IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION Plaintiff, v. CEPHALON, INC. Defendant.	Civil Action No. 1:08-cv-00244 (JDB)

FEDERAL TRADE COMMISSION'S OPPOSITION
TO CEPHALON'S MOTION TO TRANSFER

Transfer and consolidation or coordination of the FTC's enforcement action with related private actions in Pennsylvania is contrary to public policy. That policy, embodied in the statute governing multidistrict litigation, 28 U.S.C. § 1407 (2000), rests on the public interest in expedited resolution of government antitrust actions that seek to stop ongoing anticompetitive conduct harming consumers. To further this public interest, Congress provided that government antitrust suits be afforded special status, to avoid the risk that coordinating or consolidating them with private antitrust actions might delay relief for the public. Cephalon dismisses the policy reflected in Section 1407 as being of "no relevance" here on the ground that its current motion seeks only transfer and the transferee court will decide whether to consolidate the cases. But the public interest that Congress sought to protect by exempting government antitrust actions from the multidistrict litigation rules is plainly implicated when a defendant tries to use a two-step process to circumvent that exemption.

Cephalon's motion is further undercut by the simple fact that the pending private antitrust damage actions to which it would tether the FTC's injunction case have been at a standstill for over a year, without any substantial proceedings having taken place. The prospect that transfer would delay the FTC's case is beyond dispute. Finally, even aside from the public interest in avoiding potential delay, Cephalon's attempt to demonstrate that private interests make transfer appropriate here falls far short of what the law requires.

BACKGROUND

A. The FTC's case

The escalating cost of health care in the United States – and in particular, of prescription drugs – is a significant, national issue. The FTC's complaint seeks to enjoin an ongoing violation of the FTC Act that is contributing to the escalating prescription drug costs, and costing consumers hundreds of millions of dollars every year that it continues. The complaint charges that Cephalon engaged in a course of anticompetitive conduct to prevent the entry of low-cost generic products that would have competed with its flagship product, Provigil, a branded drug that had over $800 million in sales in the United States last year. Facing the threat of imminent entry by at least one of four generic drug makers that had challenged the only remaining patent on Provigil (a narrow patent relating to the size and distribution of particles of the active ingredient), Cephalon paid each of the companies to abandon its patent challenge and agree not to compete with Provigil until April 2012. This date – three years prior to expiration of the challenged patent – is some six years later than was likely to occur absent Cephalon's unlawful conduct.

There is a strong public interest in expediting the resolution of this case. The FTC is seeking a permanent injunction that, among other things, would bar Cephalon from maintaining

the provisions in its agreements with the generic challengers that prevent the sale of a generic version of Provigil. If the entry restriction in those agreements is eliminated, generic versions of Provigil will be able to enter and compete. Cephalon and the generic firms have predicted that generic versions of Provigil would be priced at 75 to 90 percent below the price of branded Provigil and would quickly capture the vast majority of Cephalon's sales. Unnecessary delay in the prosecution of the FTC's case would be extremely costly for patients and those who purchase Provigil on their behalf. Delay, however, is exactly what Cephalon expects – and is counting on – in order to preserve its Provigil monopoly.[1]

B. The private suits pending in the Eastern District of Pennsylvania

Although various private antitrust suits challenging Cephalon's agreements with the four generic companies were filed in 2006, after more than a year and a half, there has been no significant progress in these cases. Declaration of Barry S. Taus ("Taus Decl.") ¶¶ 3, 8-10. Discovery has not even begun. Taus Decl. ¶ 10.

The private cases are damage actions – most are class action suits – alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (2000). Taus Decl. ¶ 7. Rather than a single defendant (as in the FTC's case), there are five: Cephalon and the four generic companies that were paid not to compete. Taus Decl. ¶ 6. The defendants all filed motions to dismiss the

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[1] Cephalon 8-K at 3 (filed March 23, 2007) (stating that a possible FTC challenge to Cephalon's patent litigation settlements "would take many years to resolve, and therefore [] the final resolution of this matter will not have a material adverse impact on [Cephalon's] business."), *available at* http://www.sec.gov/Archives/edgar/data/873364/000110465907021799/a07-8836_18k.htm (last visited March 6, 2008); *see also* Cephalon Q2 2006 earning call transcript at 21-22 (August 3, 2006) (statements to the same effect by Cephalon's CEO and General Counsel), *available at* http://seekingalpha.com/article/14976-cephalon-q2-2006-earnings-conference-call-transcript-ceph?page=-1 (last visited March 6, 2008).

complaints for failure to state a claim, and have refused to comply with plaintiffs' discovery requests while the dismissal motions are pending. Taus Decl. ¶¶ 8, 10. The dismissal motions contend that the private plaintiffs lack antitrust standing to maintain the suits. Taus Decl. ¶ 9. In addition, the defendants claim that mere possession of a patent, even though untested in the courts, provides a broad antitrust immunity that allows a patent holder with monopoly power to grant would-be competitors a share of the monopoly profits in exchange for a promise to stay off the market for the life of the patent.

