IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELLIOTT ASSOCIATES, L.P., ELLIOTT INTERNATIONAL, L.P., and KNOLLWOOD INVESTMENTS, L.P.,

Plaintiffs,

v.

SYLVIA MATHEWS BURWELL, in her official capacity as SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

and

MARGARET HAMBURG, M.D., in her official capacity as COMMISSIONER OF FOOD AND DRUGS, FOOD AND DRUG ADMINISTRATION,

Defendants,

and

HIKMA PHARMACEUTICALS PLC and WEST-WARD PHARMACEUTICAL CORP.,

Intervenor-Defendants.

Civil Action Nos. 1:14-cv-1668 (KBJ)
1:14-cv-1850 (KBJ)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

FDA's approval of Mitigare was no routine agency decisionmaking, but a radical departure from the statute, controlling regulations, and longstanding FDA policy. The opposition briefs make this clear: Neither FDA nor Hikma identifies *any* prior instance of FDA secretly approving a 505(b)(2) application for a drug with an indication that is claimed by an innovator's listed method-of-use patents. What happened here is unprecedented.

Binding FDA regulations require that when a 505(b)(2) applicant seeks approval for a drug product that "includes an indication that . . . is claimed by a use patent, the applicant *shall submit an applicable certification*." 21 C.F.R. § 314.50(i)(1)(iii)(B) (emphasis added). Absent that "required" patent certification, Hikma's 505(b)(2) application was incomplete. *See id.* § 314.50(i)(1)(i). FDA arbitrarily and capriciously violated controlling regulations and approved Hikma's application knowing that the required patent certification was not made and knowing that Orange Book-listed patents claimed the same indication Hikma requested. *See* MSJ Mem. 36; Hr'g Tr. 69-70 (Nov. 19, 2014).

FDA contends that it need not follow subsection (i)(1)(iii) of its regulation because Hikma complied with another subsection, while Hikma asserts that an applicant need comply with subsection (i)(1)(iii) only when it "chooses" to do so. FDA Mem. 13; Hikma Mem. 15. These arguments are astounding. An applicant must comply with *all* controlling regulations, not just those it "chooses," and FDA is obligated to follow *all* of its regulations. FDA's failure to do so here renders its approval of Mitigare arbitrary, capricious, and contrary to law.[1]

[1] Citations to "MSJ Mem. __" are to Plaintiffs' Memorandum Of Points And Authorities In Support Of Their Motion For Summary Judgment, filed in No. 14-cv-1850 on November 17, 2014. Citations to "FDA Mem. __" and "Hikma Mem. __" are to the opposition briefs filed by Hikma and FDA, respectively, in No. 14-cv-1668 on December 11, 2014. This brief refers to Hikma Pharmaceuticals PLC and West-Ward Pharmaceutical Corp. together as "Hikma," and refers to Elliott Associates, L.P., Elliott International, L.P., and Knollwood Investments, L.P. together as "Plaintiffs."

The opposition briefs also expose the absence of statutory support for FDA's lawless action. FDA attempts to justify its action on the ground that "drug" uniformly must mean "drug product" throughout the statute (*see* FDA Mem. 3), but the only FDA interpretation of this statute that is entitled to *Chevron* deference is the published regulations—makes clear that "drug" means both "drug product" and "drug substance." Meanwhile, Hikma argues that all references to "drug" must refer to "Col-Probenecid" (*see* Hikma Mem. 6), but overlooks this reading's absurd consequence of erasing any reference to Hikma's *own* colchicine-only product from the statute. Only Plaintiffs' construction accounts for every word of the statute, avoids these absurd consequences, and gives effect to the unambiguously expressed intent of Congress.

FDA's asserted justification ultimately boils down to a policy plea that enforcing the patent certification requirement here would somehow disrupt the Hatch-Waxman Act's "delicate balance between generic and innovator manufacturers." FDA Mem. 4. But, as the Supreme Court has recognized, the patent certification requirement, and the notice to patent holders that it provides, is absolutely central to that "balance," and that balance plainly is upended when an applicant is permitted to certify to only those patents that it "chooses," rather than to all those that might be infringed. Hikma Mem. 15.

The Court should hold FDA to its own regulations and uphold Congress's unambiguously expressed intent—and set aside FDA's unlawful approval of Mitigare.[2]

[2] Both FDA and Hikma style their opposition briefs as containing "cross-motions" for summary judgment even though neither sets forth any independent grounds in support of their motions. Plaintiffs do not object to a procedural "vehicle" for allowing the Court to terminate the case after deciding Plaintiffs' motion for summary judgment. *See* FDA Mem. 1 n.1; Hikma Mem. 3 n.3. Plaintiffs do object, however, to Hikma's threatened attempt to contravene this Court's November 18, 2014 Order by filing an additional "reply brief . . . after receiving Elliott's opposition brief." Hikma Mem. 3 n.3. Plaintiffs compromised their own reply deadline to achieve the existing briefing schedule, and it would be unfair to Plaintiffs—as well as prejudicial to the Court's own timetable—for Hikma to file additional briefing outside the agreed-upon, Court-ordered sequence. FDA agrees with Plaintiffs and has stated that there will be no further briefing. FDA Mem. 1 n.1. Accordingly, to the extent the "cross-motions" require a response, they are opposed for the reasons set forth in this reply brief. To the extent Hikma files any
[*footnote continued on next page*]

ARGUMENT

I. FDA's Approval Of Mitigare Was Arbitrary And Capricious Because It Was Done In Violation Of Its Own Regulation

For all the purported ambiguity and confusion that FDA and Hikma attempt to inject, it is abundantly clear that FDA violated its own regulations in approving the Mitigare application. The Mitigare label sought approval for the use of colchicine for the prophylaxis of gout flares—the same indication claimed by the Colcrys® use patents listed in the Orange Book. *See* MSJ Mem. 26-27. FDA's regulations interpreting and implementing Section 505(b)(2)'s patent certification requirements state: "If the labeling of the drug product for which the applicant is seeking approval includes an indication that, according to the [Orange Book] or in the opinion of the applicant, is claimed by a use patent, the applicant shall submit an applicable certification under paragraph (i)(1)(i) of this section." 21 C.F.R. § 314.50(i)(1)(iii)(B). Hikma, therefore, was required to certify to the Colcrys® use patents. Because FDA did not require Hikma to do so, FDA arbitrarily and capriciously violated its own regulation by approving the Mitigare application without prior notice to Takeda. *See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014). This ground alone—separate and apart from any statutory interpretation issues—is sufficient for the Court to grant summary judgment in Plaintiffs' favor; the Court need not go further.

