Attorney General's Office Secures Recovery for Consumers on Provigil

PIERRE, S.D. - Attorney General Marty Jackley announced today that a $125 million, 48 state settlement with Cephalon and affiliated companies (“Cephalon”). The settlement ends a multistate investigation into anticompetitive conduct by Cephalon to protect the monopoly profits it earned from its landmark wakefulness drug, Provigil. That conduct delayed generic versions of Provigil from entering the market for several years.

“This case is another example of how State Attorneys General are working together with our federal partners to protect consumers," said Jackley.

The settlement includes $35 million for distribution to consumers who bought Provigil. South Dakota’s total recovery will be about $548,443.23 consisting of: (1) $239,125.74 to compensate for Provigil purchases by certain state entities or authorized purchases off state contracts; (2) an estimated $189,528.66 for distribution to South Dakota consumers for payments for Provigil; and (3) $309,317.49 for State’s share of disgorgement and costs.

As patent and regulatory barriers that prevented generic competition to Provigil neared expiration, Cephalon intentionally defrauded the Patent and Trademark Office to secure an additional patent, which a court subsequently deemed invalid and unenforceable. Before that court finding, Cephalon was able to delay generic competition for nearly six years by filing patent infringement lawsuits against all potential generic competitors. Cephalon settled those lawsuits in 2005 and early 2006 by paying the generic competitors to delay sale of their generic versions of Provigil until at least April 2012. Because of that delayed entry, consumers, states, and others paid hundreds of millions more for Provigil than they would have had generic versions of the drug launched by early 2006, as expected.

This multistate settlement was facilitated by litigation brought against Cephalon by the Federal Trade Commission. In May 2015, the FTC settled its suit against Cephalon for injunctive relief and $1.2 billion, which was paid into an escrow account. The FTC settlement allowed for those escrow funds to be distributed for settlement of certain related cases and government investigations, such as those of the 48 states.

The settlement is subject to court review, including providing consumers with notice and an opportunity to participate in, object to, or opt out of settlement.