7 **Mr. Sitarchuk:** Thank you, Your Honor.

8 (Whereupon, the proceedings were concluded. There were
9 no exhibits introduced.)

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1 I, the undersigned Daphne D. Helms, official court
2 reporter for the Fifth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate, and complete transcript of record of all the
5 proceedings had and evidence introduced in the trial of the
6 captioned case, relative to appeal, in the circuit court for
7 Richland County, South Carolina, on the 21st of April, 2014.

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

10
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12 September 24, 2014

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14 _____
15 Daphne D. Helms, court reporter
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COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

CEPHALON, INC., : Civil Action No.
 : 2012-CP-40-07317
Plaintiff, :
 :
vs. :
 :
ALAN WILSON, in his :
capacity as Attorney :
General for the :
State of South :
Carolina, :
 :
Defendant. :

- - -
Oral deposition of GEOFFREY C. HAZARD JR.,
taken at Morgan, Lewis & Bockius, LLP, 1701 Market
Street, Philadelphia, Pennsylvania, taken on
Monday, December 16, 2013, beginning at
approximately 11:00 a.m., before Christine Brown,
Certified Court Reporter and Notary Public.
- - -

Page 2 1 APPEARANCES: 2 3 MORGAN, LEWIS & BOCKIUS, LLP 4 BY: TIMOTHY D. KATSIFF, ESQUIRE 5 - AND - 6 EZRA CHURCH, ESQUIRE 7 1701 MARKET STREET 8 PHILADELPHIA, PENNSYLVANIA 19103 9 (215) 963-4857 10 Tkatsiff@morganlewis.com 11 -- Representing Plaintiff 12 13 JANET, JENNER & SUGGS, LLC 14 BY: GERALD J. JOWERS JR., ESQUIRE 15 500 TAYLOR STREET, SUITE 301 16 COLUMBIA, SOUTH CAROLINA 29201 17 (803) 726-0050 18 Gjowers@MyAdvocates.com 19 -- Representing Defendant 20 21 ALSO PRESENT: 22 C. HAVIRD JONES JR. 23 ASSISTANT ATTORNEY GENERAL 24 25 (Via telephone) STEPHEN MCKINNEY, ESQUIRE	Page 4 1 EXHIBITS (continued) 2 3 Exhibit 12 12/5/13 e-mail 79 4 5 Exhibit 13 11/14/13 e-mail 80 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
Page 3 1 INDEX 2 3 WITNESS 4 GEOFFREY C. HAZARD JR. 5 EXAMINATION 6 BY: Mr. Jowers 5, 87, 89 7 BY: Mr. Katsiff 83, 87 8 9 EXHIBITS 10 11 NUMBER DESCRIPTION PAGE 12 Exhibit 1 Notice of Deposition 7 13 Exhibit 2 Affidavit of Professor 13 14 Geoffrey C. Hazard Jr. 15 16 Exhibit 3 Fact Summary 24 17 18 Exhibit 4 Plaintiff's Supplemental 41 19 Responses and Objections to 20 Defendant's Second Set 21 of Interrogatories 22 Exhibit 5 CD 74 23 Exhibit 6 12/7/13 e-mail 75 24 Exhibit 7 11/25/13 e-mail 75 25 Exhibit 8 12/4/13 e-mail 77 Exhibit 9 12/4/13 e-mail 77 Exhibit 10 12/6/13 e-mail 78 Exhibit 11 12/6/13 e-mail 79	Page 5 1 (It is hereby stipulated and agreed 2 by and among counsel for the respective 3 parties that sealing, filing and 4 certification are waived; and that all 5 objections, except as to the form of the 6 question, are reserved to the time of 7 trial.) 8 - - - 9 GEOFFREY C. HAZARD JR., after having 10 been duly sworn, was examined and 11 testified as follows: 12 - - - 13 EXAMINATION 14 - - - 15 BY MR. JOWERS: 16 Q. Good morning, sir. Would you state your 17 full name for us. 18 A. Geoffrey C. Hazard Jr. 19 Q. All right. If you don't understand one of 20 my questions this morning, will you let me know? 21 A. I will. 22 Q. If you need to take a break at any time, 23 feel free to ask. We'll accommodate you. All 24 right? 25 A. That would be fine.

Page 6

1 Q. When were you first contacted about this
2 case?

3 A. Sometime during the summer, I think.

4 Q. The summer of 2013?

5 A. Yes, sir.

6 Q. Who was it that contacted you?

7 A. I think it was Mr. Katsiff.

8 Q. Have you ever worked with Mr. Katsiff
9 before?

10 A. No.

11 Q. Were you told anything about the case when
12 you were contacted?

13 A. Only very generally.

14 Q. What do you recall being told?

15 A. I don't recall, but I know there was a
16 proceeding in South Carolina, and it raised the
17 question about the agreement with private counsel
18 concerning prosecution of a case against Cephalon.

19 Q. Have you ever worked with any attorneys in
20 the Morgan Lewis firm before?

21 A. I'm sure I have, but I can't remember.

22 Q. Sitting here today, you don't recall the
23 names of any of those attorneys?

24 A. No.

25 Q. One other thing. If you can wait until I

Page 7

1 finish my question before you begin your answer,
2 and I'll try to do the same.

3 A. Sure.

4 Q. Now, you've given a number of depositions
5 over the years; is that correct?

6 A. Yes, sir.

7 Q. Can you tell me approximately how many
8 you've given?

9 A. Well, over the last -- it started -- my
10 first one was 1982, and I think probably the number
11 of depositions is 75 or 80 or 90, something like
12 that.

13 Q. All of those as an expert witness in
14 litigation matters?

15 A. Yes, sir.

16 Q. All right. Have you ever provided expert
17 services to Cephalon before?

18 A. No.

19 Q. Or Tiva before?

20 A. No.

21 - - -

22 (Whereupon, Exhibit No. 1, Notice of
23 Deposition, was marked for
24 identification.)
25 - - -

Page 8

1 BY MR. JOWERS:

2 Q. I'd like to pass you what's marked as
3 Exhibit 1, a deposition notice in this case.

4 A. Yes.

5 Q. All right, Professor. I've marked the
6 deposition notice as Exhibit 1 and passed you a
7 copy. Have you seen the notice of today's
8 deposition before now?

9 A. Yes, sir.

10 Q. All right. What I'd like to direct your
11 attention to is Attachment A, the second page, that
12 asks for you to bring certain items with you today.

13 A. Yes, sir.

14 Q. Did you review that before this morning?

15 A. I did.

16 Q. Did you make an effort to find the
17 materials requested of you?

18 A. I did.

19 Q. Did you bring everything with you today
20 that you found responsive to Exhibit A?

21 A. Everything that I had, yeah.

22 MR. KATSIFF: I just, for the
23 record, will just assert we have brought
24 material with us and complied with this to
25 the best that we can, but I'm not waiving

Page 9

1 any objections that we have to it,
2 particularly, and we'll give you some
3 written objections to it, Mr. Jowers, but
4 particularly in that whether or not it's
5 proper to do a document request this way
6 as an attachment to a Notice of
7 Deposition.

8 MR. JOWERS: That would be a debate
9 for another day.

10 MR. KATSIFF: Yes, but in the
11 interest of economy and everyone's time,
12 we've, for the most part, attempted to
13 comply.

14 MR. JOWERS: Great.

15 BY MR. JOWERS:

16 Q. Notwithstanding any potential objections
17 to the request for documents, Professor Hazard, do
18 I understand that you on your own made an effort to
19 find documents responsive to this?

20 A. Yes, sir.

21 Q. And the ones that you found you provided
22 to Counsel and brought with you today?

23 A. Yes, sir.

24 Q. Okay.

25 A. There were a lot of documents that I had

Page 10

1 seen, but in accordance with my usual practice,
 2 once I've read something and satisfied I understood
 3 it, I usually throw them out because I don't want
 4 to -- all that stuff in my files.

5 Q. Okay. We'll talk about that.

6 MR. KATSIFF: I would just, if it's
 7 helpful at all to avoid some conversation
 8 about that -- but what we did was we
 9 provided you with a copy of everything
 10 that we sent to Professor Hazard including
 11 substantive e-mails that we would have
 12 exchanged with Professor Hazard. The only
 13 thing we didn't give you were e-mails
 14 regarding travel arrangements and stuff
 15 like that.

16 MR. JOWERS: Okay. Those are all in
 17 the box that I was provided?

18 MR. KATSIFF: Correct.

19 MR. JOWERS: We'll take a look at
 20 some of that.

21 BY MR. JOWERS:

22 Q. Do you maintain a list of testimony or
 23 depositions that you've given as an expert?

24 A. Yes.

25 Q. Did you bring a copy of that with you

Page 11

1 today?

2 A. No, but I can supply it.

3 Q. Okay. Would you mind providing
 4 Mr. Katsiff with a copy of that so we can --

5 A. Sure.

6 Q. -- request it from him?

7 A. Sure.

8 Q. How far back in time does your list of
 9 testimony go?

10 A. About eight years, I think.

11 Q. Did you bring a copy of your CV?

12 A. No, sir.

13 Q. Are you still actively involved as -- in
 14 academics?

15 A. Yes.

16 Q. All right.

17 A. I'm an emeritus but I'm teaching -- I've
 18 been teaching this fall.

19 Q. And as a professor emeritus, does that
 20 mean that you're retired yet continuing to teach?

21 A. Yes.

22 Q. And you're teaching how many courses?

23 A. Two seminars, one on -- it's what I call
 24 my doctor seminar. It's a course designed to
 25 introduce the subject of law to people from the

Page 12

1 medical school at UCSF, University of California,
 2 San Francisco.

3 The other is a seminar -- I call it a
 4 trainer seminar. Students under my supervision are
 5 writing papers about decisions by former justice
 6 Roger Trainer of the California Supreme Court.

7 Q. How long is the medical seminar?

8 A. It's the fall, fall term.

9 Q. Semester?

10 A. Yes, sir.

11 Q. All right. Is it the same for the Trainer
 12 seminar? Is that a full --

13 A. Well, that seminar has had several
 14 segments. The one this fall was this fall, but I
 15 had conducted that seminar last spring and the
 16 previous fall and the previous spring, so it's a --
 17 each time having a new group of students.

18 MR. KATSIFF: Mr. Jowers, just to be
 19 helpful to you again, the CV and the list
 20 of prior cases are in the materials that
 21 have been provided. So during the break,
 22 if you'd like, we can show you -- I think
 23 they're attachments to the --

24 MR. JOWERS: I'd like to go ahead
 25 and look at those if we can do that.

Page 13

1 MR. KATSIFF: Yes, sure. Why don't
 2 you continue and I'll try to find them for
 3 you.

4 MR. JOWERS: I'd just like to go and
 5 do it now.

6 MR. KATSIFF: Okay. If you look at
 7 this -- do you have the affidavit, because
 8 that's what it's attached to.

9 MR. JOWERS: Here is the affidavit.

10 MR. KATSIFF: I think it's attached
 11 to that.

12 MR. JOWERS: Okay.

13 MR. KATSIFF: We have a couple
 14 copies of that as well if you'd like to
 15 mark that. Gerry, if you want to mark it,
 16 there's some copies for you.

17 MR. JOWERS: Let's do that. We will
 18 make Exhibit 2 the documents and -- your
 19 affidavit in this matter and the attached
 20 documents.

21 - - -

22 (Whereupon, Exhibit No. 2, Affidavit
 23 of Professor Geoffrey C. Hazard, was
 24 marked for identification.)
 25 - - -

Page 14 1 BY MR. JOWERS: 2 Q. I'll pass you a copy of that now. 3 A. Thank you, sir. 4 Q. Before we get into the substance of your 5 affidavit, which I haven't had time to fully review 6 myself, did you type that affidavit yourself? 7 A. Yes. 8 Q. Okay. Did anyone else contribute to the 9 information contained in your affidavit? 10 A. I sent it to Mr. Katsiff, and they 11 supplied me with the quotation to the County of 12 Santa Clara. I knew about that case, but they 13 wanted it in here. So I put it in. They also 14 supplied a citation to the ward against the Village 15 of Monroeville, but I thought that essentially 16 covered the same point I had mentioned -- for which 17 I cited Toumey against the State of Ohio. 18 Q. All right. Did you keep a copy of the 19 original affidavit before changes were made to it? 20 A. No. It's all on the computer. 21 Q. Now, did you select the materials attached 22 to Exhibit 2? 23 A. Well, they sent -- I asked them to provide 24 at this statement of facts, which they did, and -- 25 Q. Is the statement of facts attached to your	Page 16 1 CV, have you published anything, in your opinion, 2 relevant to the issues, the subject of your 3 testimony in this case? 4 A. No. 5 Q. Are there publications listed on your CV 6 that relate to state attorney, attorneys general, 7 and contingency fee agreements with outside 8 counsels? 9 A. I don't think anything specific. I recall 10 that in our treatise on the law governing lawyers, 11 which I wrote with colleague Bill Hodes, I think we 12 talked about that there, but I'm not sure. If I've 13 written on the subject, it would be that book. 14 Q. Would you point me to that book that 15 you're referencing? 16 A. Yeah. If you look at -- under Books, if 17 you look down about halfway down, there's a book 18 called Law of Lawyering. 19 Q. Yes, sir. 20 A. Yeah, that's what I'm talking about. 21 Q. On page 4? 22 A. Yes, sir. 23 Q. You were an editor of that book? 24 A. Coauthor. 25 Q. Coauthor. All right. Do you recall that
Page 15 1 affidavit? 2 A. Yes, sir. 3 Q. Okay. 4 A. And -- 5 Q. As to the -- 6 A. That's my usual procedure. 7 Q. As to the remaining attachments to Exhibit 8 2, did you select those documents to be -- 9 A. No. 10 Q. -- attachments to your affidavit? 11 A. No. 12 Q. So the selection of the attachments to 13 your affidavit, Exhibit 2, was all something done 14 by the attorneys at Morgan Lewis? 15 A. Yes. 16 Q. Now, it appears to say to me that the last 17 attachment is your CV; is that right? 18 A. Yes, sir, that's right. I supplied that. 19 Q. Is that a current, up-to-date and accurate 20 copy of your CV? 21 A. I think so, yeah. Let me double-check. 22 Well, as of last May, I don't think there have been 23 any material changes. Let me just see if there has 24 been -- no, there's no material changes. 25 Q. Since May 23rd of 2013, the date of your	Page 17 1 you specifically wrote a section relating to 2 contingency fee agreements with outside counsel? 3 A. No. Bill and I each work on drafts. I 4 can't remember what specifically I wrote, what he 5 wrote. We both write and we both -- both accept 6 what we have written as our own. 7 Q. Are there any other publications that are, 8 in your opinion, directly relevant to the subject 9 matter of your testimony today? 10 A. I don't think so. 11 Q. Are you presently involved as an expert in 12 any other cases? 13 A. Yes, three or four or five. They're all 14 covered by protective orders. 15 Q. When you say they're covered by protective 16 orders, what exact do you mean? 17 A. Well, whatever they say, but in general, 18 I'm required to maintain confident -- in confidence 19 my engagement until it's revealed by my 20 presentation of a formal opinion. 21 Q. Okay. And that's the subject of a court 22 order? 23 A. Often, I guess, it's an order. It's 24 usually worked out, stipulated to. 25 Q. If my question is are you presently

Page 18 1 involved as an expert witness in any other cases 2 involving contingency fees with outside counsel and 3 state attorneys general, are you prohibited from 4 answering that question? 5 A. No, and I'm not. 6 Q. Have you previously given testimony in 7 such cases? 8 A. I can't recall. I think I maybe once gave 9 an opinion on that subject to a case that was up in 10 Canada somewhere, a lawyer in Toronto, but that 11 was, you know, 20 years ago sometime, 15 years ago 12 at least. 13 Q. What is your hourly rate for your work on 14 this case? 15 A. 800 an hour except for travel, which is 16 500 an hour. 17 Q. How did you arrive at that figure, that 18 hourly rate? 19 A. It's what I've been using for several 20 years. 21 Q. Did you get an upfront retainer in this 22 case? 23 A. A fee of 15,000 for work leading up to the 24 affidavit, and then the hourly rate applies to work 25 since then.	Page 20 1 you were retained, provided materials, up to 2 drafting and signing the affidavit? 3 A. Yes, sir. 4 Q. I believe that affidavit was signed on 5 December 6, 2013. Have you done any work on this 6 case since that day? 7 A. Not aside from coming here. 8 Q. I see that you were in San Francisco when 9 you signed the affidavit in Exhibit 2. How did you 10 transmit the affidavit to Counsel? 11 A. I think I sent it to him by Federal 12 Express. 13 Q. Would you describe for me outside of your 14 work as a consultant in litigation, what -- and the 15 teaching that you've told me about -- what other 16 professional activities are you currently involved 17 in? 18 A. Well, I serve as special ethics counsel to 19 several law firms, and from time to time I'm asked 20 to provide legal advice to lawyers who have or 21 think they have problems. I do some pro bono work 22 as well. 23 Q. What firms are you special counsel on 24 legal matters? 25 A. Bingham McCutchen -- they go by Bingham
Page 19 1 Q. All right. So is that 15,000 a flat rate? 2 A. Yes, sir. 3 Q. All right. So that's what you would 4 charge in any case in which you were asked to give 5 an opinion? 6 A. No. It's negotiated. Sometimes it's more 7 than that. Sometimes it's somewhat less. It 8 depends on the estimates of how much material has 9 to be reviewed. 10 Q. Does that \$15,000 initial fee include 11 drafting and signing the affidavit in the case? 12 A. Yes, sir. 13 Q. I take it, then, you haven't submitted a 14 bill. 15 A. That's correct. 16 Q. Have you maintained -- have you kept track 17 of your hours? 18 A. Only in this coming to Philadelphia 19 because I don't keep track of hours when I have a 20 fixed fee. 21 Q. Can you estimate for me how many hours of 22 work went into producing the affidavit in 23 Exhibit 2? 24 A. 15 or 20, I guess. 25 Q. And that would be the time spent from when	Page 21 1 now, I think; Cozen O'Connor; Langer, Grogan & 2 Diver, who are here. Langer, L-A-N-G-E-R, Grogan, 3 G-R-O-G-A-N, and Diver. And Murphy and Falcone are 4 in Baltimore. 5 Q. All right. So the Langer firm is here in 6 Philadelphia? 7 A. Yes, sir. 8 Q. Are the other two in -- 9 A. Well, Cozen is -- their headquarters is 10 here. 11 Q. And the Bingham firm? 12 A. Their headquarters are Boston. 13 Q. Have you ever given presentations or spoke 14 to a CLE program or seminars of any type on the 15 propriety of contingent fee agreements with outside 16 counsel and state attorneys general? 17 A. No. 18 Q. Have you ever done -- strike that. 19 Do you maintain a file of research 20 relating to contingent fee agreements with outside 21 counsel and state attorneys general? 22 A. No. 23 Q. Have you ever done research into that 24 subject? 25 A. Yeah, in connection with that opinion for

Page 22

1 the Toronto lawyer, which was a short time, as I
2 recall, after the opinion that was rendered by the
3 Rhode Island Supreme Court. That's the only way I
4 can identify the timing, but it was sometime after
5 that.

6 Q. And as you said earlier, that may have
7 been 20 or so years ago?

8 A. Whenever it was, yeah.

9 Q. Yes. All right. And so between that
10 opinion for the Toronto lawyer and your work in
11 this case, you haven't for any reason done research
12 specifically on propriety of contingency fee
13 arrangements with outside counsel and state
14 attorneys general?

15 A. That's right. I do follow the evolving
16 cases, but I haven't focused on any particular
17 research.

18 Q. Have you ever given presentations to
19 groups of corporate counsel or general counsel for
20 the pharmaceutical industry?

21 A. I've given presentations where I'm sure
22 some of those folks were present, but not to any
23 group defined as such.

24 Q. Have you ever spoken at national meetings
25 of state attorneys general?

Page 23

1 A. No.

2 Q. Currently, this year, what percentage of
3 your income is the result or comes from your work
4 as an expert in litigation?

5 A. Well, I guess it's probably --

6 MR. KATSIFF: Objection to form.

7 But you can answer.

8 THE WITNESS: -- more than half
9 because starting January I've been
10 emeritus, so that means I'm on the
11 relatively modest retirement benefit that
12 I get from University of California, and
13 I've been paid somewhat by Hastings. I
14 think it's about 35,000. But I guess my
15 income from these consulting activities --
16 I can't distinguish between expert
17 testimony ones and these other
18 consultations, but I would say that
19 between them they probably -- 250,000,
20 something like that.

21 BY MR. JOWERS:

22 Q. Are you taking on more expert consultation
23 work now than you were two or three years ago?

24 A. No. I'm trying to -- I mean, I have not
25 turned anybody down, but I haven't gotten as many

Page 24

1 calls, I think, in the last couple of years as I
2 did, say, five years ago. But it's not been a
3 precipitous drop. It's been somewhat of a tailing
4 off.

5 Q. When was the last time you gave a
6 deposition?

7 A. I think it was in the spring. I've
8 given -- I testified in a case in Aspen, Colorado,
9 here about a month ago, and I gave testimony in
10 another matter -- I'm trying to remember what it
11 was -- sometime in the summer. If you've got the
12 list of testimonies, I could do better in
13 recollecting.

14 Q. Perhaps at a break we'll pull that out and
15 take a look at it.

16 You brought with you today -- and we can
17 go ahead and mark a copy.

18 MR. JOWERS: This will be Exhibit 3.

19 - - -

20 (Whereupon, Exhibit No. 3, Fact
21 Summary, was marked for identification.)

22 - - -

23 BY MR. JOWERS:

24 Q. What you've described for me as your file
25 in this case.

Page 25

1 A. Yes, sir.

2 Q. And it was about a quarter-inch thick or
3 so. I've marked that as Exhibit 3. You told me
4 that you're often sent documents and you review
5 them, and after you've reviewed them, your practice
6 is to throw them away.

7 A. Yes.

8 Q. Yet you've retained some documents, and
9 those are in Exhibit 3.

10 A. Yes, just a few of them.

11 Q. How is it that you decided to retain the
12 documents in Exhibit 3 and discard the others?

13 A. I just sort of guess sometimes. Well,
14 first of all, they have to be small because I don't
15 like to keep -- I don't keep big files. And I
16 have -- I keep them in my home, and we have a small
17 apartment. So it's just the correspondence with
18 Morgan Lewis. I think I kept a copy of certain
19 pages from Mr. Jones' testimony which seemed to be
20 important. I don't have any particular method of
21 doing it.

22 Q. If you would turn in Exhibit 3 --

23 A. Yeah.

24 Q. -- there is a cover letter dated
25 September 11, 2013, enclosing Attorney General Alan

Page 26 1 Wilson's deposition? 2 A. Yes. 3 Q. I'll give you a moment to find that. 4 There you go. 5 A. Yeah. Okay. 6 Q. All right. And what follows is not the 7 entire deposition, but it looks to me like three 8 pages. 9 A. Yes. 10 Q. Two pages of testimony. 11 A. Yeah. 12 Q. All right. Would you tell us, then, what 13 is it on page 40 and 92 from General Wilson's 14 deposition that was important enough for you to 15 save here? 16 A. I can't now recall, but I think it had to 17 do with how the office, AG office, handles money 18 arising out of these arrangements. And that was 19 about it. 20 Q. All right. If you would, take a look at 21 page 40. 22 A. Yeah. 23 Q. And it looks like what we have on page 40 24 is predominantly, and not exclusively, an answer to 25 a question --	Page 28 1 THE WITNESS: That the general 2 assembly has to approve of the AG's, I 3 guess you'd say, continuation of retention 4 and putting the money to use in the AG's 5 office. That is, the AG can't do it 6 simply on their own authority, but it 7 requires approval by the general assembly. 8 BY MR. JOWERS: 9 Q. All right. Can you tell me, then, the 10 impact of that testimony on your opinions. 11 A. Well, I don't think any because I 12 understood that the AG's office would then argue 13 with the attorney -- with the general assembly that 14 they should get some money out of the recovery. It 15 ought to go to their office so they can continue to 16 do the work that they're trying to do. And so the 17 AG's office hopes and expects, I think 18 realistically, that the general assembly would be 19 sympathetic and approve that. So it's not up to 20 the AG's office alone, but on the other hand, they 21 think they have pretty good working relations -- 22 this is all my inference -- with the general 23 assembly so that they will get an okay to be able 24 to spend it or at least some of it. 25 Q. In this testimony, as you've read it, when
Page 27 1 A. Yeah. 2 Q. -- that General Wilson gave. 3 A. Yeah. 4 Q. All right. If you'd just take a moment to 5 look at that. 6 A. Yeah. 7 Q. And once you've finished, let me know. 8 A. Okay. I read that. 9 Q. All right. Can you tell me now, having 10 had the opportunity to refresh your memory, what 11 was significant to you about General Wilson's 12 testimony on page 40? 13 A. I'm sorry. It's about how they -- he says 14 we can keep the money, but we don't have the 15 general assembly's authorization to spend it. It's 16 just sitting there. There might as well have been 17 a hole in the ground. And so he's saying that they 18 get the money and they have to sit on it, and then 19 there's a question about when -- under what 20 circumstances they can then make use of the money. 21 Q. What is your understanding of the answer 22 to that question? 23 A. Well, that this -- 24 MR. KATSIFF: Objection. You can go 25 ahead.	Page 29 1 it refers to on page 40 retaining the money -- 2 A. Yeah. 3 Q. -- do you understand that to be referring 4 to attorney's fees or the proceeds of a case 5 brought by the attorney general? 6 A. Well, it's the proceeds. I mean, if I 7 understand your question. 8 Q. Well, let me make sure you do understand 9 it. What I'm asking is, for instance, let's look 10 at on page 40, line 6, 5 and 6. We have certain 11 law statutes that authorize us to even keep the 12 money. 13 A. Yeah. 14 Q. Now, and then there was a discussion on an 15 answer that followed. When that refers to the 16 money, as you understand it, is that the attorney's 17 fees kept by the Attorney General's Office or is he 18 referring to the entire settlement or funds 19 recovered? 20 MR. KATSIFF: Objection to form. Go 21 ahead. 22 THE WITNESS: I mean -- well, no. 23 The way this thing works is that it's -- 24 you're talking about attorney's fees, not 25 the whole settlement.

Page 30 1 BY MR. JOWERS: 2 Q. Okay. The next page is page 92. 3 A. Yeah. 4 Q. And before we get to that, just to wrap 5 that up, am I correct that the information that 6 General Wilson gave on page 40 really didn't have 7 an impact on your opinions in this case one way or 8 the other? 9 A. I don't think so. I mean, I understood 10 the procedures within the state of South Carolina 11 about handling the money. But I also understood 12 that the AG's office expected, I think reasonably, 13 to get in this case the 10 percent that's in the 14 agreement. They couldn't, as it were, realize on 15 that expectation. Simply on their own judgment, 16 they had to get general assembly approval, but as I 17 understand it, they expected that they would. 18 Q. So I'm understanding correctly that 19 General Wilson's testimony on page 40 we've been 20 over really didn't change your opinion one way or 21 the other. 22 A. No, I don't think so. 23 Q. Okay. All right. Now, moving to page 92. 24 A. Yeah. 25 Q. If you'd take a moment to review that and	Page 32 1 might have been sent along with the letter from 2 Mr. Katsiff about the engagement. 3 Q. I see. 4 A. So those are essentially contemporaneous 5 as far as I recall. 6 Q. All right. Then with respect to 7 correspondence enclosing case materials, was 8 August 5th the first time you received case 9 materials? 10 A. Yes, sir. 11 Q. It appears that you were provided with a 12 notebook -- 13 A. Yes. 14 Q. -- or a binder? 15 A. Yes. 16 Q. Did you ask for any specific documents to 17 be sent to you? 18 A. No. 19 Q. So everything that was sent to you was 20 selected by counsel at Morgan Lewis? 21 A. Yes. 22 Q. Did you ever ask what depositions had been 23 taken? 24 A. No. I rely on the lawyer retaining me to 25 send me stuff that could be important, and as far
Page 31 1 then let me know when you've had a chance to do 2 that. 3 A. Well, the question here is, he says can 4 the office just spend the money without permission 5 from legislature? No, we have to get permission. 6 We have to be authorized. That's what I was 7 talking about. 8 Q. So that what you've just read, which would 9 be lines 22 through 24, is the testimony that was, 10 I guess, significant enough to you to save this 11 page? 12 A. Yeah, I mean, I understood how the system 13 works, and I thought it was epitomized here. 14 Q. If you would turn over two pages to the 15 next cover letter. 16 A. Yeah. 17 Q. This was dated August 5, 2013? 18 A. Yeah. 19 Q. Was this the first correspondence you 20 received in this case? 21 A. I think so, unless we had -- unless the 22 fee agreement came before that, which it might 23 have. But that's what -- if you look at the 24 payment, we have a letter that's got -- the date is 25 blank, but it might have been the same date. It	Page 33 1 as I could tell, what was sent pretty well covered 2 the problem to be addressed. 3 Q. In the same letter, referencing the binder 4 tab 9 -- it's on the second page if you'd like to 5 turn to it. There's an expert report of Professor 6 Nathan Crystal in the AstraZeneca case? 7 A. Yes. 8 Q. All right. Did you review that? 9 A. Yeah. 10 Q. Did you rely on Professor Crystal's 11 affidavit? 12 A. No. I took it into account. 13 Q. All right. When you were first engaged in 14 this matter, were you told that there was another 15 expert report out there from a prior case involving 16 the South Carolina Attorney General's Office? 17 A. I don't recall. I don't think so. 18 Q. Did you have any knowledge of Professor 19 Crystal's report prior to being sent it in August? 20 A. No. 21 Q. Did you make any notes or outlines? 22 A. I never make notes, no. 23 Q. Why not? 24 A. I got it -- I have the stuff in my head, 25 not on a piece of paper.

