IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANOFI-AVENTIS U.S. LLC Plaintiff, v. FOOD AND DRUG ADMINISTRATION and MARGARET HAMBURG, M.D. Commissioner, Food and Drug Administration and KATHLEEN SEBELIUS Secretary of Health and Human Services Defendants, and SANDOZ, INC. Intervenor-Defendant.	)	Case No.: 1:10-cv-01255-EGS

AARP'S BRIEF *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Legislation

Miscellaneous

STATEMENT OF INTEREST

AARP is a nonpartisan, nonprofit membership organization for millions of persons age 50 or older, dedicated to addressing the needs and interests of older Americans. As the country's largest membership organization, AARP has a long history of advocating for access to affordable health care and for controlling costs without compromising quality. AARP therefore has a strong interest in this case because the entry of generic enoxaparin into the marketplace may be blocked, thereby reducing access to affordable prescription drug treatments. Affordable prescription medication is particularly important to the older population which, because of its higher rates of chronic and serious health conditions, has the highest rate of prescription drug use. Persons over sixty-five, although only thirteen percent of the population, account for thirty-four percent of all prescriptions dispensed and forty-two cents of every dollar spent on prescription drugs. Families USA, *Cost Overdose: Growth in Drug Spending for the Elderly, 1992-2010* at 2 (July 2000), *available at* http://www.familiesusa.org/assets/pdfs/drugod852b.pdf. Since prescription drug spending has skyrocketed over the last decade and a half, and national health expenditures on prescription drugs have quadrupled, AARP advocates for broader access to prescription drugs and lower prescription drug costs for consumers. To that end, AARP has worked at the state and national levels for laws and policies that will bring more generic competition to the marketplace. *See e.g.*, AARP, *Rx Watchdog Newsletter* (May 2010), *available at* http://www.aarp.org/health/drugs-supplements/rx_watchdog.pdf (highlighting trends in the prescription drug market place and how those trends impact consumers); AARP, Statement for the Record for the S. Comm. on Health, Education, Labor & Pension, *Follow-on Biologics* (Mar. 8, 2007)(supporting pathway for approval of generic biologics); Brief for AARP et al. as

Amici Curiae Supporting Appellants, *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98 (2d Cir. 2010)(arguing that pay for delay deals may constitute antitrust violations).

INTRODUCTION

Sanofi-Aventis's request for emergency injunctive relief in order to maintain market exclusivity for its brand-name blockbuster drug Lovenox (enoxaparin) is contrary to the public's interest. Granting Sanofi's request will not only delay the availability of generic versions of Lovenox, but could create an impenetrable roadblock for future approvals of generic biologic pharmaceuticals (also known as "follow-on biologics").[1] Given the significant impact that improved access to lower-cost generic drugs has on consumers and the U.S. health care system, the public interest strongly favors denial of plaintiff's motion for injunctive relief.

The introduction of generic competition into the market saves the federal government billions of dollars each year, in addition to savings that accrue to other payers of health care, including private and state employers, employees and consumers. Access to affordable treatment options can mean the difference between life and death for people with devastating chronic conditions. If the FDA is prevented from administering clear regulatory pathways for the

[1] Lovenox (enoxaparin), classified as a "low molecular weight heparin" (LMWH) for the treatment of thromboembolic disease, was approved in 1993 by the U.S. Food and Drug Administration (FDA) as a drug under Section 505(b) of the Federal Food, Drug and Cosmetic Act (FFDCA), 21 U.S.C. § 355(b). FDA has traditionally regulated heparin and heparin-derived products as drugs, rather than under the regulatory regime for biologics set forth in Section 351 of the Public Health Service Act, 42 U.S.C. § 262. Thus, generic versions of enoxaparin may be approved through the abbreviated approval process for generic drugs established by the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, 21 U.S.C. § 355(j). The new follow-on biologic pathway enacted as part of the health care reform legislation earlier this year does not apply to the approval of generic versions of enoxaparin. *See* Section 7002(a) of the Patient Protection and Affordable Care Act (hereinafter "Affordable Care Act"), Pub. L. No. 111-148 (amending Section 351 of the Public Health Service Act). Nevertheless, because heparin and heparin-derived products are derived from an animal source, the technical considerations for a determination of "sameness" with respect to these products are anticipated to be similar and possibly precedent-setting in the context of FDA's "sameness" determinations for follow-on biologics under the new legislation.

approval of generic drugs, the U.S. health care system will not realize the benefits of market competition or the savings generics can provide. Further, patients suffer the health effects of having to go without treatment when they are unable to afford branded medications.

