IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FERRING PHARMACEUTICALS INC., Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, and STEPHEN OSTROFF, M.D., in his official capacity as ACTING COMMISSIONER OF FOOD AND DRUGS, FOOD AND DRUG ADMINISTRATION, Defendants.	Civil Action No. 1:15-cv-802 (RC)

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT
AND
REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

FDA used to interpret the Food, Drug, and Cosmetic Act's new chemical entity (NCE) exclusivity statute to deny exclusivity for a new drug approved as part of a fixed-dose combination drug product if the novel drug was combined with other *non*-novel active ingredients. The agency's old interpretation did not square with the statute, with the agency's own regulations, or with simple logic and policy. But when FDA changed its interpretation, it did so only "prospectively," to drugs approved after the agency's announcement.

Ferring's PREPOPIK®, a fixed-dose combination drug product containing a novel drug, was approved before the agency's announcement, meaning that FDA continues to apply its *prior* interpretation of the exclusivity statute to PREPOPIK—and to deny exclusivity. That violates the APA in multiple independent respects: The interpretation is not, and never was, a permissible reading of the statute. It does not even comport with the agency's own regulation. And the agency's line-drawing between pre- and post-announcement fixed-dose combination drug products is completely capricious.

The government has little to offer against all this in its responsive submission. It defends its old interpretation of the word "drug" in the NCE exclusivity statute to refer only to a finished drug *product*, not to a drug *substance*, such that *all* of the active ingredients in the finished drug product must be novel in order to invoke the statutory exclusivity. But the government concedes that the same word ("drug") used later in the same sentence of the same subsection of the same statute means drug substance, not drug product. The government's statutory interpretation is straight out of the Alice-in-Wonderland playbook: the word "drug" in the NCE exclusivity statute means whatever FDA says it means, even if it means two different things in the same

sentence, and even if the second use in the sentence specifically refers back to the first.[1] This type of statutory analysis simply does not pass muster under *Chevron*, syntax, or logic.

Nor has the government grappled with the plain language of FDA's own regulation, which makes clear that the "new chemical entity" entitled to exclusivity is a drug substance, not the drug product itself. Although it suggests in passing that its regulation is "consistent with" the agency's prior statutory interpretation, Gov. Mem. 20, the government made no effort to examine the language of the regulation, let alone explain how the words selected by the agency fit together in a way that makes any logical sense under FDA's proposed interpretation. The government's silence on this point speaks volumes.

Finally, the government has failed to provide any rational justification for treating Ferring's PREPOPIK differently than other similarly situated fixed-dose combination drug products. Many other fixed-dose combination drug products receive NCE exclusivity, whether through FDA's so-called "umbrella" policy or, now, under FDA's new interpretation of the eligibility clause. Because FDA cannot articulate a reason for treating PREPOPIK differently than those other fixed-dose combination drug products, FDA's conduct is arbitrary and capricious.

I. FDA'S DECISION VIOLATES THE FDCA.

The FDCA's text, purpose, and history make clear that if any drug *substance* contains a novel active component, that drug substance is eligible for NCE exclusivity even if the drug *product* also contains other, previously approved active components. *See* Ferring Mem. 10-23. Indeed, FDA's own regulation comports with this statutory interpretation. *Id.* at 19-23. Because

[1] *See* Lewis Carroll, *Through the Looking Glass* (" 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' ").

FDA applied an interpretation[2] of the statute to PREPOPIK that does not comport with the statutory command (nor with its own regulatory interpretation of the statutory command), its decision is unlawful. The government's brief does nothing to countermand this argument.

A. FDA's Interpretation Fails Under *Chevron* Step One.

The government does not dispute that the statute uses the word "drug" twice in the same sentence, introducing it as "**a**" drug and then later referring back to it as "**the**" drug. Nor does the government dispute that FDA has already interpreted the *second* use of the word "drug"—the "**the**" drug, in the so-called "bar clause"—to mean "drug *substance*." Gov. Mem. 16-17 (agreeing "that FDA has appropriately interpreted 'drug' to mean drug substance in the bar clause"); A.R. 209[3] (same). The government nonetheless asserts that it is now free to interpret the first drug—the "**a**" drug in the so-called "eligibility" clause—to mean "drug *product.*" *Id.* But the "presumption that a given term is used to mean the same thing throughout a statute" is "surely at its most vigorous" when, as here, "a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). That "most vigorous" presumption applies all the more when the second term is defined with reference back to the first—the "*the*" drug related to the "a" drug. *See Work v. United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923) (use of definite article "the" shows Congress' intent to refer back to the appraisement referenced earlier in the same sentence); *U.S. v. Wilcox*, 487 F.3d 1163, 1176 (8th Cir. 2007) ("use of the

