UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEVA PHARMACEUTICALS USA, INC.
1090 Horsham Road
North Wales, PA 19454,

Plaintiff,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services,
200 Independence Ave., S.W.
Washington, DC 20204;

MARGARET HAMBURG, M.D., in her official capacity as Commissioner of Food and Drugs,
200 C Street, S.W.
Washington, DC 20204;

UNITED STATES FOOD AND DRUG ADMINISTRATION,
5600 Fishers Lane
Rockville, MD 20857,

Defendants.

Case: 1:09-cv-01111
Assigned To : Kessler, Gladys
Assign. Date : 6/17/2009
Description: Admn. Agency Review

TEVA PHARMACEUTICALS USA, INC.'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Teva Pharmaceuticals USA, Inc. ("Teva") brings this complaint for declaratory and injunctive relief against Defendants Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; Margaret Hamburg, in her official capacity as Commissioner of Food and Drugs; and the United States Food and Drug Administration (collectively "FDA"). In support thereof, Teva states the following:

NATURE OF THE ACTION

1. Teva brings this lawsuit in response to FDA's refusal to follow the D.C. Circuit's decision in *Ranbaxy Labs. Ltd. v. Leavitt*, 469 F.3d 120 (D.C. Cir. 2006), in assessing whether the first patent-challenging applicant for a generic version of a previously approved drug is entitled to 180 days of marketing exclusivity under the Hatch-Waxman and Medicare Modernization Act amendments to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355 *et seq*. ("the FDCA" or "the statute").

2. In particular, FDA has issued a definitive and final—but legally unsustainable—rule of decision that now allows brand manufacturers to deprive the first patent-challenging generic applicant of its entitlement to 180-day exclusivity by unilaterally manipulating FDA's official patent listings ("the Delisting Rule"). Pursuant to that Rule, brand manufacturers are free to remove (or "delist") a patent from FDA's official patent list voluntarily, even if the effect of that delisting will be to deprive the first generic applicant of 180-day exclusivity. But, as *Ranbaxy* held, the statute's text and structure preclude brand manufacturers from voluntarily delisting a patent where doing so would deprive the first applicant of its statutory reward for challenging that patent in the first place. The Delisting Rule thus fundamentally undermines the congressionally ordained incentive scheme for generic market entry, to the detriment of pharmaceutical manufacturers, public and private insurers, and the millions of Americans who depend on safe and affordable generic medicines.

3. Immediate judicial review of the Delisting Rule is essential. As set forth in greater detail below, the Delisting Rule strips Teva of its entitlement to 180-day marketing exclusivity for generic products containing losartan potassium, which currently are marketed by Merck under the brand names Cozaar® and Hyzaar®. This Court repeatedly has recognized that the first generic applicant's loss of 180-day exclusivity is truly irreparable: "Once the statutory

entitlement has been lost, it cannot be recaptured." *Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) (quoting *Apotex, Inc. v. FDA*, No. Civ.A. 06-627, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006), *aff'd* No. 06-5204, 2006 WL 2591087 (D.C. Cir. Aug. 30, 2006)). In this case, the loss of exclusivity ***also*** will cost Teva hundreds of millions of dollars in revenues. Those losses cannot later be recovered from FDA due to the Agency's sovereign immunity.

4. Nonetheless, FDA successfully has shielded the Delisting Rule from challenge in the courts by following a policy and practice that thwarts effective judicial review of that rule. Specifically, FDA has adopted and adheres to a procedural approach under which it withholds the formal issuance of its determination that a first applicant is ***not*** entitled to 180-day exclusivity under the Delisting Rule until the Agency is ready to—and in fact simultaneously does—approve a competing generic manufacturer's product. Because it is virtually impossible to obtain effective judicial relief after FDA approves competing generic products for commercial marketing, *see Sandoz*, 439 F. Supp. 2d at 32; *Apotex*, 2006 WL 1030151, at *17, any delay in adjudicating the narrow issue raised in this case will all but eliminate Teva's ability to obtain effective judicial review and relief of its claims. Indeed, in each of the prior cases in which FDA has applied the Delisting Rule, FDA's procedural approach has caused the aggrieved parties to abandon their efforts to obtain meaningful judicial relief. *See Cobalt Labs., Inc. v. FDA*, No. 08-798-RBW (filed May 8, 2008); *Hi-Tech Pharmacal Co. v. FDA*, Case No. 08-1495-JDB (filed Aug. 8, 2008).

5. As a result, this Court immediately should declare that the Delisting Rule is in excess of FDA's statutory authority, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and enter an injunction compelling FDA to proceed on Teva's

ANDAs for generic losartan potassium drug products in a manner not inconsistent with this Court's ruling.

PARTIES

6. Plaintiff Teva is a Delaware corporation with its principal place of business in North Wales, Pennsylvania. Teva is a wholly-owned, indirect subsidiary of Teva Pharmaceutical Industries Ltd. ("Teva Ltd."), a global pharmaceutical company organized under the laws of Israel with its principal place of business in Israel. Teva distributes the finished pharmaceutical products of Teva Ltd. in the United States and is an industry leader in the development, manufacture, and marketing of generic pharmaceuticals in the United States.

7. Defendant Kathleen Sebelius is the Secretary of Health and Human Services ("HHS") and is the official charged by law with administering the FDCA. Secretary Sebelius is sued in her official capacity. She maintains offices at 200 Independence Ave., S.W., Washington, DC 20204.

8. Defendant Margaret Hamburg, the Commissioner of the FDA, has the delegated authority to administer the drug approval provisions of the FDCA. Commissioner Hamburg is sued in her official capacity. She maintains offices at 200 C St., S.W., Washington, DC 20204, and 5600 Fishers Lane, Rockville, MD 20857.

9. Defendant FDA is the agency within HHS charged with overseeing, *inter alia,* the human drug approval process, including the portions of that process relevant to this case.

