

January 29, 2004

2004 01 29 11:11

Dockets Management Branch
U.S. Food and Drug Administration
Room 1061
5630 Fishers Lane
Rockville, Maryland, 20852

RE: Docket 2004P-0006

**COMMENTS OF TEVA PHARMACEUTICALS USA, INC.
IN OPPOSITION TO STAY PETITION OF PURDUE PHARMA RE
ANDAs FOR CONTROLLED RELEASE OXYCODONE HCI TABLETS**

On behalf of Teva Pharmaceuticals USA, Inc. ("Teva"), the undersigned respectfully submits these comments in opposition to the Petition for Stay of Agency Action ("Petition") submitted January 6, 2004 on behalf of Purdue Pharma L.P. ("Purdue") (Docket 2004P-0006). Purdue's petition seeks a stay of approval of ANDAs for generic versions of its OxyContin® (oxycodone extended release) Tablets, on the grounds that generic oxycodone products should be subject to a Risk Management Program ("RMP") similar to the RMP allegedly being implemented by Purdue. However, because Purdue has not yet been granted approval for its recently modified OxyContin labeling describing its RMP, Purdue requests that generic approvals be delayed pending approval of Purdue's proposed labeling changes. As shown herein, Purdue's petition is without merit. Nevertheless, Teva is actively developing its own voluntary RMP for its oxycodone drug in consultation with FDA, and will implement its RMP as expeditiously as possible. Approval of Teva's ANDA, however, cannot be delayed pending final implementation of oxycodone RMPs, or approval of RMP-associated labeling.

BACKGROUND

OxyContin has been approved and marketed – for treatment of moderate to severe pain requiring continuous analgesia for an extended period of time – since December 1995. Immediate release oxycodone products have been approved and prescribed for treatment of pain for much longer – since at least August 31, 1976 (Endo's Percocet®). As a powerful opioid agonist, oxycodone is recognized as a drug with a high potential for abuse, and accordingly has long been regulated by the Drug Enforcement Administration (DEA) as a Schedule II Controlled Substance (C-II). Following the introduction of OxyContin, abuse and diversion of the drug became an unexpectedly serious problem, and to some degree still occurs. The history and scope of OxyContin abuse and diversion is detailed in the recent report of the United States General Accounting Office ("GAO") GAO Report 04-110: *OxyContin Abuse and Diversion and Efforts to Address the Problem* (December 2003) ("GAO Report").

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As GAO and the Drug Enforcement Administration (“DEA”) have reported, Purdue’s aggressive marketing practices and regulatory violations with respect to OxyContin have contributed significantly to OxyContin abuse and diversion. *See* GAO Report at 56:

The root of the problem...appears to be the unfortunate convergence of Purdue’s marketing techniques and the public/policy focus on pain undertreatment. The DEA has previously stated that the company’s aggressive methods, calculated fueling of demand and the grasp for major market share very much exacerbated OxyContin’s widespread abuse and diversion...[T]he fact remains that Purdue’s efforts [to establish Risk Management Programs] – which may be viewed as self-serving public relations damage control – would not have been necessary had Purdue not initially marketed its product aggressively and excessively. Contributing to the abuse and diversion problem...is the fact that in promoting this drug to practitioners, Purdue deliberately minimized the abuse risk associated with OxyContin...

(DEA comments to draft GAO Report) (emphasis added). *See also Id.* at 17 (“DEA expressed concern that [Purdue’s marketing practices] resulted in OxyContin being promoted to physicians who were not adequately trained in pain management.”); and 43 (“Purdue’s aggressive marketing of OxyContin fueled demand and exacerbated the drug’s abuse and diversion.”).

