ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 12, 2008

No. 08-5141

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TEVA PHARMACEUTICALS USA INC.,
Plaintiff-Appellee,

v.

MICHAEL O. LEAVITT, Secretary of Health and Human Services, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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GLOSSARY

ANDA	—	Abbreviated new drug application
APA	—	Administrative Procedure Act
FDA	—	Food and Drug Administration
FDA Br.	—	The Government's Appellant Brief, filed June 18, 2008
FDCA	—	Federal Food, Drug, and Cosmetic Act
JA	—	Joint Appendix
NDA	—	New drug application
Orange Book	—	"Approved Drug Products With Therapeutic Equivalence Evaluations"
Teva Br.	—	Teva's Appellee Brief, filed July 21, 2008

SUMMARY OF ARGUMENT

The Federal Food, Drug, and Cosmetic Act ("FDCA") requires new drug application ("NDA") holders to submit patents to FDA that "claim" drug products, and provides for an award of 180-day exclusivity only to generic applicants that certify to such patents. See 21 U.S.C. §§ 355(b)(1); (c)(2); (j)(2)(A)(vii); (j)(5)(B)(iv). The FDA decision under review – that the '952 patent, which had been withdrawn by the NDA holder, did not claim the relevant drug and thus could not be the basis for Teva's paragraph IV certification – was reasonable, consistent with the FDCA, and not arbitrary and capricious under the Administrative Procedure Act ("APA"). The district court should be reversed because it ignored the statute and improperly substituted its view for FDA's interpretation of the law.

Teva is asking this Court to rewrite the statute so that Teva would be entitled to exclusivity based on its certification to a patent that had been withdrawn by the innovator and therefore no longer claimed the listed drug. Teva argues that exclusivity should be based on whether patents appeared in the paper version of the Orange Book – regardless of whether the patents claimed the drug at issue. That interpretation fails under the statute, and it defies common sense. Teva attempts to dodge the statute by focusing this Court's attention on non-

statutory and non-regulatory statements in an FDA publication, the Orange Book. Teva does not demonstrate that these statements override the statute; indeed, Teva barely addresses the statutory requirement that a patent claim the relevant drug for certification purposes. Teva argues again and again that FDA "conceded" that the patent was still in the paper Orange Book at the time of its certification; however, that fact does not demonstrate that the patent claimed the drug – which is the statutory prerequisite to certification. Teva does not and cannot refute that when the NDA holder withdrew the '952 patent that patent no longer claimed the drug for purposes of exclusivity under 21 U.S.C. § 355(j)(2)(A)(vii), regardless of the timing of FDA's publication of the patent withdrawal in the paper Orange Book. Thus, Teva does not rebut the dispositive issue in this case: Whether FDA's interpretation of the FDCA to require a paragraph IV certification to a patent that claims the relevant drug is a reasonable one. This is not a complicated issue, and FDA's decision was reasonable in all respects.

Alternatively, even if FDA's published list (rather than whether the patent actually claimed the drug at the time of Teva's certification) were dispositive regarding when a patent claimed a drug, FDA reflected withdrawal of the patent on a list of patents made available to the public on FDA's website, and FDA's decision to use the most current, accurate patent information as the basis for patent

certifications cannot be arbitrary and capricious.

Teva frames the issue in this case as "which version of FDA's patent list controlled at the time Teva submitted its Paragraph IV certification to the '952 patent," Teva Br. at 18, and argues that FDA's regulations require that the outdated paper version controls. This is not correct. Contrary to Teva's assertions, FDA does not "simply pretend that its regulations don't exist." Id. at 1. Rather, FDA's regulations make clear that applicants must certify to the most current, accurate patent information that has been submitted to the agency. FDA regulations provide that applicants should look to the most current information available – and that the information in the Orange Book monthly supplements is not necessarily the most current information.

At bottom, Teva argues in this Court that the government is estopped from denying it exclusivity: "Teva did precisely what FDA told it to do, and the government cannot now maintain that Teva did not do what it was supposed to do when it did exactly what FDA ordered it to do." Teva Br. at 32. Putting aside the fact that FDA told Teva in 2001 that Teva could not certify to the patent at issue (Teva readily complied and then did not object for six years), Teva disclaimed any reliance on a theory of estoppel in the district court, presumably because such a claim would be doomed both legally and factually.