JURISDICTION AND VENUE

10. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. This action arises under the FDCA, 21 U.S.C. §§ 301 *et seq.*, as amended by the Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman") and the Medicare Modernization Act of 2003 ("MMA"), *codified at, inter alia*, 21 U.S.C. § 355; the

Administrative Procedure Act ("APA"), 5 U.S.C. §§ 555, 702, and 706; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

FACTUAL ALLEGATIONS

The Statutory Framework

12. The approval of generic drugs is governed by the FDCA, as modified by Hatch-Waxman, Pub. L. No. 98-417, 98 Stat. 1585 (1984), and the MMA, Pub. L. No. 108-173 § 1101(c)(1). *See* 21 U.S.C. §§ 355, *et seq.*[1] Although the FDCA since has been amended by the Food and Drug Administration Amendments Act of 2007 ("FDAAA"), Pub. L. 110-85, 121 Stat. 823 (2007), those amendments do not alter the relevant statutory framework for generic drug approval.

13. Generic drugs contain the same active ingredients, and provide the same therapeutic value, as brand-name drugs. They are, however, generally sold at a lower price to consumers, private insurers, and public insurers. In 1984, Congress enacted Hatch-Waxman to increase the availability of generic drugs and thereby significantly reduce the cost that the public pays for pharmaceuticals by expediting the process of bringing generic drugs to market.

14. In order to accomplish that goal, the statute permits generic companies to obtain FDA approval of their products so long as they can show that those products are bioequivalent to products FDA already has deemed safe and effective. Generic manufacturers do so by submitting an Abbreviated New Drug Application ("ANDA") to FDA. 21 U.S.C. § 355(j). If the ANDA establishes the proposed generic product's bioequivalence to a previously approved

[1] Because the issues in this case turn on the interplay between the Hatch-Waxman Act and the MMA, both versions of the statute are referenced. Pre-MMA citations are denoted as (2002). Post-MMA citations do not denote a year.

drug, the generic applicant need not repeat the safety and efficacy studies that the brand-name manufacturer conducted on its version of the drug. Instead, the generic applicant can rely on the safety and efficacy studies that the brand manufacturer included as part of its previously approved New Drug Application ("NDA"). 21 U.S.C. § 355(j)(2)(A).

15. Each ANDA must also include a certification regarding every patent that the brand manufacturer has listed as claiming the brand-name drug. 21 U.S.C. § 355(j)(2)(A)(vii). FDA publishes such patent information in a publication titled *Approved Drug Products with Therapeutic Equivalence Evaluations*, which commonly is called "the Orange Book." *See* 21 C.F.R. § 314.94(a)(12); 21 C.F.R. § 314.53(f).

16. Generic applicants can make one of four certifications to a listed patent: (1) that no patent information has been filed with respect to the pertinent brand-name drug ("Paragraph I certification"); (2) that the patent identified as claiming the brand-name drug has expired ("Paragraph II certification"); (3) that the generic drug will not be marketed until the date on which the patent identified as claiming the brand-name drug will expire ("Paragraph III certification"); and (4) that the listed patent is invalid, unenforceable, and/or will not be infringed by the manufacture, use, or sale of the generic drug for which the ANDA is submitted ("Paragraph IV certification"). *See* 21 U.S.C. § 355(j)(2)(A)(vii).

17. Of these, Paragraph IV certifications are the most important. Such certifications are a statutory act of patent infringement, *see* 35 U.S.C. § 271, and signal the generic manufacturer's intent to market its product prior to the expiration of one or more patents listed as claiming the brand-name drug.

18. By design, the statute encourages generic drug companies to file Paragraph IV certifications. The first generic drug company to challenge a patent by filing a Paragraph IV

certification typically bears significant research-and-development and legal costs in order to identify, design around, and/or mount a legal challenge to potentially vulnerable brand-company patents. Because filing a Paragraph IV certification is an act of infringement, the filing invites a patent infringement lawsuit by the brand manufacturer. Such litigation is expensive and time consuming.

19. To encourage generic drug companies to bear the costs and risks associated with filing Paragraph IV certifications, the Act gives the first Paragraph IV applicant an exclusive right to market generic versions of the brand-name drug product for 180 days. Pre-MMA, the 180-day period ran from either the first commercial marketing of the generic drug or the date of a court decision holding that the patent is invalid or not infringed. *See* 21 U.S.C. § 355(j)(5)(B)(iv) (2002) ("the application shall be made effective not earlier than one hundred and eighty days after – (I) the date [FDA] receives notice from the [first applicant] of the first commercial marketing of the drug ..., or (II) the date of a decision of a court ... holding the patent [is] ... invalid or not infringed"). The MMA amended the statute to remove the court-decision trigger, leaving only the commercial marketing trigger. *See* 21 U.S.C. § 355(j)(5)(B)(iv) ("[a subsequent] application shall be made effective on the date that is 180 days after the date of the first commercial marketing of the drug ... by any first applicant"). In order to remain eligible for 180-day exclusivity, the first applicant must at all times "lawfully maintain" its Paragraph IV certification to the challenged patent. 21 U.S.C. § 355(j)(5)(B)(iv)(II)(bb) (defining "first applicant" as the first generic applicant to "submit[] a substantially complete application that contains and lawfully maintains a [Paragraph IV certification] for the drug"). Under longstanding FDA regulations, a generic applicant cannot lawfully maintain its Paragraph IV certification if, *inter alia*, the patent expires, 21 C.F.R. § 314.94(a)(12)(viii); the patent is

adjudicated to be valid and infringed by the generic drug, *id.* § 314.94(a)(12)(viii)(A); or the patent information is removed from the Orange Book, *id.* § 314.94(a)(12)(viii)(B).

Problems Under The Pre-MMA Statute

20. Three exclusivity-related problems commonly arose prior to passage of the MMA: (1) in some cases, a first applicant's failure to market its product created a "bottleneck" that indefinitely delayed the onset of generic competition; (2) at times, brand manufacturers would improperly ***list*** a patent in the Orange Book, and thereby could delay the onset of generic competition for years at a time; and (3) brand manufacturers occasionally would improperly ***delist*** (or remove from the Orange Book) a patent, and thereby seek to divest the first applicant of its statutory reward for challenging that patent.

