FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007317

Cephalon Inc
PLAINTIFF(S)

Alan Wilson
South Carolina State Attorney General
DEFENDANT(S)

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

RICHLAND COUNTY FILED
2014 JUN -6 PM 12:36

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

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

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

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

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

It is clear that the General Assembly wrote SCUTPA as a civil statute providing civil remedies. The penalties for willful violations of SCUTPA that Cephalon complains about are expressly referred to as civil, not criminal. *See* S.C. Code § 39-5-110(a); *see also Hudson*, 522 U.S. at 103 (finding an action by the Office of the Comptroller of the Currency was civil in nature, in part, because "both [statutes], which authorize the imposition of monetary penalties for violations . . . expressly provide that such penalties are 'civil.'"). These penalties are only awarded where the court finds that an entity either knew or should have known that its conduct was a violation of SCUTPA and the Attorney General petitions the court to award civil penalties. S.C. Code § 39-5-110(a). The injunctive relief available to the Attorney General is sought by filing an action in the court of common pleas. *See* S.C. Code § 39-5-50(a). If such an injunction is violated, the court of common pleas retains jurisdiction to award additional civil penalties. *See* S.C. Code § 39-5-110(b). The Attorney General has the right under SCUTPA to accept assurances of voluntary compliance, as long as those assurances are in writing and filed with and, importantly, subject to the approval of the court of common pleas. *See* S.C. Code § 39-5-60. Actions to enforce or to challenge investigative demands served by the Attorney General are filed in the court of common pleas. *See* S.C. Code §§ 39-5-70; 39-5-100. SCUTPA was codified as part of Title 39, entitled Trade and Commerce, rather than with Title 16, Crime and Offenses. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (the State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State]'s probate code, instead of the criminal code."). These and other provisions of SCUTPA all demonstrate that the General Assembly intended actions brought by the Attorney General under SCUTPA, and the civil penalties available in certain cases, as purely civil in nature.

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

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

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

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

(1) "[w]hether the sanction involves an affirmative disability or restraint";
(2) "whether it has historically been regarded as punishment";
(3) "whether it comes into play only on a finding of *scienter*";
(4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence";
(5) "whether the behavior to which it applies is already a crime";
(6) "whether an alternative purpose to which it may rationally be connected in assignable for it"; and
(7) "whether it appears excessive in relation to the alternative purpose assigned."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). The Supreme Court has instructed that "these factors must be considered in relation to the statute on its face." *Id.* at 169. Further, these factors are neither "exhaustive nor dispositive," but are instead "useful guideposts." *Smith*, 538 U.S. at 97. After carefully considering these factors and the arguments of both parties, I find that Cephalon has not shown by clearest proof that SCUTPA is "so punitive in effect as to negate the intention to deem it civil." *See Justin B.*, 405 S.C. at 405, 747 S.E.2d at 781 (citing *Hendricks*, 521 U.S. at 361).

As to the first factor, SCUTPA does not impose an affirmative disability or restraint. SCTUPA "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100. Regardless of the outcome of the enforcement action against Cephalon, no one will be or can be imprisoned as a result of that litigation. Cephalon argues that the injunctive relief sought in the enforcement action constitutes a disability or restraint. This argument fails for three primary reasons. First, the Attorney General seeks a permanent

injunction only to prohibit Cephalon from committing further violations of SCUTPA. Second, Cephalon is not subject to any physical restraint, nor does an injunction "'resemble imprisonment,' the archetypal affirmative disability." *Justin B.*, 405 S.C. at 406, 747 S.E.2d at 782. Lastly, the Supreme Court has already ruled that the "sanction[] of occupational debarment" is nonpunitive. *Smith*, 538 U.S. at 86; *see also Hudson*, 522 U.S. at 94 ("While petitioners have been prohibited from further participating in the banking industry, this is 'certainly nothing approaching the "infamous punishment" of imprisonment.'") (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

With regard to the second factor, Cephalon argues that the civil penalties sought by the Attorney General under S.C. Code § 39-5-110 of up to $5,000 per violation have been historically regarded as punishment. Cephalon is incorrect; the Supreme Court has again made clear that "neither money penalties nor debarment has historically been viewed as punishment." *Hudson*, 522 U.S. at 104.

