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By Gorav Jindal and Brian Savage[1]

In ongoing antitrust litigation related to the antisleeping drug Provigil, drug manufacturer Cephalon recently moved to compel the production of all materials underlying two Federal Trade Commission studies cited by the Commission in support of its claims. The dispute over the discoverability of these materials, although seemingly innocuous, garnered the attention of nearly forty third-party pharmaceutical companies that, along with tens and perhaps hundreds of other drug companies since 2001, have filed patent litigation settlement agreements with the FTC as required by federal law. Apprehensive about the prospect of having their settlement strategies made public, these third parties opposed disclosure and moved to intervene. In the end, the court denied Cephalon's motion to compel, thus protecting the confidentiality of the third parties' agreements. Yet while these companies were undoubtedly relieved by the court's decision, they now face the possibility of one day finding themselves in Cephalon's shoes, having to defend against untested conclusions from FTC studies without the benefit of the materials upon which these studies were based.

Background

The FTC Studies

Over the past decade, the FTC has authored two empirical studies based, at least in part, on the settlement agreements, litigation history, and other information it has collected from the pharmaceutical industry. In July 2002, the Commission issued a study analyzing patent litigation and drug competition under the Hatch- Waxman Act, noting, among other things, that generic drug manufacturers prevailed in the vast majority of patent suits that resulted in a decision between 1992 and 2000.[2]

In January 2010, the FTC published a second study analyzing so-called "pay-for-delay" settlement agreements—agreements that include payments from brand-name to generic manufacturers in exchange for delayed generic entry. According to this study, such agreements delay generic competition by an

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[2] *See* FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION 13 (2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

average of 17 months and cost consumers an estimated $3.5 billion per year.[3] The FTC has, at various times and in various cases, relied on these general statistics to challenge specific agreements as producing anticompetitive results.

The Statutory Provisions Governing the Collection of Information Underlying the FTC Studies

Passed in 2003, the Medicare Prescription Drug, Improvement, and Modernization Act ("MMA")[4] requires drug companies that settle Hatch-Waxman patent litigation to file their settlement agreements and related documents with the Federal Trade Commission and United States Department of Justice within ten business days of execution.[5] The MMA thus provides the antitrust authorities with an opportunity to review settlement agreements for their effect on competition. The confidentiality protections afforded to these materials are set forth in Section 1114 of the MMA:

> Any information or documentary material filed with the [Department of Justice] or the [FTC] pursuant to this subtitle shall be exempt from disclosure under [the Freedom of Information Act], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.[6]

Between January 1, 2004 and September 30, 2009, over 110 companies filed more than 400 settlement agreements with the FTC under the MMA.[7] The findings from the FTC's January 2010 study are based largely on these agreements.

The FTC also collected an undisclosed number of agreements in 2001—before the MMA's passage—by issuing special orders to drug manufacturers under FTC Act section 6(b),[8] ultimately using these agreements to prepare its 2002 study. Although the FTC Act allows the Commission to seek commercially sensitive information by special order, this information "shall not be disclosed" as long as it

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[3] FED. TRADE COMM'N, PAY FOR DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS 2 (2010), *available at* http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

[4] Pub. L. No. 108-173, 117 Stat. 2066 (2003) (codified as amended in scattered sections of 42 U.S.C.).

[5] MMA § 1113, 117 Stat. at 2462-63.

[6] MMA § 1114, 117 Stat. at 2463.

[7] *See* Pl.'s Corrected Mem. in Opp. to Def.'s Mot. to Compel at 7, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 24, 2011).

[8] *See* 15 U.S.C. § 46(b) (2011) (empowering the FTC to "require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, . . . to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports, or answers in writing to specific questions, furnishing to the commission such information as it may require").

is marked "confidential"[9] and may only be disclosed in judicial proceedings involving the Federal Trade Commission if "relevant and material."[10]

FTC v. Cephalon, Inc.