Page 34 1 Q. When you review materials that are sent to 2 you, do you highlight things? 3 A. No. 4 Q. Do you put tabs on things? 5 A. No. 6 Q. Throughout the course of your work in this 7 case, did you ever do any research on the issues 8 involved? 9 A. No. 10 Q. Were you provided with any case law by 11 Counsel? 12 A. No. They gave me a couple of cases since 13 then, but I knew what the state of the law was. 14 Q. Okay. The cases that they've given you 15 since then, are you referring to the one cited in 16 your affidavit you told me about earlier? 17 A. Yeah, but I knew about the Santa Clara 18 case, the California case. 19 Q. Um-hum. Have you provided any case law or 20 research materials to Counsel? 21 A. No. 22 Q. If we continue in the packet, Exhibit 3, 23 you have certain pages -- 24 A. Yes. 25 Q. There's two pages from the mini	Page 36 1 his. I'm talking about the -- 2 MR. KATSIFF: Oh, I'm sorry. I'm 3 sorry. 4 MR. JOWERS: We'll start over. 5 THE WITNESS: No, I understood. 6 MR. JOWERS: Let me get a clean 7 record. 8 MR. KATSIFF: Sorry about that. 9 BY MR. JOWERS: 10 Q. You can take a look through Exhibit 3, but 11 you understand there's a litigation retention 12 agreement between -- 13 A. Yes. 14 Q. -- the South Carolina Attorney General and 15 outside counsel? 16 A. I thought it was accurately described, 17 yes. 18 Q. Okay. When you say you thought it was 19 accurately described, by whom? 20 A. I thought Mr. Jones referred to it and the 21 attorney general both. 22 Q. All right. The litigation retention 23 agreement isn't something that you kept in your 24 file. 25 A. No.
Page 35 1 deposition, or it looks like actually one page of 2 four from the mini transcript from Mr. Jones's 3 deposition? 4 A. Yeah. 5 Q. Would you take a look at that and tell me 6 what was it about these pages, 262 through 265, 7 that was significant enough for you to keep these 8 pages? 9 A. Well, I thought he did a pretty good job 10 of describing what the situation was. 11 Q. All right. In what respects? 12 A. Well, he says the more civil penalties 13 award, the more fees go to private counsel, which 14 is what I understood the deal to be. So he's 15 essentially confirming in his deposition testimony 16 the basic idea that's involved here. 17 Q. And because I don't see it included within 18 Exhibit 3, am I correct that you discarded the 19 litigation retention agreement in this case? 20 MR. KATSIFF: It's in the exhibit. 21 MR. JOWERS: Is it in here? 22 MR. KATSIFF: Yes. It's the next 23 page after the excerpt from Mr. Jones' 24 deposition. 25 MR. JOWERS: You're talking about	Page 37 1 Q. Do you know when you discarded it? 2 A. No, along with the other stuff. 3 Q. Did you read the whole thing? 4 A. Yep. 5 Q. Do you know when you discarded any of the 6 depositions that were provided to you? 7 A. No. Probably in October, maybe September. 8 Q. Also in Exhibit 3 is your expert 9 affidavit? 10 A. Yes, sir. 11 Q. All right. It's the same affidavit that 12 we have in Exhibit 2. 13 A. Yep. 14 Q. All right. Can you tell me when you began 15 writing this affidavit? 16 A. No, but I expect it was signed, I think, 17 in December. And I -- I think that I probably did 18 it in November sometime, sometime after they sent 19 me Exhibit A, which was my request -- responded to 20 my request to give me a plain vanilla statement of 21 fact. 22 Q. All right. Let's go and talk about that 23 then. This is the fact summary -- 24 A. Yes. 25 Q. -- that you referred to?

Page 38 1 A. Yes. 2 Q. A copy of that is also in Exhibit 3; is 3 that right? 4 A. I think so. 5 Q. All right. That was something prepared at 6 your request? 7 A. Yes. 8 Q. By the attorneys at Morgan Lewis? 9 A. Yes. 10 Q. Did you tell me earlier that you ask for a 11 summary in every case? 12 A. That's my standard practice, yes. 13 Q. Why is that? 14 A. Because they have -- the lawyers always 15 know in better detail what are the sources of 16 information, and so I tell them, you know, I don't 17 want any surprises. So give me a statement of 18 facts that I can use as a basis for my opinion. I 19 will have often read a lot of the stuff referred 20 to, but I want them to take the burden of providing 21 what amounts to a summary. 22 Q. All right. If we look at Exhibit 3, that 23 first cover letter is the transmittal letter for 24 this fax summary dated November 14; is that right? 25 A. Yeah.	Page 40 1 an opportunity to meet with counsel from Morgan 2 Lewis? 3 A. Yesterday. 4 Q. Was that the first time? 5 A. Yes. 6 Q. Who was present at that meeting? 7 A. Mr. Katsiff, Mr. Brody, Mr. Church. 8 Q. Was that here at the offices of Morgan 9 Lewis? 10 A. Yes, sir. 11 Q. About how long was that meeting? 12 A. A couple hours. 13 Q. Do you have anyone that assists you in 14 your expert consultation work? 15 A. No. 16 Q. Is there anything that you reviewed 17 relating to this case that isn't here with us 18 today? 19 A. Not that I know of, no. 20 Q. Now, you may or may not know that we have 21 a scheduling order in this case in South Carolina 22 that requires motions for summary judgment to be 23 filed today. Have you had an opportunity to review 24 Cephalon's motion for summary judgment in this 25 case?
Page 39 1 Q. All right. Would it be fair to say, then, 2 that your affidavit was most likely begun sometime 3 after that date? 4 A. Yep. 5 Q. So the affidavit would have been -- you 6 would have started drafting sometime after the 14th 7 of November and completed it on December 6? 8 A. Yes, something like that. 9 Q. I see. Would it be fair to say that the 10 fact summary supplied to you was one of the items 11 that you relied upon in forming your opinions in 12 this case? 13 A. Yes. 14 Q. Would it also be fair to say that by 15 November 14th you had most likely already discarded 16 the initial materials already sent to you? 17 A. Yes, or shortly thereafter. 18 Q. Do you typically produce a report or 19 affidavit in every -- 20 A. Yes. 21 Q. -- case you're involved in? 22 A. Yes, even in states where -- in 23 jurisdictions where it's not required because I 24 think it's good practice. 25 Q. Before this deposition began, did you have	Page 41 1 A. I don't think so. 2 - - - 3 (Whereupon, Exhibit No. 4, 4 Plaintiff's Supplemental Responses to 5 Defendant's Second Set of Interrogatories, 6 was marked 7 for identification.) 8 - - - 9 BY MR. JOWERS: 10 Q. Professor, I'm going to pass you now 11 Exhibit 4, which is Cephalon's answers to 12 interrogatories in this case. 13 A. Okay. 14 Q. And I would like you to turn to page 2. 15 Have you seen this before today, Exhibit 4? 16 A. I don't think so, no. 17 Q. Do you see that there's only one 18 interrogatory here? 19 A. That's what it says. 20 Q. Okay. And the interrogatory asks for each 21 expert witness that may be called to testify at 22 trial, set forth the opinions held by the expert, 23 the basis for the opinions, and the materials 24 considered and relied upon in forming those 25 opinions. Do you see that?

Page 42 1 A. I see that. 2 Q. All right. Do you agree that the South 3 Carolina Attorney General's a defendant in this 4 case and entitled to know those things? 5 MR. KATSIPP: Objection to form. 6 You can answer. 7 THE WITNESS: They're entitled to a 8 truthful answer to legitimate 9 interrogatories, and I would assume that 10 this is an appropriate response but I 11 haven't read it. 12 BY MR. JOWERS: 13 Q. Is there anything objectionable about that 14 interrogatory? 15 A. No. 16 Q. I'd like you to turn to the second page. 17 A. Of -- 18 Q. Or the third page of Exhibit 4. 19 A. Yeah. 20 Q. And you can see about halfway in it begins 21 a list of the materials that were supplied to you? 22 A. Yeah. 23 Q. Number 6 is Cephalon's memorandum of law 24 and reply brief in further support of its motion 25 for summary judgment, the underlying enforcement	Page 44 1 A. Yes. 2 Q. Do you see that? 3 A. Yes. 4 Q. All right. What impact, if any, did the 5 account summary have on your opinions in this case? 6 A. I can't recall any. I thought the 7 witnesses explained it enough for me to understand 8 it. 9 Q. Number 11 is the SCAG's master settlement 10 log produced in discovery. Do you recall reviewing 11 that? 12 A. No, I don't. I could have but I can't 13 recall. 14 Q. All right. Since you can't recall 15 reviewing it, would it be fair to say that Number 16 11, the master settlement log, didn't have an 17 impact on your opinions in this case? 18 A. No, not that I can recall. The main 19 question was to know what the agreement was and how 20 the money was handled, and I thought I understood 21 that. 22 Q. All right. Similarly, with Number 12, 23 budget history for the SCAG? 24 A. Same thing. 25 Q. All right. Same answer, that it didn't
Page 43 1 action. Do you see that? 2 A. Yes. 3 Q. Then Number 7 states opposition? 4 A. Yeah. 5 Q. All right. Did you review those 6 documents? 7 A. I can't recall. 8 Q. Do you have any understanding of why a 9 motion for summary judgment in the underlying case 10 was sent to you? 11 A. No. 12 Q. Do you think the motion for summary 13 judgment in the underlying case is relevant to your 14 opinions? 15 A. Well, it might well have attachments to it 16 that were relevant. 17 Q. As you sit here today, do you recall any 18 attachments to the motion for summary judgment or 19 the opposition that were relevant to your opinions? 20 A. No. I thought I already had that 21 information. 22 Q. Number 10 -- 23 A. Yeah. 24 Q. -- is the account summary for the SCAG 25 civil litigation.	Page 45 1 have any impact on your opinions? 2 A. No. 3 Q. There was also Number 13, some responses 4 to interrogatories. Did you rely on any of the 5 state's responses to interrogatories? 6 A. Not that I can recall. 7 Q. All right. Number 18, on the next page, 8 the SCAG's responses to -- supplemental responses 9 to request for production of interrogatories. As 10 you sit here today, do you believe that you relied 11 on those items? 12 A. No. I relied on the testimony of 13 Mr. Jones and, as I recall, Mr. Wilson. There was 14 a financial officer, whoever that guy was, Osmer 15 maybe. 16 Q. Yes, sir. The final documents in 17 Exhibit 4 is Number 19, copies of South Carolina 18 Code Sections 1-785 and 1-7150. As you sit here 19 today, do you recall receiving those? 20 A. I can't recall. 21 Q. I take it that you don't recall whether or 22 not you reviewed them. 23 A. I don't know. 24 Q. So that it would be fair to say that your 25 opinions were not influenced one way or another by

Page 46 1 South Carolina Code Sections 1-785 and 1 -- 2 A. As best that I can recall, that's correct. 3 Q. And 1-7150? 4 A. Yeah. 5 Q. Do you intend to do any additional work in 6 this case? 7 A. Showing up for trial, reading the 8 deposition after it's transcribed. 9 Q. Is there anything that you've asked for 10 that you haven't received? 11 A. No. 12 Q. Is there anything else that you'd like to 13 see or you need to see in order to finalize your 14 opinions? 15 A. The opinion is finalized here. 16 MR. JOWERS: All right. We've been 17 going about an hour now. Is it all right 18 if we take a break? 19 MR. KATSIFF: That would be great. 20 (Brief recess.) 21 BY MR. JOWERS: 22 Q. When we took a break, did you talk about 23 your testimony with anyone? 24 A. Yes, I asked him if I'm doing okay. He 25 said yes.	Page 48 1 Q. So then is Exhibit 4 a comprehensive list 2 of the items you were provided to review? 3 A. As far as I know, yes. I don't know of 4 anything outside of them, but obviously parts of 5 those were not as interesting to me as the 6 testimony of Mr. Wilson, Mr. Jones, Mr. Osmer and 7 the underlying agreement. 8 Q. All right. As you sit here today, you 9 can't think of anything that you reviewed in this 10 matter that is not listed in Exhibit 4? 11 A. That's right. 12 Q. Okay. Of the things that you did review, 13 it sounds to me that the most important to you were 14 the first fee agreement, the deposition of General 15 Wilson, deposition of Mr. Jones, and Mr. Osmer? 16 A. Yeah. 17 Q. As well as the fact summary? 18 A. Yeah. 19 Q. And those were the most important 20 materials with respect to your opinions? 21 A. Yeah. 22 Q. All right. Then let's turn to your 23 affidavit, which you have in front of you, 24 Exhibit 2. 25 A. I do.
Page 47 1 Q. Exhibit 3, the file you brought with you 2 today? 3 A. Yes, sir. 4 Q. Is it fair to say that Exhibit 3 5 represents the materials that were most important 6 to you in forming your opinions? 7 A. They were, among others, but the agreement 8 is obviously important, but I understood that it 9 was in writing. It's a document. It's not in 10 dispute. I thought their testimony reminded me of 11 the way it worked, and I understand that. 12 Q. Exhibit 4, just to close off this area, 13 that is Cephalon's response to interrogatories, 14 about your opinions and the materials you reviewed, 15 and we looked through certain of those items. 16 There's 19. And what I want to be clear, is that's 17 all the things you were provided are described here 18 in Exhibit 4 with the addition of the fact summary 19 that you requested? 20 MR. KATSIFF: The fact summary is 21 mentioned in Exhibit 4. 22 MR. JOWERS: Is it? 23 MR. KATSIFF: It's Number 8. 24 MR. JOWERS: You're right. 25 BY MR. JOWERS:	Page 49 1 Q. And I'd like to direct your attention to 2 Paragraph 4. 3 A. Yes, sir. 4 Q. Is this Paragraph 4 the summary of your 5 opinion? 6 A. Yeah. 7 Q. And so that, in your opinion, the 8 agreement between the Attorney General's Office and 9 private counsel, quote, creates a financial 10 incentive for the AG's office and is inconsistent 11 with recognized standards of professional conduct, 12 quote. 13 A. That's a summary, yes. 14 Q. Okay. Do you then after Paragraph 4 set 15 forth the basis for that opinion? 16 A. Yeah. 17 Q. And do you after Paragraph 4 specify the 18 recognized standards of professional conduct that 19 you were referring to in Paragraph 4? 20 A. Well, it has to deal with acting as a 21 neutral minister of justice, and for that I take a 22 cue from Rule 3.8, which talks about prosecutors. 23 This is not technically a prosecution, but it has 24 some similarity to it, and it has the idea of a 25 minister of justice, which was the underlying

Page 50 1 concept that's at issue. 2 Q. All right. The recognized standards of 3 professional conduct that you're referring to in 4 Paragraph 4, if I understand you correctly, what 5 you're talking about is the concept of a neutral 6 minister of justice? 7 A. That's the basic idea. 8 Q. All right. Is that a concept that's found 9 in case law? 10 A. Yeah. I mean, that's what Santa Clara 11 County, for example, talks about at considerable 12 length. That opinion is fairly recent, quite 13 comprehensive, and I think it fully explains it. I 14 happened to be acquainted with that case 15 beforehand, but having the quote was helpful. 16 Q. So are you then applying the concepts in 17 Santa Clara and other cases to the facts in this 18 case? 19 A. Yeah. That's the idea. 20 Q. Did I also understand you correctly in 21 that, in your opinion, the underlying action is 22 like a criminal prosecution? 23 A. It has elements of it. It's regulatory, 24 quasi-penal in that it's -- you can get penalty 25 damages, punitive damages perhaps, but it's not	Page 52 1 by a state government agency seeking punitive 2 damages, potentially, for what he claims to be a 3 violation of South Carolina law. That's a public 4 lawsuit. 5 Q. All right. Are there factors that have 6 been described in case law that assist with the 7 determination of whether an action is civil, 8 criminal or quasi-criminal? 9 A. Not much, but there was first some dis -- 10 in the cases, a question whether it would be 11 permissible ever for a public agency to retain 12 private counsel on a contingent fee basis -- 13 contingent fee basis. 14 And the first iteration of cases on that 15 subject, some of them said even that's no good, but 16 then there was a growing recognition that a state 17 government, in particular here, had need to get 18 private counsel because private counsel could be 19 retained who had much better acquaintance with how 20 to prosecute one of these cases, greater litigating 21 capacity, and so I came to see that this might be 22 okay. And indeed, you can see that transition 23 reflected in the Santa Clara case, where the 24 earlier case in California had been more 25 disapproving, if we can put it that way. But in
Page 51 1 limited to compensatory damages. 2 Q. All right. So would you call it a 3 quasi-criminal action? 4 A. That would be a term you could use, yes. 5 Q. So if we look at perhaps three types of 6 actions, there would be civil, purely civil, purely 7 criminal, and then quasi-criminal? 8 A. Yes, that would be -- 9 MR. KATSIFF: Objection to form. 10 THE WITNESS: It would be a good way 11 of positioning it in that set of concepts. 12 BY MR. JOWERS: 13 Q. All right. So did you analyze the facts 14 of this case and reach a determination that this -- 15 the underlying case against Cephalon was 16 quasi-criminal in nature? 17 MR. KATSIFF: Objection to form. Go 18 ahead. 19 THE WITNESS: That's a term that 20 could properly be used. 21 BY MR. JOWERS: 22 Q. All right. Would you tell me how you 23 arrived at the opinion that the underlying action 24 is quasi-criminal in nature. 25 A. Well, because it's punitive. It's proven	Page 53 1 this case, they move away from that. 2 And so I was quite aware that this was a 3 problematic issue. Could you have a contingent fee 4 at all? Answer, qualified yes. But what if you 5 got a direct payment to the office, which was 6 what's involved here, subject, of course, to 7 legislative approval. So it seemed to me that this 8 was like a -- what resulted in the AG's office 9 having a direct benefit from the contingent fee 10 contract. So that's the relation on the attorney's 11 fees. 12 And the question is what's the underlying 13 case. And as I said, that is -- is what you can 14 call regulatory or quasi-criminal because it's 15 seeking more than compensatory damages. 16 Q. Focusing on the factors that led you to 17 conclude that there was -- or the underlying action 18 was quasi-criminal, that's a subject on which there 19 is case law, right? 20 A. Well, there may be. 21 Q. Have you heard of the Mendoza factors? 22 A. I've heard that case mentioned, but that 23 would be a limited question of law, which if it's 24 resolved in South Carolina one way or the other, 25 would obviously supercede any expert opinion. But

Page 54 1 I don't know that it's been resolved. My 2 impression is that question has not been definitely 3 resolved in South Carolina law. 4 Q. All other things being the same, if the 5 underlying action were purely civil, purely 6 compensatory, would your ultimate conclusion be 7 different? 8 A. Yeah. 9 Q. And that you would not have a -- you 10 wouldn't take issue with the Attorney General's 11 Office retaining a portion of the proceeds as 12 attorney's fees on a contingent fee calculation? 13 MR. KATSIFF: Objection to form. Go 14 ahead. 15 THE WITNESS: Well, you've got two 16 things, two variables here. One is you're 17 getting a derived benefit and the other is 18 whether the -- what's the nature of the 19 underlying suit. To determine the nature 20 of the underlying suit, you say what kind 21 of remedies could they get, and remedies 22 here include possibility of punitive 23 damages. So I would say that made it what 24 we have called quasi-criminal. And then 25 you get them having a benefit out of that	Page 56 1 wouldn't -- would not say that it's a violation of 2 recognized standard. 3 Q. I see. Are you aware that in the state's 4 amended complaint it raised a claim for 5 compensatory damages on behalf of the state health 6 plan? 7 A. I assume they did have a claim for 8 compensatory damages. 9 Q. All right. As to that claim alone, do you 10 take issue with the litigation retention agreement? 11 A. Well, if that were the only claim 12 involved, the answer would be what I gave earlier. 13 But it's not the only claim involved. So if you 14 want to say if that were the only claim involved, 15 it would go back to my previous answer. 16 Q. All right. If the claim for the state 17 health plan, compensatory claim, was the only claim 18 involved, you wouldn't have an issue with the 19 litigation retention agreement? 20 A. I would not say it violated recognized 21 standards. I think it's not a good idea, but 22 that's a matter of, I think, professional judgment. 23 I think it just raises issues you don't need. 24 Q. I see. How then are you unable to 25 separate the compensatory claim from the other
Page 55 1 kind of litigation, which means they have 2 an incentive to have that kind of case go 3 forward and realize some money. 4 BY MR. JOWERS: 5 Q. All right. So then if you were to remove 6 the punitive damages aspect from the case, if the 7 state was seeking purely compensatory damages, it 8 sounds like your opinion would be different. 9 A. Yeah, that's right. 10 Q. How would your opinion change? 11 A. Well, then the question is, could the state 12 hire a private counsel on a contingent fee basis to 13 pursue some kind of compensatory damage claim that 14 the state might have, for example, damage to its 15 property or something like that. If you had a big 16 enough piece of property where the lawsuit would 17 be -- put a stress on resources available to the 18 AG's office as such, they could, in my opinion, go 19 seek private counsel and do it on a contingent fee 20 basis. 21 Q. And the fee agreement could be exactly as 22 it is in this case, and you wouldn't take issue 23 with it under those circumstances? 24 A. Well, I would say, why do you want to do 25 that, because it's just raising questions. But I	Page 57 1 claims and say, you know, the compensatory claim 2 may be okay but these claims seeking punitive 3 damages are not? 4 MR. KATSIFF: Objection to form. 5 THE WITNESS: Well, because that's 6 an exercise of the sovereign authority of 7 the state. I mean, ordinary people 8 couldn't get that, as far as I know, 9 unless there's special provisions in the 10 statute, but this is a public proceeding. 11 And they're seeking a sanction that is not 12 compensatory. 13 BY MR. JOWERS: 14 Q. Does the fact that the state seeks what 15 you've described as noncompensatory damages taint 16 the whole case in your view? 17 MR. KATSIFF: Objection to form. 18 Go ahead. 19 THE WITNESS: I don't know what it 20 means. I mean, you can make claims for 21 various types of recovery. If they had 22 asked claims only compensatory, you'd have 23 a different case than the case we have. 24 BY MR. JOWERS: 25 Q. Are you aware that the Attorney General

Page 58 1 began this case before there was a litigation 2 retention agreement? 3 A. Yeah. 4 Q. Are you aware that the decision to file 5 the case, the choice of claims to assert and the 6 scope of the covered conduct were all decisions 7 made before outside counsel was involved? Is that 8 consistent with your understanding? 9 MR. KATSIFF: Object to form. 10 Mischaracterizes the evidence. 11 THE WITNESS: Whatever -- I assume 12 they thought about the case before they 13 filed it. What they asserted in the case 14 I'm not familiar with. If you tell me 15 they filed only for compensatory, that 16 would be one premise. But as I understand 17 it, as the case now stands, it's not so 18 limited. 19 BY MR. JOWERS: 20 Q. I didn't suggest that it was. You were 21 provided with a copy of the state's complaint in 22 the underlying case. True? 23 A. As I understand it, yeah. I thought it 24 sought compensatory damages. Now, whether they 25 thought of it, the AG's office, or that was thought	Page 60 1 MR. KATSIFF: Objection to form. 2 THE WITNESS: Well, they have a duty 3 to act as ministers of justice, and I 4 assume that they would. They didn't have 5 any connection to private counsel. They 6 don't have the prospect of getting a share 7 of continued fees. There may be that 8 they -- under the law they could seek 9 recovery of their own attorney's fees, but 10 that would be what the law would allow. 11 BY MR. JOWERS: 12 Q. So if the law allows the attorney general 13 to seek recovery of attorney's fees, that's not 14 something that you take issue with? 15 MR. KATSIFF: Objection to form. 16 THE WITNESS: Yeah, that's right. 17 BY MR. JOWERS: 18 Q. So if in our hypothetical the state began 19 this case, the underlying case, and continued it 20 through conclusion entirely on its own, achieved a 21 recovery of money and then applied to the court for 22 attorney's fees -- and let's use 2.5 percent of the 23 recovery just as a number -- based on a statute, 24 would you have any concerns with that? 25 MR. KATSIFF: Objection to form.
Page 59 1 of after the case had been filed is a separate 2 question. I don't think it's relevant to the 3 opinion. The question is what is the pending 4 claim. 5 Q. So the fact that the claims asserted in 6 the complaint were made before there was a 7 litigation retention agreement, before outside 8 counsel was involved, is not an important factor, 9 in your opinion. 10 MR. KATSIFF: Objection to form. 11 THE WITNESS: I would think not. 12 You know, it depends if you can make the 13 deal before or after. If you make it 14 after, the question is what's the -- what 15 are the pending claims, what's covered by 16 the agreement. 17 BY MR. JOWERS: 18 Q. If the state of South Carolina brought 19 this case on its own without outside counsel and 20 continued it on its own with outside counsel -- 21 A. Continued without? 22 Q. Yes. 23 A. Yeah. 24 Q. Would you have any concerns about the 25 case?	Page 61 1 THE WITNESS: No, I don't think so. 2 BY MR. JOWERS: 3 Q. Is it your understanding that per the fee 4 contract, the fees allocated to the office, the 5 Attorney General, are 10 percent of the fees? 6 A. That's my understanding. 7 Q. All right. So if the maximum fee outside 8 counsel could obtain on a recovery is 25 percent, 9 the office would seek 2.5 percent? 10 A. I think that's the way it works. 11 Q. Okay. Do you understand that the fee 12 contract requires court approval of attorney's fees 13 in this case? 14 A. I don't understand that, but that could 15 well be. 16 Q. All right. A court would be neutral. 17 True? 18 A. Yeah, I would assume so. 19 Q. All right. A court wouldn't have a 20 financial interest in the outcome? 21 A. That's right. 22 Q. A court wouldn't have an interest in the 23 fees paid to the Attorney General's Office? 24 A. Well, they have a responsibility 25 concerning it if they're passing on it, but they