Although briefing on the motions to dismiss was completed more than a year ago (in January 2007), oral argument has yet to be scheduled. Taus Decl. ¶ 8. Likewise, briefing on plaintiffs' motion to compel responses to discovery has been completed for over a year, but the motion remains unresolved. Taus Decl. ¶ 10. Cephalon suggests that the court in the Eastern District of Pennsylvania is already familiar with the issues raised by the FTC's case, but nothing in the proceedings in the private cases indicates that is so.

Thus, although the private damage suits were filed before the FTC's suit, these actions are far behind the FTC in trial preparation. The private damage actions were filed based on publicly available information after learning of Cephalon's agreements with the generic firms in early 2006. Taus Decl. ¶ 2. The FTC filed its case after an investigation that spanned a year and a half and included internal business documents from Cephalon and generic firms, as well as 24 investigational depositions. Declaration of Saralisa C. Brau ("Brau Decl.") ¶¶ 2, 5-6. The private plaintiffs have had no discovery. Indeed, they do not even have copies of the challenged agreements. Taus Decl. ¶ 10.

The private actions raise numerous complex issues that are irrelevant to the FTC's case but will require substantial time to resolve, for example: whether the various classes of plaintiffs

can establish antitrust standing; the correct calculation of damages; and the propriety of the private plaintiffs' requests for certification of the various classes.[2] Indeed, private antitrust suits generally take far longer than government antitrust enforcement actions to resolve.[3]

ARGUMENT

I. Congress has expressed a strong public policy against combining government antitrust enforcement actions with private antitrust suits

To protect the nation's consumers from ongoing injury caused by anticompetitive conduct, Congress has determined that federal government antitrust law enforcement initiatives, such as this current action, must be allowed to proceed expeditiously and separately from related private actions. Under the multidistrict litigation program, most civil actions involving one or more common questions of fact pending in different districts may be consolidated or coordinated for pretrial proceedings. 28 U.S.C. § 1407(a) (2000). However, even where the actions involve common questions of fact, the multidistrict litigation statute specifically exempts "any action in which the United States is a complainant arising under the antitrust laws." 28 U.S.C. § 1407(g) (2000).[4]

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[2] *See, e.g., In re Nifedipine Antitrust Litigation*, MDL No. 1515, 2007 U.S. Dist. LEXIS 85726 (D.D.C. Nov. 21, 2007) (case pending five years before class certified). *See also* Taus Decl. ¶ 9.

[3] In the *Lorazepam* antitrust litigation, for example, it took three years from the filing of the complaint for the government to obtain injunctive and equitable relief; in contrast, in the private actions it took almost eight years from the filing of the complaint for the court to enter judgment for compensatory and punitive damages in favor of plaintiffs. *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 372-74 (D.D.C. 2002); *In re Lorazepam & Clorazepate Antitrust Litig.*, MDL 1290, No. 99-mc-0276 (D.D.C. February 6, 2008) (judgment entered for private plaintiffs).

[4] The FTC's action is an antitrust case brought by the "United States." *Cf. Minnesota Mining & Mfg. Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311, 321-22 (1965) (finding that an FTC enforcement action was "instituted by the United States" for purposes of

(continued...)

The legislative history of Section 1407 demonstrates Congress's concern with delaying government enforcement suits:

> To treat the Government differently is not arbitrary, for the purpose of the governmental suit normally differs from that of a private suit; the Government seeks to protect the public from competitive injury, while private parties are primarily interested in recovering damages for injuries already suffered.

H.R. Rep. No. 90-1130, at 8 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1905 (letter of Deputy Attorney General Ramsey Clark, incorporated into Report). Significantly, Congress was well aware that forbidding consolidation and coordination would occasionally impose a burden on defendants:

> [E]xempting the Government from this legislation may occasionally burden defendants because they may have to answer similar questions posed both by the Government and by private part[ies].

