



Eon Labs
The Pharmacy Drug Company

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Via Courier

17 Dec. 2004

Dockets Management Branch (HFA-305)
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Re: Docket No. 2004P-0520 (180-Day Exclusivity For
Ipratropium Bromide And Albuterol Sulfate Inhalation Solution)

Dear Sir or Madam:

Eon Labs, Inc. (Eon) submits this comment to oppose the relief requested by IVAX Pharmaceuticals, Inc. (IVAX) in its 19 Nov. 2004 citizen petition.

A. INTRODUCTION

For purposes of this comment, Eon adopts the following timeline, which serves as the factual basis for IVAX's petition:

- 22 April 2003 – IVAX ANDA, with out a Paragraph IV certification is received by FDA (subsequently accepted for substantive review).
- 14 Oct. 2003 – U.S. Patent No. 6,632,842 B2 is issued.
- 06 Nov. 2003 – The '842 patent is listed in the Orange Book.¹

¹ Dey, L.P.'s 30 Aug. 2004 amendment to its citizen petition (Docket No. 2004P-0324) states that the patent was listed on 14 Oct. 2003. This discrepancy in Orange Book listing dates is immaterial for the issues posed by IVAX's citizen petition.

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- 28 Nov. 2003 – Eon’s *original* ANDA containing a Paragraph IV certification to the ‘842 patent is received by FDA.
- 09 Dec. 2003 – IVAX *amends* its pending ANDA by submitting a Paragraph IV certification to the ‘842 patent and provides notice to Dey, L.P. (Dey).
- FDA determines that Eon’s ANDA is acceptable for substantive review and notifies Eon.
- Eon timely sends notice of its Paragraph IV certification within 20 days of the postmark date of the FDA letter accepting Eon’s ANDA for review.
- 20 Jan. 2004 – Dey receives Eon’s written notice of its Paragraph IV certification to the ‘842 patent.

The crux of IVAX’s petition is that it is entitled to 180-day exclusivity because it was the first ANDA sponsor to accomplish both of the following: submit a Paragraph IV certification for the ‘842 patent and provide actual notice of that certification to the NDA sponsor and patent holder. Under the assumed facts, there is no question that IVAX accomplished both of those events before Eon accomplished both events. But that is immaterial, because IVAX’s petition is based on a faulty fundamental premise: that the priority date for 180-day exclusivity purposes is determined in the same way for an amendment of a pending ANDA (like IVAX’s) to include a Paragraph IV certification to a newly listed patent, versus the submission of an original ANDA (like Eon’s) that includes a Paragraph IV certification. FDA has always drawn a distinction in this area, and it was not changed in any way by the 08 Dec. 2003 enactment of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. 108-173. This distinction is fatal to the relief IVAX seeks.²

² We note that IVAX is inconsistent in how it characterizes the relief it seeks. At page 1, note 1 of its petition, IVAX states that it does not seek a determination that it is entitled to 180-day exclusivity, only confirmation of the standard that FDA will use to determine whether IVAX is entitled to exclusivity.

B. DISCUSSION

B.1. Prior To The MMA: Differences In FDA Treatment Of Paragraph IV Notices – Original ANDAs Versus Amended ANDAs

We start with an examination of FDA's policies and interpretations before the 08 Dec. 2003 enactment of the MMA. Under prior law, an ANDA sponsor that amended its pending ANDA to include a new Paragraph IV certification was required to give notice to the NDA sponsor and patent holder "when the amended application is submitted." Former 21 U.S.C. section 355(j)(2)(B)(iii).

In comparison, an original ANDA sponsor that included a Paragraph IV certification only had to state in the application that it "will give" notice to the NDA sponsor and patent holder. Former 21 U.S.C. § 355(j)(2)(B)(i).

FDA's regulations did not specifically address how FDA determined the relevant priority dates for 180-day exclusivity purposes. It was, however, FDA's longstanding interpretation of the statute and its regulations that, for an original Paragraph IV ANDA that is subsequently accepted for substantive review, the priority date was the *effective filing date of the original ANDA submission*; the date on which actual notice was sent was irrelevant. See Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, 08 Nov. 2003, at 31, in *Purepac Pharmaceutical Co. v. Thompson*, No. 03-2210 (TPJ) (D.D.C.) ("Thus, unlike ANDA amendments, the date of notice is not a factor in determining the effective date of an original ANDA's submission to FDA.") (Enclosure A).³

But the remainder of the petition is devoted to arguments as to why IVAX is in fact ostensibly entitled to 180-day exclusivity. IVAX's motive is transparent.

