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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

Case No. 2014-001465

Cephalon, Inc., ... Appellant,

v.

Alan Wilson, ... Respondent.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Attorney General expends a great deal of ink arguing issues that are not in dispute. First, the Attorney General maintains that he has authority to retain private lawyers to prosecute enforcement actions under the South Carolina Unfair Trade Practices Act (SCUTPA). Resp. Br. at 11. Cephalon is not challenging the Attorney General's authority *vel non* to retain private lawyers; this case is about whether the South Carolina and Federal Constitutions permit private lawyers, as well as the Attorney General, to have a contingency fee interest in monetary penalties imposed under SCUTPA.[1]

Next, despite having retained the private lawyers for their expertise, the Attorney General assures the Court that they have only a "subservient" role and that he and his deputies are in "full and complete control" of every aspect of the litigation. Resp. Br. at 7. Again, this is beside the point. It doesn't matter whether the Attorney General actually controls litigation of the Enforcement Action, because the Attorney General himself has a financial interest in the outcome of the litigation. Due process requires control of the litigation by a *disinterested* government attorney—but the Attorney General's entitlement to a share of any and all monetary relief—

[1] Indeed, a growing number of states have enacted legislation specifically *prohibiting* this arrangement. *See, e.g.*, Miss. Code Ann. § 7-5-8(c); N.C. Gen. Stat. Ann. § 114-9.5(c); Wisc. Stat. Ann. § 20.9305(c).

whether in the form of damages or monetary penalties—makes him anything but disinterested.

The Attorney General protests that the amount of his contingency fee cannot be determined without knowing the number of violations and the per-violation penalty amount, neither of which has yet been determined in the Enforcement Action. This is yet another irrelevancy. The problem is not the value of the Attorney General's financial interest in the Enforcement Action—the problem is the fact that the financial interest exists at all.[2] In addition, while the lucrative nature of these arrangements certainly ought to give the Court pause, *any* arrangement that gives the Attorney General a financial stake in a monetary penalties action is unconstitutional *ab initio*, even if the Attorney General never collects a single dime.

Finally, the Attorney General assures the Court that any fee award will be subject to court approval. This is a hollow promise, as explained *infra*. More importantly, no amount of judicial scrutiny can cure the fundamental problem that the contingency fee agreement gives the Attorney General a financial stake in the Enforcement Action that is antithetical to his duty to fairly and impartially serve the public interest.

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[2] As stated in Cephalon's opening brief, many state attorneys general engage private lawyers on a contingency fee basis to litigate monetary penalties actions like the Enforcement Action. The South Carolina Attorney General's office, however, appears to be the only one in the country to give itself a contingency fee interest in monetary penalties.

ARGUMENT

I. The Attorney General's statutory right to reimbursement of actual litigation expenses does not authorize the contingency fee.

The Attorney General claims that S.C. Code Ann. § 1-7-85 gives him authority to receive a contingency fee in a SCUTPA enforcement action. Resp. Br. at 14-15. Bizarrely, the Attorney General contends that the Fee Agreement "operates as a ceiling" that *limits* the amount of the contingency fee he can receive. *Id.* at 15. In other words, the Attorney General's position is that were it not for the terms of the contingency fee agreement with his private lawyers, § 1-7-85 would entitle him to retain for himself a full 25 percent of any recovery in a SCUTPA monetary penalties action.

Unsurprisingly, the Attorney General makes no attempt to reconcile this astonishing position with the statutory text—for it cannot be done. Section 1-7-85 provides that "the Office of the Attorney General may obtain reimbursement for its costs in representing the State," and that these "costs" may include attorneys' fees. The Attorney General admits, however, that he has no idea what his costs are—he tracks neither attorney time nor expenses related to the Enforcement Action. Consequently, no one—not the Attorney General, not his private lawyers, and certainly not the circuit court—can determine whether the Attorney General's contingency fee approximates the amount needed to reimburse him for fees and costs actually incurred.