This Court should give deference to FDA's interpretation of the statute and regulations it is charged with implementing regarding whether a patent claims a drug for purposes of certification. The district court's conclusion to the contrary should be reversed.

ARGUMENT

I. FDA Properly Denied Teva's Request for Exclusivity Because Teva Did Not Certify to a Patent that Claimed The Brand-Name Drug Product

As explained in the government's initial brief, this case turns on the statutory language providing that the patent that is the subject of the certification must be one "which claims the listed drug" or "which claims a use for such listed drug for which the applicant is seeking approval" and for which patent information is required to be submitted under the statute. FDA Br. at 23-29. Because the '952 patent did not claim the listed drug at the time of Teva's certification, Teva's paragraph IV certification was improper and Teva was not entitled to exclusivity.

Teva argues that this case is not "about the statute," but does not explain why the statute does not control. Teva Br. at 19. Teva asserts that "this case is about FDA's failure to follow the plain text of its own rules and implementing regulations." Id. In support of this contention, Teva cites various non-statutory

"directives" and FDA regulations that FDA allegedly "failed to follow." Not one of those regulations governs the award of exclusivity, and Teva provides no explanation about how any of these provisions, discussed in greater detail below, overrule the statute and thus "control" this case.

Teva's argument would lead to the conclusion that abbreviated new drug application ("ANDA") applicants may certify to a patent included in the paper Orange Book (and thus obtain 180-day exclusivity) whether or not the patent claims the listed drug. That is not the law, and has never been the law. In fact, as pointed out in the initial government brief, FDA requires certification to patents that are recently submitted to FDA even before the patents appear in any form of the Orange Book. FDA Br. at 22. This requirement is statutory: Such patents claim the listed drug, even if they are not in the Orange Book. See JA 78 n.14. Hence, FDA's position is the reasonable one that uses the most current information when it determines, for certification purposes, whether a patent claims a drug. Teva's position, which makes the listing in the paper Orange Book the controlling factor, is inconsistent with the statute – and with this long-standing FDA practice.

Teva argues that whether a patent "claims" a product is a matter that is always disputed by a paragraph IV certification. Teva Br. at 36. Teva is focusing

on an entirely inappropriate meaning of what a patent "claims." The difference between whether a patent claims a product for purposes of certification and whether a patent will be found to "claim" a product as a matter of substantive patent law are two entirely different inquiries. With respect to the first inquiry, whether a patent holder has submitted a patent to FDA that claims a product under 21 U.S.C. § 355(j)(2)(A)(vii) is a matter of whether the patent holder has submitted the patent to FDA and certified to FDA that the patent claims the product. Only the NDA holder decides which patents "claim" the drug for purposes of patent listing. 21 U.S.C. §§ 355(b)(1) & (c)(2). FDA accepts this patent listing (or withdrawal) based on the patent holder's certification; it does not make independent determinations of the merits of the scope of patents submitted to FDA. FDA Br. at 22; Purepac Pharmaceutical Co. v. Thompson, 354 F.3d 877, 880, 884 (D.C. Cir. 2004) . On the other hand, the meaning of "claim" in the sense argued by Teva is whether the patent actually encompasses the generic product as a matter of patent law; i.e., whether the patent is valid and infringed. This difference was recognized in one of the cases principally relied on by Teva. See Purepac, 354 F.3d at 883 ("setting aside the question of what use the patent *actually* covered – a question the FDA leaves to the courts – what use did [the patent holder] *say* the patent covered?") (emphasis in original). A paragraph IV

certification asserts that the patent is "invalid or will not be infringed," 21 U.S.C. §§ 355(j)(2)(A)(vii), not that the patent does not claim the drug for purposes of its certification. A finding of noninfringement in patent litigation, while it might mean that the patent does not encompass the generic applicant's product, does not mean that the patent did not claim the NDA holder's drug within the meaning of the FDCA for patent listing purposes. Here, by the time Teva submitted its ANDA, the patent holder had already informed FDA that the '952 patent did not claim the product; thus, Teva's paragraph IV certification was improper – something FDA told Teva in 2001 and with which Teva then agreed.