[2] Unless otherwise specified, references to "FDA's interpretation" herein refer to the agency's old, now-superseded interpretation. Even though FDA has now revoked that interpretation, FDA is relying on the old interpretation in defending its treatment of PREPOPIK.

[3] All pages of the administrative record cited herein are included in Exhibit 1 to Ferring's Memorandum in Support of Summary Judgment (Dkt. Nos. 20-3 and 20-4).

definite article indicates that 'the victim' who may be reimbursed is the victim described at the beginning of the subsection"); *Nat'l Foods, Inc. v. Rubin*, 936 F.2d 656, 660 (2d Cir. 1991).

The government does not take this towering syntactic problem head-on; indeed, it fails to grapple with the "the"/"a" issue at all. And in fact, the government implicitly agrees that it is counterintuitive in the extreme to define "the" drug differently from the "a" drug it refers back to, by suggesting instead that the agency in theory could just as easily have interpreted both references to mean "drug *product*" and not "drug *substance*." Gov. Mem. 17-18. Not so. As the agency itself has admitted, its interpretation of the second occurrence of the term "drug" to mean "drug substance" under the "umbrella" policy was driven by clear Congressional intent. 54 Fed. Reg. 28872, 28897 (July 10, 1989) (interpreting the second use of "drug" in the sentence to mean "drug substance" because "[t]he agency does not believe that Congress intended the exclusivity provisions to discourage innovators from making improvements in their drug products nor from authorizing the marketing of competitive products."). But even assuming that it would have been reasonable for FDA to interpret the second occurrence of the term "drug" to mean "drug product," the fact remains that FDA did not do so. Gov. Mem. 17-18; A.R. 209. Once FDA interpreted the second occurrence of "drug" to mean "drug substance," it follows that the first use of the term "drug"—in the very same sentence—must also have the same meaning.

The government nevertheless gamely contends that "it is permissible to interpret the same word to have different meanings in two different clauses of the same provision." Gov. Mem. 19. First, nothing in the statute suggests that Congress intended the *single sentence* at issue to have two different, independently interpretable "clauses." The "eligibility" and "bar" clauses are an FDA construct, part of the agency's effort to justify interpreting the same word in the same sentence differently. But in any event, the cases cited in the government's brief actually

addressed use of the same term "in *different* provisions of" the same statute, not the same provision—let alone the same *sentence*. *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007) (emphasis added) (addressing meaning of the word "modification" in two separate air pollution control schemes set forth sixty provisions apart in Clean Air Act); *Allina Health Sys. v. Sebelius*, 982 F. Supp. 2d 1, 11 (D.D.C. 2013) (examining meaning of phrase set forth in two differently numbered subsections of statute, and pertaining to two types of government programs). The government has not offered a single example of a circumstance where the same term *in the same sentence* carries two different meanings. *See, e.g., Amarin Pharms. Ireland Ltd. v. FDA*, --- F. Supp. 3d ---, 2015 WL 3407061, at *11 (D.D.C. May 28, 2015) (noting that "Congress . . . enacted the relevant references to 'active ingredients' at the same time, in the same amendments, and inserted the language into the same subsection of the FDCA," all of which counseled in favor of interpreting the references uniformly).

The government also argues that the mere fact that "drug" can have more than one meaning in the FDCA automatically puts this case in *Chevron* Step Two territory. Gov. Mem. 19. This Court has already held otherwise, when talking about this same statute, no less. *See Amarin*, 2015 WL 3407061, at *10 (fact that the term "active ingredient" can have more than one meaning does not convert the case to a Step Two case). The government does not contest the statement by the *Amarin* court; instead, it attempts to distinguish a case *cited* in *Amarin*, *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) ("*CAISO*"), as "not stand[ing] for the proposition" for which Ferring (or apparently the *Amarin* court) cited it. But *CAISO* equally supports Ferring's argument; it makes clear that a court must look at the word in the context of the statute in order to determine ambiguity under Step One. *Id.* at 400-01. Many other cases stand for the same principle. *See A.T. Massey Coal Co. v. Holland*, 472 F.3d 148,

160 (4th Cir. 2006) (cited in Ferring's opening submission, and ignored in the government's); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-96 (2004) (rejecting the "assum[ption] that the word 'age' has the same meaning wherever the ADEA uses it" and holding that "[h]ere, regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA. The word 'age' takes on a definite meaning from being in the phrase [at issue].").