Cephalon is correct that civil penalties can only be assessed upon a finding by the court that it "knew or should have known that [its] conduct was a violation of Section 39-5-20." S.C. Code § 39-5-110. However, *scienter* is not required for a threshold finding that Cephalon violated SCUTPA or the entry of a permanent injunction against Cephalon for future unfair or deceptive acts and practices. As in *Smith*, this factor is "of little weight in this case." *Smith*, 538 U.S. at 87. Analyzing the fifth factor—whether Cephalon's behavior is a crime—I agree that the Attorney General has alleged that Cephalon's marketing and promotion of its drugs for off-label uses is illegal under federal law and resulted in a federal guilty plea. Again however, this factor is of "little weight" and does not rise to the level of clear proof necessary to override the General Assembly's clear intent to craft SCUTPA as a civil statute.

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

support civil goals." *Justin B.*, 405 S.C. at 407, 747 S.E.2d at 782. Indeed, "to find that the mere presence of a deterrent purpose rendered a sanction 'criminal,' would severely undermine the state's ability to engage in effective regulation." *Justin B.*, 405 S.C. at 398, 747 S.E.2d at 778; *see also Hudson*, 522 U.S. at 105 ("To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation[.]"). The presence of a deterrent purpose in SCUTPA is in support of civil, not criminal, goals.

SCUTPA has an undeniable connection to a clear nonpunitive purpose—protecting the public from unfairness and deception. *See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986) ("The legislature intended in enacting the UTPA to control and eliminate 'the large scale use of unfair and deceptive trade practices within the state of South Carolina.'") (citation omitted). Indeed, the Attorney General is required, prior to commencing an action seeking injunctive relief, to have reasonable cause to believe that such an action "would be in the public interest." S.C. Code § 39-5-50; *see also* S.C. Code § 39-5-70 (authorizing the Attorney General to serve an investigative demand "when he believes it to be in the public interests that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this article[.]"). Similarly, a private individual must show, in order to recover under SCUTPA, that the defendant's "unfair or deceptive act affected [the] public interest." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)). The public interest purpose of SCUTPA, as recognized by both the statutes and the courts of this state, is nonpunitive.[2]

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

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

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

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

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

Court recognized in the case of *Cooley v. S.C. Tax Comm.*, 204 S.C. 10, 28 S.E.2d 445, 447-48 (1943), the Attorney General possesses the authority as the State's chief legal officer to appoint and approve private counsel to represent the State.

While the South Carolina appellate courts have not directly considered the Attorney General's right to appoint special counsel on a contingency fee basis, the appellate courts of other states have expressly approved of such an arrangement. In *West Virginia ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 651 (W.Va. 2013), the Supreme Court of West Virginia held that "the Attorney General has common law authority to provide for compensation to be paid to special assistant attorneys general through a court-approved award of attorney's fees taken directly from the losing opponent in the litigation." Similarly, the Supreme Court of Rhode Island held that,

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

Rhode Island v. Lead Indus. Ass'n, Inc., 951 A.2d 428, 475 (R.I. 2008) (internal quotes and citations omitted). The Supreme Court of Missouri reached the same conclusion in *Missouri ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000), holding that, "[i]n the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general."

In short, the Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions brought against individuals and companies for violations of SCUTPA and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case.

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

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

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

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

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

contempt action alleging violation of that order." *Id.* at 807. Nowhere did the Supreme Court construct a *per se* bar on the use of contingency fee attorneys in cases akin to criminal prosecutions.

Instead, the courts that have directly considered whether contingency fee counsel may be employed by state Attorneys General, including in cases where civil penalties are sought, have approved of such arrangements provided that the government attorneys retain control of the litigation. The Texas Court of Appeals considered this issue in *International Paper Co. v. Harris County*, __ S.W.3d __, 2013 WL 3864317 (Tex. App. July 25, 2013). Harris County filed an environmental enforcement action relating to contamination of a river and sought "civil penalties of up to $25,000 per day for violations of laws regulating the disposal of industrial waste." *Id.* at *2. The county retained outside counsel on a contingency fee basis. *Id.* The defendants asserted that the use of contingency fee counsel violated their due process right to a fair and neutral prosecution, characterizing the environmental enforcement action as quasi-criminal in nature. *Id.* at *2. The court closely analyzed the case law and rejected the defendants' argument that the due process clause imposed a *per se* bar on a governmental entity's engagement of outside counsel on a contingent fee basis to pursue civil litigation seeking recovery of civil penalties. *Id.* at *7. As the court noted, "[n]o court that Defendants have cited, or that we can find, has interpreted the due process clause in the manner urged by Defendants, *i.e.*, as adopting a blanket prohibition against a governmental entity retaining private counsel on a contingent-fee basis to pursue civil litigation in which the only remedy sought is civil penalties." *Id.* at *15.