FDA's position in this case is consistent with the holding of Purepac, one of the principal cases relied on by Teva. There, this Court held that FDA was permitted to delist a patent, and thus reject Torpharm's paragraph IV certification, because the patent had been improperly listed. 354 F.3d at 886. Although the patent in Purepac was delisted because of a court decision, the holding makes clear that Teva's basic argument is incorrect: publication in the Orange Book does not "control" whether a paragraph IV is properly submitted.

II. FDA Regulations Are Consistent With the Statute

Teva argues repeatedly that FDA's decision violates its own rules and regulations or that FDA "pretend[s]" its regulations "don't exist." See, e.g., Teva

Br. at 1, 3, 17, 19, 32. FDA has, however, reasonably interpreted the statute and its implementing regulations to require applicants to certify to the most current patent information, even if that information does not yet appear in the printed version of the Orange Book or a monthly Cumulative Supplement. JA 76-78.

Thus, an FDA regulation requires patent information to be put on public display immediately when received, even before it is published in any form of the Orange Book. See 21 C.F.R. § 314.53(e). FDA's long-standing practice requires certification to such patents – whether or not they appear in the Orange Book. See FDA Br. at 22; JA 78 n.14; Transcript of Motion Hearing before the District Court, April 4, 2008 (Docket Number 31), at 20-21 ("April 4 Transcript").

Teva mischaracterizes an FDA regulation in an attempt to persuade this Court that applicants can certify only to patents on the "list," and that the "list" is only the paper version of the Orange Book. Teva Br. at 17. Teva paraphrases 21 C.F.R. § 314.3(b) as defining the "list" as the "Orange Book and its monthly Cumulative Supplements," Teva Br. at 17; see also id. at 5, 18 ("Orange Book and current Cumulative Supplement"). The actual language of 21 C.F.R. § 314.3(b) defines "the list" as "the list of drug products with effective approvals published in the current edition of FDA's publication 'Approved Drug Products with Therapeutic Equivalence Evaluations' and any current supplement to the

publication" – not the particular paper version of the "Cumulative Supplement" that Teva relies upon in this case. See 21 C.F.R. § 314.3(b) (emphasis added.). That regulation does not specify that the list must be on paper, nor does it purport to establish a procedure that overrules the statute, i.e., that permits an award of exclusivity based on certification to patents that do not claim drug products.

More important, despite Teva's repeated accusation that FDA did not follow its own regulations, the preamble to FDA's proposal of those regulations dispels any doubt as to whether an applicant can rely on an outdated, paper version of the list in making a patent certification: "The patent information submitted to FDA, whether or not published in the list, should be the basis of the applicant's certification." Abbreviated New Drug Application Regulations, 54 Fed. Reg. 28,872, 28,885 (proposed rule July 10, 1989) (emphasis added). The preamble further states:

> To assist the applicant in determining whether information on a relevant patent has been submitted to FDA, the agency will place copies of new patent submissions on approved drug products and, prior to its publication, a copy of the patent information supplement to the list on public display in the Freedom of Information Office . . . Once a year, FDA conducts a review of the patent information published in the list and deletes all patents that have expired in the course of the year. Thus, an applicant should check the list for published patent information and FDA's Freedom of Information Office for patent information submitted to FDA but not yet published.

Id. (emphasis added).

FDA's regulation, 21 C.F.R. § 314.53(e), and the preamble make crystal clear that, when there is any discrepancy between the actual patent submission and the information in the paper list, an applicant's patent certification must be based on the actual submission of patent information, and not on any inaccurate information reflected in the paper list or Cumulative Supplement. Contrary to Teva's repeated argument, FDA has not "ignored" its regulations, but has acted consistently with them.

