Interlocutory Orders, Etc.

BASF SE

Docket No. C-4253, Order, December 4, 2009

Order approving respondent's application for Commission approval ofproposed divestiture of BASF's Ciba BV Business and the Ciba IB Business to Dominion Colour Corporation.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Schlossberg:

This letter responds to the October 16, 2009, Petition of BASF For Approval of Proposed Divestiture ("Petition") requesting that the Commission approve BASF's divestiture of the Ciba BV Business and the Ciba IB Business to Dominion Colour Corporation ("DCC") pursuant to the order in this matter. The Petition was placed on the public record for comments for thirty days, until November 17, 2009, and no comments were received.

After consideration of the proposed transaction as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the divestiture of the Ciba BV Business and the Ciba IB Business to DCC. In according its approval, the Commission has relied upon the information submitted and representations made in connection with BASF's Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

THORATEC CORPORATION,
AND
HEARTWARE INTERNATIONAL, INC.

FTC File No. 091-0064, Decision, July 21, 2009

RESPONSE TO HEARTWARE INTERNATIONAL, INC.'S PETITION TO LIMIT OR QUASH SUBPOENAS *AD TESTIFICANDUM*

Dear Mr. Buffier:

On June 26, 2009, HeartWare International, Inc. ("HW") filed its Petition to Limit or Quash Subpoenas *Ad Testificandum* Dated April, 24, 2009 ("Petition").[1] The challenged subpoenas were issued in the Commission's investigation to determine whether there is reason to believe that Thoratec Corp.'s acquisition of HW would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18. This letter advises you of the Commission's disposition of the Petition seeking to limit or quash subpoenas issued to Messrs. Douglas Godshall and James Schuermann for oral testimony at investigational hearings conducted (and to be continued) in accordance with the provisions of Commission Rules 2.8, 2.8A and 2.9, 16 C.F.R. §§ 2.8, 2.8A, 2.9.[2] The Petition was referred to

[1] Commission Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1), requires that a petition to limit or quash a subpoena be filed prior to the subpoena's return date or within twenty days after service, whichever first occurs. Even though this Petition may be untimely under a technical reading of the rule, the Commission will entertain it because the events giving rise to HW's claims for relief did not occur until after the expiration of the filing deadline, and HW's Petition was filed promptly after receipt of staff's June 24 letter announcing the reconvening of the investigational hearings.

[2] In ruling on the Petition, the Commission does not reach the issue of whether HW has standing to file the Petition without joining Messrs. Godshall and Schuermann as parties to the Petition. While the Commission understands that counsel for Petitioner also represents Messrs. Godshall and Schuermann, no statement to that effect appears in the Petition. The Commission assumes that the individuals subpoenaed are aware of the instant

the full Commission for determination by Commissioner Pamela Jones Harbour, acting in her sole discretion as the Commission's delegate pursuant to the provisions of Rule 2.7(d)(4), 16 C.F.R. § 2.7(d)(4).

I. Background and Summary

The Federal Trade Commission issued subpoenas *ad testificandum* on April 24, 2009 ("subpoenas"), to Douglas Godshall and James Schuermann for oral testimony at investigational hearings. Mr. Godshall is HW's President and Chief Executive Officer. Mr. Schuermann is the Vice President for Sales and Marketing for HW. Investigational hearings were held on June 5th (Godshall) and June 11th (Schuermann). During the course of these investigational hearings, testimony was withheld by the witnesses upon advice of counsel because the admission of an exhibit, or the testimony being sought, would have elicited information that might be subject to claims of attorney-client privilege and/or the work-product doctrine. Counsel objected to the use of Godshall Exhibit No. 10 (two emails and an attached revenue model spreadsheet) on the ground that the documents had been inadvertently produced, and were subject to both attorney-client privilege and the work-product doctrine.[3] HW's counsel requested the return of the inadvertently produced documents. Commission counsel briefly questioned the witness regarding the factual bases for the privilege claim, and obtained information indicating this exhibit was produced at the "explicit" request of Mr. Buffier,[4] and that it had been requested as part of the "joint defense" of the proposed merger.[5]

Petition and have elected not to raise any additional objections particular to themselves regarding further compliance with the subpoenas.

[3] Godshall IH 245:12-249:20, Jun. 5, 2009. The exhibit was described by Commission counsel as consisting of two emails and a spreadsheet "entitled HeartWare revenue model." *Id*. at 245:20. The top email was from Godshall to Schuermann dated April 15, 2009, "subject re e-mailing HVAD financials JFApril09.XLS." *Id*. at 245:21-23. The transcript provides no further information regarding either the identity of the second email or the contents of either email or the attachment.

[4] *Id*. at 246:4

[5] *Id*. at 248:7-12.