Purdue’s actions have led directly to governmental efforts to regulate Purdue’s marketing activities and to implement programs to reduce OxyContin abuse. For example, FDA sent Purdue two Warning Letters objecting to advertisements “that violated the Federal Food, Drug, and Cosmetic Act (FD&C Act), including one advertisement that failed to include warnings about the potentially fatal risks associated with OxyContin use.” GAO Report at 4, 25-28. As one FDA letter warned Purdue, its advertisements for OxyContin:

Fail[ed] to present in the body of the advertisements critical safety information related to the use of OxyContin needed to balance these broad claims promoting its efficacy for pain relief. *Neither one of your ads presents in the body of the advertisements any information from the boxed warning discussing OxyContin’s potential for abuse and the related considerations when prescribing the drug. Neither one of your ads presents in the body of the advertisements any information from the boxed warning disclosing that the drug can be fatal if taken by certain patients or under certain conditions.*

Warning Letter to Purdue Pharma, Jan. 17, 2003 at p. 4 (underscores in original, italics added).

Purdue states in its Petition that it has “worked closely” and “in close cooperation with FDA” to “educate physicians, other health care professionals, and patients regarding the serious and potentially fatal risks of abuse and misuse of OxyContin,” Pet. at 3. However, that position is disingenuous at best, and Purdue’s remedial actions have been described by DEA as nothing

more than “self-serving public relations damage control.” GAO Report at 56. This is because consistently over the last several years, Purdue’s remedial actions have been forced upon it by governmental pressure to take steps to address OxyContin abuse and diversion. *See* GAO Report at 34 (“abuse and diversion of OxyContin...prompted FDA to revise the drug’s label and take other actions to protect the public health. In July 2001 FDA reevaluated OxyContin’s label and made several changes in an effort to strengthen the ‘Warnings’ section of the label....FDA also added a black box warning....”); 36 (“In April 2001 DEA developed a national action plan to deter abuse and diversion of OxyContin); 37 (“DEA has also attempted to raise national awareness of the dangers associated with abuse and diversion of OxyContin.); 38 (“DEA and the [professional] health organizations also called for a renewed focus on educating health professionals, law enforcement, and the public about the appropriate use of opioid pain medications in order to promote responsible prescribing and limit instances of abuse and diversion.”). *See also*, FDA White Paper: *Protecting the Public Health: FDA Pursues an Aggressive Enforcement Strategy* (June 2003) (FDA’s Warning Letter “required [Purdue] to take high-impact corrective actions,” specifically a comprehensive corrective advertising campaign to fully inform prescribers of the abuse risk of OxyContin.).

Moreover, it is highly relevant, and more than a little disturbing, that Purdue’s Petition was filed just one day after the U.S. District Court for the Southern District of New York ruled that three of Purdue’s OxyContin patents, U.S. Patents Nos. 5,549,912, 5,508,042, and 5,656,295, are unenforceable due to inequitable conduct, and thus incapable of preventing generic competition for Purdue’s single most valuable product. Given that the elements of Purdue’s RMP upon which the Petition is based are still not fully operational, and that the labeling describing those programs has not yet received FDA approval, the timing of this Petition is highly suspicious. It is in the context of these facts that FDA must evaluate Purdue’s last-minute effort to delay generic competition for a drug that accounts for 90% of Purdue’s prescription drug revenues. GAO Report at 9.

DISCUSSION

As demonstrated herein, Purdue’s petition must be denied for the following reasons:

1. FDA may not *require* generic versions of OxyContin to be marketed in conjunction with a risk management program as a precondition to approval;
2. The OxyContin labeling references to Purdue’s risk management program as recently *proposed* by Purdue have not yet been *approved* by FDA, and therefore FDA may not require generic oxycodone products to copy that unapproved labeling;
3. Teva is nevertheless working with FDA to develop and implement its own risk management program which Teva expects will be implemented expeditiously and will be incorporated into Teva’s oxycodone labeling; and

