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**Comments Opposing Citizen Petition Filed On Behalf
of Abbott Laboratories and Laboratories Fournier SA
Docket No. 2004P-0386/CP1**

Reliant Pharmaceuticals, Inc. ("Reliant") submits these comments in opposition to the Citizen Petition filed on behalf of Abbott Laboratories and Laboratoires Fournier SA (hereinafter collectively "Abbott") on August 31, 2004.

Abbott, in an eleventh hour attempt to block competition, has filed this Citizen Petition for the express purpose of delaying approval of Reliant's fenofibrate products (NDA No. 21-695).¹ In its fenofibrate 505(b)(2) application, Reliant properly certified to the one patent listed in the Orange Book for the only NDA which it references and which contains investigations on which it seeks to rely – NDA No. 19-304. Abbott nevertheless contends that Reliant is also required to certify to the patents identified in the Orange Book for NDA No. 21-203 – an application on which Reliant *does not* rely,

¹ The Prescription Drug User Fee Act (PDUFA) action date for NDA No. 21-695 is October 4, 2004.

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has not referenced in any way in its Section 505(b)(2) application, and which covers fenofibrate products that have different dosage forms and strengths from the Reliant fenofibrate products.

Abbott's arguments, taken to their logical conclusion, would require Reliant to certify to any patent claiming the composition or formulation of any approved drug product containing the drug substance fenofibrate. Under this absurd theory, Abbott would potentially be entitled to a 30-month stay of approval of Reliant's application and any other 505(b)(2) application (or ANDA) for any drug product containing fenofibrate, even though the drug substance fenofibrate has been in the public domain for more than ten years and ANDAs for generic versions of the reference listed drug have been approved. Such perpetual evergreening is directly contrary to both the spirit and the letter of the Hatch-Waxman Amendments and FDA's regulations.

I. Abbott's Petition Is An Unjustified And Blatant Attempt To Use The Citizen Petition Process To Inappropriately Delay Competition

The timing of Abbott's Citizen Petition makes it apparent that it is an archetypical example of an inappropriate citizen petition. On February 18, 2004, Reliant notified Abbott that it had submitted a 505(b)(2) application for micronized fenofibrate capsules that cited as its reference listed drug Abbott's discontinued micronized fenofibrate 200 mg capsules that were the subject of NDA No. 19-304. Reliant's application included a Paragraph IV certification with respect to U.S. Patent No. 4,895,726 (the "'726 patent"), which is the only patent listed in the Orange Book for NDA No. 19-304. Despite this notice, Abbott did not file its Citizen Petition with the Agency until August 31, 2004 – over six months later and only five weeks prior to the PDUFA action date.

Abbott's sole objective is to delay approval of the Reliant products and obtain an automatic 30-month stay to which it is not entitled. Contrary to the goal of resolving patent disputes while the FDA approval process is ongoing, disingenuously cited by Abbott on page 8 of its Citizen Petition, Abbott is not seeking the timely resolution of patent infringement issues. Indeed, Abbott did not bring an infringement action after receiving Reliant's notice on February 18, 2004. Even more remarkably, Abbott has sought to dismiss a patent declaratory judgment action filed by Reliant on June 1, 2004 to declare the patents listed in the Orange Book for NDA No. 21-203 invalid, unenforceable, and not infringed by the products that are the subject of Reliant's pending 505(b)(2) application – NDA No. 21-695.² Abbott's Petition is thus a transparent, blatant, and unjustified attempt to use the citizen petition process to prevent competition in the marketplace by delaying approval of Reliant's fenofibrate products.

II. Abbott's Position Is Patently Absurd And Contrary To Both The Intent Of Congress And FDA's Consistent Policy

The position set forth by Abbott in its Citizen Petition is patently absurd and clearly contrary to both the intent of Congress and FDA's consistent policy under the Hatch-Waxman Amendments. In its 505(b)(2) application, Reliant properly certified to the only patent which claims the drug for which and on which the investigations on which Reliant relies were conducted – the '726 patent.

Section 505(b)(2) of the statute describes the certification requirement as follows:

² Abbott's motion to dismiss is based on an erroneous interpretation of the statute that is similar to the flawed interpretation advocated in its Citizen Petition. *See* Opening Brief in Support of Defendants' Motion to Dismiss the Complaint, filed in *Reliant Pharmaceuticals, Inc. v. Abbott Laboratories and Laboratories Fournier*, Civ. No. 04-350 (D.Del. July 30, 2004).

(2) An application submitted . . . for a drug for which the investigations . . . relied upon by the applicant for approval of the application were not conducted by or for the applicant and for which the applicant has not obtained a right of reference or use from the person by or for whom the investigations were conducted shall also include—

(A) a certification, in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the drug for which such investigations were conducted or which claims a use for such drug for which the applicant is seeking approval under this subsection and for which information is required to be filed under paragraph (1) or subsection (c).