In February 2008, the FTC filed suit against pioneer drug manufacturer Cephalon, alleging that the company had paid four generic firms to delay selling generic versions of the antisleeping drug Provigil in connection with the settlement of multiple patent infringement suits.[11] Two classes of plaintiffs and the generic manufacturer Apotex also filed suit against Cephalon and the four generics, and in July 2009, all four cases were consolidated in the Eastern District of Pennsylvania.[12] Both in its Complaint against Cephalon and its briefing on Cephalon's Motion to Dismiss, the FTC cited its 2002 study to argue that "[i]n pharmaceutical patent litigation, the risk that the patentee will fail in its attempt to exclude is substantial."[13] In an October 2009 letter to the court, the FTC also cited a speech by FTC Chairman Jon Leibowitz previewing the Commission's 2010 study about the anticompetitive effects of "pay-for-delay" agreements.[14]

In May 2010, Cephalon asked the FTC to produce all materials underlying both studies—a request designed to capture the settlement agreements upon which the studies were based. The FTC objected, and in December 2010, Cephalon moved for an order compelling the production of the underlying materials or, in the alternative, prohibiting the FTC from relying on the studies.[15] In an unprecedented showing of industry-wide solidarity, thirty-seven branded and generic pharmaceutical companies (the "Third Parties") moved to intervene, seeking a protective order to prevent disclosure of the settlement agreements they filed with the FTC and the sensitive information contained therein.[16]

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[9] 15 U.S.C. § 57b-2(c).

[10] 15 U.S.C. § 57b-2(d)(1)(C).

[11] *See* Pl.'s First Am. Compl., FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Aug. 12, 2009).

[12] *See* Consolidation Order, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. July 30, 2009) (consolidating E.D. Pa. Civil Nos. 06-1797, 06-1833, 06-2768, and 08-2141).

[13] Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Sept. 14, 2009); *see also* Pl.'s First Am. Compl., *supra* note 11, at ¶ 25 ("An FTC study of all patent litigation initiated between 1992 and 2000 between brand-name drug manufacturers and [Hatch-Waxman Act] Paragraph IV generic applicants found [that] when cases were litigated to a decision on the merits, the generics prevailed in cases involving 73 percent of the challenged drug products.").

[14] *See* Letter from Markus H. Meier to The Honorable Mitchell S. Goldberg (Oct. 14, 2009), attached as Ex. 5 to Decl. of Mark A. Ford in Supp. of Def.'s Mot. to Compel Production of Docs. from Pl. Federal Trade Commission, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Dec. 22, 2010).

[15] Def.'s Mot. to Compel Production of Docs. from Pl. Federal Trade Commission, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Dec. 22, 2010).

[16] *See* Third-Party Pharmaceutical Cos. Mot. to Intervene, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011); Third-Party Pharmaceutical Cos. Mot. for Protective Order, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011). On January 20, 2011, the court referred these motions, along with Cephalon's Motion to Compel, to a magistrate judge for disposition. *See* FTC v. Cephalon, Inc., Civil No. 08-2141, Doc. No. 95 (E.D. Pa. Jan. 20, 2011).

The dispute raised a host of complicated issues for all parties involved. Although the FTC apparently "ha[d] no intention" of offering the 2002 or 2010 studies into evidence, the Commission insisted on its right—and the right of its experts—to rely on the studies' conclusions without having to produce the materials upon which these conclusions were based.[17] Cephalon, meanwhile, argued that the FTC was obligated either to produce these materials for independent analysis or to abandon relying on its studies in the Provigil litigation.

Caught in the middle of this dispute were the myriad third-party pharmaceutical companies—thirty-seven of whom moved to intervene—who between 2001 and 2009 filed hundreds of settlement agreements with the FTC as required by federal law. Aware that they might one day find themselves on the other side of an FTC antitrust suit, these companies did not support the FTC's purported right to rely on untested conclusions from its own studies in prosecuting antitrust claims. Nevertheless, these companies filed their settlement agreements with the FTC expecting that they would remain confidential, and they were deeply concerned about the potential effects of disclosure—even if limited to the parties involved in the Provigil litigation—upon their competitive interests.