Page 62 1 wouldn't have any vested interest in it. 2 Q. If, in fact, the litigation retention 3 agreement provides that attorney's fees for both 4 outside counsel and the Attorney General are to be 5 reviewed and approved by a court, does that 6 alleviate your concerns in any way? 7 A. It's a factor, but I wouldn't think it 8 would be enough because usually if you adequately 9 document it, the court would be disposed to say, 10 well, if that's what your, you know -- that's what 11 you're asking for, it seems to be reasonable. That 12 would not eliminate the incentive that we've been 13 talking about here. 14 Q. When you use the term "incentive," tell me 15 exactly what the incentive is as you see it in this 16 case. 17 A. Well, they get some money concerning -- 18 out of what the private lawyers would have realized 19 in their contingent fee, and they can use that 20 money assuming they get legislative approval to 21 augment the capability of the AG's office to 22 conduct matters in the future. So that's a 23 benefit. 24 Q. I see. Would your opinion be any 25 different if the state's portion of the fee was	Page 64 1 Q. So as long as the office in its pursuit or 2 application for attorney's fees is following what 3 South Carolina law allows, you don't see an issue 4 with that? 5 MR. KATSIFF: Objection to form. 6 THE WITNESS: Well, expressly 7 allows, yeah. Now, the question is 8 whether this deal is different, and as I 9 understand the terms, it is different and 10 that's where the difficulty arises. 11 BY MR. JOWERS: 12 Q. And what particulars do you understand 13 this deal to be different? 14 A. That they get -- they have an interest in 15 getting a share of the fees that are contingent. 16 And so that would influence -- would be a factor in 17 their judgment about, for example, whether to 18 settle and, if so, for how much, because if the 19 figure for settlement, if that's what -- if that 20 was the outcome, would be -- result in 21 determination of the percentage they would get or 22 the money they would get under the percentage of 23 injury. 24 So they have an incentive to have the 25 settlement terms advantageous, not merely as it
Page 63 1 calculated on an hourly rate versus a contingency? 2 A. I don't understand the question. Whose -- 3 whose services are to be compensated on hourly 4 rate? 5 Q. The Attorney General's Office, as a 6 hypothetical. 7 A. They have to assign some kind of hourly 8 value or whatever to the services their lawyers are 9 rendering. 10 Q. Sure. Assume that was the case. Rather, 11 as it stands, it's a percentage of the recovery or 12 a percentage of outside counsel's fees. Suppose 13 that the contract provided instead for a 14 calculation of the Attorney General's portion on a 15 fee -- an hourly basis. Would that impact your 16 opinion at all? 17 A. The question you're asking me, as I 18 understand it, is this. Suppose that there's a 19 provision in law that the AG's office can 20 request -- award to it of fees, and suppose that in 21 pursuing that opportunity they requested that fees 22 be paid to them on the basis of the time that their 23 staff lawyers had spent. I wouldn't think that 24 there's any problem with that because that's 25 following precisely what the law allows.	Page 65 1 were for the general public good but for the good 2 of this particular office. 3 Q. When you reviewed the litigation retention 4 agreement, did you see that the agreement provides 5 for control of the litigation by the South Carolina 6 Attorney General's Office? 7 A. Yes. 8 Q. Based on everything that you reviewed, are 9 you satisfied that the South Carolina Attorney 10 General's Office is in fact in control of the 11 underlying case? 12 MR. KATSIFF: Objection to form. 13 You can answer. 14 THE WITNESS: Well, that's a 15 question, is that -- control can mean 16 intense, explicit, day-to-day, 17 week-to-week scrutiny and so on, or it can 18 mean overall approval. And the 19 distinction of that was suggested, if not 20 fully laid out, in the Santa Clara case. 21 And so their control in all these cases 22 from the beginning, the public office 23 contended that they had control. The 24 question was whether -- the kind and 25 quality of that, and if it were of a

Page 66 1 fairly general sort, wouldn't the prospect 2 of getting some money out of it be a 3 factor in their exercises of judgment. So 4 control is not a -- is a degree of 5 supervision that can vary. 6 BY MR. JOWERS: 7 Q. All right. And in your opinion in this 8 case, control is not a determining factor in your 9 ultimate conclusion. 10 A. Not their word, no. 11 Q. Setting that aside, if we focus on the 12 materials that you reviewed, have you been able to 13 determine whether or not the Attorney General's 14 Office is exercising control of this underlying 15 litigation? 16 MR. KATSIFF: Objection to form. 17 THE WITNESS: No. 18 BY MR. JOWERS: 19 Q. You don't have an opinion on that one way 20 or the other? 21 A. Well, my opinion is only that that could 22 be -- there's a range that's involved there. 23 Q. All right. If the South Carolina Attorney 24 General had a representative at every deposition 25 taken in this case, would that be a factor	Page 68 1 underlying case and the first amended complaint? 2 A. No. I understand that the live pleadings 3 still involve claims for punitive damages. Maybe 4 they weren't there in the beginning. I don't know 5 that. 6 Q. Okay. Sitting here today you can't 7 describe your understanding of what changed, if 8 anything, between the initial complaint and the 9 first amended complaint? 10 A. No. I understand -- I understand I'm 11 correct that the live pleadings had the element 12 that I mentioned. I don't think I'm mistaken about 13 that. How they got there is another question. 14 Q. If you look at page 2 of your affidavit, 15 Exhibit 2? 16 A. Are we looking at numerical page 2 or -- 17 MR. KATSIFF: Yes. 18 BY MR. JOWERS: 19 Q. Yes. 20 A. Okay. I'm with you. 21 Q. I'm looking at paragraph 5. 22 A. Yeah. 23 Q. Moving down to subsection D. 24 A. Yeah. 25 Q. You write, "As described in paragraphs 20
Page 67 1 suggestive of control? 2 A. Sure. It moves in that direction, yes. 3 Q. If the South Carolina Attorney General's 4 Office reviewed every motion, brief, discovery 5 served in the case, would that be a factor 6 suggestive of control? 7 A. Sure. 8 Q. The South Carolina Attorney General having 9 a representative sign or cosign all of the 10 pleadings, memos, motions, briefing in case, would 11 that be a factor suggesting control? 12 A. Yes. 13 Q. Are you aware that Cephalon has negotiated 14 directly with the Attorney General's Office without 15 involving outside counsel? 16 A. I'm not informed on that subject. 17 Q. If in fact Cephalon approached and was 18 able to negotiate directly with the South Carolina 19 Attorney General's Office without involvement of 20 outside counsel, would that be a factor suggesting 21 control on the part of the office? 22 A. I would think so. 23 Q. All right. Are you aware of any changes 24 made to the claims made of the scope of the conduct 25 complained of between the initial complaint in the	Page 69 1 to 24 of the fact summary, the AG's office has used 2 recoveries to fund and expand its office operations 3 and as a reserve for future operations." 4 A. Yeah. 5 Q. Okay. What is the significance of that 6 statement to your opinions in this case? 7 A. Well, that they were -- it was a benefit 8 to them. 9 Q. All right. And this statement in 10 paragraph D is something that you took from the 11 fact summary provided to you? 12 A. Yeah, and I think Mr. Osmer testified to 13 that. 14 Q. Are you aware that the litigation 15 retention agreement has a severability provision? 16 A. No, but it wouldn't surprise me. 17 Q. Why wouldn't it surprise you? 18 A. Because that's -- they could well 19 anticipate there might be a problem, and therefore 20 they would think that if the 10 percent is 21 considered to be improper or seriously imprudent, 22 it might still, both sides, want to have the 23 agreement to go forward on the other basis. 24 Q. All right. If a court were to agree with 25 you and strike or find that the 10 percent, as

Page 70 1 we've been calling it, was improper, if the 2 litigation agreement provided that the rest of the 3 contract was to remain in effect, would your 4 concerns with the litigation going forward then be 5 alleviated? 6 MR. KATSIFF: Objection to form. 7 THE WITNESS: Well, yeah, then you 8 would have a straight contingent fee 9 agreement, and as I understand, the 10 general view in decisions with which I'm 11 acquainted is that that's okay, if there 12 is adequate supervision and control, which 13 is a separate question we have already 14 talked about. 15 BY MR. JOWERS: 16 Q. Yes, sir. All right. Just to state it 17 simply, then, if we were to strike from the 18 agreement the 10 percent of the recovery of the 19 attorney's fees paid to the Attorney General's 20 Office, your concerns that you're expressing here 21 would be alleviated? 22 MR. KATSIFF: Objection to form. Go 23 ahead. 24 THE WITNESS: That's what my opinion 25 says, yeah.	Page 72 1 model rules? 2 A. Yeah. 3 Q. And that refers to special 4 responsibilities of a prosecutor? 5 A. Yes. 6 Q. All right. So in your opinion, in 7 applying the model rules as well as the case law to 8 this case, the standards applicable to the Attorney 9 General are the same as those of the prosecutor. 10 Is that fair? 11 A. No. I'm saying I don't think the Attorney 12 General would be characterized as such as falling 13 under the provisions of 3.A because those are 14 framed in terms really of a criminal prosecution. 15 What I pick up is the comment about not simply an 16 advocate, and saying that the idea of minister 17 justice is broader than cases involving prosecution 18 for crime, which I think is correct. I think the 19 government lawyers have a different set of 20 responsibilities than private counsel. Those are 21 epitomized in the term "minister of justice," and 22 there's not been very -- I've studied this. There 23 are not very, as far as I can see, useful opinions 24 about what exactly that might mean when you're not 25 talking about a criminal prosecution. So what you
Page 71 1 BY MR. JOWERS: 2 Q. Yes, sir. All right. 3 Are you aware or have you identified 4 anyone within the office that would benefit 5 personally from the outcome of this litigation? 6 A. Well, if you put aside headaches, I 7 certainly don't think there's any financial 8 benefit. 9 Q. All right. When you say you don't think 10 there's any financial benefit, what you're saying 11 is there's no one in the office with a personal 12 financial stake in the outcome of this case. 13 A. As far as I know. 14 Q. All right. Turning to page 3 of your 15 affidavit, Exhibit 2. Beginning in paragraph 6, 16 you cite some of the authorities supporting your 17 opinion. Is that -- 18 A. Yeah. 19 Q. -- accurate? 20 A. Yeah. 21 Q. You begin with the opinion that this --, in 22 A, the opinion that this underlying case is penal 23 or quasi-penal in character? 24 A. Yes. 25 Q. Then in B you cite Rule 3.8 of the ABA	Page 73 1 have to say, what's the idea here? And I said the 2 central idea is that objectivity similar -- I don't 3 say same as -- similar to a judge, and that's 4 elaborated considerably in that California case 5 that I mentioned. And there are other cases that 6 have groped at that problem. We're saying it's 7 sort of like -- it has the same features. The 8 public authority has broad powers and a broad range 9 of discretion that is supposed to be animated by 10 concern for the general public welfare and not for 11 the specific benefit of their -- of their office. 12 I don't think you can get any more exact than that. 13 MR. KATSIFF: Whenever you're ready 14 for a break. 15 MR. JOWERS: Yes. 16 MR. KATSIFF: Do you want to do it 17 now? 18 MR. JOWERS: Sure. 19 (Luncheon recess.) 20 BY MR. JOWERS: 21 Q. Back on the record. Did you discuss your 22 testimony with anyone during the break? 23 A. A little with Mr. Katsiff. 24 Q. What did you talk about? 25 A. He wanted me to be clear that my -- I'm

Page 74 1 not talking about the basic contingent fee 2 agreement but rather the 10 percent, and I 3 understand there's a legal argument over the basic 4 one. It's an argument, the general contents of 5 which I'm aware of, but it's outside the scope of 6 my opinion. 7 Q. Okay. Your opinion is limited to the -- 8 A. 10 percent. 9 Q. -- propriety of the 10 percent? 10 A. Yes. 11 Q. All right. And one of the basis for that 12 opinion is your conclusion that the underlying 13 action is quasi-criminal in nature? 14 A. Yes. 15 Q. Now, we also discussed earlier today that 16 we'd make as an exhibit the electronic version of 17 all the documents produced this morning. And we'll 18 mark that now as Exhibit 5. 19 - - - 20 (Whereupon, Exhibit No. 5, CD, was 21 marked for identification.) 22 - - - 23 BY MR. JOWERS: 24 Q. I just want to ask you about a few of 25 those items that I pulled out.	Page 76 1 MR. KATSIFF: We just had Exhibit 6. 2 MR. JOWERS: Thank you. 3 MR. KATSIFF: No problem. 4 MR. JOWERS: Exhibit 7. 5 BY MR. JOWERS: 6 Q. And what I'd like you to do, Professor, is 7 confirm that this e-mail that you, in fact, 8 received from counsel, Mr. Brody, with attachments, 9 three ethics advisory opinions, Rule 38 and two 10 cases, Toumey versus State of Ohio and Ward versus 11 Village of Monroe, Ohio. 12 A. I have a vague memory of that, yeah. I 13 don't think they had any effect -- I mean, I had 14 previously mentioned the Toumey cases, the old one, 15 but has a general principle. 16 Q. Yes, sir. 17 A. And I got those. 18 Q. Okay. Then you can set those aside. 19 I think we've been through this, but you 20 didn't go out on your own and look up South 21 Carolina ethics advisory opinions? 22 A. No. 23 Q. All right. The ones that you have were 24 provided to you by Counsel? 25 A. Yeah.
Page 75 1 - - - 2 (Whereupon, Exhibit No. 6, 12/7/13 3 e-mail, was marked for identification.) 4 - - - 5 BY MR. JOWERS: 6 Q. Exhibit 6 -- I'll pass that to you now. 7 And would you confirm that Exhibit 6 is an e-mail 8 that you sent to Counsel enclosing your list of 9 testimony? 10 A. Yeah. 11 Q. Okay. 12 A. Yeah, yeah. Here we are. And I think at 13 the time this was -- when was this? Yeah, this is 14 up-to-date. The last one is one in Aspen. 15 Q. Okay. 16 A. Yes. 17 Q. All right. Thank you. You can set that 18 aside. 19 - - - 20 (Whereupon, Exhibit No. 7, 11/25/13 21 e-mail, was marked for identification.) 22 - - - 23 BY MR. JOWERS: 24 Q. I've marked another e-mail with 25 attachments as Exhibit 6. And --	Page 77 1 - - - 2 (Whereupon, Exhibit No. 8, 12/4/13 3 e-mail, was marked for identification.) 4 - - - 5 BY MR. JOWERS: 6 Q. And I'm marking as Exhibit 8 another 7 e-mail with an attachment. And for the record, 8 these are CBPH DJ1734 through 37. 9 My first question to you on that is do you 10 recall receiving that e-mail and attachment. 11 A. I don't but I'm sure I did. 12 Q. All right. Was that attachment to 13 Exhibit 8 a draft of what eventually became your 14 affidavit? 15 A. I think so, yeah. 16 - - - 17 (Whereupon, Exhibit No. 9, 12/4/13 18 e-mail, was marked for identification.) 19 - - - 20 BY MR. JOWERS: 21 Q. I'll mark as Exhibit 9 another e-mail. 22 This one is from you to Mr. Brody with an 23 attachment; is that right? 24 A. Yeah. 25 Q. All right. Does that appear to be --

Page 78 1 A. Draft. 2 Q. -- a draft of what eventually became -- 3 A. Yeah. 4 Q. -- your affidavit? 5 A. Yeah. 6 Q. All right. Would you expect that your -- 7 any changes you made to the affidavit draft would 8 be reflected in the attachment to Exhibit 9? 9 A. Well, if you compared the two with my 10 final, you'd see whatever differences there were, 11 and there weren't many. 12 Q. All right. 13 - - - 14 (Whereupon, Exhibit No. 10, 12/6/13 15 e-mail, was marked for identification.) 16 - - - 17 BY MR. JOWERS: 18 Q. All right. I'm passing you now 19 Exhibit 10, and at the top there is an e-mail from 20 you to Mr. Brody; is that right? 21 A. Yeah. 22 Q. Yes, sir. And that's dated December 6? 23 A. Yeah. 24 Q. All right. It says received. I will 25 fax --	Page 80 1 MR. JOWERS: Thank you. 2 MR. KATSIFF: No problem. 3 MR. JOWERS: Number 12. 4 BY MR. JOWERS: 5 Q. All right. I'll pass you now an e-mail, 6 an attachment, Number 12, and that's from Tyler 7 Brody to you? 8 A. Yes. 9 Q. With an attachment? 10 A. Yeah. 11 Q. And what's attached, is that the final 12 version of your affidavit? 13 A. I think so. 14 Q. All right. So -- 15 A. I told them to put the heading on it and 16 all that stuff. 17 Q. Thank you. 18 A. You've got the first page under there 19 somewhere. 20 - - - 21 (Whereupon, Exhibit No. 13, 11/14/13 22 e-mail, was marked for identification.) 23 - - - 24 BY MR. JOWERS: 25 Q. All right. And then Exhibit 13 from
Page 79 1 A. I will get it notarized and fax it and 2 FedEx the original. I'm sure that's what I did. 3 Q. Yes, sir. And it's the next sentence I 4 wanted to ask you about. Says -- oh, I see now. 5 Strike that. 6 All right. Thank you. 7 - - - 8 (Whereupon, Exhibit No. 11, 12/6/13 9 e-mail, was marked for identification.) 10 - - - 11 BY MR. JOWERS: 12 Q. And then Exhibit 11, another e-mail 13 December 6, 2013, signed affidavit, sent fax, and 14 original sent FedEx; is that right? 15 A. Yeah. 16 Q. All right. So on December 6 when you 17 signed the affidavit, you faxed it to Counsel? 18 A. Yeah. 19 - - - 20 (Whereupon, Exhibit No. 12, 12/5/13 21 e-mail, was marked for identification.) 22 - - - 23 MR. JOWERS: Tim, what number was 24 the last one? 25 MR. KATSIFF: The last one was 11.	Page 81 1 November 14, another e-mail with an attachment 2 providing you with the fax summary you requested? 3 A. Yeah. 4 Q. All right. So that would have been the 5 date and approximate time you received -- 6 A. Yes. 7 Q. -- the fact summary? 8 A. Yeah. 9 Q. All right. The opinions that you've given 10 me today, are those the opinions you intend to 11 express at trial? 12 A. Yes, sir. 13 Q. If you change your opinions, alter your 14 opinions in any way or develop new opinions, will 15 you let Counsel know? 16 A. I certainly will. 17 Q. Have you understood all of my questions? 18 A. I think so. 19 MR. JOWERS: All right. Thank you, 20 sir. That's all I have. 21 MR. KATSIFF: Wait. I'm going to 22 have some questions. 23 Can you just give me a second 24 because there's one thing I want to try to 25 get. Just give me five minutes.

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1 (Brief recess.)
2 - - -
3 (Whereupon, Exhibit No. 14, 11/19/13
4 e-mail was marked for identification.)
5 - - -
6 BY MR. JOWERS:
7 Q. All right. I've just marked as Exhibit 14
8 an e-mail with an attachment I was just sent, and
9 it looks to me that that was an e-mail initially
10 sent from you?
11 A. Yes.
12 Q. That was the draft of your report?
13 A. I guess -- yes, that's what that is.
14 Q. It looks like it may have gone to a
15 paralegal first?
16 A. You mean the addressee?
17 MR. KATSIFF: Correct.
18 MR. JOWERS: Yes.
19 THE WITNESS: Yeah, yeah.
20 BY MR. JOWERS:
21 Q. All right. So what Exhibit 14 is is the
22 first draft of your report that you sent to
23 Counsel?
24 A. I think so.
25 MR. JOWERS: All right.

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1 - - -
2 EXAMINATION
3 - - -
4 BY MR. KATSIFF:
5 Q. Just a couple of questions. If we could
6 go back, then -- and let's see if I can find where
7 that document was.
8 MR. KATSIFF: Are these the
9 documents right here?
10 MR. JOWERS: Um-hum.
11 BY MR. KATSIFF:
12 Q. Professor Hazard, if you could look at
13 Exhibit 9 for me, which Mr. Jowers asked you some
14 questions about.
15 A. Yeah.
16 Q. Do you have that in front of you? If you
17 could look at the e-mail. Now, that was an e-mail
18 dated December 4 --
19 A. Yeah.
20 Q. -- 2013 from Mr. Brody to you?
21 A. Yeah.
22 Q. Now, did you ask Mr. Brody to send you a
23 copy back of the opinion because --
24 A. I don't think so.
25 Q. -- you had deleted it accidentally?

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1 A. I can't remember.
2 Q. Okay. But in any case, you drafted the
3 opinion; is that right?
4 A. Yes. Oh, yeah.
5 Q. And the draft of the opinion was the last
6 exhibit we were looking at, the first draft of the
7 opinion?
8 A. Yeah, whatever.
9 Q. Exhibit 14.
10 A. Yeah. Yes, sure. November, then we get a
11 lot of... I remember saying to Tyler that it had
12 to be looked at by a lot of people, so that's what
13 happened. And so it was a little late getting back
14 to me.
15 Q. Now, you were discussing with Mr. Jowers
16 the issue of punitive damages.
17 A. Yeah.
18 Q. Among punitive damages that you were
19 referring to throughout your deposition today,
20 would you also include civil penalties as a type of
21 punitive damage?
22 A. Yeah, sure. I thought I was clear about
23 that.
24 Q. Now, do you have an understanding that
25 part of the compensatory damages that the state

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1 seeks in the underlying action against Cephalon
2 includes damages on behalf of the citizens of South
3 Carolina in the state's parens patriae power?
4 A. Yes.
5 Q. Would you consider that to be a regulatory
6 action?
7 A. As far as I know, because I don't think
8 that money is then redistributed directly right to
9 the citizens. It may go into the state treasury
10 unless -- eventually it would go down, we hope, to
11 the benefit of the people. But I don't think --
12 you're not going to be sending checks out to the
13 citizens.
14 Q. Just give me a second because it looks
15 like Exhibit 2 has gotten --
16 MR. KATSIFF: I think the rest of it
17 may be over there.
18 MR. JOWERS: Yes, it was in that big
19 stack of documents.
20 MR. KATSIFF: We're going to have to
21 go back through this and make sure it's
22 correct. There we go.
23 MR. JOWERS: Why don't we put the
24 binder clip back on it.
25 BY MR. KATSIFF:

Page 86 1 Q. Now, Exhibit 2 is your affidavit which 2 contains your opinion in this case; is that right? 3 A. Yes. 4 Q. Okay. Have you been asked to form -- 5 well, your opinion -- your opinion is that the 6 10 percent contingent fee portion of the agreement 7 with private counsel, the 10 percent fee kickback 8 to the Attorney General, is inconsistent with 9 requirements of a minister of justice; is that 10 right? 11 MR. JOWERS: I object to the form. 12 BY MR. KATSIFF: 13 Q. What is your opinion in this case, sir? 14 A. It focuses on the 10 percent, not on the 15 more general question about the contingent -- 16 underlying contingent fee agreement. 17 Q. And when you're talking about the general 18 question of the underlying contingent fee 19 agreement, are you referring to whether or not the 20 underlying contingent fee agreement, even if it did 21 not have the 10 percent provision, would be 22 constitutional under notions of due process? 23 A. That's outside of the scope of what I'm 24 talking about. 25 Q. So you have no opinion on the legal	Page 88 1 Q. I just want to follow-up on that question, 2 the exclusion. Your testimony has never been 3 excluded because you weren't found to be qualified 4 as an expert, has it? 5 A. No, no. 6 MR. KATSIFF: Okay. 7 THE WITNESS: It was because they 8 thought it was an inappropriate subject 9 for expert opinions, which often is a kind 10 of problem, but I won't -- because you're 11 talking about standards of professional 12 conduct which are reflected and the rules 13 of professional conduct and underlying 14 law, and so the question of where do 15 you -- what's the proper domain of expert 16 opinion is often an arguable question, but 17 I've never been turned down because they 18 didn't think I knew what I was talking 19 about. 20 BY MR. KATSIFF: 21 Q. In this case, you know, your opinion is 22 premised on standards of professional conduct; 23 isn't that right? 24 A. Yes. 25 MR. JOWERS: Object to the form.
Page 87 1 question of whether or not the fee agreement 2 violates the due process clause of either the 14th 3 Amendment of the United States Constitution or the 4 analogue in South Carolina? 5 A. I don't think it's appropriate for an 6 expert witness. No, it's not part of my opinion. 7 MR. KATSIFF: That's all I have. 8 MR. JOWERS: Okay. 9 - - - 10 EXAMINATION 11 - - - 12 BY MR. JOWERS: 13 Q. Very briefly, Professor. Has your 14 testimony ever been excluded by a court? 15 A. Yes. 16 Q. Is that something that's happened multiple 17 times? 18 MR. KATSIFF: Objection. Outside 19 the scope. 20 THE WITNESS: Twice. 21 MR. JOWERS: All right. Thank you. 22 - - - 23 EXAMINATION 24 - - - 25 BY MR. KATSIFF:	Page 89 1 BY MR. KATSIFF: 2 Q. Is your opinion in this case premised on 3 standards of professional conduct? 4 A. That's what it says, yeah. 5 - - - 6 EXAMINATION 7 - - - 8 BY MR. JOWERS: 9 Q. The times when your expert opinion has 10 been excluded, it's because you were found to be 11 giving legal opinions? 12 A. I can't recall. I think it was that they 13 thought for whatever reason that it was unnecessary 14 to have expert opinion, perhaps because I can 15 remember vividly one case. The judge thought that 16 he could decide the question whether it was 17 considered a question of professional judgment or 18 whatever without the aid of the august witnesses 19 that were offered to him. And I think the 20 reasoning he wanted to do that is because he didn't 21 want to offend the guy on the other side. 22 MR. JOWERS: Okay. 23 THE WITNESS: That's just my 24 conjecture. 25 Are we all done?

Page 90 1 MR. KATSIFF: We're all done. 2 - - - 3 (Whereupon, the proceedings 4 concluded at approximately 1:50 p.m.) 5 - - - 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	Page 92 1 ERRATA SHEET 2 Attach to Deposition of: GEOFFREY C. HAZARD JR. 3 Taken on: DECEMBER 16, 2013 4 In the matter of: CEPHALON VS. WILSON 5 PAGE LINE NO. CHANGE REASON THEREFOR 6 _____ 7 _____ 8 _____ 9 _____ 10 _____ 11 _____ 12 _____ 13 _____ 14 _____ 15 _____ 16 _____ 17 _____ 18 _____ 19 _____ 20 _____ 21 _____ 22 _____ 23 _____ 24 _____ 25 _____
Page 91 1 CERTIFICATE 2 I, Christine Brown, a Certified Court 3 Reporter, hereby certify that the testimony and the 4 proceedings in the foregoing matter taken on the 5 date hereinbefore stated are contained fully and 6 accurately in the stenographic notes taken by me 7 and constitutes a true and correct transcript of 8 the same. 9 10  11 12 CHRISTINE BROWN, 13 Certified Court Reporter, and 14 Notary Public for the State of 15 Pennsylvania. 16 17 (The foregoing certification of this 18 transcript does not apply to any reproduction of 19 the same by any means unless under the direct 20 control and/or direction of the certifying 21 shorthand reporter.) 22 23 24 25	Page 93 1 SIGNATURE PAGE 2 - - - 3 I hereby acknowledge that I have read 4 the foregoing transcript, dated December 16th, 5 2013, and the same is a true and correct 6 transcription of the answers given by me to the 7 questions propounded, except for the changes, if 8 any, noted on the errata sheet. 9 - - - 10 11 SIGNATURE: _____ 12 GEOFFREY C. HAZARD JR. 13 14 DATE: _____ 15 16 WITNESSED BY: _____ 17 18 19 20 21 22 23 24 25

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.

WHAT'S BITING?



TIDELINEMAGAZINE.COM

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

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

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

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 settlements 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.

Jay Smith

From: Sonny Jones
Sent: Wednesday, July 13, 2011 4:10 PM
To: John McIntosh; Jay Smith
Subject: RE: Information on Cephalon (Provigil, Gabitril, Actiq)

Excellent

>>> John W. McIntosh 7/13/2011 3:24 PM >>>
Victoria has put on A.G.'s schedule. So A.G. will be there for awhile.

John W. McIntosh
Chief Deputy
SC Office of the Attorney General

>>> Sonny Jones 11:26 AM 7/13/2011 >>>
Thanks. I have Chief Deputy John McIntosh set up w/ you @ 9:15-10 AM this Friday, July 15. Alan may be available at that time also.

(Just talked w/ you on the phone). After you sign the fee contract we would like for you to file the Motion for Complex designation; we want to make sure that you are satisfied w/ the listed schedule in that proposal.

Also, we are starting to work on gathering materials for the discovery responses.

See you Friday.

Sonny

>>> "Kenneth M. Suggs" <ksuggs@medlawlegalteam.com> 7/13/2011 10:39 AM >>>

I can meet Friday any time up to noon. Let me know. Im available at your convenience today to talk about the complex litigation motion. Ill go ahead and file a notice of appearance.
Would you go ahead and get together the facts/documents to respond to interrogatories?
Im going to want to get both Howard and Rob phvd into the case. Assume thats ok.
Also, we need to know as soon as practicable about our co-counsel. Im assuming yall will draft the fee agreement.

From: Sonny Jones [<mailto:AGSJONES@scag.gov>]
Sent: Tuesday, July 12, 2011 3:55 PM
To: Kenneth M. Suggs
Cc: Howard Janet; Harrell R. Ray; Robert K. Jenner; Jay Smith
Subject: RE: Information on Cephalon (Provigil, Gabitril, Actiq)

Got your voice mail. Excellent.... Are you in town Friday for a possible meeting w/ the AG?

Plus, we need to discuss w/ you on making an appearance and getting this complex litigation motion filed.

SCAG000497

[0509]

Please advise. Thanks.

