

ORIGINAL



UNITED STATES OF AMERICA
~~BEFORE THE FEDERAL TRADE COMMISSION~~

In re

~~CFPHALION, INC. (File No. 0610202)~~

C4121

PETITION TO QUASH
~~WILMER CUTLER PICKERING HALE AND DORR LLP~~

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TABLE OF AUTHORITIES

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Federal Statutes

I. Introduction

hereby petitions to quash the Civil Investigative Demand issued by the Federal Trade

Commission (the "Commission") on July 7, 2009 ("2009 CID").¹ For the reasons described below, the Commission's authority to use compulsory process under Part II of the Commission's

versions of Cephalon's wakefulness drug, Provigil, with the Food and Drug Administration ("FDA"). See Complaint for Injunctive Relief ¶ 36, *F.T.C. v. Cephalon, Inc.*, No. 08 Civ. 2141 (E.D. Pa.), originally filed in 08 Civ. 244 (D.D.C. Feb. 13, 2008) ("FTC Provigil Complaint").

The four first-filers – Teva Pharmaceuticals, Inc. ("Teva"), Ranbaxy Laboratories, Inc. ("Ranbaxy"), Mylan Pharmaceuticals Inc. ("Mylan"), and Barr Laboratories, Inc. ("Barr") – each

Settlement and License Agreement between Cephalon, Inc. and Carlsbad Tech., Inc. (Aug. 2, 2006) (the "Carlsbad/Watson Settlement") (CFTC-ES_00206171 - CFTC-ES_00206200).³

After the Commission issued the August 30, 2006 Resolution, the staff engaged in a

[REDACTED]

On February 13, 2008, the Commission filed a complaint against Cephalon in the United States District Court for the District Columbia, alleging that the settlement agreements with the

Act ("FTC Act"), 15 U.S.C. § 45. FTC Provigil Complaint ¶ 85. Redacted

[Redacted]

[Redacted]

[Redacted]

[Redacted]

B. Contrary to the Staff's Assertions, the CID Seeks Information Relating to the Subject Matter of the Earlier Investigation and the Pending Lawsuit Against Cephalon.

Recognizing that it cannot both investigate and litigate with Cephalon on the same

subject matter, the staff attempts to justify the 2000 CID by claiming it is unrelated to the

[REDACTED]

documents related to the Provigil Settlements and also requested documents related to [Redacted]

[Redacted].⁷ In

response to the 2007 Subpoena, Cephalon produced the [Redacted], several

earlier drafts [Redacted], and thousands of documents and emails referencing [Redacted]

[Redacted] Declaration of Wendy A. Terry (“Terry Decl.”) ¶ 2.

On April 26, 2007, the Commission issued a Civil Investigative Demand to Cephalon

[REDACTED]

[REDACTED]. Letter from James C. Burling, Wilmer Cutler Pickering Hale and Dorr LLP, to Philip M. Eisenstat and Saralisa C. Brau, F.T.C. (Oct. 23, 2007). [REDACTED]

[REDACTED]

[REDACTED], the staff had ample opportunity to use its investigative powers to probe Cephalon on that issue before it brought suit in 2008. Now that the Commission has filed a civil complaint, however, it must obtain discovery pursuant to the Federal Rules of Civil Procedure.

In short, the staff is not legitimately pursuing a new inquiry or one differentiated by new circumstances, but is attempting to circumvent the judicial process by investigating matters already concluded at the administrative level.

IV. Conclusion

For all the foregoing reasons the Commission should ~~quash~~ the 2009 CID ¹¹

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APPENDIX – PUBLIC VERSION

UNITES STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

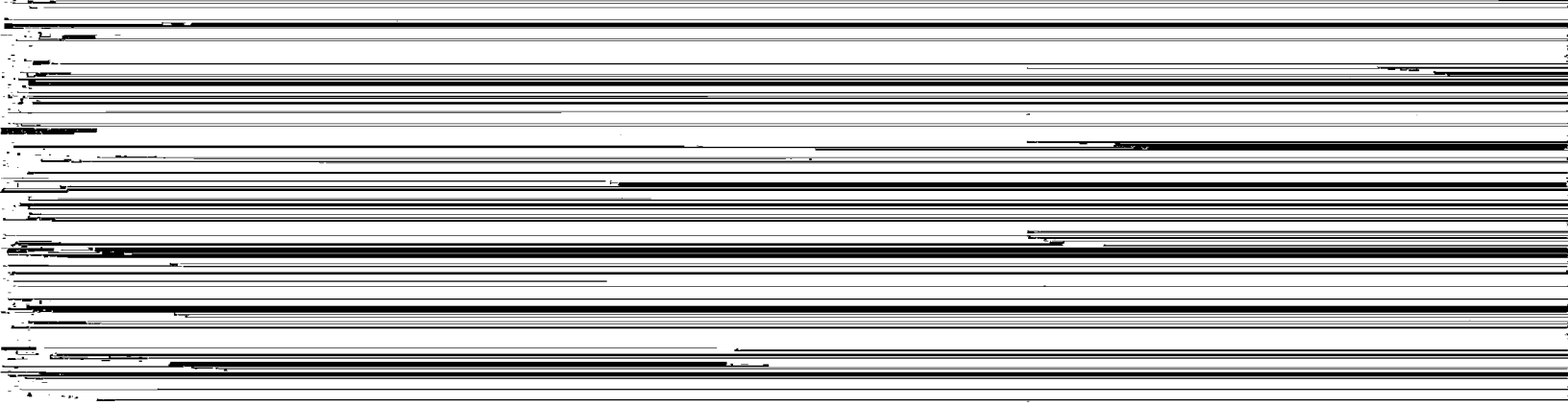
In re
CEPHALON, INC. (File No. 0610182)

CERTIFICATE OF SERVICE AND OF ACCURACY OF ELECTRONIC COPY

I, Hartmut Schneider, hereby certify that I have caused the following documents to be filed, by hand, with the Office of the Secretary of the Federal Trade Commission on this 22nd day of July, 2009: (i) one original and twelve (12) copies of the confidential version of Cephalon,

In re Petition to Quash Civil Injunction No. D. Md. 11-17-0000-1

[REDACTED]



UNITES STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re
CEPHALON, INC. (File No. 0610182)

STATEMENT REQUIRED BY 16 C.F.R. § 2.7 (d)(2)

On July 20, 2009, James C. Burling of Wilmer Cutler Pickering Hale and Dorr LLP
("WilmerHale"), counsel to Cephalon, Inc. ("Cephalon"), spoke by telephone from the Boston,

[REDACTED]

UNITES STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re

CEPHALON, INC. (File No. 0610182)

**DECLARATION OF WENDY A. TERRY IN SUPPORT OF
CEPHALON, INC.'S PETITION TO QUASH
CIVIL INVESTIGATIVE DEMAND DATED JULY 7, 2009**

I, Wendy A. Terry, Esq., declare under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I am a counsel at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP, attorneys for Cephalon, Inc. ("Cephalon"). I am a member in good standing of the Bars of the District of Columbia and the Commonwealth of Virginia. I make this declaration in support of Cephalon's Petition to Quash Civil Investigative Demand Dated July 7, 2009.
2. In response to the Subpoena dated March 15, 2007, Cephalon produced the final Redacted multiple drafts Redacted and thousands of pages of documents relating to Redacted.
3. Cephalon produced documents using bates number prefixes starting with the letter C. In addition, there were a small number of documents that used SHEK and VE.

7 On July 3, 2007, in response to Specification 5 of the CTD, Carbalen provided



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