UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEVA PHARMACEUTICAL INDUSTRIES LTD., TEVA NEUROSCIENCE, INC.,	)	Case No. 1:14-cv-786
Plaintiffs,	)	
v.	)	
KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services;	)	
MARGARET HAMBURG, M.D., in her official capacity as Commissioner of Food and Drugs;	)	
UNITED STATES FOOD AND DRUG ADMINISTRATION,	)	
Defendants.	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Federal Defendants hereby move to dismiss this case. The grounds for this motion are stated in the memorandum of points and authorities filed with this motion.

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Dated: May 12, 2014

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FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This case reflects the efforts of plaintiff Teva Pharmaceutical Industries, Ltd. ("Teva") to extend its monopoly for Copaxone (glatiramer acetate injection), a blockbuster multiple sclerosis drug. The Food and Drug Administration ("FDA") has not yet approved any generic products, and Teva does not know if or when, or on what basis, such an approval will occur. In preemptively seeking to eliminate competition by enjoining the Food and Drug Administration ("FDA") from approving a generic drug, Teva asks this Court to review decisions that have not yet been made and to find injury where none exists.

Over the last six years, Teva has filed no less than six citizen petitions with its various legal and scientific assertions and requests, each time making the same demand: that FDA not approve any generic competitor's product without requiring, among other things, a full set of clinical trials. FDA responded each time, repeatedly explaining to Teva that, because Teva's petitions relate to specific issues of approvability, FDA cannot issue a substantive response to the petitions without first completing the scientific analysis necessary to make the approval decision.

FDA's responses to Teva's requests reflect that the agency's scientific evaluations are ongoing and must be completed in the context of generic applications. Teva has no right to a final, merits decision about potential competitors' approvals before FDA's review of their applications is complete. Teva's request that this Court decide whether an abbreviated new drug application ("ANDA") may be approved in the first instance without first meeting Teva's additional "conditions" for approval – conditions above and beyond what Congress has set forth in the statute – is absolutely unprecedented, extrastatutory, and extrajudicial. The agency will take appropriate action to approve any generic applications if and when any such applications are ready for approval, as Congress has mandated, and as FDA does for all other generic drug approvals.

Courts are justifiably reluctant to second guess FDA's scientific determinations, and FDA is not aware of any instance in which a court has overturned an FDA decision approving a generic drug on scientific grounds. Nor has Teva cited any case in which a court has blocked generic approval before it has occurred – much less taken it upon itself to determine the scientific issues bearing upon the approval of an ANDA before the agency itself has done so. But that is precisely what Teva asks this Court to do. This Court should decline Teva's remarkable invitation and dismiss this premature and ill-considered lawsuit.

Not only are Teva's claims unripe and unjusticiable for want of standing, but Teva has not established that it will suffer certain, great, and irreparable injury in the absence of a preliminary injunction. If Teva ever suffers the loss that it claims it will here, such loss will be a small percentage of its multibillion dollar portfolio of generic and brand drugs, and thus would not threaten or even seriously injure the business. And finally, the balance of harms weighs against the entry of preliminary relief because Teva's desire to further delay generic competition does not outweigh FDA's interest in the thoughtful and careful exercise of its generic approval decisions without premature judicial interference.

For these reasons, this Court should dismiss Teva's complaint and deny Teva's motion for a preliminary injunction.

STATUTORY AND REGULATORY BACKGROUND

A. New Drug Applications

Under the Federal Food, Drug, and Cosmetic Act ("FDCA"), pharmaceutical companies seeking to market the initial version of a drug (also known as the "innovator" or "pioneer" drug) must first obtain FDA approval by filing a new drug application ("NDA") containing extensive scientific data demonstrating the safety and effectiveness of the drug. 21 U.S.C. § 355(a), (b). An NDA applicant must also submit information on any patent that claims the drug, or a method of using the drug, for which a claim of patent infringement could reasonably be asserted against an unauthorized party. 21 U.S.C. § 355(b)(1), (c)(2). FDA publishes the patent information it receives in "Approved Drug Products with Therapeutic Equivalence Evaluations" (the "Orange Book"), *available at* http://www.fda.gov/cder/ob/.