21 U.S.C. § 355(b)(2) (emphasis supplied).

FDA's regulations state:

A 505(b)(2) application is required to contain the following: . . . a certification with respect to each patent issued by the United States Patent and Trademark Office that, in the opinion of the applicant and to the best of its knowledge, claims a drug (the drug product or drug substance that is a component of the drug product) on which investigations that are relied upon by the applicant for approval of its application were conducted or that claims an approved use for such drug and for which information is required to be filed under section 505(b) and (c) of the act and § 314.53.

21 C.F.R. § 314.50(i)(1)(i)(A) (emphasis supplied). FDA's regulations further provide that the certification requirement applies to those patents identified in the Orange Book for the listed drug on which the 505(b)(2) application relies, as well as other drugs³ involved in the investigations upon which the 505(b)(2) applicant relies:

³ A 505(b)(2) application might rely on more than one listed drug as well as on a drug that is not listed if, for example, it sought approval for a combination product containing an active ingredient in a listed drug (e.g., fenofibrate) and another active ingredient contained in a separate listed drug or an old drug not approved under section 505(b) and therefore not listed in the Orange Book. *See Approved Drug Products with Therapeutic Equivalence Evaluations*, 24th Edition (“Drugs on the market approved only on the basis of safety (covered by the ongoing Drug Efficacy Study Implementation [DESI] review [e.g., Donnatal® Tablets and Librax® Capsules] or pre-1938 drugs [e.g., Phenobarbital Tablets]) are not included in this publication”). In this case, Reliant relies

(1) The applicant shall submit a complete archival copy of the application that contains the following:

(vi) Any patent certification or statement required under section 505(b)(2) of the act with respect to any relevant patents that claim the listed drug or that claim any other drugs on which investigations relied on by the applicant for approval of the application were conducted, or that claim a use for the listed or other drug.

21 C.F.R. § 314.54(a)(1)(vi) (emphasis supplied). In a recent comprehensive analysis of the 505(b)(2) provisions, which Abbott appears to completely ignore, FDA further stated that “the statute requires that 505(b)(2) and ANDA applicants certify whether the proposed products may infringe the patents on the listed drugs they reference in their applications.” Consolidated FDA Response to Citizen Petitions, Docket Nos. 2001P-0323, 2002P-0447, and 2003P-0408 (Oct. 14, 2003) at 5 (hereinafter “Consolidated Response”) (emphasis supplied).⁴

The plain language of the statute and of FDA’s long-standing interpretations demonstrate Abbott’s theories are simply erroneous. In an obvious attempt to avoid the plain language, Abbott, in its Citizen Petition, concocts several rewrites of the applicable statutory provisions:

on data for only one other drug product – that approved under NDA No. 19-304 – and thus the reference to “other drugs” in 21 C.F.R. § 314.54(a)(1)(vi) is not applicable here.

⁴ This summer, FDA successfully defended its interpretation of the 505(b)(2) certification requirements. Although the controversy involved different facts, FDA’s brief nevertheless explained, “The FDCA also requires . . . § 355(b)(2) NDA applicants to certify whether their proposed products may infringe the patents on the listed drugs they reference in their applications.” *See Memorandum in Opposition to Plaintiffs’ Motion for a Temporary Restraining Order And A Preliminary Injunction, in King Pharmaceuticals, Inc., et al. v. FDA, et al.*, (D.D.C. No. 1:04cv01058 (RBW) (July 1, 2004).

- “Reliant was required ... to certify as to all patents properly listed for any drug previously approved on the basis of the investigations on which NDA 21-695 relies.”
- “Equally plainly, the drugs for which investigations are conducted are formulations and components and also future formulations whose approval the investigations may support.” (emphasis in original)
- “Such studies were performed ‘for’ any dosage form that the sponsor or a licensee may ultimately market.”
- “Here, the studies on which Reliant relies were conducted by or for Abbott and are scientifically relevant to both Abbott’s NDA 19-304 and its NDA 21-203.”
- “Plainly, an innovator applicant conducts safety and effectiveness investigations of a drug substance as support for each dosage form of the drug it may ultimately develop.”

Each of these assertions represents a desperate effort on the part of Abbott to amend the applicable statutory provisions and subvert both Congressional intent and FDA’s consistent policies.

