IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BOEHRINGER INGELHEIM PHARMA GmbH & CO. KG,
Binger Strasse 173
55216 Ingelheim am Rhein
Federal Republic of Germany,

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,
900 Ridgebury Road
Ridgefield, CT 06877,

Plaintiffs,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION,
10903 New Hampshire Avenue
Silver Spring, MD 20993,

STEPHEN OSTROFF, in his official capacity as Acting Commissioner, United States Food and Drug Administration,
10903 New Hampshire Avenue
Silver Spring, MD 20993,

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
200 Independence Avenue
Washington, DC 20201,

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary, United States Department of Health and Human Services,
200 Independence Avenue
Washington, DC 20201,

UNITED STATES PATENT AND TRADEMARK OFFICE,
600 Dulany Street
Alexandria, VA 22314,

Case No. _____

MICHELLE K. LEE, in her official capacity as Undersecretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office,)

Defendants.)

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

Plaintiffs Boehringer Ingelheim Pharma GmbH & Co. KG (BIPKG) and Boehringer Ingelheim Pharmaceuticals, Inc. (BIPI), in their complaint against the U.S. Food and Drug Administration (FDA); Dr. Stephen Ostroff, M.D., in his official capacity as Acting Commissioner of FDA; the U.S. Department of Health and Human Services (HHS); Silvia Mathews Burwell, in her official capacity as Secretary of HHS; the U.S. Patent and Trademark Office (PTO); and Michelle K. Lee, in her official capacity as Undersecretary of Commerce for Intellectual Property and Director of the PTO, allege as follows:

PRELIMINARY STATEMENT

1. Plaintiffs' drug PRADAXA® (dabigatran etexilate mesylate) capsules (PRADAXA®) is the subject of a patent. PRADAXA® is also an FDA-approved drug. Accordingly, PRADAXA®'s patent is entitled to an extension to restore the time that would be otherwise lost during its "regulatory review period"—the period needed to test the drug and for FDA to review its marketing application.

2. The legal question in this case involves a key statutory date needed to properly determine the length of a patent term extension (PTE). Plaintiffs contend that FDA's approach to that determination violated the agency's statutory mandate. It also was erroneous, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

3. A drug product's regulatory review period typically lasts many years and substantially reduces the effective terms of patents covering the drug. To address this problem,

Congress enacted PTE legislation to restore a patent's term that otherwise would be lost during that regulatory review period.

4. Congress divided a drug product's regulatory review period into two phases: the *testing* phase and the *approval* phase. The difference between the two phases is significant. A PTE is made up of *one-half* of the time it takes to *test* the drug (the testing phase), plus *all* of the time it takes for FDA to *review* the marketing application (the approval phase). The length of the full PTE thus depends heavily on when a drug's approval phase begins.

5. The PTE statute unambiguously states that the testing phase ends and the approval phase begins on the date the drug product's marketing application is "initially submitted" to FDA. Congress intentionally used the phrase "*initially* submitted" because it wanted the approval phase to begin when FDA could begin its review—even though the agency might decide later that it needs additional information or requires other changes to the application. Accordingly, FDA's governing regulation states that an application is "initially submitted" on the date it contains sufficient information for FDA to "*commence* review" of the application. The "initially submitted" date is therefore tied to FDA's review.

6. FDA granted the PRADAXA® marketing application priority review and requested that plaintiff BIPI submit the PRADAXA® application on a rolling basis to speed review, as the drug was an important new therapy. BIPI made its first rolling submission covering several modules of the PRADAXA® application on September 17, 2009.

7. BIPI submitted the final elements of the application on December 15, 2009. The PRADAXA® marketing application was "initially submitted" to FDA no later than that point; by that date, all of the required elements of the PRADAXA® application were submitted, and the

application contained sufficient information for FDA to commence review. FDA confirmed as much; it was actively reviewing the application on that date and continued to do so thereafter.

8. In the course of its review, FDA sent a Refuse-to-File Letter (RTF Letter) to BIPI in February 2010. The letter requested no new testing, requested no new data, and identified no major omissions from the marketing application. Rather, the RTF Letter requested that BIPI correct some transcription errors, transposition errors, and auditing errors in one limited portion of the application.

9. The RTF Letter did not halt FDA's ongoing review of the PRADAXA® marketing application. In fact, FDA specifically assured BIPI in both formal and informal correspondence that observed that the agency's review of the application would continue.