B. Abbreviated New Drug Applications

The Drug Price Competition and Patent Term Restoration Act of 1984 (known as the

"Hatch-Waxman Amendments"), codified at 21 U.S.C. § 355 and 35 U.S.C. §§ 156, 271, and 282, permits the submission of abbreviated new drug applications ("ANDAs") for approval of generic versions of approved drug products. 21 U.S.C. § 355(j). ANDA applicants need not submit clinical data to demonstrate the safety and efficacy of their product, as in an NDA. Rather, an ANDA relies on FDA's previous findings that the product approved under the NDA is safe and effective. Specifically, under 21 U.S.C. § 355(j), the agency approves duplicates of "listed" drugs on the basis of chemistry, manufacturing, and bioequivalence data without evidence from literature or clinical data to establish effectiveness and safety. Under these provisions, if an ANDA applicant establishes that its proposed drug product has the same active ingredient, strength, dosage form, route of administration, labeling (with certain permissible differences), and conditions of use as a listed drug, and that it is bioequivalent to that drug, the applicant can satisfy the approval requirements by relying on FDA's previous finding that the listed drug is safe and effective.

1. Same Active Ingredient Requirement

For drugs with only one active ingredient, the ANDA must contain "information to show that the active ingredient of the new drug is the same as that of the listed drug." 21 U.S.C. § 355(j)(2)(A)(ii)(I). If an ANDA applicant demonstrates that it has the same active ingredient as the listed drug (and all other approval requirements are met), FDA must approve that ANDA. 21 U.S.C. § 355(j)(4)(C)(i).

FDA regulations define "same as" to mean "identical in active ingredient(s)." 21 C.F.R. § 314.92(a)(1). In the preamble to this final rule, FDA rejected the suggestion that, to be the same as the listed drug's active ingredient, the ANDA product's active ingredient must "exhibit the same physical and chemical characteristics, that no additional residues or impurities can

result from the different manufacture or synthesis process; and that the stereochemistry characteristics and solid state forms of the drug have not been altered." 57 Fed. Reg. 17,950 at 17958-59 (Apr. 28, 1992). Instead, FDA "will consider an active ingredient to be the same as that of the reference listed drug if it meets the same standards for identity." *Id.* at 17,959. FDA explained that "[i]n most cases, these standards are described in the U.S. Pharmacopeia (U.S.P.). However, in some cases, FDA may prescribe additional standards that are material to the ingredient's sameness." *Id.* Courts accord "a high level of deference" to FDA's determinations of active ingredient sameness. *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998) (upholding FDA decision that ANDA product had "same" active ingredient as listed drug although carbohydrate side chains had not been shown to be identical).

2. Immunogenicity Considerations for an ANDA

FDA has previously considered other ANDA approvals of complex products and reviewed information relevant to whether the ANDA product would present any greater immunogenicity risk than the innovator product. In *Sanofi-Aventis U.S. v. FDA*, 842 F. Supp. 2d 195, 209-10 (D.D.C. 2012), the court upheld FDA's consideration of studies comparing the immunogenicity risk of the innovator and ANDA product. As with all ANDA approvals, the information that FDA may require for approval will vary depending on the nature of the drug.