The question, then, is whether the Attorney General's statutory authority to seek "reimbursement" allows him to broker a deal to split the

contingency fee with his private lawyers, even though the amount received under such an arrangement would have no relationship to the hours actually worked or the expenses actually incurred.

Merely stating the question suggests the answer: Of course not. "A generally accepted definition of reimburse is 'to pay back that expended.'" Op. Atty. Gen. No. 1722 (Sept. 2, 1964); *see* MERRIAM-WEBSTER'S COLL. DICT. 1049 (11th ed. 2012) (to reimburse someone is "to make restoration or payment of an equivalent to" what was expended). Reimbursement, as that term is "commonly used and understood," *see Santoro v. Schulthess*, 384 S.C. 250, 273, 681 S.E.2d 897, 908 (Ct. App. 2009), does not encompass contingency fees calculated as a percentage of the spoils of litigation. Section 1-7-85 allows the Attorney General to seek repayment for attorneys' fees and expenses actually incurred, and no more.

This understanding of § 1-7-85 is confirmed by the text of S.C. Code Ann. § 1-7-150, which was already law when the General Assembly passed § 1-7-85. *See Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 780 (1997) ("[T]here is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."). Section 1-7-150 provides:

> (A) The Attorney General shall account to the State Treasurer for all fees, bills of costs, and monies received by him by virtue of his office.

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

(emphasis added). Section 1-7-150 allows the Attorney General to keep pre-litigation and litigation costs awarded by the court, *see* S.C.R.C.P. 54(d), or agreed upon between the parties in settlement. Section 1-7-150 does not authorize the Attorney General to be paid a contingency fee. Rather, attorneys' fees must be remitted to the General Fund, and only thereafter may the Attorney General seek reimbursement under § 1-7-85. What he may not do, under either provision, is receive a contingency fee.

There is a further problem with the Attorney General's claim that § 1-7-85 gives him authority to acquire a contingency fee interest in a SCUTPA penalties action: Any authority granted to the Attorney General by state law is constrained by the South Carolina and United States Constitutions. Because the contingency fee agreement between the Attorney General and his private lawyers violates Cephalon's due process rights, it is invalid regardless of any purported statutory authority.

II. The Attorney General's direct financial interest in the amount of civil penalties imposed on Cephalon is fundamentally incompatible with due process.

The Attorney General tries to assure the Court that there is nothing to be concerned about here, arguing that there are multiple safeguards to ensure the reasonableness of his contingency fee, Resp. Br. at 21; that this case is no different from a number of other circumstances in which he is allowed to retain the proceeds of enforcement actions, *id.* at 22-23; and that there is no evidence that he has acted improperly, *id.* at 24-25. None of these explanations can overcome the due process violation inherent in his contingency fee arrangement with his private lawyers.

The Attorney General recites a litany of "safeguards" that purportedly resolve any due process problem created by the contingency fee arrangement. None of these "safeguards" can remedy the problem at the core of the Enforcement Action, namely, that a punitive action—instituted by the Attorney General in his sovereign capacity to enforce the laws of South Carolina—is being prosecuted by lawyers, including the Attorney General himself, who have a vested financial interest in the amount of punitive monetary penalties ultimately imposed.

The Attorney General first touts the role of the jury, as a "neutral finder of fact," in determining whether Cephalon is liable for penalties, and the role of the circuit court in determining the number of violations and the amount of the penalty for each. Resp. Br. at 21. But due process requires

more than an impartial jury and an unbiased judge. It also requires a government attorney whose pursuit of the litigation is not influenced by a financial stake in the outcome. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980).

The Supreme Court rejected the Attorney General's position in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). In that case, the government argued that it was not improper to appoint interested private attorneys to prosecute a criminal contempt action because the proceedings were initiated and supervised by a neutral judge. *See id.* at 807. The Court flatly rejected this argument, noting the myriad choices left to the prosecutor's discretion which are "critical to the conduct of a prosecution" and "are all made outside the supervision of the court." *Id.*

Next, the Attorney General points to the circuit court's role in approving an award of attorneys' fees as another "safeguard." There are at least two critical flaws in this argument. First, the circuit court has a role in attorneys' fees only if the case settles. If the case goes to trial and a judgment is imposed, the circuit court will have no role in allocating the proceeds among the General Fund, the Attorney General's private lawyers, and the Attorney General himself. Rather, the terms of the fee agreement will control. (Wilson Dep. 41:8-14, R. p. 295.)