10. BIPI resubmitted the small portion of the PRADAXA® marketing application for which FDA had requested some corrections on April 19, 2010.

11. Despite meeting the clear "initial submission" standard and despite the fact that FDA was actively reviewing the PRADAXA® marketing application long before the agency determined that PRADAXA®'s approval phase did not begin until April 19, 2010. In doing so, FDA deprived BIPKG of more than two months of its rightful PTE.

12. Plaintiffs therefore seek a declaratory judgment against FDA declaring that the agency's determination of the date on which the PRADAXA® marketing application was initially submitted, and the agency's corresponding determination of the regulatory review period for PRADAXA®, violated the agency's statutory mandate and also was erroneous, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Plaintiffs also seek injunctive relief ordering FDA to recalculate the regulatory review period in accordance with the

law—i.e., using December 15, 2009—the date of "initial submission"—as the date on which the approval phase commenced.

13. Because PTO must adhere to FDA's incorrect regulatory review period determination, Plaintiffs also seek injunctive relief ordering the PTO to issue a final certificate of extension for the '380 patent based on FDA's recalculation of the regulatory review period for PRADAXA®. If such certificate of extension issues during the pendency of this case, Plaintiffs alternatively seek injunctive relief ordering PTO to revise or reissue the certificate of extension for the '380 patent based on FDA's recalculation of the regulatory review period for PRADAXA®.

PARTIES

14. Plaintiff Boehringer Ingelheim Pharma GmbH & Co. KG is a corporation of the Federal Republic of Germany, headquartered at Binger Strasse 173, 55216 Ingelheim am Rhein, Federal Republic of Germany, and the owner of record of the '380 patent.

15. Plaintiff Boehringer Ingelheim Pharmaceuticals, Inc. is a U.S. corporation headquartered at 900 Ridgebury Road, Ridgefield, Connecticut 06877, and the sponsor of new drug application (NDA) 22-512, the approved marketing application for PRADAXA®.

16. Defendant FDA is an agency of HHS. FDA has the delegated responsibility to review and approve marketing applications for drug products. FDA also makes determinations regarding the regulatory review period for drug products for the purposes of patent term restoration under authority delegated by Congress and the Secretary of HHS. FDA's headquarters and principal place of business are at 10903 New Hampshire Avenue, Silver Spring, Maryland 20903. Its governmental activities occur in this District and nationwide.

17. Defendant Stephen Ostroff, M.D., is the Acting Commissioner of FDA and is sued solely in his official capacity. As Acting Commissioner, Dr. Ostroff has the ultimate responsibility for the activities of FDA, including those actions complained of herein. His governmental activities occur in this District and nationwide.

18. Defendant HHS is a cabinet department of the United States government. Its headquarters and principal place of business are at 200 Independence Avenue, S.W., Washington, District of Columbia 20201. Its governmental activities occur in this District and nationwide.

19. Defendant Sylvia Mathews Burwell is the Secretary of HHS and is sued solely in her official capacity. Congress has charged HHS and the Secretary with implementing the relevant portions of the Federal Food, Drug, and Cosmetic Act and the Hatch-Waxman Act. Her governmental activities occur in this District and nationwide.

20. Defendant PTO is an agency of the Department of Commerce. PTO determines the eligibility of patents for which patent term extension is sought, and also issues certificates of extension for eligible patents. PTO's headquarters and principal place of business are at 600 Dulany Street, Alexandria, Virginia 22314. Its governmental activities occur in this District and nationwide.

21. Defendant Michelle K. Lee is the Director of PTO and is sued solely in her official capacity. As Director, Ms. Lee has the ultimate responsibility for the activities of the PTO, including those actions complained of herein. Her governmental activities occur in this District and nationwide.

JURISDICTION AND VENUE

22. This action arises under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, because FDA has engaged in final agency action presenting an actual controversy for which Plaintiffs are entitled to relief and Plaintiffs have adequately exhausted their administrative remedies.

23. Jurisdiction in this Court is proper under 28 U.S.C. § 1331, in that this is a civil action arising under the laws of the United States; 28 U.S.C. § 1346, in that this case involves claims against the federal government; 5 U.S.C. § 702, in that Plaintiffs are seeking judicial review of an agency action from which they have suffered a legal wrong, been adversely affected, and been aggrieved; and 28 U.S.C. § 1361, in that this is an action to compel an officer of the United States to perform his duty.