A. Bottlenecks

21. Prior to the MMA, the first applicant's 180-day exclusivity period began to run from the earlier of (a) the date on which the first applicant first marketed the generic drug ("the commercial marketing trigger"), 21 U.S.C. § 355(j)(5)(B)(iv)(I) (2002) or (b) "the date of a decision of a court ... holding the patent which is the subject of the certification to be invalid or not infringed" ("the court decision trigger"), *id.* § 355(j)(5)(B)(iv)(II) (2002).

22. In certain cases, the brand manufacturer declined to sue any of the Paragraph IV challengers. Although subsequent generic applicants occasionally sought to trigger the first applicant's exclusivity through the court decision trigger by filing an action seeking a declaratory judgment that the challenged patent was invalid or not infringed, the Federal Circuit held that subsequent applicants lacked standing to sue, and thus dismissed such cases. *See, e.g., Teva*

Pharms. USA, Inc. v. Pfizer, Inc., 395 F.3d 1324 (Fed. Cir. 2005).[2] As a result, the first applicant's exclusivity period could only be triggered by commercial marketing.

23. At times, however, first applicants delayed commercial marketing for years. And because the first applicant's continued eligibility for 180-day exclusivity prevented FDA from approving subsequent applicants who otherwise were prepared to launch, first applicants who delayed entry thus created a "bottleneck" that would deprive consumers of prompt access to more affordable generic medicines.

B. Improper Patent Listings

24. In non-bottleneck cases where generic applicants otherwise were prepared to enter the market, brand manufacturers sometimes delayed the onset of generic competition by manipulating patent listings in the Orange Book.

25. As set forth above, generic applicants must submit a certification to every listed patent—even if they believe that the brand manufacturer has improperly listed a patent in the Orange Book (for instance, because the patent does not actually cover the brand-name drug). *See supra* ¶¶ 15-16; *see also* 21 C.F.R. § 314.53(f). If a brand manufacturer promptly sues a Paragraph IV filer for infringement, it is entitled to an automatic stay that prevents FDA from approving the generic applicant's ANDA for thirty months ("the thirty-month stay"). 21 U.S.C. § 355(j)(5)(B)(iii).

26. Brand manufacturers thus could delay generic competition for years at a time by (1) wrongfully listing a new patent in the Orange Book shortly before FDA otherwise would have approved an ANDA, (2) filing suit against the applicant after the applicant challenged the

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[2] The *Teva v. Pfizer* decision was later overruled by *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

newly listed patent with a Paragraph IV certification, and (3) thereby gaining the benefit of an automatic 30-month stay.

27. Under the pre-MMA statute, generic applicants had no recourse in such cases. *See, e.g.*, *aaiPharma Inc. v. Thompson*, 296 F.3d 227, 236 (4th Cir. 2002) (noting that a "serious[] problem arises when an NDA holder wrongly lists a patent in the Orange Book that does not actually claim its approved drug under the standard set forth in [21 U.S.C.] § 355(c)(2). Once the patent is listed, the NDA holder can delay an ANDA applicant's entry into the marketplace for up to thirty months (and extend its monopoly power) simply by filing a patent infringement suit," and observing that "[t]he harm to generic drug manufacturers, and ultimately to the consuming public, is obvious").

C. Improper Patent Delistings

28. Prior to the passage of the MMA, brand manufacturers also attempted to deprive first generic applicants of exclusivity by "delisting" patents. Rather than suing a generic applicant that had filed a Paragraph IV certification to a questionable patent (and thus risk an adverse court decision), the brand manufacturer would simply ask FDA to remove the patent from the Orange Book.

29. A generic applicant, however, could not maintain a Paragraph IV certification to a patent that has been delisted. Indeed, FDA regulations provided that "[i]f a patent is removed from the list, any applicant with a pending application ... shall amend its certification ... [to] certify ... that no patents ... claim the drug or, if other relevant patents claim the drug, shall amend the certification to refer only to those relevant patents." 21 C.F.R. § 314.94(a)(12)(viii)(B) (2002). At this point, "the application will no longer be considered to be one containing a [Paragraph IV certification]." *Id.* And because a Paragraph IV certification

was necessary in order to be eligible for 180-day exclusivity, *see* 21 U.S.C. § 355(j)(5)(B)(iv) (2002), the brand manufacturer's delisting of a patent effectively divested the first generic applicant of its 180-day exclusivity.

30. Despite this effect on congressionally-granted exclusivity, FDA had a practice that permitted such delistings unless the patent was the subject of an infringement case brought by the brand manufacturer. *See* 21 C.F.R. § 314.94(a)(12)(viii)(B) ("A patent that is the subject of a lawsuit under § 314.107(c) shall not be removed from the list until FDA determines either that no delay in effective dates of approval is required under that section as a result of the lawsuit, that the patent has expired, or that any such period of delay in effective dates of approval is ended."). FDA defended this practice based on its purely "ministerial" role in evaluating patent certifications by brand manufacturers. *See Ranbaxy*, 469 F.3d at 125 (noting FDA's argument that the "interpretation of patent listings [is] outside the agency's expertise" so it plays only a "ministerial ... role in maintaining patent listings in the Orange Book"); *American Bioscience Inc. v. Thompson*, 269 F.3d 1077, 1084-85 (D.C. Cir. 2001).

31. Teva challenged this rule, and the D.C. Circuit rejected FDA's reading of the statute at *Chevron* step one. *Ranbaxy*, 469 F.3d at 126. The court held that FDA's practice of permitting the brand manufacturer to delist a patent and thereby deprive the first generic applicant of 180-day exclusivity "reduce[ed] the certainty of receiving a period of marketing exclusivity" and thereby "diminish[ed] the incentive for a manufacturer of generic drugs to challenge a patent listed in the Orange Book ...." *Id.* Because "FDA may not ... change the incentive structure adopted by the Congress," the court held that FDA's practice violated the plain text and structure of the Hatch-Waxman Act, and flatly declared FDA's pre-MMA approach to delisting "unlawful." *Id.*

The MMA Solutions

32. In 2003, Congress modified the statutory scheme in part to remedy the problems encountered under the prior version of the statute.

