UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMGEN, INC.	)	Case No. 1:17-cv-01006-RDM
Plaintiff,	)	
v.	)	
THOMAS E. PRICE, MD in his official capacity as Secretary of Health and Human Services, and	)	
SCOTT GOTTLIEB, M.D., in his official capacity as Commissioner of Food and Drugs;	)	
Defendants.	)	

SUPPLEMENT TO DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

At the hearing on June 2, 2017, the Court asked the parties to address certain topics and provide certain documents. In response, the Defendants state the following:

A. May 2006 Memorandum

Exhibit A is a redacted 2006 memorandum describing the basis for denial of pediatric exclusivity.[1] It sets forth FDA's interpretation and implementation of the "fairly respond" standard in 21 U.S.C. § 355a(d)(3), and reflects an earlier instance of the same approach that FDA took when evaluating Amgen's request for pediatric exclusivity in this case.[2] Of note, the memorandum contains the following:

[1] These redactions were undertaken quickly in order to provide this document within the time available, and may be overbroad.

[2] FDA has similar denial memoranda for other drugs setting forth this same interpretation, and we will provide redacted versions of those documents upon request.

- An explanation of the Agency's interpretation and application of the relevant standard which is essentially identical to that in Amgen's denial letter, including the Agency's consideration of whether there will be health benefits to studying this drug for the proposed indication in the pediatric population, as well as whether the studies have met the objectives of the written request and the objective of the pediatric exclusivity provision as a whole. *Compare* Ex. A, at 1-3 *to* Compl. Ex. 2, at 1-3.
- A conclusion that is similarly consistent with the conclusion that the Agency reached here:

> Not only did the sponsor fail to study the number of patients requested in the Written Request, but the study sample size was insufficient to evaluate the efficacy, safety, and pharmacokinetics of in the study population. As a result, the study objective could not be met.

Ex. A at 8.

B. Post-*Mead* Deference

The Court asked Defendants for a statement on the application of *Chevron* deference in light of *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Chevron* deference extends to administrative determinations, such as the one here, that are not embodied in rulemaking or formal adjudication. As the Supreme Court made clear in *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002):

> [T]he fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due. . . . If this Court's opinion in [*Christiansen v. Harris County*, 529 U.S. 576 (2000))] suggested an absolute rule to the contrary, our later opinion in [*United States v. Mead Corp.*, 533 U.S. 218 (2001)] denied the suggestion. Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and comment rulemaking. (citations omitted).

In *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279-80 (D.C. Cir. 2004), for example, the D.C. Circuit rejected Mylan's argument that only minimal deference was owed to FDA's interpretation because it was not embodied in a formal regulation and extended *Chevron* deference to the agency's interpretation of the pediatric and generic exclusivity provisions that was expressed in a letter decision. The court explained that deference was appropriate because of "the complexity of the statutory regime . . . the [presence of] FDA's expertise or the careful craft of the scheme it devised to reconcile the various statutory provisions." *See also Astrazeneca Pharms. LP v. FDA*, 713 F.3d 1134, 1139 (D.C. Cir. 2013) (deferring to FDA's interpretation of a statute in a letter decision, and stating that "[t]his language is permeated by ambiguities that, under *Chevron*, leave discretion in the FDA to adopt reasonable interpretations"); *Novartis Pharms. Corp. v. Leavitt*, 435 F.3d 344, 351-52 (D.C. Cir. 2006) (deferring to FDA's interpretation of a statute in a citizen petition response without notice-and-comment rulemaking).

C. <u>Sliding Scale</u>

The Court asked the Defendants their position on the use of a "sliding scale" in analyzing temporary restraining orders and preliminary injunctions after *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Defendants first note that the new administration does not appear to have established an official position on this issue. Nevertheless, as the government has previously pointed out, there is serious doubt whether the sliding scale survives *Winter*. As Judge Kavanaugh has noted, "the *Winter* Court rejected the idea that a strong likelihood of success could make up for showing only a possibility (rather than a *likelihood*) of irreparable harm. In other words, the Court ruled that the movant always must show a likelihood of irreparable harm." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009)

(Kavanaugh, J., joined by Henderson, J., concurring); *see also Sierra Club v. DOE*, 825 F. Supp. 2d 142, 148 (D.D.C. 2011) ("With respect to irreparable harm, it is now clear that a showing of irreparable injury is an independent prerequisite for a preliminary injunction."); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) ("Like our colleagues [J. Kavanaugh and J. Henderson], we read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" (quoting *Davis*, 571 F.3d at 1296)).