24. This Court may issue a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, in that there exists between Plaintiffs and Defendants an actual, justiciable controversy as to which Plaintiffs require a declaration of their rights by this Court.

25. Plaintiffs have standing to bring the present lawsuit because, among other things, (i) they are suffering and face actual, imminent injury that is fairly traceable to Defendants' conduct and that is likely to be redressed by a favorable decision from this Court; and (ii) Plaintiffs are within the zone of interest of the relevant statutory provisions.

26. Venue is proper in this Court under 28 U.S.C. § 1391(e) because a defendant resides in this district and a substantial part of the events or omissions giving rise to this action occurred in this district.

BACKGROUND

Patent Term Extensions Restore Patent Term Lost During Regulatory Review

27. New human drugs must undergo a regulatory review period and receive FDA approval before they can be commercially marketed. 21 U.S.C. §§ 331(d), 355(a). A drug product's "regulatory review period"—the time it takes to *test* the drug and the time it takes for FDA to *review* the drug's marketing application—typically lasts many years and substantially reduces the effective terms of patents covering the drug.

28. Congress addressed this problem in the Hatch-Waxman Act. *See* Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984). Title II of the Hatch-Waxman Act provides that the holder of a patent covering a drug subject to FDA's regulatory review is entitled to a PTE to compensate for the period of time the pre-market approval requirement barred commercial marketing of the product. 35 U.S.C. § 156(a).

29. A drug's regulatory review period consists of the sum of two parts, known as the "testing phase" and the "approval phase." 35 U.S.C. § 156(g)(1); 21 C.F.R. § 60.22(a) (a product's regulatory review period consists "of the sum of the lengths of a testing phase and an approval phase").

30. The term of a patent eligible for extension may be extended by the sum of (i) one half of the time the product was in the testing phase, and (ii) all of the time the product was in the approval phase. 35 U.S.C. § 156(c).

31. For human drugs, the testing phase begins "on the date [an investigational new drug application] became effective for the approved product" and ends "on the date an application was *initially submitted* for such drug product under" 21 U.S.C. § 355. 35 U.S.C. § 156(g)(1)(B)(i) (emphasis added); *see* 21 C.F.R. § 60.22(a)(1). The approval phase begins "on

the date the application was *initially submitted* for the approved product under" 21 U.S.C. § 355 and ends "on the date such application was approved under such section." 35 U.S.C. § 156(g)(1)(B)(ii) (emphasis added); *see* 21 C.F.R. § 60.22(a)(2).

32. An application is considered to be "initially submitted" as soon as it contains sufficient information for FDA to begin its review:

> For purposes of determining the regulatory review period and its component periods, an application for agency review is considered to be "initially submitted" if the applicant has made a deliberate effort to submit an application containing all information necessary *for the agency review to begin*. The Committee recognizes that the agency receiving the application might decide it needs additional information or other changes to the application. As long as the application was complete enough so that agency action could be commenced, it would be considered "initially submitted."

H.R. Rep. No. 98-857, pt. 1, at 44 (1984) (emphasis added).

33. Congress chose the term "initially submitted" and explicitly rejected the term "filed" because "an application is often not considered to be filed, *even though agency review has begun*, until the agency has determined that no other information is needed." *Id.* (emphasis added).

34. Consistent with Congress's intent, FDA's regulations provide that for "purposes of determining the regulatory review period for any product, a marketing application . . . is initially submitted on the date it contains sufficient information to allow FDA to *commence review* of the application." 21 C.F.R. § 60.22(f) (emphasis added).

35. Thus, the date a marketing application is "initially submitted" for purposes of PTE is tied to FDA commencing review.

The '380 Patent

36. BIPI is the sponsor of NDA 22-512, the approved marketing application for PRADAXA®. PRADAXA® is a human drug product indicated to reduce the risk of stroke and systemic embolism in patients with non-valvular atrial fibrillation.[1]

37. On July 11, 2000, the PTO issued the '380 patent, titled "DISUBSTITUTED BICYCLIC HETEROCYCLES, THE PREPARATIONS AND THE USE THEREOF AS PHARMACEUTICAL COMPOSITIONS." It named as inventors Norbert Hauel, Henning Priepke, Uwe Ries, Jean Marie Stassen, and Wolfgang Wienen.