The preamble also states: "As a general rule, FDA intends to use the list and its supplemental updates as the primary means of announcing information regarding patent status, exclusivity, type of bioequivalence study needed, and eligibility for consideration in an ANDA." 54 Fed. Reg. at 28,876 (emphasis added). Significantly, although the printed list (paper and electronic) is the "primary means" of providing public notice of patent information, it is not the only means, as Teva would have this Court hold. Rather, FDA has reasonably interpreted "list" as including the most current, up-to-date patent submission information – including Janssen's withdrawal of the '952 patent in this case. Similarly, in the 2003 preamble to final rules regarding patent submissions and listing requirements for NDAs, FDA stated: "A patent is considered listed in the

Orange Book as of the date it is received in the Central Document Room as required in § 314.53(d)(4) and (d)(5), if it is accompanied by a declaration form that is both complete and contains information indicating that the patent is eligible for listing." See 68 Fed. Reg. 36,676, 36,687 (June 18, 2003).

The regulation relied on extensively by Teva, 21 C.F.R. § 314.53(f) (cited by Teva at 1, 2, 5, 12, 17, 19, 25, 35) – which Teva claims "expressly require[s] generic applicants to submit 'an appropriate certification for each listed patent,' even if the applicant disagrees about the 'correctness of the patent information . . . published by FDA in the list'" (Teva Br. at 1) – is not applicable to this case. That regulation permits "any person" who disputes the accuracy or relevance of patent information submitted to the agency to notify the agency of the dispute and then directs FDA to request confirmation of the correctness of the information from the patent holder. The regulation further provides that if the patent holder "does not change the patent information submitted to FDA," further applicants must still certify to the patents, notwithstanding any disagreement. Needless to say, this challenge procedure did not happen in this case, and Teva cannot contend that it was required to file a certification based on that regulation. More importantly, the regulation establishes that it is the patent holder's assertion that a patent claims a drug that determines whether a certification is required by ANDA applicants. In

this case, the patent holder had determined that the '952 patent did not claim the drug; that determination controls for purposes of patent certification requirements.

All of this goes to demonstrate that the Orange Book is not a rule or regulation, nor does it control the issue of whether a patent claims a drug for certification purposes. In its initial brief, the FDA pointed out numerous cases which held that documents such as the Orange Book are not the law nor do they change the law. FDA Br. at 27. In response to this point, Teva attempts to distinguish the nature of the particular documents at issue in those cases from the Orange Book. Teva Br. at 31. However, Teva misses the importance of those cases, which is that documents like the Orange Book have been found not to be rules or regulations, and those holdings were based on factors that make clear the Orange Book is not a regulation. Those factors are: 1) the agency's characterization of the document; 2) whether the document was published in the Federal Register or Code of Federal Regulations; and 3) whether the document has a binding effect. See, e.g., Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999). Here, as discussed above, FDA does not regard the Orange Book as the final word on whether a patent claims a drug product, but requires certification to patents that claim drugs whether or not they are on the list. Thus, FDA does not characterize the Orange Book as a rule or regulation; the Orange Book has not

been published in the Federal Register or Code of Federal Regulations; and it does not bind FDA (or the public) to use inaccurate information. Significantly, Teva identifies no precedent that would support the conclusion that the Orange Book is a rule or regulation or that it in some manner changes the statute.

III. FDA's Interpretation of its Statute is Entitled to Deference

FDA has considerable discretion to determine whether a patent claims a drug for certification purposes. FDA Br. at 13-15. Ambiguities in the Hatch-Waxman statutory regime are commonplace, and FDA's interpretations to fill in the gaps have largely been upheld by courts. In Purepac, for example, this Court upheld FDA's interpretation of a statutory ambiguity regarding whether an applicant had to file its paragraph IV certification simultaneously with its notice to the NDA holder, and whether the failure to do so would result in no exclusivity. 354 F.3d at 889. FDA determined that a paragraph IV certification becomes effective only when the applicant ultimately provides notice, and thus a certification may have a delayed effective date. Id. at 888. This Court stated that in these circumstances, "the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions." Id. at 889. Similarly, the Court upheld FDA's

determination to use receipt dates rather than mailing dates for exclusivity purposes. Id. at 889-890. This Court posed the question as "whether either the statute or the regulation *precludes* the FDA's approach." Id. at 889 (emphasis in original).