4. Purdue has failed to meet the required conditions for the imposition of its requested stay of generic approvals.

I. RMPs May Not Be Required As a Condition of Oxycodone Drug Approval

Teva recognizes the value of Risk Management Programs for OxyContin and its generic competitors, and Teva is actively conferring with FDA to implement its own RMP for use with its generic version of OxyContin. It is important to emphasize however, that such RMPs are entirely voluntary and cannot be mandated by FDA as a condition of approval of oxycodone ANDAs. *See* GAO Report at 6 (“[risk management] plans are an optional feature of new drug applications...”); 13 (“All drug manufacturers have the option to develop and submit risk management plans to FDA...”); 42 (“risk management plans...are now an optional feature of new drug application.”); and 55 (FDA comments agreeing that “the Commissioner of Food and Drugs should ensure that FDA’s risk management guidance encourages [i.e., but does not require] pharmaceutical manufacturers that submit new drug applications for these [Schedule II controlled] substances to include plans that contain a strategy for monitoring the use of these drugs and identifying potential abuse and diversion problems.”) (all emphases added).

The optional nature of risk management programs derives from the statutory NDA and ANDA approval criteria, which are not only silent with respect to whether RMPs can be mandated as a condition of approval, but which in fact preclude, by their express terms, the imposition of such a requirement. Specifically, under section 505(c) of the Act, FDA is required to approve an NDA if none of the reasons set forth in section 505(d) are found to be applicable. *See* 21 U.S.C. § 355(c) (“the Secretary shall either – (A) approve the application if he then finds that none of the grounds for denying approval specified in subsection (d) applies, or (B) give the applicant notice of an opportunity for a hearing...under subsection (d)...”) (emphasis added).

The only relevant grounds upon which FDA may deny approval to an NDA are based upon whether the drug has been shown to be safe and effective for the uses for which approval is sought, i.e., “use under the conditions prescribed, recommended, or suggested in the proposed labeling” of the drug. The plain language of the statute provides:

(d) If the Secretary finds...that

(1) the [sponsor’s] investigations...do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof;

(2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions;

(3) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity;

(4) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions; or

(5) evaluated on the basis of the information submitted to him as part of the application and any other information before him with respect to such drug, there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof; or

(6) the application failed to contain the patent information prescribed by subsection (b) of this section; or

(7) based on a fair evaluation of all material facts, such labeling is false or misleading in any particular;

he shall issue an order refusing to approve the application....

21 U.S.C. § 355(d) (emphasis added).

The statutory content and approval criteria for Abbreviated New Drug Applications also leave no room for requiring a risk management program as a condition of approval, as these criteria are directed at assuring that the “conditions of use prescribed, recommended, or suggested in the labeling proposed for the new [generic] drug have been previously approved for [an innovator] drug,” and that the generic drug is otherwise the “same” as the innovator product in several enumerated respects (specifically, therapeutic equivalence and bioequivalence). *See* 21 U.S.C. § 355(j)(2)(A). Importantly, the statute specifically limits FDA’s ability to impose any conditions of ANDA approval other than those set forth in the statute: “The Secretary may not require that an abbreviated application contain information in addition to that required by clauses (i) through (viii)” of that section. *Id.* (emphasis added).

The key terms in the statutory NDA and ANDA approval provisions are “conditions of use prescribed, recommended, or suggested” in the labeling of the drug. Here, OxyContin and its generic equivalents are only labeled and intended for legitimate therapeutic conditions of use, specifically, the treatment of pain, as prescribed by a licensed professional for a specific patient’s legitimate medical needs. These drugs are *not* intended or labeled for illicit use, abuse, or diversion. Accordingly, FDA is simply not authorized by law to require risk management programs, or RMP-associated labeling, as a condition of approval for oxycodone ANDAs

because such RMPs and associated labeling bear no relationship to the legitimate “conditions of use prescribed, recommended, or suggested” in the drugs’ labeling.¹

We note again that Teva is fully cooperating with FDA to develop and implement its own risk management program, notwithstanding the entirely optional nature of such programs, as described above. The details of Teva’s proposed program will be communicated to FDA confidentially via Teva’s pending oxycodone ANDA.