3. Bioequivalence Requirement

The FDCA requires ANDA sponsors to provide "information to show that the new drug is bioequivalent to the listed drug." 21 U.S.C. § 355(j)(2)(A)(iv). FDA has considerable flexibility to determine how this requirement for establishing bioequivalence can be met. For example, a generic drug is bioequivalent to the brand drug if the following conditions exist:

> . . . the rate and extent of absorption of the drug do not show a significant difference from the rate and extent of absorption of the listed drug when

> administered at the same molar dose of the therapeutic ingredient under similar experimental conditions in either a single dose or multiple doses . . . .[1]

See 21 U.S.C. § 355(j)(8)(B)(i). Different approaches may apply to locally acting, nonsystemically absorbed drug products:

> For a drug that is not intended to be absorbed into the bloodstream, the Secretary may establish alternative scientifically valid methods to show bioequivalence if the alternative methods are expected to detect a significant difference between the drug and the listed drug in safety and therapeutic effect.

21 U.S.C. § 355(j)(8)(C).

FDA's regulations similarly reflect the flexibility that FDA has in choosing the appropriate methods to establish bioequivalence for particular drug products. In 21 C.F.R. § 320.1(e), FDA defines bioequivalence (in part) as:

> . . . the absence of a significant difference in the rate and extent to which the active ingredient or active moiety . . . becomes available at the site of drug action when administered at the same molar dose under similar conditions in an appropriately designed study.

The regulations also make it clear that although in vivo studies may be the preferred approach to demonstrate bioequivalence in many cases, they are not the only permissible one. On the contrary, under the regulations, "bioequivalence may be demonstrated by several in vivo and in vitro methods."[2] The regulations provide the following:

> FDA may require in vivo or in vitro testing, or both, to . . . establish the bioequivalence of specific drug products . . . The selection of the method used to meet an in vivo or in vitro testing requirement depends upon the purpose of the study, the analytical methods available, and the nature of the drug product. Applicants shall conduct bioavailability and bioequivalence testing using the most accurate, sensitive, and reproducible approach available among those set forth in paragraph (b) of this section. The method used must be capable of . . . establishing bioequivalence, as appropriate, for the product being tested.[3]

In 21 C.F.R. § 320.24, FDA describes these methods in general descending order of accuracy, sensitivity, and reproducibility as follows: (1) in vivo pharmacokinetic studies, (2) in

[1] *See also* 21 C.F.R. §§ 320.1(e), 320.23(b).
[2] 21 C.F.R. § 320.24(a).
[3] *Id.*

vivo pharmacodynamic effect studies, (3) comparative clinical endpoint studies, and (4) in vitro studies. In addition, consistent with 21 U.S.C. § 355(j)(8)(C), 21 C.F.R. § 320.24(b)(6) states that FDA has the flexibility to use "[a]ny other approach deemed adequate by FDA to . . . establish bioequivalence." If FDA determines that in vivo studies are appropriate for a product or class of products, FDA regulations provide that applicants may apply for a waiver of such an in vivo study requirement, consistent with 21 C.F.R. § 320.22.[4] Section 320.22 in turn directs that, subject to a "good cause" exception, FDA "shall" waive that in vivo requirement upon a subsequent showing that the individual applicant's product meets certain additional criteria.[5] For example, FDA considers that bioequivalence is "self-evident" for certain products such as parenteral solutions intended solely for administration by injection if the ANDA applicant demonstrates that its individual product from that product class contains the same active and inactive ingredients in the same concentration as the brand drug.

The Agency's authority to make bioequivalence determinations on a case-by-case basis enables FDA to effectuate several long-recognized policies that protect the public health: (1) refraining from unnecessary human research when other methods of demonstrating bioequivalence meet the statutory and regulatory standards; (2) permitting the Agency to use the latest scientific advances in approving drug products; (3) protecting the public by ensuring only safe and effective generic drugs are approved for marketing; and (4) making more safe and effective generic drugs available.