Commission counsel then stated that the privilege and work-product issues would be submitted to the Commission's General Counsel for an evaluation of the protections claimed and instructions regarding the proper disposition of the documents. At the same time, staff reserved the right to recall Mr. Godshall for further testimony, depending on the determination of the General Counsel regarding the documents.[6] HW's counsel also reserved its right to object.[7]

Later during the Godshall investigational hearing, counsel instructed the witness not to respond to questions regarding the substance of his conversations with customers regarding their reaction to the proposed merger transaction on the grounds that communications at the request of counsel were protected by the work-product doctrine.[8] HW's counsel made a clear distinction between (1) the substance of the conversations between the witness and customers undertaken at the behest and under the supervision of counsel, and (2) the identity of the third parties with whom the conversations were held.[9] Mr. Godshall identified ten customers with whom he spoke on behalf of HW's counsel, and one further person with whom he might have had such a conversation. He was not, however, permitted to testify as to the

---

[6] *Id*. at 249:10-18. Staff subsequently advised HW's counsel that the staff would delete these documents from their files, and advised that such deletion did not constitute the Commission's agreement as to the validity of the protections being asserted. Petition, Exhibit E at 1 (Letter from James Southworth to Beau Buffier, dated June 12, 2009). Staff also requested "a written description of the process used to review HeartWare's submission for privileged materials." *Id*. The Commission understands that HW has not provided either the requested information regarding HW's privilege review processes or an updated privilege log that includes the deleted documents.

[7] *Id*. at 249:19-20.

[8] *Id*. at 287:7-12, and 20-21.

[9] The conversation between the witness and third parties was subject to work-product protection, but the identities of the third parties were not subject to such protections, according to HW's counsel. *Compare id*. at 288:17-20 (Mr. Buffier: "I'm going to instruct Mr. Godshall not to answer if any of [the substance of] those communications were held at the direction of legal counsel.") *with id*. at 287:20-21 (Mr. Buffier: "You can answer if you remember which doctors [you spoke with].").

substance of those conversations, regarding either the questions asked or the answers given.

In similar manner, Mr. Schuermann was permitted to testify regarding conversations he had with customers regarding their reactions to the transaction when those conversations were not pursuant to counsel's request and direction.[10] The witness did provide some limited information regarding conversations with third parties about the transaction when those discussions had not been undertaken at the direction of counsel. Counsel for HW advised

Mr. Schuermann not to answer any questions about the substance of any conversations that he had with third parties at the direction of counsel.[11]

Subsequent conversations between Bureau of Competition staff and HW's counsel were not successful in resolving the dispute regarding the witnesses' right to withhold answers regarding the substance of conversations undertaken at the request of counsel, and the revenue model and associated documents. On June 24, staff sent a letter to HW's counsel directing the reappearance of the witnesses "to provide testimony regarding communications they had with customers about the proposed acquisition," stating staff's belief that HW had not "established the necessary factual predicate to show that this information is protected work product."[12] The letter further directed the witnesses to reappear to answer questions about "sales and market shares with respect to any relevant product being developed by HeartWare," citing HW's privilege claims respecting the revenue model as the reason for not having examined Mr. Schuermann

---

[10] Schuermann IH 235:12-15, Jun. 11, 2009 (Ms. Delbaum: "At this point, Mr. Schuermann, I'll just caution you not to reveal any communications that you had at our request. If you have knowledge of customer reaction outside of that, feel free to answer.").

[11] *Id*. at 250:18-25.

[12] Petition, Exhibit C (Letter from James Southworth to Beau Buffier, dated Jun. 24, 2009) at 1.

about sales and market shares during his investigational hearing on June 11.[13]

The Petition, dated June 26, 2009, was filed on June 29. The Petition seeks to limit or quash the reappearance of the witnesses for further investigational hearing examination. Petition at 19. In addition to reiterating HW's claims of attorney-client privilege and work-product protections, the Petition claims that it would be unduly burdensome to require Mr. Schuermann "to return to Washington, D.C. for further hearings," Petition at 18, because staff already had an extended opportunity in which these issues could have been raised with Mr. Schuermann.

II. Third-Party Interviews by HeartWare's Managers at the Direction of Counsel in Anticipation of Litigation Are Entitled to Protection as Trial Preparation Materials.

Commission Rule 2.9(b)(2), 16 C.F.R. § 2.9(b)(2), permits a witness at an investigational hearing to refuse to answer questions the answers to which are privileged. That rule, however, does not provide any guidance regarding the perimeters of the privileges that may be asserted. The Commission will read Rule 2.9(b)(2) *in pari materia* with Rule 3.31(c)(3)(Hearing preparations: Materials.), 16 C.F.R. § 3.31(c)(3). The latter rule protects trial preparation materials from discovery if they were "prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent)." *Id*. The protections afforded by this rule are not absolute; they may be overcome upon a showing that the party seeking discovery has substantial need of the materials in preparation of its case and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge *shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

[13] *Id*. at 1-2.