In *Merck Sharp & Dohme Corp. v. Conway*, 947 F.Supp.2d 733 (E.D. Ky. 2013), the court addressed a challenge to the Attorney General's use of contingency fee counsel to bring a claim under the Kentucky Consumer Protection Act against Merck relating to Merck's marketing and distribution of a prescription drug—a strikingly similar context. The Attorney General and outside counsel sought the maximum civil penalties of $2,000 per violation and $10,000 per violation targeted to individuals over the age of 65. *Id.* at 735. Merck challenged the use of contingency fee counsel on due process grounds, and both sides filed cross-motions for summary judgment. The court again declined to adopt a *per se*

prohibition. "An attorney general does not necessarily violate a defendant's due process rights by hiring outside counsel on a contingency-fee basis." *Id.* at 739. "Thus, as long as the required safeguards are in place, a government entity may engage contingency-fee counsel to assist in a civil prosecution without infringing on the defendant's due process rights." *Id.* The key test—according to the judge in *Merck*—was whether the Attorney General retained full control over the litigation. Thus, so long as the retention agreement contained sufficient safeguards to vest control with the Attorney General, and the Attorney General actually controlled the litigation, the use of contingency-fee counsel to assert consumer protection claims against the defendant was constitutionally permissible. *Id.* at 739-740. Because both elements of control were present, the court denied Merck's motion for summary judgment and granted the Attorney General's motion for summary judgment. *Id.* at 752.

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

After reviewing carefully the terms of the Litigation Retention Agreement, I find that this agreement contains adequate safeguards to ensure that the Attorney General retains control of the enforcement action against Cephalon and serves as the ultimate decision maker. The agreement specifically provides that "[t]he Attorney General shall have final authority over all aspects of this litigation. The litigation may be commenced, conducted, settled, approved, and ended only with the express approval and signature of the Attorney General." Furthermore, "[a]ll pleadings, motions, briefs and other material which may be filed with the court shall first be approved by the Attorney General and provided to his office in draft form in a reasonable and timely manner for review." Outside counsel agree to communicate regularly with the Attorney General and his staff to keep them fully informed.

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

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

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

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

A key premise of Cephalon's argument is that the Litigation Retention Agreement creates an improper financial interest in the litigation for the Attorney General's office. However, the Attorney General's right to seek attorneys' fees is not created by the Litigation Retention Agreement. Rather, S.C. Code § 1-7-85 provides, in pertinent part:

> Notwithstanding any other provision of law, the Office of the Attorney General may obtain reimbursement for its costs in representing the State in criminal proceedings and in representing the State and its officers and agencies in civil and administrative proceedings. These costs may include, but are not limited to, attorney fees or investigative costs or costs of litigation awarded by court order or settlement[.]

S.C. Code § 1-7-85. This statute specifically provides that the Attorney General may obtain attorneys' fees and costs for representing the State in civil proceedings. The statute does not limit the ways in which the attorneys' fees for the Attorney General could be calculated. The Attorney General's authority to seek attorneys' fees is inherent in his powers under the South Carolina Constitution and common law.

The terms of the Litigation Retention Agreement do not create the Attorney General's ability to seek attorneys' fees. The fee calculation agreed to by the Attorney General and outside counsel operates as a ceiling to the fees the Attorney General can ultimately seek. In the absence of this language, the Attorney General would have the unfettered right under § 1-7-85 to seek attorneys' fees in the event the enforcement action against Cephalon is settled or a judgment is entered in favor of the State. Similarly, if the Attorney General had continued this action without outside counsel, he would still have the statutory

authority to seek attorneys' fees calculated in the same manner as set forth in the Litigation Retention Agreement.

I find that the Litigation Retention Agreement does not create the Attorney General's claim for attorneys' fees; his authority to seek those fees is derived from his duties and powers from common law and the Constitution and was recognized and codified by the General Assembly in § 1-7-85. The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees he will ultimately seek the court approve, and provides notice that any fees approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery.

