IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.,
Washington, DC 20580,

Petitioner,

v.

PAUL M. BISARO,
President and CEO,
Watson Pharmaceuticals, Inc.
360 Mt. Kemble Avenue,
Morristown, NJ 07962

Respondent.

Misc. No.

Case: 1:10-mc-00289
Assigned To : Kollar-Kotelly, Colleen
Assign. Date : 4/27/2010
Description: Miscellaneous

PETITION OF FEDERAL TRADE COMMISSION FOR AN ORDER ENFORCING ADMINISTRATIVE SUBPOENA *AD TESTIFICANDUM*

Petitioner, the Federal Trade Commission ("FTC" or "Commission"), petitions this Court, pursuant to Sections 9 and 16 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 49, 56, for an order compelling respondent, Paul M. Bisaro, President and Chief Executive Officer of Watson Pharmaceuticals, Inc. ("Watson"), to appear and testify in response to a subpoena *ad testificandum* issued on July 22, 2009. The subpoena seeks testimony relevant to an ongoing FTC law enforcement investigation, FTC File No. 0610182. The Commission is investigating whether certain pharmaceutical companies, including Watson, have entered into unlawful agreements to prevent generic competition to Cephalon, Inc.'s branded sleep-disorder drug, Provigil. Because sales of Provigil exceed $800 million per year and generic drugs sell for only a fraction of the price of branded drugs, the investigation will enable the Commission to learn whether the agreements are unlawfully restricting competition and costing consumers

hundreds of millions of dollars per year.

In support of its petition, the Commission states as follows:

1. The Commission is an administrative agency of the United States, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.* The Commission is authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prevent, *inter alia*, the use of "unfair methods of competition in or affecting commerce."

2. In order to determine whether violations of Section 5 may have occurred, Section 3 of the FTC Act, 15 U.S.C. § 43, empowers the Commission to prosecute any inquiry necessary to its duties in any part of the United States; Section 6 of the Act, 15 U.S.C. § 46, empowers the Commission to investigate the business and conduct of persons, partnerships, or corporations engaged in or whose business affects commerce; and Section 9 of the Act, 15 U.S.C. § 49, authorizes the Commission to issue subpoenas to compel testimony from witnesses regarding matters relating to any investigation authorized by the Commission.

3. This Court has jurisdiction over respondent and the authority to enforce the Commission's subpoena *ad testificandum* pursuant to Section 9 of the FTC Act, 15 U.S.C. § 49, which provides in pertinent part as follows:

> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

4. The Declaration Under Penalty of Perjury of James Rhilinger, which verifies the allegations of this Petition, is attached hereto as Pet. Exh. 1.

5. On August 30, 2006, the Commission issued an omnibus Resolution Authorizing

Use of Compulsory Process in a Nonpublic Investigation (FTC File No. 0610182). Pet. Exh. 2. The resolution authorized the use of compulsory process to determine whether Cephalon, Inc. ("Cephalon"), Teva Pharmaceutical Industries, Inc. (and its affiliate Teva Pharmaceuticals USA, Inc.), Barr Laboratories, Inc., Rainbows Laboratories, Inc., Milan Pharmaceuticals, Inc., Carlsbad Technology, Inc. ("Carlsbad"), Watson Pharmaceuticals, Inc. ("Watson"), or others have engaged in any unfair methods of competition that violate Section 5 of the FTC Act, 15 U.S.C. § 45, by entering into any agreements regarding any modafinil products. *Id.* The resolution directed that any and all compulsory process available to it be used in connection with this investigation. Pet. Exh. 1 ¶ 5; Pet. Exh. 2. The investigation is nationwide in scope and is being conducted by attorneys in the Health Care Division of the Commission's Bureau of Competition in Washington, D.C., where relevant documents and information are located. Pet. Exh. 1 ¶ 5.