38. BIPKG is the current assignee of the '380 patent, and owns rights, title, and interests in and to the '380 patent.

39. The original expiration date of the '380 patent is February 18, 2018.

PRADAXA®'s Regulatory Review Period

40. The investigational new drug application (IND) for PRADAXA® became effective on August 6, 2003, marking the start of the testing phase. 77 Fed. Reg. 26,289, 26,290.

41. Following the effective date of the PRADAXA® IND, but before the initial submission of the PRADAXA® marketing application, FDA notified BIPI that it expected to review the PRADAXA® application on a "priority" basis and requested that BIPI submit the application on a "rolling review" basis: "In order for us [FDA] to complete our review of your NDA in a timely fashion, we request that you submit each module as you complete it." Minutes of Aug. 17, 2009 FDA Meeting, at 3. BIPI agreed to do so, and on September 17, 2009, it submitted the first modules of the marketing application for PRADAXA®. On September 30, 2009, BIPI began submitting data for the clinical module of the PRADAXA® application.

[1] Non-valvular atrial fibrillation is a type of irregular heartbeat.

42. BIPI submitted to FDA the final elements of the PRADAXA® marketing application, including documents across several previously submitted modules, on December 15, 2009. FDA subsequently acknowledged that it had received the PRADAXA® application on that date. *See* NDA Acknowledgement Letter, at 1 (Jan. 5, 2010).

43. On February 12, 2010, FDA's Division of Cardiovascular and Renal Products (the Division) sent an RTF Letter to BIPI. In its letter, the Division stated that the application contained some "transcription errors, transposition errors, and auditing errors." RTF Letter, at 1 (Feb. 12, 2010). In a meeting following the RTF Letter, FDA asked BIPI to conduct a series of "data quality checks" and organize the study report "in a manner that facilitates review." Minutes of Feb. 18, 2010 FDA Meeting, at 2. No new testing or data were requested, and no major omissions from the application were identified in the RTF Letter or the February 18, 2010 meeting minutes.

44. Ordinarily, a refuse-to-file decision will immediately terminate review activity on a marketing application. However, in certain cases, FDA may continue with its substantive review of the application while the sponsor works to repair the deficiencies the agency has identified. As FDA's longstanding guidance on RTF actions makes clear:

> The agency may, for particularly critical drugs, not use the RTF procedure, even where it could be invoked, or might review parts of a refused application if it believes that initiating the full review at the earliest possible time will better advance the public health.

FDA, Center for Drug Evaluation and Research, New Drug Evaluation Guidance Document: Refusal to File 3 (July 12, 1993) (the Refusal to File Guidance).

45. Consistent with its guidance, and notwithstanding the RTF determination, FDA specifically stated in the RTF Letter that it would continue its ongoing review of the already submitted PRADAXA® marketing application:

> In recognition of the importance of this priority application, we proposed a rolling review. *We will, of course, continue our review* of parts of your application that are complete and reviewable, such as the chemistry and pharmacology toxicology sections.

RTF Letter, at 2 (Feb. 12, 2010) (emphasis added). Such language—an express statement that FDA will continue its ongoing review of an application notwithstanding an RTF determination—is rare, if not unique. In other instances where FDA has refused to file applications, FDA has not indicated that it planned to continue its review of the application. *See, e.g.*, Refuse to File Letters from FDA (Y. Mille) to Luitpold Pharmaceuticals, Inc. (Apr. 5, 1995 and June 1, 1995); Refuse to File Letters from FDA (J. Phillips) to Upsher-Smith Laboratories, Inc. (Aug. 28, 1995 and Oct. 5, 1995); Refuse to File Letter from FDA (J. Phillips) to Sanofi Winthrop, Inc. (Sept. 20, 1996); Refuse to File Letters from FDA (R. Lipicky) to Biovail Corporation International (Jan. 13, 1998 and Mar. 27, 1998); Refuse to File Letter from FDA (E. Colman) to Merck & Co., Inc. (Oct. 29, 2009); Refuse to File letter from FDA (R. Katz) to Eisai, Inc. (July 21, 2011); Refuse to File Letter from FDA (R. Justice) to Roxane Laboratories, Inc. (Feb. 17, 2012); and Refuse to File Letter from FDA (J. Farley) to Paladin Therapeutics, Inc. (Nov. 26, 2012).

46. In keeping with its express commitment, FDA continued to substantively review the submitted PRADAXA® marketing application after issuing the RTF Letter. For example, just four days after the RTF Letter, the Division's lead Project Manager for the PRADAXA® application sent BIPI an e-mail with questions from FDA's liver toxicity experts. The e-mail reiterated FDA's commitment to continue its review of the application:

> As I mentioned on the phone, *regardless of the RTF, we are continuing our review of the application*.