Complicating matters further, the FTC was unable to provide these companies with a definitive list of the settlement agreements at risk of being disclosed. Nor, for its part, did Cephalon explain in any detail why it needed these agreements to rebut the FTC's claims. Tens and perhaps hundreds of otherwise disinterested third parties were thus forced to defend themselves blindly against a potentially significant threat to their well-being.

Cephalon's Motion to Compel and the FTC's Response

In moving to compel the production of "the analyses, source materials, and other documents relating to" the FTC's studies,[18] Cephalon relied on "disclosure exemptions" in both the MMA and FTC Act, arguing that it was entitled to review the settlement agreements underlying these studies because it was involved in litigation with the FTC. In particular, Cephalon noted that settlements filed under the MMA are confidential "except as may be relevant to *any administrative or judicial action or proceeding*."[19] Cephalon applied a similar logic in requesting documents underlying the FTC's 2002 study, noting that the FTC Act allows for disclosure of materials that are relevant to judicial proceedings "to which the Commission is a party."[20]

According to Cephalon, it needed the materials underlying the FTC's studies "to respond to any use of the studies in motion practice and to be able to cross-examine experts or other witnesses relying upon

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[17] *See* Third-Party Pharmaceutical Cos. Mot. to Intervene, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011); Third-Party Pharmaceutical Cos. Mot. for Protective Order, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011). On January 20, 2011, the court referred these motions, along with Cephalon's Motion to Compel, to a magistrate judge for disposition.

[18] Def.'s Mem. of Law in Supp. of Mot. to Compel Production of Docs. from Pl. Federal Trade Commission at 1, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Dec. 22, 2010).

[19] Pub. L. No. 108-173, § 1114, 117 Stat. 2006, 2463 (2003) (emphasis added).

[20] *See* 15 U.S.C. § 57b-2(d)(1)(C).

them."[21] Although lacking in specifics, Cephalon's argument was thus based largely upon the principles of fairness that underlie the federal rules of discovery.[22] While Cephalon recognized that its requests were likely to capture sensitive information from the "settlement agreements that inform[ed the FTC's studies]," the company believed that "any confidentiality concerns [could be] addressed by the protective order already in place [in the Provigil litigation]."[23] The FTC, of course, did not share Cephalon's view. According to the FTC, it had used the disputed studies only to emphasize the anticompetitive effects of "pay-for-delay" agreements generally, thus rendering the materials underlying these studies irrelevant to the Provigil litigation.[24] Nor did the FTC believe that Rule 26 required the disclosure of these materials, since the Commission's experts had not relied upon them in forming their opinions.[25] Finally, noting that third-party settlement agreements comprised the "vast majority" of the materials in question, the FTC argued that the MMA and FTC Act categorically prohibited their disclosure.[26]

The Third Parties' Case to Protect Their Confidential Information

The Third Parties made three principal arguments in seeking a protective order to bar disclosure of the requested information: (A) settlement agreements and related materials filed under the MMA and the FTC Act are highly confidential and should not be disclosed; (B) the MMA and the FTC Act categorically prohibit disclosure of these materials; and (C) even if the statutes permit disclosure, these materials are irrelevant to the Provigil litigation and/or the FTC should be prohibited from putting them at issue.[27]

The Confidentiality of the Requested Materials

Patent settlement agreements, as compromises based on parties' assessments of litigation risk, are confidential by their very nature. These agreements often include royalty rates and other licensing terms. They may specify the conditions under which a pioneer drug manufacturer has authorized a generic to enter the market. They may also specify the price at which a finished drug or critical input (e.g., an active pharmaceutical ingredient) is to be supplied.[28] In short, these agreements contain highly sensitive and propriety business information, a point upon which the parties in the Provigil litigation all seemed to agree.

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[21] Def.'s Mem. of Law in Supp. of Mot. to Compel, *supra* note 18, at 1.

[22] *See id.* at 5.

[23] *Id.* at 6; *see also* Amended Stipulated Protective Order, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Nov. 9, 2009).

[24] *See* Pl.'s Corrected Mem. in Opp. to Def.'s Mot. to Compel at 8-12, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 24, 2011).

[25] *See id.* at 12.