³ In comparison, the priority date for 180-day exclusivity purposes was determined differently when a pending ANDA was amended to include a new Paragraph IV certification. If the sponsor of a pending ANDA amended its application to include a new Paragraph IV certification but did not satisfy the statutory requirement for simultaneous amendment and notice, that sponsor's priority date would have been the date on which notice was actually sent. *Id.* at 19-24; see *TorPharm, Inc. v. Thompson*, 260 F. Supp.2d 69, 80 (D.D.C. 2003),

Indeed, IVAX is well aware of FDA's longstanding interpretation, as it was a party in the *Purepac* litigation, where it intervened as a defendant in support of FDA's position. See Intervenor-Defendant IVAX Pharmaceuticals, Inc.'s Memorandum of Points and Authorities in Opposition to Plaintiff Purepac Pharmaceutical Co.'s Motion for Preliminary Injunction, 08 Nov. 2003, at 23 ("FDA's implementing regulations make clear that the ultimate giving of notice for an original NADA filer is irrelevant for purposes of whether the original ANDA was complete when filed.") (Enclosure B). IVAX ought to be estopped in asserting otherwise.

In *Purepac*, the central issue was the validity of FDA's interpretation that the date that notice was actually given for a Paragraph IV certification in an original ANDA was irrelevant for 180-day exclusivity priority purposes. Having strenuously supported FDA's position in that litigation, IVAX cannot now argue a different, dramatically opposed position here.⁴

But in a bold leap of faith, IVAX then mischaracterizes FDA's pre-MMA interpretation and contends that FDA's purported interpretation supports its petition:

The pre-MMA approach, permitting enforcement of statutory timeframes for notice through eligibility for 180-day exclusivity, remains a reasonable approach and provides the most a [sic] reasonable basis for enforcing the new MMA notice provisions.

IVAX petition at 5. Eon Labs agrees with the quoted language when it is taken at face value. IVAX's error here is that FDA's pre-MMA interpretation, discussed above, does not in any way support the relief that it seeks.

affirmed, Purepac Pharmaceutical Co. v. Thompson, 354 F.3d 877, 888-89 (D.C. Cir. 2004). Here, there is no dispute about IVAX's priority date, as IVAX complied with the statutory requirement of simultaneous ANDA amendment and notice of the Paragraph IV certification.

⁴ The *Purepac* case was dismissed by agreement of all the parties before a judicial decision on a pending motion for preliminary injunction.

B.2. After Passage Of The MMA: Changes To Notice Requirements Do Not Affect 180-Day Exclusivity Priority Dates

We turn next to the MMA, which made some changes to the notice of Paragraph IV certification requirements. With regard to the amendment of a pending ANDA to include a new Paragraph IV certification, the revised statutory provision maintains the prior requirement for simultaneous amendment and notice, but uses somewhat different language (notice to be given “at the time at which the applicant submits the amendment”). 21 U.S.C. § 355(j)(2)(B)(ii)(II). With regard to an original ANDA containing a Paragraph IV certification, notice is to be given “not later than 20 days after the date of the postmark on the notice with which [FDA] informs the applicant that the application has been filed.” 21 U.S.C. § 355(j)(2)(B)(ii)(I). The MMA’s new notice provisions apply retroactively to all Paragraph IV certifications submitted on or after 18 Aug. 2003. MMA, Pub. Law No. 108-173 § 1101(c)(2). Thus, the new notice provisions apply to the ANDAs under discussion.

Indisputably, by adopting different express requirements for the timeliness of notice in the MMA, Congress recognized that the amendment of a pending ANDA to include a Paragraph IV certification, and the submission of an original ANDA with a Paragraph IV certification, are treated differently. Nothing in this language or its legislative history even remotely suggests a Congressional intent to change the longstanding FDA interpretation that the priority date for 180-day exclusivity purposes for a sponsor that submits an original ANDA with a Paragraph IV certification, which ANDA is subsequently accepted for substantive review, is the date of original receipt by FDA. Congress is presumed to have known FDA’s interpretation and could have expressly changed it had it so desired. It did not do so. See, e.g., *Williams Natural Gas Co. v. FERC*, 943 F.2d 1320, 1335 (D.C. Cir. 1991) (and cases cited therein).