FDA and Hikma *do not contest* the language or meaning of FDA's regulation. Nor can they—the regulation is clear on its face. Rather, they attempt to avoid the regulation's

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[*footnote continued from previous page*]
further briefs that the Court does not strike as unauthorized, Plaintiffs request a further hearing on the motions for summary judgment so that they can respond to any additional arguments. *See* Order 2, No. 14-cv-1668 (D.D.C. Nov. 18, 2014), ECF No. 48.

requirement in three ways: By ignoring it, by erasing it, and by amending it without regard to APA procedures.[3]

1. Both FDA and Hikma try to persuade this Court that subsection (i)(1)(iii) of the regulation should be ignored and the Court instead should focus myopically on subsection (i)(1)(i). *See* FDA Mem. 13; Hikma Mem. 14-15 (citing 21 C.F.R. § 314.50(i)(1)(i)). But the law requires that FDA and Hikma comply with *all* subsections; FDA "is not free to ignore or violate its regulations while they remain in effect." *Nat'l Envtl. Dev. Ass'n's*, 752 F.3d at 1009 (quotation marks omitted).

Regulation 314.50(i)(1) sets out the "[c]ontents" of the patent certifications "required" for a 505(b)(2) application. Subsection (i)(A) provides the basic certification requirements, including the four types of available certifications and a representation that notice will be provided to each patent owner. Each of the subsequent subsections begin with the word "[i]f" followed by some specified circumstance. Subsection (i)(B) applies "if" the drug relied on is a licensed generic drug. Subsection (ii) applies "if" there are no relevant patents. Subsection (iii)(A) applies "if" the method-of-use patents and the label differ. Finally, subsection (iii)(B) applies "if the labeling of the drug product for which the applicant is seeking approval includes an indication that . . . is claimed by a use patent." *See generally* 21 C.F.R. § 314.50(i)(1)(i)-(iii).

By their plain terms, these subsections are cumulative and complementary—not exclusive or contradictory. Hikma and FDA provide *no* rationale justifying why only one subsection is applicable, or why subsection (i) should be applied to the exclusion of subsection

[3] In fact, FDA and Hikma do not actually dispute—and thus waive any opposition to—Plaintiffs' argument that FDA's failure to comply with its regulation was arbitrary and capricious. *See* MSJ Mem. 36. Instead, they argue only that the regulation does not accurately reflect their *statutory* interpretation (*see* FDA Mem. 13; Hikma Mem. 15), which relates to Elliott's *separate* argument that FDA exceeded its statutory authority. For completeness, Plaintiffs address both arguments herein.

(iii). Contrary to FDA's accusation (FDA Mem. 13), Plaintiffs do not contend that subsection (iii) is the only subsection applicable to patent certifications. Rather, FDA and Hikma must comply with *all* subsections, including (i) and (iii); only FDA and Hikma argue that one subsection should be read to exclude the other. But FDA cannot pick and choose the provisions it "deem[s] suitable" to comply with—or the regulations it chooses to enforce—in any "given case." *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105 (D.C. Cir. 1993) (quotation marks omitted). Nor can FDA "play fast and loose with its own regulations" or "ignore the regulation or label it 'inappropriate'" simply because the "regulation as written does not provide [FDA] a quick way to reach a desired result." *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979). That is the very definition of arbitrary and capricious.[4]

Both subsections represent FDA's binding interpretation of Section 505(b)(2)(A), and only by enforcing both of these subsections is the entire regulation given substantive effect. *See, e.g.*, *Rainsong Co. v. FERC*, 151 F.3d 1231, 1234 (9th Cir. 1998) ("in the construction of administrative regulations . . . it is presumed that every phrase serves a legitimate purpose"); *accord Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 1, 9 (D.D.C. 1998). Accordingly, FDA should have required Hikma to make a patent certification *both* with respect to patents mentioned in subsection (i) *and* any "use patent[s]" that claim an indication included in "the labeling of the drug product for which the applicant is seeking approval." 21 C.F.R. § 314.50(i)(1)(i) & (iii).

2. Hikma also attempts to erase subsection (iii) by arguing that it merely requires the same certifications already required by subsection (i) (*see* Hikma Mem. 15), pointing to

[4] Even if subsections (i) and (iii) were in conflict—they are not—the requirements of subsection (iii) would prevail because it is the more specific regulation on the issue of which use patents require certifications. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 169-70 (2007) ("the specific governs the general" when interpreting two regulations); *see also Williams v. Chu*, 641 F. Supp. 2d 31, 38 (D.D.C. 2009) ("The rules of statutory construction apply when interpreting an agency regulation . . . ." (quotation marks omitted)).

subsection (iii)'s requirement that applicants submit the "applicable certification under paragraph (i)(1)(i)" for all use patents that claim the indication for which approval is sought. 21 C.F.R. § 314.50(i)(1)(iii)(B); *cf.* FDA Mem. 13 (citing same provision). But if subsection (iii) only required the same certifications as subsection (i), subsection (iii) would add *nothing* to an applicant's responsibilities and thus could be erased entirely from the Code of Federal Regulations without any substantive impact. Hikma's reading "would render the pertinent regulation a *nullity*." *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). "[B]ecause regulations, like statutes, should not be interpreted as to make a provision either superfluous or meaningless," that interpretation must be rejected. *Kelso*, 13 F. Supp. 2d at 10 (quotation marks omitted).

The phrase "applicable certification under paragraph (i)(1)(i)" obviously refers to the different *types of certifications* listed in clauses (1) – (4) of subsection (i)(1)(i)(A) that must be made. That is, "[i]f the labeling of the drug product for which the applicant is seeking approval includes an indication that, according to the [Orange Book] or in the opinion of the applicant, is claimed by a use patent, the applicant shall submit" one of those four certifications.[5] Because the labeling of Mitigare contained the indication "(colchicine) capsules are indicated for prophylaxis of gout flares in adults," and the Colcrys® use patents claimed a "method of using colchicine for the prophylaxis of gout flares," Hikma was required to provide one of these four patent certifications set forth in subsection (i). Plaintiffs' straightforward reading gives substantive effect to all of the words in subsection (i)(1)(iii)(B); FDA and Hikma's interpretation does not.