[26] *Id.* at 13-16. For further discussion of the MMA's and FTC Act's confidentiality provisions, see *infra* Section IV.B.

[27] *See* Third-Party Pharmaceutical Cos. Mem. of Law in Supp. of Mot. for Protective Order at 2, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011).

[28] *See id.* at 8.

The parties did not agree, however, as to whether the protective order governing the litigation was adequate to protect the Third Parties' confidentiality. Noting that a protective order is the typical means by which sensitive information is protected from public disclosure, and apparently viewing the Provigil litigation as no different from any other, Cephalon argued that "any confidentiality concerns [could be] addressed by the protective order already in place."[29]

As the Third Parties pointed out, however, the coordination plan governing discovery in the Provigil litigation requires that documents produced to one party be produced to outside counsel for all parties in the consolidated actions, including counsel for Cephalon, the five generics, and the multiple class action plaintiffs.[30] These generics often compete with the Third Parties and, if disclosure were allowed, would be afforded an inside peek into how their adversaries settle disputes involving patents, the crown jewels for these businesses. Further contributing to the Third Parties' anxiety, counsel for the two plaintiff classes had demonstrated a propensity for suing drug companies. In fact, according to their websites, three of the firms representing these classes had been involved in twenty-five actions against drug manufacturers since 1999 alone.[31]

In these circumstances, the Third Parties feared that their confidential information, once disclosed, would infect the minds of counsel who routinely engaged in litigation or settled cases with branded and generic drug companies alike. Even assuming best of faith, the Third Parties did not believe that it would be possible for counsel to compartmentalize such information, thus creating a significant risk of competitive harm.[32] Moreover, even if it *were* possible for counsel to segregate confidential information in their own minds, the Third Parties worried about the potential for inadvertent disclosure, given the many parties and points of access involved in the Provigil litigation and the sheer volume of MMA settlements at issue. On the whole, therefore, the Third Parties viewed the protective order as insufficient to protect their interests and argued that Cephalon's request for disclosure should be denied.[33]

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[29] Def.'s Mem. of Law in Supp. of Mot. to Compel Production of Docs. from Pl. Federal Trade Commission at 6, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Dec. 22, 2010).

[30] *See* Joint Discovery Coordination Order ¶ 7, FTC v. Cephalon, Inc., Civil No. 08-2141 (Aug. 31, 2010) ("A Party responding to a written discovery request in any Pending Case shall serve its response to Discovery Counsel in the Pending Cases.").

[31] *See* http://www.garwingerstein.com/, http://www.hanzmancriden.com/, and http://www.srkwlaw.com/index.html.

[32] *See* Third-Party Pharmaceutical Cos. Mem. of Law in Supp. of Mot. for Protective Order at 9-12, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011).

[33] *See id.* at 10. The FTC agreed with the Third Parties' position, explaining that "even if designated as 'highly confidential' under the terms of the protective order, the private patent settlement documents and related business transactions of dozens of pharmaceutical companies would be turned over to their competitors' lawyers (some of whom might be found on the other side of future settlement and business negotiations) as well as to numerous class action lawyers who routinely sue pharmaceutical companies for anticompetitive behavior." Letter from Bradley S. Albert to Mark A. Ford at 3 (Dec. 7, 2010), attached to Third-Party Pharmaceutical Cos. Mem. of Law in Supp. of Mot. for Protective Order as Exhibit 1.

The Scope of the Statutes' "Disclosure Exemption"

As noted above,[34] both the MMA and FTC Act protect the confidentiality of materials collected by the FTC, with certain limited exceptions. Contrary to Cephalon's expansive view, the Third Parties maintained that these exceptions apply only where the FTC seeks to use confidential materials against the parties who submitted them, and thus that both statutes barred the disclosure of the settlement agreements at issue in the Provigil litigation.