The government also argues that "because drug applications are *generally* submitted for drug products rather than drug substances, interpreting 'drug' to mean drug product flows logically from the text." Gov. Mem. 18 (emphasis added). But as Ferring explained in its opening brief, the very statutory provision at issue in this case specifically talks about drug substances (in the form of an active ingredient) being approved in an application. *See* 21 U.S.C. § 355(j)(5)(F)(ii) ("no active ingredient . . . of which has been approved *in [a prior] application*") (emphasis added). Congress clearly understood, then, that drug substances can be the subject of an application—which is why the government liberally salts its contrary argument with the qualifier "*generally*." Gov. Mem. 18.

Finally, the government suggests in passing that Ferring did not bother making a "plain language" statutory argument in its Citizen Petition. Gov. Mem. 2, 15 n.6. Not so. Not only did Ferring argue in its Citizen Petition that FDA's interpretation violated the statute's language, *see, e.g.*, A.R. 70-76, but FDA expressly addressed the very same statutory arguments set forth above in its Citizen Petition Response. *See, e.g.*, A.R. 199 (noting that the petitions requested that "FDA . . . adopt a new interpretation of section 505(c)(3)(E)(ii) and (j)(5)(F)(ii) of the FD&C Act."); A.R. 210 (discussing the permissibility of interpreting the word "drug" to mean two different things in the eligibility clause and the bar clause).

B. FDA's Interpretation Fails Under *Chevron* Step Two.

The agency's formal regulation on NCE exclusivity explains that if a "drug product" contains a "new chemical entity" (defined as a "drug that contains no active moiety that has been approved by FDA in any other application"), no person may submit an application for a drug product containing the same "active moiety" as in the new chemical entity. 21 C.F.R. § 314.108(a). In other words, exclusivity attaches to the "new chemical entity" (NCE) contained in the "drug product"—not to the drug product itself. If this Court defers to anything, it should be the agency's own regulation. *See Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (regulations promulgated through formal notice and comment rulemaking entitled to more deference than other agency interpretations); *Barrick Goldstrike Mines, Inc. v. Whitman*, 260 F. Supp. 2d 28, 36-37 (D.D.C. 2003) (agency's interpretation that is inconsistent with its own regulations is invalid). And because FDA's prior interpretation did not comport with its own regulation, that interpretation fails even at *Chevron* Step Two.

The government responds only in passing to this argument, asserting as if it were self-evident that its prior interpretation was sufficiently "consistent" with the regulation. Gov. Mem. 20. The government stops short of attempting to parse the regulation itself. And it similarly fails to explain how its interpretation makes any sense in light of the regulation's plain language. If the "new chemical entity" that is the subject of exclusivity refers to a "drug product," then the regulation would apply to a "drug product" that contains a "drug product." *See* Ferring Mem. 21. The government offers no rejoinder to that.[4]

[4] FDA's statements in the rulemaking preamble support the conclusion that a "new chemical entity" refers to an individual drug substance, rather than a drug product. As FDA stated there, the regulatory definition of "new chemical entity" is modeled on the agency's use of the term "new molecular entity," which means a "*compound* containing an entirely new active moiety." 54 Fed. Reg. 28872, 28897-98 (July 10, 1989) (emphasis added). As FDA acknowledged in the