[5] "(1) That the patent information has not been submitted to FDA"; "(2) That the patent has expired"; "(3) The date on which the patent will expire"; or "(4) That the patent is invalid, unenforceable, or will not be infringed." 21 C.F.R. § 314.50(i)(1)(i) & (iii).

3. Hikma and FDA further suggest that the regulation was somehow amended by non-binding pronouncements by FDA staff intimating that certifications mandated by the regulation are in fact not required. In essence, FDA and Hikma assert that various Citizen Petition responses and "Draft Guidance" should trump FDA regulations promulgated via formal rulemaking. *See* FDA Mem. 11; Hikma Mem. 13-16.

It is axiomatic that staff pronouncements cannot "trump a formal regulation with the procedural history necessary to take on the force of law." *See Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004); *see also Doe v. Chao*, 540 U.S. 614, 633 n.2 (2004) (informal agency actions cannot "override" longstanding regulation interpreting the statute). Thus, an agency's "draft guidance is not an authoritative interpretation of [statutory] requirements entitled to deference." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 n.5 (D.C. Cir 2013). More specifically, FDA's *Draft Guidance for Industry: Applications Covered by Section 505(b)(2)* "is in no way binding on this Court," *Sanofi-Aventis U.S. LLC v. FDA*, 842 F. Supp. 2d 195, 211 (D.D.C. 2012), and "does not operate to bind FDA or the public," *Draft Guidance for Industry: Applications Covered by Section 505(b)(2)* at 1 (attached as Exhibit B to McGill Declaration, No. 14-cv-1850, ECF No. 14-2). Similarly, FDA admits that a Citizen Petition response is "not quite a regulation" (Hr'g Tr. 37 (Nov. 4, 2014)) and reflects only "the FDA's most recent thinking on any given topic" (Hr'g Tr. 39 (Nov. 19, 2014)). "[T]he fact that [FDA's] subsequent interpretation runs 180 degrees counter to the plain meaning of the regulation" should give the Court "at least some cause to believe that the agency may be seeking to constructively amend the regulation." *Nat'l Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992). And since "APA rulemaking [is] required if [an agency action] adopted a new position inconsistent with any of the [agency's] existing regulations," to the extent the Draft

Guidance and Citizen Petition responses conflict with FDA's regulation, the regulation must control. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); *accord U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005).[6]

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"The requirement that agencies comply with their own regulations . . . ensures that they follow proper procedures in reaching their decisions." *Fuller v. Winter*, 538 F. Supp. 2d 179, 191 n.5 (D.D.C. 2008). Here, FDA did not. That violation is arbitrary and capricious, and the Court may grant summary judgment for Plaintiffs on this ground alone. *See* 5 U.S.C. § 706(2).

II. FDA's Action Is Contrary To The Purpose, Text And Structure Of The Hatch-Waxman Act

Both FDA and Hikma urge the Court to view Section 505(b)(2) through a microscopic lens of a supposed "*quid pro quo*" between the applicant and the manufacturer who conducted the studies on which the applicant relies to obtain approval, without regard to innovators whose listed patents claim the precise indication for which the applicant is seeking approval. From there, FDA and Hikma argue that Section 505(b)(2) cannot possibly be interpreted to apply to some else's patents (even though the patents claim the same indication). But the legislative bargains reflected in the Hatch-Waxman Act are well documented and, as FDA elsewhere admits, they strike a broader balance between the desire "to get more drugs to market quickly" and the need for "protecting innovators' patent rights." FDA Mem. 2. In Part II.A, *infra*, Plaintiffs refute Hikma and FDA's fictitious narrative and explain why FDA's refusal to require Hikma to certify to listed patents that claim the very use of colchicine for which Hikma sought

[6] Nor can it be said that any of these later agency actions have "interpreted" the regulation, since they are "silent about the agency's interpretation of its regulation" (and therefore are due no deference) and would be unreasonable interpretations of the regulation (since they conflict with its plain text). *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 839-40 (Fed. Cir. 2006); *see also Exportal Ltda v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990). Moreover, "an agency may not escape . . . notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

approval fails to uphold Hatch-Waxman's essential *quid pro quo*. In Part II.B, *infra*, Plaintiffs show that, to the extent the statute is ambiguous, the only interpretation that commands deference is FDA's regulation, which expressly required Hikma to certify to the Colcrys® patents. In any event, the statute is unambiguous.

A. The Hatch-Waxman Act's *Quid Pro Quo* Requires 505(b)(2) Applicants To Certify To Patents Claiming The Applicant's Requested Indication

1. In their briefs, FDA and Hikma attempt to rewrite the history of the Hatch-Waxman Act and the essential bargain that it codified. Prior to the Hatch-Waxman Act, manufacturers seeking approval to market a lower-cost alternative to a brand-name drug had few, if any, expeditious options. They could either conduct the expensive and time-consuming clinical trials necessary for FDA approval of a new drug, or submit a "paper NDA" attempting to prove their drug's safety by reference to "learned articles" demonstrating the safety of the chemical compound. *See* Gerald J. Mossinghoff, *Overview of the Hatch-Waxman Act and Its Impact on the Drug Development Process*, 54 Food & Drug L.J. 187, 187 (1999) [hereinafter "Mossinghoff"]; *see also Mylan Labs., Inc. v. Thompson*, 332 F. Supp. 2d 106, 110 (D.D.C.), *aff'd*, 389 F.3d 1272 (D.C. Cir. 2004). Moreover, even the unlicensed testing of patented brand-name drugs could expose manufacturers to liability for infringement under the Patent Act, thus effectively preventing generic drug companies from even beginning to develop a competing drug product until all patent coverage for the pioneer drug had expired. *See Roche Prods., Inc. v. Bolar Pharm. Co.*, 733 F.2d 858, 863-64 (Fed. Cir. 1984). By the early 1980s, few manufacturers were willing to risk the expense and delay of attempting to secure FDA approval to market a generic or near-duplicate drug product—prompting Congress in 1984 to create "the Hatch-Waxman shortcut." *See* Mossinghoff, *supra*, at 189.

