Court of Common Pleas of Philadelphia County
Trial Division

# Civil Cover Sheet

For Prothonotary Use Only (Docket Number)
SEPTEMBER 2016
E-Filing Number: 1609055347
002877

| PLAINTIFF'S NAME | DEFENDANT'S NAME |
|---|---|
| JOSEPH A. CALTAGIRONE | CEPHALON, INC. |
| **PLAINTIFF'S ADDRESS** | **DEFENDANT'S ADDRESS** |
| 2222 EAST CUMBERLAND STREET<br>PHILADELPHIA PA 19125 | 1090 HORSHAM ROAD<br>NORTH WALES PA 19454-1505 |
| **PLAINTIFF'S NAME** | **DEFENDANT'S NAME** |
| JOSEPH F. CALTAGIRONE | TEVA PHARMACEUTICALS USA, INC. |
| **PLAINTIFF'S ADDRESS** | **DEFENDANT'S ADDRESS** |
| 2222 EAST CUMBERLAND STREET PHILADELPHIA<br>PHILADELPHIA PA 19125 | 1090 HORSHAM ROAD<br>NORTH WALES PA 19454-1505 |
| **PLAINTIFF'S NAME** | **DEFENDANT'S NAME** |
| | |
| **PLAINTIFF'S ADDRESS** | **DEFENDANT'S ADDRESS** |
| | |

| TOTAL NUMBER OF PLAINTIFFS | TOTAL NUMBER OF DEFENDANTS | COMMENCEMENT OF ACTION |
|---|---|---|
| 2 | 2 | ☒ Complaint ☐ Petition Action ☐ Notice of Appeal<br>☐ Writ of Summons ☐ Transfer From Other Jurisdictions |

**AMOUNT IN CONTROVERSY**
☐ $50,000.00 or less
☒ More than $50,000.00

**COURT PROGRAMS**

| | | | |
|---|---|---|---|
| ☐ Arbitration | ☐ Mass Tort | ☐ Commerce | ☐ Settlement |
| ☒ Jury | ☐ Savings Action | ☐ Minor Court Appeal | ☐ Minors |
| ☐ Non-Jury | ☐ Petition | ☐ Statutory Appeals | ☐ W/D/Survival |
| ☐ Other: | | | |

**CASE TYPE AND CODE**
20 - PERSONAL INJURY - OTHER

**STATUTORY BASIS FOR CAUSE OF ACTION**

**RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)**

FILED
PRO PROTHY
SEP 26 2016
M. BRYANT

**IS CASE SUBJECT TO COORDINATION ORDER?**
YES NO

TO THE PROTHONOTARY:

Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: JOSEPH A CALTAGIRONE , JOSEPH F CALTAGIRONE

Papers may be served at the address set forth below.


**NAME OF PLAINTIFF'S/PETITIONER'S/APPELLANT'S ATTORNEY**
RICHARD J. HOLLAWELL

**ADDRESS**
FIVE GREENTREE CENTER
525 ROUTE 73 NORTH
SUITE 117
MARLTON NJ 08053

**PHONE NUMBER**
(856)778-5500

**FAX NUMBER**
(856)778-1918

**SUPREME COURT IDENTIFICATION NO.**
88094

**E-MAIL ADDRESS**
rhollawell@richardconsole.com


**SIGNATURE OF FILING ATTORNEY OR PARTY**
*RICHARD HOLLAWELL*

**DATE SUBMITTED**
Monday, September 26, 2016, 10:35 am

FINAL COPY (Approved by the Prothonotary Clerk)

**NOTICE TO PLEAD**
**TO: Defendant**
You are hereby notified to file a written response to the enclosed Complaint within twenty (20) days from the date of service hereof or a judgment may be entered against you.



Richard J. Hollawell, Esquire
Attorney for Plaintiff

**THIS IS NOT AN ARBITRATION CASE. AN ASSESSMENT OF DAMAGES IS REQUIRED. JURY TRIAL DEMANDED.**

**CONSOLE & HOLLAWELL, P.C.**
By: Richard J. Hollawell, Esquire
Attorney I.D. No. 88094
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Attorneys for Plaintiffs

**FLYNN & ASSOCIATES, P.C.**
Alfred J. Falcione, Esquire
Attorney I.D. No.: 71386
2091 Springdale Road, Suite 2
Cherry Hill, NJ 08003
(856) 669-6100

| | | |
|---|---|---|
| JOSEPH A. CALTAGIRONE, as Administrator Ad Prosequendum for the Estate of JOSEPH F. CALTAGIRONE, deceased and JOSEPH A. CALTAGIRONE, Individually | : | COURT OF COMMON PLEAS PHILADELPHIA COUNTY |
| Plaintiffs | : | CIVIL TRIAL DIVISION |
| vs. | : | |
| | : | NO. |
| CEPHALON, INC. & TEVA PHARMACEUTICALS USA, INC. | : | **JURY TRIAL DEMANDED** |
| Defendant(s) | : | |

**NOTICE**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after the complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without any further notice for any money claimed in the complaint or for any other claim or relief requested by plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

PHILADELPHIA BAR ASSOCIATION
Lawyer Referral and Information Service
1101 Market Street, 11th Floor
Philadelphia, Pennsylvania 19107
(215) 238-6300

**AVISO**

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plaza al partir de la feche de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITAABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

ASSOCIACION DE LICENCIADOS DE FILADELPHIA
Servicio De Referencia E Informacicion Legal
1101 Market Street, 11th Floor
Filadelfia, Pennsylvania 19107
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| JOSEPH A. CALTAGIRONE, as Administrator Ad Prosequendum for the Estate of JOSEPH F. CALTAGIRONE, deceased and JOSEPH A. CALTAGIRONE, Individually | : | COURT OF COMMON PLEAS PHILADELPHIA COUNTY |
| Plaintiffs | : | CIVIL TRIAL DIVISION |
| vs. | : | |
| | : | NO. |
| CEPHALON, INC. & TEVA PHARMACEUTICALS USA, INC. | : | |
| Defendant(s) | : | |

## COMPLAINT - CIVIL ACTION

Plaintiffs, Joseph A. Caltagirone, as Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased, and Joseph A. Caltagirone, Individually, by and through his attorney, Richard J. Hollawell, Esquire, states that he has a cause of action against Defendants, Cephalon, Inc. and Teva Pharmaceuticals USA, Inc. and in support thereof avers the following:

## I. PARTIES

1. Plaintiff, Joseph A. Caltagirone, is an adult individual and citizen of the Commonwealth of Pennsylvania, residing therein at 2222 East Cumberland Street, Philadelphia, Pennsylvania 19125.

2. Mr. Caltagirone is the Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased. **A true and correct copy of the Letters of Administration is attached as Exhibit "1."**

3. Joseph F. Caltagirone, who was Joseph A. Caltagirone's son, was born on April 18, 1975 and passed away on May 15, 2014 after suffering for many years with addiction to Fentanyl and other opiates. Joseph F. Caltagirone's manner of death was accidental and due to drug intoxication as confirmed by the medical examiner.

4. Defendant, Cephalon, Inc. (hereinafter referred to as "Cephalon") is an existing Delaware corporation with its headquarters and principle place of business located at 1090 Horsham Road, North Wales, PA 19454. At all times relevant hereto, Cephalon was/is in the business of manufacturing, selling and distributing pharmaceutical drugs, namely opioids, Actiq (Fentanyl lollipops) and Fentora (Fentanyl buccal tablets) that are extremely powerful synthetic opiates which are highly addictive, highly dangerous and lethal.

5. Defendant, Teva Pharmaceuticals USA, Inc. (hereinafter referred to as "Teva"), is a Delaware corporation with its headquarters and principle place of business located at 1090 Horsham Road, North Wales, PA 19454. At all times relevant hereto, Teva was/is in the business of manufacturing, selling and distributing pharmaceutical drugs, namely a synthetic opioid, Actiq (Fentanyl lollipops) that is 80-100 times more powerful than morphine, highly addictive, highly dangerous and lethal.

6. In approximately 2011, Teva acquired Cephalon and Teva took over Cephalon's existing headquarters and principle place of business in Horsham, PA. However, Cephalon, Inc. is still an existing corporate entity that is currently registered with the Pennsylvania Department of State Corporation Bureau.

## II. JURISDICTION OF VENUE

7. Jurisdiction and Venue is proper in the Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania in that Defendants, Cephalon and Teva maintain its headquarters, principle place of business and nerve center within the Commonwealth of Pennsylvania and regularly, continuously and systematically conducts business in Philadelphia County as its products are regularly, marketed, sold and purchased in Philadelphia.

8. Jurisdiction of Venue is proper in the Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania in that a significant portion of the events relevant to this matter occurred in Philadelphia County, Commonwealth of Pennsylvania, namely Defendants marketing of Actiq to Decedent's physician, the prescribing and dispensing of Defendant's drug, Actiq, to Decedent and ultimately Decedent's death.

## III. CHRONOLOGY OF FACTS

9. In November of 1998, the Federal Drug Administration ("FDA") granted restricted marketing approval for Actiq, limiting its lawful marketing ***only*** for malignant cancer patients experiencing breakthrough cancer pain who had developed a tolerance to less dangerous therapies for their underlying cancer pain. The FDA further specified that Actiq should not be marketed for off-label uses and that the drug must be prescribed solely to cancer patients by oncologists and pain specialists specifically trained in the use of schedule II opioids to treat pain in cancer patients.

10. Actiq is a solid formulation of fentanyl citrate which adheres to a plastic stick and dissolves in the mouth for transmucosal absorption. In other words, Actiq is in the form of a lollipop, designed to allow patients for whom the drug is approved (malignant cancer patients who are often to ill to ingest the drug in any other manner) to ingest and absorb fentanyl to lessen their persistent cancer pain.

11. As an integral part of the FDA's approval of Actiq in 1998, the FDA mandated that a Risk Management Program ("RMP") be implemented due to the danger of addiction and death from the drug. The FDA required the implementation of the RMP for the purpose of ensuring a strict compliance program that obligated Defendants to actively discourage non-cancer uses of Actiq for both individual physicians and groups of physicians as the drug ***was contraindicated*** for acute/post-operative pain and chronic non-cancer pain but, rather, only approved for breakthrough cancer pain in patients with chronic cancer pain.

12. A key safety component of the RMP was to be proper patient selection for Actiq, i.e. only patients with malignant breakthrough cancer pain.