33. To prevent bottlenecks, the MMA now provides that the first generic applicant will "forfeit" its entitlement to 180-day exclusivity if the applicant fails promptly to market its drug after the certain events occur. 21 U.S.C. § 355(j)(5)(D)(i)(I). Specifically, forfeiture under these "failure-to-market" provisions of the MMA occurs upon the ***later*** of two dates—one determined by the timing of FDA's actions with respect to the first applicant's ANDA, and the other determined if (and only if) the filing of a Paragraph IV certification results in litigation.

> (I) Failure to market.—The first applicant fails to market the drug by ***the later of***—
>
> ***(aa) the earlier of*** the date that is—
>
> > (AA) 75 days after the date on which the approval of the application of the first applicant is made effective under subparagraph (B)(iii); or
> >
> > (BB) 30 months after the date of submission of the application of the first applicant;
> >
> > ***or***
>
> ***(bb)*** with respect to the first applicant or any other applicant (which other applicant has received tentative approval), the date that is 75 days after the date as of which, as to each of the patents with respect to which the first applicant submitted and lawfully maintained a [Paragraph IV certification], at least 1 of the following has occurred:
>
> > (AA) In an infringement action brought against that applicant with respect to the patent or in a declaratory judgment action brought by that applicant with respect to the patent, a court enters a final decision ... that the patent is invalid or not infringed.
> >
> > (BB) In an infringement action or a declaratory judgment action described in subitem (AA), a court signs a settlement order or consent decree that enters a final judgment that includes a finding that the patent is invalid or not infringed.

> (CC) The patent information submitted under subsection (b) or (c) of this section is withdrawn by the [brand manufacturer].

Id. (emphasis added).

34. In certain cases, none of the events described in the (bb) subsection will have occurred by the time the first applicant's ANDA otherwise is eligible for approval. In such cases, FDA quite correctly has held that there can be no forfeiture based on the applicant's failure to market. *See generally* 1/17/08 Ltr. from G. Buehler to M. Goshko (FDA Docket No. 2007-N-0389) ("Granisetron Dec.") (attached as Exhibit 1). That is so, FDA has explained, because forfeiture runs from ***the later of*** (1) the date determined in the (aa) subsection ***or*** (2) the date determined in the (bb) subsection. If none of the events described in the (bb) subsection has occurred, it necessarily will be the "later" of the two possible dates, and the first applicant will not have failed to meet the conditions set forth in the (bb) subsection (*i.e.*, that it begin marketing its product within 75 days of an event listed in that subsection). *Id.* at 5.

35. Two other amendments to the statutory scheme address the problem of improper patent listings by brand manufacturers. First, the MMA now provides that generic applicants must certify only to those patents that are listed in the Orange Book at the time they file their ANDA. 21 U.S.C. § 355(j)(5)(B)(iii). Thus, if a brand manufacturer wrongfully lists a new patent in the Orange Book after the first applicant submits its ANDA, the first applicant need not submit a certification to that patent, and thus cannot be blocked by a thirty-month stay resulting from contrived litigation regarding the newly listed patent. *Id.*

36. Second, and of particular import to this case, the MMA for the first time provides generic applicants with a mechanism through which they can litigate the validity of a brand manufacturer's decision to list a particular patent in the Orange Book. In particular, where a brand manufacturer files a patent infringement suit against the generic applicant in response to a

Paragraph IV certification, the applicant now is entitled to bring a counterclaim "seeking an order requiring the [brand manufacturer] to correct or delete the patent information submitted" to the Orange Book—that is, to delist the patent from the Orange Book. *Id.* § 355(j)(5)(C)(ii)(I). The MMA's new counterclaim provision thus provides generic applicants with a novel mechanism to clear the patent thicket and enter the market despite improper attempts by a brand manufacturer to list patents in the Orange Book.

The Delisting Rule

37. As cases began to arise under the MMA's new forfeiture provisions, FDA adopted—and since has followed—a practice of *sua sponte* opening a public docket and soliciting public comments when it has not previously interpreted discrete aspects of the statute's forfeiture provisions.

38. One of the earliest such cases involved 180-day exclusivity for acarbose tablets (branded by Bayer as Precose®). In that case, Cobalt Pharmaceuticals filed the first Paragraph IV certification to a patent that the brand manufacturer of acarbose tablets (Bayer) had listed as claiming the product. Cobalt thereby became eligible for 180-day exclusivity under the MMA. After receiving Cobalt's exclusivity-grounding Paragraph IV certification, however, Bayer chose not to sue Cobalt for patent infringement. Instead, on April 16, 2007 (more than two years after Cobalt filed its ANDA), Bayer voluntarily asked FDA to delist the patent from the Orange Book.

39. On September 26, 2007, FDA *sua sponte* issued a public notice soliciting comments regarding Cobalt's continued eligibility for 180-day exclusivity for generic acarbose tablets in light of Bayer's delisting request. *See* 9/26/07 Ltr. from G. Buehler to ANDA Applicants (the "Acarbose Notice") (attached as Exhibit 2). In particular, FDA's Acarbose Notice stated that the Agency intended to interpret, and wished to obtain the public's "views regarding[,] the applicability of [FDCA] section 505(j)(5)(D)(i)(I)(bb)(CC)—relating to the

delisting of a patent." *Id.* Because FDA at that time had never interpreted the (bb)(CC) clause of the failure-to-market forfeiture provision ("the delisting trigger"), and because its decision in the acarbose case would definitively establish FDA's interpretation of the delisting trigger for future cases, FDA faxed its solicitation for public comment to every company that had filed an ANDA for generic acarbose tablets and posted the Notice on its public website. *Id.* At least five companies submitted responses, including Teva. *See* Docket, FDA 2007-N-0445 (attached as Exhibit 3).