Ferring also explained in its opening submission that the government cannot credibly invoke broad-scope "deference" where FDA has waffled so much on what exactly it is it wants a court to give deference *to*. Ferring Mem. 22. The government concedes that FDA has taken at least two inconsistent positions on what the statute means. Gov. Mem. 19-20. It nonetheless suggests that FDA is entitled to deference because the agency only flip-flopped once—or, actually, twice, if the court agrees with Ferring's reading of the regulation—instead of multiple times. Gov. Mem. 20. The precise number of flips and flops is beside the point. FDA has offered three interpretations of the statute—one in its regulations, one in defending its prior policy, and another in announcing its new policy. Its (now superseded) prior interpretation is owed considerably less deference as a result. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *see also Prevor v. FDA*, 67 F. Supp. 3d 125, 138 (D.D.C. 2014) (rejecting interpretation at *Chevron* Step Two where FDA exhibited a "significant shift in [its] practices when classifying products"). The government articulates no reason to defer to FDA's (now superseded) informal interpretation instead of its regulation or its new policy, and it cites no case law supporting its assertion that this court must defer equally to *each* of multiple different, and some concurrent, interpretations of the statute.

Nor is FDA's interpretation entitled to deference merely because it has been around a while, as the government suggests. Gov. Mem. 21. "[T]hat is history, not explanation." *Se. Ala. Med. Ctr. v. Sebelius*, 572 F. 3d 912, 920 (D.C. Cir. 2009). Even an "agency interpretation of longstanding duration" must "still yield to the plain meaning of the statute." *Port Auth. of N.Y.*

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preamble, Congress was aware when it enacted the statutory exclusivity provision that FDA employed the term "new molecular entity" as part of a scheme to classify new drugs by chemical type. 54 Fed. Reg. 28872, 28897 (July 10, 1989). Indeed, FDA continues to use this classification scheme and has recognized PREPOPIK as a "new molecular entity." Congress intended that such products would earn NCE exclusivity.

& N.J. v. Dep't of Transp., 479 F.3d 21, 31 n.4 (D.C. Cir. 2007). And even at *Chevron* Step Two, the reasonableness of FDA's interpretation turns on its "'fit' with the statutory language, as well as its conformity to statutory purposes." *Goldstein v. S.E.C.*, 451 F.3d 873, 880-881 (D.C. Cir. 2006) (finding interpretation "outside the bounds of reasonableness"); *Abbott Labs. v. Young*, 920 F.2d 984, 988-989 (D.C. Cir. 1990) (invalidating interpretation at *Chevron* Step Two); *Prevor*, 67 F. Supp. 3d at 137-138 (same).

The government's last salvo is to defend its prior interpretation as reasonable in light of the purposes of the FDCA to "limit[] grants of 5-year NCE exclusivity only to products that were wholly novel, thereby rewarding the most innovative products." *See* Gov. Mem. 21 n.10. But NCE exclusivity does not turn on which products were "*most* innovative" or "*wholly* novel"—that is the government's own self-serving gloss. A novel active ingredient—such as sodium picosfulfate—is no less innovative when first developed in a fixed-dose combination, rather than first developed as a single-ingredient product and then later incorporated into a fixed-dose combination. And even under FDA's old statutory interpretation, novel active ingredients were granted NCE exclusivity if they were first approved as a single-ingredient product and then approved (even hours later) as part of a fixed-dose combination drug product. There simply is no basis in the text of the statute, its history, or its purpose to justify FDA's line-drawing. The purpose of the statute is to reward exclusivity to "new chemical entities," 130 Cong. Rec. H9113 (daily ed. Sept. 6, 1984) (Rep. Waxman explaining that the exclusivity period provided "the incentives needed to develop *new chemical entities*"), and to refuse exclusivity to drugs that require "no new research effort." *Abbott Labs.*, 920 F.2d at 986. Fixed-dose combination products containing new active ingredients require just as much research effort and are just as

"new" as single-ingredient products containing those same new active ingredients. FDA has now recognized as much, *see* A.R. 215—just not for PREPOPIK.

For all of these reasons, FDA's interpretation fails even *Chevron* Step Two review.

II. FDA'S REFUSAL TO AWARD FERRING FIVE-YEAR EXCLUSIVITY VIOLATED ITS OWN REGULATIONS.

Ferring explained in its opening submission that FDA's interpretation (as applied to Ferring) violated its own regulations. Ferring Mem. 23-24. The relevant regulation describes a "drug product" that contains a "new chemical entity," and in turn defines "new chemical entity" to mean "a drug that contains no active moiety that has been approved by FDA in any other application submitted under section 505(b) of the Act." 21 C.F.R. § 314.108(b)(2) and (a). In other words, the finished drug product contains the protected "new chemical entity," which in turn is comprised of the novel active moiety. NCE exclusivity thus attaches to the drug substance. And FDA has taken no steps to revise its regulation now that it has announced its new NCE exclusivity policy, making clear that the regulation actually supports FDA's *new* statutory interpretation, not the one it applied to PREPOPIK.