Here, neither the statute nor the regulations specify the manner in which FDA is to determine whether an ANDA applicant's certification is for a patent that claims a drug, nor do they specify the form in which FDA must publish patent information. See 21 U.S.C. §§ 355(b)(1); (c)(2); (j)(2)(A)(vii); (j)(5)(B)(iv); 21 C.F.R. § 314.53(e). FDA's denial of exclusivity to Teva based on Teva's certification to a patent that did not claim the drug was reasonable, entirely consistent with the statute and regulations, and should be upheld.

Teva does not demonstrate that there is anything – statutory or regulatory – that precludes FDA's decision. Teva relies primarily on statements in the paper Orange Book for the principle that its certification to the '952 patent was proper. Teva Br. at 26-31. The reasons given for this argument are that the Orange Book 1) is "legally required;" 2) states that it is "legally required;" 3) is "linked" to the patent challenge regulation; 4) is "disseminated to the public and intended to be relied on by the public;" and 5) states what the public "must" do. Id. at 31. As explained in FDA's initial memorandum, however, the statute does not "legally

require" a paper – rather than an electronic – Orange Book. FDA Br. at 22, 30. The allegedly "linked" regulation is the patent challenge provision, which – as explained above – is not applicable to this case. Finally, although the Orange Book states that it must be used with the most current Cumulative Supplement, the whole point of this instruction is to ensure that the applicant utilize the most current information available, not that the paper Orange Book can be relied on even when it contains inaccurate information.

Perhaps most important, none of the alleged "directives" contained in the Orange Book overrules the statute. It is the statute that controls. Teva argues that FDA argues "for the first time ever," that "the Orange Book statements . . . are not the law" and "do not 'control' the outcome of this case." Teva Br. at 30 (Teva makes a variant of this waiver argument at pages 17 and 32 of its brief). This is not correct. FDA has, throughout this case, made clear its position that it is the statute that controls, not statements in the Orange Book. In its brief to the district court, the government noted:

> [T]he statute requires NDA holders to submit patents to FDA that "claim" drug products, and requires generic applicants to certify to these patents. FDA did not abuse its discretion when it found that the '952 patent . . . did not "claim" Risperdal and thus no exclusivity could be awarded based on the '952 patent. FDA's position is that it is allowed to used the most current information available to ensure compliance with the statute. Teva, on the other hand, argues that

> FDA is precluded from doing so if the paper version of the Orange Book contains information that is inconsistent with the most current information. . . . Teva's argument is meritless.

Memorandum in Opposition to Motion for Preliminary Injunction ("FDA PI Opp.") (Docket Number 14) at 15-16; see also id. at 11-12, 17-18, JA 78. In addition, at the oral argument on motions before the district court, counsel for FDA stated: "Teva is addressing the language in the Orange Book as though it were the statute. . . . The statute requires that patents be listed that claim certain drugs, and that certifications be filed to patents that claim drugs." April 4 Transcript at 16. Also, counsel pointed out that FDA requires certification to patents that claim drug products even if they have not yet appeared in any version of the Orange Book, and noted: "[T]he issue is what does the statute require, not what's in the book." Id. at 21.

In any event, even if FDA had not made this specific argument, the case law is clear that it is not necessary to make all legal arguments in support of an issue raised below. Yee v. City of Escondido, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal

theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); New York v. EPA, 431 F.3d 801, 802 (D.C. Cir. 2005) ("the Supreme Court ruled that while courts generally should not entertain an 'issue or claim' raised for the first time in a reply brief, they were not limited to 'particular legal theories' advanced by the parties."); United States v. Rapone, 131 F.3d 188, 196 (D.C. Cir. 1997) (party permitted to "offer[] new legal authority for the position that he repeatedly advanced before the district court. . . ."). Here, it is clear that FDA raised the issue of whether FDA's decision was appropriate under the statute and that it is the statute that is the determining factor in this case. See, e.g., FDA P.I. Opp. at 3, 15-18.