Ultimately, under the statute and regulations, the choice of appropriate bioequivalence study design is based on the ability of the study to compare the drug delivered by the two

[4] *See* 21 C.F.R. § 320.21(f) ("Information to permit FDA to waive the submission of evidence measuring the *in vivo* bioavailability or demonstrating the in vivo bioequivalence shall meet the criteria set forth in § 320.22.").
[5] 21 C.F.R. § 320.22(a).

products at the particular site of action of the drug, and Congress assigned this decision to FDA.[6] Courts have consistently upheld FDA's scientific discretion to determine how the bioequivalence requirement should be met for a given product or class of products.[7]

C. Citizen Petitions to FDA

FDA regulations permit any "interested person" to "petition the Commissioner to issue, amend, or revoke a regulation or order, or to take or refrain from taking any other form of administrative action." 21 C.F.R. § 10.25(a); *see* 21 C.F.R. § 10.30. In 2007, Congress amended the FDCA to add 21 U.S.C. § 355(q) out of concern that citizen petitions were being abused by NDA sponsors in order to delay approval of generic drugs. Section 355(q) applies to citizen petitions that are submitted at a time when an application under 21 U.S.C. § 355(j), 21 U.S.C. § 355(b)(2) (another type of application referencing an innovator product), or 42 U.S.C. § 262(k) (relating to biosimilars) is pending, and the petitioner requests an action that could delay approval of that application. 21 U.S.C. § 355(q)(1)(A). For those petitions, 355(q) provides that FDA must take final agency action on a petition within 150 days after the date the petition is submitted. 21 U.S.C. § 355(q)(1)(F).[8]

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[6] *Schering Corp. v. FDA*, 51 F.3d 390, 399 (3d Cir. 1995) ("there is no evidence that Congress intended to limit the discretion of the FDA in determining when drugs were bioequivalent for the purposes of ANDA approval"); *Bristol-Myers Squibb v. Shalala*, 923 F. Supp. 212, 217 (D.D.C. 1996) ("the expressed desire of Congress, through the 1984 amendments, was that FDA retain its historically wide discretion in defining showings of bioequivalence") (internal citation and quotation omitted).

[7] *Schering Corp.*, 51 F.3d at 397-400; *ViroPharma, Inc. v. Hamburg*, 916 F. Supp. 2d 76, 82-83 (D.D.C. 2013) (upholding bioequivalence determination over innovator challenge); *Astellas Pharma US, Inc. v. FDA*, 642 F. Supp. 2d 10, 19 (D.D.C. 2009) (the "high degree of deference" given to FDA's scientific determinations "has been applied to the FDA's determinations regarding with methodologies it determines are needed to test the bioequivalency of a given generic."); *Fisons Corp*, 860 F. Supp. at 866-67 ("[T]he factual determination of how bioequivalence is determined properly rests within the FDA's discretion."); *Sullivan*, 782 F. Supp. at 651 (deference afforded Agency's determination so long as it is not contrary to the governing statute and regulations and is based on a "reasonable and scientifically supported criterion").

[8] Section 1135 of the Food and Drug Safety and Innovation Act of 2012 (Pub. L. No. 112-114) amended 21 U.S.C. § 355(q) to shorten the time FDA has to take final agency action from 180 days to 150 days after the petition is submitted.

FDA has issued a guidance document explaining the relationship between review of petitions under 21 U.S.C. § 355(q) and review of ANDAs for which the agency has not yet made a final decision on approvability.[9] FDA explained:

> If a petition requests that the Agency take an action related to a specific aspect of a pending application, we will consider the review status of the affected application(s) in determining whether it would be appropriate for the Agency to respond to the request to take the action requested in the petition within the 180-day[10] timeframe.

Id. at 12.

FDA further explained that answering a section 355(q) petition may deprive an ANDA applicant of procedural rights, because the applicant must have notice of an opportunity for a hearing on whether the application is approvable.

> There is no evidence that in enacting section [355](q), Congress intended to limit applicants' procedural rights by requiring that the Agency make decisions that constitute final Agency action on the approvability of specific aspects of a pending application (e.g., the acceptability of a proposed trade name, specific claims proposed in a drug product's labeling) on a piecemeal basis outside of the process established under the Act and regulations.

Id. at 13.