13. The RMP required affirmative corrective action if "a problem of off-label usage becomes known and identified", Defendants were then required to notify "all identified prescribers to emphasize the approved indication and appropriate patient selection".

14. Defendants blatantly disregarded the FDA required RMP and actually deployed a wide-ranging pattern of behavior as set forth below that completely undermined and disregarded the safeguards of the RMP, all for its own profit that resulted in an epidemic of addiction and overdose deaths, including Decedent in this case.

15. Actiq was approved by the FDA for such a limited and specific purpose due to its potency. Defendants recognized that its sales and profit potential was restricted with such limited approval and therefore devised a plan to change its limited use through unlawful, false and deceptive practices and then executed upon its plan as more fully discussed below.

16. Despite Actiq's very limited purpose, approval and instructions for use, during the period from 2000 through at least 2011, Defendants engaged in an unlawful, deceptive and reckless pattern and practice of marketing, promoting and selling Actiq, for *inter alia*, the treatment of pain

of patients with a wide range of conditions for which Actiq was inappropriate, highly dangerous, contradicted and specifically forbidden by the FDA as further set forth herein.

17. As a result of Defendants' unlawful, deceptive, false and reckless off-label promoting and marketing of Actiq, the drug's sales exploded from $15 million in 2000 to $570 million in 2006, a 3700% increase.

18. Defendants set Actiq sales quotas for its sales representatives that were impossible to obtain without the promoting of the drug beyond its malignant cancer-pain indication and approval, and Defendants engaged in an all out effort to assist and push its sales force to engage in the false and deceptive promoting and marketing of Actiq for forbidden purposes knowing that it was affirmatively misleading the medical community to attain its goal.

19. Defendants instructed its sales representatives, in Philadelphia and across the country, to call on and ask physicians that did not treat patients with cancer if they had the potential to treat cancer pain. Even if the physicians say no, Cephalon comprised a "decision tree" for its sales force that instructed the representatives to give the physicians free Actiq coupons for them to pass on to patients with non-cancer related pain. The coupon program was specifically identified in Defendants' marketing documents stating that it "is a remarkably effective promotional tool" that increased prescriptions of Actiq significantly with little cost.

20. Defendants encouraged and falsely told neurologists and primary care physicians that Actiq was proper for patients experiencing migraine headaches despite specifically knowing that Actiq was contraindicated for migraine headaches. An internal document titled "Actiq in Migraine" instructed salespeople to tout the berry flavored fentanyl as "an ER on a stick." Defendants' reference to "ER" is so, as it is not uncommon for acute migraine suffers to present to an emergency room for proper treatment of migraines if their migraine syndrome flared.

21. Defendants directed its sales representatives, whom Defendants referred to as "Pain Management Specialists", not to disclose to physicians that Actiq was contraindicated for treatment of acute or post-operative pain and was completely inappropriate for any use other than to manage breakthrough malignant cancer pain.

22. Defendants engaged in its unlawful, deceptive and reckless pattern and practice of marketing and promoting Actiq through the use of creating and sponsoring Continuing Medical Education (hereinafter "CME") seminars throughout the country in which Defendants funded and actually paid physicians' travel expenses to attend.

23. A key element of Defendants' plan was to co-opt physicians to become Defendants' "key opinion leaders" many of whom were paid tens of thousands of dollars to disseminate to a broad range of physicians the false, misleading and medically unsupported CME presentations prepared and/or controlled by Defendants. Two of Defendants' "key opinion leaders' were Stephen H. Landy, M.D., and Perry G Fine, M.D. discussed more fully below.

24. Instead of creating and sponsoring objective CMEs, Defendants converted such events into its self-interested promotional tools by controlling the speakers paid handsomely by Defendants, and controlling the topics, information and slides used which was highly misleading to the medical community who had a reasonable expectation that they were being provided objective and truthful educational materials.

25. For instance, a few examples of Defendants' repeated unlawful, deceptive and reckless pattern and practice of marketing and promoting Actiq through CMEs, was a CME held in New York in September of 2003, organized and promoted by Cephalon where one of its topics was "Opioid use in Headache" and another in October of 2003 in Las Vegas where a main topic was "Use of Actiq in opioid-naive patients".

26. As part of its scheme to get the medical community to prescribe its fentanyl drugs for non-cancerous chronic pain for which its fentanyl drugs were contraindicated, Defendants paid and funded one of its primary "key opinion leaders", Perry G. Fine, M.D., a pain management physician who served on the boards of the American Academy of Pain Medicine and American Pain Foundation, to publish a self-directed study in the Journal of Pain and Symptom Management titled Long Term Safety and Tolerability of Fentanyl Buccal Tablet for the Treatment of Breakthrough Pain in Opioid-Tolerant Patients with Chronic Pain. Defendants had this sham study conducted to spread misinformation and create confusion in the medical community and the public through its highly paid and controlled "key opinion leader", Dr. Fine.

27. It is not uncommon in the medical community for drugs to be prescribed for off-label purposes; however, drug manufacturers are not legally permitted to encourage or promote the use of regulated drugs for any indications that have not been formally approved by the FDA and the Food, Drugs and Cosmetics Act ("FDCA"), 21 U.S.C. section (SIGN) 301, *et seq*., requires drug manufacturers like Defendants to obtain FDA approval before promoting drugs for expanded indications. Indeed, under the FDCA, a drug cannot be marketed in the United States unless the manufacturer of the drug or its successor submits a New Drug Application (NDA) and demonstrates to the satisfaction of the FDA that the drug is safe and effective for each of its intended uses.

28. Defendants schemed, planned and unlawfully marketed and promoted off-label usage of Actiq throughout the medical community, knowing that physicians would believe its off-label usage was safe for non-cancer patients due to the misrepresentations and false information being provided by Defendants directly and indirectly through paid spokespersons and key opinion leaders.

29. In September of 2008, Defendant, Cephalon, entered a guilty plea in the Federal Court for the Eastern District of Pennsylvania in connection with its unlawful conduct of misbranding and

improper marketing of Actiq. *United States of America v. Cephalon*, Criminal Np.08-598 (E.D.Pa.). In its guilty plea, Cephalon admitted that "In 1998, Actiq was approved by the FDA only for breakthrough cancer pain for patients with malignancies who were already tolerant to opioid therapy for their cancer pain." Cephalon also admitted that it promoted Actiq for uses not approved by the FDA, including migraine headaches and general non-cancer chronic pain. **A true and correct copy of Cephalon's 2008 guilty plea is attached and incorporated herein by reference as Exhibit "2".**

30. Decedent, Joseph F. Caltagirone became a patient of Thomas C. Barone, D.O., a family medicine practitioner, located at 255 S. 17th Street, Suite 601, Philadelphia, PA on or about April 4, 2005 for the treatment of his migraine headaches.

31. As it did throughout the country, Defendants, through is sales representatives, agents, workpersons and employees, made sales calls to Dr. Barone's office prior to and while Decedent was a patient of Dr. Barone, unlawfully, falsely and deceptively promoting and marketing Actiq to Dr. Barone, suggesting that he prescribe and utilize Actiq for his non-cancer pain patients, including those with migraine headaches such as Decedent.

32. During the course of its deceptive, misleading, false and unlawful marketing of Actiq to Dr. Barone, Defendants also supplied coupons for Actiq to Dr. Barone who in turn gave them to patients who Defendants knew were not cancer patients for whom the drug was only intended and approved.

33. From approximately August of 2005 through December of 2011 and due to Defendants' deceptive, untruthful and unlawful actions in promoting the use of Actiq to Dr. Barone, Dr. Barone prescribed Decedent approximately 5,918 fentanyl lollipops, the majority of them being 800 or 1200 mcg.

34. Prior to Dr. Barone initiating prescriptions of Actiq for Decedent's migraine headaches in 2005, Defendants' sales personnel falsely represented to Dr. Barone that Actiq was safe and effective for the treatment of migraine headaches when it was known that said representations were false and that such off-label use of Actiq was not only highly dangerous but also unlawful.

35. Prior to Dr. Barone writing prescriptions of Actiq for Decedent's migraine headaches in 2005, Defendants' sales personnel provided Dr. Barone with and/or directed him to an article dated September 20, 2004 written by Stephen H. Landy, M.D., a paid spokesperson for Defendants, titled Oral Transmucosal Fentanyl Citrate for the Treatment of Migraine Headache: A Case Series which was published in the Journal of Head and Face Pain that unempirically concluded it was safe and effective to prescribe Actiq, (Oral Transmucosal Fentanyl Citrate) for persons experiencing migraine headaches. **A true and correct copy of Dr. Landy's September 20, 2004 article is attached and incorporated herein by reference as Exhibit "3".**

36. Dr. Landy was a major spokesperson and key opinion leader for Defendants in its unlawful, untruthful and reckless marketing campaign to the medical community in order to encourage the medical community to prescribe Actiq for indications that were not approved by the FDA.

37. Not only did Dr. Barone reference Dr. Landy's 2004 article, which was contained in Decedent's medical file and stated that it was safe and effective to prescribe Actiq to patients with migraines, he relied upon the article and Defendants other false and misleading information about Actiq before he began prescribing Actiq to Decedent.

38. Dr. Barone relied upon Defendants misleading and untruthful information about the safety, effectiveness and permissible usage of Actiq and Decedent, Joseph F. Caltagirone, relied upon the beliefs held by Dr. Barone that Actiq was safe and effective for his migraine headaches,

precisely what Defendants scheme set out to achieve.

39. In the ensuing years after 2006 and through 2011, Decedent was prescribed greater dosages of Actiq and other Schedule II opiate medications by Dr. Barone which resulted in Decedent developing an addiction to opiates which was proximately caused by the powerful and addictive Fentanyl he had been ingesting since 2005.

40. From December 28, 2011 through January 5, 2012, Decedent, Joseph F. Caltagirone, received inpatient treatment at Friends Hospital for his depressed mood from his addiction to Schedule II narcotic pain medication.

41. From January 5, 2012 until January 18, 2012, Joseph F. Caltagirone was admitted as a patient at the Kirkbride Center in Philadelphia, Pennsylvania for rehabilitative services to treat his opiate pain medication addiction.

42. On May 18, 2012; October 19, 2012; and December 12, 2012, Mr. Caltagirone received treatment at the John F. Kennedy Behavioral Health Center in Philadelphia, Pennsylvania, again to attempt to treat his opiate pain medication addiction.

