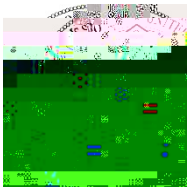

Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

November 13, 2009

VIA FACSIMILE AND EXPRESS MAIL

Watson Pharmaceuticals, Inc.
c/o Steven C. Sunshine, Esquire
Skadden Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005

Re: *Petition to Quash Subpoena* Ad Testificandum *Dated July 22, 2009*
File No. 061-0182

Dear Mr. Sunshine:

On July 30, 2009, Paul M. Bisaro (Petitioner), the President and Chief Executive Officer of Watson Pharmaceuticals, Inc. ("Watson"), filed a Petition to Quash Subpoena *Ad Testificandum* Dated July, 22, 2009 ("Petition"). The challenged subpoena was issued in the Commission's ongoing investigation to determine whether Watson, or others, are depriving consumers of access to lower-cost, generic modafinil drug products through any unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

In the course of the investigation, a subpoena was issued for Petitioner's testimony at an investigational hearing ("IH") to be held on July 31, 2009 at the Commission's offices at 601 New Jersey Ave., N.W. in Washington, DC.[1] Petitioner did not provide the requested testimony. Instead, he filed a Petition asking the Commission to quash the subpoena on the grounds that (a) the Commission already has all the information that it might obtain from his responses to any questions propounded in such an investigational hearing; [2] (b) the subpoena is unreasonable in that it seeks the testimony of a high-level corporate executive;[3] and (c) the subpoena purportedly

[1] Petition, Exhibit A at 1 (Subpoena *Ad Testificandum* issued to Paul Bisaro on July 27, 2009).

[2] *Id*. at 15-17.

[3] *Id. at 17-19.*

the U.S. market for modafinil to generic competition. Under the Hatch-Waxman Act (the Drug Price Competition and Patent Restoration Act of 1984, Pub. L. 98-417, as amended), the first firm(s) to file a Paragraph IV ANDA for a generic version of a branded drug are elig(8-)Tj9.9600 0.0000 TDQ8-

[7] At that time, Cephalon's listing in the FDA's "Orange Book" included the '516 Patent, but did not [REDACTED .] *Id*. at 3, Sunshine Decl. at ¶ 13.

[8] [REDACTED REDACTED REDACTED].

Likewise, when FTC counsel asked Mr. Buchen at his investigational hearing on June 25, 2009, whether the patent settlement agreement with Cephalon [REDACTED REDACTED], counsel instructed Mr. Buchen not to answer because the Commission was asking "[REDACTED REDACTED]."[15] FTC counsel attempted to elicit additional information regarding particular provisions of the patent settlement agreement between Watson and Cephalon that related to [REDACTED], but Mr. Buchen's counsel again instructed him not to answer because, "[REDACTED REDACTED]."[16]

It is not necessary to address the validity of Watson's privilege claims to rule on this Petition. *See Petition of Hoechst Marion Roussel, Inc.*, 128 F.T.C. 798, 804 (Nov. 1, 1999) ("The issue here is simply whether Spears must appear for a hearing, not the validity of any privileges Hoechst might claim in response to questions asked during the hearing. Indeed, no assessment of privilege claims is even possible because as yet, no questions have been posed and no proper assertions of privilege have been lodged."). In the event Mr. Bisaro appears and testifies at an investigational hearing, any unresolved dispute between the FTC and Mr. Bisaro concerning the validity of any privilege asserted will be resolved by the district court, if the Commission elects to challenge particular claims of privilege. See 16 C.F.R. § 2.13.

To summarize, the record clearly shows that fully responsive answers to the Commission's questions regarding [REDACTED] have not been provided either by Watson or Mr. Buchen. The Commission understands that Mr. Bisaro is the only other Watson employee who possesses any knowledge regarding these issues.[17] Thus, Mr. Bisaro's testimony is necessary in order for the Commission to satisfy itself that the law is not being violated.[18] Furthermore,

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business. Likewise, his reports on the progress [REDACTED] to his corporate superior, Mr. Bisaro, also appear to be ordinary course of business discussions. Petitioner has cited no authority to support a claim that a corporation can shield its day-to-day business activities from scrutiny merely by having those activities discharged by lawyers. *See Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 444 (S.D. NY 1990) (The attorney-client "privilege covers communications made in connection with the rendering of legal advice, it does not extend to the provision of business and management advice.").

[15] Buchen IH 44:22-24, Jun. 25, 2009.

[16] Buchen IH 48:9-12. This privilege claim, however, fails to account for the Commission's right to obtain information regarding Watson's understanding of the duties and limitations that Watson, or its managers believe were imposed upon the firm by reason of this contract.

[17] Petition at 17; Buchen IH 39:1.

[18] *Morton Salt Co.*, 338 U.S. at 642-43.

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[23] *Id*. at 47:10-11. The relationship between Cephalon's [REDACTED] obligations to Watson and [REDACTED] are not obvious. This is especially true in light of other provisions in that agreement that appear more likely to be related to [REDACTED]; provisions about which Mr. Buchen was instructed by counsel not to testify. *Id*. at 51:6.

[24] Press Release, Watson, Watson Announces CEO Succession Plan (Aug. 2, 2007), available at: http://ir.watson.com/phoenix.zhtml?c=65778&p=irol-newsArticle&ID=1035647&highlight= (Last Visited Oct. 2, 2009).