UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **CEPHALON, INC.,** **Defendant.**	**Civil Action No. 08-0244 (JDB)**

MEMORANDUM OPINION

Defendant Cephalon, Inc., is the manufacturer of the prescription wakefulness drug known as Provigil. Cephalon also owns a patent relating to the "particle size composition" of Provigil's active ingredient, modafinil. In late December 2002, Cephalon instituted a single patent infringement case against four pharmaceutical companies that had applied to sell generic modafinil products that would compete directly with Provigil. After more than two years of litigation, Cephalon eventually reached independent settlements with each of those companies whereby they agreed to forego entry into the market until 2012 in return for lucrative side agreements with Cephalon. Those settlements are the subject of several consolidated antitrust class actions currently pending against Cephalon in the Eastern District of Pennsylvania. On February 13, 2008, the Federal Trade Commission ("FTC" or "Commission") filed this action against Cephalon, claiming that it had unlawfully monopolized the market for wakefulness drugs by impeding the entry of generic competitors to Provigil through the settlement arrangements. Cephalon has now moved to transfe

Upon careful consideration, the Court will grant Cephalon's motion.

BACKGROUND

Cephalon is a Delaware corporation that has its principal place of business in Frazer, Pennsylvania. See Def.'s Mot. Attach. Aff. of Randall J. Zakr

entrants can show "that either: (1) the generic version does not infringe the patents on the brand-name drug, or (2) the patents are invalid." Compl. ¶ 16. Such a showing is made to the FDA by

[1] These provisions cover only paragraph IV filings made before December 2003, as is the case here.

controversy.

The agreements provide that each of the generic manufacturers may not introduce generic versions of modafinil until April 2012. Id. Cephalon insists that those settlement agreements were negotiated exclusively via phone conversations (and e-mail communications) that took place at the company's corporate headquarters in Frazer, Pennsylvania. Id. ¶ 10. Meanwhile, "[c]ontemporaneous with the Settlements, Cephalon also entered into certain other business transactions with the Generics and other entities." Id. ¶ 11. As Cephalon would have it, those side agreements are simply typical business arrangements. The FTC and a litany of private plaintiffs in the Pennsylvania action see it differently. According to the FTC, during the course of the patent litigation it became evident to Cephalon that generic entry by one or more of the manufacturers was all but certain to occur at some point in 2006, thereby "decimat[ing] [Provigil's] sales." Compl. ¶ 1. Cephalon does not own a patent on modafinil itself; the RE37,516 patent covers only the particular size composition of modafinil used in Provigil. But the FTC maintains that "Cephalon's Particle Size Patent could be easily circumvented." Id. ¶ 36. Put another way, Cephalon was unlikely to prevail in its patent infringement suit against the four generic manufacturers -- and that lawsuit was the only impediment to the introduction of generic competition to Provigil.

Faced with that reality, the FTC argues, "Cephalon bought off all four of its potential competitors" in order to maintain its monopoly position in Provigil. Id. ¶ 3. Under this view, the side arrangements reached contemporaneously with the settlement agreements were not the product of ordinary business necessities; rather, they were effectively lucrative pay-outs to the generic manufacturers designed to "handsomely compensate[]" them in lieu of introducing

generic competitors to Provigil. Id. Hence, in the words of Cephalon's CEO: "We were able to get six more years of patent protection. That's $4 billion in sales that no one expected." Id. ¶ 4.

Moreover, the settlement agreements in effect preclude generic entry by other manufacturers as well. Because the four first filers enjoy a 180-day exclusivity period, FDA is "prevented by law from approving any other generic version of Provigil until the 180-day exclusivity period has been triggered and run." Id. ¶ 85. But under the settlement agreements that window will not start to run until April 2012, when the first filers may finally begin to market generic Provigil. Significantly, the other trigger for starting the 180-day exclusivity period -- an appeals court decision concerning whether Provigil's patents were either infringed upon or invalid -- will also not come to pass with respect to the first filers owing to the settlements. And the FTC maintains that "Cephalon has taken further steps to ensure that no court decision will trigger the 180-day exclusivity period, including settling or refusing to litigate with other generic companies that could trigger the exclusivity period." Id. ¶ 88.