43. As a result of the Decedent's addiction to Schedule II opiates, Dr. Barone determined that Methadone was warranted to curtail Decedent's need for powerful Schedule II opiates he had been prescribed for almost a decade while attempting to avoid severe withdrawal due to abruptly ceasing the pain medication.

44. On May 15, 2014, Mr. Caltagirone died due to an adverse reaction to the prescription medication being prescribed by Dr. Barone.

45. Mr. Caltagirone's official autopsy reported the cause of death as "drug intoxication," and the manner of death was "methadone toxicity".

46. The grievous suffering, injuries and ultimate death of Joseph F. Caltagirone were caused and/or contributed by the negligence, fraud, wantonness and recklessness of Defendants, their agents, servants, and employees, and were due in no manner whatsoever to any act or failure to act on the part of Mr. Caltagirone.

**COUNT I**
**NEGLIGENCE**
**Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased v. Cephalon. Inc. and Teva Pharmaceuticals USA, Inc.**

47. The previous paragraphs are incorporated herein as though fully set forth herein at length.

48. Defendants had a duty to exercise reasonable and ordinary care in the marketing, promotion, sale and distribution of its extremely powerful, addictive , dangerous and lethal drug, Actiq, pursuant to the limited purpose and specific guidelines set forth by the FDA.

49. Defendants breached their duty of care to Plaintiffs in its promotion, marketing, sale and distribution of its drug, Actiq.

50. The Defendants had a duty to exercise reasonable and ordinary care in the promotion, marketing and branding of Actiq to the medical community who would prescribe Defendants' drug to consumers and to truthfully disseminate honest and accurate information as to the very limited FDA approved purpose for Actiq.

51. The Defendants breached their duty to care to Plaintiffs in its promotion, marketing and branding of Actiq to the medical community and specifically Thomas C. Barone, D.O. who relied upon Defendants' misrepresentations and fraudulent, intentional, reckless and negligent behavior that resulted in Actiq being prescribed when it was unsafe, ineffective and specifically prohibited.

52. The injuries/death sustained by Decedent, as aforesaid, were directly and proximately caused by the negligent, careless, wanton, willful and reckless conduct of Defendants as fully set forth throughout the Complaint.

53. Specifically, the Defendants: (a) marketed, promoted, misrepresented, sold and/or distributed Actiq to physicians, including Thomas C. Barone, D.O., as safe, appropriate and effective for medical conditions not approved by the FDA; (b) marketed, promoted, misrepresented, sold and/or distributed Actiq to physicians, including Thomas C. Barone, D.O., as safe, appropriate and effective for migraine headaches when in fact it was not; ( c) marketed, promoted, misrepresented, sold and/or distributed Actiq to physicians, including Thomas C. Barone, D.O., as safe, appropriate and effective for non-FDA approved off label treatment of pain in non-cancer patient.

54. Defendants planned, schemed and acted consciously, intentionally, negligently, wantonly and recklessly by misbranding and falsely advertising, promoting and misrepresenting Actiq to the medical community and the public knowing that its fraud, misrepresentations and misbranding would result in physicians prescribing Actiq for persons that did not have cancer which was specifically forbidden by the FDA which exposed the public and specifically Decedent to a severe risk of harm, suffering, addiction and death.

55. The grievous suffering, injuries and ultimate death of Joseph F. Caltagirone were caused and/or contributed by the negligence, fraud, wantonness, recklessness and intentional wrongful behavior of Defendants, their agents, servants, and employees, and were due in no manner whatsoever to any act or failure to act on the part of Mr. Caltagirone.

**WHEREFORE,** Plaintiffs demand damages against Defendants, jointly and severally, in an amount in excess of $50,000.00 and in excess of the prevailing Arbitration limits under the Wrongful Death And Survival Act, exclusive of pre-judgment interest, post-judgment interest, together with

costs, punitive damages, interest, attorneys fees and such other relief as permitted by law and as the Court may deem appropriate under the circumstances.

**COUNT II**
**COMMON LAW FRAUD**
**Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased v. Cephalon. Inc. and Teva Pharmaceuticals USA, Inc.**

56. The previous paragraphs are incorporated herein as though fully set forth herein at length.

57. The Defendants falsely and fraudulently represented to the medical community, pharmacies, Decedent, Decedent's physicians and the public that its drug, Actiq, was appropriately tested and found to be safe and effective for the treatment of non-cancer pain when they knew it was only approved by the FDA for the very limited purpose of treating patients with breakthrough cancer pain from malignancies.

58. The representations made by Defendants were, in fact, false and when Defendants made their representations, they knew they were false and they willfully, wantonly and recklessly disregarded the extreme danger of causing serious illness, addiction and death to non-cancer patients who used Actiq.

59. The false representations made by Defendants were carried out with the intent to defraud and deceive the medical community, pharmacies, Decedent, Decedent's physician, Thomas C. Barone, D.O., and the public for the sole purpose to increase prescriptions and consumption of Actiq to increase Defendants' profits, all of which evinced a callous, willful, reckless and depraved indifference to the health, safety and welfare of Decedent, Joseph F. Caltagirone, and the public.

60. At the time that the misrepresentations were made by Defendants, Decedent and his physician, Thomas C. Barone, D.O., were unaware of the falsity of those representations and

reasonably believed them to be true and they reasonably relied upon the false representations of Defendants.

61. In reliance upon Defendants' false representations, Decedent and his physician, Thomas C. Barone, D.O. were induced into using Actiq for the treatment of migraine headaches, believing it was safe, appropriate and effective.

62. Had Decedent, Joseph F. Caltagirone, known the true facts that Actiq was only approved for treatment of patients with breakthrough cancer pain and that Actiq was never tested, proven to be effective, safe nor approved by the FDA for migraine headaches, he would have never used Actiq for his migraine headaches.

63. The Defendants wrongful conduct constitutes fraud and deceit, and was committed and perpetrated willfully, wantonly and purposely upon Decedent, Joseph F. Caltagirone.

64. As a proximate result of Defendants' fraudulent conduct, Decedent, Joseph F. Caltagirone, was caused grievous sickness, suffering, addiction and ultimately death.

**WHEREFORE,** Plaintiffs demand damages against Defendants, jointly and severally, in an amount in excess of $50,000.00 for Wrongful Death and Survival damages plus delay damages and interest accruing thereupon, punitive damages, counsel fees and costs, other economic and compensatory damages exclusive of pre-judgment interest, post-judgment interest, and such other relief as permitted by law and as the Court may deem appropriate under the circumstances.

## COUNT III
## NEGLIGENT MISREPRESENTATIONS
**Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased v. Cephalon. Inc. and Teva Pharmaceuticals USA, Inc.**

65. The previous paragraphs are incorporated herein as though fully set forth herein at length.

66. The Defendants had a duty to accurately and truthfully represent to the medical community, pharmacies, Decedent, Decedent's physicians and the public that its drug, Actiq, was only approved by the FDA to be safe and effective for the treatment of patients with cancer pain from malignancies and that it was not approved by the FDA as safe and effective for the treatment of non-cancer pain.

67. The representations made by Defendants through their multiple unlawful and fraudulent acts were, in fact, false.

68. The Defendants failed to exercise reasonable and ordinary care in making their representations to the medical community and public concerning Actiq while they were marketing, promoting, selling and distributing Actiq to the medical community and the public and Defendants' intent and purpose was for the medical community to prescribe Actiq and consumers to ingest Actiq for medical conditions that were unapproved and the drug was unsafe and ineffective.

69. As a foreseeable, direct and proximate result of the negligent misrepresentations of Defendants, Thomas C. Barone, D.O. and the medical community relied upon said misrepresentations and believed in was safe and lawful to prescribe Actiq for off-label uses which caused Decedent and the public to believe that it was safe to ingest Actiq for non-cancer pain, when Defendants knew that its misrepresentations would create a high risk of addiction, suffering and death.

70. The grievous suffering, injuries and ultimate death of Joseph F. Caltagirone were proximately caused and/or contributed by the negligence, fraud, wantonness, recklessness and intentional wrongful behavior of Defendants, their agents, servants, and employees, and were due in no manner whatsoever to any act or failure to act on the part of Mr. Caltagirone.

**WHEREFORE,** Plaintiffs demand damages against Defendants, jointly and severally, in an amount in excess of $50,000.00 and in excess of the prevailing Arbitration limits under the Wrongful Death And Survival Act, exclusive of pre-judgment interest, post-judgment interest, together with costs, punitive damages, interest, attorneys fees and such other relief as permitted by law and as the Court may deem appropriate under the circumstances.

**COUNT IV**
**VIOLATION OF UNFAIR TRADE PRACTICES/CONSUMER PROTECTION LAW**
**Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased v. Cephalon. Inc. and Teva Pharmaceuticals USA, Inc.**

71. The previous paragraphs are incorporated herein as though fully set forth herein at length.

72. Decedent, Joseph F. Caltagirone, was a consumer within the meaning of the Unfair Trade Practice and Consumer Protection Law ("UTPCPL"), 73 Pa.Stat.Ann §9201 et. seq.

73. Defendants, Cephalon and Teva, are deemed "persons" pursuant to the UTPCPL and all relevant times hereto were engaged in trade and commerce governed by the UTPCPL.

74. The aforesaid described conduct of Defendants, Cephalon and Teva, violates the Unfair Trade Practice and Consumer Protection Law, 73 Pa.Stat.Ann §9201 et. seq.

75. Specifically, Defendants have engaged in unfair and deceptive acts or practices and other fraudulent conduct which created the likelihood of confusion or of misunderstanding on the part of Dr. Barone who relied upon Defendants misrepresentations which in turn created the likelihood of confusion or of misunderstanding on the part of Decedent who relied upon Dr. Barone and who ended up as the consumer of Defendants' drug.

76. The actions of Defendants were intentional, reckless, wanton and willful.

77. As a direct and proximate result of its violation of the Unfair Trade Practice and Consumer Protection Law, 73 Pa.Stat.Ann §9201 et. seq., Defendants are liable to Plaintiffs for Wrongful Death and Survival damages plus delay damages and interest accruing thereupon, treble damages, punitive damages, counsel fees and costs, other economic and compensatory damages, as well as any and all direct and consequential damages.

78. As a direct and proximate result of its violation of the Unfair Trade Practice and Consumer Protection Law, 73 Pa.Stat.Ann §9201 et. seq. Defendants are liable to Plaintiffs for treble damages.