Sonny

>>> "Kenneth M. Suggs" <ksuggs@medlawlegalteam.com> 7/11/2011 12:11 PM >>>

Can we do a conference call at 3:30 edt?
Please acknowledge email.
The call in number is 866-415-4341. Pin # 4630621388

From: Sonny Jones [<mailto:AGSJONES@scag.gov>]
Sent: Friday, July 08, 2011 12:23 PM
To: Kenneth M. Suggs
Cc: Jay Smith
Subject: RE: Information on Cephalon (Provigil, Gabitril, Actiq)

Jay will get you a figure on the disgorgement amount...the civil penalties would be the big #

Sonny

>>> "Kenneth M. Suggs" <ksuggs@medlawlegalteam.com> 7/8/2011 12:05 PM >>>

The motion for complex designation looks fine to me.
Can you guys get together here sometime Monday afternoon. I'll have one partner on videoconference and another by phone. We'll be able to make a decision that day.
Do you have a ballpark figure for the anticipated damages?
Ken

-----Original Message-----

From: Jay Smith [<mailto:JSmith@scag.gov>]
Sent: Friday, July 08, 2011 10:03 AM
To: Kenneth M. Suggs
Cc: Sonny Jones
Subject: Fwd: Information on Cephalon (Provigil, Gabitril, Actiq)

Sonny asked that I forward some additional information to you. Attached are our three-day notice to Cephalon, Cephalon's letter to us regarding statute of limitations, Cephalon's litigation hold letter, and the latest draft of a joint motion for complex case designation. Sonny said that he would like for you to review the motion for complex case designation before we signed off on it. Thanks.

>>> Jay Smith 7/7/2011 6:13 PM >>>
Hey Ken -

Per our conversation a couple minutes ago, attached are our complaint, Cephalon's answer and rogs/RFPs, and some documents from the federal settlement.

SCAG000498

[0510]

A quick overview of the USDOJ/NAMFCU settlement is here:
<http://www.justice.gov/opa/pr/2008/September/08-civ-860.html>

Thanks,
Jay

Jay W. Smith
Research Analyst
South Carolina Attorney General's Office 1000 Assembly Street, Room 519
Columbia, SC 29201
Direct: 803.734.3733
Cell: 803.206.4262
Fax: 803.734.3677
jsmith@scag.gov

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SCAG000499
3

[0511]

Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: 215.963.5000
Fax: 215.963.5001
www.morganlewis.com

Morgan Lewis
C O U N S E L O R S A T L A W

Eric W. Sitarchuk
Partner
215.963.5840
esitarchuk@morganlewis.com

December 23, 2011

VIA FEDERAL EXPRESS

Alan Wilson
Attorney General
Office of the South Carolina Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

Re: State of South Carolina ex. rel. Alan Wilson (in his Official Capacity) v. Cephalon,
Civil Action No. 2011-CP-40-3661 (Richland County)

Dear General Wilson:

This is the letter that Marguerite Willis recently advised your outside counsel, Ken Suggs, we would be sending regarding Cephalon's continued demand that your Office drop this patently time-barred litigation. We are also responding to Mr. Suggs' inquiry about whether Cephalon's view of the State's lawsuit has changed as a result of Teva Pharmaceuticals' recent acquisition of Cephalon. Cephalon and Teva's position remains unchanged – the State has no good faith basis to proceed with this lawsuit.

On March 8, 2011, Cephalon submitted a letter to your Office detailing why the above matter, which was then contemplated but not yet filed, would clearly be time-barred. Nevertheless, suit was filed. The limited discovery that has been produced to date not only confirms the concerns raised in our letter, but also reveals significant additional information supporting Cephalon's position. The further discovery we intend to pursue, including a motion to compel and depositions of knowledgeable witnesses within your Office, will undoubtedly reveal even more.

In light of what is set forth below, however, it is already plainly apparent that there is simply no good ground to support your Office pursuing this litigation further. Thus, Cephalon respectfully requests that you dismiss the complaint before Cephalon continues to incur

Philadelphia Washington New York Los Angeles San Francisco Miami Pittsburgh Princeton Chicago Palo Alto
Dallas Houston Harrisburg Irvine Boston Wilmington London Paris Brussels Frankfurt Beijing Tokyo

[0512]

Attorney General Alan Wilson
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significant expense in defending a lawsuit for which no good faith argument can be made that it is timely.

I. Additional Facts Exposed by Discovery to Date

Because the above-captioned complaint was filed on June 6, 2011, this matter is time-barred if the Attorney General "discovered" its potential claims no later than June 5, 2008. Even the very limited discovery that your outside private counsel has been willing to release so far amply demonstrates the Attorney General's Office discovered its claims long before that date.

As we previously addressed, the first two of four *qui tam* False Claims Act lawsuits were originally filed in late 2003. Discovery has now confirmed that your Office was fully knowledgeable of the allegations in the *qui tam* lawsuits no later than mid-2005. In May, 2005, a National Association of Medicaid Fraud Control Units ("NAMFCU") task force was formed and South Carolina Assistant Attorney General Bill Gambrell was appointed as a member of the team. (S.C. Answer to Interrogatory 1). (Exh. A). On or about May 16, 2005, Mr. Gambrell became aware of the *qui tam* lawsuits. (S.C. Answer to Interrogatory 4). (Exh. A).

Furthermore, on May, 26, 2005, the U.S. Attorney's Office in Philadelphia sent the *qui tam* complaints to the then NAMFCU team leader, John Guthrie of Ohio. (Exh. B). Mr. Guthrie forwarded the complaints to Mr. Gambrell on June 3, 2005. (Exh. C). In addition to communicating with others in South Carolina's Medicaid Fraud Control Unit about the matter, Mr. Gambrell "would have also had limited communications with his superiors, John McIntosh, Deputy Attorney General, and Henry D. McMaster, Attorney General" "concerning allegations that Cephalon allegedly promoted the Drugs at Issue [in the current South Carolina lawsuit] for unapproved uses." (S.C. Answers to Interrogatories 2 and 3). (Exh. A). Thus, by no later than mid-2005, a host of individuals in South Carolina's Attorney General's Office were well aware of the existence of this cause of action.

On September 21, 2006, Mr. Gambrell was re-appointed to the NAMFCU team and made its leader. (Exh. D). "As Team Leader, Mr. Gambrell was responsible for coordinating and leading the settlement negotiations on behalf of the State Medicaid Fraud Control Units." (S.C. Answer to Interrogatory 1). (Exh. A). Thus, this knowledge was not a one-time exposure but instead was reinforced and compounded from 2005 forward.

The recent discovery revelations do not end there, however. On November 30, 2005, Mr. Gambrell received from the U.S. Attorney's Office a copy of a PowerPoint presentation that the U.S. Attorney's Office had made to Cephalon's counsel that previous summer. (Exh. E). The PowerPoint presented excerpts of various Cephalon and other documents that the government contended were key pieces of evidence supporting its theory of off-label promotion. In fact, the documents consisted of what the government viewed as among the most significant documents regarding the alleged unlawful off-label marketing of each of the three drugs at issue in the current lawsuit, Gabitril, Actiq and Provigil.

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As described in our March 8th letter, with the commencement of settlement negotiations, Mr. Gambrell continued his lead role in the matter. He participated in negotiation sessions with Cephalon and government representatives on May 31, July 23 and August 29, 2007. (Exhs. F, G, H). In advance of the May 31 meeting, Mr. Gambrell e-mailed Deputy Attorney General McIntosh: "Cephalon is under seal so the case name should not be used outside the office. Cephalon is an off label case involving three drugs - - Actiq, Gabitril, & Provigil." (Exh. I). Notably, in the e-mail, Mr. Gambrell only cautioned as to use of the case name, not as to the nature of the allegations or the drugs involved. Further, as to the case name, he did not set forth any restrictions on using it within the Attorney General's Office.

Connecticut Assistant Attorney General Rob Deichert attended a number of meetings with Cephalon and the government, including the negotiation sessions on May 31 and August 29, 2007 in which Mr. Gambrell participated. (See Exh. H). Mr. Deichert made clear that he was representing Connecticut's interests with respect to the Connecticut Attorney General's alleged Connecticut Unfair Trade Practices Act ("CUTPA") claims, separate and apart from his state's interest in the NAMFCU group.

As you know, the settlement negotiations continued thereafter, culminating on September 14, 2007 with the parties' agreement to settle the state NAMFCU, federal and *qui tam* claims for \$425 million. That agreement was disclosed by Cephalon in a November 8, 2007 SEC filing and press release, and was the subject of numerous reports in the media.

Following that announcement, on November 15, 2007, Connecticut sent an e-mail to Sonny Jones of your Office, as well as to representatives of the other states. The e-mail referenced Connecticut's ongoing investigation and invited Mr. Jones and others to contact the Connecticut Attorney General's Office with any questions. It further informed Mr. Jones and the others, that Connecticut "will be in touch with each of you soon with further information." (Exh. J). Mr. Jones forwarded the e-mail to Jay Smith.

The nature of Connecticut's investigation was certainly well known to Mr. Jones at the time. In addition to whatever Connecticut told him, that state's investigation had been widely reported in the press. This included an extensive November 21, 2006 article in the Wall Street Journal. The article explained that the Connecticut Attorney General's "investigation also involves off-label sales of two other Cephalon drugs [in addition to Actiq], the narcolepsy pill Provigil and the epilepsy treatment Gabitril." The article then went on to detail some of the evidence that Connecticut's investigation had "uncovered." (Exh. K).

II. The Sealed *Qui Tam* Complaints Did Not Disable South Carolina from Pursuing Its Claims in a Timely Manner

In the face of this unequivocal record of the Attorney General's Office's prior knowledge, we inquired of your outside private counsel on what basis he continues to proceed. He informed us that the seal of the *qui tam* complaints somehow acted as a "disability" tolling

the statute of limitations. That position is completely devoid of support either in the facts of this case or the law.

First, the other states which asserted state law claims, limited to Connecticut and Massachusetts, did so in a timely manner. Nothing, including the sealing of the *qui tam* complaints, "disabled" them from accessing or using the information necessary to investigate or pursue their claims. As described above, Connecticut commenced its own CUTPA investigation well before the *qui tam* complaints were unsealed. Further, Mr. Deichert, the attorney handling Connecticut's investigation, attended the negotiation sessions with Mr. Gambrell, and representatives of other states, the federal government and Cephalon. Similarly, in October, 2007, the Attorney General of Massachusetts commenced a separate consumer protection investigation into the promotion of Cephalon's products, an investigation Cephalon disclosed in its November 9, 2007 SEC filing.¹

Second, as a matter of law, the sealing of a *qui tam* complaint does not prevent a state from proceeding with an Unfair Trade Practices investigation or litigation. The only provision of the False Claims Act addressing the seal is 31 U.S.C. § 3730(b) (2000). It provides: "The [*qui tam*] complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." That is it. There is no provision restricting other investigations or lawsuits. Nor is there a provision restricting the use of evidence or other information gathered in the course of the investigation of the *qui tam* complaint. Instead, it is only the *qui tam* complaint itself that is under seal, nothing more.

Thus, under the plain language of the False Claims Act, the seal did not prevent South Carolina from acting on the information in possession of or reasonably available to Mr. Gambrell, Mr. Jones, Mr. McIntosh, Mr. Smith, General McMaster himself and perhaps many others in the Office prior to June 6, 2008. The information went far beyond the *qui tam* complaints themselves. It included: knowledge of the subject matter of the investigation from press reports and SEC disclosures; the allegations and legal theories being asserted and that were under investigation; the documents highlighted in the PowerPoint attached to the November 2005 e-mail; other evidence gathered by the government's investigation; Mr. Gambrell's knowledge from his participation in the government's investigation and the settlement negotiations; the \$425 million settlement reached in September, 2007; and Connecticut's November, 2007 invitation to Mr. Jones to discuss its investigation. None of that was under seal.

Nor is there anything in South Carolina law tolling the statute as a consequence of a sealed complaint. The discovery rule sets a very low bar: "South Carolina's statute of limitations requires 'very little to start the clock.'" *Maier v. Tietex Corp.*, 331 S.C. 371, 380 (Ct. App. 1998) (quoting *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994) (applying South Carolina law)). "In applying the discovery rule, inquiry is focused upon whether the complaining party acquired knowledge of any existing facts sufficient to put said party on inquiry which, if

¹ No other state, until South Carolina over three years later, has pursued a cause of action against Cephalon for alleged violations of unfair trade practices or state consumer protection laws.

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COUNSELORS AT LAW

developed, will disclose the alleged fraud.” *Burgess v. Am. Cancer Soc’y, S.C. Div., Inc.*, 300 S.C. 182, 185 (Ct. App. 1989) (internal quotation marks omitted).

There are no statutory exceptions that toll the limitations period because of sealed pleadings in another case, some kind of “disability” or for any other reason. The South Carolina Unfair Trade Practices Act (“Unfair Trade Practices Act”) is unequivocal: “no action may be brought under this article more than three years after the discovery of the unlawful conduct which is the subject of the suit.” S.C. CODE ANN. § 39-5-150. The only exception to strict enforcement of the statute of limitations is the rarely applied doctrine of equitable tolling. We addressed that doctrine in detail in our prior letter. Suffice it to say here that equitable tolling “is a doctrine that should be used sparingly and only when the interests of justice compel its use,” *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 117 (2009), and where “it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” *Pelzer v. South Carolina*, 378 S.C. 516, 520, 521 (Ct. App. 2008). No gross injustice arises from requiring the State to act in a timely manner to protect its interests based on the ample notice it both had and was free to act upon well over three years prior to the filing of the instant lawsuit.

In any event, South Carolina’s own conduct thoroughly debunks the notion that it withheld action based on any purported disability arising from the sealing of the *qui tam* complaints. Those seals were lifted on September 25, 2008. Yet, South Carolina did not bring suit in that year, or the next or even the next. Equity does not countenance what is plainly an after-the-fact explanation to rationalize what, in fact, was nothing more than a failure of diligence.

III. South Carolina’s Claim for Equitable Relief is Time-Barred

Your outside private counsel has also asserted that the limitations period for the unjust enrichment claim has not expired. That position is similarly without basis. South Carolina’s claim against Cephalon for unjust enrichment is premised on fraud. It is based on allegations that Cephalon’s practices were “fraudulent,” “false” and “deceptive.” (Compl. ¶¶ 75, 77, 78, 79, 82). As such, the unjust enrichment claim is governed by S.C. CODE ANN. § 15-3-530(7), which provides for a three year statute of limitations from the date of discovery for “any action for relief on the ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery . . .” S.C. CODE ANN. § 15-3-530(7); see 18 S.C. Jur. Reference § 3 (June 2011) (historically the court of chancery had jurisdiction over equitable claims); *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 678 S.E.2d 430, 434 (S.C. 2009) (noting that unjust enrichment is an equitable doctrine). Thus, the claim for unjust enrichment is also time-barred because the Attorney General’s Office discovered its claim before June 6, 2008.

Attorney General Alan Wilson
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IV. Conclusion

We have not received nearly all the discovery to which we believe we are entitled. A motion to compel is being filed to address that, and depositions and third party discovery will be taken. Nonetheless, even the limited information disclosed thus far makes plain that good grounds simply do not exist to pursue this matter any further or to cause Cephalon to continue to incur the substantial cost of defending this lawsuit. We thus respectfully request that you reconsider your decision to proceed with this litigation, and instead dismiss this case.

Very truly yours,

Eric W. Sitarchuk / *CMK*

Eric W. Sitarchuk

c: C. Havird Jones, Jr., Esquire (w/encls.) (via fedex)
Kenneth M. Suggs, Esquire (w/encls.) (via fedex)
Marguerite Willis, Esquire (w/encls.) (via e-mail)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2012-CP-40-07317
CEPHALON, INC.,	)	
	)	
Plaintiff,	)	
	)	
STATE OF SOUTH CAROLINA, <i>ex rel.</i>	)	
ALAN WILSON, in his official Capacity	)	
as Attorney General for the State of	)	
South Carolina,	)	
	)	
Defendant.	)	

**DEFENDANT STATE OF SOUTH CAROLINA, *ex rel.* ALAN WILSON'S, IN HIS
OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF SOUTH
CAROLINA, SUPPLEMENTAL RESPONSES TO PLAINTIFF CEPHALON, INC.'S
FIRST SET OF INTERROGATORIES**

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: Give the names and addresses of persons known to you or counsel to be witnesses concerning this matter and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

RESPONSE:

1. Attorney General Alan Wilson
P.O. Box 11549
Columbia, SC 29211
2. C. Havird "Sonny" Jones, Jr., Esquire
P.O. Box 11549
Columbia, SC 29211
3. John W. McIntosh, Esquire
P.O. Box 11549
Columbia, SC 29211
4. Jay Smith
P.O. Box 11549
Columbia, SC 29211

No written or recorded statements have been taken from any of these individuals.

INTERROGATORY NO. 2: Set forth a list of prepared documents in your possession that relate to any claim or defense in this matter.

RESPONSE:

Please refer to documents produced in response to Plaintiff Cephalon, Inc.'s First Set of Requests for Production.

INTERROGATORY NO. 3: List the names and addresses of any expert witness whom you propose to use as a witness at any trial or proceeding in this matter.

RESPONSE:

None at this time. The Defendant will supplement this response as needed.

INTERROGATORY NO. 4: For each person known to you or counsel to be a witness concerning the facts of this matter, set forth either a summary sufficient to inform Cephalon of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE:

Please refer to response to Interrogatory No. 1. No written or recorded statements have been taken from any of these individuals. Attorney General Wilson, John McIntosh, Sonny Jones, and Jay Smith are knowledgeable about the nature of the underlying case, the Litigation Retention Agreement, and the roles and responsibilities of outside counsel and the supervision and control of the litigation by and through the office of the Attorney General.

INTERROGATORY NO. 5: Identify all persons who participated in preparing, drafting or negotiating the Contingent Fees Agreement, state the job title and employer for each person and describe their role in the negotiations.

RESPONSE:

Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client and work product privileges. Subject to and without waiving this objection, Attorney General Wilson, John McIntosh, Sonny Jones, and Jay Smith participated in drafting and negotiating the Litigation Retention Agreement with outside counsel.

INTERROGATORY NO. 6: Identify by matter each instance from January 1, 2000 to the present for which the SCAG has engaged private contingent-fee counsel. For each matter listed in response to this Interrogatory identify: (a) the private contingent-fee counsel retained; (b) the total recovery by the State, if any; (c) the portion of each recovery paid or otherwise distributed to private contingent-fee counsel; (d) the portion of each recovery received by or distributed to the SCAG; (e) the portion of each recovery deposited in the general fund of the State of South Carolina; (f) any reimbursements for costs obtained by the SCAG that were approved by the South Carolina Budget and Control Board pursuant to S.C. CODE ANN. § 1-7-85; and (g) any funds that were allocated by the South Carolina General Assembly, the South Carolina Budget and Control Board or any other arm of the State to pay contingent fees to private contingent-fee counsel or the SCAG.

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery. This interrogatory seeks information that is not relevant to the matter at issue and is not likely to lead to the discovery of admissible evidence in this case. All Litigation Retention Agreements without outside counsel are posted online on the website of the SCAG. Those that are not yet posted online are enclosed. Further, please refer to the enclosed Excel spreadsheets prepared by Jay Smith.

INTERROGATORY NO. 7: Identify the SCAG's final budget for each fiscal year from 2000 to the present. For each fiscal year, describe in detail all sources of revenue for the

SCAG's budget and identify any portion of revenue derived from (a) contingency fee actions; or (b) civil or criminal enforcement actions.

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery, is overly broad and unduly burdensome. Subject to and without waiving this objection, defendant has produced responsive documents and further encloses documents that are responsive to this interrogatory.

INTERROGATORY NO. 8: Describe in detail the SCAG's total expenditures for each fiscal year from 2003 to the present. For each fiscal year, identify the total number of SCAG employees and the total amount of the SCAG's payroll and benefit expenditures including, but not limited to, any bonuses awarded to SCAG employees and the basis or criteria used for awarding compensation increases (including, but limited to bonuses, salary raises and other remuneration).

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery, and is overly broad and unduly burdensome. Subject to and without waiving this objection, defendant has produced responsive documents and further encloses documents that are responsive to this interrogatory.

INTERROGATORY NO. 9: For each fiscal year from 2003 to the present, describe in detail any budget requests made by the SCAG to the South Carolina General Assembly, the South Carolina Budget and Control Board, or any other arm of the State. In responding to this Interrogatory, identify the total amount of funds sought in each request.

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery, is overly broad and unduly burdensome. Subject to and without waiving this

objection, defendant has produced responsive documents and further encloses documents that are responsive to this interrogatory.

INTERROGATORY NO. 10: Identify each and every employee of the SCAG who is related by blood or marriage to Contingent-Fee Counsel.

RESPONSE:

Defendant objects to this interrogatory on the basis of relevance, it exceeds the scope of permissible discovery, and is not likely to lead to the discovery of admissible evidence.

Subject to and without waiving this objection, no party to the Litigation Retention Agreement is related, by blood or marriage to any employee of the SCAG. However, Gerald D. Jowers, Jr., of the firm of Janet, Jenner & Suggs, LLC is married to Mary Frances Jowers, Esquire, an Assistant Attorney General.

INTERROGATORY NO. 11: Describe in detail the process by which the SCAG selected Contingent-Fee Counsel in the Underlying Enforcement Action. In responding to this Interrogatory: (a) identify the date(s) during which the selection process took place; (b) describe in detail the criteria used for selecting Contingent-Fee Counsel; (c) describe in detail the reasons for the SCAG's or State's decision to select Contingent-Fee Counsel; (d) describe in detail whether the SCAG or State employed a competitive bidding process or issued any requests for proposal ("RFP") in order to identify and retain Contingent-Fee Counsel to prosecute the Underlying Enforcement Action; (e) identify each private firm or attorney that participated in any such competitive bidding process or submitted a response to an RFP; (f) identify all employees of the SCAG or the State involved in the selection of Contingent-Fee Counsel; and (g) set forth all reasons why Contingent-Fee Counsel was selected.

RESPONSE:

Defendant objects to this interrogatory on the basis that it seeks information that is protected by the attorney-client and work product privileges. Defendant further objects

to this interrogatory on the basis that it seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving these objections, the selection process of Contingent-Fee Counsel occurred in the summer of 2011 after the Complaint in the underlying action was filed. The SCAG did not employ a competitive bidding process or issue any requests for proposal to identify or retain Contingent-Fee Counsel. Outside counsel was selected based on their reputation, experience, resources, and willingness to work for the SCAG in accordance with the terms of the Litigation Retention Agreement. SCAG employees involved in the selection of outside counsel were Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, and Assistant Deputy Attorney General Sonny Jones. Generally, the office decided to employ outside counsel for this case when it became clear that the resources required for it would exceed that available to the office and that the SCAG attorneys involved may be called as witnesses in the case.

INTERROGATORY NO. 12: Identify all employees of the SCAG who were involved in the decision to proceed with the Underlying Enforcement Action. In responding to this Interrogatory: (a) identify each such employee's title and position; and (b) identify each such employee who was assigned to or employed by the MFCU at any time between January 1, 2005 and December 31, 2008, and the approximate dates during which such employees were employed by or assigned to the MFCU.

RESPONSE:

1. Attorney General Alan Wilson
P.O. Box 11549
Columbia, SC 29211
2. C. Havird "Sonny" Jones, Jr., Esquire
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211
3. Jay Smith

**Director of Consumer Protection and Antitrust
P.O. Box 11549
Columbia, SC 29211**

**4. John W. McIntosh, Esquire
Chief Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211**

Jay Smith was employed by SC MFCU from approximately May 2008 until July 2008.

INTERROGATORY NO. 13: Identify all public statements made by South Carolina Attorney General Alan Wilson ("AG Wilson") reflecting or relating to the need to raise or increase revenue, funding, or the budget for the SCAG. In responding to this Interrogatory, identify any such statements made by AG Wilson to: (a) the media; (b) the South Carolina General Assembly; (c) the Governor of the State of South Carolina; and (d) any employees of the State and/or the SCAG.

RESPONSE:

Defendant objects to this interrogatory in that it seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. Further, defendant objects to this interrogatory to the extent that publically made statements by the Attorney General or members of his staff are, by definition, in the public domain and, as such, are readily available to the plaintiff. Further, please refer to the budget requests already produced and supplemented herein.

INTERROGATORY NO. 14: Describe in detail whether any attorney employed by the SCAG: (a) has day-to-day responsibility for the prosecution of the Underlying Enforcement Action; (b) is directly responsible for the course and conduct of the Underlying Enforcement Action; (c) possesses veto power over any decisions made by Contingent-Fee Counsel; and (d) has authority to make decisions regarding settlement of the Underlying Enforcement Action. In responding to this Interrogatory: (i) state the name of each attorney responsible for each responsibility identified in parts (a)-(d) of this Interrogatory; (ii) describe each and every

specific task performed to fulfill these responsibilities; and (iii) identify the approximate number of hours per week devoted to fulfilling each such responsibility.

RESPONSE:

Defendant objects to this interrogatory on the basis that it seeks information that is protected by the work product privilege. Subject to and without waiving this objection, Attorney General Wilson, Chief Deputy John McIntosh, Assistant Deputy Attorney General Sonny Jones, and Assistant Attorney General Jared Libet are the attorneys responsible for the underlying action. The Attorney General's control and involvement in the Underlying Enforcement Action is set forth and described in the Litigation Retention Agreement. The Attorney General retains complete control over the litigation.. The Attorney General's staff does not track the number of hours per week spent on this case.

INTERROGATORY NO. 15: Describe in detail what time, billing or expense records are required to be maintained by Contingent-Fee Counsel with respect to their work on the Underlying Enforcement Action. With respect to such records: (a) identify when that requirement was imposed; and (b) whether such records are required to be provided to the SCAG.

RESPONSE:

Please refer to the Litigation Retention Agreement. Per the Agreement, expenses are to be submitted in one invoice at the conclusion of the litigation. The Litigation Retention Agreement does not require outside counsel to maintain time records. To date, no time records or expense reports have been submitted to the Office of the Attorney General.

INTERROGATORY NO. 16: Describe in detail the basis for the assertion in Paragraph 9 of your Answer to the Complaint that "[b]ecause 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." In responding to this Interrogatory: (a) identify the personnel who determined that information regarding the "FCA case" should not be shared with other divisions of the SCAG; (b) identify the information and authorities that were relied upon in making the determination that the MFCU should not share information regarding the "FCA case" with other divisions of the SCAG; (c) identify when the decision that information regarding the "FCA case" should not be shared by the MFCU with other divisions of the SCAG was made; and (d) describe in detail whether former South Carolina Attorney General Henry McMaster ever considered making a settlement demand to or filing a law suit against Cephalon based on allegations that Cephalon promoted or marketed the Drugs at Issue for unapproved uses and identify all SCAG personnel involved in such considerations and whether communications reflecting or relating to the considerations were oral or in writing.

RESPONSE:

Defendant objects to this interrogatory. This interrogatory seeks information that is unrelated to the issues presented in this declaratory judgment action and, as such, seeks information that is irrelevant and beyond the scope of permissible discovery. Further, this interrogatory is not likely to lead to the discovery of admissible evidence in this case.

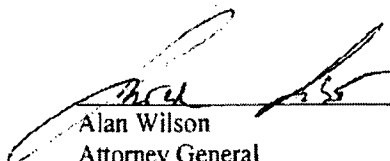
INTERROGATORY NO. 17: Describe in detail the basis for the assertion in Paragraph 9 of your Answer to the Complaint that "[b]ecause of the federal seal, the state was prevented from pursuing the Underlying Action until such time as the seal was lifted." In responding to this Interrogatory: (a) identify the personnel who determined that the federal seal prevented the State from pursuing the Underlying Enforcement Action; (b) identify the information and authorities that were relied upon in reaching the conclusion that the federal seal prevented the State from pursuing the Underlying Enforcement Action; (c) identify the date(s) on which you determined that the federal seal prevented the State from pursuing the Underlying

Enforcement Action; (d) identify any communications reflecting or relating to the issue of whether the State was prevented from pursuing the Underlying Enforcement Action; € describe in detail any and all policies, procedures or guidelines concerning the sharing of information between the MFCU, on the one hand, and any other division or component of the SCAG or arm of the State, on the other; (f) identify the date(s) on which you first contemplated filing a law suit against Cephalon based on allegations that Cephalon promoted or marketed the Drugs at Issue for unapproved uses and the personnel involved in the considerations; and (g) describe in detail the process by which you decided to make a settlement demand upon Cephalon in or around February 2011 based on allegations that Cephalon promoted or marketed the Drugs at Issue for unapproved uses and identify the personnel involved in the decision.

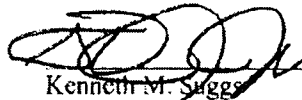
RESPONSE:

Defendant objects to this interrogatory. This interrogatory seeks information that is unrelated to the issues presented in this declaratory judgment action and, as such, seeks information that is irrelevant and beyond the scope of permissible discovery. Further, this interrogatory seeks information protected by the work product privilege.