The government's response, as we observed above, is not a response; it argues merely that the regulation "is consistent with the agency's prior interpretation." Gov. Mem. 20. It is understandable why the government wishes not to grapple with the plain language of the regulation, because if "new chemical entity" means "drug *product* that contains no active moiety," then the relevant portion of the regulation would read: "if a drug product contains a drug product that contains no active moiety." That will not wash. *See supra* at 7; *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation that is nonsensical does not warrant judicial deference).

The government acknowledges that FDA's interpretation "was not the most natural reading of the regulation," but nonetheless argues that the agency adopted it in order to effectuate Congress' alleged "purpose" of "reserving 5-year NCE exclusivity for only completely innovative drugs." *Id.* But there is nothing in the text or history of the statute that suggests that Congress intended to "reserve" NCE exclusivity for drugs that are approved for the first time in combination with other drugs; such drugs require just as much research effort and are just as novel as drugs that are approved as part of a single-ingredient drug product. *See* 130 Cong. Rec. H9113 (daily ed. Sept. 6, 1984) (Rep. Waxman explaining that the exclusivity period provided "the incentives needed to develop *new chemical entities*"); *Abbott Labs.*, 920 F.2d at 986 (Congress intended to deny exclusivity to drugs that require "no new research effort."). Nor does the agency's interpretation find support in FDA's conclusion that Congress intended for either of 3-year or 5-year exclusivity to apply to a drug product, but not both. Gov. Mem. 20. Even under the old interpretation of the statute that FDA applied to PREPOPIK, drug products often received both types of exclusivity. For example, if FDA approved a novel drug substance in a single ingredient drug product, the drug substance would receive 5-year exclusivity. If FDA then approved that same drug substance in a fixed dose combination drug product, the second drug product would retain the 5-year exclusivity for the novel ingredient and also receive 3-year exclusivity for any data submitted to show the effectiveness of the two drugs in combination.

For these reasons as well, FDA's attempt to cling to its prior interpretation as applied to PREPOPIK should be rejected.

III. FDA ACTED ARBITRARILY AND CAPRICIOUSLY BY TREATING SIMILARLY SITUATED PARTIES DIFFERENTLY.

Even assuming FDA's interpretation of the statute and regulation were legally defensible, FDA's decision *still* fails because the agency has not adequately justified treating PREPOPIK

differently than other similarly situated drug products. Defendants attempt to recast Ferring's similarly-situated argument as one of fairness: so long as Ferring was on notice of FDA's interpretation when it filed its drug application for PREPOPIK, the government argues, the agency was not required to apply its revised interpretation of the statute "retroactively." Gov. Mem. 22-23. But that, of course, is not the relevant legal test. The APA requires an agency to treat similarly situated entities the same, full stop.[5] And the government has not articulated any meaningful differences between PREPOPIK and the many other fixed-dose combination drugs permitted to take advantage of NCE exclusivity, whether under either FDA's umbrella policy or its new interpretation of the exclusivity clause.

A. FDA Has Not Justified Treating PREPOPIK Differently Than Other Fixed-Dose Combination Drug Products Approved After a Single-Ingredient Product.

An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so. *See* Ferring Mem. 24-29. The government argues in response that PREPOPIK is not "similarly situated" to the other fixed-dose combination drug products that received the benefit of NCE exclusivity under the agency's so-called "umbrella" policy,[6] pursuant to which the agency has recognized that NCE exclusivity attaches to the drug substance, not the drug product. Gov. Mem. 23-24. According to the government, PREPOPIK was not "similarly situated" to many other fixed-dose combination drug products because its new chemical entity was ineligible for separate approval as a single-ingredient product. *Id.* But that is circular reasoning at its finest. It is precisely because PREPOPIK could not be approved as a

[5] In any event, Ferring had every right to expect that the plain meaning of the statute and regulation would be applied to PREPOPIK, regardless of FDA's informal "policy."