Were Abbott’s fanciful attempt to expand the certification requirement accepted, a 505(b)(2) applicant would be required to certify to the patents listed in the Orange Book for the reference listed drug *and* to patents listed for any other approved drug product that itself relied in any way on the investigations relied upon by the 505(b)(2) applicant. This could include variations on the reference listed drug developed by the originator company, as well as other drug products introduced by other companies. For example,

Abbott could grant a right of reference to the original fenofibrate studies submitted in support of NDA No. 19-304 to a company seeking to market a combination containing fenofibrate and a statin. Because the investigations “support” the approval of this hypothetical combination product, Reliant would be required to certify to the patents listed in the Orange Book for the combination product. How an applicant such as Reliant would discern which approved products relied upon the investigations in question, and therefore which patents are subject to certification, Abbott does not say. Nothing in the statute, FDA’s regulations, or FDA’s implementation of section 505(b)(2) even remotely suggests that the certification process was to be the guessing game that would result if Abbott’s theory were reality.

Instead, as set forth above, the statute requires a 505(b)(2) applicant to certify to “each patent which claims the drug for which such investigations were conducted” and FDA’s regulations require certification to each patent which claims the “drug ... on which [the] investigations ... were conducted.” Once the listed drug – the drug product on which investigations that are relied upon by the applicant for approval of its application were conducted – is identified, the scope of this certification requirement is clear. Because the Orange Book identifies, for each listed drug product, the drug substance (active ingredient) patents, drug product (formulation and composition) patents, and method-of-use patents that claim the approved drug product, a 505(b)(2) applicant need only consult the Orange Book patent listings for the listed drug upon which it relies to identify those patents that claim the drug “for which” and “on which” investigations that are relied upon by the applicant for approval of its application were conducted, and therefore to which the applicant must certify.

Reliant's 505(b)(2) application seeks approval to market 43 mg, 87 mg, and 130 mg fenofibrate capsule products, the same dosage form, but not the same strength, as the products approved under NDA No. 19-304.⁵ Reliant's application contains data from studies establishing that Reliant's proposed products are bioequivalent to the drug products approved under NDA No. 19-304. Because the products in the bioequivalence study supporting Reliant's application are those approved under NDA No. 19-304, Reliant referenced these products as the listed drugs on which it relies. Further, as Abbott points out, the clinical studies conducted by or for Abbott on which Reliant relies were performed using the never-marketed 100 mg capsules that were approved under NDA No. 19-304.

Thus, it is this product – the 100 mg capsules approved under NDA No. 19-304 – “for which” and “on which” the studies were performed. Reliant therefore included in its application a certification to the one patent identified in the Orange Book for NDA No. 19-304 – the ‘726 Patent. The ‘726 patent is the only patent which claims the drug for which and on which the investigations on which Reliant relies were conducted. Importantly, there are no outstanding patents covering fenofibrate, the drug substance at issue here.⁶ Further, the only listed drugs referenced by Reliant in its application were

⁵ Significantly, the Reliant products are neither the same strength nor the same dosage form as the Abbott products approved under NDA No. 21-203. Thus, they are not, as Abbott acknowledges, pharmaceutical equivalents of the products covered by NDA No. 21-203 or NDA No. 19-304. *See* Draft Guidance For Industry: Applications Covered By Section 505(b)(2) (Oct. 1999) (“If there is a listed drug that is the pharmaceutical equivalent to the drug proposed in the 505(b)(2) application, that drug should be identified as the listed drug”).

⁶ *See* U.S. Patent Nos. 3,795,691 and 3,759,950 (expired March 6, 1991 and September 19, 1990, respectively).

those drugs approved under NDA No. 19-304. Contrary to Abbott's obvious redrafting of the statutory language, an investigation simply cannot be conducted "for" or "on" a future product that does not yet exist. Further, the fact that a study is "scientifically relevant" to another application does not, under the statute or regulations, require certification to the patents listed for that other application. Based on both the clear statutory language quoted above and FDA's long-standing interpretation of the statutory language, it is clear that Reliant was required to certify only to the '726 patent.

Consistent with the statutory language and FDA's longstanding interpretation, the Agency has approved ANDAs for generic versions of the products approved under NDA No. 19-304 without requiring the generic applicants to certify to the patents listed for the drug products covered by NDA No. 21-203. *See, e.g.*, Letter to Teva Pharmaceuticals USA, U.S. Agent for Novopharm (April 9, 2002) (approving ANDA for 134 mg and 200 mg fenofibrate capsules and noting the ANDA contained a certification to the '726 patent). This, of course, would not be possible if, as Abbott suggests, the FDA interpreted the certification requirement to apply to any patent related to fenofibrate.⁷

Although Abbott does not mention the approved capsule ANDAs in its Citizen Petition, it does make much of the fact that other ANDA applicants seeking approval to

⁷ FDA interprets the certification requirements applicable to both ANDAs and 505(b)(2) applications in the same manner. *See* 54 Fed. Reg. 28872, 28875 (July 10, 1989) (The Hatch-Waxman amendments "impose on a 505(b)(2) applicant additional requirements with respect to patent certification, notification of such certification to the patent owner, and exclusivity that are generally the same as those that apply to ANDA's"); Consolidated Response at 7 (describing ANDA and 505(b)(2) certification requirements as the same). Abbott's position, if accepted by FDA, would result in a patent certification process for 505(b)(2) applications that is substantially different from that for ANDAs.