Dated April 5, 2013



Alan Wilson
Attorney General
C. Havird Jones
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3970

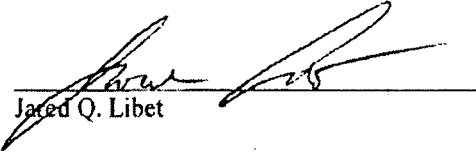


Kenneth M. Suggs
Gerald D. Jowers, Jr.
Janet, Jenner & Suggs, LLC
Post Office Box 927
Columbia, SC 29202
James Todd Rutherford
The Rutherford Law Firm, LLC
Post Office Box 1452
Columbia, SC 29202

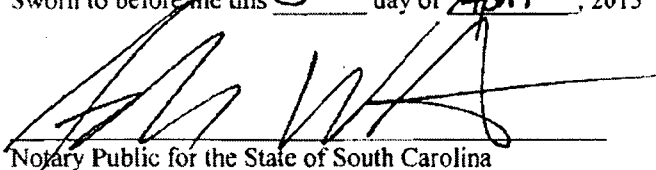
Attorneys for Defendant

VERIFICATION

I Jared Q. Libet, Assistant Attorney General, verify that I have read the foregoing Supplemental Answers to Interrogatories and to the best of my information and belief, the information provided herein is truthful and accurate.


Jared Q. Libet

Sworn to before me this 5th day of April, 2013


Notary Public for the State of South Carolina

My Commission Expires May 8, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2012-CP-40-07317
CEPHALON, INC.,	)	
	)	
Plaintiff,	)	
	)	
ALAN WILSON, in his capacity as	)	
Attorney General for the State of South	)	
Carolina,	)	
	)	
Defendant.	)	

**DEFENDANT STATE OF SOUTH CAROLINA, *ex rel.* ALAN WILSON'S, IN HIS
CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA,
SUPPLEMENTAL RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION**

RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All documents that you identified, referenced
or relied upon in your responses to Cephalon's First Set of Interrogatories.

RESPONSE:

Defendant objects to this request to the extent it seeks documents protected from
disclosure by the attorney-client privilege and work product doctrine. Subject to and
without waiving this objection, responsive documents have been produced.

REQUEST FOR PRODUCTION NO. 2: All documents that you identified, referenced
or relied upon in your Answer to the Complaint.

RESPONSE:

None.

REQUEST FOR PRODUCTION NO. 3: All documents that you intend to introduce or
use at any trial or proceeding in this matter.

RESPONSE:

A decision as to what documents may be used at the trial of this matter has not been made at this time. Further, defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. The response will be supplemented as appropriate.

REQUEST FOR PRODUCTION NO. 4: All documents reflecting or concerning the negotiation, drafting, execution or approval of the Contingent Fees Agreement or drafts of the Contingent Fees Agreement.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege. There are no memos or notes responsive to this request. A copy of the template Litigation Retention Agreement on which the retention agreement in the underlying case is based is enclosed. A copy of the unsigned Litigation Agreement in the Cephalon case is enclosed. Defendant encloses a signed Addendum to the Litigation Retention Agreement for the Cephalon case. Copies of emails responsive to this request are also attached.

REQUEST FOR PRODUCTION NO. 5: All documents reflecting or concerning any public statements by South Carolina Attorney General Alan Wilson or former South Carolina Attorney General Henry McMaster regarding the SCAG's or State's retention of private contingent-fee counsel or use of private contingent fee agreements.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. Further, defendant objects to the extent that publically made statements by the Attorney General are, by definition, in the public domain and, as such, are readily

available to the plaintiff. Copies of documents responsive to this request are enclosed.

This response will be supplemented as necessary.

REQUEST FOR PRODUCTION NO. 6: All documents reflecting or concerning any projected or potential recoveries, awards or contingent fees in the Underlying Enforcement Action and all documents reflecting or concerning any projected or potential fees for Contingent-Fee Counsel.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. No non-privileged responsive documents have been created since the initial spreadsheet provided to Cephalon on March 4, 2011 by email. A copy of that email and associated attachments are enclosed. One document is being withheld on the basis of work product privilege.

REQUEST FOR PRODUCTION NO. 7: All documents reflecting or concerning any projected or potential recoveries, awards, contingent fees or revenue for the SCAG resulting from or related to the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. No non-privileged responsive documents have been created since the initial spreadsheet provided to Cephalon on March 4, 2011 by email. A copy of that email and associated attachments are enclosed. One document is being withheld on the basis of work product privilege.

REQUEST FOR PRODUCTION NO. 8: All documents concerning the process, criteria or standards used in connection with the retention of Contingent-Fee Counsel and the decision to retain Contingent-Fee Counsel.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. Subject to and without waiving this objection, the only responsive document Defendant has identified is a section in the office manual. A copy of that document is enclosed.

REQUEST FOR PRODUCTION NO. 9: All SCAG budgets for each fiscal year from 2003 to the present including, but not limited to, documents that identify SCAG expenditures and payroll.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery, is overly broad and unduly burdensome. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving these objections, responsive documents are enclosed.

REQUEST FOR PRODUCTION NO. 10: All communications from January 1, 2003 to the present between the SCAG, on the one hand, and the South Carolina General Assembly, the South Carolina Budget and Control Board, the South Carolina Governor or any other State or federal agency, on the other, reflecting or relating to funding or budget requests by the SCAG.

RESPONSE:

Defendant objects to this request in that it is overly broad, unduly burdensome, and exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving these objections, all budget requests by the SCAG have been produced.

REQUEST FOR PRODUCTION NO. 11: All documents identifying the compensation (including, but not limited to, bonuses, salary raises and other remuneration) budgeted for employees of the SCAG for each fiscal year from 2003 to the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, responsive documents are enclosed.

REQUEST FOR PRODUCTION NO. 12: All documents referring or relating to the sources or potential sources of funding for compensation increases (including, but not limited to, bonuses, salary raises and other remuneration) and the criteria for awarding compensation increases for SCAG employees between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, responsive documents are enclosed.

REQUEST FOR PRODUCTION NO. 13: All documents concerning any salary raises or bonuses awarded between January 1, 2003 and the present to any SCAG employees that

were funded in whole or in part, directly or indirectly, by a recovery, reimbursement or contingent-fee as a result of a judgment awarded on a SCUTPA claim.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, Defendant encloses responsive documents including the office budgets for each year 2003 to present. Defendant also encloses a statement of the expenditures made from the civil litigation account (30350007) from 2003 - 2013. The civil litigation account receives funds through SCUTPA cases including those pursued by a multistate group, by the SCAG only, and by retained outside counsel. The SCAG does not track expenditures made from this account by the source of the funds.

REQUEST FOR PRODUCTION NO. 14: All documents identifying the total amount of any recovery or judgment awarded to the State or the SCAG in any matter prosecuted by private contingency-fee counsel between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery is overly broad and unduly burdensome. Defendant further objects that this request seeks the work product of the office and information relating to matters outside the scope of this action. Subject to and without waiving this objection, Defendant encloses an Excel spreadsheet created and maintained by Jay Smith, Director of Consumer Protection and Antitrust. Further, Defendant encloses the prior saved versions of this spreadsheet. These documents are confidential pursuant to the protective order entered in this case and are identified as such.

REQUEST FOR PRODUCTION NO. 15: All documents concerning any amounts received by the SCAG pursuant to S.C. CODE ANN. § 1-7-85 between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery.

This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, please refer to the spreadsheets identified in No. 14, above.

REQUEST FOR PRODUCTION NO. 16: All documents concerning any allocation by the General Assembly of any portion of an award or judgment in favor of the State to private contingency-fee counsel or the SCAG between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery.

This request is not relevant and not likely to lead to the discovery of admissible evidence. Further, any actions by the General Assembly are matters of public record and readily available to Plaintiff. Subject to and without waiving this objection, the defendant is not aware of any responsive documents.

REQUEST FOR PRODUCTION NO. 17: All documents concerning any policy, process or procedure implemented by the SCAG to screen from the Underlying Enforcement Action any SCAG employee who may have a personal pecuniary interest either directly or through a spouse or other familial relationship.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client privilege. This request is not relevant and not

likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, there are no responsive documents.

REQUEST FOR PRODUCTION NO. 18: All communications identifying SCAG employees who may have a personal pecuniary interest in the Underlying Enforcement Action and forwarding any notices or memoranda reflecting or relating to the imposition of restrictions on the access of such employees to information or activities concerning the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client privilege. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, there are no responsive documents.

REQUEST FOR PRODUCTION NO. 19: All documents concerning the SCAG's oversight, control and responsibility for the prosecution of the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request to the extent that it seeks to invade the attorney-client and work product privileges. Notwithstanding this objection, please refer to the Litigation Retention Agreement.

REQUEST FOR PRODUCTION NO. 20: All documents concerning the duties and responsibilities of Contingent-Fee Counsel in the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request to the extent that it seeks to invade the attorney-client privilege. Notwithstanding this objection, please refer to the Litigation Retention Agreement.

REQUEST FOR PRODUCTION NO. 21: All documents that show any time records for each of the SCAG employee involved in the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client privilege. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, SCAG employees to not keep records of their time spent on the underlying action.

REQUEST FOR PRODUCTION NO. 22: All documents that refer to or reflect time charges or expenses incurred, or hours or other increments of time worked, by Contingent-Fee Counsel, relating to the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client and work product privileges. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, no documents reflecting time records or expenses incurred have been submitted by outside counsel to the SCAG.

REQUEST FOR PRODUCTION NO. 23: All documents concerning the SCAG's policies, procedures or guidelines in effect between January 1, 2003 and December 31, 2008 regarding the use of information contained in a sealed *qui tam* Complaint.

RESPONSE:

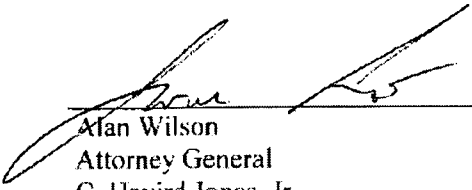
Defendant objects to this request in that it seeks discovery relevant in the underlying case, but having no bearing at all on the issues presented in this declaratory judgment action. Without waiving this objection, Defendant states that no responsive documents exist.

REQUEST FOR PRODUCTION NO. 24: All documents referring or relating to legislation or potential legislation in the South Carolina General Assembly concerning the State's or SCAG's use and retention of private contingency-fee counsel including, but not limited to, the Private Attorney Retention Sunshine Act, the South Carolina Fairness in Civil Justice Act of 2011, or SCUTPA.

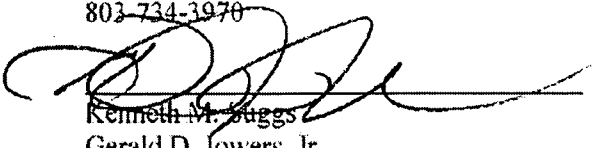
RESPONSE:

Defendant objects to this request to the extent it seeks documents protected from disclosure by the work product doctrine. Defendant further objects to this request in that actions by the General Assembly are matters of public record and readily available to Plaintiff. Subject to this objection, responsive documents are enclosed. Defendant will supplement as necessary.

DATED: April 5, 2013



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



Kenneth M. Suggs
Gerald D. Jowers, Jr.
Janet, Jenner & Suggs, LLC
Post Office Box 927
Columbia, S.C. 29202

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

Attorneys for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
CEPHALON, INC.,	)	Civil Action No. 2012-CP-40-07317
	)	
Plaintiff,	)	
v.	)	
	)	
ALAN WILSON, in his Capacity as	)	
Attorney General for the State of	)	
South Carolina,	)	
	)	
Defendant.	)	
	)	
	)	

AFFIDAVIT OF PROFESSOR GEOFFREY C. HAZARD, JR.

The undersigned, Geoffrey C. Hazard, Jr., provides the following affidavit under oath:

1. I am Professor Emeritus, Hastings College of the Law, University of California; Professor of Law Emeritus, University of Pennsylvania; Professor of Law Emeritus, Yale University; Director (executive director) Emeritus, American Law Institute.

I am a member of the bar in California and was previously a member of the bar in Connecticut, Oregon and Pennsylvania. I maintain an active consulting practice in professional ethics and in civil litigation. I am special counsel to several law firms in matters of professional ethics.

I was Reporter for the American Bar Association Model Rules of Professional Ethics, on which the South Carolina Rules of Professional Ethics are based, and principal draftsman of the ABA Model Code of Judicial Conduct. I am author or co-author of a treatise on legal ethics

and a course book and many articles on the subject. A copy of my professional biography is attached as Exhibit B.

2. I have been engaged by counsel for Cephalon, Inc., for my opinions in this matter. I am being compensated for the work on my usual basis.

3. As the basis of my opinions I have relied on the Fact Summary prepared at my request by counsel for Cephalon, which is attached as Exhibit A, and on the case materials referred to therein, which I have reviewed.

4. In summary, in my opinion the agreement between the South Carolina Attorney General's Office ("AG's Office") and the private lawyers—the Rutherford Law Firm and Mr. Suggs ("Private Lawyers")—involving a contingent fee ("Fee Agreement"), creates a financial incentive for the AG's Office that is inconsistent with recognized standards of professional conduct.

5. (a) As set forth in the Fact Summary, the Fee Agreement provides that the Private Lawyers will prosecute the Underlying Enforcement Action for penalties, damages and punitive damages.

(b) The compensation of the Private Lawyers is covered by the Fee Agreement, which provides that the Private Lawyers will pay litigation expenses and be compensated through a share of any recovery, through judgment or settlement.

(c) The formula for the contingent fee calls for division of recovery, after expenses, between the Private Lawyers and the State. As stated in Paragraphs 13 and 17 of the Fact Summary, the Fee Agreement provides that 10% of the fees of the Private Lawyers, for both damages and punitive damages, are to go directly to the AG's Office. These provisions could result in payments of several million dollars to the AG's Office.

(d) In prior contingent undertakings of similar kind, as described in Paragraphs 20-24 of the Fact Summary, the AG's Office

has used recoveries to fund and expand its office operations and as a reserve for future operations.

6. The question is whether this fee arrangement is consistent with recognized standards of professional ethics. In my opinion it is not.

(a) The litigation covered by the Fee Agreement is regulatory and, in that punitive damages are recoverable, penal or quasi-penal in character. Correspondingly, the assertion of such litigation by counsel is a form of Prosecution.

(b) Rule 3.8 of the ABA Model Rules, on which Rule 3.8 of the South Carolina Rules of Professional Conduct are based, addresses the "Special Responsibilities of a Prosecutor." The subdivisions of Rule 3.8 impose various special duties on a prosecutor, designed to assure that prosecutions are objectively fair and professionally responsible. Comment [1] to Rule 3.8 sums up the underlying principle:

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

(c) There are various definitions and elaborations of the concept of "minister of justice." Some of these have been set forth in judicial opinions dealing with contingent fee agreements similar to the Fee Agreement in this case.

(d) The essential idea is that the prosecutor has a responsibility of objectivity similar to that of a judge. That responsibility reflects the underlying fact that the government office of prosecutor has powerful means at its disposal and wide discretion in how to deploy those means. "It is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done." *County of Santa Clara v. Superior Court*, 235 P.3d 21, 35 (Cal. 2010). Prosecutorial discretion extends to whether to prosecute, what charges to assert, whether to negotiate a resolution, and what terms to accept in a resolution through settlement. Those dimensions of discretion are inherent in a penal, quasi-penal or

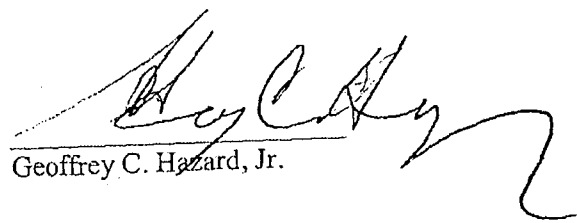
regulatory proceeding such as is involved between the State and Cephalon.

(e) The courts have been rightly troubled in situations where prosecutorial agencies have engaged private counsel on a contingent fee basis. The decisions are divided: Some hold that such arrangements *per se* involve improper incentives for a prosecutorial agency; others have held contingent fee arrangements permissible where the agency affirms that it has supervisory control.

(f) I am aware of no contingent fee arrangement providing for a return of litigation proceeds to a prosecutorial agency, as is involved in the 10% arrangement in the present Fee Agreement. That arrangement means that the AG's Office, however much it asserts the objectivity of its supervision, stands to gain directly from certain outcomes, more than in other outcomes. The gain could be very substantial.

(g) The concept of "minister of justice" signifies a condition of prosecutorial objectivity similar to that of the judiciary. It would of course be inconsistent with recognized standards of professional conduct if a court were to have a financial interest in the outcome of a matter coming before it. Indeed, that would be a violation of Due Process of Law under the settled principle in *Tumey v. State of Ohio*, 273 U.S. 510 (1927). See also *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

(h) In my opinion the arrangement in the Fee Agreement under which the AG's Office is directly to receive, for its operations, a substantial share of contingent recoveries, is inconsistent with the concept of a minister of justice and thus with recognized standards of professional conduct.


Geoffrey C. Hazard, Jr.

SWORN TO before me this 6 th
day of December, 2013.

Leah De Muynck, Notary Public
Notary Public for California

MY COMMISSION EXPIRES: July 19, 2016

State of California San Francisco
County of San Francisco
Subscribed and sworn to (or affirmed) before me,
on this 6 day of December, 20 13
by Geoffrey C. Hazard Jr.
proved to me on the basis of satisfactory evidence
to be the person(s) who appeared before me.
Signature Leah De Muynck (Seal)
Notary Public



EXHIBIT A

FACT SUMMARY

1. On June 6, 2011, the South Carolina Attorney General's Office (the "AG's Office"), on behalf of the State of South Carolina ("State"), filed a lawsuit against Cephalon, Inc. ("Cephalon") for alleged violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, ("SCUTPA") and unjust enrichment (the "Underlying Enforcement Action"). (Ex. A.) The State filed an amended complaint on February 13, 2012. (Ex. B.) In bringing the lawsuit, the Attorney General of South Carolina ("AG") purports to be acting in his capacity as the State's chief legal officer. (*Id.* at 1.)

2. The State's claims are based on allegations that Cephalon engaged in the off-label promotion of three federally-approved prescription medications – Gabitril, Provigil and Actiq. (*E.g., id.* at ¶ 33.) The AG's Office seeks to recover statutory penalties under SCUTPA, as well as equitable and injunctive relief. (*Id.* at 1.)

3. The AG's Office entered into an agreement with private lawyers – J. Todd Rutherford of the Rutherford Law Firm and Kenneth M. Suggs of Janet, Jenner & Suggs, LLC – for the private lawyers to prosecute the Underlying Enforcement Action. The agreement is dated July 26, 2011 and it is titled, "Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq" (the "Contingent Fees Agreement" or the "Agreement"). (Ex. C.)

4. Under the Contingent Fees Agreement, private counsel agreed to provide the AG's Office with "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" in exchange for a portion of any recovery obtained by the State. (*Id.* at

1.) The Contingent Fees Agreement allows the AG's Office to retain 10% of private counsels' contingent fee for itself. (*Id.* at Art. IV(A)(3)-(4).)

5. The Contingent Fees Agreement expressly states that the Underlying Enforcement Action is "a contingent fee case" and private counsel "shall receive no compensation for any services rendered unless the State of South Carolina receives a settlement or award in connection with" the Underlying Enforcement action. (*Id.* at Art. IV(A).) The Agreement further provides a formula under which private counsel is entitled to recover its out-of-pocket costs and take a contingent fee based on a sliding percentage of any settlement or judgment obtained on the State's behalf. (*Id.* at Art. IV(A)(1), (3)-(4).)

6. Specifically, the Agreement requires private counsel to advance all "reasonable, normal and verified" costs and expenses necessary for conducting the Underlying Enforcement Action. (*Id.* at Art. IV(A)(1).) Private counsel is entitled to recover these costs and expenses from the State's "gross or total recovery, if any, before any distribution is made." (*Id.*)

7. Pursuant to the Amendment to the Contingent Fee Agreement, any recovery in the Underlying Enforcement Action would also be used to compensate private counsel "for time spent defending the State and the Attorney General in *Cephalon, Inc. v. Alan Wilson, in his Capacity as Attorney General for the State of South Carolina, 2012-CP-40-7317*." (Ex. D at Art. V(B)(10)) ("Compensation under this Section B.10 shall be considered a cost of litigation. As with other costs of litigation, [private counsel] shall receive reimbursement solely from the litigation's recovery.".)

8. The Agreement further provides that "at least 75%" of the remaining settlement or judgment proceeds (excluding punitive or exemplary damages) must be "applied to or for the State or the people of South Carolina or the victims in a manner to be determined by the AG in

his sole discretion” (Ex. C at Art. IV(A)(2).) In addition the Contingent Fees Agreement provides that any settlement or judgment proceeds shall be paid to the AG’s Office, and that the AG’s Office will distribute the funds. (*Id.* at Art. IV(A)(5).) Per the Agreement, private counsel is entitled to collect a contingent fee “whether the settlement or judgment is entirely monetary in nature or is combined with non-monetary relief.” (*Id.* at Art. IV(B).) The Agreement also provides that: “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.” (*Id.*)

9. Under the Agreement, private counsel “ shall be paid the remaining 25% or less in fees of [the] remaining or net settlement or judgment proceeds including civil penalties, restitution, or damages (but not including punitive or exemplary damages)” pursuant to the sliding scale referenced in Paragraph 10, below. (*Id.* at Art. IV(A)(3).)

10. The sliding contingency payment is 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%

(*Id.*)

11. In computing the aggregate contingent fee the Agreement states: “The structured contingent fee schedule set forth herein shall operate cumulatively so that, in relation to each

successive category or level of recovery, [private 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 private counsel. (*Id.*)

12. For example, based on this sliding scale, if the State obtains a net recovery of \$10 million, private counsel is entitled to a contingent fee of \$2,350,000 (*i.e.*, $(\$5,000,000 \times .25) + (\$5,000,000 \times .22) = \$2,350,000$). (*Id.*)

13. In addition, the Agreement expressly provides that the AG’s Office “shall retain 10% of [private counsels’] fees awarded under [the contingent fee schedule]. (*Id.*)

14. Thus, if private counsel is entitled to a contingent fee of \$2,350,000, the Agreement entitles the AG’s Office to receive \$235,000. (*Id.*)

15. The Agreement further provides that private counsel shall also be paid a percentage of any punitive or exemplary damage proceeds (which include the trebled portion of any trebled damages, but not including civil penalties) on a similar sliding scale. (*Id.* at Art. IV(A)(4).) Specifically, the Agreement requires that private counsel be paid: 20% of the first \$0 to \$10 million of any punitive or exemplary damages; 15% of any excess punitive or exemplary damages over \$10 million and up to \$100 million; and 10% of any excess punitive or exemplary damages over \$100 million. (*Id.*) This portion of the contingent is also cumulative. (*Id.*)

16. Thus, if the State is awarded \$100 million in punitive damages, then private counsel is entitled to a fee of \$15,500,000 (*i.e.*, $(\$10,000,000 \times .20) + (\$90,000,000 \times .15) = \$15,500,000$). (*Id.*)

17. The Agreement also provides that “the AG shall retain 10% of [private counsels’] fees” for punitive or exemplary damages. (*Id.*)

18. Thus, if private counsel is entitled to a contingent fee of \$15,500,000 based on an award of punitive or exemplary damages, the AG’s office is entitled to keep \$1,550,000 for itself. (*Id.*)

19. The AG’s Office has used contingent fees retained pursuant to other contingent fees agreements to fund its operations, including employees’ salaries, benefits and other day-to-day operating expenses. *See* Paragraphs 20-24 below.

20. According to the AG’s written discovery responses and deposition testimony, an account called the “civil litigation account,” Account No. 30350007, “receives funds through SCUTPA cases including those pursued by a multistate group, by the SCAG only, and by retained outside counsel.” (Ex. E, Request for Production No. 13; Ex. F (SCAG001158 – SCAG001161).)

21. The AG’s Office’s Finance Director, Tom Osmer who was the State’s corporate designee on the topic of the budgets, revenues, funding and expenditures of the AG’s Office, testified that any contingent fees recovered by the AG’s Office in the Underlying Enforcement Action pursuant to the litigation retention agreement would be deposited in the civil litigation account, Account No. 30350007. (Ex. G, Osmer Dep. at 115:17-21 (“Q. [I]f there’s a recovery in a case that [the Consumer Protection Group] is working on, . . . the portion of that recovery that is being kept by the AG’s Office would go into the [30350007] account; correct? A. Yes.”).)

22. Mr. Osmer also testified that the AG’s Office uses the money in the civil litigation account, Account No. 30350007, to fund its operations, including: (1) routine, day-to-day

operations; (2) employee salaries and temporary positions; (3) fringe benefits for employees; (4) basic expenses, such as telephone bills; and (5) consultant fees. (*Id.*, Osmer Dep. at 123:21-24, 124:11-125:23.)

23. In addition, Mr. Osmer testified that the AG's Office carries forward any excess funds in the civil litigation account, Account No. 30350007, so that such funds can be used to fund operations in subsequent years. (Ex. G, Osmer Dep. at 65:24-66:2 ("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."), 201:16-21 ("Q. Okay. But isn't it also true that money recovered by the AG's office, and particularly the Consumer Protection Division of the AG's office, can be carried forward to the next year pursuant to a proviso? A. Yes.").

24. A state statutory framework governs the monies recovered by the Attorney General through litigation or settlement. According to state law, recoveries on behalf of the State are required to be deposited into the State's General Fund. South Carolina statute § 1-7-150(B) states that: "[a]ll 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." S.C. Code Ann. § 1-7-150(B).

25. Pursuant to S.C. Code Ann. § 1-7-85, the SCAG is permitted to obtain reimbursement for its costs in civil proceedings after approval of the State Budget and Control Board.

26. Mr. Osmer testified that the AG's Office does not track the specific expenses it incurs in any given matter, or the expenses incurred by the Consumer Protection Division generally. (Ex. G, Osmer Dep. at 109:16-19 ("Q. . . . [T]he [AG's Office] doesn't track expenses

it incurs on a case-by-case basis; isn't that right? A. That's correct.".) Mr. Osmer also testified that the AG's Office does not track expenses incurred by the Consumer Protection Division. (*Id.* at 60:5-8 ("Q. Okay. Are there any internal orders relating to tracking of the expenses for any of the work that [the Consumer Protection Division] is doing? A. No.").)

27. The Contingent Fees Agreement does not require private counsel to track the amount of time spent litigating the Underlying Enforcement Action. (Ex. H at Interrogatory No. 15 ("Per the Agreement, expenses are to be submitted in one invoice at the conclusion of the litigation. The [Contingent Fees Agreement] does not require outside counsel to maintain time records.").

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff(s)

vs.

Cephalon, Inc.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2011-CP - 40- 3661

(Please Print)

Submitted By: C. Havird Jones, Jr.

Address: Office of the Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

SC Bar #: 3178

Telephone #: 803.734.3680

Fax #: 803.734.3677

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)

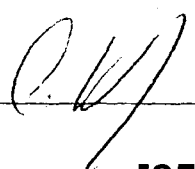
**If Action is Judgment/Settlement do not complete*

- ☐ 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 | Torts - Professional Malpractice | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | ☐ Notice/ File Med Mal (230) | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | ☐ Other (299) | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | | ☐ Personal Injury (350) | ☐ Possession (450) |
| | | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |

- | | | | |
|--|--|---|--|
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstatement Driver's License (800) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| | ☐ Transcript Judgment (740) | ☐ Forfeiture-Petition (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Forfeiture—Consent Order (850) | ☐ SCDOT (950) |
| | ☐ Other (799) | ☐ Other (899) | ☐ 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) | ☒ Pharmaceuticals (630) |
| ☐ Automobile Arb. (610) | ☒ Unfair Trade Practices (640) |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) |
| ☐ Other (699) | ☐ Sexual Predator (510) |

Submitting Party Signature: 

Date: June 2, 2011

[0555]

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:

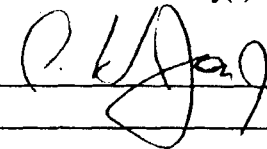
- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus of prohibition;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is forfeiture proceeding brought by the State;
- ☐ 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

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.

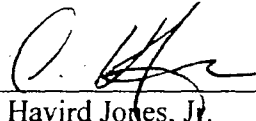
) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-40-

SUMMONS

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

FILED
2011 SEP 15 PM 4:15
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY
SOUTH CAROLINA

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

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

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

By: Alan Wilson
Alan Wilson
Attorney General

June 3, 2011

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

Plaintiff,

v.

CEPHALON, INC,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
)
)

Civil Action No. 2011-CP-40-3661

FIRST AMENDED COMPLAINT

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

2012 FEB 13 PM 1:40

RICHLAND COUNTY
FILED

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.

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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.

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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;

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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.