The Hatch-Waxman Amendments aim to incentivize the speedy entry of lower-cost drug products while balancing the need to reward the substantial investments required for discovering and developing new drugs. "Because the FDA cannot authorize a generic drug that would infringe a patent," the Hatch-Waxman Amendments "direct brand manufacturers to file information about their patents" with the agency. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1676 (2012). Brand manufacturers must file "the number and expiration date of any patent which claims the drug that is the subject of the application, or a method of using such drug." *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 777 (1990); *see also* 21 U.S.C. § 355(b)(1). FDA also requires each brand manufacturer to "provide a description of any method-of-use patent it holds," known as a "use code." *Caraco*, 132 S. Ct. at 1676. FDA publishes this patent information in the Orange Book, which "provides notice of patents covering name brand drugs." *Merck & Co. v. Hi-Tech Pharmacal Co.*, 482 F.3d 1317, 1319 (Fed. Cir. 2007). By requiring brand-name drug manufacturers to identify any relevant patent information in this manner, the Hatch-Waxman Act and FDA's regulations aim "[t]o facilitate the approval of generic drugs as soon as patents allow." *Caraco*, 132 S. Ct. at 1676.

Requiring brands to publish their patent information is only half of the statutory balance. ANDAs and paper NDAs, in turn, must include one of four certifications with respect to the brand manufacturers' listed patents. *See* 21 U.S.C. § 355(b)(2)(A), (j)(2)(A)(vii). "This certification is significant," the Supreme Court has held, because "it determines the date on which approval of an ANDA or paper NDA can be made effective." *Eli Lilly*, 496 U.S. at 677. For example, applications containing a so-called Paragraph IV certification "may become effective immediately only if the patent owner has not initiated a lawsuit for infringement within

45 days of receiving notice of the certification." *Id.* If the patent owner timely files a patent infringement lawsuit, FDA's approval is automatically stayed for 30 months. *Id.* at 677-78.

Hikma took advantage of the "Hatch-Waxman shortcut" and sought approval for a method of use that was claimed by Takeda's patents; Hikma therefore was obliged to file a patent certification with respect to the Colcrys® use patents. Before 1984, Hikma would have been required to conduct expensive testing on its single-ingredient colchicine product in order to obtain FDA approval to market that product. But even that testing would have placed Hikma at risk for infringement liability before its drug was approved. Under that framework, Hikma likely would not have entered the colchicine market until the Colcrys® patents expired (2028/2029). As a result of the Hatch-Waxman Act, however, Hikma was allowed to use one of the approval shortcuts, but only after it had certified as to all patents in the Orange Book "to which a claim of patent infringement could reasonably be asserted," (21 U.S.C. § 355(b)(1)) which obviously includes Takeda's Colcrys® patents claiming the very use of colchicine for which Hikma was seeking approval. The certification requirement, and the automatic stay of approval upon filing of a patent infringement action, permits patent holders to litigate and resolve patent infringement claims before the allegedly infringing product enters the market. *That* is Hatch-Waxman's *quid pro quo*—applicants get an expedited approval pathway for applicants in exchange for granting patent holders an opportunity to litigate their claims of patent infringement ***before*** the market for their products are disrupted—and FDA failed to enforce it here.[7]

[7] This *quid pro quo* explains why Congress chose not to include a patent certification requirement for Section 505(b)(1) New Drug Applications. A certification requirement in that context truly *would* be a one-way street, since 505(b)(1) applicants by definition do not receive the benefit of an expedited approval pathway. *See* Hr'g Tr. 106-09 (Nov. 19, 2014). Innovators who invest the hundreds of millions of dollars needed to proceed under the Section 505(b)(1) pathway already have more than adequate incentives to avoid competitors' patents or risk liability for infringement and loss of their investment.

2. Attempting to minimize the applicant's statutory obligations, Hikma and FDA advance an unduly narrow (and unsupported) view of the Hatch-Waxman *quid pro quo*. Under that view, the 505(b)(2) applicant need only certify to any patents listed for the drug on which the applicant chooses (in its sole discretion) to rely for proving safety and efficacy. *See* Hr'g Tr. 51 (Nov. 19, 2014). According to Hikma, requiring a 505(b)(2) applicant to certify to patents claiming the use for which the applicant is seeking approval would somehow turn the *quid pro quo* into "a one-way street" and provide a "windfall" for patent holders. Hikma Mem. 2; *accord* FDA Mem. 10. Hikma and FDA are wrong.

Takeda obtained 17 patents by conducting innovative and costly research on the safe use of colchicine, and it provided its patent information to FDA after proving to FDA's satisfaction that Colcrys® was safe and effective for the prophylaxis of gout flares. These were not simple and cost-free endeavors, and it certainly is no "windfall" to require a subsequent 505(b)(2) applicant to certify to any listed patents that claim the exact same indication for the exact same drug. In contrast, FDA provided a clear windfall to Hikma: Hikma was allowed to exploit the Hatch-Waxman shortcut without certifying to method-of-use patents claiming the same indication Hikma requested, depriving Takeda of an opportunity to fully litigate its claims against Hikma and sharply advantaging Hikma over the three generic pharmaceutical companies (Par, Amneal, and Watson) who filed ANDAs for generic Colcrys® and are litigating infringement of the Colcrys® patents. *See* MSJ Mem. 30 n.13 (*Takeda Pharm. v. Watson Labs, et. al.*, Case 14-cv-00268, J. Robinson presiding). FDA suggests that patent owners who do not "share their data with other drug manufacturers in return" are not entitled to "the benefit of FDCA patent protections" (FDA Mem. 2), but Takeda *did* share its data with FDA, and Hikma could have availed itself of that data simply by referencing Colcrys®.

FDA asks: "Why would an applicant have to certify to a patent that is listed for a drug product on whose information the applicant does not rely for approval?" FDA Mem. 10. The answer is: Because FDA's Orange Book reports that the patent claims the use for which the applicant is seeking approval, and FDA cannot approve a drug that would infringe a patent. *Caraco*, 132 S. Ct. at 1676. The more pertinent question is: "Why should an applicant seeking approval for the use of colchicine for the prophylaxis of gout flares *not* have to certify to four patents that FDA's Orange Book lists as claiming the use of colchicine for the prophylaxis of gout flares?" FDA cannot answer this question.