The FTC began investigating this transaction in April 2006. See FTC Opp'n Attach. Decl. of Saralisa C. Brau, Esq. ¶ 2. Meanwhile, a direct purchaser of Provigil filed an antitrust suit against Cephalon and the four generic manufacturers in the Eastern District of Pennsylvania on April 27, 2006, alleging that the agreements violated Sections 1 and 2 of the Sherman Act. See FTC Opp'n Attach. Decl. of Ba 18 hat ill also not come to pass

The FTC filed this action on February 13, 2008. Although the complaint alleges violations of Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), the action is premised upon the same operative facts and events that form the basis for the private Sherman Act cases pending in the Eastern District of Pennsylvania. In light of that fact, Cephalon moved this Court to transfer the case to that district. FTC opposes transfer on three broad grounds: (1) that Cephalon has failed to make an adequate case for transfer; (2) that the United States is entitled to deference in choosing its forum for antitrust actions; and (3) that transfer to the Eastern District of Pennsylvania would unduly delay the government's prosecution of this case to the detriment of consumers nationwide.

STANDARD OF REVIEW

The governing statute, 28 U.S.C. § 1404(a), provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought." "The Court has 'broad discretion' to order transfer under this standard." Rosales v. United States, 477 F. Supp. 2d 213, 215 (D.D.C. 2007) (quoting In re Scott, 709 F.2d 717, 720 (D.C. Cir. 1983)). "[T]he proper technique to be employed is a factually analytical, case-by-case determination of convenience and fairness." SEC v. Savoy Indus., 587 F.2d 1149, 1154 (D.C. Cir. 1978) (citing Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). "As a general matter, the burden is on the party seeking transfer to demonstrate that the 'balance of convenience of the parties and witnesses and the interest of justice are in [its] favor." Thayer/Patricof Educ. Funding LLC v. Pryor Res., 196 F. Supp. 2d 21, 31 (D.D.C. 2002) (quoting Armco Steel Co. v. CSX Corp., 790 F. Supp. 311, 323 (D.D.C. 1991)). There are several relevant factors to consider in this analysis, among them:

> The private interest considerations include: (1) the plaintiffs' choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses . . . , but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof. The public interest considerations include: (1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home.

Id. at 31-32 (quoting Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr., 24 F. Supp. 2d 66, 71 (D.D.C. 1998)).

DISCUSSION

The threshold question here is whether the FTC could have brought this case in the Eastern District of Pennsylvania as an initial matter. This issue is not seriously disputed because it is plainly evident that the FTC could have done so. FTC's venue provision provides, in relevant part, that "[a]ny suit may be brought where . . . [the] corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28." See 15 U.S.C. § 53(b)(2). Cephalon both "resides," see 28 U.S.C. § 1391(c), and transacts business at its principal place of business in Frazer, Pennsylvania, which is within the Eastern District of Pennsylvania.

deference, and that deference is particularly heightened when the government brings an antitrust suit. The Commission also postulates that Cephalon's ultimate goal in seeking this transfer is to

[2] Notwithstanding the Commission's sweeping assertion that antitrust plaintiffs should be afforded "heightened respect" in their forum selections, see FTC Opp'n at 10, the FTC pru

Columbia. None of the negotiations that led to the settlement agreements at the heart of this controversy took place in, or were in any other way related to, the District. See Zakreski Aff. ¶¶ 10-11. Moreover, the patent infringement suit filed by Cephalon, which, in turn, resulted in the settlement agreements, was filed in the District of New Jersey, id. ¶ 8. That lawsuit was also not related in any way to the District of Columbia. Indeed, neither Cephalon nor the four generic manufacturers maintain their corporate citizenship or principal places of business within the District of Columbia. In short, neither the operative events of this lawsuit nor the parties that were involved in those events have any meaningful connection to this District.

To be sure, the FTC "resides" in the District of Columbia in the sense that the agency's

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much. The logical conclusion of that line of argument suggests that a manufacturer, such as Cephalon here, may be subject to suit in any forum where its products are ultimately sold. It is difficult to conclude that the Commission implies otherwise, because the mere fact that the District of Columbia is the nation's capital does not mean that decisions from this Court have any additional nationwide effect beyond that of other district courts.

Turning to the convenience of the parties and witnesses, Cephalon argues that the Eastern District of Pennsylvania is the more appropriate forum because Cephalon's corporate headquarters is located there as well as many of the material fact witnesses in this case. See Def.'s Mot. at 14. Those witnesses include the principal negotiators of the settlement agreements and other employees familiar with Cephalon's business operations. Moreover, Cephalon maintains that "not one of [its] likely fact witnesses resides in the District of Columbia," and indeed "none of the Generics, whose employees may also be called to testify, is either incorporated in or has its principal place of business in the District of Columbia." Id. Finally, to the extent that "access to sources of proof," see Thayer/Patricof Educ. Funding, 196 F. Supp. 2d at 31-32 (citations omitted), is an issue in this case, Cephalon presumably maintains records and documents regarding the settlement agreements and underlying patent litigation at its corporate headquarters located in the Eastern District of Pennsylvania.