[6] FDA's "umbrella policy" allows the NCE exclusivity granted to an active ingredient to travel with the drug substance to other drug products containing the same drug substance subsequently approved for the same sponsor. Ferring Mem. 7.

single-ingredient drug product that it is in this pickle to begin with. PREPOPIK is a fixed-dose combination drug. FDA is treating it differently than it treats other fixed-dose combination drugs. The question here is whether FDA lawfully can opt to regulate one type of fixed-dose combination drug differently than another. The government cannot point to the very thing Ferring challenges as arbitrary to explain why its conduct was *not* arbitrary.

The distinction between the two categories also must *matter*. *See Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 733 (D.C. Cir. 1965) (agency must "do more than enumerate factual differences, if any, between [one case] and the other cases; it must explain the relevance of those differences"). Yes, PREPOPIK's new chemical entity was first approved as part of a fixed-dose combination, while the new chemical entities in EDARBYCLOR, COMPLERA, and NESINA were all first approved as part of single-ingredient drugs.[7] The drug products also have different names, treat different conditions, and were developed by different companies. All of those things are equally irrelevant to the question whether FDA has offered a legally sufficient justification for treating different fixed-dose combination products differently.

The government does not even suggest that the purpose of the FDCA is somehow served by treating new chemical entities differently based on whether they are approved first in a single-ingredient or fixed-dose combination product. Gov. Mem. 24. Nor could it; FDA itself has recognized that its previous interpretation distinguishing between the two categories of products

[7] The government also points out that the actual length of the exclusivity period depends on the length of time between the two approvals, since the umbrella policy merely carries over the 5-year NCE exclusivity awarded to the single-ingredient drug to later-approved fixed-dose combinations. Gov. Mem. 23-24. Still, fixed-dose combination drugs are eligible for the full five years when, as was the case with NESINA, they are approved on the same day as the single-ingredient product. A.R. 907; Ferring Mot. for Summary Judgment Ex. 7 (Dkt. No. 20-10). And others, like EDARBYCLOR and COMPLERA, have received over four years of NCE exclusivity. A.R. 214 n.80; A.R. 908-09. There simply is no reason that PREPOPIK should be denied similar treatment.

"may place undue importance on the order in which these two NDAs are approved." A.R. 213-214; Ferring Mem. 27. *See also Abbott Labs*, 920 F.2d at 989 (finding "farfetched" and "fail[ing] to serve any conceivable statutory purpose" an interpretation that would base the degree of exclusivity protection a drug received on the sequence in which a sponsor's applications are approved).

If sodium picosulfate had first been approved as a single-ingredient product, it would have been awarded NCE exclusivity. And if sodium picosulfate had first been approved as a single-ingredient product whose labeling required it be used only with previously approved active ingredients, it would have been awarded NCE exclusivity. But, according to FDA, because sodium picosulfate was first approved as part of a fixed-dose combination product, it earns no NCE exclusivity. The agency can point to no rationale to explain this disparate treatment or why Congress would have intended such an absurd result.

B. FDA Has Not Justified Treating PREPOPIK Differently Than Fixed-Dose Combination Drug Products Approved After FDA Corrected Its Interpretation.

Ferring also explained in its opening submission that FDA failed to justify denying PREPOPIK the benefit of the agency's corrected statutory interpretation. Ferring Mem. 27-29. The government's brief in response contends that the previous interpretation had been "longstanding," that the agency wanted to avoid "unnecessary disruption to regulated industry," that the interpretation could impose an "unanticipated burden" on ANDA sponsors, and that applying the policy to Ferring would not advance the statutory goal of providing incentives for new drug development. Gov. Mem. 22. None of those contentions holds water.

To begin with, the "long-standing" practice was based on an informal policy document that conflicted with the plain language of a superseding formal agency regulation. Ferring Mem.