Id. Nonetheless, Congress concluded that the potential burden on private defendants from duplicative discovery was "justified by the importance to the public of securing relief in antitrust cases as quickly as possible." *Id.*

II. The public policy against combining government antitrust actions with private damage actions is both relevant and compelling here

Cephalon cannot seek to transfer this case under the provisions that Congress specifically adopted to deal with the pendency of related cases in multiple districts. As discussed above, 28 U.S.C. § 1407(g) expressly exempts government antitrust enforcement suits from these rules, in order to eliminate the risk that such transfer would threaten the public's interest in expedited relief for ongoing antitrust violations. Cephalon instead is attempting to use a two-step process: it asks this Court to transfer this case to the Eastern District of Pennsylvania in order to permit

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[4](...continued)
tolling the statute of limitations for private plaintiff antitrust damages action under the Clayton Act).

that court to then consider consolidation or coordination of the FTC case with the pending private actions.[5]

Although Cephalon claims that its use of this two-step process renders the public policy embodied in the multidistrict litigation statute of "no relevance, even by analogy" here,[6] it offers no support for this assertion. It cites no case – in this District or elsewhere – in which a government antitrust case has been transferred and consolidated or coordinated with one or more private damages suits.[7] In fact, in *United States v. Dentsply International, Inc.*, 190 F.R.D. 140 (D. Del. 1999), the court anticipated and rejected the two-step strategy Cephalon seeks to employ here, finding it inconsistent with congressional policy. The *Dentsply* court denied the defendant's request for consolidation of the government's antitrust case with pending private damages suits under Fed. R. Civ. P. 42(a), based on "the public policy position articulated by the United States Congress" in exempting government actions from the rules governing multidistrict litigation. In so doing, the court pointed out that to countenance the sort of two-step strategy that Cephalon seeks would effectively allow defendants to evade the exemption for government antitrust suits in the multidistrict litigation statute:

> [A]llowing defendants to consolidate private antitrust cases filed in the same district with Government antitrust cases would allow them to circumvent § 1407(g) by seeking transfer of individual cases to the same forum and then moving for consolidation under Rule 42(a).

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[5] *See* Def. Mot. at 11, n. 9 (issue of consolidation or coordination among the actions "can (and should) be addressed by the Eastern District of Pennsylvania court after transfer").

[6] *Id.*

[7] Cephalon erroneously characterizes *Comptroller of the Currency v. Calhoun First Nat'l Bank*, 626 F. Supp. 137 (D.D.C. 1985), as a civil antitrust action that was transferred to another district where related cases were pending (Def. Mot. at 8); it was a securities case.

Dentsply, 190 F.R.D. at 144.

Absent consolidation or coordination with the various private cases, the judicial efficiencies that Cephalon claims justify transfer are unlikely to be significant.[8] And, given the circumstances here, the potential for slowing down the FTC case is substantial. As was noted at the outset, the private cases were filed on the basis of publicly available information and plaintiffs have had no discovery. The FTC, in contrast, already has the fruits of its year and a half investigation, including internal business documents from Cephalon and generic firms, as well as over twenty witness transcripts. Furthermore, the presence of numerous issues unique to the private damage actions (including class certification and calculation of damages), as well as the numerous parties on both sides, will inevitably make the proceedings in the private cases far more complex and time consuming than what is required by the FTC's relatively streamlined suit.

Whatever modest litigation efficiencies might be achieved from transfer here do not justify the substantial likelihood of delay in the government case. Indeed, the *Dentsply* court, after finding that "the standard factors . . . would counsel consolidation in this case," nonetheless declined to consolidate in light of the overriding public policy interest. *Dentsply*, 190 F.R.D. at 143. As the *Dentsply* court explained, Congress wisely precluded an individual case-by-case balancing of litigation efficiencies against delay:

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[8] *See SEC v. Hart*, No. 78-65, 1978 U.S. Dist. LEXIS 17506 at *4-5 (D.D.C. May 26, 1978) (denying transfer of case where judicial economy would not be served because government action would not likely be consolidated with related cases in transferee forum); *Polychrome Corp. v. Minnesota Mining and Mfg. Co.*, 259 F. Supp. 330, 333-334 (D.C.N.Y. 1966) (denying transfer of antitrust case to forum where government antitrust suit pending, in part because cases were different and it was unlikely that cases would be consolidated for trial if transferred).