B.3. The MMA's 180-Day Exclusivity Forfeiture Provisions: Not Applicable And Not Helpful To IVAX

Next, IVAX tries to bootstrap the MMA's new 180-day exclusivity forfeiture provisions so that they apply here. This effort too is fatally flawed.

As a threshold matter, the new 180-day exclusivity period forfeiture provisions apply only to an ANDA filed after the MMA's enactment date (08 Dec. 2003) for a reference-listed drug for which no Paragraph IV certification was made before December 8, 2003. MMA, Pub. L. No. 101-173, § 1102(b)(1). This should be the end of the inquiry, as Congress expressly provided that the provision on which IVAX tries to rely does not apply to the IVAX and Eon ANDAs (because, at a minimum, Eon's Paragraph IV certification was made and received by FDA before 08 Dec. 2003).

Even if we accept IVAX's argument that the new 180-day forfeiture provisions and the newly added definition of "first applicant" in revised 21 U.S.C. § 355(j)(5)(B)(iv)(II)(bb) are somehow applicable, IVAX's interpretation of this provision is wrong.

"First applicant" for 180-day exclusivity purposes means, in relevant part, the first applicant that submits "a substantially complete application that contains and *lawfully maintains* a [Paragraph IV certification] for the drug." 21 U.S.C. § 355(j)(5)(B)(iv)(II)(bb) (emphasis added). Based on this definition, IVAX argues: "Thus, under the amended statute, the paragraph IV certification is not lawfully maintained for purposes of determining eligibility for exclusivity unless and until the actual-notice requirement is met." IVAX petition at 2. This argument fails.

IVAX's argument assumes that FDA interprets the "lawful maintenance" of a Paragraph IV certification requirement so that notice is necessary for "lawful maintenance."⁵ Under this interpretation, the most straightforward— if not the only plausible — reading is that notice given in accordance with the applicable statutory provision satisfies the "lawful maintenance" requirement. Here, under

⁵ We note that other interpretations are possible.

the assumed facts that serve as basis for this comment, Eon gave timely notice of its Paragraph IV certification, within the 20-day window after the postmark date of the FDA letter notifying Eon that its original Paragraph IV ANDA was accepted for substantive review. Thus, even under IVAX's interpretation of the MMA 180-day exclusivity forfeiture provision, Eon gave timely notice and thereby "lawfully maintain[ed]" its Paragraph IV certification.

B.4. Fundamental Fairness: No Basis For IVAX To Complain

Finally, IVAX contends that an award of 180-day exclusivity to Eon would be "extraordinarily unfair" (IVAX petition at 8) because it would have the functional effect of subjecting IVAX's ANDA to a 30-month delay of final approval (because Eon's 180-day exclusivity would block final approval of IVAX's ANDA, and Eon is subject to a 30-month delay of final approval). Under the assumed facts that serve as the basis for this comment, the events about which IVAX complains (180-day exclusivity for Eon; Eon subject to 30-month delay of final approval) are a direct consequence of the plain language of the Hatch-Waxman Amendments, as amended by the MMA. There is simply no room for any agency "interpretation" to achieve a different result, even if "unfair."

More fundamentally, there is nothing inherently unfair about this scenario. IVAX stalled for over one month from the date that it asserts the '842 patent was listed in the Orange Book (06 Nov. 2003) – and almost two months after the '842 patent issued (14 Oct. 2003) – before amending its ANDA to include a Paragraph IV certification to this patent (09 Dec. 2003). The 180-day exclusivity "reward" goes to the first sponsor to challenge an Orange Book patent, not (as IVAX would like to believe) the first sponsor to submit any ANDA for the reference listed drug. IVAX would have no need to complain about purported unfairness if it had simply amended its pending ANDA to include a Paragraph IV certification and provided notice in a more timely fashion.

C. CONCLUSION

For the reasons discussed, IVAX is not entitled to any of the relief sought. Specifically, IVAX is not entitled to a confirmation that it is entitled to 180-day exclusivity. Nor is it entitled to confirmation that the standard set forth in its petition that FDA should use to determine eligibility for 180-day exclusivity is correct.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Shashank Upadhye". The signature is written in a cursive, flowing style.

Shashank Upadhye, Esq.

Vice President and Counsel