79. As a direct and proximate result of its violation of the Unfair Trade Practice and Consumer Protection Law, 73 Pa.Stat.Ann §5201 et. seq. Defendants are liable to Plaintiffs for attorneys' fees incurred in the maintenance of this action.

**WHEREFORE,** Plaintiffs demand damages against Defendants, jointly and severally, in an amount in excess of $50,000.00 for Wrongful Death and Survival damages plus delay damages and interest accruing thereupon, treble damages, punitive damages, counsel fees and costs, other economic and compensatory damages exclusive of pre-judgment interest, post-judgment interest, and such other relief as permitted by law and as the Court may deem appropriate under the circumstances.

## FIRST CAUSE OF ACTION
## WRONGFUL DEATH
### Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased v. Cephalon. Inc. and Teva Pharmaceuticals USA, Inc.

80. The previous paragraphs are incorporated herein as though fully set forth herein at length.

81. Plaintiff, Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased, brings this action on behalf of the beneficiaries under and by virtue of the Wrongful Death Act, 42 Pa. C.S.A. §8301, and the applicable Rules of Civil Procedure and decisional law.

82. As a result of the wanton, reckless and negligent acts and omissions of Defendants, Joseph F. Caltagirone was caused to suffer grave injuries, suffering and ultimately death, resulting in the entitlement to damages to the Estate of Joseph F. Caltagirone, deceased.

83. Plaintiff, Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased, claims all executor's expenses recoverable under the Wrongful Death Act, including but not limited to damages for hospital, medical, funeral, and burial expenses and all expenses of administration made necessary because of Joseph F. Caltagirone's death.

84. The Wrongful Death Act Beneficiaries are:

a.) Joseph A. Caltagirone, Surviving Father of Joseph F. Caltagirone, deceased

b.) Donna Shaffer, Surviving Mother of Joseph F. Caltagirone, deceased

85. On behalf of Wrongful Death Act beneficiaries, the Administrator claims damages for monetary support that decedent would have provided to the beneficiaries during their lifetime, including but not limited to the support provided or which could have been expected to have been provided to the beneficiaries.

86. On behalf of the Wrongful Death Act beneficiaries, the Administrator claims damages for loss of companionship, comfort, society, guidance, solace, and protection by the decedent.

87. On behalf of the Wrongful Death Act beneficiaries, the Administrator claims damages for the full damages allowed under the Wrongful Death Act of Pennsylvania and decisional law interpreting the Act.

**WHEREFORE,** Plaintiffs demand damages against Defendants, jointly and severally, in an amount in excess of $50,000.00 are liable for Wrongful Death and Survival damages plus delay damages and interest accruing thereupon, treble damages, punitive damages, counsel fees and costs, other economic and compensatory damages exclusive of pre-judgment interest, post-judgment interest, and such other relief as permitted by law and as the Court may deem appropriate under the circumstances.

## SECOND CAUSE OF ACTION
## SURVIVAL ACTION
### Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased v. Cephalon. Inc. and Teva Pharmaceuticals USA, Inc.

88. The previous paragraphs are incorporated herein as though fully set forth herein at length.

89. Plaintiff, Joseph A. Caltagirone, Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased, brings this Survival Action on behalf of the Estate of Joseph F. Caltagirone, deceased, under and by virtue of 42 Pa. C.S.A. §8302, and the applicable Rules of Civil Procedure and decisional law.

90. As a result of the wanton, reckless and negligent acts and omissions of Defendants, Joseph F. Caltagirone was caused to suffer grave injuries, suffering and ultimately death, resulting in the entitlement to damages by said beneficiaries under the Survival Act.

91. On behalf of the Survival Act beneficiaries, the Administrator claims the amount of lost earnings of decedent between the time of injury and death.

92. On behalf of the Survival Act beneficiaries, the Administrator claims loss of earnings and economic loss to decedent's estate, including but not limited to, decedent's total estimated future earning power less his cost of personal maintenance as a result of Decedent's death.

93. On behalf of the Survival Act beneficiaries, the Administrator claims all loss of income, retirement, and Social Security income as a result of Decedent's death.

94. On behalf of the Survival Act beneficiaries, the Administrator claims damages for the pain, suffering, and inconvenience endured by Decedent prior to death, including but not limited to, physical pain and suffering, mental pain and suffering, and the fright and mental suffering attributed to the peril leading to Decedent's death.

95. Plaintiff claims the full measure of damages under the Survival Act and decisional law interpreting said Act.

**WHEREFORE,** Plaintiffs demand damages against Defendants, jointly and severally, in an amount in excess of $50,000.00 for Wrongful Death and Survival damages plus delay damages and interest accruing thereupon, treble damages, punitive damages, counsel fees and costs, other economic and compensatory damages exclusive of pre-judgment interest, post-judgment interest, and such other relief as permitted by law and as the Court may deem appropriate under the circumstances.

**CONSOLE & HOLLAWELL, P.C.**

BY: Richard J. Hollawell

RICHARD J. HOLLAWELL
Attorney I.D. No. 88094
Attorneys for Plaintiff
525 Route 73 North, Suite 117
Marlton, NJ 08053
(856) 778-5500

Dated: 9/13/16

**VERIFICATION**

I, Joseph A. Caltagirone, as Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased, and Joseph A. Caltagirone, Individually, the Plaintiff in the foregoing action, hereby verify that the statements made in the foregoing Civil Action Complaint are true and correct to the best of my knowledge, information and/or belief. I understand that false statements hereunder made are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsifications to authorities.

Joseph A. Caltagirone, as Administrator Ad Prosequendum for the Estate of Joseph F. Caltagirone, deceased

Dated: 9/13/16

EXHIBIT 1

LETTERS OF ADMINISTRATION

**REGISTER'S OFFICE**
PHILADELPHIA COUNTY, PA



Nº A3637-2014

ESTATE OF JOSEPH F CALTAGIRONE

Social Security No. 181-60-9256

WHEREAS, JOSEPH F CALTAGIRONE
late of 2222 E CUMBERLAND ST, PHILADELPHIA, PA 19125
died on the 15th day of May, 2014;
and

WHEREAS, the grant of letters of administration is required for the administration of his estate.

THEREFORE, I, RONALD R. DONATUCCI, Register for the Probate of Wills and Grant of Letters Testamentary and of Administration, in and for the County of Philadelphia in the Commonwealth of Pennsylvania, hereby certify that I have granted Letters of Administration
to JOSEPH A CALTAGIRONE
who has duly qualified as Administrator of the estate of the above named decedent and has agreed to administer the estate according to law, all of which fully appear of record in the Office of the Register of Wills of Philadelphia County, Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at Philadelphia, the 12th day of September 2014

*Deputy Register*

10-36 (Rev. 10/99)

# Office of the Register of Wills of Philadelphia County, Pennsylvania

**File #: A3637-2014**

**Commonwealth of Pennsylvania** }
**County of Philadelphia** } **ss.**

I, **RONALD R. DONATUCCI, ESQUIRE**, Register for the Probate of Wills and Granting Letters of Administration in and for the County of Philadelphia, in the Commonwealth of Pennsylvania

DO HEREBY CERTIFY AND MAKE KNOWN That on the **12th** day of **September**

in the year of our Lord **2014** **LETTERS OF ADMINISTRATION**

on the Estate of **JOSEPH F CALTAGIRONE**

**DOCTOR**

Deceased, were granted unto **JOSEPH A CALTAGIRONE**

having first been qualified well and truly to administer the same. And I further certify that no revocation of said Letters appears of record.

Date of death **5/15/2014**

Given under my hand and seal of office, this **12th** day of **September**, 20**14**

*Deputy Register*

**NOT VALID WITHOUT ORIGINAL SIGNATURE AND IMPRESSED SEAL**

10-14 (Rev. 3/08)

Case ID: 160902877

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA



| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| v. | : | CRIMINAL NO. 08-598 |
| CEPHALON, INC. | : | |

**GOVERNMENT'S MEMORANDUM FOR ENTRY OF PLEA AND SENTENCING**

## I. INTRODUCTION

The government submits this memorandum to assist the Court with the entry of a guilty plea and with sentencing in this case. Defendant Cephalon, Inc., has signed a guilty plea agreement under Fed.R.Crim.P. 11(c)(1)(C) under which, with the Court's approval, it will plead guilty to a one-count misdemeanor information charging it with misbranding under the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq. ("FDCA"), and pay a stipulated fine of $50 million (which includes $10 million in criminal forfeiture). The plea agreement also proposes that the Court proceed to impose sentence immediately, waiving a presentence investigation.

The plea agreement resolves a very significant investigation into the promotional practices in the United States of defendant Cephalon, Inc., a pharmaceutical manufacturer, for its drugs Actiq, Gabitril, and Provigil. The essence of the charge is that Cephalon marketed its drugs for uses that had not been approved by the Food and Drug Administration ("FDA"), a form of unlawful misbranding known as "off-label marketing." This plea is part of a global resolution that includes a civil settlement agreement with the United States and many states, a Corporate Integrity Agreement with the Department of Health and Human Services, Office of the Inspector

General, and resolution of several civil actions brought under the qui tam provisions of the False Claims Act.

## II. THE CRIMINAL CHARGE

The information filed in this case charges Cephalon with one count of misdemeanor misbranding under the FDCA, 21 U.S.C. §§ 331(a), 333(a)(1), and 352(f)(1). A copy of this information is attached as Exhibit A.

As the information explains, the FDCA intensively regulates all aspects of the manufacture and distribution of drugs in the United States (pars. 2-3). In general, a drug manufacturer can not sell a drug here until the FDA approves the manufacturer's application, and determines that the drug was safe and effective, based on well controlled clinical studies, for the use proposed by the manufacturer. As part of its regulatory process, the FDA also reviews and approves the drug's "label" or "labeling," which must include adequate directions for the intended use – that is, the use that the manufacturer proposed in seeking the FDA's approval.

Under the FDCA, a drug is misbranded if the labeling does not contain "adequate directions for use." 21 U.S.C. § 352(f)(1). The FDA can not approve "adequate directions for use" until the drug is approved for that use, based on the FDA's finding that the drug is safe and effective, as established by proper clinical studies. Any uses for a drug that are not approved by FDA as safe and effective, and thus that were not included in the drug's approved labeling, are known as "off-label" indications or uses. A drug that is promoted for an off-label indication or use does not contain "adequate directions for use," because such an off-label indication or use was not included in the FDA-approved labeling for the drug. Promoting a drug for an off-label use constitutes misbranding of that drug.