Id. (emphasis added). The protections afforded to trial preparation materials under Rule 3.31(c)(3) are substantially similar to the work-product doctrine. *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 2D §§ 2021 - 2028 at 313-415 (1994); *Hickman v. Taylor*, 329 U.S. 495 (1947). Our rule should be construed accordingly.

Commission staff do not appear to question that some third-party interviews undertaken by these two witnesses were done in anticipation of litigation for HW or its attorneys, and at the direction of counsel. Mr. Godshall's testimony on the latter point stands unrebutted in this record:

Q: Have you talked to any customers about this transaction?

A: I've spoken with many customers and have been advised by – have been requested by counsel to speak to customers, to help educate counsel as well as to collect customer opinion. So since the transaction, my customer discussions on the subject of this deal have been at the direction of counsel.

Godshall IH at 286:18-25. On the current record, HW has provided an adequate factual basis to support its assertion that customer interviews conducted by HW managers at the direction of counsel in anticipation of litigation are entitled to trial preparation materials protections within the meaning of Rules 2.9(b)(2) and 3.31(c)(3).

Commission staff could only overcome the qualified protections of Rule 3.31(c)(3) by showing that there was a "substantial need [for the customer interview materials] . . . and that [staff are] unable without undue hardship to obtain substantial equivalent materials by other means." Customer reactions to prospective mergers are important to the merger review process; however, that importance, standing alone, is not sufficient to overcome the protections of our rule under the circumstances. The Commission understands that staff have had a reasonable opportunity to interview each of HW's customers identified in the investigational hearing testimony of Messrs. Godshall and Schuermann. The record does not support a finding that staff are

"unable without undue hardship to obtain the substantial equivalent of the [customer interviews identified by the testimony of Messrs. Godshall and Schuermann] by other means." *Id*. The Commission also believes that staff can obtain comparable information from other third-party interviewees, at least to the extent that the identity of those third parties has been provided by HW.[14] Accordingly, the Petition shall be granted in part.[15]

III. Additional Investigative Hearing Time Is Not Unduly Burdensome.

HW has not demonstrated that resumption of the investigational hearings is unwarranted. Directing the witnesses to reappear for further examination regarding sales and market shares does not necessarily raise any claim of privilege.[16] HW's does not dispute staff's right to question Mr. Schuermann regarding sales and market share information.[17] Rather, it objects to the resumption of Mr. Schuermann's investigational hearing on the grounds that staff had, and failed to avail themselves of, the

---

[14] HW does not contest its obligation to identify the customers whose interviews were conducted by its managers at the request of counsel in anticipation of litigation. Godshall IH at 287:20-21. *See also Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) ("Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them.").

[15] Granting the Petition in part recognizes the validity of the privilege claim, but is not a limitation upon staff's right to ask questions regarding customer interviews, including without limitation issues related to: (1) the unprivileged details of otherwise privileged conversations, (2) issues related to the scope of privilege being claimed with respect to otherwise privileged conversations, or (3) the further examination of the factual bases for such claims of privilege. In any subsequent questioning, HW may assert further privilege claims, and staff may seek resolution of such claims through a district court enforcement action commenced by the FTC's General Counsel in accordance with the provisions of Rule 2.13, 16 C.F.R. § 2.13.

[16] Staff's request to resume the investigational hearings of the witnesses may be based in part on HW's assertion that Godshall Exhibit 10 is protected by claims of privilege and the work-product doctrine, but that does not provide a ground for prohibiting the resumed examination of these witnesses. It is not necessary to resolve whether that exhibit is privileged to dispose of the Petition.

[17] Petition at 17-18.

opportunity to examine Mr. Schuermann regarding those subjects during the first 9½ hours (including breaks) of his investigational hearing on June 11. Petition at 18. HW claims that staff should not have a "second bite of the apple" because doing so would constitute an "abuse of process" and would be "presumptively unreasonable" in light of the 7-hour limitation on civil litigation depositions conducted pursuant to Fed. R. Civ. P. 30(d)(1). Petition at 18-19.

The mistake lies in HW's assumption that Commission investigational hearings should be governed, by analogy, by the limitations included within the Federal Rules of Civil Procedure. To the extent that the scope of the Commission's Rules of Practice regarding its conduct of investigations should be construed by analogy to some other legal activities, the Supreme Court has observed that the appropriate analogy is to the grand jury, not to civil litigation.[18] Commission rules applicable to the conduct of investigational hearings do not include time limitations comparable to those cited by HW's Petition.[19] Rule 2.9(b)(6) vests the person conducting an investigational hearing with broad discretion to "take all necessary action[s] to regulate the course of the hearing;" that, of necessity, includes the discretion to adjourn and reconvene a hearing at a later date, especially when, as here, doing so will permit all parties to the hearing to become better informed regarding the scope and validity of any claimed rights to withhold particular evidence or testimony.