I. DELAYING ENTRY OF GENERIC VERSIONS OF LOVENOX HARMS THE PUBLIC.

A court considering a plaintiff's request for a preliminary injunction must examine, among other factors, whether the public interest will be furthered by the injunction. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). The plaintiff fails to establish that a preliminary injunction would further the public interest. See Pl.'s Mem. 42. Indeed, the public interest is served by allowing the FDA to exercise its scientific judgment to determine whether generic versions of Lovenox have satisfied the requirements for approval under the abbreviated approval process for generic drugs established by the Hatch-Waxman Act. Through this process, the FDA approved a generic version of Lovenox on July 23, 2010. Letter from Keith Webber, Deputy Director, Office of Pharmaceutical Science, Center for Drug Evaluation and Research, to Sandoz, Inc. (July 23, 2010). Because the plaintiff has enjoyed market exclusivity with Lovenox for nearly 17 years and has reaped billions of dollars in profits as a result of its monopoly, its motivation to further delay the entry of generic competition is apparent, and its actions warrant careful scrutiny.[2] Anti-competitive conduct that denies the public timely access to quality, affordable lifesaving prescription drugs is contrary to the public interest. Lovenox is derived from an animal source, and therefore is similar to a biologic drug. The tactics used here to perpetually delay the marketing of an approved generic drug could

[2] In 2009 alone, worldwide sales for Lovenox totaled $4.572 billion. *See* IMS, *Top 15 Global Products, 2009, Total Audited Markets* (Dec. 2009), *available at* http://www.imshealth.com/deployedfiles/imshealth/Global/Content/StaticFile/Top_Line_Data/Top%2015%20Global%20Products_2009.pdf.

create adverse precedent as the FDA moves toward establishing an approval process for follow-on biologics pursuant to the Affordable Care Act's provisions amending section 351 of the Public Health Service Act. *See* Affordable Care Act, § 7002(a).

A. Consumers Realize Significant Benefits When Generic Competition is Introduced into the Market.

Prescription drug spending in the United States has skyrocketed over the last two decades, from $40 billion in 1990 to over $300 billion in 2009. *See* Kaiser Family Foundation, *Prescription Drug Trends* (Sept. 2008), *available at* http://www.kff.org/rxdrugs/upload/3057_07.pdf; IMS Health, Press Release, *IMS Health Reports U.S. Prescription Sales Grew 5.1 Percent in 2009, to $300.3 Billion* (Apr. 1, 2010), *available at* http://www.imshealth.com/portal/site/imshealth/menuitem.a46c6d4df3db4b3d88f611019418c22a/?vgnextoid=d690a27e9d5b7210VgnVCM100000ed152ca2RCRD&vgnextchannel=41a67900b55a5110VgnVCM10000071812ca2RCRD&vgnextfmt=default. Affordable prescription medication is particularly important to the older population, which has the highest rate of prescription drug use. AARP, *Rx Watchdog Report*, Vol. 6, Issue 6 (Aug. 2009), *available at* http://assets.aarp.org/www.aarp.org_/cs/health/205870rxwatchdogftc.pdf. In the twelve month period ending with March 2010, the price of brand-name prescription drugs most widely used by Medicare beneficiaries increased by 9.7 percent, the highest rate of increase observed since AARP began tracking these prices in 2002. AARP, Insight on the Issues 43, *Rx Watchdog Report: Brand Name Drug Prices Continue to Climb Despite Low General Inflation Rate* (May 2010), *available at* http://assets.aarp.org/rgcenter/ppi/health-care/i43-watchdog.pdf.

Competition from generic drugs is the most effective means of slowing the spiraling cost of pharmaceuticals. Generics typically sell for a fraction of the cost of their branded counterparts and quickly capture the majority of unit sales. Recognizing the clear consumer benefit that