40. FDA's interpretation of the delisting trigger was essential to determining Cobalt's continued eligibility for 180-day exclusivity. If Bayer's voluntary delisting of the challenged patent was lawful (despite the D.C. Circuit's decision in *Ranbaxy*), it would have triggered the delisting trigger in the (bb) subsection of the failure-to-market forfeiture provisions. Cobalt thus would have forfeited its exclusivity because there would have been applicable dates in both subsections—(1) September 22, 2007 for the (aa) subsection (*i.e.*, 30 months from the time Cobalt submitted its ANDA to FDA), and (2) June 30, 2007 for the (bb) subsection (*i.e.*, 75 days after Bayer requested the delisting)—and both of those dates would have passed. Cobalt thus would have forfeited its exclusivity on September 22 (*i.e.*, "the later of" the two dates). If, however, Bayer's voluntary delisting of the challenged patent were impermissible, and thus did not trigger the delisting clause, there would be no applicable date in the (bb) subsection, and Cobalt would have retained its eligibility for 180-day exclusivity. *See* Granisetron Dec. at 5.

41. After it received FDA's Notice in the acarbose matter, Teva prepared and filed a lengthy response to the questions FDA had raised in the Notice. Of particular import here, Teva argued that Cobalt had not forfeited its exclusivity under the delisting trigger because the statute did not permit Bayer to withdraw the '769 patent, and because Bayer's delisting request thus

could not lawfully serve as a delisting trigger under 21 U.S.C. § 355(j)(5)(D)(i)(I). *See* 10/16/07 Ltr. from M. Goshko to G. Buehler ("Teva Acarbose Response") (attached as Exhibit 4).

42. In particular, Teva reminded the Agency that *Ranbaxy* had held—at *Chevron* step one—that the plain text and structure of the statute did not permit brand manufacturers to voluntarily delist a patent where doing so would deprive the first Paragraph IV applicant of its 180-day exclusivity. *Id.* at 2, 5. Nothing in the MMA changes that. As Teva argued, there was no indication that Congress intended the delisting trigger *sub silentio* to abrogate what *Ranbaxy* had identified as the statute's fundamental bar against manipulative patent delistings, by implicitly allowing brand manufacturers to engage in the very kind of manipulation that the statute always had prohibited. Instead, Teva explained, the delisting trigger was inextricably tied to the MMA's new delisting-counterclaim provision, which for the first time had permitted generic applicants to seek a court order requiring the brand manufacturer involuntarily to delist the challenged patent from the Orange Book. *Id.* at 6 (discussing 21 U.S.C. § 355(j)(5)(c)(ii)(I)).

43. In those circumstances, and only in those circumstances, the delisting trigger made sense: Just as the MMA now provided that a first applicant could not create a bottleneck by failing to launch promptly after obtaining a court decision holding, or a settlement or consent decree that included a finding, that a challenged patent was invalid, unenforceable or not infringed, *see* 21 U.S.C. § 355(j)(5)(D)(i)(I)(bb)(AA)-(BB), so Congress had provided through the delisting trigger that a first applicant could not create a bottleneck after obtaining a court decision requiring the brand manufacturer involuntarily to delist a challenged patent from the Orange Book. *See id.* § 355(j)(5)(D)(i)(I)(bb)(CC); *see also* Teva Acarbose Response at 5-6.

44. Outside that context, however, Teva argued that the delisting trigger's "tail" could not reasonably be interpreted to "wag the dog." While the delisting trigger makes clear that a

first applicant can lose its exclusivity by refusing to commence marketing promptly after clearing the patent thicket by securing an involuntary, court-ordered delisting, it does not remotely suggest that brand manufacturers now are free to divest the first applicant of its exclusivity by voluntarily delisting a challenged patent before the first applicant is able to launch—thereby manipulating the statutory incentive for generic manufacturers to challenge brand-name patents in the first place. Teva Acarbose Response at 5-6; *cf. Ranbaxy*, 469 F.3d at 126.

45. On May 7, 2008, FDA announced its Delisting Rule. *See* 5/7/08 Ltr. from G. Buehler to W. Rakoczy (attached as Exhibit 5) ("Acarbose Dec."). In the process, FDA explicitly "considered and rejected" Teva's arguments. *Id.* at 8-9. FDA first stated that it was free to ignore the D.C. Circuit's *Ranbaxy* decision simply because that case interpreted and applied the pre-MMA version of the statute. *Id.* at 8. According to FDA, *Ranbaxy* offers no pertinent guidance on the delisting question because "[t]he effect of patent delisting on eligibility for 180-day exclusivity is expressly addressed by the plain language" of the MMA. *Id.* While FDA agreed with Teva that the delisting trigger applies whenever a first applicant obtains a court order requiring the brand manufacturer to delist a challenged patent, it rejected Teva's argument that the trigger applies only in that context. According to the Agency, "the scope of the patent delisting forfeiture provision is much broader" and must be applied "whenever a patent is withdrawn (or requested to be 'delisted') by the NDA holder." *Id.* (emphasis added).

46. Applying its Delisting Rule, FDA announced that Cobalt had forfeited its exclusivity on September 22, 2007—eight months before the Rule was promulgated. *Id.* at 7-8. On the same day it issued the Delisting Rule, FDA granted final approval to ANDAs filed by both Cobalt and Roxane Laboratories (a subsequent generic applicant). *See id.* at 1 n.1.

Although Cobalt initiated litigation in this Court challenging FDA's decision, Cobalt soon dismissed its action because FDA had already approved Roxane and thus irremediably had deprived Cobalt of its 180-day exclusivity. *See Cobalt Labs., Inc. v. FDA*, No. 08-cv-00798-RBW.

The COSOPT® Case

47. Shortly after FDA promulgated the Delisting Rule, the same issue arose in a similar case regarding 180-day exclusivity for dorzolamide/timolol maleate opthalmic solution (branded by Merck as COSOPT®). In that case, Merck originally had listed three patents as claiming COSOPT®, one of which (the '413 patent) would expire in October 2008, and two of which (the '735 and '443 patents) were scheduled to expire in April 2011. *See* 9/4/08 Ltr. from G. Buehler to ANDA Applicant ("COSOPT® Solicitation") (attached as Exhibit 6).