market generic versions of the tablet products approved under NDA No. 21-203 and one other 505(b)(2) applicant (Cipher⁸) have certified to the patents listed for NDA No. 21-203. Presumably, these other applications rely on data submitted for the fenofibrate tablets approved under NDA No. 21-203 or reference these products as the listed drugs, and thus their sponsors determined that they were required to include certifications to the patents listed in the Orange Book for this NDA. The fact that others have relied on data in Abbott's tablet product NDA simply does not speak to Reliant's certification obligations for a different product that relies, not on data in NDA No. 21-203, but rather, on data in NDA No. 19-304.

In sum, FDA has consistently required applicants such as Reliant to certify to those patents listed in the Orange Book for the listed drug on which the application relies and for pharmaceutical equivalents to the drug products subject to the applications (if any). Reliant has done so in this case. Reliant submitted its 505(b)(2) application in October 2003. FDA's regulations permit the Agency to refuse to file an application if it does not contain the information, including patent certifications, required under section 505(b) of the Act and section 314.50 of the Agency's regulations. 21 C.F.R. § 314.101(d)(3). Yet, instead of objecting to Reliant's application as incomplete, FDA

⁸ In describing the Cipher 505(b)(2) application, Abbott conveniently omits mention of the one strength that is identical to the Abbott products approved under NDA No. 21-203 (160 mg) and the fact that the Cipher application contained data from a bioequivalence study in which Cipher compared its 160 mg strength to Abbott's 160 mg strength that was approved under NDA No. 21-203. This is presumably the basis on which Cipher concluded that it was required to certify to the patents listed for NDA No. 21-203. That Cipher so concluded is irrelevant to Reliant's certification obligations for different products.

accepted it for filing in February 2004. No objections have been raised because there are no credible objections. Reliant's application is complete and contains a certification to the only patent to which Reliant is required to certify under the statute and FDA's implementing regulations.

As explained above, Abbott's position that Reliant should have certified to the patents listed for NDA No. 21-203 is absurd.⁹ Taking Abbott's argument to its logical conclusion, Reliant would be required to certify to any patent claiming the composition or formulation of any approved drug product containing the drug substance fenofibrate. Under this theory, Abbott could constantly seek to obtain new composition patents and NDA or supplemental approvals for new fenofibrate-containing single-entity and/or combination products¹⁰ and thereby require any 505(b)(2) applicant who seeks to market a fenofibrate product relying on the previously approved NDAs to certify to these new patents and potentially be subject to an automatic 30-month stay even though: (a) the products covered by the new applications are, at most, pharmaceutical alternatives to the

⁹ Abbott attempts to rely upon *Marion Merrell Dow, Inc. v. Hoechst-Roussel Pharms., Inc.*, Civ. No. 93-5074, 1994 WL 424207 (D.N.J. May 5, 1994), reprinted at 32 U.S.P.Q.2d (BNA) 1156, a decade-old unpublished district court decision, in support of their position that Reliant must certify to any patent related in any way to fenofibrate. That case has no precedential value and is factually distinguishable. First, the *MMD* case was decided before FDA issued its final rule implementing the patent certification requirements. Moreover, unlike the situation in this case, Hoechst-Roussel cited a listed drug in a different dosage form (immediate release), even though there was another listed diltiazem product in the same dosage form (sustained release), *i.e.*, the pharmaceutical equivalent, as Hoechst-Roussel's proposed product. Here, in contrast, there can be no credible claim that Reliant has cited the wrong reference listed drug.

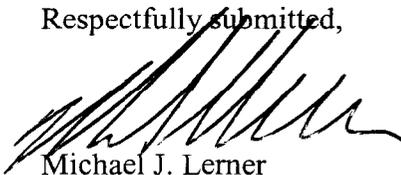
¹⁰ We understand that Abbott is planning to introduce at least one new formulation of Tricor in the "not too distant future." See *Abbott Pinning Tricor Growth on Improved Formulation, Combination Use*, "The Pink Sheet", Vol. 66, No. 025, p. 37 (June 21, 2004), attached as Exhibit 1.

previously approved Abbott products, and (b) the drug substance fenofibrate has been in the public domain for more than ten years. Such perpetual evergreening is directly contrary to both the spirit and the letter of the Hatch-Waxman Amendments and FDA's regulations.

Conclusion

Based on the foregoing, the undersigned oppose the Abbott Citizen Petition and respectfully request that FDA deny the relief sought by Abbott.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael J. Lerner", is written over the typed name.

Michael J. Lerner
Vice President Legal Affairs