> Congress, in carving out an exclusion of Government antitrust claims from the multidistrict litigation statute, explicitly excluded these cases from a case-by-case weighing of possible delays versus efficiencies to be gained from coordinating pretrial proceedings.

Id. at 146. Even if there may be some instances in which coordination might not prove to cause delay, "there is no way to ensure ahead of time that delay will not occur." *Id.*

Likewise, the risk of inconsistent judgments does not warrant setting aside the strong public policy against requiring government antitrust cases to be coordinated with related private actions.[9] Indeed, courts routinely deny such transfer requests when related cases are pending in different districts, even though inconsistent results are always possible.[10] Moreover, the risk of inconsistent results is inherent in the multidistrict litigation scheme that Congress devised, because cases are coordinated only for pretrial proceedings, with cases returning to the transferor court for trial. 28 U.S.C. § 1407(a).

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[9] Cephalon cites three cases in which the court identified the risk of inconsistent judgments as a factor in granting transfer. Def. Mot. at 12. None involve government antitrust enforcement, and all involve circumstances not present here. *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 53 (D.D.C. 2000), granted a transfer to a district in which the same plaintiff had already litigated and lost identical claims against the same defendant. *Barham v. UBS Financial Services*, 496 F. Supp. 2d 174, 180 (D.D.C. 2007), granted transfer where the same attorneys were already litigating, on behalf of the plaintiffs' co-workers, identical employment discrimination claims against the same employer in the neighboring district. *California Farm Bureau Federation v. Badgley*, No. 02-2328, 2005 U.S. Dist LEXIS 12861, at *5-7 (D.D.C. June 29, 2005), granted the government defendants' motion to transfer the case to a district where a suit involving "apparently identical issues of law and fact" (at *5) was pending, observing that "[a]llowing these two suits to proceed unconsolidated" would be inappropriate (at *7).

[10] *AT&T Corp. v. PAB Inc.*, 935 F. Supp. 584 (E.D. Pa. 1996) (denying transfer of case to district where related actions pending, when transfer likely to lead to delay); *Combs v. Adkins & Adkins Coal Co., Inc.*, 597 F. Supp. 122 (D.D.C. 1984) (denying transfer notwithstanding related litigation pending in transferee district); *Star Lines, Ltd. v. Puerto Rico Mar. Shipping Auth.*, 442 F. Supp. 1201 (S.D.N.Y. 1978) (same); *Hart*, 1978 U.S. Dist. LEXIS 17506 (same); *Polychrome Corp.*, 259 F. Supp. 330 (same).

The "clear public policy of prioritizing prompt judicial resolution of Government antitrust claims to provide expeditious relief to the public" is particularly compelling under the circumstances presented here. *Dentsply*, 190 F.R.D. at 145. As noted above, the ongoing harm from denying consumers access to generic versions of Provigil is clear, direct, and predictable, and amounts to hundreds of millions of dollars in increased drug costs each year. These higher costs fall on patients, public and private health plans, and taxpayers, who ultimately foot the bill for government drug benefit programs. These facts reinforce the wisdom of the congressional policy granting special status to government antitrust enforcement actions.

III. Cephalon has failed to show that the private interest factors of section 1404(a) justify transfer of the FTC's enforcement action

Even aside from the strong public policy reasons against transfer and consolidation or coordination of this federal enforcement antitrust case, Cephalon does not meet its burden to show that private interests make transfer of the FTC's action appropriate.

A. The FTC's choice of forum is entitled to substantial deference

The plaintiff's choice of forum is a "'paramount consideration' in any determination of a transfer request," and is ordinarily entitled to "great deference." *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., Inc.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002) (Bates, J.).[11] Moreover, the presumption in favor of the plaintiff's forum choice has been given "heightened respect" in cases arising under the antitrust laws because of the affirmative congressional policy embodied in the Clayton Act's liberal venue provisions which allows plaintiffs the widest possible choice of

[11] *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) ("there is ordinarily a strong presumption in favor of the plaintiff's choice of forum"); *FC Inv. Group LC v. Lichtenstein*, 441 F. Supp. 2d 3, 12-13 (D.D.C. 2006) (same).

forums in which to sue.[12] The FTC's venue provision, 15 U.S.C. § 53(b)(2) (2000), is at least as broad as the Clayton Act's.[13]