It is implausible that Congress would have enacted a certification requirement for Section 505(b)(2) that applicants could avoid at will merely by claiming to rely on an unpatented drug product. In fact, Section 505(b)(2) makes clear than whenever an applicant "relie[s] upon" another's studies to shortcut the full NDA approval process (21 U.S.C. § 355(b)(2)), the 505(b)(2) applicant must persuade FDA that it is not infringing any potentially applicable product and use patents. *See Caraco*, 132 U.S. at 1676. Prior to 1984, manufacturers of duplicate and near-duplicate drug products generally had to wait until the patents covering a brand drug expired before applying for FDA approval. Now, the 505(b)(2) shortcut eliminates the wait, but applicants must certify to "each patent" that "claims the drug for which" the reference investigations were conducted, or that "claims a use for such drug for which the applicant is seeking approval." 21 U.S.C. § 355(b)(2)(A).[8]

The Hatch-Waxman Act's patent provisions are essential to achieving Congress's twin objectives of rewarding investments in new drug discovery and facilitating the marketing of

[8] If Congress wished to mandate the "simple *quid pro quo*" that Hikma and FDA envision (Hikma Mem. 1), it could have simply required a certification with respect to any patents claiming the drug on which the investigations were conducted. The detailed language of Section 505(b)(2) emphatically shows that Congress required more.

lower-cost, competing drugs as soon as the relevant patents allow. Those provisions cannot work as Congress provided without the certification mechanism. And because FDA is responsible for enforcing both the FDCA and the Hatch-Waxman Amendments, *see* 21 U.S.C. § 371(a); Proposed Rule, 67 Fed. Reg. 65,448, 65,457 (Oct. 24, 2002), FDA has a special duty to ensure that 505(b)(2) and ANDA applicants submit the necessary patent certifications in all cases. FDA breached that duty here, and its action undoes the fundamental legislative bargain reflected in the statute.

B. FDA's Controlling Regulation Validates Plaintiffs' Construction, And Only Plaintiffs' Construction Gives Effect To The Clear Intent Of Congress

FDA argues that Section 505(b)(2) is ambiguous, and that the agency's resolution of the statutory ambiguities is entitled to deference. *See* FDA Mem. 2-3. But even if the intent of Congress as expressed in Section 505(b)(2) were ambiguous (it is not), any doubt over the meaning of Section 505(b)(2) was dispelled when FDA issued an authoritative regulation requiring a certification if the 505(b)(2) applicant's drug label includes an indication that is claimed by a listed use patent. 21 C.F.R. § 314.50(i)(1)(iii)(B). Only that official interpretation, promulgated after notice and comment and spoken in FDA's "most authoritative voice"—and not differing interpretations advanced by FDA staff in Citizen Petition responses, Draft Guidance, or briefs filed in litigation—is entitled to deference. *See Cent. Laborers'*, 541 U.S. at 748; *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). To the extent that any agency pronouncements that FDA or Hikma cite conflict with these regulations, those pronouncements are themselves arbitrary and capricious and should be afforded zero deference. *See supra* Part I.

In any event, FDA's litigating position here runs afoul of Congress's unambiguously expressed intent, and therefore fails at *Chevron*'s step one. *Chevron*'s step one does not turn on

whether the statutory text is unambiguous in all respects or could have been written more artfully. The touchstone of *Chevron*'s step one, rather, is whether an agency's interpretation of a statute "'give[s] effect to the unambiguously expressed intent of Congress'" as determined using "'traditional tools of statutory construction.'" *Depomed, Inc. v. U.S. Dep't of Health & Human Servs.*, --- F. Supp. 2d ----, 2014 WL 4457225, at *8 (D.D.C. Sept. 5, 2014) (quoting *Chevron, USA, Inc., v. NRDC*, 467 U.S. 837, 842-43 (1984)). Section 505(b)(2) expresses Congress's clear intention to require an applicant to certify to any listed patents claiming the indication for which the applicant is seeking FDA's approval.

1. FDA argues that the word "drug" in Section 505(b)(2) is ambiguous and explains that "FDA has interpreted 'drug' in this provision to mean drug product rather than active ingredient." FDA Mem. 3. According to FDA, this interpretation of "drug" is not merely helpful in explaining FDA's action in this case; it is "the question at issue." *Id.* at 12. But FDA's regulation on patent certifications—the only agency interpretation that entitled to deference in this case—shows that "drug" means *both* drug product *and* drug substance. Specifically, FDA's regulation for 505(b)(2) applications requires a patent certification "with respect to each patent . . . that . . . claims a drug (the drug product or *drug substance that is a component of the drug product*) on which investigations that are relied upon by the applicant for approval of its application were conducted or that claims an approved use for such drug." 21 C.F.R. § 314.50(i)(1)(i)(A) (emphasis added).

This interpretation is a direct result of FDA's deliberate decision to read "drug" expansively. In 1994, on its own initiative, FDA expanded its requirements for listing patents in the Orange Book—and the requirements for patent certifications—by expressly including patents claiming the drug substance and any approved use of that drug substance. As a result of that

change, FDA's regulation for 505(b)(2) applications now requires patent certifications with respect to patents claiming both "the drug product" and the "drug substance that is a component of the drug product." 21 C.F.R. § 314.50(i)(1)(i)(A). At the time of the amendment, FDA explained that the newly-added parenthetical serves "to clarify the type of patents for which a certification should be made." Final Rule, 59 Fed. Reg. 50,338, 50,339 (Oct. 3, 1994). Any contrary construction now or in any Citizen Petition responses or Draft Guidance is not entitled to deference. *See Christopher*, 132 S. Ct. at 2166; *Cent. Laborers'*, 541 U.S. at 748.