Judges in this district have, in some cases, continued to employ a sliding-scale analysis even after *Winter*. *See Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323, at **4 (D.D.C. Nov. 16, 2012). Under a sliding-scale approach, "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis*, 571 F.3d at 1291-92 (Majority Op.). Where a plaintiff fails to make a strong showing of likelihood of success on the merits, it must make an especially strong showing of irreparable harm. *See id.* at 1291. Moreover, even under the sliding scale approach, "it is clear that a failure to show a likelihood of success on the merits is alone sufficient to defeat a preliminary injunction motion." *In re Akers*, No. 10-1300(JEB), 2012 WL 5419318 (D.D.C. Nov. 7, 2012). Thus, even if the Court were to employ some sort of sliding scale, Amgen's failure to establish any plausible likelihood of success precludes the entry of a TRO or PI, irrespective of the strength of their irreparable injury claim (which, as noted in our initial brief, falls far short of the prevailing standard in this district). Amgen's motion should be denied under either standard.

D. OrthoTri-Cyclen (Norgestimate/ethinyl estradiol) Pediatric Exclusivity Decision

The Court asked for additional detail regarding Ortho Tri-Cyclen. In granting pediatric exclusivity to that drug on December 18, 2003, the agency relied on the documents available to it at the time, and review of that decision would exclude later documents, such as the March 8, 2004, and May 6, 2005, documents that Amgen cites. Pl.'s Mem. at 29.

We have located the Written Request, Amendment #2, which explains that the agency agreed to consider interim efficacy and safety data submitted for only the first 6 cycles as fulfilling the Written Request. *See* Ex. B, at 4. We have not yet been able to locate any documents that fully explain the basis for the Pediatric Exclusivity Board's decision, and we will continue to search for such documents.

E. Legislative History of 21 U.S.C. § 355a(j)

The Court asked Defendants to submit legislative history for 21 U.S.C. § 355a(j). At this time, we have not been able to locate any pertinent legislative history, but we will continue our research.

F. Meaning of the Statement "We have learned a lot"

The Court asked Defendants to explain what "We have learned a lot" refers to in the meeting minutes from September 4, 2013 (Ex. 1 to the Complaint, at 7). In full, the comment states, "We have learned a lot from the analysis of the clinical data collected during the pediatric program. We look forward to an active discussion with you about possible ways to modify the WR to obtain valuable and needed data to inform the safe and effective use of cinacalcet in the pediatric population." In context, it does not appear that this reference to data was specific to data from any particular study. Rather, it appears that the meeting minutes were referring generally to the clinical data collected as of that date.

Moreover, the "learned a lot" comment must be viewed in context with other statements in the document, such as: "The data generated to date are insufficient to allow a robust assessment of the safety and efficacy of cinacalcet use in children. As stated above, we continue to believe that cinacalcet has a role to play in the management of secondary hyperparathyroidism in the pediatric population and should be studied adequately." *Id.* at 6.

Dated: June 4, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

MICHAEL S. BLUME
Director

ANDREW CLARK
Assistant Director

/s/ Charles J. Biro

Charles J. Biro
Illinois Bar No. 6277139
Trial Attorney
Consumer Protection Branch
Civil Division
United States Department of Justice
P.O. Box 386
Washington, DC 20044
202-307-0089
Charles.Biro@usdoj.gov

Of Counsel:

JEFFREY S. DAVIS
Acting General Counsel

ELIZABETH H. DICKINSON
Associate General Counsel,
Food and Drug Division

ANNAMARIE KEMPIC
Deputy Chief Counsel, Litigation

WENDY S. VICENTE
Senior Counsel

MUSTAFA ÜNLÜ
Counsel

U.S. Department of Health & Human Services
Office of the General Counsel
10903 New Hampshire Avenue
White Oak 31 Room 4562

Silver Spring, MD 20993-0002
(301) 796-3396

CERTIFICATE OF SERVICE

I certify that on June 4, 2017, a copy of this pleading was filed via the Court's CM/ECF system and served on the attorneys of record for all parties via the Court's CM/ECF system.

/s/ Charles J. Biro
Charles J. Biro
United States Department of Justice