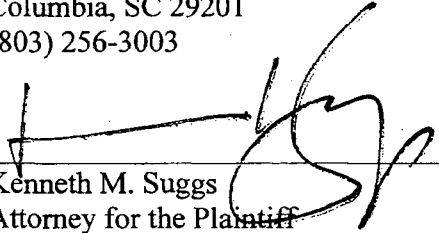
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General
C. HAVIRD JONES, JR.
Assistant Deputy Attorney General

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

KENNETH M. SUGGS
GERAL D. JOWERS, JR.
Janet, Jenner & Suggs, LLC
500 Taylor Street, Suite 301
Columbia, SC 29201
(803) 726-0050

J. TODD RUTHERFORD
Rutherford Law Firm, LLC
2113 Park Street
Columbia, SC 29201
(803) 256-3003

By: 
Kenneth M. Suggs
Attorney for the Plaintiff

February 13, 2012

EXHIBIT C

**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.

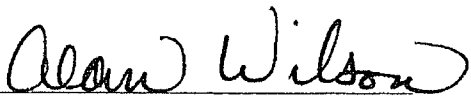
J. Headings

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

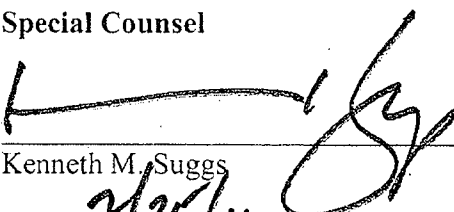
This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

Attorney General of South Carolina


Alan Wilson

Date: July 26, 2011

Special Counsel


Kenneth M. Suggs
Date: 7/25/11


J. Todd Rutherford
Date: 7/26/11

**Amendment to the Litigation Retention Agreement for Special Counsel Appointed by
the South Carolina Attorney General as to Provigil, Gabitril, and Actiq**

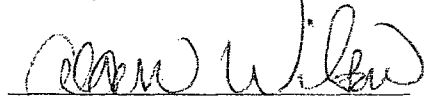
Pursuant to Article VII.I of the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq effective July 26, 2011 between the Attorney General and Kenneth M. Suggs and J. Todd Rutherford (the "LRA"), the LRA is hereby amended by inserting the following language at Article V.B.10:

10. Defensive litigation

Special Counsel shall be compensated for time spent defending the State and the Attorney General in *Cephalon, Inc. v. Alan Wilson, in his Capacity as Attorney General for the State of South Carolina, 2012-CP-40-7317* at the following rates: \$175 per hour for attorneys with 10 or more years of experience, \$110 per hour for attorneys with more than 6 but less than 10 years of experience, \$90 per hour for attorneys with more than 3 but less than 6 years of experience, \$80 per hour for attorneys with less than 3 years of experience, and \$50 per hour for paralegals. Compensation under this Section B.10 shall be considered a cost of litigation. As with other costs of litigation, Special Counsel shall receive reimbursement solely from the litigation's recovery.

The below signatories hereby agree to this amendment to the LRA.

Attorney General of South Carolina



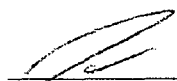
Alan Wilson

Date: 1-16-13

Special Counsel

Kenneth M. Suggs

Date: _____


J. Todd Rutherford

Date: 1/16/13

**Amendment to the Litigation Retention Agreement for Special Counsel Appointed by
the South Carolina Attorney General as to Provigil, Gabitril, and Actiq**

Pursuant to Article VII.I of the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq effective July 26, 2011 between the Attorney General and Kenneth M. Suggs and J. Todd Rutherford (the "LRA"), the LRA is hereby amended by inserting the following language at Article V.B.10:

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The below signatories hereby agree to this amendment to the LRA.

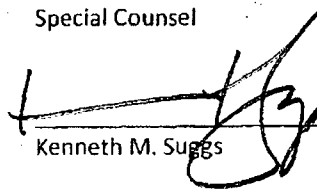
Attorney General of South Carolina



Alan Wilson

Date: 1-16-13

Special Counsel



Kenneth M. Suggs

Date: 1/15/13

Date: _____

J. Todd Rutherford

EXHIBIT D

**Amendment to the Litigation Retention Agreement for Special Counsel Appointed by
the South Carolina Attorney General as to Provigil, Gabitril, and Actiq**

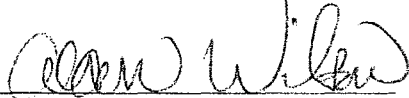
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The below signatories hereby agree to this amendment to the LRA.

Attorney General of South Carolina



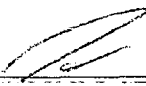
Alan Wilson

Date: 1-16-13

Special Counsel

Kenneth M. Suggs

Date: _____


J. Todd Rutherford

Date: 1/12/12

**Amendment to the Litigation Retention Agreement for Special Counsel Appointed by
the South Carolina Attorney General as to Provigil, Gabitril, and Actiq**

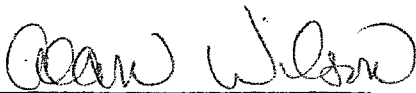
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The below signatories hereby agree to this amendment to the LRA.

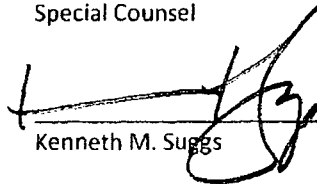
Attorney General of South Carolina



Alan Wilson

Date: 1-16-13

Special Counsel



Kenneth M. Suggs

Date: 1/15/13

Date: _____

J. Todd Rutherford

EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	Civil Action No. 2012-CP-40-07317
CEPHALON, INC.,	)	
	)	
Plaintiff,	)	
	)	
ALAN WILSON, in his capacity as	)	
Attorney General for the State of South	)	
Carolina,	)	
	)	
Defendant.	)	

DEFENDANT STATE OF SOUTH CAROLINA, *ex rel.* ALAN WILSON'S, IN HIS CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA, SUPPLEMENTAL RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION

RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All documents that you identified, referenced or relied upon in your responses to Cephalon's First Set of Interrogatories.

RESPONSE:

Defendant objects to this request to the extent it seeks documents protected from disclosure by the attorney-client privilege and work product doctrine. Subject to and without waiving this objection, responsive documents have been produced.

REQUEST FOR PRODUCTION NO. 2: All documents that you identified, referenced or relied upon in your Answer to the Complaint.

RESPONSE:

None.

REQUEST FOR PRODUCTION NO. 3: All documents that you intend to introduce or use at any trial or proceeding in this matter.

RESPONSE:

A decision as to what documents may be used at the trial of this matter has not been made at this time. Further, defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. The response will be supplemented as appropriate.

REQUEST FOR PRODUCTION NO. 4: All documents reflecting or concerning the negotiation, drafting, execution or approval of the Contingent Fees Agreement or drafts of the Contingent Fees Agreement.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege. There are no memos or notes responsive to this request. A copy of the template Litigation Retention Agreement on which the retention agreement in the underlying case is based is enclosed. A copy of the unsigned Litigation Agreement in the Cephalon case is enclosed. Defendant encloses a signed Addendum to the Litigation Retention Agreement for the Cephalon case. Copies of emails responsive to this request are also attached.

REQUEST FOR PRODUCTION NO. 5: All documents reflecting or concerning any public statements by South Carolina Attorney General Alan Wilson or former South Carolina Attorney General Henry McMaster regarding the SCAG's or State's retention of private contingent-fee counsel or use of private contingent fee agreements.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. Further, defendant objects to the extent that publically made statements by the Attorney General are, by definition, in the public domain and, as such, are readily

available to the plaintiff. Copies of documents responsive to this request are enclosed.

This response will be supplemented as necessary.

REQUEST FOR PRODUCTION NO. 6: All documents reflecting or concerning any projected or potential recoveries, awards or contingent fees in the Underlying Enforcement Action and all documents reflecting or concerning any projected or potential fees for Contingent-Fee Counsel.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. No non-privileged responsive documents have been created since the initial spreadsheet provided to Cephalon on March 4, 2011 by email. A copy of that email and associated attachments are enclosed. One document is being withheld on the basis of work product privilege.

REQUEST FOR PRODUCTION NO. 7: All documents reflecting or concerning any projected or potential recoveries, awards, contingent fees or revenue for the SCAG resulting from or related to the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. No non-privileged responsive documents have been created since the initial spreadsheet provided to Cephalon on March 4, 2011 by email. A copy of that email and associated attachments are enclosed. One document is being withheld on the basis of work product privilege.

REQUEST FOR PRODUCTION NO. 8: All documents concerning the process, criteria or standards used in connection with the retention of Contingent-Fee Counsel and the decision to retain Contingent-Fee Counsel.

RESPONSE:

Defendant objects to this request to the extent that seeks documents and information protected from disclosure by the attorney-client privilege and work product doctrine. Subject to and without waiving this objection, the only responsive document Defendant has identified is a section in the office manual. A copy of that document is enclosed.

REQUEST FOR PRODUCTION NO. 9: All SCAG budgets for each fiscal year from 2003 to the present including, but not limited to, documents that identify SCAG expenditures and payroll.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery, is overly broad and unduly burdensome. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving these objections, responsive documents are enclosed.

REQUEST FOR PRODUCTION NO. 10: All communications from January 1, 2003 to the present between the SCAG, on the one hand, and the South Carolina General Assembly, the South Carolina Budget and Control Board, the South Carolina Governor or any other State or federal agency, on the other, reflecting or relating to funding or budget requests by the SCAG.

RESPONSE:

Defendant objects to this request in that it is overly broad, unduly burdensome, and exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving these objections, all budget requests by the SCAG have been produced.

REQUEST FOR PRODUCTION NO. 11: All documents identifying the compensation (including, but not limited to, bonuses, salary raises and other remuneration) budgeted for employees of the SCAG for each fiscal year from 2003 to the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, responsive documents are enclosed.

REQUEST FOR PRODUCTION NO. 12: All documents referring or relating to the sources or potential sources of funding for compensation increases (including, but not limited to, bonuses, salary raises and other remuneration) and the criteria for awarding compensation increases for SCAG employees between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, responsive documents are enclosed.

REQUEST FOR PRODUCTION NO. 13: All documents concerning any salary raises or bonuses awarded between January 1, 2003 and the present to any SCAG employees that

were funded in whole or in part, directly or indirectly, by a recovery, reimbursement or contingent-fee as a result of a judgment awarded on a SCUTPA claim.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, Defendant encloses responsive documents including the office budgets for each year 2003 to present. Defendant also encloses a statement of the expenditures made from the civil litigation account (30350007) from 2003 - 2013. The civil litigation account receives funds through SCUTPA cases including those pursued by a multistate group, by the SCAG only, and by retained outside counsel. The SCAG does not track expenditures made from this account by the source of the funds.

REQUEST FOR PRODUCTION NO. 14: All documents identifying the total amount of any recovery or judgment awarded to the State or the SCAG in any matter prosecuted by private contingency-fee counsel between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery is overly broad and unduly burdensome. Defendant further objects that this request seeks the work product of the office and information relating to matters outside the scope of this action. Subject to and without waiving this objection, Defendant encloses an Excel spreadsheet created and maintained by Jay Smith, Director of Consumer Protection and Antitrust. Further, Defendant encloses the prior saved versions of this spreadsheet. These documents are confidential pursuant to the protective order entered in this case and are identified as such.

REQUEST FOR PRODUCTION NO. 15: All documents concerning any amounts received by the SCAG pursuant to S.C. CODE ANN. § 1-7-85 between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery.

This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, please refer to the spreadsheets identified in No. 14, above.

REQUEST FOR PRODUCTION NO. 16: All documents concerning any allocation by the General Assembly of any portion of an award or judgment in favor of the State to private contingency-fee counsel or the SCAG between January 1, 2003 and the present.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery.

This request is not relevant and not likely to lead to the discovery of admissible evidence. Further, any actions by the General Assembly are matters of public record and readily available to Plaintiff. Subject to and without waiving this objection, the defendant is not aware of any responsive documents.

REQUEST FOR PRODUCTION NO. 17: All documents concerning any policy, process or procedure implemented by the SCAG to screen from the Underlying Enforcement Action any SCAG employee who may have a personal pecuniary interest either directly or through a spouse or other familial relationship.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client privilege. This request is not relevant and not

likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, there are no responsive documents.

REQUEST FOR PRODUCTION NO. 18: All communications identifying SCAG employees who may have a personal pecuniary interest in the Underlying Enforcement Action and forwarding any notices or memoranda reflecting or relating to the imposition of restrictions on the access of such employees to information or activities concerning the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client privilege. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, there are no responsive documents.

REQUEST FOR PRODUCTION NO. 19: All documents concerning the SCAG's oversight, control and responsibility for the prosecution of the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request to the extent that it seeks to invade the attorney-client and work product privileges. Notwithstanding this objection, please refer to the Litigation Retention Agreement.

REQUEST FOR PRODUCTION NO. 20: All documents concerning the duties and responsibilities of Contingent-Fee Counsel in the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request to the extent that it seeks to invade the attorney-client privilege. Notwithstanding this objection, please refer to the Litigation Retention Agreement.

REQUEST FOR PRODUCTION NO. 21: All documents that show any time records for each of the SCAG employee involved in the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client privilege. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, SCAG employees to not keep records of their time spent on the underlying action.

REQUEST FOR PRODUCTION NO. 22: All documents that refer to or reflect time charges or expenses incurred, or hours or other increments of time worked, by Contingent-Fee Counsel, relating to the Underlying Enforcement Action.

RESPONSE:

Defendant objects to this request in that it exceeds the scope of permissible discovery and seeks to invade the attorney-client and work product privileges. This request is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving this objection, no documents reflecting time records or expenses incurred have been submitted by outside counsel to the SCAG.

REQUEST FOR PRODUCTION NO. 23: All documents concerning the SCAG's policies, procedures or guidelines in effect between January 1, 2003 and December 31, 2008 regarding the use of information contained in a sealed *qui tam* Complaint.

RESPONSE:

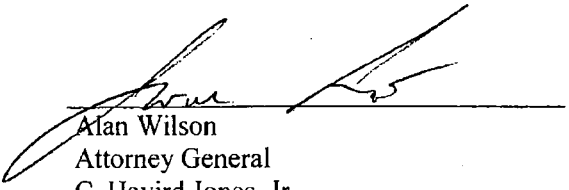
Defendant objects to this request in that it seeks discovery relevant in the underlying case, but having no bearing at all on the issues presented in this declaratory judgment action. Without waiving this objection, Defendant states that no responsive documents exist.

REQUEST FOR PRODUCTION NO. 24: All documents referring or relating to legislation or potential legislation in the South Carolina General Assembly concerning the State's or SCAG's use and retention of private contingency-fee counsel including, but not limited to, the Private Attorney Retention Sunshine Act, the South Carolina Fairness in Civil Justice Act of 2011, or SCUTPA.

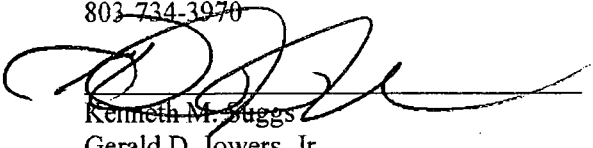
RESPONSE:

Defendant objects to this request to the extent it seeks documents protected from disclosure by the work product doctrine. Defendant further objects to this request in that actions by the General Assembly are matters of public record and readily available to Plaintiff. Subject to this objection, responsive documents are enclosed. Defendant will supplement as necessary.

DATED: April 5, 2013



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



Kenneth M. Suggs
Gerald D. Jowers, Jr.
Janet, Jenner & Suggs, LLC
Post Office Box 927
Columbia, S.C. 29202

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

Attorneys for Defendant

EXHIBIT F

FY2010:30350007

GL Account	YTD Beg Bal	YTD Activity	YTD End Bal
5010580000 CLASSIFIED POSITIONS	2,449,334.45		2,449,334.45
5010660000 TERI-SECOND ANNUAL LEAVE PAYOUT	17,701.20		17,701.20
5010710000 TEMPORARY POSITIONS	274,516.24		274,516.24
5010890000 TERMINAL LEAVE	240.61		240.61
5020070000 DATA PROCESS SERVICES-OTHER	8,088.40		8,088.40
5020070001 DP SERV-HARDWARE MAINTENANCE	73.66		73.66
5020070003 DP SERV-SOFTWARE LICENSES	3,000.00		3,000.00
5020080000 FREIGHT EXPRESS DELIVERY	94.52		94.52
5020090000 TELEPHONE & TELEGRAPH	536.47		536.47
5020120000 CELLULAR TELEPHONE SERVICES	2,859.88		2,859.88
5021010000 LEGAL SERVICES	2,328.80		2,328.80
5021020000 ATTORNEY FEES	18,495.63		18,495.63
5021040000 LEGAL SETTLEMENTS	12,500.00		12,500.00
5021310000 MEDICAL & HEALTH SERVICES	84.00		84.00
5021430000 NON-ST EMPLOYEE TRAVEL	426.22		426.22
5021460000 GENERAL REPAIR	1,337.93		1,337.93
5021540000 OTHER PROFESS SERVICES	16,065.48		16,065.48
5030010000 OFFICE SUPPLIES	20.35		20.35
5030060000 DATA PROCESS SUPPLIES	938.26		938.26
5030060002 DATA PROC SUP-SOFT	5.88		5.88
5030070000 POSTAGE	20,000.00		20,000.00
5030090000 COMMUNICATION SUPPLIES	161.52		161.52
5031530000 GASOLINE	15.00		15.00
5040050000 RENTAL-CONTINGENT RENTAL PAYMENT	933.78		933.78
5041010000 DUES & MEMBERSHIP FEES	9,695.00		9,695.00
5050040000 IN STATE-AUTO MILEAGE	359.11		359.11
5050510000 OUT STATE MEALS (NON-REPORTABLE)	225.99		225.99
5050520000 OUT STATE-LODGING	1,925.57		1,925.57
5050530000 OUT STATE-AIR TRANS	1,275.44		1,275.44
5050540000 OUT STATE-AUTO MILEAGE	221.79		221.79
5050550000 OUT STATE-OTHER TRANS	266.19		266.19
5050560000 OUT STATE-MISC TR EXPENSE	213.00		213.00
5050570000 OUT STATE-REGISTRATION FEES	724.00		724.00
5051540000 LEASED CAR-STATE OWNED	3,068.41		3,068.41
5130010000 RETIREMENT-SRS	283,947.70		283,947.70
5130080000 RETIREMENT-ORP	51,974.93		51,974.93
5130080001 RETIREMENT-ORP FURLOUGH	186.41		186.41
5130310000 SOCIAL SECURITY-ST EMP	194,938.88		194,938.88
5130610000 HEALTH INS-ST EMP	129,993.45		129,993.45
5130670000 DENTAL INS-STATE EMPLOYEES	4,093.06		4,093.06
5130710000 PRE-RET DEATH BENEFIT-ST EMP	3,272.42		3,272.42
5130710001 PRRT DTH-ST EMP FUR	47.02		47.02
5130780000 PRE-RET DEATH BENEFIT-ORP	608.71		608.71
5130780001 PRRT DTH BEN-ORP FUR	3.61		3.61
5202020000 LIBRARY BOOKS MAPS FILM (NON-CAP)	569.79		569.79
* Expenses	3,517,368.76		3,517,368.76
** Expenses Level 2	3,517,368.76		3,517,368.76
*** Expenses	3,517,368.76		3,517,368.76
**** Total	3,517,368.76		3,517,368.76

FY2011 30350007

GL Account	YTD Beg Bal	MTD Activity	YTD End Bal
5010580000 CLASSIFIED POSITIONS	3,068,402.07		3,068,402.07
5010710000 TEMPORARY POSITIONS	193,610.98		193,610.98
5010730000 OVERTIME & SHIFT DIFFERENT	28.01		28.01
5010890000 TERMINAL LEAVE	27,943.63		27,943.63
5010890002 TERMINAL LEAVE - TERI	9,399.38		9,399.38
5020070003 DP SERV-SOFTWARE LICENSES	5,778.00		5,778.00
5020120000 CELLULAR TELEPHONE SERVICES	1,608.32		1,608.32
5021010000 LEGAL SERVICES	381.90		381.90
5021020000 ATTORNEY FEES	708.98		708.98
5021540000 OTHER PROFESS SERVICES	157,402.76		157,402.76
5030020001 PHOTOCOPY SUPPLIES	15.00		15.00
5030030001 PRT COMM-CONSUM	171.20		171.20
5030090000 COMMUNICATION SUPPLIES	590.58		590.58
5041010000 DUES & MEMBERSHIP FEES	530.00		530.00
5050050000 IN STATE-OTHER TRANS			
5050060000 IN STATE-MISC TR EXP	10.00		10.00
5050510000 OUT STATE MEALS (NON-REPORTABLE)	360.41		360.41
5050520000 OUT STATE-LODGING	2,909.00		2,909.00
5050530000 OUT STATE-AIR TRANS	2,074.80		2,074.80
5050540000 OUT STATE-AUTO MILEAGE	183.08		183.08
5050550000 OUT STATE-OTHER TRANS	421.52		421.52
5050560000 OUT STATE-MISC TR EXPENSE	194.00		194.00
5050570000 OUT STATE-REGISTRATION FEES	1,377.00		1,377.00
5051540000 LEASED CAR-STATE OWNED	1,285.89		1,285.89
5060199000 DEP EXP - LOW VALUE ASSETS (MA)	112.30		112.30
5060299000 DEP EXP - LOW VALUE ASSETS (FA)	112.30		112.30
5130010000 RETIREMENT-SRS	323,142.01		323,142.01
5130080000 RETIREMENT-ORP	95,918.91		95,918.91
5130310000 SOCIAL SECURITY-ST EMP	237,447.36		237,447.36
5130610000 HEALTH INS-ST EMP	190,875.92		190,875.92
5130670000 DENTAL INS-STATE EMPLOYEES	5,624.79		5,624.79
5130710000 PRE-RET DEATH BENEFIT-ST EMP	3,686.31		3,686.31
5130710001 PRRT DTH-ST EMP FUR	1.87		1.87
5130780000 PRE-RET DEATH BENEFIT-ORP	1,095.05		1,095.05
5202020000 LIBRARY BOOKS MAPS FILM (NON-CAP)	109.94		109.94
* Expenses	4,333,513.27		4,333,513.27
** Expenses Level 2	4,333,513.27		4,333,513.27
*** Expenses	4,333,513.27		4,333,513.27
**** Total	4,333,513.27		4,333,513.27

FY2012 30350007

GL Account	YTD Beg Bal	MTD Activity	YTD End Bal
5010080000 ATTORNEY GENERAL	725,275.01		725,275.01
5010580000 CLASSIFIED POSITIONS	52,854.33		52,854.33
5010710000 TEMPORARY POSITIONS	2.16		2.16
5010730000 OVERTIME & SHIFT DIFFERENT	488.43		488.43
5010890000 TERMINAL LEAVE	107.00		107.00
5020010000 OFFICE EQUIP SERVICE	3,008.56		3,008.56
5020070000 DATA PROCESS SERVICES-OTHER	484.09		484.09
5020070001 DP SERV-HARDWARE MAINTENANCE	3,086.17		3,086.17
5020070002 DP SERV-SOFTWARE MAINTENANCE	5,778.00		5,778.00
5020070003 DP SERV-SOFTWARE LICENSES	220.03		220.03
5020080000 FREIGHT EXPRESS DELIVERY	533.40		533.40
5020090000 TELEPHONE & TELEGRAPH	217.42		217.42
5020090001 TELEPHONE - DESK SVC	46.87		46.87
5020090008 NON-STATE LONG DISTANCE FOR T&T	1,665.29		1,665.29
5020120000 CELLULAR TELEPHONE SERVICES	677.85		677.85
5021010000 LEGAL SERVICES	1,486,211.65		1,486,211.65
5021020000 ATTORNEY FEES	6,004.31		6,004.31
5021400000 EDUC TRNG-NON STATE	11,832.43		11,832.43
5021430000 NON-ST EMPLOYEE TRAVEL	158,234.14		158,234.14
5021540000 OTHER PROFESS SERVICES	9,364.20		9,364.20
5030010000 OFFICE SUPPLIES	3,490.34		3,490.34
5030020001 PHOTOCOPY SUPPLIES	1,102.10		1,102.10
5030030001 PRT COMM-CONSUM	4,897.32		4,897.32
5030060000 DATA PROCESS SUPPLIES	11,482.83		11,482.83
5030060001 DATA PROC SUP-MIN EQ	12,698.96		12,698.96
5030070000 POSTAGE	425.38		425.38
5030090000 COMMUNICATION SUPPLIES	143.92		143.92
5033090000 EMPLOYEE RECOGNITION AWARDS	1,419.26		1,419.26
5040050000 RENTAL-CONTINGENT RENTAL PAYMENT	1,770.64		1,770.64
5040070000 RENT-ST OWNED R PROPERTY	1,475.00		1,475.00
5041010000 DUES & MEMBERSHIP FEES	112.99		112.99
5050020000 IN STATE-LODGING	180.30		180.30
5050040000 IN STATE-AUTO MILEAGE	11.00		11.00
5050060000 IN STATE-MISC TR EXP	99.00		99.00
5050070000 IN STATE-REGISTRATION FEES	272.90		272.90
5050510000 OUT STATE-MEALS (NON-REPORTABLE)	1,856.31		1,856.31
5050520000 OUT STATE-LODGING	3,012.40		3,012.40
5050530000 OUT STATE-AIR TRANS	772.25		772.25
5050540000 OUT STATE-AUTO MILEAGE	198.00		198.00
5050550000 OUT STATE-OTHER TRANS	212.83		212.83
5050560000 OUT STATE-MISC TR EXPENSE	1,250.00		1,250.00
5050570000 OUT STATE-REGISTRATION FEES	983.61		983.61
5051540000 LEASED CAR-STATE OWNED	51,472.23		51,472.23
5060116000 DE-DATA PRNG EQ(MA)	15,921.37		15,921.37
5060136000 DE-INT ASSET-DEP(MA)	180,203.65		180,203.65
5060199000 DEP EXP - LOW VALUE ASSETS (MA)	3,110.83		3,110.83
5060216000 DE-DATA PRNG EQ(FA)	3,980.34		3,980.34
5060236000 DE-INT ASSET-DEP(FA)	186,802.69		186,802.69
5060299000 DEP EXP - LOW VALUE ASSETS (FA)	65,176.63		65,176.63
5130010000 RETIREMENT-SRS	38,405.47		38,405.47
5130080000 RETIREMENT-ORP	57,172.03		57,172.03
5130310000 SOCIAL SECURITY-ST EMP	114,037.47		114,037.47
5130610000 HEALTH INS-ST EMP	1,517.25		1,517.25
5130670000 DENTAL INS-STATE EMPLOYEES	721.75		721.75
5130710000 PRE-RET DEATH BENEFIT-ST EMP	423.53		423.53
5130780000 PRE-RET DEATH BENEFIT-ORP	108.28		108.28
5190310000 STATE GRAND JURY EXPENSES			
* Expenses	3,233,012.20		3,233,012.20
** Expenses Level 2	3,233,012.20		3,233,012.20
*** Expenses	3,233,012.20		3,233,012.20
**** Total	3,233,012.20		3,233,012.20

SCAG001160

[0626]