Second, even if the case settles, the circuit court's role in "approving" attorneys' fees is entirely illusory. The Attorney General evidently wants the

Court to believe that submitting the proposed attorneys' fees to the circuit court will result in adversarial testing of the propriety of the award. But adversarial testing cannot occur because there is no one to oppose the Attorney General's proposed order. The settling defendant's only interest is in the dollar amount of the settlement; it is not concerned with how that amount is divided among the Attorney General, his private lawyers, and the General Fund. The Attorney General will not challenge the proposed order—he is, after all, the architect of the contingency fee agreement. And, the private lawyers will not challenge the fee even if they are unhappy with the size of the Attorney General's cut; they will remain silent for fear of killing the golden goose.

Court "approval" is meaningless without adversarial testing of the proposed order. Because no such testing will occur, the submission of a proposed order to the circuit court is no "safeguard."

The Attorney General also points out that his office cannot spend his share of contingency fee recoveries until the General Assembly authorizes the expenditure of these funds. This is beside the point. What matters is that the Attorney General's fee agreements with private lawyers enable him to develop a cache of funds that are immune from the ebb and flow of General Fund revenue. In lean years, this cache of funds protects the Attorney General and his staff from the sting of budget cuts. Indeed, even though appropriations to the Attorney General's Office have decreased in recent

years, the number of employees has *increased*. (McIntosh Dep. 60:22-61:19, R. p. 274.) Further, use of this cache of funds means that less revenue is allocated to the Attorney General from the General Fund, making it appear that the Attorney General is doing more with less money—no doubt a boon for an elected official.

III. Because the Enforcement Action is indistinguishable from a criminal prosecution, the contingency fee arrangement between the Attorney General and his private lawyers is *per se* unconstitutional.

The Attorney General tacitly admits that if the Enforcement Action is indistinguishable from a criminal prosecution, then the contingency fee arrangement with his private lawyers cannot stand. Resp. Br. at 26. He argues only that the Enforcement Action is not akin to a criminal proceeding. These arguments are not persuasive, however.

Addressing the *Kennedy* factors, *see Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), the Attorney General argues first that SCUTPA does not authorize imprisonment, the paradigmatic form of affirmative disability or restraint. As Cephalon pointed out in its opening brief, however, corporations cannot be imprisoned. The paradigmatic "affirmative disability or restraint" applicable to corporations thus is not imprisonment, but injunctive relief, which the Attorney General seeks in the Enforcement Action.

The Attorney General concedes that several of the *Kennedy* factors weigh in favor of a finding that the Enforcement Action is criminal in nature. Resp. Br. at 31-32. The third *Kennedy* factor is met because monetary penalties under SCUTPA are only available upon a showing of willfulness, a standard that unquestionably suggests criminal conduct. The fourth *Kennedy* factor is met because monetary penalties under SCUTPA serve no compensatory purpose; they are intended solely to punish and deter the

sanctioned conduct. Further, the Attorney General admits that the fifth *Kennedy* factor—whether the sanctioned behavior is already a crime—is met.

The Attorney General asks the Court to disregard all of these markers of a criminal punishment scheme in light of his argument regarding the sixth *Kennedy* factor. According to the Attorney General, the Enforcement Action serves the nonpunitive purpose of "protecting the public from unfairness and deception." Resp. Br. at 32. The Attorney General forgets that "protecting the public" is what *criminal* statutes do. Moreover, the question under *Kennedy*'s sixth factor is not whether the enforcement scheme results in some benefit to the public at large. The sixth factor is concerned with whether monetary penalties serve a compensatory purpose in addition to a punitive one. *See Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224, 237 (D. Mass. 2011). SCUTPA's monetary penalties scheme serves no compensatory purpose whatsoever, and therefore the sixth *Kennedy* factor weighs in favor of a conclusion that the penalties scheme is akin to a criminal sanction.