The information alleges that Cephalon misbranded three of its drugs by marketing them off-label from 2001 through at least 2006 (pars. 6-11). Those drugs are the following:

- Actiq: approved by the FDA in 1998 for breakthrough cancer pain in opioid-tolerant patients. Cephalon improperly promoted Actiq for non-cancer pain uses.

- Gabitril: approved by the FDA in 1997 as an anti-epilepsy drug, for use as adjunctive therapy in adults and children 12 years and older in the treatment of partial seizures. Cephalon improperly promoted Gabitril to treat anxiety, insomnia, and pain.

- Provigil: approved by the FDA in 1998 for excessive daytime sleepiness associated with narcolepsy; in 2004, the FDA approved the expansion of Provigil's label to include the treatment of excessive sleepiness associated with obstructive sleep apnea/hypopnea syndrome, and shift work sleep disorder. Cephalon improperly promoted Provigil to treat sleepiness, tiredness, decreased activity, lack of energy and fatigue.

The information describes the defendant's off-label practices and its training of its sales staff to ignore the legal restrictions on promoting these drugs (pars. 12-18). In particular:

- Cephalon had its sales representatives call on doctors who would not normally prescribe the defendant's drugs in the course of the doctors' practice;

- Cephalon trained its sales representatives on techniques to prompt the doctors into off-label conversations;

- Cephalon's compensation and bonus structure encouraged off-label marketing;

- Cephalon had its sales representatives tell doctors how to document their off-label uses of drugs to get these uses paid by insurers, who often will not pay for off-label uses;

- Cephalon used its grants for continuing medical education to promote off-label uses; and

- Cephalon sent doctors to "consultant" meetings at lavish resorts to hear the company's off-label message.

The information also describes the risks to patients from Cephalon's off-label marketing campaign (pars. 19-23). Those risks were particularly high in the case of Actiq, an extremely powerful narcotic with a very narrow label, and Gabitril, an anti-seizure drug. Actiq was approved for use by opioid-tolerant patients suffering from breakthrough cancer pain, that is, patients whose cancer pain was so severe that their opioid therapies (such as morphine) were no longer effective. The label called for Actiq to be prescribed by oncologists or pain specialists familiar with opioids. Yet the defendant promoted Actiq to other doctors, including general practitioners, for more general pain uses. The use of Actiq by patients who are not yet tolerant of opioids poses particular dangers. Similarly, the FDA found that the use of Gabitril by non-epileptics was associated with seizures.

More generally, the information describes how off-label marketing can interfere with proper patient care and thus harm patients (pars. 19, 23). And as the information details, Cephalon proceeded with its off-label marketing campaigns despite directions from the FDA to stop (pars. 24-26).

The specific charge is that defendant Cephalon introduced and caused the introduction into interstate commerce of Provigil, Gabitril, and Actiq, drugs which were misbranded because they lacked adequate directions for their use in that Cephalon promoted them off-label, from January 2001 through October 2001 (par. 28). This is the charge to which Cephalon is pleading guilty.

## III. THE GUILTY PLEA AGREEMENT

The essential terms of the plea agreement are set forth here. (A complete copy is attached for the Court's reference as Exhibit B.) In particular:

- Cephalon agrees to plead guilty to a one-count information charging misdemeanor misbranding of its drugs Provigil, Gabitril, and Actiq between January 2001 and October 1, 2001, in violation of the FDCA, 21 U.S.C. §§ 331(a), 333(a)(1), and 352(f)(1). The charge arises from Cephalon's unlawful promotional practices, known as "off-label" marketing. Cephalon also agrees not to contest forfeiture as set forth in the agreement. Plea Agreement, par. 1.

- The parties entered into this plea agreement under Fed.R.Crim.P. 11(c)(1)(C), with a stipulated sentence. If the Court rejects this plea under Rule 11(c)(1)(C), then the plea converts automatically to a plea under Rule 11(c)(1)(B), and the stipulated sentence becomes the sentence jointly recommended by the parties. Plea Agreement, par. 2.

- The agreed-upon sentence is: payment of $50 million ($40 million as the criminal fine, plus $10 million as the criminal forfeiture), all payable within 10 business days of sentencing; plus the special assessment of $125. In light of the Corporate Integrity Agreement signed by Cephalon, the parties agree that the defendant will not be placed on probation. Plea Agreement, par. 2.

- The parties stipulate to the following facts and basis for the plea, criminal fine and forfeiture (Plea Agreement, par. 6(A)):

  (1) Cephalon marketed Provigil, Gabitril, and Actiq, which were drugs within the meaning of 21 U.S.C. § 321(g)(1).

  (2) Shipments of a drug in interstate commerce must be accompanied by labeling bearing adequate directions for use for each of the drug's intended uses.

  (3) In 1998, Provigil was approved by the FDA to treat excessive daytime sleepiness associated with narcolepsy.

  (4) Between January 2001 and October 1, 2001, Cephalon promoted Provigil for uses not approved by the FDA, including as a daytime stimulant to treat sleepiness, tiredness, decreased activity, lack of energy and fatigue. Cephalon's promotion of Provigil for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Provigil's labeling did not bear adequate directions for each of the drug's intended uses.

  (5) In 1997, Gabitril was approved by the FDA as an anti-epilepsy drug indicated as adjunctive therapy in adults and children 12 years and older in the treatment of partial seizures.

(6) Between January 2001 and October 1, 2001, Cephalon promoted Gabitril for certain uses not approved by the FDA, including as an agent for anxiety, insomnia, and pain. Cephalon's promotion of Gabitril for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Gabitril's labeling did not bear adequate directions for each of the drug's intended uses.

(7) In 1998, Actiq was approved by the FDA for breakthrough cancer pain for patients with malignancies who were already tolerant to opioid therapy for their cancer pain.

(8) Between January 2001 and October 1, 2001, Cephalon promoted Actiq for uses not approved by the FDA, including for non-cancer pain uses, such as injuries and migraines. Cephalon's promotion of Actiq for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Actiq's labeling did not bear adequate directions for each of the drug's intended uses.

(9) Between 2001 through October 1, 2001, Cephalon profited by misbranding Provigil, Gabitril and Actiq, and distributing these drugs in interstate commerce.

- The United States contends that, as a matter of relevant conduct, the conduct at issue continued past October 1, 2001. Cephalon does not admit that this conduct extended past October 1, 2001. Plea Agreement, par. 6(B).

- The Plea Agreement includes a non-prosecution clause for conduct which (a) falls within the scope of the grand jury investigation in this district relating to Provigil, Gabitril, and Actiq; or (b) was known to the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice as of the date of the execution of this plea agreement, and which concerned the sale, promotion, or marketing of these three drugs in the United States. This non-prosecution clause is binding on the United States Attorney's Office for the Eastern District of Pennsylvania, the Office of Consumer Litigation of the Department of Justice, all other United States Attorney's Offices, and the Criminal Division of the United States Department of Justice. Plea Agreement, pars. 8-9.

- The Plea Agreement contains an appellate waiver. There can be no appeal if the Court enters the plea under Rule 11(c)(1)(C). If the plea is entered under Rule 11(c)(1)(B), then the defendant may appeal only to argue that the sentence exceeded the statutory maximum as set forth in the plea agreement, the Court erroneously departed upward under the Sentencing Guidelines, or the Court imposed an unreasonable sentence above the final Sentencing Guideline range.

Plea Agreement, par. 11.

- If acceptable to the Court, the parties agree to waive the presentence investigation and report pursuant to Fed.R.Crim.P. 32(c)(1), and ask that Cephalon be sentenced at the time the guilty plea is entered. Plea Agreement, par. 15.

## IV. THE OTHER COMPONENTS OF THE GLOBAL RESOLUTION

As the Plea Agreement references, this is part of a global resolution of this investigation with the United States. In a separate civil settlement among Cephalon, the United States and various states, Cephalon will pay $375 million, plus interest, to resolve False Claims Act claims by the United States Medicaid and Medicare Trust Funds, and other federal programs and agencies, as well as claims by state Medicaid programs and the District of Columbia. This settlement also resolves the four qui tam actions filed in this district.

Along with the civil settlement agreement, Cephalon has signed a five-year Corporate Integrity Agreement with the Department of Health and Human Services, Office of the Inspector General. This agreement imposes a strict compliance program to ensure that the conduct does not recur.

## V. THE ESSENTIAL ELEMENTS OF THE OFFENSE

### A. Misbranding

The information charges one count of misbranding under the FDCA, in violation of 21 U.S.C. §§ 331(a), 333(a)(1), and 352(f)(1). Section 331 lists prohibited acts, including:

> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

Under section 352 of the FDCA, a drug is "misbranded" under several circumstances, including (as relevant here):

A drug or device shall be deemed to be misbranded –

(f) Directions for use and warnings on label
Unless its labeling bears (1) adequate directions for use . . . .

Section 333 sets forth penalties, including:

(a) Violation of section 331 of this title; second violation; intent to defraud or mislead
(1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

The information in this case charges a misdemeanor under this penalty provision. The offense would rise to the felony level either if the government charged and proved the defendant's intent to defraud or mislead, or if the defendant had already been convicted of an FDCA violation (the second-offender felony provision). 21 U.S.C. § 333(a)(2).

Thus, in order to prove the crime of misdemeanor misbranding, the government must establish the following elements beyond a reasonable doubt:

- that Actiq, Gabitril, and Provigil are drugs
- that they were misbranded, in that they lacked adequate directions for the uses intended by Cephalon, and
- that they were introduced into interstate commerce.

It is not illegal for a doctor to prescribe off-label, using his or her best medical judgment. However, it constitutes misbranding for a drug manufacturer to promote an off-label use to that doctor.

**B. Forfeiture**

The forfeiture component of the information and plea agreement arises from the FDCA's provision for seizing misbranded drugs. 21 U.S.C. § 334 (allowing proceedings on libel of information, for condemnation, against drugs that are misbranded or adulterated so that the

government can seize, destroy or sell them). These proceedings are by their nature classic civil forfeiture proceedings. Under federal forfeiture law, the government can pursue criminal forfeiture in any case where the defendant is charged with a violation of an Act of Congress which contains a civil forfeiture remedy. See 28 U.S.C. § 2461(c) (allowing criminal forfeiture where the defendant is charged "in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized . . . ."). Thus, if civil forfeiture is authorized in a statute such as the FDCA, then criminal forfeiture is as well.