This conclusion is consistent with decisions by numerous courts that have concluded that FDA's 1994 amendment construing "drug" to mean both drug product and drug substance "is a permissible reading of the statute." *Ben Venue Labs., Inc. v. Novartis Pharm. Corp.*, 10 F. Supp. 2d 446, 455 (D.N.J. 1998). The Federal Circuit, for example, commented that "the new 1994 rule represented a change in FDA procedures concerning what patents must be listed in the Orange Book" and, "of course, leads to more patents' being listed in the Orange Book." *Andrx Pharm., Inc. v. Biovail Corp*., 276 F.3d 1368, 1377 n.5 (Fed. Cir. 2002). Similarly, the District of Maryland has upheld FDA's listing of a drug substance patent as a "reasonable exercise of its statutory and regulatory powers," noting that cases decided under FDA's pre-1994 patent listing and certification requirements are "of doubtful continuing validity." *Watson Pharm., Inc. v. Henney*, 194 F. Supp. 2d 442, 446 (D. Md. 2001). Just as Takeda is required to list the Colcrys® patents in the Orange Book for "a method of using colchicine for the prophylaxis of gout flares," Hikma was required to certify to those patents.

Even now, in this litigation, FDA admits that it construes "drug" to mean both drug product and drug substance. On page 3 of its brief, FDA concedes:

> Both the statute and regulation require 505(b)(2) applicants to submit patent certifications to product patents (patents covering the ***drug product*** or ***drug***

> ***substance*** that is a component of the drug product) and use patents (patents covering approved methods of using the product).

Id. at 3 (emphasis added). Because FDA is forced to acknowledge its regulation, FDA attempts to defend its approval of Mitigare by construing "drug" in the first clause of Section 505(b)(2)(A) to refer to "the drug product or drug substance that is a component of the drug product," and later in the same sentence, by construing "such drug" to refer only to patents claiming a use of "the product" but not patents claiming a use of the substance. *Id.* Yet FDA never explains why "such drug" can only mean "drug product" when referring to method-of-use patents. FDA repeatedly criticizes Plaintiffs for construing "drug" to have "different meanings in the same sentence of a single statutory provision" (*id.* at 8), but that is exactly the construction that FDA has provided in its brief.

FDA asserts that it is "reasonable" to interpret "'such drug' in section 505(b)(2) to mean drug product rather than active ingredient" (FDA Mem. 11), yet offers no reason why that restrictive interpretation should apply when the *previous* use of "drug" in the statute can mean both "drug product or drug substance" (*id.* at 3). FDA also repeatedly (*id.* at 7, 11) cites to *Pfizer, Inc. v. FDA*, 753 F. Supp. 171, 176, 177 (D. Md. 1990), but fails to note that *Pfizer* was decided *before* FDA expanded its listing and certification requirements in 1994 and therefore "is of doubtful continuing validity." *Watson Pharm.*, 194 F. Supp. 2d at 446; *see also supra* at 16.

Even if "drug" could mean only drug product, FDA still should have required that Hikma certify to the Colcrys® patents. The drug product for which Hikma submitted an application is a single-ingredient, 0.6 mg colchicine capsule. Under Section 505(b)(2)(A), Hikma was required to certify to any listed patents claiming a use for that product for which Hikma was seeking approval. Any patent listed as claiming the use of colchicine for the prophylaxis of gout flares would also claim that same use of the applicant's specific colchicine *product*, since use of the

product falls within what is claimed. Four patents are listed in the Orange Book as claiming the use of colchicine for the prophylaxis of gout flares. Because those patents encompass the use of Hikma's drug for the indication for which Hikma sought approval, even construing "drug" to mean only drug product, Hikma was required to certify to the Colcrys® patents.

Thus, under *Chevron*'s step two, FDA's arguments fail. To the extent that any interpretation of the statute is due deference, it is the interpretation advanced in FDA's own regulations, which clearly stand for two propositions: (1) drug can mean "drug substance" with respect to patent certifications (21 C.F.R. § 314.50(i)(1)(i)) and (2) certifications must be made to any use patent claiming an indication on the "labeling of the drug product for which the applicant is seeking approval" (*id.* at § 314.50(i)(1)(iii)). *Chevron*'s step two ends there.

2. Although Plaintiffs clearly prevail under *Chevron*'s step two, the Court need not reach step two because Congress's expressed intent is unambiguous. *See* MSJ Mem. 14-25. Plaintiffs' construction gives effect to every word of Section 505(b)(2), while FDA's position renders important provisions superfluous. *See id.* at 17. FDA attempts to explain away the statutory superfluity that its interpretation would engender by explaining that the phrase "for which the applicant is seeking approval" distinguishes between those uses of the listed drug product (Col-Probenecid) for which the applicant is seeking approval and those for which it is not. *See* FDA Mem. 12. But, of course, Hikma was *not* seeking approval for a use of Col-Probenecid—it was seeking approval for a use of *colchicine*. FDA's hypothetical illustrates why "such drug" must (at least) mean colchicine.

The legislative history makes doubly clear that Hikma was required to certify to Takeda's controlling use patents listed as claiming the use of colchicine for the prophylaxis of gout flares. *See* MSJ Mem. 19-22. Despite FDA's longstanding reliance on the 1984 House Report as an

authoritative interpretation of Section 505(b)(2) (*see, e.g.*, Fenofibrate CP Response 7 n.6 (McGill Decl., Ex. P)), FDA now attempts to brush aside the legislative history with a syntax-defying argument (*see* FDA Mem. 9-10). FDA argues that when the House Report stated that patent certifications were required for "all use patents which claim an indication for *the drug for which the applicant is seeking approval*," H.R. Rep. No. 98-857, pt. 1 (House Report) at 32 (emphasis added), it could have been referring to "patents listed in the Orange Book for *the approved drug relied on* that cover an indication for which the applicant is seeking approval," FDA Mem. 9-10 (emphasis added). But the House Report is unambiguous and resolves any conceivable ambiguity in Section 505(b)(2). FDA's atextual reading should be rejected.

3. Hikma's construction of Section 505(b)(2) deviates from FDA's and fares even worse. In an argument that even FDA could not bring itself to make, Hikma posits that every instance of "drug" in Section 505(b)(2) refers to the "listed drug product" (Hikma Mem. 6), which Hikma conceives as Col-Probenecid. That interpretation is obviously wrong. Section 505(b)(2) applies only where, as here, an applicant seeks approval for a drug based on the safety and efficacy studies conducted for *another* drug. Put differently, the statute necessarily concerns two drugs—the applicant's drug and the reference drug. But Hikma reads its own drug out of the statute and ignores the context in which the word "drug" is used—context which makes abundantly clear to which "drug" Congress is referring.