The Attorney General does not attempt to argue that the contingency fee agreement with his private lawyers is permitted even if the Enforcement Action is criminal in nature. And indeed, it is "beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the private attorney's compensation on the outcome of the criminal prosecution." *County of Santa Clara v. Superior Ct.*, 235 P.3d 21, 31 n.7 (Cal. 2010).

IV. The fee agreement does not meet the due process requirements applicable to quasi-criminal actions like the Enforcement Action.

The Attorney General apparently believes that if the Enforcement Action is not functionally a criminal proceeding under *Kennedy*, then it is not a quasi-criminal action. Resp. Br. at 34 ("As set forth above [referring to discussion of the *Kennedy* factors], the Attorney General strongly disputes Cephalon's argument that the [Enforcement Action] is quasi-criminal in nature ..."). The *Kennedy* analysis is concerned with whether the court should disregard a "civil" label because the underlying proceeding is functionally indistinguishable from a criminal action, thereby entitling the defendant to the full panoply of constitutional protections applicable in criminal cases. In contrast, the "quasi-criminal" label applies to sanctions that are "civil" in both form and function, but which entail the imposition of monetary penalties that serve a punitive purpose. Defendants in quasi-criminal proceedings are not entitled to the "procedural guarantees normally associated with criminal prosecutions," but they are entitled to greater due process protections than are defendants in purely civil proceedings. *See United States v. Ward*, 448 U.S. 242, 253-54 (1980).

The Supreme Court, as well as numerous federal and state courts, have recognized that certain constitutional protections apply to quasi-criminal proceedings. *See, e.g., United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (invoking the rule of lenity to construe a tax on

certain firearms because the statute "has criminal applications that require no additional requirement of willfulness"); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 & n.16 (1982) (applying the vagueness standard for criminal statutes to a licensing ordinance that was "quasi-criminal" because of its "prohibitory and stigmatizing effects"); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) (holding that "because civil penalties are 'quasi-criminal' in nature," the Due Process Clause entitles "parties subject to such ... sanctions" to the same level of notice required for criminal statutes); *Corder v. United States*, 107 F.3d 595, 597 (8th Cir. 1997) (holding that because a civil penalty for food stamp trafficking "is a quasi-criminal sanction," due process prohibits "standardless discretion to impose whatever fine the agency pleases"); *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 122 (5th Cir. 1991) (holding that "[t]he statute in question authorizes *civil* penalties, but its prohibitory effect is quasi-criminal and warrants," as a matter of due process, application of the criminal standard for vagueness); *Sims v. Collection Div.*, 841 P.2d 6, 13-15 (Utah 1992) (applying Fourth Amendment's exclusionary rule to an action for tax penalties because of its quasi-criminal nature).

For the reasons set forth in Part III, *supra*, the Enforcement Action should be recognized as a criminal proceeding under *Kennedy*. At the very least, however, the Enforcement Action is surely a quasi-criminal proceeding. Quasi-criminal statutes "provide for punishment but are civil rather than

criminal in form." *Savina Home Indus. v. Sec'y of Labor*, 594 F.2d 1358, 1362 n.6 (10th Cir. 1979). Quasi-criminal penalties seek to punish the defendant "for a general wrong to the public." *United States v. NEC Corp.*, 11 F.3d 136, 137 (11th Cir. 1993).

Under this definition, an action for monetary penalties under SCUTPA is a quasi-criminal proceeding, "analogous to sentencing in a criminal proceeding." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). The Attorney General brought this action in his sovereign capacity on behalf of the public of South Carolina. Monetary penalties under SCUTPA serve a retributive and deterrent purpose and are imposed on the same basis as criminal sanctions under federal law. *Cf. Thompson/Center Arms*, 504 U.S. at 517-18 (applying criminal rules of statutory construction to tax penalty with "criminal applications that require no additional requirement of willfulness").