As the misbranded drugs are no longer available for seizure or destruction, the government can seek substitute assets. See 18 U.S.C. § 2461(c) (the procedures set forth in 21 U.S.C. § 853 apply to this criminal forfeiture); 21 U.S.C. § 853(p) (allowing the forfeiture of substitute assets if the items subject to forfeiture are no longer available).

## VI. THE MAXIMUM PENALTIES

The maximum penalty for this offense is a fine of $200,000 (under 18 U.S.C. § 3571(c)(5)), or twice the gross gain or gross loss, whichever is greater (18 U.S.C. § 3571(d)); a special assessment of $125 (18 U.S.C. § 3013(a)(1)(B)(iii)); and a five-year term of Court supervision (18 U.S.C. § 3561(c)(2)); in addition, forfeiture may be ordered.

## VII. THE FACTS AT TRIAL

In the plea agreement, the parties have stipulated to a factual basis sufficient to support the entry of this plea. Plea Agreement, par. 6(A). If the case were to proceed to trial, the government would prove these facts beyond a reasonable doubt, as well as the other allegations set forth in the information.

In summary, the government would show a concerted plan to maximize revenue

by the off-label marketing of Actiq, Gabitril, and Provigil, which for many of the years covered by the information were Cephalon's only drugs. The defendant's unlawful promotional efforts included several facets, set forth in the information, including training and compensating the sales staff to encourage off-label marketing, managing them to conduct this off-label marketing, co-opting the supposedly neutral continuing medical education process, and bestowing favors on doctors in the form of "consulting" sessions at lavish resorts where they attended off-label sessions. In fact, according to a Cephalon document, these meetings "proved incredibly effective in driving prescription growth among the attendees."

At trial, the government would show that the defendant's off-label marketing was no accident. Indeed, the proof would demonstrate that, for over six years, the very top levels of the company knew and approved of these efforts. This was a highly organized and deliberate effort to maximize revenue despite legal restrictions. Further, Cephalon continued its illegal promotional activities after January 2002, when the FDA specifically directed the company to stop promoting Provigil for off-label uses.

A. **Actiq**

The case of Actiq is particularly egregious, as this drug is 80-100 times more powerful than morphine. The FDA-approved label for Actiq is unusually restrictive:

> [Actiq] must not be used in opioid non-tolerant patients. Life-threatening hypoventilation could occur at any dose in patients not taking chronic opiates. Actiq is indicated only for the management of breakthrough cancer pain in patients with malignancies who are already receiving and who are tolerant to opioid therapy for their underlying persistent cancer pain.

The label calls for Actiq to be prescribed by oncologist or pain specialists familiar with the use of opioids. Because of the potency and risk of the drug, the FDA also mandated a risk management

program requiring Cephalon to submit quarterly reports concerning issues such as diversion.

In about 2001, Cephalon began a significantly expanded marketing effort for Actiq, including telling its sales representatives to target non-cancer physicians. In its marketing strategy for 2002, Cephalon described the Actiq patient profile as:

> any opioid tolerant patient suffering from breakthrough pain, regardless of disease state, is a potential candidate for Actiq. Additionally any patients suffering from moderate to severe episodic pain due to migraine headaches, sickle cell pain crises, etc. are potential candidates for Actiq. Lastly, Actiq may also be appropriate as a pre-procedural pain medication for any opioid naive or opioid tolerant patient about to undergo radiation therapy, wound dressing changes, physical therapy, etc. in a monitored setting. . . . By illustrating the true onset of analgesia and proving Actiq safe and effective in the treatment of other pain diagnoses, *including both opioid tolerant and opioid naive patients,* Actiq will be posed for tremendous growth in 2002 in both the BTP [breakthrough pain] and episodic pain segments of the opioid market.

(Emphasis added.) The marketing of Actiq for patients who were "opioid naive" directly contradicted the label and increased the risk for this population considerably.

Cephalon management conveyed its disregard for the FDA-approved label for Actiq (opioid-tolerant cancer patients with breakthrough cancer pain, to be prescribed by oncologist or pain specialists familiar with opioids) to the sales force. Using the mantra "pain is pain," Cephalon instructed the sales representatives to focus on physicians other than oncologists, and to promote Actiq for multiple uses other than breakthrough cancer pain.

**B. <u>Gabitril</u>**

Cephalon bought the rights to make and sell Gabitril in 2000, and started its promotions in 2001. The drug had been approved in 1997 as an anti-epilepsy drug indicated as adjunctive therapy in adults and children 12 years and older in the treatment of partial seizures. As of 2000, sales of Gabitril were declining. The anti-seizure field was crowded with other anti-epileptics, and Gabitril was only indicated as adjunctive therapy, meaning it had to be taken with

another drug to be effective. Cephalon knew that Gabitril was seen as "last in class as an anti-seizure medication." Cephalon attempted to identify "new market niches" for Gabitril.

Relying on market research showing a large growth in the use of anti-convulsants by psychiatrists, in 2001 Cephalon relaunched Gabitril, calling it the first Selective Gabapentin Reuptake Inhibitor, in hopes of taking advantage of the growing market among psychiatrists for SSRIs, (Selective Serotonin Reuptake Inhibitors such as Prozac, Paxil and Zoloft which are used to treat depression and also anxiety). To carry out its plan for Gabitril use beyond epilepsy, Cephalon instructed its sales representatives to focus on psychiatrists rather than neurologists (the specialty physicians who would ordinarily treat patients with epilepsy).

The Gabitril relaunch was successful. Cephalon tracked the rise in Gabitril prescriptions by psychiatrists from 8,065 in 2000 to 42,922 in 2001, and attributed this increase to its off-label promotion. Management told the sales representatives that it was "VITAL to develop MORE psychiatry writers, MORE psychiatry adopters, and MORE psychiatry product champions" because the company was committed "first and foremost" to psychiatry. This company call for the sales representatives to focus on psychiatrists, not neurologists, continued until Cephalon stopped promoting Gabitril in 2005.

In February 2005, after receiving adverse event reports that patients (mostly with psychiatric illnesses) were having seizures after taking Gabitril for conditions other than epilepsy, the FDA issued a public health advisory and required Cephalon to add a bolded warning on the Gabitril label advising physicians of the association between Gabitril and seizures in patients who did not have epilepsy. The FDA also required Cephalon to send a letter to physicians advising of the Gabitril-seizure association. At that point, Cephalon stopped promoting the drug.

C. **Provigil**

Cephalon's shift in focus from neurologists (on-label use) to psychiatrists (off-label use) included Provigil as well as Gabitril. Cephalon recognized that, because Provigil was the most-used drug in the limited narcolepsy population, the only avenue to greater sales was to expand the use beyond the label. Because psychiatrists were prescribing Provigil to treat conditions such as depression-related fatigue, Cephalon revised its promotional strategy to emphasize fatigue related to conditions other than narcolepsy. Instead of obtaining a broader indication for Provigil, however, Cephalon decided to "establish the product as a drug of choice for fatigue as well as sleepiness and to address the multiple symptoms that can be alleviated by the product in addition to the use of the product in adjunctive therapy beyond its indication" and to "better define benefits of 'wake-promotion' to expand use into other areas."

Shortly after Cephalon started promoting Provigil off-label for "wakefulness," in January 2002 the FDA directed Cephalon to stop disseminating false and misleading written promotional materials representing that Provigil was better, safer, more effective, or useful in a broader range of conditions or patients than had been approved. The company's promotional materials had included claims that Provigil was useful for sleepiness, tiredness, decreased activity, lack of energy and fatigue.

Although Cephalon stopped using these written promotional materials, its sales force continued to promote Provigil for those unapproved uses. For example, in November 2002, a Cephalon manager, accompanying a sales representative on calls to physicians, counseled the sales person: "Your best call of the day was with Dr. [a psychiatrist] . . . . Informing the physician of the transition that we have made with Provigil from narcolepsy to the variety of

areas in which it is currently being used was also effective."

In December 2002, Cephalon applied to the FDA to expand Provigil's label to cover excessive sleepiness, without regard to the patient's underlying medical condition. In January 2004, the FDA approved a more narrow expansion of the label, not for the requested excessive sleepiness, but instead for excessive sleepiness associated with two specific medical conditions: (1) obstructive sleep apnea, in certain patients, and (2) shift work sleep disorder. Despite these narrow expansions to the label, Cephalon continued to promote Provigil for off-label uses, behaving as if it had received the broader label it had been denied.

**D. Sales**

Cephalon's marketing and sales reports show the success of these off-label campaigns:

- Actiq: from $50.1 million in 2001 to $550.4 million in 2006
- Gabitril: from $24.6 million in 2001 to $ 87.3 million in 2004
- Provigil: from $146.2 million in 2001 to $691.7 million in 2006.

## VIII. THE SENTENCING CONSIDERATIONS

The stipulated criminal fine of $50 million is the result of intensive negotiations between the parties. It represents a just resolution of the charge against Cephalon for its off-label marketing, particularly when coupled with the significant civil settlement and the obligations imposed by the Corporate Integrity Agreement. The total package is the largest resolution in this district's history.

The proposed criminal resolution accomplishes the goals of sentencing without being overly harsh. Off-label marketing is harmful, in general, in that it interferes with the

doctor-patient relationship, is misleading to doctors, and can harm patients. In this case, the harms go beyond the general. Promoting Actiq for use in patients who were not yet opioid-tolerant risked hypoventilation and death. Selling Gabitril for non-epileptics promoted seizures in that population. Expanding the use of Provigil beyond its indication also potentially over-medicates patients with a drug that has not been proven to be safe and effective for those uses.

The agreed-upon sentence also properly takes into account Cephalon's conduct. It reflects the fact that the company has no prior conviction and cooperated with the investigation, balanced against the breadth and length of the illegal conduct. The government believes that the global resolution will deter the company from further unlawful promotions.

A fine of this nature, coupled with all of the other aspects of this case, will also be just punishment for the offense, and serve as general deterrence to others who might be tempted to go down the road of off-label marketing. All of these factors are difficult to quantify, but the parties have engaged in lengthy discussions aimed at reaching a fair resolution of this matter.

The government therefore asks the Court to accept the plea and impose the agreed-upon sentence.