II. The FDA Approved OxyContin Labeling Does Not Refer to Purdue’s RMP

Even if FDA were authorized to require the use of RMPs and associated labeling as a condition of approval of oxycodone ANDAs, it is crucial to note that Purdue’s proposed RMP and related labeling changes *have not been approved by FDA*. Thus, as a matter of black-letter FDA law, ANDAs for generic versions of OxyContin cannot be required to include such labeling as a condition of approval. *See* 21 U.S.C. § 355(j)(2)(A)(v) (requiring ANDA product labeling to be “the same as the labeling approved for the listed drug.”) (emphasis added); 21 C.F.R. § 314.94(a)(8)(iv) (requiring a comparison of the proposed generic labeling “with the approved labeling for the reference listed drug.”). (emphasis added).

If and when, and *only* if and when, such OxyContin labeling changes are approved by FDA, may FDA even consider requiring changes to generic oxycodone labeling pursuant to the “same labeling” requirement for ANDAs. 21 U.S.C. § 355(j)(2)(A)(v). Thus, a fundamental legal flaw in Purdue’s Petition is the premise that ANDA applicants must copy *unapproved* OxyContin labeling before receiving final approval, or alternatively that ANDAs must await approval until such time as the OxyContin labeling is approved to include reference to Purdue’s RMP. Both results are impermissible under the Act and FDA’s regulations, and must be rejected.

It important to carry the analysis of Purdue’s RMP-related labeling one step further to address the question of whether, assuming Purdue’s proposed labeling will eventually be approved in some form, generic oxycodone labeling must precisely copy that labeling, or whether generic labeling can comply with the statutory requirements by referring to the elements of the generic manufacturer’s specific risk management program, even if it differs from Purdue’s

¹ In this respect, RMPs for oxycodone are fundamentally different than drug use/risk management programs required in connection with other drugs, where those programs were deemed necessary for the safe and effective use of the drugs for their intended and labeled conditions of use. Examples of such programs include: patient-directed smoking cessation program materials for smoking cessation drugs (Nicorette); distribution limitations to ensure availability of emergency OB-GYN care for patients using mifepristone for medical abortions; and patient registry programs to monitor and detect known side effects of the drug when used as intended (e.g., Lotronex, Clozaril). Moreover, unlike Actiq (fentanyl citrate) lozenges, which are subject to a risk management program, OxyContin was not approved under subpart H, 21 C.F.R. § 314.520, and thus is not subject to mandatory post-marketing restrictions.

RMP. Teva respectfully suggests that a generic applicant need not directly copy approved labeling that describes Purdue's RMP, but may instead describe the generic manufacturer's own RMP, which may differ from Purdue's. This approach would be consistent with the same labeling requirement, even though the RMP labeling of generic products would not match "approved" labeling of the innovator drug, because under FDA regulations, permissible differences in generic labeling can include labeling changes required because the drugs are manufactured by different companies, 21 U.S.C. § 355(j)(2)(A)(v), and "labeling revisions made to comply with current FDA labeling guidelines or other guidance." 21 C.F.R. § 314.94(a)(8)(iv). As FDA is about to implement RMP Guidance for oxycodone and other schedule II controlled substances, *see* GAO Report at 13, generic labeling that includes references to the generic applicant's RMP would comply with the "same labeling" requirement, even though such generic-specific labeling is not approved, for the reference listed drug.