Take, for example, the opening phrase of Section 505(b)(2). The "application submitted under paragraph (1) for a drug" (21 U.S.C. § 355(b)(2)) plainly refers to Hikma's drug; there is no other application being submitted. The only drug for which Hikma submitted an application for approval is a single-ingredient colchicine product, *not* a combination colchicine-probenecid

product. The "drug" in the opening paragraph must be colchicine.[9]

Section 505(b)(2)(A) contains two references to "drug." In the first instance, Hikma was required to certify to any "patent which claims the drug for which such investigations were conducted"—that is, the investigations on which Hikma is relying to prove safety and efficacy. 21 U.S.C. § 355(b)(2)(A). Because Hikma purported to rely on Danbury's safety and efficacy investigations, this "drug" is colchicine-probenecid or Col-Probenecid, and Hikma was required to certify to any patents claiming that drug combination or that drug product.

Hikma was *also* required to certify to any patent "which claims a use for such drug for which the applicant is seeking approval." 21 U.S.C. § 355(b)(2)(A). If "such drug" referred to colchicine-probenecid, then there would be no need for further modification and the phrase "for which the applicant is seeking approval" would be surplusage. The reason that "such drug" is modified by "for which the applicant is seeking approval" is to identify the specific prior reference to which "such drug" refers. It is the drug in the opening clause of 505(b)(2), which describes the drug that is the subject of the application—colchicine. Thus, Hikma was required to certify to any patents claiming a use for colchicine for which Hikma was seeking approval. As it happens, there are four controlling use patents—the Colcrys® patents. This construction gives effect to every statutory term and leaves a role to play for *both* drugs that are referenced in Section 505(b)(2). Hikma's construction does not.

There is no merit to the claim that the legislative history "supports Hikma's reading of the statute." Hikma Mem. 10. According to Hikma, the House Report speaks to a situation

[9] Hikma argues that the first reference to "drug" in Section 505(b)(2) is to Col-Probenecid, but that construction makes no sense. Just as there is no dispute that the relevant "applicant" is Hikma, there can be no plausible dispute that the relevant "application" is Hikma's application for colchicine. If the "application submitted under paragraph (1) for a drug" is the Danbury application for Col-Probenecid submitted in 1976, then there is no provision allowing Hikma to file its colchicine application.

where "a Paper NDA's [sic] is submitted for a listed drug [i.e., a drug product]." *Id.* (quoting House Report 32). How could a paper NDA be submitted for a listed drug *product*, like Col-Probenecid or Colcrys®? It cannot, as Hikma knows perfectly well. Prior to 2011, Hikma tried to submit a paper NDA for an exact duplicate of Colcrys®, but FDA rejected that attempt as unlawful. *See* MSJ Mem. 3 & n.3. Applicants for a listed drug product must proceed via the ANDA pathway, and there is no dispute that Hikma would have been required to certify to the Colcrys® patents had it sought approval for Mitigare under Section 505(j). Thus, the "listed drug" referenced in the House Report makes sense only if it means "drug substance."

The statute certainly would not be "inadministrable" (Hikma Mem. 12) under Plaintiffs' interpretation. FDA already scours the Orange Book to identify "any unexpired exclusivity on any drug product containing the active moiety" in the applicant's drug product (FDA 00476), so identifying use codes that cover the applicant's indication is well within FDA's grasp. Plaintiffs agree that a 505(b)(2) applicant need not "certify to *all* patents listed in the Orange Book for drug products that have nothing to do with its application." Hikma Mem. 12. But Congress specifically required 505(b)(2) applicants to certify to listed use patents claiming the same use of the same drug for which the applicant is seeking approval. As the legislative history contemplates, "in some instances an applicant will have to make multiple certifications with respect to product and controlling use patents." House Report 32. There is nothing unreasonable in requiring an applicant to submit multiple certifications if use of the applicant's drug might infringe multiple listed patents. *See, e.g.*, Fenofibrate CP Response 3 n.2 (505(b)(2) applicants may have to "certify to multiple sets of patents").[10]

[10] Hikma's acetaminophen hypothetical (Hikma Mem. 12) destroys any suggestion that Plaintiffs' interpretation would be unworkable. Only ***one*** use code even mentions acetaminophen and that code does not describe a *use* of acetaminophen, but rather a "method of treating acetaminophen overdose with acetylcysteine solutions." *See* [*footnote continued on next page*]

Contrary to Hikma's exaggerated rhetoric, a faithful interpretation of the statutory text would not turn FDA into the "patent police." Hikma Mem. 18. FDA already requires the 505(b)(2) applicants to certify to method-of-use patents which claim an indication for which the applicant is seeking approval (21 C.F.R. § 314.50(i)(1)(iii)), deeming those certifications essential for a complete application. *See* Hr'g Tr. 52-55 (Nov. 19, 2014). Enforcing that regulatory requirement entails nothing more than a simple search for use codes in the Orange Book and the conviction to deny applications that are incomplete. FDA need not determine the validity of those patents or make a legal determination of infringement. If FDA must perform duties with respect to patents, it is because FDA regulates in an innovation-driven industry and is charged by Congress with administering Hatch-Waxman's dual goals.

III. FDA Acted Arbitrarily And Capriciously In Departing From Its Longstanding Policy Without Notice And Reasoned Justification

FDA policy has long sought to "ensure that the 505(b)(2) applicant does not use the 505(b)(2) process to end-run patent protections," including by requiring applicants to rely on the "most similar" drug. Fenofibrate CP Response 9. Yet FDA permitted—and abetted—Hikma in accomplishing an "end-run" by allowing Hikma to reference Col-Probenecid instead of Colcrys® (the "most similar" drug). That action is arbitrary and capricious. *See, e.g.*, *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009).