6. Respondent Paul M. Bisaro is President and Chief Executive Officer of Watson, a publicly traded Nevada corporation, headquartered in Corona, California, with offices in Morristown, New Jersey, where respondent Bisaro's office is located. Watson develops, manufactures, and markets bioequivalent generic pharmaceutical products. Pet. Exh. 1 ¶ 3. Bisaro and Watson are engaged in, and their business affects, "commerce," as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. *Id.*

7. Under the authority of the Commission's resolution, the Commission issued civil investigative demands ("CIDs") to Watson and Carlsbad that included a series of questions relating to possible agreements relating to modafinil products. Pet. Exh. 1 ¶ 10. The Commission also issued subpoenas *ad testificandum* to David A. Buchen, Watson's Senior Vice President, General Counsel, and Secretary, and to Paul Bisaro, Watson's President and Chief

Executive Officer. Pet. Exh. 1 ¶ 11.

8. Watson, however, provided only partial responses to the CID questions. Pet. Exh. 1 ¶ 10. Accordingly, on or about June 11, 2009, Commission staff advised Watson, by letter, that its CID responses were incomplete, identified the deficiencies, and requested that Watson provide the missing information. *Id.* Watson, however, denied that its responses were deficient and did not provide all of the requested information. *Id.*

9. On June 25, 2009, Mr. Buchen appeared and testified at an investigational hearing, but failed to provide complete answers to questions relating to agreements or discussions involving modafinil products on the ground, *inter alia*, that the questions, as posed, called for responses that are protected by the attorney-client privilege. Pet. Exh. 1 ¶ 11.

10. At the investigational hearing, Mr. Buchen testified that Mr. Bisaro is the only person at Watson with whom Mr. Buchen had discussed conversations he had relating to possible agreements involving modafinil products. Pet. Exh. 1 ¶ 11, Pet. Exh. 4 at 17. Thereupon, to obtain the necessary information, on July 22, 2009, the Commission issued a subpoena *ad testificandum* directing Mr. Bisaro to appear and testify in Washington, D.C. on July 31, 2009. Pet. Exh. 1 ¶ 12; Pet. Exh. 3.

11. Rather than appear and testify, Mr. Bisaro filed a petition to quash the subpoena on July 30, 2009, pursuant to Rule 2.7 of the Commission's Rules of Practice and Procedure. Pet. Exh. 1 ¶ 13; Pet. Exh. 4.

12. On November 13, 2009, Commissioner Pamela Jones Harbour, pursuant to authority delegated by the full Commission, *see* 16 C.F.R. § 2.7(d)(4), denied Mr. Bisaro's petition to quash, concluding, *inter alia*, that FTC's staff's "concerns that certain [agreements] might delay consumer access to lower-cost generic drugs, even without considering Watson's

incomplete and contradictory responses to CIDs and subpoenas, provide ample grounds for asking Mr. Bisaro to sit for an investigational hearing as part of the Commission's continuing investigation." Pet. Exh. 1 ¶ 13; Pet. Exh. 5.

13. Thereupon, on November 27, 2009, Mr. Bisaro, by his counsel, requested review by the full Commission of Commissioner Harbour's November 13, 2009 decision, denying Mr. Bisaro's petition to quash. *See* 16 C.F.R. 2.7(f). Pet. Exh. 1 ¶ 13; Pet. Exh. 6.

14. On April 2, 2010, the Commission denied Mr. Bisaro's petition, and directed Mr. Bisaro to appear and testify at an investigational hearing on April 15, 2010, or as otherwise agreed by Commission staff. Pet. Exh. 1 ¶ 14; Pet. Exh. 7. In denying the petition, the Commission concluded, *inter alia*, that conducting an investigational hearing of Mr. Bisaro is proper because "the critical question of whether Watson has reached a potentially unlawful agreement remains unanswered," and "such an agreement, if it exists, could be delaying generic entry to detriment of consumers." Pet. Exh. 7 at 2.