The FTC correctly responds by pointing out that the proper inquiry with respect to the convenience of witnesses is "not whether certain witnesses may be located outside the chosen forum, but instead whether those 'wit[illegible]

Cephalon's showing.

The most compelling point in Cephalon's favor is the risk of inconsistent judgments that would arise if this case is not transferred. Although there are some differences between the private parties' claims against Cephalon and the government's case -- namely that the private litigants must demonstrate antitrust injury and prove damages -- at the core the two matters involve identical issues of fact and law. Hence, absent transfer to the Eastern District of Pennsylvania, Cephalon would be forced simultaneously to litigate two cases in two different courts arising out of precisely the same conduct. That obviously presents a serious risk of inconsistent judgments. If this Court, for instance, were to find that reverse-payment settlements are lawful while the district court in Pennsylvania reached the opposite result, or vice versa, Cephalon would face a classic case of conflicting judgments. That is exactly the sort of inconsistent result that transfer can ameliorate.

There is ample authority to support the conclusion that the interest of justice dictates that transfer is appropriate to avoid subjecting a defendant to the grave risk of inconsistent judgments deriving from the same conduct. "Courts in this district have clearly stated, 'The interests of justice are better served when a case is transferred to the district where related actions are pending.'" Reiffin, 104 F. Supp. 2d at 56 (quoting Martin-Trigona v. Meister, 668 F. Supp. 1, 3 (D.D.C. 1987)). Prior` decisions have recognized that there is a "compelling public interest in avoiding duplicative proceedings (and potentially inconsistent judgments) [that] warrants transfer of venue." Id. at 58. Indeed, "the most significant factor weighing in favor of transferring [a] case is the presence of closely related litigation." Barham v. UBS Fin. Servs., 496 F. Supp. 2d 179, 180 (D.D.C. 2007). "[T]he fact that there is an ongoing case dealing with similar issues in

another jurisdiction weighs very heavily in favor of a transfer under § 1404(a)." Holland v. A.T. Massey Coal, 360 F. Supp. 2d 72, 77 (D.D.C. 2004) (citing In re Scott, 709 F.2d at 721 n. 10); see also California Farm Bureau Fed'n v. Badgley, 2005 U.S. Dist. LEXIS 12861 at *7 (D.D.C. June 29, 2005) ("[A] significant risk that this court and the California court would issue inconsistent orders subjecting [defendant] to inconsistent obligations . . . weigh[s] heavily in favor of transfer.").

Tellingly, the FTC does not dispute that its proposed course of action would create a serious risk of inconsistent judgments. Instead, the Commission urges the Court to disregard entirely that concern. After all, the FTC argues, "courts routinely deny such transfer requests when related cases are pending in different districts, even though inconsistent results are always possible." See FTC Opp'n at 9. In support of that proposition, the FTC cites to five cases (the most recent of which is over ten years old) that all involve factors or circumstances that distinguish them from the present case.[4] See AT&T Corp. v. PAB, Inc., 935 F. Supp. 584 , 593 (E.D. Pa. 1996) (transfer declined where corporate defendants were both "Pennsylvania corporations with their principal places of business in the Eastern District of Pennsylvania," and thus there were efficiencies associated with proceeding in that district because "[d]efendants' witnesses and documentary evidence [was] accessible" there); Combs v. Adkins & Adkins Coal Co., Inc., 597 F. Supp. 122, 125 (D.D.C. 1984) (transfer declined because the litigation concerned pension funds administered in the District of Columbia and the putative transferee district was engaged in litigation that involved separate entities); Star Lines, Ltd. v. Puerto Rico

[4] The Court notes that it is a bit of a stretch to refer to five decisions spanning over forty years as reflecting a "routine" practice.