1. Hikma and FDA suggests that, despite this clear policy, 505(b)(2) applicants have free reign to rely on any drug they want. Hikma Mem. 17; FDA Mem. 16. But that is not the case. For example, if a drug exists that is the "pharmaceutical equivalent" of applicant's drug, FDA

[*footnote continued from previous page*]
http://www.accessdata.fda.gov/scripts/cder/ob/docs/pattermsall.cfm?firstRec=1201 (use code U-1373). Thus, despite there being "[m]ore than one hundred drug products" containing acetaminophen (Hikma Mem. 12), a 505(b)(2) applicant seeking approval for a use of acetaminophen would not have to certify to a single method-of-use patent. That is hardly "inadministrable."

policy requires that 505(b)(2) applicants rely on the pharmaceutical equivalent and certify to that drug's patents. *See* Fenofibrate CP Response 9; Draft Guidance 8; FDA Mem. 14-15. Similarly, "[w]hen there is no listed drug that is a pharmaceutical equivalent to the drug product proposed in the 505(b)(2) application . . . the 505(b)(2) applicant should choose the listed drug or drugs that are most similar to the drug for which approval is sought." Fenofibrate CP Response 9.

Hikma and FDA suggest that this policy has been undone by the FDA's Suboxone Citizen's Petition Response. *See* Hikma Mem. 18; FDA Mem. 15-16. But that Response did not undermine the "most similar" drug requirement. Specifically, Hikma and FDA quote the Response's language that the "most similar" drug policy "does not reflect a statutory or regulatory requirement." *See* Hikma Mem. 18; FDA Mem. 15-16 (both quoting Suboxone CP Response 7 (McGill Decl., Ex. Q)). Plaintiffs, however, have always contended that this is an FDA *policy*, not necessarily one expressed in a regulation or statute. Likewise, the "pharmaceutical equivalent" policy is also not required by statute or regulation, yet all parties agree *that* policy must be followed. *See* FDA Mem. 14-15, Hr'g Tr. 54-55 (Nov. 19, 2014); Fenofibrate CP Response 9; Draft Guidance 8; Suboxone CP Response 8. More importantly, *both* are policies that the FDA cannot arbitrarily depart from without reasoned justification, as it has done here. *See, e.g.*, *Eagle*, 563 F.3d at 551; *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084, 1085 (D.C. Cir. 2001).

In addition, as FDA and Hikma both point out, the Suboxone Response addressed the inapplicability of the "most similar" drug policy in a different factual circumstance than present here—namely, when the "determination of which listed drug is 'most similar' to the proposed product may be difficult." *See* Hikma Mem. 18; FDA Mem. 15-16 (both quoting Suboxone CP Response 3). But that is not the case here. No one disputes that Colcrys® is the only Orange

Book-listed drug remotely similar to Mitigare since it is the only other single-ingredient colchicine product (Colchicine CP Response 12 (McGill Decl., Ex. A)), differing from Mitigare only in dosage form, unlike the manifestly dissimilar Col-Probenecid. *See* MSJ Mem. 4, 7. Determining which drug is the "most similar" is not at all difficult in this case, so the Suboxone Response's exception to the "most similar" drug policy is inapposite. Indeed, the district judge overseeing the related patent litigation concluded that "it is my impression that Hikma has effectively side-stepped the ANDA regime in an effort to get its generic product to market without appropriate legal underpinnings," Mem. Order 6, *Takeda Pharm. USA, Inc. v. West-Ward Pharm. Corp.*, No. 14-cv-1268 (D. Del. Oct. 9, 2014), ECF No. 21—a finding that the court has not retracted.

All of Hikma's arguments are centered on its brash assertion that it may "design[]" its drug development programs to "avoid[] patents" (Hikma Mem. 18), so long as it is willing to pay the price of conducting duplicative studies as a result of refusing to rely on the Colcrys® approval (Hr'g Tr. 51 (Nov. 19, 2014)). But there are at least two other parties that the "most similar" drug policy seeks to benefit. First, of course, it protects patent holders like Takeda by preventing circumvention of their patents. Second, the "most similar" drug policy benefits *FDA* because it "ensure[s] that [FDA] can rely, to the maximum extent possible, on what is already known about a drug without having to . . . re-review . . . what has already been demonstrated." Fenofibrate CP Response 9. Thus, "to avoid unnecessary duplication of research *and review*, . . . the 505(b)(2) applicant should choose the listed drug or drugs that are most similar." *Id.* (emphasis added); *see also* Proposed Rule, 54 Fed. Reg. 28,872, 28,890 (July 10, 1989) (Hatch-Waxman was designed to "assist the agency in avoiding duplicative reviews of safety and effectiveness information about already approved drugs"). Even Hikma has admitted that 505(b)(2) was "designed to

avoid duplicative studies." Hr'g Tr. 49 (Nov. 19, 2014). FDA cannot require previous applicants to rely on the "most similar" drug in order to avoid the cost of FDA reviewing duplicative studies, only to depart arbitrarily from that policy when a favored applicant like Hikma seeks approval. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 680 F.3d 819, 824-25 (D.C. Cir. 2012).

2. FDA does not disavow its policy (and Congress's intent) of "ensur[ing] that patent certification obligations for 505(b)(2) applications and for ANDAs are parallel." MSJ Mem. 31 (quotation marks omitted; alteration in original). Instead, FDA argues that applicants under the parallel 505(j) pathway are required to certify only to patents claiming a use for the reference listed drug, which FDA apparently assumes would still be Col-Probenecid. FDA Mem. 14-15. But FDA's argument misses the point entirely: Hikma sought approval for a single-ingredient colchicine product, not a combination colchicine-probenecid product. It could *not* have referenced Col-Probenecid in an ANDA; the *only* drug a Mitigare ANDA application could have referenced was Colcrys®, accompanied by a "suitability petition" to modify the dosage form from tablet to capsule. *See* Final Rule, 57 Fed. Reg. 17,950, 17,951-52 (Apr. 28, 1992); Draft Guidance 4; 21 C.F.R. § 314.93. Thus, had Hikma sought approval under Section 505(j) for Mitigare, Hikma would have been required to reference Colcrys® and certify to its patents. Pursuant to its own anti-circumvention policy, Hikma was not permitted to use 505(b)(2) to circumvent the patents that it would otherwise have to certify to if it filed an ANDA.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this motion for summary judgment be granted, the cross-motions for summary judgment be denied, and that the Court hold unlawful and set aside FDA's approval of Mitigare.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2014, I caused a copy of the foregoing Plaintiffs' Reply Brief In Support Of Their Motion For Summary Judgment, to be served upon all parties via this Court's Electronic Case Filing system.

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