15. By letter dated April 13, 2010, Mr. Bisaro, by his counsel, informed Commission staff attorneys that Mr. Bisaro would not appear and testify, notwithstanding the full Commission's denial of his petition to quash, and that he does not intend to comply with the July 22, 2009 subpoena *ad testificandum*. Pet. Exh. 1 ¶ 14; Pet. Exh. 8.

16. Commission staff met with counsel for Mr. Bisaro (at counsel's request) on April 19, 2010, in an effort to determine if the parties could resolve their differences as to Mr. Bisaro's testimony. Pet. Exh. 1 ¶ 15. Mr. Bisaro's counsel reiterated that his client did not intend to appear at the investigational hearing, as required by the July 22, 2009 subpoena and the full Commission's April 2, 2010 ruling denying the petition to quash. *Id.*

17. Respondent's repeated refusals to comply with the Commission's subpoena has

materially impeded the Commission's law enforcement inquiry. Pet. Exh. 1 ¶ 16.

18. It is in the public interest that the Commission's investigation no longer be delayed by Respondent's refusal to provide testimony in response to the subpoena.

WHEREFORE, the Commission invokes the aid of this Court and prays:

1. That this Court enter an order directing Respondent, Paul M. Bisaro, to show cause why he should not comply with and obey the subpoena *ad testificandum* directing him to appear and provide testimony;

2. That this Court subsequently enter its own order requiring Respondent to appear and testify, as directed by the Commission's subpoena, ten days from the date of issuance of this Court's order, or at such other date as may be established by the Commission; and

3. That the Commission be granted such other relief as the Court deems just and proper.

Date: April 23, 2010

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel
(D.C. Bar No. 224576)

JOHN F. DALY
Deputy General Counsel for Litigation
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Fax (202) 326-2477

Petition Exhibit 2

The Commission Resolution Authorizing Use of Compulsory Process – FTC File No. 0610182 is a public document

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN A NONPUBLIC INVESTIGATION

File No. 0610182

Nature and Scope of Investigation:

To determine whether Cephalon, Inc., Teva Pharmaceutical Industries, Inc. (and its affiliate Teva Pharmaceuticals USA, Inc.), Barr Laboratories, Inc., Ranbaxy Laboratories, Inc., Mylan Pharmaceuticals, Inc., Carlsbad Technology, Inc., Watson Pharmaceuticals, Inc., or others have engaged in any unfair methods of competition that violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. Sec. 45, as amended, by entering into agreements regarding any modafinil products.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. *et. seq.*, and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

ISSUED: August 30, 2006

Petition Exhibit 3

The Commission's July 22, 2009, Subpoena *Ad Testificandum* to Respondent is a public document

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Paul Bisaro President/CEO, Watson Pharmaceuticals, Inc. c/o Steven C. Sunshine, Esq. Skadden, Arps, Slate, Meagher & Flom, LLP 1440 New York Ave. NW, Washington, DC 20005	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Ave. NW Washington, DC 20001 Rm 7100	Markus Meier
	5. DATE AND TIME OF HEARING OR DEPOSITION
	July 31, 2009 at 10:00am

6. SUBJECT OF INVESTIGATION

See attached resolution, File No. 0610182

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Markus H. Meier, Records Custodian Saralisa C. Brau, Deputy Records Custodian	Saralisa Brau, Mark Woodward, Ellen Connelly, Alpa Gandhi

DATE ISSUED	COMMISSIONER'S SIGNATURE
7/27/09	

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

FTC Form 68-A (rev. 10/93) The original was delivered to: Mr. Paul Bisaro
Watson Pharmaceuticals, Inc.
311 Bonnie Circle
Corona, California 92880

Copies were sent to counsel
identified under Item 1

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

○ *in person.*

○ *by registered mail.*

○ *by leaving copy at principal office or place of business, to wit:*

---

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN A NONPUBLIC INVESTIGATION

File No. 0610182

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By direction of the Commission.

Donald S. Clark
Secretary

ISSUED: August 30, 2006