Respectfully submitted,

LAURIE MAGID
Acting United States Attorney

/s/ Catherine Votaw
CATHERINE VOTAW
Chief, Health Care Fraud
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was served upon defense counsel by hand-delivery and email, on this 29th day of September, 2008, as follows:

Eric Sitarchuk, Esquire
Morgan Lewis
1701 Market Street
Philadelphia, PA 19103-2921

/s/ Catherine Votaw
CATHERINE VOTAW
Chief, Health Care Fraud
Assistant United States Attorney

# EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | : | |
| **v.** | : | **CRIMINAL NO.** |
| **CEPHALON, INC.** | : | |

**GUILTY PLEA AGREEMENT**

Under Federal Rule of Criminal Procedure 11(c)(1)(C), the government, the defendant, Cephalon, Inc. (hereinafter "Cephalon"), and Cephalon's counsel enter into the following guilty plea agreement. Any reference to the United States or the government in this agreement shall mean the Office of the United States Attorney for the Eastern District of Pennsylvania, and the Office of Consumer Litigation of the Department of Justice.

1. Cephalon agrees to plead guilty to Count One of an Information, waiving prosecution by indictment, charging it with the introduction into interstate commerce of drugs that were misbranded through off-label promotion, a misdemeanor, in violation of 21 U.S.C. §§ 331(a), 333(a)(1) and 352(f)(1), and not to contest forfeiture as set forth in the notice of forfeiture seeking criminal forfeiture of $10,000,000 in substitute assets, in lieu of the drugs which were promoted off-label and are no longer available, all arising from Cephalon's off-label promotion of its drugs Provigil, Gabitril, and Actiq between January 2001 and October 1, 2001. Cephalon further acknowledges its waiver of rights, as set forth in the attachment to this agreement.

2. The parties agree that this plea agreement is made pursuant to Fed.R.Crim.P. 11(c)(1)(C) and that the following specific sentence is the appropriate disposition

of this case. If the Court rejects this plea agreement, the parties further agree that this agreement shall automatically convert to a plea agreement pursuant to Fed.R.Crim.P. 11(c)(1)(B), and this specific sentence shall be the joint recommendation of the parties, although not binding on the Court. The agreed upon sentence is as follows:

A. Cephalon agrees to pay the special assessment in the amount of $125 on the date of sentencing.

B. Cephalon agrees to pay $50,000,000 to resolve this Information, of which $40,000,000 will be applied to a criminal fine, and $10,000,000 will be applied as substitute assets to satisfy the forfeiture obligation. Cephalon will pay these amounts within 10 business days of the date of sentencing. Cephalon and the government agree that this fine and forfeiture represent a fair and just resolution of all issues associated with loss, fine and forfeiture calculations.

C. Cephalon agrees that as a result of its acts or omissions, the forfeitable property, that is the drugs which were promoted off-label, are no longer available for forfeiture as they cannot be located or have been transferred, sold or deposited with a third party, or otherwise disposed of, within the meaning of federal law. As a result, Cephalon agrees to the entry and satisfaction of a judgment and preliminary order of forfeiture on the date of the guilty plea, forfeiting to the United States the sum of $10,000,000 as substitute assets for the pertinent drugs. Cephalon agrees that, within 10 business days of the date of sentencing, Cephalon will make payment to the United States, by means of a wire transfer to the United States Marshal Service or check payable to same, in the amount of $10,000,000, this amount representing

substitute assets of the offense for which it is pleading guilty, subject to forfeiture in full satisfaction of the judgment and preliminary order of forfeiture.

D. The government agrees that, in light of the Corporate Integrity Agreement executed contemporaneously with this guilty plea agreement, Cephalon will not be placed on probation.

3. In a separate civil settlement among Cephalon, the United States and various States, executed contemporaneously with this guilty plea agreement, Cephalon will pay $375,000,000. Cephalon waives any and all defenses and objections in this matter or in that civil proceeding which might be available under the Double Jeopardy and Excessive Fines clauses of the Eighth Amendment. The parties agree that, in light of this civil settlement, and to avoid complicating and prolonging the sentencing process, the appropriate disposition of this case does not include a restitution order.

4. Cephalon waives any claim under the Hyde Amendment, 18 U.S.C. § 3006A (Statutory Note), for attorney's fees and other litigation expenses arising out of the investigation or prosecution of this matter.

5. Cephalon understands, agrees and has had explained to it by counsel that the Court may impose the following statutory maximum sentence: a fine of $200,000, or twice the gross gain or gross loss, whichever is greater; a special assessment of $125; restitution as ordered by the Court; and a five-year term of Court supervision; in addition, forfeiture may be ordered. Cephalon further understands that the terms and conditions of any Court supervision may be changed, and extended, by the Court if Cephalon violates any of the terms and conditions of that supervision.

6. With respect to Cephalon's conduct:

A. The parties stipulate to the following facts and basis for the plea, criminal fine and forfeiture:

(1) Cephalon marketed Provigil, Gabitril, and Actiq, which were drugs within the meaning of 21 U.S.C. § 321(g)(1).

(2) Shipments of a drug in interstate commerce must be accompanied by labeling bearing adequate directions for use for each of the drug's intended uses.

(3) In 1998, Provigil was approved by the FDA to treat excessive daytime sleepiness associated with narcolepsy.

(4) Between January 2001 and October 1, 2001, Cephalon promoted Provigil for uses not approved by the FDA, including as a daytime stimulant to treat sleepiness, tiredness, decreased activity, lack of energy and fatigue. Cephalon's promotion of Provigil for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Provigil's labeling did not bear adequate directions for each of the drug's intended uses.

(5) In 1997, Gabitril was approved by the FDA as an anti-epilepsy drug indicated as adjunctive therapy in adults and children 12 years and older in the treatment of partial seizures.

(6) Between January 2001 and October 1, 2001, Cephalon promoted Gabitril for certain uses not approved by the FDA, including as an

agent for anxiety, insomnia, and pain. Cephalon's promotion of Gabitril for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Gabitril's labeling did not bear adequate directions for each of the drug's intended uses.

(7) In 1998, Actiq was approved by the FDA for breakthrough cancer pain for patients with malignancies who were already tolerant to opioid therapy for their cancer pain.

(8) Between January 2001 and October 1, 2001, Cephalon promoted Actiq for uses not approved by the FDA, including for non-cancer pain uses, such as injuries and migraines. Cephalon's promotion of Actiq for these additional intended uses violated 21 U.S.C. § 352(f)(1), because Actiq's labeling did not bear adequate directions for each of the drug's intended uses.

(9) Between 2001 through October 1, 2001, Cephalon profited by misbranding Provigil, Gabitril and Actiq, and distributing these drugs in interstate commerce.

B. The United States contends that, as a matter of relevant conduct, the conduct which forms the basis for this plea agreement, as set forth in subsection (A) above, continued past October 1, 2001. Cephalon does not admit that this conduct extended past October 1, 2001.

7. Cephalon and the United States retain the right to withdraw from this guilty plea agreement, and this plea agreement will be null and void, if the civil settlement

agreement and Corporate Integrity Agreement are not executed contemporaneously with this plea agreement.

8. The government agrees that, other than the charges in the Information in this case, it will not bring any other criminal charges against Cephalon for conduct which (a) falls within the scope of the grand jury investigation in the Eastern District of Pennsylvania relating to Cephalon's drugs Provigil, Gabitril, and Actiq; or (b) was known to the United States Attorney's Office for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice as of the date of the execution of this plea agreement, and which concerned the sale, promotion, or marketing of these three drugs in the United States. The non-prosecution provisions of this paragraph are binding on the Office of the United States Attorney for the Eastern District of Pennsylvania, the Office of Consumer Litigation of the Department of Justice, the United States Attorney's Offices for each of the other 93 judicial districts of the United States, and the Criminal Division of the United States Department of Justice. Attached as Exhibit B is a copy of the letter to United States Attorney Laurie Magid from the Assistant Attorney General, Criminal Division, Department of Justice, authorizing this agreement.

9. Cephalon understands that this guilty plea agreement does not bind any other government agency, or any component of the Department of Justice except as specified in paragraph 8 of this guilty plea agreement. Further, Cephalon understands that the United States takes no position as to the proper tax treatment of any of the payments made by Cephalon pursuant to this plea agreement, the civil settlement agreement, or the Corporate Integrity Agreement referenced in this plea agreement.

10. Cephalon agrees to waive the statute of limitations, and any other time-related defense, to the charge to which it is agreeing to plead guilty under this plea agreement. Cephalon understands and agrees that, should it seek to withdraw its plea, it may then be prosecuted for any criminal violation of which the United States has knowledge arising out of this investigation, subject to any applicable statute of limitation or other time-related protection not waived in this paragraph. Cephalon agrees that if it does not enter its plea, or withdraws its plea, after signing this agreement, the time period between the signing of this agreement and its withdrawal shall be excluded from calculation of the limitations or time period.

11. In exchange for the undertakings made by the government in entering this plea agreement, Cephalon voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law. This waiver is not intended to bar the assertion of constitutional claims that the relevant case law holds cannot be waived.

If this plea agreement converts to a plea agreement pursuant to Fed.R.Crim.P. 11(c)(1)(B):

A. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of its sentence.

B. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:

(1) the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in this plea agreement;

(2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; and/or

(3) the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court.

If the defendant does appeal pursuant to this paragraph, no issue may be presented by the defendant on appeal other than those described in this paragraph.

12. Cephalon also waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

13. Cephalon is satisfied with the legal representation provided by its lawyers; Cephalon and its lawyers have fully discussed this guilty plea agreement; and Cephalon is agreeing to plead guilty because Cephalon admits that it is guilty.

14. Cephalon will acknowledge acceptance of this guilty plea agreement by the signature of its counsel and of a responsible corporate officer. Cephalon shall provide to the government for attachment to this plea agreement a notarized resolution by Cephalon's Board of

Directors authorizing the corporation to enter a plea of guilty, and authorizing that responsible corporate officer to execute this agreement.

15. If acceptable to the Court, the parties agree to waive the presentence investigation and report pursuant to Rule 32(c)(1) of the Federal Rules of Criminal Procedure, and ask that Cephalon be sentenced at the time the guilty plea is entered.

16. It is agreed that the parties' guilty plea agreement contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by all parties.