The Attorney General cannot dispute that private lawyers retained on a contingency fee "have a direct pecuniary interest in the outcome of the case" and thus "have a conflict of interest that potentially places their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public." *Santa Clara*, 235 P.3d at 36. In such circumstances, some courts have held that private lawyers may be retained on a contingency fee basis, but only if "*neutral, conflict-free* government attorneys retain the power to

control and supervise the litigation" so that "the heightened standard of neutrality is maintained and the integrity of the government's position is safeguarded." *Id.* (emphasis added).

The Attorney General devotes considerable effort attempting to establish that lawyers in his office are actually in control of the Enforcement Action, Resp. Br. at 4-8, but he makes ***no effort*** to show that his office is ***disinterested***. It does not matter whether the Attorney General is actually in control of the Enforcement Action because the Attorney General has exactly the same direct pecuniary interest in the outcome of the litigation as his private lawyers. Thus, while the Enforcement Action may be controlled by government attorneys, they are not "neutral, conflict-free government attorneys." *Santa Clara,* 235 P.3d at 36. The Attorney General does not cite a single decision, from any state or federal court, approving an arrangement that gives an attorney general a contingency fee interest in the proceeds of a monetary penalties action.

As the Supreme Court recognized in *Marshall*, the critical question for due process purposes is whether the contingency fee agreement, which gives the Attorney General a direct interest in the amount of monetary penalties imposed on Cephalon, injects into the enforcement process an interest that "may bring irrelevant or impermissible factors into the prosecutorial decision." *Marshall,* 446 U.S. at 249. A defendant is entitled to have enforcement discretion exercised by a government attorney whose decisions

are not subject to influence by "a personal interest, financial or otherwise" in the proceeding. *Id.* at 250 (citing with approval *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), in which a prosecutor was disqualified from litigation in which he had a personal interest).

The Attorney General tries to shelter the contingency fee agreement under *Marshall*'s umbrella, but the financial incentive in this case is far more direct and substantial than the incentive in *Marshall*. Under the civil-penalties-return scheme discussed in *Marshall*,

- The regional offices had no control over the allocation of funds, because all decisions regarding allocation were made by the national office of the Employment Standards Administration (ESA), *id.* at 250-51;
- ESA did not always allocate funds to regional offices, and when it did the amount was always in proportion to each offices' actual expenses incurred in enforcing child labor laws, *id.* at 251;
- The funds were a *de minimis* portion of the national office's annual budget, *id.* at 245;
- Any funds appropriated to ESA by Congress, but not spent, were returned to the Treasury. The amount returned was always greater than the amount of civil penalties collected, indicating that civil penalties were not necessary to operate the ESA or the regional offices, *id.* at 245-46.

The contingency fee agreement between the Attorney General and his private lawyers in this case has none of the saving characteristics identified by the *Marshall* Court:

- The Attorney General drafted the contingency fee agreements, and thus had complete, unsupervised control over the percentage of monetary penalties received by his office;

- The Attorney General *always* receives a percentage of monetary penalties collected. Further, the Attorney General's cut is not correlated to his actual enforcement expenses but rather increases as the amount of monetary penalties increases;
- The Attorney General's share of revenues from monetary penalties is a significant part of his annual budget and has made it possible for him to hire additional employees, even as appropriations by the General Assembly have decreased; and
- The Attorney General keeps, forever, every dime he is paid under the contingency fee agreement.

Thus, unlike in *Marshall*, the contingency fee agreement between the Attorney General and his private lawyers creates a financial interest in the amount of monetary penalties imposed on Cephalon that is direct and substantial. And, most importantly, the amount of the Attorney General's cut increases as the amount of monetary penalties imposed increases. The fee agreement thus creates an incentive that is antithetical to a "dispassionate assessment of the propriety of" civil penalties claims. *Young*, 481 U.S. at 805.