Notwithstanding these well-established principles, Cephalon urges this Court to nullify the FTC's forum choice here, charging that the FTC filed its complaint in this District, rather than in the Eastern District of Pennsylvania where several private actions are pending, as part of some Machiavellian ploy to maximize its "bites at the judicial apple." Def. Mot. at 12-13. But the FTC should hardly be expected or required to abandon its prosecutorial judgment simply because some private plaintiffs happened to reach the courthouse steps first. Moreover, the FTC's decision to sue in the District of Columbia is neither remarkable nor unusual. The Commission routinely files antitrust enforcement actions in the District of Columbia, particularly when the impact of the challenged conduct, such as here, is felt by consumers on a nationwide scale.[14]

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[12] *See, e.g., United States v. Brown Univ.*, 772 F. Supp. 241, 242 (E.D. Pa. 1991) (denying transfer motion because a government's choice of forum in an antitrust suit is entitled to "heightened respect"); *Expoconsul Int'l, Inc. v. A/E Sys., Inc.*, 711 F. Supp. 730, 735 (S.D.N.Y. 1989) (denying transfer motion, in part, because defendant's burden to overcome plaintiff's choice of forum is "especially heavy in antitrust suits") (quoting *Star Lines, Ltd.* 442 F. Supp. at 1207).

[13] *Compare* FTC Act, 15 U.S.C. § 53(b)(2) ("Any suit may be brought where . . . [the] corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28.") *with* Clayton Act, 15 U.S.C. § 22 (2000) ("Any suit . . . under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . .").

[14] *See, e.g., FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999); *FTC v. Warner Chilcott Holdings Co.*, Civ. Action No. 1:05-CV-2179-CKK (D.D.C. 2005); *FTC v. Perrigo Co.*, Civ. Action No. 1:04-CV-1397 (D.D.C. 2004) (stipulated judgment).

B. Convenience of the parties and witnesses does not support transfer

To overcome the strong presumption in favor of the FTC's forum choice, Cephalon "bear[s] a heavy burden of establishing that [this choice] is inappropriate" and that transfer is necessary. *Thayer/Patricof*, 196 F. Supp. 2d at 31 (quoting *Pain v. United Techs. Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980)). To satisfy this burden, Cephalon must do more than merely suggest that another forum "may be superior to that chosen by the plaintiff." *Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr.*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998). Cephalon must show that "the private and public interest factors clearly point towards trial in the alternative forum." *FC Inv. Group LC*, 441 F. Supp. 2d at 13-14. This Court has routinely denied requests to transfer based on a defendant's failure to meet this heavy burden.[15]

On the last page of its motion – almost as an afterthought – Cephalon finally tries to satisfy this burden, arguing that the convenience of the parties and witnesses "clearly favors transfer." Def. Mot. at 14. As support for this claim, Cephalon states that the Eastern District of Pennsylvania would be more convenient because seven of its current employees who may be witnesses at trial reside in that forum. Zakreski Aff. ¶ 12-13. Of course, transfer to the defendant's home district would always be more convenient for the defendant. But, as this Court has noted before, the critical factor for a Section 1404(a) transfer request is not whether certain

[15] *Toledano v. O'Conner*, 501 F. Supp. 2d 127, 156 (D.D.C. 2007) (Bates, J.) (denying transfer because defendant failed to show that considerations of convenience and interests of justice warranted it); *Thayer/Patricof*, 196 F. Supp. at 37 (denying transfer because defendants did not meet "heavy burden of establishing that [plaintiff's] choice of forum should be disturbed"); *FC Inv. Group LC*, 441 F. Supp. at 14 (denying transfer because defendant did not meet their "burden of showing that the balance of convenience of the parties and witnesses and the interest of justice are in their favor"); *Green v. Footlocker Retail, Inc.*, No. 04-1875, 2005 U.S. Dist. LEXIS 11190, at *8 (D.D.C. June 3, 2005) (denying transfer); *Shapiro, Lifschitz & Schram, P.C.*, 24 F. Supp. at 73 (denying transfer because "defendants have failed to meet the heavy burden of demonstrating that transfer is warranted"); *Air Line Pilots Ass'n v. Eastern Air Lines*, 672 F. Supp. 525 (D.D.C. 1987) (denying transfer).