accompanies generic drug competition, Congress sought to speed up generic entry by enacting the Hatch-Waxman Act. *See* H. Rep. No. 98-857, pt. 1, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647 (the purpose of the Hatch-Waxman Act "is to make available more low cost generic drugs by establishing a generic drug approval procedure"). Indeed, generics make up nearly 70 percent of drugs prescribed today, whereas generics constituted only 12 percent of prescription drugs dispensed prior to the passage of the Hatch-Waxman Act. *See* AARP, *Rx Watchdog Report*, Vol. 6, Issue 4 (May 2009), *available at* http://assets.aarp.org/www.aarp.org_/cs/health/205256rxwatchdogmay09.pdf; Food and Drug Administration, *Protecting America's Health Through Human Drugs: Greater Access to Generic Drugs* (Jan. 2006), *available at* http://www.fda.gov/Drugs/ResourcesForYou/Consumers/ucm143545.htm. Savings to consumers from generic competition are estimated at over $734 billion in the past 10 years. AARP, *Rx Watchdog Report* (May 2009) at 5. Such benefits can be achieved only if FDA is permitted to carry out its mandate to review and, as appropriate, approve applications for generic drug approval.

Delaying the entry of affordable generics on the market not only impedes competition, but the lack of lower cost treatment options reverberates throughout the entire health care system. For patients with a fixed or limited income, having a generic option is often the difference between having access to a health care treatment and not having any treatment option at all. Older adults, who are disproportionately affected by chronic disease and are more likely to take medications regularly over long periods of time, resort to skipping or reducing doses, or foregoing their prescriptions altogether, when faced with increased drug costs. AARP, *Rx Watchdog Report*, Vol. 6, Issue 1 (Feb. 2009), *available at* http://assets.aarp.org/www.aarp.org_/cs/health/rx_watchdog_feb09.pdf. This can lead to adverse health outcomes, as conditions left

untreated will worsen and result in a higher cost of care over time. *Id*. *See also*, American Medical Association, Statement for the Record to the Subcomm. on Commerce, Trade, and Consumer Protection for the H. Comm. on Energy and Commerce, *Impact of "Pay-for-Delay" Settlements On Patient Access to Affordable Generics and Overall Health Care System Costs* (April 13, 2009).

B. The Lack of Lower-Cost Generic Biologic Treatment Options Puts Lifesaving Prescription Drugs Out of Reach for Patients.

Biologically-derived drugs are often used to treat serious, chronic illnesses that tend to affect older populations, such as diabetes, cancer, rheumatoid arthritis and multiple sclerosis. *See* AARP, *Rx Watchdog Report* (May 2010), *available at* http://assets.aarp.org /www.aarp.org_/articles/health/207961rxwatchdog0510.pdf. While biologic drugs have become increasingly prevalent in the treatment of these chronic conditions, the shockingly high cost of these drugs can put them out of reach for many patients. For example, annual costs for biologics used to treat rheumatoid arthritis, such as Enbrel, Remicade, and Rituxan, are between $15,000 and $22,450 per year; cancer drugs, such as Gleevec and Avastin, can cost between $5,500 and $32,500 for one course of treatment, and since patients often need more than one course of treatment, the annual cost of Avastin, for instance, can be up to $100,000. *See* AARP, *Rx Watchdog Report* (May 2009) at 2. Not only are these costs already extremely burdensome, they are continuing to grow. In the 12-month period ending March 2010, the cost of Enbrel grew almost 10 percent and Gleevec grew 15.6 percent, while several biologics used to treat multiple sclerosis grew by 25 percent or more. *See* AARP, Insight on the Issues 43 at 10. Worldwide, biologics now account for one out of eight prescriptions written, with sales over $75 billion in 2007. AARP, *Rx Watchdog Report* (Feb. 2009) at 5. Biologic costs are predicted to exceed $100 billion by 2012, at which time they will account for 26 percent of U.S. drug spending. Bob

Billings, Generic Pharmaceutical Association, *Biogenerics: NACDS Pharmacy and Technology Conference* (Aug. 9, 2009), *available at* http://meetings.nacds.org/rxconference/2009/pdfs/edsessions/Billings_Biogenerics.pdf.

The costs associated with biologic drugs are a large and growing burden, especially for the Medicare program. The Medicare Payment Advisory Commission (MedPAC) reported that the Medicare program spent approximately $13 billion on biologic drugs in 2007. MedPAC, *Report to Congress: Improving Incentives in the Medicare Program* 103 (June 2009), *available at* http://www.medpac.gov/documents/jun09_EntireReport.pdf. Of the nearly $17 billion spent on prescription drugs under the Medicare Part B program, the top six biologics accounted for more than $7 billion (or 43 percent). *Id.* Although biologics only accounted for about six percent of Medicare Part D spending in 2007, spending on biologics increased more rapidly than overall Part D drug spending between 2006 and 2007 (36 percent compared to 22 percent). *Id*. at 105.