Teva takes issue with the statement in FDA's brief that there is no "procedure" that permits certification to patents that do not claim drug products; i.e., that "there is no requirement anywhere in the FDCA or FDA's regulations that an ANDA applicant search any version of the Orange Book." Teva Br. at 23. Teva argues that this is the "first time that FDA has ever made such an argument." Id. However, this argument was made to rebut the district court's pronouncement that the Orange Book had established a "procedure" that had been violated by FDA. FDA Br. at 25. Obviously, FDA could not have made this argument before

that decision was rendered. Significantly, Teva had not argued to the district court that the Orange Book had established any "procedures." Moreover, the "procedure" allegedly violated by FDA is "to look in the Orange Book in order to determine which patents require certifications." Teva Br. at 24. As discussed above, it has been FDA's position throughout this litigation that the statute makes clear that certifications can only be filed to patents that claim drug products, and nothing in the Orange Book (whether called a "procedure" or something else) overrides this. In any event, one of Teva's sources for this "procedure" is 21 C.F.R. § 314.53(f), which – as discussed above – is the "challenge" regulation that does not even apply to this case. Teva's other source for this "procedure" is the Orange Book. Teva Br. at 24. Obviously the Orange Book is not a rule or a regulation and any guidance provided in the Orange Book is insufficient to overrule the statute.

Teva attempts to make much of the fact that the introduction to the 2005 annual edition of the paper Orange Book stated that changes in patent listings would be reflected daily on its website, while previous editions simply noted the availability of the electronic Orange Book. Teva Br. at 7-8, 26, 29-30. This change to a non-statutory and non-regulatory publication does not alter the statutory requirement that patents claim drug products – which was the law in

2001 and is still the law today. In other words, this change is not relevant to the issues before the Court: It does not render FDA's decision to use the most current information to ensure compliance with the statute unreasonable.

Teva next takes issue with FDA's statement that it is unclear what the district court meant by using the term "listed patent." Teva Br. at 24. Again, Teva argues that FDA waived this argument, presumably by not presenting it to the district court. Id. As with the issue discussed above, however, this argument is directed to a statement made by the district court and could not have been made prior to the district court's decision. At any rate, it is in fact unclear what the district court meant by that term: FDA's position throughout this litigation is that the '952 patent had been withdrawn before Teva's certification and did not claim the relevant drug in any legal sense. See FDA Br. a 23-29. FDA conceded that the patent remained (inaccurately) in the paper Orange Book, but had been removed from the electronic listing. Thus, it is not clear what the district court meant in using the term "listed patent."

Teva cites several cases for the proposition that this Court has recognized the validity of the Orange Book. Teva Br. at 22-23. None of those cases, however, involved the issue here, i.e., whether a withdrawn patent still claims a drug product if the withdrawal has not yet been reflected in the paper Orange

Book.

Thus, even if this case turned on which "list" of patent information is controlling for purposes of exclusivity – the most current information available through FDA's website or an outdated, paper version – Teva would not be entitled to exclusivity. The agency reasonably determined that Teva was required to certify to the most current patent information available because it accurately reflected that the '952 patent did not claim Risperdal, and that Teva's certification to a patent listed in an out-of-date paper version was incorrect and did not make Teva eligible for exclusivity.

IV. FDA's Decision is Consistent with the Statutory Scheme

As set forth in FDA's citizen petition response, FDA's decision is fully consistent with the Hatch-Waxman incentives for developing generic drugs. Because Teva filed its paragraph IV certification to the '952 patent after it had been withdrawn, Teva "assumed none of the risks that 180-day exclusivity is designed to reward." JA 79. Teva's argument that FDA's position would allow "FDA to divest first-filers of their statutory reward after they invest substantial resources . . . diminishes the incentive to make such challenges in the future," Teva Br. at 37, completely misses the mark. Teva faced no risk whatsoever of patent litigation upon submitting its ANDA because the NDA holder had already

withdrawn the '952 patent. Teva cannot dispute that the statute allows NDA holders to withdraw patents, and thus applicants must always bear the risk that a patent will be withdrawn before they are able to file a paragraph IV certification. As with many other aspects of the Hatch-Waxman regime, unforeseen circumstances may occur that will undermine a company's hope of exclusivity.