E. Cephalon's Rights to Due Process Are Not Violated by the Attorney General's Retention of a Portion of Outside Counsel's Attorneys' Fees.

Cephalon urges that its constitutional rights are violated because the Attorney General retains a portion of any attorneys' fees awarded to outside counsel on a contingency fee basis.[3] Pursuant to the terms of the Litigation Retention Agreement, the below table breaks down the fees ultimately received by outside counsel and the Attorney General's office in the event of any recovery:

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

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

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

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

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

The similarities between the facts in *Marshall* and the present case are readily apparent. In the enforcement action against Cephalon, the Attorney General performs no judicial or quasi-judicial functions. He cannot assess any penalties against Cephalon; any civil penalties would be awarded by a judge after a finding that Cephalon willfully violated SCUTPA. The undisputed evidence before me demonstrates that no salaries are tied to the civil penalties received in this or any other enforcement case. Furthermore, the uncontradicted testimony from the Attorney General's office established that, even where money is received by the Attorney General as a result of a settlement or judgment in an enforcement action under SCUTPA, the Attorney General may not spend that money unless and until the General Assembly appropriates it for the Attorney General's use. Because the Attorney General's office can only spend what the General Assembly has appropriated, any recovery, including penalties, the Attorney General ultimately receives do not increase his budget without authorization by the General Assembly to retain and spend those funds.

Cephalon offers no evidence to the contrary. Indeed, its greatest point of emphasis is that, in the exceptional case, the Attorney General's contingency fee could amount to several million dollars, which could comprise a significant portion of his yearly budget. For that proposition, Cephalon craves reference to the trial court's decision in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 2007-

CP-42-1438 (June 3, 2011), where the judge imposed civil penalties of over $327,000,000. However, Cephalon's reliance on this decision is misplaced for four principal reasons. First, the civil penalties in that case were imposed by the neutral finder of fact, not the Attorney General. Second, that penalty award is currently on appeal to the South Carolina Supreme Court, which may reduce or eliminate the penalty altogether. Third, even if the South Carolina Supreme Court affirms the ruling of the trial court, the Attorney General must still seek an award of attorneys' fees from the court, which would have the discretion to reduce the fees awarded. Finally, even if the impartial trial court approves the full fee, the Attorney General cannot spend any of it without an appropriation by the General Assembly.

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

In short, Cephalon has offered no evidence at all that the "[Attorney General]'s contingent-fee interest in this case has caused [the Attorney General] to be overzealous in its prosecution of the underlying lawsuit, to act improperly or with a bias other than that inherent in the adversarial system, or to otherwise act in a manner contrary to the public interest." *See International Paper*, 2013 WL 3864317, at *14. As in *Marshall*, there is no realistic possibility that the Attorney General's contingent interest will affect his judgment in the enforcement action against Cephalon. As the Texas Court of Appeals stated, "[w]e reject the contention that simply because a lawyer will be paid a contingent fee in a civil case means that lawyer will disregard any heightened standards to which a lawyer performing government functions is subject." *International Paper*, 2013 WL 3864317, at *14. If judgment is entered against it,

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

The provisions of the Litigation Retention Agreement pertaining to the retention of attorneys' fees by the Attorney General are not constitutionally defective. As discussed above, there are numerous safeguards that must be satisfied before the Attorney General can actually spend any attorneys' fees it may ultimately acquire from its enforcement action against Cephalon. First, assuming the matter does not settle, the neutral finder of fact must determine that Cephalon violated SCUTPA. Second, with regard to civil penalties, the neutral finder of fact must determine that Cephalon knew or should have known that its conduct violated SCUTPA and, upon petition by the Attorney General, the court must determine both the number of violations and the amount of penalty to impose for each. Third, the court must approve the attorneys' fees to be awarded both to the Attorney General and outside counsel. Finally, the General Assembly must appropriate those funds for use by the Attorney General's office. Consequently, Cephalon has not shown any infringement upon its constitutional due process rights.

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

Cephalon argues that the contingency fee agreement violates the Separation of Powers Doctrine in that it allegedly diverts state funds to the Attorney General's office and to private counsel. I find this argument to be without merit. In support of this argument, Cephalon relies on S.C. Code § 1-7-150(B). This statute provides, in pertinent part,

> All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State, except . . . where some other disposition is required by law.

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

Columbia, South Carolina
June 2, 2014

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