witnesses may be located outside the chosen forum, but instead whether those "witnesses would be unwilling to testify in the District of Columbia." *FC Inv. Group LC*, 441 F. Supp. 2d at 14. Because a party can compel testimony from its own employees, this Court has assumed that employee witnesses will appear voluntarily, an assumption that Cephalon does not appear to dispute.[16] In addition, while inconvenience and burden on individual defendants (who are required to remain in a forum for the duration of a trial) may, in certain cases warrant transfer, such concerns are far less significant in matters involving a large corporate defendant (like Cephalon), where any potential inconvenience to employee witnesses is limited to the day of testimony.[17] Accordingly, the fact that Cephalon's likely employee witnesses may reside in the Eastern District of Pennsylvania does not warrant transfer.[18]

Moreover, in addition to witnesses from Cephalon, this case will likely involve testimony from various non-parties. These non-parties include the generic companies that Cephalon paid to abandon their patent challenges and agree not to compete with Provigil until April 2012, as

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[16] *See Thayer/Patricof*, 196 F. Supp. 2d at 32. Indeed, all nine Cephalon employees appeared voluntarily at investigational depositions held at the Commission's office in Washington, D.C. Brau Decl. ¶ 7.

[17] A number of the cases Cephalon cites in which the court granted transfer involve individual defendants where matters of convenience and burden appropriately carry more weight than here. *See, e.g.*, *SEC v. Roberts*, No. 07-407, 2007 U.S. Dist. LEXIS 49301, at *2-3 (D.D.C. July 10, 2007) (individual defendant facing criminal charges in another district arising from the same conduct); *SEC v. Page Airways, Inc.*, 464 F. Supp. 461, 463 (D.D.C. 1978) (defendants included individuals comprising "a large part of Page's senior management"); *Calhoun First Nat'l Bank*, 626 F. Supp. at 138 (individual as well as corporate defendants).

[18] *Thayer/Patricof*, 196 F. Supp. 2d at 32. *See also Gruber Hurst Johansen & Hail, LLP v. Hackard & Holt*, No. 3:07-cv-1410-G, 2008 U.S. Dist. LEXIS 2961 at *17 (N.D. Tex. Jan. 15, 2008) (convenience to party employee witnesses is entitled to little weight because their presence may be compelled by the party); *Brown Univ.*, 772 F. Supp. at 243 (location of party employee witnesses is not a factor warranting transfer because their presence can be compelled by the party).

well as other generic companies blocked from competing with a generic version of Provigil as a result of Cephalon's anticompetitive conduct. Brau Decl. ¶¶ 8-18. Some of these potential non-party witnesses are located within the subpoena power of the District of Columbia. Brau Decl. ¶ 12. Most of these potential non-party witnesses, however, are scattered around the country, far from either the District of Columbia or the Eastern District of Pennsylvania. Brau Decl. ¶¶ 8-18 (identifying potential witnesses in locations including California, Michigan, Vermont, Illinois, and Ontario, Canada).

Cephalon does not show – as it must to justify transfer – that these potential non-party witnesses would be unwilling to testify in the District of Columbia.[19] Nor does Cephalon suggest that those potential witnesses residing outside either jurisdiction would, for some reason, be more willing to travel and appear to testify in the Eastern District of Pennsylvania than in the District of Columbia. Finally, even if certain witnesses were unwilling to appear, that alone does not warrant transfer because parties can use videotaped depositions to capture their testimony.[20] For all these reasons, Cephalon has failed to show that the convenience to the parties and witnesses and the interests of justice clearly point towards the Eastern District of Pennsylvania.

CONCLUSION

Transfer and consolidation or coordination of the FTC's action is contrary to public policy. "Congress has made the decision that inefficiencies and inconvenience to antitrust

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[19] *Thayer/Patricof*, 196 F. Supp. 2d at 33 (the moving party "must demonstrate . . . whether [a] witness is willing to travel to a foreign jurisdiction"); *FC Inv. Group LC*, 441 F. Supp. 2d at 14 (moving party must demonstrate that witnesses are unwilling to testify in the transferor forum); *Shapiro, Lifschitz & Schram, P.C.*, 24 F. Supp. 2d at 72 (D.D.C. 1998) (denying transfer request, in part, because defendant failed to show that non-resident witnesses would not appear).

[20] *See Thayer/Patricof*, 196 F. Supp. 2d at 34.

defendants are trumped by an unwillingness to countenance delay in the prosecution of Government antitrust litigation." *Dentsply*, 190 F.R.D. at 146. Accordingly, Cephalon's motion to transfer should be denied.

Dated: March 6, 2008

Respectfully Submitted,

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