Teva does not argue – nor could it – that a paragraph IV applicant would still be entitled to 180 days of exclusivity if a patent holder withdrew a patent one day before the filing of a paragraph IV certification, and that withdrawal were immediately reflected in all versions of the Orange Book. Thus, even if an ANDA applicant did a significant amount of work designing around a patent, that effort would not entitle the applicant to 180 days of exclusivity if the patent were withdrawn before th applicant submitted its certification. Here, the issue is whether the patent had been withdrawn, i.e., whether it no longer claimed Risperdal, before Teva submitted its paragraph IV certification. If so, then Teva is not entitled to exclusivity no matter how much work it did. For this reason, FDA's decision to rely upon the most current information when it accepted Teva's ANDA must be analyzed without reference to any alleged "effort" by Teva to "design around" the '952 patent.

Teva's argument that NDA applicants would seek to withdraw patents when

paragraph IV certifications were filed and thus "no Paragraph IV challenger would ever be entitled to exclusivity," Teva Br. at 36, is absurd. This argument assumes that all patent holders would delist patents as soon as paragraph IV certifications are filed, and thus none would fight the patent challenges on the merits. Id. Not only is this scenario improbable (and not what occurred in this case), under this Court's recent holding in Ranbaxy Labs. Ltd. v. Leavitt, 469 F.3d 120 (D.C. Cir. 2006), 180-day exclusivity cannot be denied ANDA applicants when patents are withdrawn after a paragraph IV certification is filed. FDA Br. at 9-10.

V. Teva's Other Arguments are Without Merit

Teva's argument that "FDA's refusal to award Teva . . . exclusivity was unlawful" because Teva "did exactly what the Agency required it to do in order to qualify for 180-day exclusivity," Teva Br. at 2, has no merit. Teva's counsel waived any reliance on such an estoppel-based theory below. April 4 Transcript at 6 ("the reliance and estoppel issues are not before the Court anywhere"). Teva has never asserted that it relied solely on the paper version of the Orange Book and that it was unaware of the electronic Orange Book. See Smith v. United States, 277 F. Supp. 2d 100, 115 (D.D.C. 2003) (requiring reasonable reliance for estoppel). Not only can Teva not establish the factual requirements for estoppel as a general matter, there can be no estoppel against the government in these

circumstances. See Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990); ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988) ("we are aware of no case in which this court has applied the doctrine [of estoppel] against the government."). "Following the rules" is simply inadequate to obtain exclusivity when an applicant fails to meet the statutory requirements. See, e.g., Purepac, 354 F.3d at 888 (rejecting TorPharm's argument that it should get exclusivity because it "played by the rules").

In addition, Teva's argument that it should get exclusivity because it "did what it was required to do by the agency" is simply incorrect. Upon receiving Teva's incorrect certification, FDA promptly informed Teva that it should amend its certification because the patent had been withdrawn. Teva readily complied and did not object for six years.

CONCLUSION

For the foregoing reasons and those stated in FDA's opening brief, the district court's judgment should be reversed, and judgment entered for federal appellants. Consistent with this Court's June 11, 2008, order granting expedition, the government respectfully requests the Court to do so as promptly as possible in order to permit FDA to approve other ANDAs, which have been delayed by the district court decision.

Respectfully submitted,

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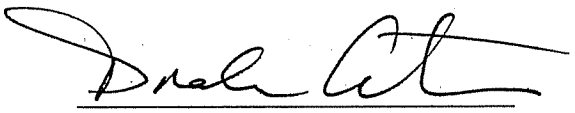

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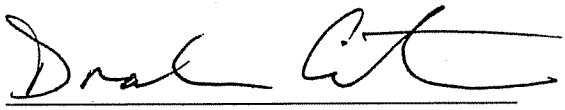

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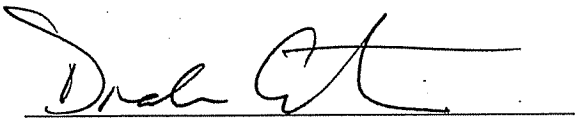

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