E-mail from A. Blaus, FDA Project Manager, to M. Kliewer, BIPI (Feb. 16, 2010) (emphasis added).

47. There are numerous examples of FDA's continued review of the PRADAXA® marketing application. They include:

A. February 16, 2010: The Division sends BIPI detailed requests from FDA's liver toxicity experts (noted above), accompanied by assurances that "*regardless of the RTF, we are continuing our review of the application*." *See* E-mail from A. Blaus, FDA Project Manager, to M. Kliewer, BIPI (Feb. 16, 2010) (emphasis added).

B. February 16, 2010: FDA's Executive Carcinogenicity Assessment Committee meets to consider BIPI's rat and mice carcinogenicity studies. *See* Meeting Minutes from D. Jacobson-Kram, Chair, Executive Carcinogenicity Assessment Committee (Feb. 16, 2010).

C. March 1, 2010: BIPI submits plan for the packaging and appearance of PRADAXA® capsules in response to comments from FDA's Division of Medication Error Prevention and Analysis. *See* E-mail from M. Kliewer, BIPI, to N. Ton, FDA Project Manager (Mar. 1, 2010).

D. March 9, 2010: FDA's Division of Biometrics completes its statistical review of the carcinogenicity studies in the PRADAXA® application. *See* FDA, Center for Drug Evaluation and Research, Pradaxa Statistical Review and Evaluation Carcinogenicity Study (Mar. 9, 2010).

E. March 15, 2010: FDA's Division of Medication Error Prevention and Analysis concurs with BIPI's plan, submitted March 1, 2010. *See* E-mail from N. Ton, FDA Project Manager, to M. Kliewer, BIPI (Mar. 15, 2010).

48. FDA thus had sufficient information to commence review, and in fact *was* actively reviewing, the PRADAXA® marketing application as of December 15, 2009. And FDA

continued to do so through October 19, 2010, the date on which the agency approved the PRADAXA® application.

BIPKG's Patent Term Extension Application

49. BIPKG timely submitted an Application for Patent Term Extension to the PTO on December 13, 2010. 35 U.S.C. § 156; *see* 37 C.F.R. § 1.720(f).

50. The Application for Patent Term Extension states that the testing phase commenced on August 7, 2003, the date on which IND No. 65,813 became effective.

51. The Application for Patent Term Extension further states that submission of nonclinical data under rolling review began on September 17, 2009, and that submission of clinical data began on September 30, 2009. The Application for Patent Term Extension also states that that the complete marketing application (NDA 22-512) was "initially submitted" on December 15, 2009, because as of that date the application contained "all information necessary for agency review to begin." *See also* 21 C.F.R. § 60.22(f).

52. The Application for Patent Term Extension states that the marketing application was approved on October 19, 2010.

53. Based on BIPKG's calculation of one-half of the "testing phase" from August 6, 2003 to December 15, 2009 (1,162 days) and all of the time corresponding to the "approval phase" from December 15, 2009 to October 19, 2010 (309 days), the company determined that the appropriate regulatory review period for PRADAXA® is 1,471 days.

54. Thus, the new term extension date of the '380 patent—based on an approval phase that began on December 15, 2009—should be February 28, 2022.

Defendants' Determination of the Regulatory Review Period for PRADAXA®

55. Defendants have determined that the '380 patent is eligible for PTE.

56. By letter dated April 18, 2012, FDA informed the PTO that the agency had reviewed BIPKG's application for patent term extension and determined the regulatory review period applicable to PRADAXA®. On May 3, 2012, FDA published formal notice of its determination in the Federal Register.

57. FDA determined that the total regulatory review period applicable to PRADAXA® was 2,633 days. Of this time, FDA calculated that 2,449 days occurred during the testing phase and 184 days occurred during the approval phase.

58. According to FDA, the PRADAXA® IND became effective August 6, 2003, triggering the start of the testing phase.

59. FDA determined that the testing phase ended and the approval phase began on April 19, 2010, the date BIPI resubmitted the small portion of the PRADAXA® marketing application referenced in the RTF Letter.

60. According to FDA, the PRADAXA® marketing application was not "initially submitted" on December 15, 2009 because it was unable to meet the agency's administrative "filing" standard. FDA made this determination despite the fact that FDA was actively reviewing the PRADAXA® application long before April 19, 2010.