Although settlement agreements filed under the MMA are confidential "except as may be relevant to any administrative or judicial action or proceeding,"[35] the Third Parties argued that the word "any" should not be interpreted literally to include every judicial action or proceeding, as such an interpretation would defy both common sense and the MMA's legislative history. The MMA's confidentiality provision would be meaningless, the Third Parties argued, if it allowed disclosure of a *third party's* commercially sensitive information to anyone at any time in any "administrative or judicial proceeding." Moreover, in recommending passage of the Drug Competition Act of 2001—the bill that would ultimately become the filing provision amendment to the MMA—the Senate Judiciary Committee interpreted this Act's "disclosure exemption" as "provid[ing] for protections of the filings made by the drug manufacturers with the antitrust enforcement agencies *parallel to those protections provided in the Hart-Scott-Rodino Antitrust Improvements Act of 1976,* 15 U.S.C. 18a(h)."[36] In turn, the HSR Act allows the FTC to disclose confidential information only where such information "*actually is used by the Commission* in administrative or judicial proceedings."[37] According to the Third Parties, therefore, confidential settlement agreements filed under the MMA—like confidential information filed under the HSR Act—may not be disclosed in "any administrative or judicial action or proceeding" unless used by the FTC against the filers themselves. Accordingly, the Third Parties maintained that the MMA barred the disclosure of their settlement agreements in the Provigil litigation.[38]

Similarly, the Third Parties noted that while the FTC Act authorized the FTC's collection of settlement agreements by special order, the statute categorically prohibits the disclosure of such "confidential"[39] materials except where "relevant and material" to judicial proceedings "to which the Commission is a

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[34] *See supra* Section I.B.

[35] Pub. L. No. 108-173, § 1114, 117 Stat. 2006, 2463 (2003) (emphasis added).

[36] S. Rep. No. 107–167, 2d Sess. 6 (2002) (emphasis added); *see also id.* at 4-5 ("The Drug Competition Act of 2001 would facilitate [the FTC's] *confidential review* of agreements between brand name manufacturers and potential generic competitors so the agencies could more efficiently, and more effectively, ensure that the antitrust laws are not being violated.") (emphasis added); 147 Cong. Rec. 3761 (2001) (statement of Sen. Patrick Leahy) (explaining that the 2001 Act would "allow[] existing antitrust laws to be enforced by ensuring that the enforcement agencies have information about no-compete deals. *The same confidentiality requirements will still apply to the FTC and to DOJ, as under current law*.") (emphasis added).

[37] General Motors Corp., 103 F.T.C. 58, 64 (1984) (emphasis added); *see also* Lieberman v. FTC, 771 F.2d 32, 39 (2d Cir. 1985) ("[T]he structure and history of [the HSR's confidentiality provision] show that Congress envisioned that *only* the Department of Justice and the FTC would use premerger information.") (emphasis added).

[38] *See* Third-Party Pharmaceutical Cos. Mem. of Law in Supp. of Mot. for Protective Order at 12-14, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011).

[39] 15 U.S.C. § 57b-2(c).

party."[40] In interpreting these provisions, the FTC has held that "[j]ust as a [private party] cannot compel the Commission to conduct a Section 6(b) survey on his behalf, so he may not compel the Commission to turn over to him the fruits of such a survey where it has not been conducted by the Commission for the purpose of aiding in the prosecution of the case against [him]."[41] Accordingly, the Third Parties argued that the FTC Act, like the MMA, prohibited the disclosure of their settlement agreements to parties such as Cephalon.[42]

The Relevance of the Settlement Agreements and the FTC's Decision to Put These Agreements at Issue

Finally, the Third Parties argued that this entire dispute was unnecessary because neither the FTC studies nor the materials underlying the same were relevant to the Provigil litigation. As the Third Parties pointed out, the issue in this case was whether Cephalon violated the antitrust laws by agreeing to pay four generic firms to delay selling generic versions of Provigil. The hundreds of settlement agreements filed with the FTC by third party pharmaceutical companies since 2001 had nothing to do with Provigil and were unlikely to constitute admissible evidence in any event. Similarly, the FTC's general views about "pay-for-delay" agreements did not speak to the legality of the specific agreements at issue.[43] Thus, putting aside the statutory arguments outlined above, the Third Parties believed that Cephalon was seeking the production of irrelevant materials.