28. The government also argues the "potential" for a burden on the industry justified its decision to apply its new interpretation only prospectively. Gov. Mem. 24-25. But it candidly acknowledges "the absence of a documented burden in the administrative record." *Id.* at 25. Nor does it identify any specific "disruption" to the industry. Instead, the purported problem is described in an unsupported theory proffered by litigation counsel that some hypothetical drug sponsor "who *may* have commenced a development program relying on the fact that PREPOPIK was not eligible for 5-year NCE exclusivity *would likely* have been burdened by the change in the expected timeframe." *Id.* (emphases added). The agency is not permitted to draw lines based on litigation counsel's coulda-woulda-shoulda hypotheses. The administrative record contains no evidence that FDA received any applications that sought to rely on PREPOPIK at the time the agency issued its initial Citizen Petition Response. A.R. 21, 835. Nor does the administrative record articulate the manner in which such hypothetical third parties would have been harmed. *See id.* And in fact, as Ferring pointed out in its opening brief, any hypothetical third-party filers were on notice that Ferring was challenging its exclusivity period at least as early as January 2013, when Ferring filed its Citizen Petition. Ferring Mem. 29; A.R. 62. The agency thus cannot justify its line-drawing with an unsupported supposition that unarticulated harm might potentially have been suffered by unnamed third parties.

Finally, the government argues that the agency's decision to apply its new interpretation only prospectively "strikes the appropriate balance between the congressional intent of the Hatch-Waxman Amendments to encourage innovation and the interests of the parties who may be affected by the interpretive change." Gov. Mem. 25. That assertion appears at the bottom of the page—prompting a reader to turn to the next page for an explanation of *why* denying NCE exclusivity to PREPOPIK somehow comports with Congressional intent to encourage drug

makers to spend money and resources on developing new chemical entities. No explanation is forthcoming. The APA does not tolerate agency *ipse dixits*. *Cross-Sound Ferry Services, Inc. v. I.C.C.*, 738 F.2d 481, 485 (D.C. Cir. 1984) (holding that "ipse dixit and a broad appeal to deregulatory policies" did not "comport with the reasoned decisionmaking requirements" of the APA). *See also Star Delivery & Transfer v. U.S.*, 659 F.2d 81, 83 (7th Cir. 1981) ("It is not enough that the [agency] merely recite the ultimate conclusions of fact mandated by statute . . . .").

FDA has provided no justification for distinguishing between fixed-dose combination drug products containing new chemical entities that were previously approved in single-ingredient products and those that were not—let alone tied that justification to the purpose of the statute. And FDA has provided no justification for distinguishing between fixed-dose combination drug products approved before it brought its interpretation in line with the statute and those approved after—let alone tied that justification to the purpose of the statute. Its disparate treatment of Ferring violates the APA. *See Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) ("A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." (internal quotation marks and citations omitted)).

Finally, *even if* FDA's prior interpretation were legally permissible, and *even if* FDA's decision to apply its new (read: correct) interpretation only "prospectively" were legally defensible, FDA fails to surmount one last problem: a "prospective" application applies to Ferring. The administrative record does not reflect that any generic applicants had taken the necessary steps that would have enabled FDA to make a legally binding exclusivity determination for PREPOPIK at the time that FDA denied Ferring's Citizen Petition. The

government contends in response that the statutory interpretation in effect at the time of approval must apply to PREPOPIK because the exclusivity period *begins* on the date the NDA is approved. Gov. Mem. 25. The exclusivity period is usually *calculated* from the approval date, to be sure. But it is only *exercised* when a subsequent application is submitted, and there is no evidence in the record of any ANDA or 505(b)(2) sponsor fitting that bill at the time FDA denied Ferring's Citizen Petition. *See* Ferring Mem. 29. Put another way, there is no credible reason for the agency to act as though Prepopik's exclusivity had been established when the record suggests that it was never even triggered by a competing generic application. Thus, "Prospective" application of the new NCE exclusivity interpretation entails applying the new interpretation to any drugs for which ANDA or 505(b)(2) applications have not yet been submitted. At the time the agency acted, that included PREPOPIK. FDA can offer no justification for refusing NCE exclusivity to Ferring.

CONCLUSION

For all of the foregoing reasons, and for those in Ferring's initial memorandum, Ferring's Motion for Summary Judgment should be granted, Defendants' Cross-Motion for Summary Judgment should be denied, and FDA should be ordered to recognize five-year exclusivity for PREPOPIK under the FDCA.

Respectfully submitted,

/s/ Catherine E. Stetson ___

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Dated: September 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September 2015, the foregoing Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment was filed via the Court's CM/ECF system and served upon ECF-registered counsel for all parties to this proceeding.

/s/ Kathryn V. Long
Kathryn V. Long