48. Hi-Tech Pharmacal Co. submitted the first ANDA for generic COSOPT®. Its ANDA contained Paragraph IV certifications for all three listed patents. Merck sued Hi-Tech for infringing the '413 patent, and won its case. But Merck did not sue Hi-Tech for infringing the other challenged patents, and Hi-Tech for a time thus remained eligible for 180-day exclusivity based on its Paragraph IV certifications to those patents. In April 2006, however, Merck asked FDA to delist the '735 and '443 patents.

49. As it had in the acarbose case, FDA eventually established a docket and solicited public comments regarding Hi-Tech's continued eligibility for 180-day exclusivity. *See* COSOPT® Solicitation at 1. And as Teva had in the acarbose case, several companies submitted comments to FDA's public docket regarding the delisting trigger. *See* Docket, FDA 2008-N-0483 (attached as Exhibit 7). At least two of those submissions reiterated the same arguments that Teva previously had raised in the acarbose proceeding. *See, e.g.*, 9/19/08 Ltr. from A. Tsien to G. Buehler (attached as Exhibit 8).

50. Hi-Tech also filed a lawsuit in this Court seeking to preemptively secure a ruling that its exclusivity remained intact. *See Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 6-7 (D.D.C. 2008). Although the Court initially denied Hi-Tech's request for a preliminary injunction, it required FDA to provide notice to the Court and the parties regarding Hi-Tech's potential forfeiture of exclusivity ***before*** the Court would permit the Agency to grant an effective approval to any other ANDA, and established a procedure under which the court would attempt to prevent FDA from depriving Hi-Tech of meaningful judicial review of the Delisting Rule. *Id.* at 13.

51. On October 28, FDA formally issued its decision that Hi-Tech had forfeited its exclusivity. *See* 10/28/08 Ltr. from G. Buehler to ANDA Applicant ("COSOPT® Dec.") at 14 (attached as Exhibit 9). As predicted, the Agency announced that it previously had rejected Hi-Tech's argument that the delisting trigger was limited to the delisting-counterclaim context when it promulgated the Delisting Rule in the acarbose case. *Id.* at 14 n.15 ("[A]s noted in the Acarbose Decision at pp. 8-9, we also have considered the argument that the forfeiture event described in section 505(j)(5)(D)(i)(I)(bb)(CC) of the Act applies only if the withdrawal of a patent is pursuant to the process described at section 505(j)(5)(C)(ii) of the Act."); *id.* at 14 ("We also have considered and rejected in both this case and in the matter described in the Acarbose Decision, the argument that eligibility for 180-day exclusivity following the NDA holder's voluntary withdrawal of its patent should be governed not by the MMA forfeiture provisions, but by the rule established in *Ranbaxy*.").

52. FDA simultaneously informed the parties and the Court that it was prepared immediately to approve other applicants' ANDAs for generic COSOPT®. Faced with an immediate commercial need to launch its product, and given the public's strong interest in

immediate generic competition, Hi-Tech abandoned its efforts to secure a preliminary injunction barring FDA from divesting the company of its exclusivity. *See Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 13, 17 (D.D.C. 2008). Instead, Hi-Tech later sought a permanent injunction based on alternative grounds. *Id.* at 22.

Facts Related to Losartan Potassium

53. Losartan potassium is an angiotensin II receptor antagonist drug used primarily to treat hypertension. Merck holds two approved NDAs relating to losartan potassium: No. 02-0386 for losartan potassium tablets and No. 02-0387 for losartan potassium/hydrochlorothiazide tablets, which it commercially markets under the brand names Cozaar® and Hyzaar®, respectively. When Merck obtained FDA approval for Cozaar® and Hyzaar®, it listed the same three patents in the Orange Book for both drugs: U.S. Patent No. 5,138,069 ("the '069 patent"), which blocks generic competition through February 11, 2010; U.S. Patent No. 5,153,197 ("the '197 patent"), which blocks generic competition through April 6, 2010; and U.S. Patent No. 5,608,075 ("the '075 patent"), which blocks generic competition through September 4, 2014.[3]

54. On December 18, 2003, Teva submitted an ANDA seeking FDA approval to market a generic version of Cozaar® 25mg, 50mg and 100mg tablets. FDA accepted Teva's generic Cozaar® ANDA for filing on February 11, 2004 and docketed it as ANDA No. 07-6958. Teva's ANDA contained Paragraph III certifications to the '069 patent and the '197 patent, meaning that it would not seek to market its generic drug until the '197 patent expired in April of 2010. Teva also submitted a Paragraph IV certification to the '075 patent, claiming that that patent is invalid, unenforceable, and/or would not be infringed by Teva's proposed generic drug

[3] Merck also listed U.S. Patent No. 5,210,079 in connection with its Cozaar® NDA. That patent relates to a method of treatment for which Teva does not seek approval.

product. Upon information and belief, Teva was the first generic applicant to submit a substantially complete ANDA for Cozaar® for all three strengths that contained a Paragraph IV certification to the '075 patent.

55. On May 24, 2004, Teva submitted an ANDA seeking FDA approval to market a generic version of Hyzaar® 50mg/12.5mg and 100mg/25mg tablets. FDA accepted Teva's generic Hyzaar® ANDA for filing on July 15, 2004 and docketed it as ANDA No. 07-7157. Teva's generic Hyzaar® ANDA contained the same patent certifications as its generic Cozaar® ANDA: Paragraph III certifications for the '069 and '197 patents, and a Paragraph IV certification for the '075 patent. Upon information and belief, Teva was the first generic applicant to submit a substantially complete ANDA for Hyzaar® for both strengths that contained a Paragraph IV certification to the '075 patent. On July 21, 2006, Teva amended its Hyzaar® ANDA to add an additional strength (100mg/12.5mg tablets) of the drug. The '075 patent is not listed in the Orange Book as claiming this strength.