FY2013 30350007

GL Account	YTD Budget	YTD Actual	YTD Diff
5010000000 ATTORNEY GENERAL			
5010000000 CLASSIFIED POSITIONS	2,530,347.49		2,530,347.49
5010710000 TEMPORARY POSITIONS	130,831.79		130,831.79
5010890000 TERMINAL LEAVE	18,649.61		18,649.61
5020010000 OFFICE EQUIP SERVICE	105.00		105.00
5020030000 COPYING EQUIPMENT SERVICE	12,556.41		12,556.41
5020030000 PRINTING BINDING ADVERTISING	47.82		47.82
5020030000 PRINT BIND AD CONP	2,296.31		2,296.31
5020070000 DATA PROCESS SERVICES-OTHER	127,640.48		127,640.48
5020070000 DP SERV-HARDWARE MAINTENANCE	32,678.02		32,678.02
5020070000 DP SERV-SOFTWARE MAINTENANCE	104.19		104.19
5020070000 DP SERV-SOFTWARE LICENSES	12,781.07		12,781.07
5020070000 DATA PROC SRV-ST AGY	0.78		0.78
5020080000 FREIGHT EXPRESS DELIVERY	7,950.29		7,950.29
5020090000 TELEPHONE & TEL EXCHNG	13,367.13		13,367.13
5020090000 TELEPHONE - DESK SVC	18,231.45		18,231.45
5020110000 TELECOMMUNICATION SERVICES	1,061.07		1,061.07
5020120000 CELLULAR TELEPHONE SERVICES	9,867.49		9,867.49
5021010000 LEGAL SERVICES	74,040.90		74,040.90
5021020000 ATTORNEY FEES	3,179.50		3,179.50
5021030000 MEDICAL & HEALTH SERVICES	1,497.00		1,497.00
5021130000 BUILDING RENOVATION	957.53		957.53
5021400000 EDUC TRNG-NON STATE	18,595.00		18,595.00
5021430000 NON-ST EMPLOYEE TRAVEL	936.56		936.56
5021460000 GENERAL REPAIR	1,305.39		1,305.39
5021470000 GROUNDMAINT REQ SVC	1,406.00		1,406.00
5021500000 MANAGEMENT CONSULTANTS	18,298.42		18,298.42
5021520000 TEMPORARY SERVICES	6,508.17		6,508.17
5021530000 CATERED MEALS	164.23		164.23
5021540000 OTHER PROFESS SERVICES	43,359.55		43,359.55
5021540000 OTHER CONTRACT SERVICES	4,301.83		4,301.83
5030010000 OFFICE SUPPLIES	35,533.67		35,533.67
5030010000 OFFICE SUPPLIES-NEWSPAPER	75.00		75.00
5030010000 OFF SUP - MIN OFF EO	1,334.85		1,334.85
5030010000 SUBSCRIPTIONS	2,535.47		2,535.47
5030020000 COPYING EQUIPMENT SUPPLIES	409.76		409.76
5030020000 PHOTOCOPY SUPPLIES	10,904.73		10,904.73
5030030000 PRINTING	1,202.60		1,202.60
5030030000 PRT COMMA-CONSUM	674.59		674.59
5030060000 PHOTO & VISUAL SUPP	69.53		69.53
5030060000 DATA PROCESS SUPPLIES	24,643.93		24,643.93
5030060000 DATA PROC SUP-MIN EQ	353.09		353.09
5030060000 DATA PROC SUP-SOFT	2,350.71		2,350.71
5030060000 COMMUNICATION SUPPLIES	3,163.82		3,163.82
5031030000 MAINT PARTS PAINT			
5031530000 GASOLINE			
5033000000 EMPLOYEE RECOGNITION AWARDS	349.35		349.35
5033000000 OTHER SUPPLIES	141.24		141.24
5040010000 RENT OFFICE EQUIP	231.12		231.12
5040020000 RENT COPYING EQUIPMENT	346.31		346.31
5040020000 RENTAL CONTINGENT RENTAL PAYMENT	20,772.35		20,772.35
5040070000 RENT-ST OWNED & PROPERTY	37,657.22		37,657.22
5040490000 RENT-OTHER	2,345.50		2,345.50
5040510000 INSURANCE-STATE	18,276.89		18,276.89
5040520000 INSURANCE-NON STATE	100.00		100.00
5041010000 DUES & MEMBERSHIP FEES	58,808.71		58,808.71
5041020000 FEES AND FINES	690.20		690.20
5041010000 CAP LEASE EXE COSTS-EQUIP	4,023.66		4,023.66
5041020000 CAP LEASE PRINCIPAL PAY-EQUIP	25,276.63		25,276.63
5041030000 CAP LEASE INTEREST PAY-EQUIP	2,279.51		2,279.51
5050010000 IN STATE MEALS (NON-REPORTABLE)	1,346.50		1,346.50
5050020000 IN STATE LODGING	6,929.33		6,929.33
5050040000 IN STATE-AUTO MILEAGE	21,223.10		21,223.10
5050060000 IN STATE-MISC TR EXP	200.00		200.00
5050070000 IN STATE-REGISTRATION FEES	2,070.00		2,070.00
5050510000 OUT STATE MEALS (NON-REPORTABLE)	608.01		608.01
5050520000 OUT STATE LODGING	1,803.91		1,803.91
5050530000 OUT STATE-AIR TRANS	3,877.03		3,877.03
5050540000 OUT STATE-AUTO MILEAGE	999.31		999.31
5050550000 OUT STATE-OTHER TRANS	477.81		477.81
5050560000 OUT STATE-MISC TR EXPENSE	237.28		237.28
5050570000 OUT STATE-REGISTRATION FEES	945.00		945.00
5051520000 REPORTABLE MEALS	387.46		387.46
5051540000 LEASED CAR-STATE OWNED	13,702.11		13,702.11
5130010000 RETIREMENT-SRS	279,487.71		279,487.71
5130030000 RETIREMENT-PORS REG & SAP	7,364.19		7,364.19
5130060000 RETIREMENT-ORP	102,149.34		102,149.34
5130310000 SOCIAL SECURITY-ST EMP	162,583.64		162,583.64
5130400000 WORKERS COMP INSURANCE	20,824.28		20,824.28
5130610000 HEALTH AND ST EMP	168,496.03		168,496.03
5130670000 DENTAL INS-STATE EMPLOYEES	4,606.31		4,606.31
5130710000 PRE-RET DEATH BENEFIT-ST EMP	2,792.57		2,792.57
5130710000 PRE-RET DEATH BENEFIT-POL OFF	0.54		0.54
5130710000 PRE-RET DEATH BENEFIT-POL OFF	89.54		89.54
5130750000 ACCIDENTAL DEATH BENEFIT-POL OFF	89.54		89.54
5130780000 PRE-RET DEATH BENEFIT-ORP	1,021.01		1,021.01
5130310000 STATE GRAND JURY EXPENSES	11,623.72		11,623.72
5130410000 PURCHASE OF EVIDENCE	397.95		397.95
* Expenses	4,185,441.59		4,185,441.59
** Expenses Level 2	4,185,441.59		4,185,441.59
*** Expenses	4,185,441.59		4,185,441.59
**** Total	4,185,441.59		4,185,441.59

SCAG001181

[0627]

EXHIBIT G

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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1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF
3 CEPHALON, INC.:

4 MORGAN, LEWIS & BOCKIUS, LLP
5 BY: TIMOTHY D. KATSIFF
6 TYLER BRODY (Via Telephone)
7 1701 Market Street
8 Philadelphia, PA 19103
9 (215) 963-5000
10 tkatsiff@morganlewis.com

11 and

12 HAYNSWORTH SINKLER BOYD, PA
13 BY: STEPHEN F. McKINNEY
14 1201 Main Street, 22nd Floor
15 Columbia, SC 29201
16 (803) 779-3080
17 smckinney@hsblawfirm.com
18 bvaldes@hsblawfirm.com

19 ATTORNEYS FOR THE DEFENDANT

20 STATE OF SOUTH CAROLINA, ex rel.
21 ALAN WILSON, in his Official Capacity
22 as Attorney General for the State of
23 South Carolina:

24 JANET, JENNER & SUGGS, LLC
25 BY: GERALD D. JOWERS, JR.
500 Taylor Street, Suite 301
Columbia, SC 29201
(803) 726-0050
gjowers@myadvocates.com

and

OFFICE OF THE ATTORNEY GENERAL
BY: C. HAVIRD JONES, JR.
1000 Assembly Street, Suite 500
Columbia, SC 29211
(843) 734-3733
agsjones@scag.gov

1 ALSO PRESENT:

2 Beth Valdes
3 Emily Bridges
4 Douglas Brown, Videographer

23 (INDEX AT REAR OF TRANSCRIPT)

1 expenses for NAMFCU?

2 A. They were designed to track expenses.

3 I do not know if they are currently tracking
4 expense.

5 Q. Okay. Are there any internal orders
6 relating to tracking of expenses for any of the
7 work that Mr. Jones' group is doing?

8 A. No.

9 Q. Okay. Do you track any of the expenses
10 relating to any of the work Mr. Jones' group is
11 doing?

12 A. No.

13 Q. Okay. Now, the revenue numbers, those
14 are the general ledger account numbers?

15 A. Yes.

16 Q. Could you explain for a layperson what
17 a general ledger is?

18 A. It's a category in which an expense or
19 a revenue is deposited using that code. And it
20 tracks that expense and revenue per fiscal year per
21 month, and it's found in these Exhibit 6 and 7
22 general ledger accounts, expenditure and revenue
23 codes.

24 Q. Okay. And that's the backbone --
25 general ledger accounts are the backbone of

1 Q. Okay. Because it's the SABAR system.

2 A. Yes.

3 Q. I see. Because it's entitled SABAR
4 Chart of Accounts.

5 A. Yes.

6 Q. I see. Okay. There's an account about
7 halfway down the page, 10140. I'm sorry. Not an
8 account. A department number called carry forward.

9 A. Yes.

10 Q. What is that?

11 A. That was designed to house the carry
12 forward an agency might have that's allowed by law
13 to be carried forward any -- any moneys in your
14 base budget that you would have left over after our
15 operations during the year. State -- state moneys.

16 Q. I see. Not the other category.

17 A. No.

18 Q. Okay. Now, is there -- is the
19 agency -- and by -- the Attorney General's Office.
20 Is the agency entitled to carry forward recoveries
21 that it receives in consumer protection cases going
22 forward from year to year?

23 A. Repeat the first part of that question.

24 Q. Sure. Is the agency entitled to carry
25 forward funds that it receives in consumer

1 protection cases going forward year to year?

2 A. We may by law.

3 Q. Okay. And what law entitles you to do
4 that?

5 A. Well --

6 Q. Or is it a proviso?

7 A. -- it's -- we base it on many laws.

8 The fact that we were allowed to retain a deposit,
9 expend it would allow us to carry it forward.

10 Q. Now, do you have a particular account
11 that those funds are housed in?

12 A. Which funds?

13 Q. Funds that you receive in -- from the
14 consumer protection group that you're carrying
15 forward.

16 A. They're all housed in, I believe, the
17 30350007 and the 30350088.

18 Q. I see. Well, and let's -- the 3500 --
19 I'm sorry. The 30350088; right?

20 A. Yes.

21 Q. My -- I thought your testimony was that
22 that account, to the best of your knowledge sitting
23 here today, is only used to pay attorneys' fees and
24 costs to outside counsel.

25 A. To the best of my knowledge.

1 recover reimbursement for fees and costs; right?

2 A. Yes.

3 Q. Okay. And now in this particular case
4 that we're talking about, this Depakote matter with
5 Abbott Labs, the Attorney General's Office
6 recovered approximately \$3.6 million in fees and
7 costs; right?

8 A. That's what it looks like, yes.

9 Q. Okay. Now, you have no idea whether or
10 not that was the actual amount of fees and costs
11 expended by the Attorney General's Office to
12 prosecute that matter, do you?

13 A. I would have no knowledge of that.

14 Q. Okay. And the reason you have no
15 knowledge of that is because the office doesn't
16 track expenses -- the office doesn't track expenses
17 it incurs on a case-by-case basis; isn't that
18 right?

19 A. That's correct.

20 Q. So you'll agree with me that, you know,
21 it's possible that the office spent far less than
22 that amount, the \$3.6 million, prosecuting that
23 case; isn't that right?

24 A. That would be speculative. I don't
25 know. We don't track per case.

1 travel. That would be a cost. We wouldn't call
2 that an attorney fee.

3 Q. Well, why don't -- why don't we -- why
4 don't we take it this way, okay, because I think --
5 you don't have familiarity with this spreadsheet.
6 So it's probably fair -- is it fair to say that you
7 have really no idea, for the most part, where most
8 of these things are being deposited on the
9 spreadsheet?

10 A. I don't know what's -- the formulas
11 behind these numbers and how they add up. I've
12 never -- I didn't create it.

13 Q. Okay.

14 A. So yes. The answer is yes, I would not
15 have knowledge.

16 Q. Okay. So let's think about it this
17 way: If there's a -- if there's a recovery in a
18 case that Mr. Jones' group is working on, okay, the
19 portion of that recovery that is being kept by the
20 AG's Office would go into the 07 account; correct?

21 A. Yes.

22 Q. Okay. And the portion of that recovery
23 that's going to be used to pay for outside counsel
24 fees and costs would go into the 88 account; is
25 that right?

1 instruction.

2 Q. Well, the 3588 is just very recent;
3 right?

4 A. Right.

5 Q. Okay. So, I mean, my question -- I
6 mean, back to my question is: Funds that are being
7 retained by the Attorney General's Office -- so you
8 know that these funds are being retained by the
9 Attorney General's Office.

10 A. Um-hum.

11 Q. Has there ever been a case involving
12 funds recovered by the consumer protection group
13 that are being retained by the office that were not
14 deposited into the 07 or 88 account eventually?

15 A. Eventually, no.

16 Q. Okay. Now, the uses of funds in the
17 07 -- the uses of funds from the 07 account, are
18 there any limitations on the uses of funds from the
19 07 account?

20 A. Other than within state law, no.

21 Q. Okay. So funds in the 07 account can
22 be used generally for the operating budget for the
23 office; isn't that right?

24 A. Yes, any legal expense.

25 Q. Okay. And, in fact, let's just look at

1 SCAG 1161. It's the last page of the document you
2 have, sir. And this is the most recent completed
3 fiscal year, is that right, 2013?

4 A. Actually, it's not completed yet.

5 Q. Not completed yet.

6 A. Right. We're currently in that, yes.

7 Q. Okay. So these are -- this is money
8 that you've currently expended out of that account;
9 is that right?

10 A. That's correct.

11 Q. And you've used it for -- to fill
12 temporary positions; right?

13 A. It looks that way, yes.

14 Q. Used it to pay for telephone?

15 A. Yes.

16 Q. Used it for management consultants?

17 A. What line is that, management
18 consultants?

19 Q. It's three-quarters of the way down.

20 A. I see it, yes.

21 Q. I'm sorry. Quarter of the way down.

22 Do you see that?

23 A. Yes.

24 Q. Used it to pay retirement; right?

25 A. Well, that's a fringe benefit.

1 Q. Yeah. Well, you used it for fringe
2 benefits; right?

3 A. Right.

4 Q. Which include, what, retirement?

5 A. All these at the bottom starting with
6 513.

7 Q. Okay. So we've got retirement.
8 Various retirement accounts. We've got Social
9 Security; right?

10 A. Yes.

11 Q. We have healthcare for people in the
12 office -- I mean, health insurance for people in
13 the office; right?

14 A. Yes.

15 Q. Okay. So use it for payroll too?

16 A. Yes.

17 Q. And that's payroll and fringe benefits
18 for the whole office; right? It's not just --

19 A. Define whole office.

20 Q. Well, it's not just the consumer
21 protection group.

22 A. No. It's all kinds of different people
23 doing different jobs.

24 Q. So if I were to add up all these for
25 each of these years, it would show me how much

1 attorneys' fees and costs that -- let me start over
2 again. Sorry. Okay.

3 So it was your opinion as an accountant
4 that the purpose of the statute was to allow for
5 the reimbursement of attorneys' fees and costs that
6 were incurred by the Attorney General's Office in
7 prosecuting the action in which the revenue was
8 recovered.

9 A. Yes.

10 Q. Okay. Now, you had a discussion with
11 Mr. Jowers about money needs to be -- in order to
12 spend money out of the 07 account, that money has
13 to be appropriated by the legislature; isn't that
14 right?

15 A. Yes.

16 Q. Okay. But isn't it also true that
17 money recovered by the AG's office, and
18 particularly the Consumer Protection Division of
19 the AG's office, can be carried forward to the next
20 year pursuant to a proviso?

21 A. Yes.

22 Q. Okay. So, you know, if -- you know, if
23 there's money left over in the account that you
24 don't spend in a particular year, you can carry
25 that leftover money to potentially be used, if it's

EXHIBIT H

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

CEPHALON, INC.,)

Plaintiff,)

STATE OF SOUTH CAROLINA, *ex rel.*)

ALAN WILSON, in his official Capacity)

as Attorney General for the State of)

South Carolina,)

Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2012-CP-40-07317

**DEFENDANT STATE OF SOUTH CAROLINA, *ex rel.* ALAN WILSON'S, IN HIS
OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF SOUTH
CAROLINA, SUPPLEMENTAL RESPONSES TO PLAINTIFF CEPHALON, INC.'S
FIRST SET OF INTERROGATORIES**

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1: Give the names and addresses of persons known to you or
counsel to be witnesses concerning this matter and indicate whether or not written or
recorded statements have been taken from the witnesses and indicate who has possession of
such statements.

RESPONSE:

1. Attorney General Alan Wilson
P.O. Box 11549
Columbia, SC 29211
2. C. Havird "Sonny" Jones, Jr., Esquire
P.O. Box 11549
Columbia, SC 29211
3. John W. McIntosh, Esquire
P.O. Box 11549
Columbia, SC 29211
4. Jay Smith
P.O. Box 11549
Columbia, SC 29211

No written or recorded statements have been taken from any of these individuals.

INTERROGATORY NO. 2: Set forth a list of prepared documents in your possession that relate to any claim or defense in this matter.

RESPONSE:

Please refer to documents produced in response to Plaintiff Cephalon, Inc.'s First Set of Requests for Production.

INTERROGATORY NO. 3: List the names and addresses of any expert witness whom you propose to use as a witness at any trial or proceeding in this matter.

RESPONSE:

None at this time. The Defendant will supplement this response as needed.

INTERROGATORY NO. 4: For each person known to you or counsel to be a witness concerning the facts of this matter, set forth either a summary sufficient to inform Cephalon of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE:

Please refer to response to Interrogatory No. 1. No written or recorded statements have been taken from any of these individuals. Attorney General Wilson, John McIntosh, Sonny Jones, and Jay Smith are knowledgeable about the nature of the underlying case, the Litigation Retention Agreement, and the roles and responsibilities of outside counsel and the supervision and control of the litigation by and through the office of the Attorney General.

INTERROGATORY NO. 5: Identify all persons who participated in preparing, drafting or negotiating the Contingent Fees Agreement, state the job title and employer for each person and describe their role in the negotiations.

RESPONSE:

Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client and work product privileges. Subject to and without waiving this objection, Attorney General Wilson, John McIntosh, Sonny Jones, and Jay Smith participated in drafting and negotiating the Litigation Retention Agreement with outside counsel.

INTERROGATORY NO. 6: Identify by matter each instance from January 1, 2000 to the present for which the SCAG has engaged private contingent-fee counsel. For each matter listed in response to this Interrogatory identify: (a) the private contingent-fee counsel retained; (b) the total recovery by the State, if any; (c) the portion of each recovery paid or otherwise distributed to private contingent-fee counsel; (d) the portion of each recovery received by or distributed to the SCAG; (e) the portion of each recovery deposited in the general fund of the State of South Carolina; (f) any reimbursements for costs obtained by the SCAG that were approved by the South Carolina Budget and Control Board pursuant to S.C. CODE ANN. § 1-7-85; and (g) any funds that were allocated by the South Carolina General Assembly, the South Carolina Budget and Control Board or any other arm of the State to pay contingent fees to private contingent-fee counsel or the SCAG.

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery. This interrogatory seeks information that is not relevant to the matter at issue and is not likely to lead to the discovery of admissible evidence in this case. All Litigation Retention Agreements without outside counsel are posted online on the website of the SCAG. Those that are not yet posted online are enclosed. Further, please refer to the enclosed Excel spreadsheets prepared by Jay Smith.

INTERROGATORY NO. 7: Identify the SCAG's final budget for each fiscal year from 2000 to the present. For each fiscal year, describe in detail all sources of revenue for the

SCAG's budget and identify any portion of revenue derived from (a) contingency fee actions; or (b) civil or criminal enforcement actions.

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery, is overly broad and unduly burdensome. Subject to and without waiving this objection, defendant has produced responsive documents and further encloses documents that are responsive to this interrogatory.

INTERROGATORY NO. 8: Describe in detail the SCAG's total expenditures for each fiscal year from 2003 to the present. For each fiscal year, identify the total number of SCAG employees and the total amount of the SCAG's payroll and benefit expenditures including, but not limited to, any bonuses awarded to SCAG employees and the basis or criteria used for awarding compensation increases (including, but limited to bonuses, salary raises and other remuneration).

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery, and is overly broad and unduly burdensome. Subject to and without waiving this objection, defendant has produced responsive documents and further encloses documents that are responsive to this interrogatory.

INTERROGATORY NO. 9: For each fiscal year from 2003 to the present, describe in detail any budget requests made by the SCAG to the South Carolina General Assembly, the South Carolina Budget and Control Board, or any other arm of the State. In responding to this Interrogatory, identify the total amount of funds sought in each request.

RESPONSE:

Defendant objects to this interrogatory in that it exceeds the scope of permissible discovery, is overly broad and unduly burdensome. Subject to and without waiving this

objection, defendant has produced responsive documents and further encloses documents that are responsive to this interrogatory.

INTERROGATORY NO. 10: Identify each and every employee of the SCAG who is related by blood or marriage to Contingent-Fee Counsel.

RESPONSE:

Defendant objects to this interrogatory on the basis of relevance, it exceeds the scope of permissible discovery, and is not likely to lead to the discovery of admissible evidence.

Subject to and without waiving this objection, no party to the Litigation Retention Agreement is related, by blood or marriage to any employee of the SCAG. However, Gerald D. Jowers, Jr., of the firm of Janet, Jenner & Suggs, LLC is married to Mary Frances Jowers, Esquire, an Assistant Attorney General.

INTERROGATORY NO. 11: Describe in detail the process by which the SCAG selected Contingent-Fee Counsel in the Underlying Enforcement Action. In responding to this Interrogatory: (a) identify the date(s) during which the selection process took place; (b) describe in detail the criteria used for selecting Contingent-Fee Counsel; (c) describe in detail the reasons for the SCAG's or State's decision to select Contingent-Fee Counsel; (d) describe in detail whether the SCAG or State employed a competitive bidding process or issued any requests for proposal ("RFP") in order to identify and retain Contingent-Fee Counsel to prosecute the Underlying Enforcement Action; (e) identify each private firm or attorney that participated in any such competitive bidding process or submitted a response to an RFP; (f) identify all employees of the SCAG or the State involved in the selection of Contingent-Fee Counsel; and (g) set forth all reasons why Contingent-Fee Counsel was selected.

RESPONSE:

Defendant objects to this interrogatory on the basis that it seeks information that is protected by the attorney-client and work product privileges. Defendant further objects

to this interrogatory on the basis that it seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. Subject to and without waiving these objections, the selection process of Contingent-Fee Counsel occurred in the summer of 2011 after the Complaint in the underlying action was filed. The SCAG did not employ a competitive bidding process or issue any requests for proposal to identify or retain Contingent-Fee Counsel. Outside counsel was selected based on their reputation, experience, resources, and willingness to work for the SCAG in accordance with the terms of the Litigation Retention Agreement. SCAG employees involved in the selection of outside counsel were Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, and Assistant Deputy Attorney General Sonny Jones. Generally, the office decided to employ outside counsel for this case when it became clear that the resources required for it would exceed that available to the office and that the SCAG attorneys involved may be called as witnesses in the case.

INTERROGATORY NO. 12: Identify all employees of the SCAG who were involved in the decision to proceed with the Underlying Enforcement Action. In responding to this Interrogatory: (a) identify each such employee's title and position; and (b) identify each such employee who was assigned to or employed by the MFCU at any time between January 1, 2005 and December 31, 2008, and the approximate dates during which such employees were employed by or assigned to the MFCU.

RESPONSE:

1. Attorney General Alan Wilson
P.O. Box 11549
Columbia, SC 29211
2. C. Havird "Sonny" Jones, Jr., Esquire
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211
3. Jay Smith

**Director of Consumer Protection and Antitrust
P.O. Box 11549
Columbia, SC 29211**

**4. John W. McIntosh, Esquire
Chief Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211**

Jay Smith was employed by SC MFCU from approximately May 2008 until July 2008.

INTERROGATORY NO. 13: Identify all public statements made by South Carolina Attorney General Alan Wilson ("AG Wilson") reflecting or relating to the need to raise or increase revenue, funding, or the budget for the SCAG. In responding to this Interrogatory, identify any such statements made by AG Wilson to: (a) the media; (b) the South Carolina General Assembly; (c) the Governor of the State of South Carolina; and (d) any employees of the State and/or the SCAG.

RESPONSE:

Defendant objects to this interrogatory in that it seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. Further, defendant objects to this interrogatory to the extent that publically made statements by the Attorney General or members of his staff are, by definition, in the public domain and, as such, are readily available to the plaintiff. Further, please refer to the budget requests already produced and supplemented herein.

INTERROGATORY NO. 14: Describe in detail whether any attorney employed by the SCAG: (a) has day-to-day responsibility for the prosecution of the Underlying Enforcement Action; (b) is directly responsible for the course and conduct of the Underlying Enforcement Action; (c) possesses veto power over any decisions made by Contingent-Fee Counsel; and (d) has authority to make decisions regarding settlement of the Underlying Enforcement Action. In responding to this Interrogatory: (i) state the name of each attorney responsible for each responsibility identified in parts (a)-(d) of this Interrogatory; (ii) describe each and every

specific task performed to fulfill these responsibilities; and (iii) identify the approximate number of hours per week devoted to fulfilling each such responsibility.

RESPONSE:

Defendant objects to this interrogatory on the basis that it seeks information that is protected by the work product privilege. Subject to and without waiving this objection, Attorney General Wilson, Chief Deputy John McIntosh, Assistant Deputy Attorney General Sonny Jones, and Assistant Attorney General Jared Libet are the attorneys responsible for the underlying action. The Attorney General's control and involvement in the Underlying Enforcement Action is set forth and described in the Litigation Retention Agreement. The Attorney General retains complete control over the litigation.. The Attorney General's staff does not track the number of hours per week spent on this case.

INTERROGATORY NO. 15: Describe in detail what time, billing or expense records are required to be maintained by Contingent-Fee Counsel with respect to their work on the Underlying Enforcement Action. With respect to such records: (a) identify when that requirement was imposed; and (b) whether such records are required to be provided to the SCAG.

RESPONSE:

Please refer to the Litigation Retention Agreement. Per the Agreement, expenses are to be submitted in one invoice at the conclusion of the litigation. The Litigation Retention Agreement does not require outside counsel to maintain time records. To date, no time records or expense reports have been submitted to the Office of the Attorney General.

INTERROGATORY NO. 16: Describe in detail the basis for the assertion in Paragraph 9 of your Answer to the Complaint that "[b]ecause 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." In responding to this Interrogatory: (a) identify the personnel who determined that information regarding the "FCA case" should not be shared with other divisions of the SCAG; (b) identify the information and authorities that were relied upon in making the determination that the MFCU should not share information regarding the "FCA case" with other divisions of the SCAG; (c) identify when the decision that information regarding the "FCA case" should not be shared by the MFCU with other divisions of the SCAG was made; and (d) describe in detail whether former South Carolina Attorney General Henry McMaster ever considered making a settlement demand to or filing a law suit against Cephalon based on allegations that Cephalon promoted or marketed the Drugs at Issue for unapproved uses and identify all SCAG personnel involved in such considerations and whether communications reflecting or relating to the considerations were oral or in writing.

RESPONSE:

Defendant objects to this interrogatory. This interrogatory seeks information that is unrelated to the issues presented in this declaratory judgment action and, as such, seeks information that is irrelevant and beyond the scope of permissible discovery. Further, this interrogatory is not likely to lead to the discovery of admissible evidence in this case.

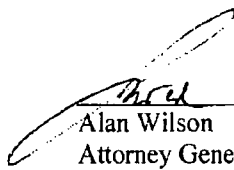
INTERROGATORY NO. 17: Describe in detail the basis for the assertion in Paragraph 9 of your Answer to the Complaint that "[b]ecause of the federal seal, the state was prevented from pursuing the Underlying Action until such time as the seal was lifted." In responding to this Interrogatory: (a) identify the personnel who determined that the federal seal prevented the State from pursuing the Underlying Enforcement Action; (b) identify the information and authorities that were relied upon in reaching the conclusion that the federal seal prevented the State from pursuing the Underlying Enforcement Action; (c) identify the date(s) on which you determined that the federal seal prevented the State from pursuing the Underlying

Enforcement Action; (d) identify any communications reflecting or relating to the issue of whether the State was prevented from pursuing the Underlying Enforcement Action; (e) describe in detail any and all policies, procedures or guidelines concerning the sharing of information between the MFCU, on the one hand, and any other division or component of the SCAG or arm of the State, on the other; (f) identify the date(s) on which you first contemplated filing a law suit against Cephalon based on allegations that Cephalon promoted or marketed the Drugs at Issue for unapproved uses and the personnel involved in the considerations; and (g) describe in detail the process by which you decided to make a settlement demand upon Cephalon in or around February 2011 based on allegations that Cephalon promoted or marketed the Drugs at Issue for unapproved uses and identify the personnel involved in the decision.

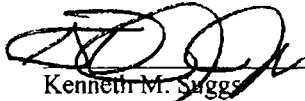
RESPONSE:

Defendant objects to this interrogatory. This interrogatory seeks information that is unrelated to the issues presented in this declaratory judgment action and, as such, seeks information that is irrelevant and beyond the scope of permissible discovery. Further, this interrogatory seeks information protected by the work product privilege.