The importance of not holding generic sponsors to the specific minutiae of Purdue's RMP-related labeling should not be underestimated, because a strict interpretation of the "same labeling" requirement in the context of these wholly optional RMPs would be unduly burdensome to generic applicants, and could thwart the purposes of Hatch-Waxman by inappropriately delaying generic approvals. For example, under a strict labeling approach, every marginal modification to Purdue's RMP and associated product labeling could require a corresponding change to the generic labeling and RMP, with no benefit to the public health and safety. More troubling is the very real prospect that Purdue will pursue a series of modifications that are designed to make it difficult or impossible for generic applicants to precisely match its program related labeling. In fact, one such strategy was recently attempted in connection with a patient support program for OTC Nicorette gum, in which the NDA sponsor claimed copyright protection over a patient video and objected to FDA-mandated use of similar materials by generic applicants. Although that dispute was resolved by the court on the basis that the FDCA's same-labeling requirement trumps copyright claims for FDA-required labeling, *see Smithkline Beecham Consumer Healthcare v. Watson Pharmaceuticals*, 211 F.3d 21 (2d Cir. 2000), the recent history of branded company strategies under Hatch-Waxman leave no room to doubt that newer more creative efforts to inappropriately delay generic competition will be attempted if FDA does not provide generic applicants with reasonable and appropriate flexibility in meeting the same labeling requirement with respect to labeling related to optional RMPs.

In any event, as discussed above, the need for any such generic RMP-related labeling is at this time premature, and accordingly the Petition must be denied.

III. Teva is Developing its Own Voluntary RMP, But its ANDA Approval May Not be Delayed on the Basis That Teva's RMP is Not Yet in Effect

As noted above, in cooperation with FDA Teva is actively and expeditiously developing its own RMP for its oxycodone product. However, as discussed below, the fact that this program, and associated labeling, is not yet finalized and implemented, cannot operate to delay approval of Teva's ANDA for a generic version of OxyContin. Specifically, FDA regulations governing Stay Petitions provide separate mandatory and discretionary criteria for granting a

requested stay, *see* 21 C.F.R. § 10.35(e), but Purdue’s Petition fails to meet all necessary criteria for either a mandatory or discretionary stay.

A. *The Petition Fails to Meet the Standards for a Mandatory Stay*

In order for a stay to be *required*, a Stay Petition must demonstrate that “all of the following apply:

- (1) The petitioner will otherwise suffer irreparable injury.
- (2) The petitioner’s case is not frivolous and is being pursued in good faith.
- (3) The petitioner has demonstrated sound public policy grounds supporting the stay.
- (4) The delay resulting from the stay is not outweighed by public health or other public interests.”

21 C.F.R. § 10.35(e); *see also*, Docket No. 2003P-0275/PSA1, FDA Denial of Stay Petition of Allergan Requesting Reclassification of Restasis as a Non-Antibiotic Drug, at 46 (December 18, 2003) (“Restasis Petition Response”) (“FDA will grant a stay only when *all* the provisions set forth in 21 C.F.R. § 10.35(e)(1)-(4) have been satisfied.”) (emphasis in original).

No Irreparable Injury. Purdue manifestly cannot meet the “irreparable injury” criteria, because approval of generic versions of OxyContin would at most create price competition (in the public interest) and it is a well established equitable principle that mere monetary losses due to competition do not constitute “irreparable injury.” *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (“The key word in this consideration is irreparable. Mere injuries, however, substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.”) (quoting *Virginia Petroleum Jobbers Ass’n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Not surprisingly, Purdue has made no serious effort to argue that it would be irreparably harmed without a stay. Its sole argument to that effect – that absence of a stay will increase abuse, *and* that Purdue will be blamed for such abuse, *and* thereby suffer “reputational injury,” Petition at 11 – is simply too speculative to support a claim of irreparable injury. Indeed, this argument has been rejected by several courts in Hatch-Waxman related cases. *See Zeneca v. Shalala*, 1999 U.S. Dist. LEXIS 2664 (D. Md., March 4, 1999) at *5-*6. As the *Zeneca* court held:

The Court finds Zeneca's reasoning untenable....Zeneca's theory of harm relies on an attenuated string of contingent events. First, the patient or physician involved in an adverse reaction incident would have to confuse Genesia's generic product with Zeneca's non-generic product. Next, this incident would need to generate significant publicity without, at the same

time, creating enough interest in the incident that the confusion as to product identity would be clarified. Zeneca's theory of harm also assumes that Zeneca, despite its significant resources, would be unable to dispel any confusion that might occur....