[5] In its filings before this Court, the Commission has not admitted that it brought this action in the District of Columbia to further its goal of obtaining a cirg

expense of exposing a single defendant (engaged in a single course of conduct) to conflicting judgments in order to advance the agency's enforcement goals. The danger, and burden, of inconsistent judgments against one defendant based on the same events, in short, outweighs whatever legitimate interest the FTC may have in achieving that result for strategic reasons. Hence, this factor strongly weighs in favor of transfer "in the interest of justice."

b. Public Interest Considerations

Of the three "public interest" factors identified in Thayer/Patricof Educ. Funding, two support transfer and one has no real application to this case. To begin with, the first factor -- familiarity with the governing laws -- cuts in Cephalon's favor here. The district court in Pennsy fa

District of Pennsylvania than there were before this Court (25,758 vs. 3,936 cases, respectively),[6] civil cases in the Eastern District of Pennsylvania had a somewhat shorter median filingd by the massive volume of

[6] These figures are exaggerated by the massive volume of consolidated MDL cases pending in the Eastern District of Pennsylvania.

home -- has little application here. The use of reverse-payment settlements to preclude generic entry into the pharmaceutical market is not an issue unique to either the District of Columbia or the Eastern District of Pennsylvania; in fact, it is not a local issue at all. See Reiffin, 104 F.2d at 52 n. 8. Instead, it is a question that has nationwide significance, the resolution of which will have the same effect if rendered by this Court or the district court for the Eastern District of Pennsylvania. Beyond the general, and minimal, interest in deciding issues relating to Cephalon in its "home" federal district court, then, this factor is of no relevance.

In sum, Cephalon has carried its burden to show that "the balance of convenience of the parties and witnesses and the interest of justice are in [its] favor." Thayer/Patricof Educ. Funding, 196 F. Supp. 2d at 31. The FTC's selection of the District of Columbia as its chosen forum is not entitled to substantial deference because it has no significant connection to the events giving rise to this case. Instead, the Eastern District of Pennsylvania is the more appropriate forum because the operative events arose there and the defendant and several significant fact witnesses reside there. The public interest factors -- namely, judicial efficiency -- favor transfer as well due to the essentially identical cases currently pending before the court in the Eastern District of Pennsylvania. Most importantly, transfer is especially appropriate here to avoid the risk that Cephalon will be subject to inconsistent judgments arising out of the same conduct.

II. Consolidation and 28 U.S.C. § 1407

The FTC devoted a large portion of its opposition brief to arguing that its case may not be consolidated with the private antitrust actions pending in the Eastern District of Pennsylvania. At first glance, that seems a bit odd because Cephalon is not presently seeking consolidation.

Nevertheless, the FTC insists that Cephalon's transfer request is in fact part of a "two-step" consolidation process. The first step, the argument goes, is transfer under 28 U.S.C. § 1404(a). The second is consolidation under Fed. R. Civ. P. 42(a). But the Commission states that Congress has expressed a strong public policy interest in exempting government antitrust suits from consolidation with private actions. Thus, the Commission claims that it will not consent to consolidation and that it is exempt from compulsory consolidation. And, it asserts, because the only efficiencies associated with transferring this case would come from consolidation, but it will not permit such consolidation to occur, there is nothing to be gained by transferring this case to the Eastern District of Pennsylvania. Indeed, the Commission argues that the only result of transfer would be needless delay of the government's action.

The Court is not persuaded. The short answer to FTC's contention is that consolidation is not the sole efficiency associated with transferring this case. In fact, the most compelling reason to grant this transfer -- the need to avoid the risk of inconsistent judgments -- is entirely independent from the prospect of consolidation. The legal question raised by the two actions is the same: whether reverse-payment settlements run afoul of the antitrust laws. Having a single district judge decide that legal question, even in two unconsolidated cases, significantly mitigates -- indeed, effectively eliminates -- the risk of conflicting legal interpretations. It is even possible that the question may only need to be decided once, as the doctrines of collateral estoppel or issue preclusion may apply in the subsequent case. And the fact that the Eastern District of Pennsylvania is Cephalon's home, [illegible] 4Tj5.2800 0.0000 TD(tiv)Tj12.7200 0.0000 TD(e)TjT(le)Tj0(istrict of)TjET

[7] The Commission's reliance on United States v. Dentsply Int'l, Inc., 190 F.R.D. 140 (D. Del. 1999), is misplaced. That case involved a motion to consolidate a government antitrust case

CONCLUSION

For the foregoing reasons, the Court will grant Cephalon's motion to transfer this action to the Eastern District of Pennsylvania. A separate Order accompanies this Memorandum Opinion.

/s/
JOHN D. BATES
United States District Judge

Date: April 28, 2008

distinct purposes and inquiries. Whereas multidistrict litigation is primarily concerned with judicial efficiency in deciding large numbers of related cases, the transfer inquiry under § 1404(a) is oriented more towards the private interests of the individual parties in a given case (in addition to public considerations).