**SIGNATURES FOR THE UNITED STATES**

GREGORY G. KATSAS
Assistant Attorney General
Civil Division
United States Department of Justice

EUGENE THIROLF
Director, Office of Consumer Litigation
United States Department of Justice

LAURIE MAGID
Acting United States Attorney

JEFFREY STEGER
Trial Attorney
Office of Consumer Litigation
United States Department of Justice

CATHERINE VOTAW
Chief, Health Care Fraud
Assistant United States Attorney

DATED: Sept. 26, 2008

**SIGNATURE FOR CEPHALON**

DATE: 9/15/08

GERALD J. PAPPERT
Executive Vice President and General Counsel
Cephalon, Inc.

**SIGNATURES OF CEPHALON'S ATTORNEYS**

DATE: 9/10/08

ERIC W. SITARCHUK, Esquire
Morgan, Lewis & Bockius LLP
Counsel for Defendant

J. SEDWICK SOLLERS III, Esquire
MARK A. JENSEN, Esquire
King & Spalding, LLP
Counsel for Defendant

Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| v. | : | CRIMINAL NO. |
| CEPHALON, INC. | : | |

ACKNOWLEDGMENT OF RIGHTS

Cephalon, Inc. ("Cephalon"), through its properly authorized officer, hereby acknowledges that it has certain rights that it will be giving up by pleading guilty.

1. Cephalon understands that it does not have to plead guilty.

2. Cephalon may plead not guilty and insist upon a trial.

3. At that trial, Cephalon understands:

   a. that Cephalon would have the right to be tried by a jury that would be selected from the Eastern District of Pennsylvania and that along with its attorney, Cephalon would have the right to participate in the selection of that jury;

   b. that the jury could only convict Cephalon if all twelve jurors agreed that they were convinced of Cephalon's guilt beyond a reasonable doubt;

   c. that the government would have the burden of proving Cephalon's guilt beyond a reasonable doubt and that Cephalon would not have to prove anything;

   d. that Cephalon would be presumed innocent unless and until such time as the jury was convinced beyond a reasonable doubt that the government had proven that Cephalon was guilty;

   e. that Cephalon would have the right to be represented by a lawyer at this trial and at any appeal following the trial, and that if Cephalon could not afford to hire a lawyer, the court would appoint one for Cephalon free of charge;

f. that through Cephalon's lawyer Cephalon would have the right to confront and cross-examine the witnesses against Cephalon;

g. that Cephalon could call witnesses to testify in its defense if Cephalon wanted to, and Cephalon could subpoena witnesses for this purpose if Cephalon wanted to; and

h. that Cephalon would not have to call witnesses to testify or otherwise present any defense if Cephalon did not want to, and that if Cephalon did not present any evidence, the jury could not hold that against Cephalon.

4. Cephalon understands that if Cephalon pleaded guilty, there will be no trial and Cephalon would be giving up all of the rights listed above, as well as any other rights associated with the trial process arising under statute, common-law, or judicial precedent.

5. Cephalon understands that if Cephalon decides to enter a plea of guilty, the judge will ask Cephalon representatives questions under oath, and that if any of those representatives lie on behalf of Cephalon in answering those questions, those persons could be prosecuted for the crime of perjury, that is, for lying under oath.

6. Cephalon understands that if Cephalon pleads guilty, Cephalon has waived its right to appeal, except as set forth in appellate waiver provisions of the plea agreement.

7. Understanding that Cephalon has all these rights and that by pleading guilty Cephalon is giving them up, Cephalon still wishes to plead guilty.

9/15/08

GERALD J. PAPPERT
Exec. Vice President and General Counsel
for Cephalon, Inc, the Defendant

ERIC SITARCHUK, Esquire
Morgan, Lewis & Bockius LLP
Counsel for Defendant.

U.S. Department of Justice

Criminal Division

*Assistant Attorney General* *Washington, D.C. 20530*

AUG 28 2008

The Honorable Laurie Magid
United States Attorney
Eastern District of Pennsylvania
Philadelphia, Pennsylvania 19106

Attention: Catherine Votaw
Assistant United States Attorney

Re: Global Non-prosecution Agreement for Cephalon, Inc.

Dear Ms. Magid:

This is in response to your request for authorization to enter into a global case disposition agreement with the company Cephalon, Inc.

I hereby approve the terms of the Plea Agreement, including Paragraph 8, in which the United States Attorney's Offices and the Criminal Division of the Department of Justice agree not to initiate further criminal prosecutions as set out therein.

You are authorized to make this approval a matter of record in this proceeding.

Sincerely,

Matthew W. Friedrich
Acting Assistant Attorney General

John C. Keeney
Deputy Assistant Attorney General
Criminal Division

**EXHIBIT B**

EXHIBIT 3

In This Article
Abstract and Introduction
Patients and Methods
Results
Comments
Figures
References

From Headache
The Journal of Head and Face Pain

# Oral Transmucosal Fentanyl Citrate for the Treatment of Migraine Headache Pain In Outpatients: A Case Series

Posted 09/20/2004

Stephen H. Landy, MD

## Abstract and Introduction

### Abstract

**Background:** Migraine headache pain that does not respond to traditional antimigraine medications frequently requires treatment in the emergency department (ED) with parenteral opioids. Rapid onset of pain relief in an outpatient setting for migraine headache is the primary objective of patients and clinicians. Oral transmucosal fentanyl citrate (OTFC®; ACTIQ®) is a novel opioid product designed to deliver rapid analgesia to patients who experience breakthrough pain (BTP).

**Objective:** To evaluate the effectiveness, tolerability, and patient satisfaction with OTFC for the outpatient treatment of acute, refractory migraine headache pain.

**Patients and Methods:** Twenty patients with recurrent acute, refractory migraine headaches who had been referred to this headache clinic are reported in this case series. All patients had a history of tolerating parenteral opioids in the ED when experiencing refractory migraine pain and had been treated with outpatient opioid therapies in attempts to manage their migraine pain. Patients were prescribed OTFC (400 µg) as rescue treatment for moderate or severe migraine headache pain as outpatients. Patients were instructed to self-administer OTFC at home and complete a diary recording: pain intensity (11-point scale; 10 = worst pain imaginable to 0 = no pain) before and 15, 30, 60, and 120 minutes after OTFC; satisfaction with the effectiveness of OTFC (selecting 1 of 7 categories ranging from "very dissatisfied" through "very satisfied") rated at 120 minutes; and adverse events.

**Results:** Eighteen patients (13 female) experienced a migraine and self-administered OTFC. OTFC successfully treated migraine episodes in all 18 outpatients; no patient went to an ED. OTFC rapidly reduced pain intensity, with significant improvement at 15 minutes that was sustained and provided progressively more pain relief at 30, 60, and 120 minutes (all $P < .01$). Mean (SEM) pain intensity significantly declined from 8.83 (0.35) pretreatment to 2.28 (0.67) at 120 minutes, an average reduction of 75% ($P < .01$). Patients' satisfaction ratings with OTFC were overwhelmingly positive, with 94% being satisfied and more than half (56%) being "very satisfied." Three (17%) patients experienced nausea, two (11%) somnolence, and one (6%) each itching, vomiting, and dry mouth. All adverse events were mild or moderate in severity.

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**Conclusions:** OTFC rapidly and significantly relieved acute, refractory migraine pain in outpatients, prevented the need for an ED visit, and was associated with high patient satisfaction ratings. The rapid onset of migraine headache pain relief in this case series is consistent with the analgesic effect reported with the use of OTFC in patients with BTP. OTFC was well tolerated in these patients who had a history of tolerating parenteral opioids in the ED when experiencing refractory migraine pain and had been treated with outpatient opioid therapies in attempts to manage their migraine pain. OTFC may be effective for outpatient treatment of acute, refractory migraine headache pain. Further controlled studies are warranted.

## Introduction

Migraine headache represents a therapeutic area in which rapid onset of analgesia and effective pain relief on an outpatient basis is the goal.[1] However, migraine headache pain can be so severe and disabling that migraineurs frequently seek crisis management in an emergency department (ED) when their usual outpatient treatments, such as serotonin ($5\text{-}HT_1$) receptor agonists, nonopioid or opioid agents, fail to deliver rapid and effective analgesia. Approximately 50% of patients with migraine report visits to the ED for the acute treatment of refractory migraine pain,[2] regardless of the burdens associated with an ED visit. These burdens may include dependence on another person as driver and aide; costs; the prolonged wait for treatment; and the brightly lit, noisy environment that can worsen symptoms.[3,4]

While many treatments for refractory migraine headache are available in the ED, including parenteral opioids, antiemetics, and various other products for injection such as chlorpromazine, dihydroergotamine, droperidol, haloperidol, ketorolac, magnesium, metoclopramide, prochlorperazine, steroids, sumatriptan, and valproic acid, these medications, with the exception of subcutaneous sumatriptan, are not routinely prescribed for general outpatient use.[5,3,6]

Refractory migraine pain may be a similar clinical model to breakthrough pain (BTP) in that effective management frequently requires a rescue medication that has a rapid onset of action and allows dosing to be tailored to the individual characteristics of BTP episodes, such as intensity and duration. Oral transmucosal fentanyl citrate (OTFC®; Actiq®), a novel product designed to deliver rapid analgesia through direct absorption of fentanyl through the oral mucosa, may represent a rational option for outpatient treatment of refractory migraine headache pain. First, OTFC has been shown to be effective and well tolerated in the treatment of BTP, based on the results from clinical trials in opioid-tolerant cancer patients.[7-11] Second, OTFC is available in six dosage strengths (200, 400, 600, 800, 1200, and 1600 µg) to allow individualization of dosing, with the effective dose determined by titration.[8,11] Research has also provided evidence of the usefulness of OTFC, although at lower doses, in patients who are not regularly taking opiates.[12-15] In one double-blind study in nonopioid-tolerant postoperative patients, the median time to the onset of pain relief following OTFC was 5 minutes, which was comparable to that following IV morphine.[12] Thus, OTFC may provide a viable option for outpatients experiencing BTP or episodic pain due to other causes, including acute, refractory migraine headaches.

We assessed the effectiveness, tolerability, and patient satisfaction with OTFC as an outpatient treatment of acute, refractory migraine headache pain.

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Section 1 of 4 Next Page: Patients and Methods

**Stephen H. Landy, MD**, Wesley Headache Clinic, 7655 Poplar Avenue, Suite 385, Memphis, TN 38138

Headache 44(8):762-766, 2004. © 2004 Blackwell Publishing

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