This same tenuous argument was also raised and rejected by the court in *Somerset Pharmaceuticals, Inc. v. Shalala*, 973 F. Supp. 443 (D. Del. 1997). The plaintiff in *Somerset* argued, like Zeneca, that it would suffer irreparable harm to its reputation if patients are injured by bioinequivalent generics which are mistaken for [the plaintiff's pioneer product]. In rejecting this theory, the court noted, "if some confusion were to occur, plaintiff has the tools that any manufacturer would have at its disposal to establish its product uniquely in the minds of consumers and their doctors." 973 F. Supp. at 455.

The lack of any possible irreparable harm to Purdue is in itself is sufficient to preclude the issuance of a stay under the mandatory prong of section 10.35(e).

The Petition is Frivolous and Brought in Bad Faith. Moreover, for the reasons described above (concerning Purdue's reported contribution to OxyContin abuse, and the lack of a statutory basis to require generic products to match unapproved reference drug labeling), Purdue's Petition is in fact frivolous and has been brought in bad faith. Further evidence of Purdue's bad faith in this matter is the fact that just one day before the filing of the Petition, Purdue lost a pivotal court decision holding that three of Purdue's Orange Book-listed patents are unenforceable due to Purdue's inequitable conduct, thus exposing Purdue to a much more imminent risk of generic competition. As noted above, Purdue's efforts to address OxyContin abuse and diversion appear to have been almost entirely reactive, coming only under pressure from governmental agencies. Now, just one day after losing this key patent case, Purdue suddenly takes a proactive stance by filing a stay petition cloaked in arguments of public safety, but which would only serve to delay generic competition. Purdue's timing reeks of hypocrisy and bad faith.

No Sound Public Policy Grounds For a Stay. Although Purdue raises arguments supporting the public policy grounds for implementing risk management programs, those arguments do nothing to demonstrate that the requested *stay* itself is supported by sound public policy considerations. Indeed, as Teva has made abundantly clear in these comments, its generic oxycodone product will be subject to a voluntary RMP and will include appropriate RMP-related labeling, as soon as FDA provides workable guidance with respect to Teva's program, or RMPs in general. Given that Purdue's own RMP is, at best, still in its formative stages, and that no RMP-related labeling changes have been approved for OxyContin, the public interest status quo will not be materially altered by immediate ANDA approvals, with amendments forthcoming to address FDA's pending guidance on RMPs. Indeed, given that generic sponsors almost never advertise or promote their products directly to physicians or patients, the advent of generic competition for OxyContin, even without immediate RMP related materials, will likely improve the abuse and diversion environment.

Other Public Policy Concerns Outweigh a Stay. Finally, Purdue makes no effort to explain why and how the delay imposed by its requested stay would outweigh the strong public interest in the earlier availability of lower cost competing generic versions of OxyContin. *See* Restasis Petition at 46 (“the public health and public interest is served by the possibility of having a safe and effective generic...drug product.”). Here, a stay simply does not outweigh the benefits of timely generic competition.

B. *The Petition Fails to Meet the Standards for a Discretionary Stay*

Where, as here, a Petitioner fails to meet all four criteria for mandatory issuance of a stay, FDA can still grant a stay in its discretion, but only where a stay:

1. “is in the public interest and”
2. “[is] in the interest of justice.”

21 C.F.R. § 1035(c). Purdue has not even argued that a discretionary stay is appropriate, but even if it had so argued, its petition would fail to meet either of these criteria.

A Stay is Not in The Public Interest. Teva agrees that risk management programs, *in principle*, can be in the public interest, and that certain risk management efforts are currently appropriate for oxycodone sustained release ANDA sponsors, to further address OxyContin abuse and diversion. It is for these reasons that Teva is cooperating with FDA to voluntarily implement its own RMP for its oxycodone product. However, for the reasons set forth in connection with Purdue’s failure to meet the “sound public policy” standard for a mandatory stay, it would also not be in the public interest to grant a discretionary stay.