For consumers, having insurance coverage, either through Medicare or in the commercial market, is no guarantee that they will be able to afford the high cost of biologics. Health insurance plans with prescription drug coverage are beginning to charge very high co-insurance rates for biologics put in "specialty" or "fourth tier" pricing categories. Co-insurance rates generally range from 25-35 percent of the drug price, with some going up to 50 percent of the cost of the drug. AARP, Strategic Analysis & Intelligence Report, *The Tier 4 Phenomenon: Shifting the High Cost of Drugs to Consumers* (Mar. 9, 2009), *available at* http://assets.aarp.org/rgcenter/health/tierfour.pdf. In 2009, 87 percent of Medicare Part D prescription drug insurance plans charged 25-33 percent co-payments for expensive biologics. Kaiser Family Foundation, *Medicare Part D 2009 Data Spotlight: Specialty Tiers* (Jun. 2009),

available at http://www.kff.org/medicare/upload/7919.pdf. An estimated 10 percent of commercial plans have specialty tiers, which means that more than 20 million people could face enormous out of pocket costs without the benefit of spending limits and low-income subsidies available under the Medicare program. AARP, Strategic Analysis & Intelligence Report at 8. One rationale for developing high "Tier 4" coinsurance rates is to encourage the use of less expensive drug options. However, as with biologics, when no less expensive treatment option exists, this practice becomes an especially onerous burden for consumers who are faced with paying a growing share of the ever-growing price of high-cost biologics. *Id.* at 2.

II. FDA MUST BE ALLOWED TO EXERCISE ITS AUTHORITY TO APPROVE GENERICS WITHOUT UNNECESSARY DELAY AIMED AT PRESERVING MARKET EXCLUSIVITY.

In order to increase generic competition in the pharmaceutical market, Congress has directed the FDA to approve generic alternatives, both for traditional chemically-derived drugs and now for more complex biologically-derived products.[3]

A. Granting Emergency Injunctive Relief to Overturn FDA's Approval of Generic Versions of Lovenox Could Derail the Follow-On Biologic Approval Process.

Since Lovenox has been regulated as a traditional drug, this case addresses the process already in place for the approval of generic drugs under the Hatch-Waxman Act. However, because Lovenox is derived from an animal source, and therefore is similar to a biologic drug,

[3] Recognizing the public need for greater access to lower-cost biologic drugs, as well as the significant cost savings that could accrue to the federal government and other health care consumers, as noted above, Congress amended section 351 of the PHSA as part of the recently enacted Affordable Care Act to include a roadmap for the FDA to implement an abbreviated regulatory pathway for the approval of follow-on biologics. *See* Affordable Care Act, § 7002(a). Similar to the Hatch-Waxman Act, which created an abbreviated pathway for the approval of generic versions of chemically-derived drugs, the new law gives the FDA the authority to establish a process for determining when a follow-on biologic is similar enough to the brand-name product so that it may be substituted without the intervention of the healthcare provider that wrote the prescription. *Id*.

the same tactics used here to perpetually delay the marketing of an approved generic drug could be used to subvert the approval process the FDA must establish to provide for a "scientifically sound and safe pathway to characterize and develop" follow-on biologics. Statement of Margaret A. Hamburg, M.D., Commissioner of Food and Drugs, Food and Drug Administration Before the Subcomm. on Agriculture for the H. Comm. on Appropriations, *President's Fiscal Year 2011 Budget Request for the FDA* (March 10, 2010), *available at* http://www.fda.gov /NewsEvents/Testimony/ucm204399.htm.

Through a citizen petition originally filed in 2003, Sanofi-Aventis claims that, because the active ingredient in Lovenox is so complex, no generic version can be approved unless the applicant (1) fully characterizes Lovenox (that is, "identif[ies] and structurally characterize[s] each of enoxaparin's unique polysaccharide chains and determines their relative abundance."), (2) demonstrates that it uses the equivalent manufacturing process as that used by Sanofi-Aventis, or (3) conducts full clinical trials to establish the safety and efficacy of the generic product. *See* Sanofi-Aventis US LLC (Covington & Burling, LLP) – Supplement Citizen Petition (3) re: FDA-2003-P-0273-0006 (Sept. 14, 2006), *available at* http://www. regulations.gov/search/Regs/home.html#documentDetail?R=0900006480490ec7. This argument is so broad that, if adopted, it undoubtedly will thwart the FDA's authority to develop an approval process for follow-on biologics and the public will never realize the benefits of generic competition in the biologic market, as it has in the generic drug market.