61. FDA determined that the approval phase ended on October 19, 2010, the date on which FDA approved the PRADAXA® application.

62. PTO is bound by FDA's final determination. When issuing a certificate of extension for the '380 patent, PTO *must* follow FDA's regulatory review period determination. *See* 37 C.F.R. § 1.775 ("The term of the patent for a human drug, antibiotic drug or human biological product will be extended by the length of the regulatory review period for the product as determined by [FDA] . . . .").

FDA Unlawfully Relied on a "Filing" Standard Instead of an "Initially Submitted" Standard in Its PTE Calculation

63. In determining that PRADAXA®'s approval phase did not begin until April 19, 2010, the date when, in FDA's view, the application was "complete," FDA unlawfully applied a "filing" standard as the trigger for PRADAXA®'s approval phase, rather than the statutorily prescribed "initial submission" standard. As a result, FDA deprived BIPKG of more than two months of its rightful PTE.

64. The PTE statute unambiguously states that the approval phase begins when a marketing application is "initially submitted" to FDA. An application is "initially submitted" when it "contains sufficient information to allow FDA to commence review." 21 C.F.R. § 60.22(f). The PRADAXA® application was "initially submitted" to FDA no later than December 15, 2009, when BIPI submitted the final elements of the application.[2] At this point, all of the required elements of the PRADAXA® application were submitted, and the application contained sufficient information for FDA to commence review. FDA was actively reviewing the application, and it continued to do so thereafter, even after FDA issued the RTF Letter.

65. Congress intentionally used the phrase "initially submitted" because Congress wanted the approval phase to begin when FDA could begin its review, even though the agency might decide later that it needed additional information or other changes to the application. Indeed, Congress specifically chose the term "initially submitted" and rejected the term "filed" because FDA will often commence review of an application even if further information or other

[2] As noted, on September 17, 2009, BIPI made its first rolling submission covering several modules of the PRADAXA® marketing application. Even though FDA immediately commenced review of BIPI's rolling submission, under FDA's current interpretation, the first submission of a rolling review application is not considered to be an "initial submission" that triggers the start of the "approval phase" for purposes of the PTE calculation. But, if this Court were to overturn FDA's interpretation; FDA were to revise this interpretation; or there were any other change in the applicable law governing the start of the approval phase for applications submitted on a rolling basis, Plaintiffs reserve the right to claim September 17, 2009, as the date the PRADAXA® application was "initially submitted."

changes are needed to meet FDA's administrative "filing" standard. In doing so, Congress explicitly rejected a "filing" standard as the start of the approval phase.

FDA's Calculation of the Regulatory Review Period for PRADAXA® Is Contrary to Past Agency Precedent

66. FDA's calculation of PRADAXA®'s regulatory review period is not just out of keeping with the governing statute; it is also contrary to the agency's past practice and precedent.

67. The agency previously has explained that once review has commenced, the approval phase is triggered; FDA cannot thereafter revert back to the testing phase. Determination of Regulatory Review Period for Purposes of Patent Extension; Tonocard Tablets, 50 Fed. Reg. 19,809, 19,810 (May 10, 1985) (issuance of a "not approvable" letter requiring additional clinical testing by the applicant did not interrupt approval phase as long as the sponsor had made "a deliberate effort to submit an application containing all information necessary for agency review to begin").

68. But that is precisely what FDA has done with regard to PRADAXA®; it is reverting back to the testing phase even though review had already commenced and no further testing was performed.

69. FDA's disparate treatment highlights the arbitrary and capricious nature of FDA's actions with respect determining the regulatory review period applicable to PRADAXA®. *See Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20 (D.D.C. 1997) (disparate treatment of similarly situated products is arbitrary and capricious).

BIPKG's Request for Revision of Regulatory Review Period

70. BIPKG timely filed a Request for Revision of Regulatory Review Period (Request for Revision) with FDA on June 27, 2012. The Request for Revision explained the factual and legal rationale for the request, and requested that "the date the application was

initially submitted with respect to the human drug product under section 505(b) of the FD&C Act" be corrected from April 19, 2010—the date provided in the Federal Register notice—to December 15, 2009.