Moreover, a discretionary stay pending final implementation of generic RMPs would not further the public interest in reducing abuse and diversion of OxyContin and generic equivalents, because it is far from clear that Purdue’s own RMP has even yet been put into operation. When a licensed pharmacist recently sought to obtain details of, and requested to participate in, Purdue’s RMP, Purdue’s Medical Services Department representative informed the pharmacist that Purdue currently has no risk management program for OxyContin. Purdue’s insistence on full implementation of voluntary generic RMPs as a condition of approval, when Purdue’s own program has yet to be fully launched, further reflects the lack of good faith behind the Petition, and shows that denying the stay and granting prompt final approval for pending oxycodone ANDAs (which FDA is obligated to do) will not be against the public interest.

A Stay is Not in the Interest of Justice. As noted above, Purdue’s petition is without merit and has been brought in bad faith, and must therefore be rejected. Purdue’s petition is based on an RMP (necessitated by Purdue’s own actions) which has yet to be meaningfully implemented, and labeling changes that are not yet approved. Moreover, Purdue waited until the proverbial 11th hour to submit its Stay Petition, with the stated purpose of delaying generic

competition. Such a result is not in the interest of justice because it would allow Purdue to benefit – by way of additional *de-facto* exclusivity against generic competition – from remedial measures against abuse and diversion, when Purdue itself reportedly shares a substantial degree of blame for these problems. As a regulatory stay under the discretionary stay prong of FDA’s regulations is inherently an equitable remedy, the familiar equitable principle that “he who requests equity must do equity” – i.e., the “unclean hands” doctrine – applies here, and it must be applied by denying Purdue’s requested stay.

**IV. FDA Must Grant Final Approval to Teva’s ANDA
On February 6, 2004 When the 30-Month Approval Stay Expires**

The only regulatory or legal barrier to final approval of Teva’s ANDA for oxycodone extended release tablets (80 mg) is the 30-month stay of approval imposed when Purdue filed a patent infringement lawsuit in response to Teva’s Paragraph IV Certifications with respect to U.S. Patents Nos. 5,549,912, 5,508,042, and 5,656,295. That 30-month stay expires on February 6, 2004. It is Teva’s expectation that it will receive final ANDA approval promptly upon expiration of that stay, even if FDA’s decision on Purdue’s stay petition is still pending. Indeed, FDA is legally prohibited from discontinuing its final review of Teva’s ANDA, or delaying Teva’s final approval, based on the pendency of the petition, under 21 C.F.R. § 10.35(d), which provides that

Neither the filing of a petition for a stay of action nor action taken by an interested person in accordance with any other administrative procedure...will stay or otherwise delay any administrative action by the Commissioner, including enforcement action of any kind, unless one of the following applies:

- (1) The Commissioner determines that a stay or delay is in the public interest and stays the action.
- (2) A statute requires that the matter be stayed.
- (3) A court orders that the matter be stayed.

21 C.F.R. § 10.35(d) (emphasis added).

Teva is concerned that OGD may have put aside the review of Teva’s ANDA based on the filing of the Stay Petition, and/or the pendency of Purdue’s patent infringement lawsuit against Teva. Please be advised that the 30-month stay will expire on February 6, 2004, and that Teva hereby requests and expects that all administrative reviews will be completed before that date, and that final approval will be immediately forthcoming on February 6. We urge the Agency to take all necessary steps to assure issuance of final approval on that date.

CONCLUSION

Teva appreciates FDA's concern about oxycodone abuse and diversion, and looks forward to working with the Agency to rapidly develop and implement an appropriate risk management program for Teva's product. Teva also appreciates the Agency's sense of urgency in reviewing and ruling on Purdue's petition expeditiously. As demonstrated herein, FDA has no choice but to deny the petition. Moreover, even if FDA has not yet formally responded to the Petition, FDA must grant final approval to Teva's ANDA on February 6, 2004, when the only applicable 30-month stay of approval expires.

Respectfully submitted,



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