The Supreme Court recognized in *Young* that "[a] prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the [prosecutor's] private client." *Id.* How much greater is the temptation when the financial rewards will flow not to a third-party, but directly to the prosecutor's office itself? If the incentive to maximize gain to a third party is unacceptable—which is what the Supreme Court held in *Young*—then the scheme created by the Attorney General must also be improper.

The Attorney General cites cases from other courts approving contingency fee agreements between state attorneys general and private lawyers. Resp. Br. at 35-36. Recognizing that private lawyers have a direct financial interest in increasing their contingency fees by maximizing the dollar amount of any judgment, even these courts have explicitly conditioned their approval of such arrangements on control of the litigation by a *disinterested* government attorney. These courts reason that actual control of the litigation by a disinterested government lawyer ameliorates the effect of the private lawyers' profit motive, thereby safeguarding the public interest and the fairness of the proceedings. Even if these decisions are correct (which Cephalon does not concede), there is a critical distinction between those cases and this one: In South Carolina, the Attorney General, just like his private lawyers, has a direct financial interest in maximizing his monetary penalties. Because the Attorney General is not disinterested, his control of the litigation does nothing to resolve the constitutional problem created by retaining private lawyers on a contingency fee basis. The Attorney General fails to cite a single case in which a court approved, in ***any*** context, an arrangement giving a government lawyer a contingent fee interest in the outcome of a case.

Unable to cite any case law on point, the Attorney General instead argues that "this is not the only instance under South Carolina law in which a state agency may retain funds from an investigation." Resp. Br. at 22.

> Under South Carolina law, for example, the Attorney General is permitted to retain the first $750,000 of

> securities fines imposed by his office in enforcement actions. *See* S.C. Code § 35-1-702(c). Similarly, the Attorney General and SLED share equally the first $500,000 of money recovered in insurance fraud cases. *See* S.C. Code § 38-55-560(D). More generally, prosecuting agencies are statutorily authorized to retain 20% of the value of all real or personal property subject to forfeiture that is seized and forfeited. *See* S.C. Code § 44-53-530(e).

Resp. Br. at 22-23. Of course, merely citing these provisions does not establish that they are any more constitutional than the Attorney General's contingency fee scheme. But at the very least, the cited statutes are formal enactments of the South Carolina General Assembly, conferring explicit authority for the Attorney General or another state agency to retain a specific amount of funds and to use those funds for designated purposes. *See* S.C. CONST. ART X, § 8. No such statutory authority exists for the contingency fee agreement. To the contrary, the contingency fee agreement between the Attorney General and his private lawyers circumvents the mandate of § 1-7-85, which limits the Attorney General to reimbursement of fees actually incurred and identifies the sources from which the Attorney General may seek reimbursement.

Similarly, the Attorney General relies on forfeiture cases, asserting that because courts have approved a prosecutor's financial interest in the proceeds of forfeiture, the fee agreement in this case must also be constitutional. The cases cited by the Attorney General, however, are not helpful to him. *New Jersey ex rel. Cumberland Cnty. v. One 1990 Ford Thunderbird*, 852 A.2d 1114 (N.J. Super. Ct. App. Div. 2004), addressed a

state statute (not a contingency fee agreement drafted without legislative supervision) that allowed county prosecutors to retain forfeiture proceeds. The court approved the arrangement under *Marshall* because the statute provided that "proceeds must be devoted to special law enforcement purposes within defined, narrowly established parameters" and affirmatively prohibited "using forfeiture proceeds to fund regular salaries or normal operating needs." *Id.* at 1124. These limitations took away any incentive a prosecutor might have in pursuing unsupported forfeiture actions. In this case, by contrast, the Attorney General's financial interest in the Enforcement Action has not been authorized by the General Assembly. Moreover, the Attorney General uses his contingency fee to fund salaries and other routine office expenses, apparently with unlimited discretion and entirely without legislative direction or supervision. (McIntosh Dep. 61:15-19, R. p. 274; Osmer Dep. 123:11-125:16, R. p. 283-84.)