Dated April 5, 2013



Alan Wilson
Attorney General
C. Havird Jones
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3970

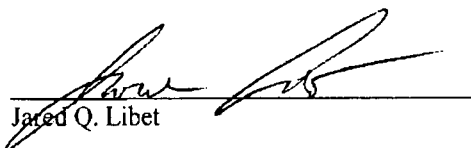


Kenneth M. Suggs
Gerald D. Jowers, Jr.
Janet, Jenner & Suggs, LLC
Post Office Box 927
Columbia, SC 29202
James Todd Rutherford
The Rutherford Law Firm, LLC
Post Office Box 1452
Columbia, SC 29202

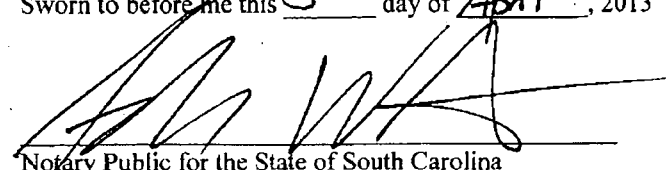
Attorneys for Defendant

VERIFICATION

I Jared Q. Libet, Assistant Attorney General, verify that I have read the foregoing Supplemental Answers to Interrogatories and to the best of my information and belief, the information provided herein is truthful and accurate.


Jared Q. Libet

Sworn to before me this 5th day of April, 2013


Notary Public for the State of South Carolina

My Commission Expires

May 8, 2017

EXHIBIT B

CURRICULUM VITAE

5/23/13

GEOFFREY C. HAZARD, JR

Miller Distinguished Professor of Law Emeritus, University of
California, Hastings College of the Law
Trustee Professor of Law Emeritus, University of Pennsylvania
Law School
Sterling Professor of Law Emeritus, Yale University
Director Emeritus, American Law Institute

Address: 2263 California Street
San Francisco, CA 94115
Tel: 415-292-6535 (home); 415-565-4800 (office)
Fax: 415-292-2304
Email: hazardg@uchastings.edu

Hastings College of the Law
200 McAllister St., San Francisco, CA 94102

EDUCATION

Swarthmore College, B.A. 1953 (Phi Beta Kappa)
Columbia University, LL.B. 1954 (Columbia Law Review)

PROFESSIONAL APPOINTMENTS

Member, California State Bar
Admitted to practice: Oregon, 1954; California, 1960;
Connecticut, 1982; Pennsylvania, 1994
Practiced in Oregon, 1954-57; Deputy Legislative Counsel, State
of Oregon, 1956-57; Executive Secretary, Oregon Legislative
Interim Committee on Judicial Administration, 1957-58
Executive Director, American Bar Foundation, 1964-70
Consultant, American Bar Association Special Committee on Code
of Judicial Conduct, 1970-72
Reporter, American Bar Association Special Commission on
Standards of Judicial Administration, 1971-77
Reporter, American Law Institute, Restatement of Judgments,
Second, 1973-81
Reporter, American Bar Association Special Commission on
Evaluation of Professional Standards, 1978-83
Reporter, Committee on Ethical Standards, National Association of
Bond Counsel, 1983-84

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Director, American Law Institute, 1984-1999
Reporter, American Law Institute and International Organization
for Unification of Private Law, Principles of Transnational
Civil Procedure, 1999-2005
Member and Consultant, Standing Committee on Rules of
Practice and Procedure, Judicial Conference of the United
States, 1994-
Member, Judicial Conference Ad Hoc Committee on Mass Torts,
1997-99
Member, American Bar Association Resource Team for High Profile
Trials 1996-1998
Member, American Bar Association Commission on Ethics 2000,
1997-2002
Member, Associazione Italiana fra gli Studiosi del Processo
Civile, 1998-
Member, American Bar Association Task Force on Federal Preemption
2008-2010
Senior Adviser, American Bar Association, Section of Business
Law, 2007-09; Emeritus 2009-

ACADEMIC APPOINTMENTS

Miller Distinguished Professor of Law, University of California
Hastings College of the Law, 2005-
Trustee Professor of Law, University of Pennsylvania, 1994-2009
Professor of Law, Yale University, 1971-94; Sterling Professor of
Law Emeritus 1994-
Associate Professor of Law, University of California,
Berkeley, 1958-61; Professor of Law, 1961-64
Visiting Professor, University of Michigan, 1963
Professor of Law, University of Chicago, 1964-71
Visiting Professor, Stanford University, 1974
Acting Dean, Yale School of Organization and Management,
1980-81; Associate Dean, 1979-80; Deputy Dean, 1981-82
Visiting Professor, Universite d'Aix-Marseille, 1982
Visiting Professor, Harvard University, 1983
Visiting Professor, University of Arizona, 1997-2001

TEACHING SUBJECTS

Civil Procedure, Legal Ethics, Federal Jurisdiction

BOARD MEMBERSHIPS

Board of Trustees, Supreme Court Historical Society, 1989-2004

-+

Board of Directors, Avatar Holdings, Inc., 1980-94
Board of Directors, Smyth, Sanford & Gerard Professional
Liability, L.L.C. 1995-97
Member, Board of Directors, Friends of the Library of the Supreme
Court of Israel 1998-
Board of Governors, International Insolvency Institute, 2004-2010

PROFESSIONAL ACTIVITIES

Member, Administrative Conference of United States, 1972-78
Adviser, American Bar Association, Standing Committee on Ethics and
Professional Responsibility, Subcommittee on Code of
Judicial Conduct, 1988-89
Member, Board of Overseers, Institute for Civil Justice, RAND
Corp., 1985-90
Advisory Council, Trinity Church (New York) Center for Ethics and
Corporate Policy, 1983-1990
Legal Advisory Committee, New York Stock Exchange, 1989-92
Member, American Bar Association Committee on Professional
Discipline, 1985-91
Member, American Bar Association, Committee on Lawyers'
Responsibility for Client Protection, 1991-1994
Member, National Association of Corporate Directors, Blue
Ribbon Commission, 2005
Member, California State Bar, American Bar Ass'n, American Law
Institute, National Legal Aid and Defender Ass'n, Fellows of
American Bar Foundation, American Academy of Arts and Sciences,
American Philosophical Society

PROFESSIONAL AWARDS

American Bar Foundation, Research Award, 1985
American Bar Foundation, William Keck Foundation Award, 1997
Columbia University School of Law Association, Medal for
Excellence, 1999
American Judicature Society, Outstanding Contributions to
Promoting Effective Administration of Justice. 1999
Ceremony of Salute, Superior Court of Pennsylvania, 1999
Gold Medal, International Insolvency Institute, 2004
American Bar Association Section of Legal Education, Kutak Award,
2005
American Bar Association, Michael Franck Award, 2008
American Law Institute, Distinguished Service Award, 2013

HONORARY DEGREES

M.A., Yale University 1971
LL.D., Gonzaga University, 1985
LL.D., University of San Diego, 1985
LL.D., Swarthmore College, 1988
LL.D., Illinois Institute of Technology, 1990
LL.D., Nova University, 1992
LL.D., Republica Italiana (faculta di Urbino), 1998
Reconocimiento, Universidad National Autónoma de
Mexico, 2006

BOOKS

RESEARCH IN CIVIL PROCEDURE (1963; Walter E. Meyer Research
Institute of Law).
LAW IN A CHANGING AMERICA (1968; editor).
QUEST FOR JUSTICE (1973; editor, American Bar Association).
GOING TO LAW SCHOOL? (1974; editor, with Thomas Ehrlich).
CIVIL PROCEDURE (6th ed. 2011, with John Leubsdorf and Debra
Bassett).
ETHICS IN THE PRACTICE OF LAW (1978).
PLEADING & PROCEDURE, STATE & FEDERAL (10th ed. 2009; with
Colin Tait, Wm. Fletcher and Stephen Bundy).
MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF
SPECIAL MASTERS (1983; with Wayne Brazil and Paul Rice).
THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (Concepts
and Insights Series 2nd ed. 2007; with Deborah Rhode).
THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (Anthology
3d ed. 1994; editor, with Deborah Rhode).
THE LAW OF LAWYERING: A Handbook on the Model Rules of
Professional Conduct (3d ed. 2004 with William Hodes).
PERSPECTIVES ON CIVIL PROCEDURE (1987; editor, with Jan Vetter).
BOARD GAMES: The Changing Shape of Corporate Power (1988; with
Arthur Fleisher, Jr. and Miriam Z. Klipper).
THE LAW AND ETHICS OF LAWYERING (5th ed. 2009; with Susan Koniak,
Roger Cramton, George Cohen and Bradley Wendel)
LA GIUSTA CIVIL NEGLI STATI UNITI (1993; with Michele Taruffo)
AMERICAN CIVIL PROCEDURE: AN INTRODUCTION (1993, with Michele Taruffo)
AMERICAN CIVIL PROCEDURE: AN INTRODUCTION (Japanese ed., Tanabe
Tr. 1997)
LA JUSTICIA CIVIL IN LOS ESTADOS UNIDOS (Spanish ed., Gascón
Inchausti Tr. 2006)
POKUS`ENI` SPRA`NI` CHI RAD (Prague, 1996; translation of
BOARD GAMES, with Arthur Fleisher, Jr. and Miriam Z.
Klipper)

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PROFESSIONAL RESPONSIBILITY AND REGULATION (Foundation Press,
2002) (with Deborah Rhode)
LEGAL ETHICS: A COMPARATIVE STUDY (Stan. U. Press. 2004) (with
Angelo Dondi)
ETICHE della PROFESSIONE LEGALE (il Mulino 2005) (with Angelo
Dondi)
ETICA JURIDICA UM ESTUDO COMPARATIVO (wmfmartinsfontes, 2011)
(with Angelo Dondi)
MORAL FOUNDATIONS OF AMERICA LAW (Intersentia, 2013 (with Douglas
S. Pinto)

REPORTS
(as reporter or draftsman)

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Law Explosion (1965).
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- Res Nova in Res Judicata, 44 So. Calif. L. Rev. 1036 (1971).
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- Attorneys' Responsibilities and Duties Under the Securities Laws, in Goldberg, Stuart C., ed., Expanding Responsibilities Under the Securities Laws (1973).
- The Effect of the Class Action Device Upon the Substantive Law, 58 F.R.D 299 (1973).
- Legal Services in the U.S.A., 2 Internat'l J. of Crim. and Pen. 43 (1974).
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- Rethinking Legal Ethics, 26 Stan. L. Rev. 1227 (1974).
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66 Calif. L. Rev. 1061 (1978).
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- The Legal and Ethical Position of the Code of Professional
Ethics, V Social Responsibility: Journalism, Law, Medicine
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Law: Parallels and Contrasts (1980)
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Opposing Parties, 33 South Carolina L. Rev. 181 (1981).
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Wrongful Conduct?, 35 U. of Miami L. Rev. 669 (1981).
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- Principles in Legislation, 41 The Record 685 (1986) (Cardozo Lecture).
- Rising Above Principle, 135 U.Penn.L.Rev. 153 (1986) (Roberts Lecture).
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**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.

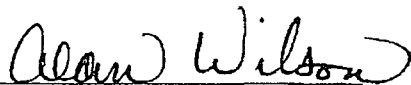
J. Headings

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

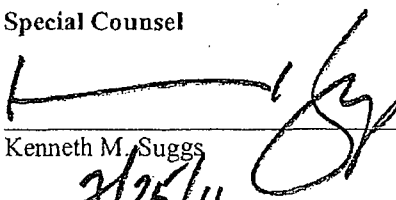
This Agreement may be executed in one or more counterparts, each of which shall be an original and all of which constitute one and the same instrument.

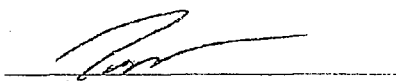
Attorney General of South Carolina


Alan Wilson

Date: July 26, 2011

Special Counsel


Kenneth M. Suggs
Date: 7/25/11


J. Todd Rutherford
Date: 7/26/11

**Amendment to the Litigation Retention Agreement for Special Counsel Appointed by
the South Carolina Attorney General as to Provigil, Gabitril, and Actiq**

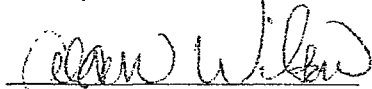
Pursuant to Article VII.I of the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq effective July 26, 2011 between the Attorney General and Kenneth M. Suggs and J. Todd Rutherford (the "LRA"), the LRA is hereby amended by inserting the following language at Article V.B.10:

10. Defensive litigation

Special Counsel shall be compensated for time spent defending the State and the Attorney General in *Cephalon, Inc. v. Alan Wilson, in his Capacity as Attorney General for the State of South Carolina, 2012-CP-40-7317* at the following rates: \$175 per hour for attorneys with 10 or more years of experience, \$110 per hour for attorneys with more than 6 but less than 10 years of experience, \$90 per hour for attorneys with more than 3 but less than 6 years of experience, \$80 per hour for attorneys with less than 3 years of experience, and \$50 per hour for paralegals. Compensation under this Section 8.10 shall be considered a cost of litigation. As with other costs of litigation, Special Counsel shall receive reimbursement solely from the litigation's recovery.

The below signatories hereby agree to this amendment to the LRA.

Attorney General of South Carolina

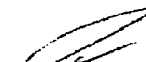


Alan Wilson

Date: 1-16-13

Special Counsel

Kenneth M. Suggs

 _____
J. Todd Rutherford

Date: _____

Date: 1/16/13

SCAG001009

[0686]

**Amendment to the Litigation Retention Agreement for Special Counsel Appointed by
the South Carolina Attorney General as to Provigil, Gabitril, and Actiq**

Pursuant to Article VII.I of the Litigation Retention Agreement for Special Counsel Appointed by the South Carolina Attorney General as to Provigil, Gabitril, and Actiq effective July 26, 2011 between the Attorney General and Kenneth M. Suggs and J. Todd Rutherford (the "LRA"), the LRA is hereby amended by inserting the following language at Article V.B.10:

10. Defensive litigation

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The below signatories hereby agree to this amendment to the LRA.

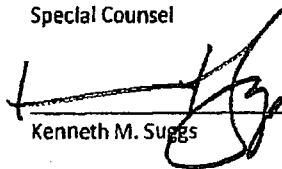
Attorney General of South Carolina



Alan Wilson

Date: 1-16-13

Special Counsel



Kenneth M. Suggs

Date: 1/15/13

Date: _____

J. Todd Rutherford

SCAG001010

[0687]

FY2010 30350007

GL Account	YTD Beg Bal	YTD Activity	YTD End Bal
5010580000 CLASSIFIED POSITIONS	2,449,334.45		2,449,334.45
5010680000 TERI SECOND ANNUAL LEAVE PAYOUT	17,701.20		17,701.20
5010710000 TEMPORARY POSITIONS	274,516.24		274,516.24
5010890000 TERMINAL LEAVE	240.81		240.81
5020070000 DATA PROCESS SERVICES-OTHER	8,088.40		8,088.40
5020070001 DP SERV-HARDWARE MAINTENANCE	73.66		73.66
5020070003 DP SERV-SOFTWARE LICENSES	3,000.00		3,000.00
5020080000 FREIGHT EXPRESS DELIVERY	94.52		94.52
5020090000 TELEPHONE & TELEGRAPH	536.47		536.47
5020120000 CELLULAR TELEPHONE SERVICES	2,859.88		2,859.88
5021010000 LEGAL SERVICES	2,328.80		2,328.80
5021020000 ATTORNEY FEES	18,495.63		18,495.63
5021040000 LEGAL SETTLEMENTS	12,500.00		12,500.00
5021310000 MEDICAL & HEALTH SERVICES	84.00		84.00
5021430000 NON-ST EMPLOYEE TRAVEL	426.22		426.22
5021460000 GENERAL REPAIR	1,337.93		1,337.93
5021540000 OTHER PROFESSIONAL SERVICES	16,065.48		16,065.48
5030010000 OFFICE SUPPLIES	20.35		20.35
5030060000 DATA PROCESS SUPPLIES	938.26		938.26
5030060002 DATA PROC SUP-SOFT	5.88		5.88
5030070000 POSTAGE	20,000.00		20,000.00
5030090000 COMMUNICATION SUPPLIES	161.52		161.52
5031530000 GASOLINE	15.00		15.00
5040050000 RENTAL CONTINGENT RENTAL PAYMENT	933.78		933.78
5041010000 DUES & MEMBERSHIP FEES	9,895.00		9,895.00
5050040000 IN STATE-AUTO MILEAGE	359.11		359.11
5050310000 OUT STATE-MEALS (NON-REPORTABLE)	225.99		225.99
5050420000 OUT STATE-LODGING	1,925.57		1,925.57
5050530000 OUT STATE-AIR TRANS	1,275.44		1,275.44
5050540000 OUT STATE-AUTO MILEAGE	221.79		221.79
5050550000 OUT STATE-OTHER TRANS	266.19		266.19
5050560000 OUT STATE-MISC TR EXPENSE	213.00		213.00
5050570000 OUT STATE-REGISTRATION FEES	724.00		724.00
5051340000 LEASED CAR-STATE OWNED	3,068.41		3,068.41
5130010000 RETIREMENT-SRS	283,947.70		283,947.70
5130080000 RETIREMENT-ORP	51,974.93		51,974.93
5130080001 RETIREMENT-ORP FURLOUGH	186.41		186.41
5130310000 SOCIAL SECURITY-ST EMP	194,938.88		194,938.88
5130310000 HEALTH INS-ST EMP	129,993.45		129,993.45
5130370000 DENTAL INS-STATE EMPLOYEES	4,093.06		4,093.06
5130710000 PRE-RET DEATH BENEFIT ST EMP	3,272.42		3,272.42
5130710001 PRRT DTH ST EMP FUR	47.02		47.02
5130780000 PRE-RET DEATH BENEFIT-ORP	608.71		608.71
5130780001 PRRT DTH BEN-ORP FUR	3.61		3.61
5202020000 LIBRARY BOOKS MAPS FILM (NON-CAP)	569.79		569.79
* Expenses	3,517,368.76		3,517,368.76
** Expenses Level 2	3,517,368.76		3,517,368.76
*** Expenses	3,517,368.76		3,517,368.76
**** Total	3,517,368.76		3,517,368.76

FY2011 30350007

GL Account	YTD Bal Bal	YTD Accty	YTD Bal Bal
5010580000 CLASSIFIED POSITIONS	3,068,402.07		3,068,402.07
5010710000 TEMPORARY POSITIONS	193,610.98		193,610.98
5010730000 OVERTIME & SHIFT DIFFERENT	28.01		28.01
5010890000 TERMINAL LEAVE	27,943.63		27,943.63
5010890002 TERMINAL LEAVE - TERI	9,399.38		9,399.38
5020070003 DP SERV-SOFTWARE LICENSES	5,778.00		5,778.00
5020120000 CELLULAR TELEPHONE SERVICES	1,608.32		1,608.32
5021010000 LEGAL SERVICES	381.90		381.90
5021020000 ATTORNEY FEES	708.98		708.98
5021540000 OTHER PROFESS SERVICES	157,402.76		157,402.76
5030020001 PHOTOCOPY SUPPLIES	15.00		15.00
5030030001 PRT COMM-CONSUM	171.20		171.20
5030080000 COMMUNICATION SUPPLIES	590.58		590.58
5041010000 DUES & MEMBERSHIP FEES	530.00		530.00
5050050000 IN STATE-OTHER TRANS			
5050080000 IN STATE-MISC TR EXP	10.00		10.00
5050510000 OUT STATE-MEALS (NON-REPORTABLE)	360.41		360.41
5050520000 OUT STATE-LODGING	2,909.00		2,909.00
5050530000 OUT STATE-AIR TRANS	2,074.80		2,074.80
5050540000 OUT STATE-AUTO MILEAGE	183.08		183.08
5050550000 OUT STATE-OTHER TRANS	421.52		421.52
5050560000 OUT STATE-MISC TR EXPENSE	194.00		194.00
5050570000 OUT STATE-REGISTRATION FEES	1,377.00		1,377.00
5051540000 LEASED CAR-STATE OWNED	1,285.89		1,285.89
5060198000 DEP EXP - LOW VALUE ASSETS (MA)	112.30		112.30
5060298000 DEP EXP - LOW VALUE ASSETS (FA)	112.30		112.30
5130010000 RETIREMENT-SRS	323,142.01		323,142.01
5130080000 RETIREMENT-ORP	95,918.91		95,918.91
5130310000 SOCIAL SECURITY-ST EMP	237,447.36		237,447.36
5130810000 HEALTH INS-ST EMP	190,875.92		190,875.92
5130870000 DENTAL INS-STATE EMPLOYEES	5,624.79		5,624.79
5130710000 PRE-RET DEATH BENEFIT-ST EMP	3,686.31		3,686.31
5130710001 PRRT DTH-ST EMP FUR	1.87		1.87
5130780000 PRE-RET DEATH BENEFIT-ORP	1,095.05		1,095.05
5202020000 LIBRARY BOOKS MAPS FILM (NON-CAP)	109.94		109.94
* Expenses	4,333,513.27		4,333,513.27
** Expenses Level 2	4,333,513.27		4,333,513.27
*** Expenses	4,333,513.27		4,333,513.27
**** Total	4,333,513.27		4,333,513.27

SCAG001159

CEPH_DJ00001223

[0689]

FY2012 30350007

CL Account	YTD Btch	YTD Accty	YTD End Bt
5010080000 ATTORNEY GENERAL			
5010530000 CLASSIFIED POSITIONS	725,275.01		725,275.01
5010710000 TEMPORARY POSITIONS	52,854.33		52,854.33
5010720000 OVERTIME & SHIFT DIFFERENT	2.16		2.16
5010830000 TERMINAL LEAVE	488.43		488.43
5020010000 OFFICE EQUIP SERVICE	107.00		107.00
5020070000 DATA PROCESS SERVICES-OTHER	3,008.56		3,008.56
5020070001 DP SERV-HARDWARE MAINTENANCE	484.09		484.09
5020070002 DP SERV-SOFTWARE MAINTENANCE	3,086.17		3,086.17
5020070003 DP SERV-SOFTWARE LICENSES	5,778.00		5,778.00
5020080000 FREIGHT EXPRESS DELIVERY	220.03		220.03
5020090000 TELEPHONE & TELEGRAPH	533.40		533.40
5020090001 TELEPHONE - DESK SVC	217.42		217.42
5020090003 NON-STATE LONG DISTANCE FOR T&T	46.87		46.87
5020120000 CELLULAR TELEPHONE SERVICES	1,665.29		1,665.29
5021010000 LEGAL SERVICES	677.85		677.85
5021020000 ATTORNEY FEES	1,486,211.65		1,486,211.65
5021400000 EDUC TRNG-NON STATE	6,004.31		6,004.31
5021430000 NON-ST EMPLOYEE TRAVEL	11,832.43		11,832.43
5021640000 OTHER PROFESS SERVICES	158,234.14		158,234.14
5030010000 OFFICE SUPPLIES	9,364.20		9,364.20
5030020001 PHOTOCOPY SUPPLIES	3,490.34		3,490.34
5030030001 PRT COMM-CONSUM	1,102.10		1,102.10
5030030000 DATA PROCESS SUPPLIES	4,897.32		4,897.32
5030030001 DATA PROC SUP-MIN EQ	11,482.83		11,482.83
5030070000 POSTAGE	12,698.96		12,698.96
5030090000 COMMUNICATION SUPPLIES	425.38		425.38
5033090000 EMPLOYEE RECOGNITION AWARDS	143.92		143.92
5040050000 RENTAL-CONTINGENT RENTAL PAYMENT	1,419.26		1,419.26
5040070000 RENT-ST OWNED R PROPERTY	1,770.64		1,770.64
5041010000 DUES & MEMBERSHIP FEES	1,475.00		1,475.00
5050020000 IN STATE-LODGING	112.99		112.99
5050040000 IN STATE-AUTO MILEAGE	180.30		180.30
5050050000 IN STATE MISC TR EXP	11.00		11.00
5050070000 IN STATE-REGISTRATION FEES	99.00		99.00
5050510000 OUT STATE-MEALS (NON-REPORTABLE)	272.90		272.90
5050520000 OUT STATE-LODGING	1,856.31		1,856.31
5050530000 OUT STATE-AIR TRANS	3,012.40		3,012.40
5050540000 OUT STATE-AUTO MILEAGE	772.25		772.25
5050550000 OUT STATE-OTHER TRANS	198.00		198.00
5050560000 OUT STATE-MISC TR EXPENSE	212.83		212.83
5050570000 OUT STATE-REGISTRATION FEES	1,250.00		1,250.00
5051540000 LEASED CAR-STATE OWNED	983.61		983.61
5060116000 DE-DATA PRNG EQ(MA)	51,472.23		51,472.23
5060136000 DE-INT ASSET-DEP(MA)	15,921.37		15,921.37
5060199000 DEP EXP - LOW VALUE ASSETS (MA)	180,203.65		180,203.65
5060216000 DE-DATA PRNG EQ(FA)	3,110.83		3,110.83
5060236000 DE-INT ASSET-DEP(FA)	3,980.34		3,980.34
5060299000 DEP EXP - LOW VALUE ASSETS (FA)	186,802.69		186,802.69
5130010000 RETIREMENT-SRS	65,176.63		65,176.63
5130080000 RETIREMENT-ORP	38,405.47		38,405.47
5130310000 SOCIAL SECURITY-ST EMP	57,172.03		57,172.03
5130310000 HEALTH INS-ST EMP	114,037.47		114,037.47
5130370000 DENTAL INS-STATE EMPLOYEES	1,517.25		1,517.25
5130710000 PRE-RET DEATH BENEFIT-ST EMP	721.75		721.75
5130780000 PRE-RET DEATH BENEFIT-ORP	423.53		423.53
5190310000 STATE GRAND JURY EXPENSES	108.28		108.28
* Expenses	3,233,012.20		3,233,012.20
** Expenses Level 2	3,233,012.20		3,233,012.20
*** Expenses	3,233,012.20		3,233,012.20
**** Total	3,233,012.20		3,233,012.20

SCAG001160

CEPH_DJ00001224

[0690]

SCAG001161
[0691]

CEPH_DJ00001225

South Carolina Legislature

attorney general found 4 times.

Part 1A Section 59 ATTORNEY GENERAL'S OFFICE Page 171

2013-2014 Appropriation Act

1 SEC. 59

ATTORNEY GENERAL'S OFFICE

	TOTAL FUNDS	GENERAL FUNDS
I. STATE LITIGATION		
PERSONAL SERVICE		
ATTORNEY GENERAL	92,007	92,007
	(1.00)	(1.00)
CLASSIFIED POSITIONS	5,784,106	3,563,748
	(177.25)	(76.05)
NEW POSITIONS		
ADMINISTRATIVE COORDINATOR I	34,000	34,000
	(1.00)	(1.00)
ATTORNEY II	46,000	46,000
	(1.00)	(1.00)
ADMINISTRATIVE COORDINATOR		
II	36,000	36,000
	(1.00)	(1.00)
INVESTIGATOR II	43,305	43,305
	(1.00)	(1.00)
ADMINISTRATIVE ASSISTANT	32,175	32,175
	(1.00)	(1.00)
INVESTIGATOR II	43,305	43,305
	(1.00)	(1.00)
NEW POSITIONS ADDED BY THE		
BUDGET AND CONTROL BOARD		
UNCLASSIFIED POSITIONS	125,000	
	(1.00)	
OTHER PERSONAL SERVICES	765,010	25,000
TOTAL PERSONAL SERVICE	7,000,908	3,915,540
	(185.25)	(83.05)
OTHER OPERATING EXPENSES	13,392,461	77,378
TOTAL STATE LITIGATION	20,393,369	3,992,918
	(185.25)	(83.05)
II. EMPLOYEE BENEFITS		
C. STATE EMPLOYER CONTRIBUTIONS		
EMPLOYER CONTRIBUTIONS	1,769,847	875,004
TOTAL FRINGE BENEFITS	1,769,847	875,004
TOTAL EMPLOYEE BENEFITS	1,769,847	875,004
III. NON-RECURRING		
APPROPRIATIONS		

[0692]

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PAGE: 171

1 SEC. 59

ATTORNEY GENERAL'S OFFICE

TOTAL FUNDS GENERAL FUNDS

S TOTAL NON-RECURRING

=====

ATTORNEY GENERAL'S OFFICE

T TOTAL FUNDS AVAILABLE

22,163,216

4,867,922

TOTAL AUTHORIZED FTE POSITIONS

(185.25)

(83.05)

=====

Legislative Services Agency
<http://www.scstatehouse.gov>

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.



William W. Wilkins (SC Bar 6112)
Kirsten E. Small (SC Bar 75681)
Burl F. Williams (SC Bar 77901)
Nexsen Pruet, LLC
Post Office Drawer 10648
Greenville, SC 29603
(864) 370-2211

Counsel for Appellant Cephalon, Inc.

April 2, 2015
Greenville, South Carolina