Even if the court determined that the requested materials *were* relevant, moreover, the Third Parties believed that the FTC should be forced to back down from relying on its studies. As the Third Parties noted, by citing to the disputed studies, the *FTC* had put the materials underlying these studies at issue—materials which industry participants were compelled to produce under federal law. Thus as a matter of equity, the Third Parties asked the Court to order the FTC to abandon its use of these studies given the significant harm that disclosure could bring to tens and perhaps hundreds of innocent third parties.[44]

The Court's Decision

In a rather anticlimactic conclusion, the Court—in a two-page order issued by a magistrate judge—briskly rejected Cephalon's motion to compel, declining to order the disclosure of the documents underlying the FTC's studies "at this time" while concluding that the FTC was "not precluded from citing the publicly-available studies at issue."[45] The Court relied on the FTC's stipulation that it would not offer the studies

[40] 15 U.S.C. § 57b-2(d)(1)(C).

[41] *Texas Indus.*, 67 F.T.C. 1378, 1380 (1965).

[42] *See* Third-Party Pharmaceutical Cos. Mem. of Law in Supp. of Mot. for Protective Order, *supra* note 38, at 13.

[43] *See id.* at 14-15. Both the FTC and Cephalon acknowledged this point. *See* Letter from Bradley S. Albert to Mark A. Ford at 3 (Dec. 7, 2010), attached to Third-Party Pharmaceutical Cos. Mem. of Law in Supp. of Mot. for Protective Order as Exhibit 1; *see also* Def.'s Mem. of Law in Supp. of Mot. to Compel Production of Docs. from Pl. Federal Trade Commission at 5 n.4, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Dec. 22, 2010).

[44] *See* Third-Party Pharmaceutical Cos. Mem. of Law in Supp. of Mot. for Protective Order at 17, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Jan. 18, 2011).

[45] Order Denying Motion to Compel at 1-2, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Feb. 28, 2011).

into evidence and that it would comply with its obligations to disclose all materials considered by its testifying experts.[46]

The Court's decision has brought relief to the pharmaceutical industry by eliminating the threat of "me-too" discovery by litigious plaintiffs' lawyers seeking to join in pharmaceutical litigation involving the FTC merely to access sensitive information concerning the settlement of patent disputes. For its part, the FTC would have found itself in the precarious position of trying to enforce a statute that had become strongly disfavored by the entire pharmaceutical industry, whose members likely would have clamored for a quick legislative solution to protect their confidential information.

Yet while this type of solution may not be necessary in light of the Court's decision, the Third Parties cannot claim complete victory in this dispute. Rather, these companies would have preferred a ruling barring disclosure of the materials underlying the FTC's studies while simultaneously foreclosing the FTC from relying on these studies to support its antitrust claims. In fact, such an outcome may very well have been Cephalon's ultimate goal, as the company offered to abandon its discovery requests if the FTC agreed not to rely on its studies in the Provigil litigation.[47] Of course, the FTC declined Cephalon's offer, insisting that it should be allowed to rely on studies that—by the Commission's own admission—are not admissible in their own right.

The Court's actual ruling, which bars disclosure of the materials underlying the FTC's studies but permits the FTC to cite to these studies in the Provigil litigation, constitutes a partial victory for the industry but a complete victory for the FTC. This outcome essentially allows the FTC to use the disputed studies as a sword but shield them from discovery. And while the industry can take satisfaction in the protection of its confidential information, the Third Parties face the unpleasant possibility of one day finding themselves in Cephalon's shoes, having to defend against innuendo from untested FTC studies without the benefit of any of the underlying data.

[46] *Id.* at 2.

[47] *See* Def.'s Mem. of Law in Supp. of Mot. to Compel Production of Docs. from Pl. Federal Trade Commission at 1 n.1, FTC v. Cephalon, Inc., Civil No. 08-2141 (E.D. Pa. Dec. 22, 2010) ("Cephalon offered to withdraw all requests relating to these studies if the FTC and other plaintiffs in the consolidated actions would stipulate that they and their experts would not rely on the studies in any way. The FTC did not accept that proposal.").