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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
CSL Limited, **a corporation**	)	**Docket No. 9337**
and	)	**PUBLIC VERSION**
Cerberus-Plasma Holdings, LLC, **a limited liability company.**	)	

COMPLAINT COUNSEL'S REPLY IN SUPPORT OF ITS MOTION TO PLACE COMPLAINT ON THE PUBLIC RECORD

Complaint Counsel respectfully submits this reply in support of its Motion to Place Complaint on the Public Record ("Motion"), filed May 29, 2009. On June 8, 2009, Respondents abandoned the underlying transaction at issue. This development obviates the need for further proceedings before this Court, but it does not foreclose the public's right of open access to the records that have already been filed. Contrary to the arguments advanced in their Memorandum of Points and Authorities in Opposition ("Opposition"), dated June 10, 2009, the information Respondents seek to hide from the public is not competitively sensitive and has not been kept confidential by the Respondents. The public interest is best served by making the Complaint public.

I. Abandonment of the Transaction Does Not Lessen the Public's Right to Access Records Already Filed

Respondents argue that their abandonment of the transaction eliminates the public's need to access the original, unredacted Complaint. Opp. at 8. Respondents ignore the "presumption of public access to any document filed in the record of an adjudicative proceeding." *Detroit*

Auto Dealers Ass'n, 1985 F.T.C. LEXIS 90, at *3 (June 7, 1985). The public has a right to know about the actions of government agencies, as well as the legislature and courts. *Equal Employment Opportunity Comm'n v. Nat'l Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (*citing Federal Trade Comm'n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.")).

Respondents cite no authority for the proposition that the mooting of the complaint mandates (or even weighs in favor of) keeping the existing adjudicative record secret. In fact, the opposite is true. The Court of Appeals for the Seventh Circuit, for example, unsealed a brief after affirming a grant of summary judgment. *Methodist Hosps. Inc., v. Sullivan*, 91 F.3d 1026, 1032 (7th Cir. 1996) (Easterbrook, J.). Dismissing the Complaint ends the current litigation; it does not eliminate the existing, ongoing public interest in the details of the proceeding.

Contrary to Respondents' assertions, the strong presumption of transparency is not limited to the Court's or Federal Trade Commission's ("FTC" or "Commission") final public opinions and orders.[1] The FTC's Rules of Practice specify that all pleadings and other materials filed in adjudicative proceedings should be open to the public, unless covered by an *in camera* order. 16 C.F.R. § 4.09(b)(5).

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[1] Respondents cite to an item in the *Schering-Plough* docket in support of their argument for a more limited public record. *See* Opp. at 8. This citation is wholly inappropriate. The quoted language is from a motion involving a request to file materials under seal submitted by one of the respondents in that matter. *See* 2001 FTC Lexis 180 at *1 (Sept. 17, 2001). The motion was denied by Administrative Law Judge, Hon. D. Michael Chappell.

II. This Court Need Not Stay Its Decision for the District Court's Ruling

Respondents urge this Court to defer to the federal district court with respect to whether material cited in the Complaint should be open to the public. The Court need not defer to the district court.[2] In merger challenges under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the district court plays an important, but limited, role, which is to determine whether the *status quo* should be maintained. It is this Court and the Commission that have authority to determine the merits. This Court need not defer to the district court, especially when the primary issue is the transparency of agency process.

III. Respondents' Opposition Does Not Support the Sealing of the Material at Issue

A. Material At Issue Does Not Qualify for In Camera Treatment

Respondents still have not explained why any of the quoted material at issue constitutes trade secrets, know-how or sensitive information. As a result, Respondents' proposed redactions are neither narrowly tailored nor justified. Respondents merely ask the Court to seal all material from their ordinary course documents.

Respondents argue for sealing the material at issue by attempting to distinguish the controlling precedent, *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961). Specifically, Respondents claim that "unlike in Hood . . . the Respondents [in this matter] seek to keep confidential their business plans and strategies . . ." Opp. at 6. Perhaps, but none of the currently redacted material constitutes business plans or strategies under *H.P. Hood.* Complaint Counsel does not propose to release the actual documents gathered during the course of the

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[2] Respondents argue that stays of administrative adjudication issued in the past by the Commission warrant deferral to the district court on this issue. Here, neither party has requested a stay, nor has the Commission issued one.

investigation. Instead, Complaint Counsel proposes to unseal only certain quotations from such documents. None of the quotations even arguably constitute business plans or strategies. For example, the fact that Respondents feared the {[redacted]} or believed that {[redacted]} does not reveal business plans or strategies. To the extent Respondents' concern is the "selective" quotation of material and "unfair and misleading" press reports, as they assert, the cure is to make public more material, not less, in order to prevent speculation and provide the necessary context.

B. The Material at Issue Has Not Been Kept Confidential

Respondents claim that "none of the confidential statements and information at issue is public today." Opp. at 6. Respondents also claim that the information at issue, which relates to the Respondents' impressions of barriers to entry, Talecris's expansion plans, impressions of marketplace dynamics, and pricing trends is "exactly the type of information that should never be disseminated to competitors." Opp. at 6. If that is true, Respondents routinely violated that tenet.

Two striking examples involve information that Respondents claim is confidential and should remain under seal, yet is featured in a recent Talecris SEC filing.[3] The Complaint alleges that Talecris believes that there are {[redacted]} Complaint at ¶ 74. By comparison, Talecris' Amended S-1 states that there are "significant barriers of entry" and describes a litany of hurdles for potential new entrants. Amended S-1 at 3. Likewise, the Complaint alleges that Talecris

[3] Amendment No. 5 to Form S-1 Registration Statement, Talecris Biotherapeutics Holdings Corp. (July 23, 2008), *available at* http://idea.sec.gov/Archives/edgar/data/1405197/000104746908008336/a2181430zs-1a.htm ("Amended S-1").

{[redacted]}

Complaint at ¶ 5. In its public filing, Talecris publicly touted this very same fact, and did so in much greater detail. Amended S-1 at 137. Respondents cannot credibly claim that all the material they now seek to withhold from the public has been kept secret.

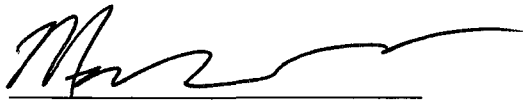
C. Public Disclosure of the Relevant Material Would Not Cause "Serious, Irreparable Injury"

Respondents argue the material at issue should be kept secret because its disclosure could adversely affect Respondents' reputations. Respondents' claim is untenable. The quoted material should not be shielded from the public because it could harm Respondents' reputation or embarrass them. *See H.P. Hood*, 58 F.T.C. at 1188. Indeed, the quoted material is potentially harmful to Respondents' reputations only because Respondents' public posture does not appear to accurately reflect their corporate strategies. The fact that Respondents' internal documents support Complaint Counsel's allegations, and contradict the public image Respondents have created, is an unfortunate fact for Respondents, but it is not grounds to shield the information from the public.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court authorize placement of the original, unredacted Complaint on the public record.

Respectfully submitted,



Dated: June 15, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 15, 2009, I served the foregoing upon the following:

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