The Attorney General also relies on *Colorado ex rel. Sandstrom v. District Ct.*, 884 P.2d 707 (Colo. 1994). In *Sandstrom*, a defendant sought to disqualify the district attorney from prosecuting the criminal charges against him on the grounds that "the district attorney had a financial interest in the outcome of the *criminal* case" because a conviction would facilitate a subsequent forfeiture action, and the district attorney's office "was designated as one of the agencies entitled to receive a portion of the forfeited currency." *Id.* at 709. Even if *Sandstrom* was correctly decided (which is

questionable), it does not help the Attorney General. The alleged financial interest in *Sandstrom* was indirect and remote; it bears no resemblance to the Attorney General's direct, contingency fee interest in the Enforcement Action.

Notably, at least one court has held unconstitutional an arrangement where the district attorney retained private lawyers on a contingency fee basis to prosecute forfeiture actions. *See Amusement Sales, Inc. v. Georgia*, 730 S.E.2d 430 (Ga. Ct. App. 2012). Noting that forfeiture "is a quasi-criminal proceeding," the court concluded that the scheme was unlawful because it "cause[d] an appointed prosecuting attorney to have a personal financial stake in the outcome of the proceedings." *Id.* at 438. The court further noted that Georgia had recently enacted a law prohibiting the use of contingency fee private lawyers in forfeiture proceedings.

Lastly, the Attorney General maintains that Cephalon has presented no evidence of actual misconduct related to the contingency fee agreement. As the Supreme Court has made clear, however, it is irrelevant whether the fee agreement resulted in any actual impropriety because the constitutional harm is "the *potential* for private interest to influence the discharge of public duty." *Young*, 481 U.S. at 805 (emphasis in original). Therefore, when an arrangement creates an actual conflict of interest "there is no need to speculate whether the prosecutor will be subject to extraneous influence." *Id.* at 807. The harm is done by the potential for misconduct, regardless of

whether this potential ever manifests in actual misconduct. *See id.* at 805-08 & nn.17, 18. *Accord Bhd. of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969) (holding that appointment of private attorneys to prosecute criminal contempt violated due process regardless of whether the attorneys acted improperly because "[t]he [judicial] system we prize cannot tolerate the unidentifiable influence" created by conflicting loyalties).

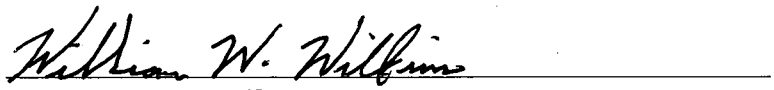
V. The contingency fee agreement violates the separation of powers by usurping the General Assembly's legislative function.

The Attorney General does not dispute that the appropriation of funds is the prerogative of the General Assembly. *See State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-14, 295 S.E.2d 633, 637 (1982) ("The General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent."). Instead, he maintains that the General Assembly, by enacting S.C. Code Ann. § 1-7-85, has authorized the contingency fee scheme at issue in this case. As discussed *supra*, however, § 1-7-85 provides only for reimbursement for funds actually expended; it does not authorize the Attorney General to participate in and be paid from a contingency fee arrangement with his private lawyers. The Attorney General's claim is further undermined by S.C. Code Ann. § 1-7-150, which allows the Attorney General to retain "investigative costs [and] costs of litigation," but not attorneys' fees, before remitting to the General Fund "all fees, bills of costs, and monies received by him by virtue of his office."

CONCLUSION

The contingency fee agreement between the Attorney General and his private lawyers violates Cephalon's due process rights under the State and Federal Constitutions. Accordingly, this Court should reverse the circuit court's decision and remand for entry of judgment in Cephalon's favor.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Cephalon Inc.'s Final Brief of Appellant and Final Reply Brief of Appellant each comply with SCACR Rule 211(b).

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Attorney General for the State of South Carolina, ... Respondent.

PROOF OF SERVICE

I certify that I have served the (i) Final Brief of Appellant, (ii) Final Reply Brief of Appellant, as well as the (iii) Rule 211(b) Certificate of Counsel, by depositing a copy of it in the U.S. Mail, postage prepaid, on April 13, 2015, addressed to the following:

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