56. Because Teva was the first generic applicant to submit substantially complete applications for generic Cozaar® and Hyzaar® that contained at least one Paragraph IV certification to at least one patent that Merck had listed in the Orange Book for those drugs, Teva became eligible for 180-day generic marketing exclusivity with respect to both drugs. *See* 21 U.S.C. § 355(j)(5)(B)(iv).

57. As required by Hatch-Waxman, Teva notified Merck of its Paragraph IV certifications to the '075 patent on February 23, 2004 (for Cozaar®) and July 15, 2004 (for Hyzaar®). Teva alleged that certain claims of the '075 patent were invalid based on prior art and that its generic losartan products did not infringe other claims of the patent under the doctrine of equivalents. Merck did not file a patent infringement claim against Teva based on those

certifications. Instead, after Teva submitted its exclusivity-qualifying Paragraph IV certifications to the '075 patent, Merck asked FDA to "delist" the '075 patent from the Orange Book. In addition, Merck declined to list the '075 patent as claiming the 100mg/12.5mg strength of Hyzaar®, which was added after Teva filed its Paragraph IV certification.

58. By doing so, Merck essentially conceded that Teva's challenges to the '075 patent were so strong that Merck could not reasonably assert the '075 patent against any generic applicant for Cozaar® or Hyzaar®, and thus that Merck could not lawfully maintain its listing of the '075 patent in the Orange Book. Teva's Paragraph IV challenges to the '075 patent thereby accomplished precisely what Congress sought to reward with 180-day exclusivity: Teva identified a vulnerable—but competition-blocking—patent, invested the resources necessary to challenge that patent, and successfully removed that patent as a barrier to generic market entry.

59. Despite that, FDA's Delisting Rule deprives Teva of its entitlement to 180-day exclusivity for its generic versions of Cozaar® and Hyzaar®. That is so because, pursuant to the Delisting Rule, forfeiture events have already occurred under both prongs of the failure-to-market trigger. As of August 12, 2006, thirty months had passed from the date Teva submitted its ANDA for generic Cozaar®. And as of January 16, 2007, thirty months had passed from the date Teva submitted its ANDA for generic Hyzaar®. These dates serve as the applicable dates in the (aa) subsection of the failure-to-market provision. *See* 21 U.S.C. § 355(j)(5)(D)(i)(I)(aa)(BB). And with respect to the (bb) subsection, well over 75 days now have passed from the date that Merck voluntarily asked FDA to delist the '075 patent from the Orange Book's patent listings for Cozaar® and Hyzaar®.[4]

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[4] FDA does not publicize the date on which it receives a delisting request from a brand manufacturer. However, the Agency's electronic Orange Book includes a notation—where applicable—that a delisting has been (Continued...)

60. FDA's Delisting Rule authoritatively holds that brand manufacturers may voluntarily delist a patent even when such a delisting will deprive the first generic applicant of its exclusivity—despite the D.C. Circuit's decision in *Ranbaxy*, and despite Teva's repeated arguments to the Agency that the Delisting Rule both violates the plain text and structure of the statute and fundamentally undermines its incentives for generic market entry. Teva thus already has "forfeited" its right to 180-day exclusivity for products containing generic losartan potassium under the Delisting Rule. *See id.* § 355(j)(5)(D)(i)(I). Teva thus already is aggrieved by FDA's Delisting Rule.

61. The problem, of course, is that the Delisting Rule is unlawful for the reasons Teva repeatedly has explained to FDA (and that numerous other generic companies long since have echoed). *See supra* ¶¶ 41-44, 49. And but-for the Delisting Rule, Teva's exclusivity would remain intact under the failure-to-market provisions set forth at 21 U.S.C. § 355(j)(5)(D)(i)(I). In short, because there has not been a triggering court decision, consent decree, or settlement order under 21 U.S.C. § 355(j)(5)(D)(i)(I)(bb)(AA)-(BB), and because the statute does not permit brand manufacturers to manipulate the incentives for generic market entry by delisting a patent in the absence of a court order resulting from a generic applicant's successful assertion of a counterclaim seeking such an order, there has not been a legally effective delisting under 21 U.S.C. § 355(j)(5)(D)(i)(I)(bb)(CC). Therefore, in the absence of the Delisting Rule, Teva would not have forfeited its exclusivity by failing to market its product before now. *See supra* ¶ 34; Granisetron Dec. at 5.

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requested. In this case, the electronic Orange Book reflected no later than January 1, 2009 that Merck had asked FDA to delist the '075 patent from the Orange Book. *See, e.g.*, Electronic Orange Book, NDA 02-0386 (25mg) (accessed June 11, 2009) (attached as Exhibit 10).

62. This Court accordingly should reject FDA's Delisting Rule as arbitrary, capricious, or otherwise contrary to law—as both this Court and the D.C. Circuit did in the *Ranbaxy* case, when FDA last tried to undermine the exclusivity incentive by permitting exclusivity-divesting patent delistings.

Immediate Judicial Review Of The Delisting Rule Is Imperative

63. As set forth above, *supra* ¶ 4, FDA has adopted a policy and practice that effectively thwarts meaningful judicial review of the Delisting Rule. Even though the Agency has already decided that Teva has lost its exclusivity, FDA refuses to issue a formal determination to that effect until it is prepared simultaneously to approve a subsequent applicant for the same product. *See* Acarbose Dec. at 1 n.1; COSOPT® Dec. at 1 n.1. The effect of this policy is not surprising: In each of the prior cases in which FDA has applied the Delisting Rule to strip a first applicant of its entitlement to 180-day exclusivity, the aggrieved applicant has abandoned its efforts to obtain meaningful judicial review of FDA's decisionmaking.

64. There is, however, no sound basis for delaying judicial review of the narrow issue presented by this Complaint—that is, whether the MMA permits a brand manufacturer to delist an exclusivity-grounding patent outside the narrow confines of a court order requiring the brand manufacturer to delist its patent under 21 U.S.C. § 355(j)(5)(C)(ii)(I). The Delisting Rule authoritatively—though unlawfully—construes the MMA's delisting trigger to permit brand manufacturers to delist patents voluntarily, even if the effect of that delisting is to deprive an otherwise-eligible first applicant of 180-day exclusivity.

