

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**FEDERAL TRADE COMMISSION,**

Petitioner,

v.

**PAUL M. BISARO,**

Respondent.

Misc. No. 10-289 (CKK)(AK)

**REPORT AND RECOMMENDATION**<sup>1</sup>

Pending before the Court are Petition of Federal Trade Commission for An Order Enforcing Subpoena *Ad Testificandum* (“Pet.”) [3], Memorandum of Points and Authorities in Support of Petition of Federal Trade Commission for an Order Enforcing Administrative Subpoena [13], Petitioner’s Reply Memorandum in Support of Petition for an Order Enforcing Administrative Subpoena *Ad Testificandum* (“Reply”) [20], Petitioner FTC’s Motion to Enforce the Subpoena *Ad Testificandum* Forthwith, and Memorandum in Support (“Mot. to Enforce”) [32], and Supplemental Brief of Respondent Paul M. Bisaro (“Supp. Br.”) [34]. Having heard oral argument and reviewed the submissions of the parties and the relevant case law, the Court issues the following Report and Recommendation.

---

<sup>1</sup> This case was referred by U.S. District Judge Colleen Kollar-Kotelly to the undersigned for a report and recommendation pursuant to Local Rule 72.3. (*See* Minute Order dated 06/30/2010; *see also* Order Referring Case [17] dated 05/26/2010.)





Resolution”). (Pet. Ex. 2.) The purpose of the investigation was to determine whether Cephalon, Watson, and other pharmaceutical companies had engaged in “any unfair methods of competition that violate Section 5 of the Federal Trade Commission Act . . . by entering into agreements regarding modafinil products.” (*Id.*) Four pharmaceutical companies had challenged Cephalon’s original patent for Provigil (the ‘516 patent) on the same day the patent was listed in the Orange Book, making all four companies “first filers” under the Hatch-Waxman statutory scheme. (Pet. Ex. 1 ¶ 6.) Watson, however, challenged the ‘516 patent much later. (*Id.*) Cephalon sued the generic challengers for patent infringement and eventually settled with the four first filers and Watson. (*Id.* ¶ 7.)

With regard to Watson, the FTC focused its investigation on the settlement agreement between Cephalon and Watson that was entered on August 2, 2006, after Cephalon had settled with the first four generic challengers. (Sunshine Decl. ¶ 8-9.) The FTC has since brought an action against Cephalon alleging that its settlement agreements with the four “first filers” prevented



and March 13, 2009. (Sunshine Decl. ¶ 17.) Mr. Sunshine alleges that during these telephone conversations Mr. Meier again importuned Watson to relinquish its marketing exclusivity. (*Id.*) Mr. Meier also asked Mr. Sunshine whether Watson would be interested in receiving a call from a generic pharmaceutical company that was prepared to launch a generic Provigil product. (*Id.* ¶ 18.) Before the call ended, Mr. Sunshine gave Mr. Meier permission to put another generic modafinil maker into contact with Watson. (Interrog. Resp. at 9.) The FTC thereafter contacted Apotex and indicated that if it was interested in pursuing a deal to jointly market modafinil, it should contact David Buchen, Watson's Senior Vice President and General Counsel. (Interrog. Resp. at 9-10.)

Within a week, Mr. Buchen received a phone call from Apotex seeking to negotiate a deal

“Watson refuses to talk to us about a deal to relinquish exclusivity so that we can market modafinil (US). Watson is oddly saying that it cannot talk to us due to FTC investigation relating to modafinil (US). Yet FTC is investigating because Watson refuses to talk to us . . . In my call with the FTC enforcement this morning, I indicated and [the FTC] confirmed that Watson is just mum about deal making. The reason for silence truly evades us and the FTC.”

*(Id.)*

The FTC withdrew its original subpoena of Mr. Bisaro, but issued a new one on July 23,

However, the undersigned declined to compel the deposition of Mr. Meier. (*Id.*)

Pursuant to this Court's order, the FTC answered the interrogatories and both parties supplemented the record. The FTC argues that it acted with a proper purpose in issuing Mr. Bisaro's subpoena and submits the interrogatory answers and two declarations to support its assertions. (*See* Mot. to Enforce.) The FTC further urges this Court to enforce the subpoena forthwith now that the record is complete and no improper purpose can be shown (*Id.*) Mr. Bisaro, however, maintains that the petition should be denied on several grounds, the least of which is that the subpoena was issued for an improper purpose. (*See* Supp. Br.) Mr. Bisaro also submits a sworn declaration of Mr. Buchen that the 2006 settlement with Cephalon does not prevent relinquishment. (Buchen Decl. [34-1].)

## **II. LEGAL STANDARD**

A proceeding to enforce an administrative subpoena, because of the important governmental interest in the expeditious investigation of possible unlawful activity, is summary in nature and the scope of issues that may be addressed in such a proceeding will be limited accordingly. *See United States v. Powell*, 379 U. S. 48, 57-58 (1964); *United States v. Morton Salt Co.*, 338 U. S. 632, 652-53 (1949). The focus of the enforcement proceedings generally will be on whether the inquiry is within the statutory authority of the agency, the demand not too indefinite, and the information sought reasonably relevant to the inquiry. *Morton Salt*, 338 U.S. at 652.

Even if the agency makes out a prima facie case for enforcement, a court can nonetheless decline to enforce the subpoena if the recipient of the agency process shows that enforcement would amount to an abuse of the court's process. *Powell*, 379 U.S. at 58. For example, "if the summons had been issued for an improper purpose, such as to harass the [subpoenaed party] or to put pressure





Commission's investigation." (Mot. to Enforce at 7.) To the extent that the FTC still believes that