HW claims that the Commission should prohibit reconvening these adjourned investigational hearings because reconvening them will impose a "substantial burden and expense" for these

---

[18] *Fed. Trade Comm'n v. Morton Salt Co*., 338 U.S. 632, 642-43 (1950) ("[The FTC] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurances that it is not. When investigatory and accusatory duties are delegated to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.").

[19] *See* Rules 2.8 (Investigational Hearings), 2.8A (Withholding Requested Materials), and 2.9 (Rights of Witnesses in Investigations), 16 C.F.R. §§ 2.8, 2.8A, 2.9.

witnesses. Petition at 3 and 18. HW cites no legal authority for its burdensomeness claim.[20] Accordingly, the Commission finds that the burdens claimed are not of a magnitude sufficient to justify the discretionary quashing of these subpoenas by the Commission.[21] That said, the Commission is aware that reconvening investigational hearings will impose some burden. The Commission encourages staff to consider reconvening these investigational hearings at a location that will mitigate some of the travel burden for the witnesses.[22]

IV. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED THAT Commission staff may, subject to Petitioner's right to withhold information in accordance with the terms of the Commission's Rules of Practice and this Letter Ruling, reconvene the adjourned investigational hearings of

---

[20] Furthermore, HW does not contest the relevance of the subject area to be covered in the resumed investigational hearing. Petition at 17-18 ("[HW] has never disputed or objected to Mr. Schuermann being questioned as to his views on 'sales and market shares with respect to any relevant product being developed by HeartWare.' [HW's] sole objection has been with respect to questions about the substance of the document (and communications surrounding the document) to the extent that such questions would divulge information protected by the work-product doctrine or the attorney-client privilege.").

[21] *See Fed. Trade Comm'n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*) ("Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business."). HW has provided the Commission with no cognizable justification for why it should afford HW greater relief than it could obtain from a district court in a subpoena enforcement action initiated by the Commission.

[22] The Commission does not know whether staff will need to recall both witnesses in light of this ruling, or whether they ever intended to re-examine Mr. Godshall concerning sales and market shares; the latter point was unclear from the June 24 letter to HW's counsel.

Messrs. Godshall and/or Schuermann at such dates and times as they may direct in writing, in accordance with the powers delegated to them by 16 C.F.R. § 2.9(b)(6).

By direction of the Commission.

Responses to Petitions to Quash

CEPHALON, INC.

FTC File No. 061-0182, Decision, November 13, 2009

RESPONSE TO WATSON PHARMACEUTICALS, INC.'S PETITION TO LIMIT OR QUASH SUBPOENAS *AD TESTIFICANDUM*

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 was issued for an improper purpose.[4]

---

[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.*

[4] *Id*. at 19-20. Watson also suggests (without supporting authority) that the investigatory resolution cited by staff as authority for issuing the instant subpoena expired when the Commission instituted a civil action against Cephalon in February 2008. *Id*. at 15 note 73. This claim is without merit. This is a continuing resolution that contains no time or other limitations. The

The record does not support these claims. Therefore, the relief requested by the Petition is denied.

This letter advises you of the Commission's disposition of the Petition.[5] This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[6]

Background and Summary

Watson develops, manufactures, and markets generic versions of brand-name drugs. In December 2004, Watson and its development partner (Carlsbad Technology, Inc.), filed an abbreviated new drug application ("ANDA") for a modafinil product with the United States Food and Drug Administration ("FDA"). Modafinil is the active ingredient in a wakefulness-enhancing drug that at present is distributed in the United States exclusively by Cephalon, Inc. under the brand name Provigil®. Provigil is covered by two Cephalon patents that are relevant to the Petition: U.S. Reissued Patent No. 37,516 ("the '516 Patent"); and U.S. Patent No. **[REDACTED]** Patent"). Petition at 3, 6.

Commission's litigation against Cephalon has no effect on the Commission's ability to continue the investigation of other parties for potential acts of wrongdoing covered by the resolution. Watson also claims the subpoena is unreasonably burdensome because it is returnable in Washington, DC rather than New Jersey, Mr. Bisaro's place of residence. *Id*. at 14 note 72, 19. Petitioner, however, provides no factual basis for this claim of burden.

[5] The request for confidential treatment in the Petition is under review by the Commission Office of General Counsel. Pending the completion of that review, the bracketed material in boldface print in this letter ruling will be redacted from the public record version of this letter ruling. The public record version of this letter ruling will be placed on the public record, including the public Commission Website, at or after 9 a.m. on November 30, 2009.

[6] This letter ruling is being delivered by facsimile and express mail. The facsimile copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.