B. Pervasive Pharmaceutical "Evergreening" Blocks Entry of Generics, Thereby Harming the Public.

Pharmaceutical "evergreening" is a pervasive problem, which occurs when brand manufacturers forestall the entry of generic products into the market in order to extend monopoly protection of their own product. One example of this behavior is the use of FDA citizen petitions

by brand manufacturers to forestall generic competition.[4] At a conference in 2005, FDA Chief Counsel Sheldon Bradshaw told generic manufacturers that the agency was troubled by the number of such petitions because "they appear designed not to raise timely concerns with respect to the legality or scientific soundness of approving a drug application, but rather to delay approval by compelling the agency to review arguments that could have been made months before." Marc Kaufman, *Petitions to FDA Sometimes Delay Generic Drugs*, Wash. Post, Jul. 3, 2006, at A1. Further, a Commissioner, and now Chairman, of the Federal Trade Commission in 2006 noted that, while "it is hard to say whether Citizen Petition abuse is a significant problem," it is worth looking into because there is an incentive to "misbehave" when "the cost of filing an improper petition is trivial compared to the value of securing even a brief delay in a rival's entry." *See* Jon Leibowitz, Remarks at the Second Annual In-House Counsel's Forum on Pharmaceutical Antitrust, *Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-ck!* (Apr. 24, 2006), *available at* http://www.ftc.gov/speeches/leibowitz/060424 PharmaSpeechACI.pdf.

Such practices seriously erode the ultimate goal of the Hatch-Waxman Act, which is to increase competition in the pharmaceutical marketplace by speeding up the approval of generic drugs. AARP, Letter to the Federal Trade Commission Re: Authorized Generic Drug Study: FTC Project No. P062105 (Jun. 5, 2006), *available at* http://www.ftc.gov/os/comments

[4] Another example of this behavior is for a patent applicant to use the continuation application process to keep a patent application alive in the United States Patent and Trademark Office indefinitely, as well as allowing the applicant to change and broaden its claims during patent prosecution and to file divisional applications that may result in multiple patents with overlapping claims and different expiration dates, all of which have the effect of delaying and injecting uncertainty into the patent prosecution process, "wearing down" patent examiners, and allowing for the issuance of "submarine patents" designed to take an industry by surprise or multiple patents that essentially cover the same invention. *See* Christopher M. Holman, *Biotechnology's Prescription for Patent Reform*, 5 J. Marshall Rev. Intell. Prop. L. 317, 331-332 (2006).

/genericdrugstudy3/060605aarp.pdf. Going forward, these practices will also eviscerate the provisions in the Affordable Care Act aimed at increasing the availability of follow-on biologics in the market. These "evergreening" tactics are contrary to public interest, as consumers and other payers of health care in the U.S. will not realize the benefits of market competition or the much needed relief that lower-cost generics provide if generic entry is blocked.

CONCLUSION

For the reasons set forth above, *Amicus* respectfully requests that Plaintiff's motion for a temporary restraining order and a preliminary injunction to delay the marketing of FDA-approved generic versions of Lovenox be denied.

August 3, 2010

/s/

Stacy Canan (Bar No.: 370522)
Bruce Vignery (Bar No.: 297911)

AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
(202)434-2060
(202)434-6424 (facsimile)
scanan@aarp.org
bvignery@aarp.org

Counsel for *Amicus Curiae* AARP

CERTIFICATE OF SERVICE

Pursuant to LCvR 5.3, I hereby certify that on August 3, 2010, I served the foregoing Brief *Amicus Curiae* of AARP in Support of Defendants via electronic and first class mail to the following counsel of record:

Andrew Clark
US DEPARTMENT OF JUSTICE
OFFICE OF CONSUMER LITIGATION
PO Box 386
Washington, DC 20044
Andrew.clark@usdoj.gov

Matthew Sterrett Leddicotte
WHITE & CASE, LLP
701 13th St., NW
Washington, DC 20005
mleddicotte@whitecase.com

Emily Johnson Henn
Fuad Rana
COVINGTON & BURLING
1201 Pennsylvania Ave, NW
Suite 819A
Washington, DC 20004
ehenn@cov.com
frana@cov.com

/s/Stacy Canan
Stacy Canan (D.C. Bar No. 370522)