65. There is no plausible basis for concluding that FDA will not apply the Delisting Rule in this case. As a matter of basic administrative law, federal agencies are obligated to treat like cases alike, and there is no meaningful distinction between this case, on one hand, and the acarbose and COSOPT® cases, on the other. Nor is there any realistic chance that FDA will

reconsider the Delisting Rule. FDA expressly "considered and rejected the argument made [by Teva] in comments to FDA's docket" when it first announced the Delisting Rule in the acarbose case. Acarbose Dec. at 8. And when Hi-Tech challenged the Delisting Rule in the COSOPT® case, FDA flatly rejected Hi-Tech's arguments on the ground that the Agency had "considered and rejected [them] ... in the Acarbose Decision." COSOPT® Dec. at 14. In short, FDA's Delisting Rule is settled, entrenched, and unshakable.

66. The Delisting Rule has irreparably harmed Teva by divesting the company of its right to 180-day exclusivity in clear violation of the statute. As the D.C. Circuit and this Court have recognized, loss of the statutory entitlement is itself an irreparable harm that warrants prompt injunctive relief. *See, e.g.*, *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 n.6 (D.C. Cir. 1998); *Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) (citing *Apotex, Inc. v. FDA*, No. Civ.A. 06-627, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006), *aff'd*, No. 06-5204, 2006 WL 2591087 (D.C. Cir. Aug. 30, 2006)); *Torpharm, Inc. v. Shalala*, No. 97-1925, 1997 WL 33472411, at *4 (D.D.C. Sept. 15, 1997). Moreover, the loss of exclusivity will in this case cost Teva literally hundreds of millions of dollars in anticipated revenues. While those losses are a form of "economic" harm, they are truly irreparable—and thus capable of grounding injunctive relief—because the government's sovereign immunity would preclude Teva from recovering damages in the event this Court later overturns the Delisting Rule. *See, e.g.*, *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004); *see also Entergy Ark., Inc. v. Nebraska*, 210 F.3d 887, 899 (8th Cir. 2000); *cf. CSX Transp., Inc. v. Williams*, 406 F.3d 667, 674 n.7 (D.C. Cir. 2005).

FIRST CAUSE OF ACTION
(Violation of the FDCA and the APA)

67. Teva repeats and incorporates by reference the allegations contained in paragraphs 1-66 above.

68. The Delisting Rule—*i.e.*, that the MMA permits a brand manufacturer to delist an exclusivity-grounding patent outside the narrow confines of a court order entered under 21 U.S.C. § 355(j)(5)(C)(ii)(I), and thereby is free to manipulate the incentives for generic market entry by divesting a first applicant of its 180-day exclusivity—violates the plain text and structure of the FDCA and fundamentally undermines the statutory scheme. The Delisting Rule is thus in excess of FDA's statutory authority, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, in violation of 5 U.S.C. § 706.

69. The Delisting Rule is a final rule subject to immediate review under the APA. FDA issued the Delisting Rule after providing public notice and soliciting comments from the general public. FDA has applied the Delisting Rule in two prior cases, and the Agency in fact rejected a successive challenge to the Delisting Rule in the COSOPT® case—in large part on the ground that the acarbose matter already "considered and rejected" the very counterarguments raised by Teva in its acarbose comments, Hi-Tech in its COSOPT® comments, and Teva in this case. In short, the Delisting Rule is the Agency's definitive interpretation of the statute, and FDA not only intended that Rule to have future effect, but in fact has given that Rule effect in subsequent cases presenting the same issue.

70. Teva has exhausted its administrative remedies. Teva responded to FDA's solicitation of public comments in the acarbose matter itself, and it appeared as an *amicus curiae* opposing the Agency's (and the Department of Justice's) position during Hi-Tech's short-lived challenge to the Delisting Rule in the COSOPT® case. In both cases, FDA explicitly

"considered and rejected" Teva's arguments. Any further efforts to secure relief through the administrative process would be futile.

71. Under the Delisting Rule, Teva has forfeited its exclusivity.

72. Neither Defendants nor any other entity will suffer cognizable harm if the relief requested herein is granted, and the public interest will be served by such relief.

73. Teva will suffer substantial and irreparable harm absent the granting of the requested relief, in the form of a lost statutory right, lost sales and decreased market share. These injuries can never be remediated absent immediate judicial review of the Delisting Rule.

74. The Delisting Rule has caused, is causing, and will continue to cause substantial harm to Teva unless and until it is declared unlawful pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the FDCA; this Court declares that FDA cannot lawfully effectuate the delisting of the '075 patent; and this Court declares that Teva has not, as of the date of the Court's order, forfeited its right to exclusivity under 21 U.S.C. § 355(j)(5)(D)(i)(I).

PRAYER FOR RELIEF

WHEREFORE, Teva prays that this Court:

A. Declare that the Delisting Rule is in excess of FDA's statutory authority, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, because the text, structure, and policies underlying the statute preclude FDA from effectuating a brand manufacturer's request to delist an exclusivity-grounding patent from the Orange Book outside the confines of a court order entered under 21 U.S.C. § 355(j)(5)(C)(ii)(I);

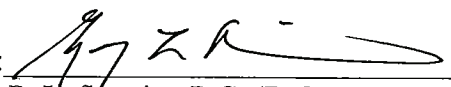
B. Declare that Teva has not, as of the date of the Court's order, forfeited its right to 180-day exclusivity under 21 U.S.C. § 355(j)(5)(D)(i)(I);

C. Enter an injunction compelling FDA to proceed on Teva's ANDA Nos. 07-6958 and 07-7157 in a manner not inconsistent with this Court's ruling; and

D. Provide such further relief as the Court may deem just and proper.

Dated: June 17, 2009

Respectfully submitted,

By: 

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