71. BIPKG also requested that FDA recalculate the "regulatory review period" accordingly.

72. FDA denied the Request for Revision on December 24, 2014.

73. In denying the Request for Revision, FDA refused to address several of Plaintiffs' specific arguments raised in the Request for Revision, including:

A. Congress considered and rejected a "filing" standard as the trigger for the approval phase;

B. FDA's Refusal to File Guidance expressly provides that in certain circumstances the agency will continue to review an application it "refuses to file," which is exactly what FDA did here; and

C. FDA reviewed several modules of the PRADAXA® application—including clinical modules—between December 15, 2009 and April 19, 2010, not just the Chemistry, Manufacturing, and Controls module.

74. FDA's denial of the Request for Revision constitutes FDA's final agency action on the regulatory review period determination for purposes of the patent term extension for the '380 patent. *See* 21 C.F.R. § 60.26(b)(2). And PTO is bound by FDA's final determination. *See* 37 C.F.R. § 1.775.

75. In light of the above, Plaintiffs have exhausted all of their available administrative remedies.

COUNT ONE
VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT
FDA's Decision Regarding When the PRADAXA® Marketing Application Was Initially Submitted Violated the Agency's Statutory Mandate and Is Erroneous, Arbitrary, Capricious, or Otherwise Not in Accordance with Law

76. Plaintiffs incorporate by reference each of the above paragraphs.

77. As set forth above, FDA's decision regarding the date the PRADAXA® marketing application was "initially submitted" violated the agency's statutory mandate and is erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A). The APA requires that such agency actions be set aside.

78. FDA's action is contrary to the governing statute and regulations, in violation of the APA.

79. FDA's action is contrary to its past precedents, in violation of the APA.

80. FDA's action impermissibly refused to address many of Plaintiffs' contentions, in violation of the APA.

81. FDA's determination of the regulatory review period in response to BIPKG's Request for Revision constitutes final agency action that is reviewable by the district court. 5 U.S.C. § 706.

82. In issuing a certificate of extension for the '380 patent, PTO must follow FDA's regulatory review period determination for PRADAXA®. *See* 37 C.F.R. § 1.775 ("The term of the patent for a human drug, antibiotic drug or human biological product will be extended by the length of the regulatory review period for the product as determined by [FDA] . . . .").

83. Plaintiffs have no adequate remedy at law and will suffer substantial and irreparable injury unless this Court issues declaratory and injunctive relief directing FDA to recalculate the regulatory review period for PRADAXA® in accordance with the law—i.e., using

December 15, 2009—the date of "initial submission"—as the date on which PRADAXA®'s approval phase commenced.

84. There exists an actual and substantial controversy between Plaintiffs and Defendants of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

85. An order directing FDA to recalculate the regulatory review period would not substantially injure other interested parties, and the public interest will be furthered by calculating the regulatory review period in a way that is not erroneous, arbitrary, capricious, or otherwise contrary to law. The intent of Congress and the public interest will be served by such an order.

86. An order directing PTO to issue a certificate of extension for the '380 patent, or, alternatively, reissuing or revising the certificate of extension for the '380 patent, based on FDA's recalculated regulatory review period would not substantially injure other interested parties, and the public interest will be furthered by a certificate of extension that reflects a calculation of the regulatory review period that is not erroneous, arbitrary, capricious, or otherwise contrary to law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request an Order from his Court:

A. Declaring (1) that FDA's determination of the regulatory review period for PRADAXA® violated the agency's statutory mandate and was erroneous, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2); and (2) that FDA's finding that the marketing application for PRADAXA® was initially submitted on April 19, 2010 violated the agency's statutory mandate and was erroneous,

arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2);

B. Awarding temporary, preliminary and/or permanent injunctive relief compelling FDA to recalculate the regulatory review period for PRADAXA® based on the date the marketing application for PRADAXA® was "initially submitted"—December 15, 2009—pursuant to 35 U.S.C. § 156(g)(4)(B);

C. Awarding temporary, preliminary and/or permanent injunctive relief compelling the PTO to issue a final certificate of extension for the '380 patent based on FDA's recalculated regulatory review period for PRADAXA® in a manner consistent with the law, or, alternatively, if such certificate of extension has already issued, revise or reissue the final certificate of extension for the '380 patent to reflect the recalculated regulatory review period for PRADAXA®;

D. Awarding Plaintiffs their costs, expenses, and attorneys' fees pursuant to 28 U.S.C. § 2412; and

E. Awarding any other relief the Court deems just and proper.

Dated: April 29, 2015

Respectfully submitted,

HOGAN LOVELLS US LLP

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