FDA has also proposed rules to implement section 355(q), noting that "Congress was concerned that some petitions may improperly delay the approval of an application if they are submitted late in the review process and do not contain valid scientific, legal, or public health issues." 77 Fed. Reg. 25, 30 (Jan. 3, 2012).

FACTUAL BACKGROUND

A. Teva's NDA for Copaxone

[9] *See* Guidance for Industry, Citizen Petitions and Petitions for Stay of Action Subject to Section 505(q) of the Federal Food, Drug, and Cosmetic Act (June 2011), *available at* http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM079353.pdf (" Guidance") (attached as Ex. 1).

[10] FDA issued this Guidance document before 355(q) was amended to change the 180-day timeframe to 150 days.

Teva is the holder of NDA 20-622 for Copaxone, 20 milligrams (mg)/milliliter (mL) and 20 mg/vial.[11] This application was approved on December 20, 1996. *Id.* A supplement to this application for a 40 mg/vial dosage was approved on January 28, 2014. *Id.* The 40 mg/vial dosage form is protected by three-year exclusivity until January 28, 2017, and Teva has listed patents covering that form until 2030. *Id.* Copaxone's active ingredient, glatiramer acetate, is a heterogeneous mixture of synthetic polypeptides synthesized from four naturally occurring amino acids — L-glutamic acid, L-alanine, L-tyrosine, and L-lysine.[12] Copaxone is indicated for the reduction of the frequency of relapses in patients with relapsing-remitting multiple sclerosis (RRMS).

B. Patent Litigation

Teva has listed several patents covering the 20 mg/mL Copaxone product in the Orange Book, all of which expire on May 24, 2014.[13] In addition, Teva has sued two potential generic competitors, Mylan and Sandoz, for infringement. *See Teva Pharms. USA v. Sandoz*, 876 F. Supp. 2d 295 (S.D.N.Y. 2012). One of the patents in that lawsuit, U.S. Patent No. 5,800,808 ("the '808 patent"), is not listed in the Orange Book, and expires later, on September 1, 2015.[14]

The U.S. Court of Appeals for the Federal Circuit held that certain patents were valid and infringed, and as a result, no ANDAs can be approved until the expiration of those patents on May 24, 2014. *Teva Pharms. USA v. Sandoz*,723 F.3d 1363, 1369 (Fed. Cir. 2013); Modified Final Judgment, *Teva Pharms. USA v. Sandoz*, No. 08-cv-7611, Dkt. No. 355 (S.D.N.Y. Dec. 20, 2013). By contrast, the Federal Circuit found that the '808 patent was invalid. *Teva*, 723 F.3d at

[11] The 20 mg/vial product has been discontinued. *See* Electronic Orange Book, *available at* http://www.accessdata.fda.gov/scripts/cder/ob/default.cfm.
[12] Teva Pharmaceutical, Inc., Citizen Petition FDA-2009-P-0555, dated November 13, 2009 (Second Teva Petition), at 10.

[13] *See* Electronic Orange Book, *available at* http://www.accessdata fda.gov/scripts/cder/ob/default.cfm.
[14] *See* Teva Provide Provides Update On Copaxone Litigation (July 26, 2013), *available at* http://www.tevapharm.com/Media/News/Pages/2013/1841693.aspx.

1369. The Supreme Court has granted certiorari on the patent validity question, but denied a stay that would have precluded any generic companies from marketing until the Court decides the case, which is expected sometime next term.[15] As a result, FDA is not prohibited by the patent litigation from approving Mylan's or Sandoz's ANDAs after May 24, 2014. *See* Modified Final Judgment, *Teva Pharm. USA, Inc. v. Sandoz Inc.*, No. 08-cv-7611, Dkt. No. 355 (S.D.N.Y. Dec. 20, 2013). However, had FDA already determined that an ANDA met the conditions for approval and was ready for final approval but for the patents due to expire on May 24, FDA would have tentatively approved such ANDAs.[16]

C. Teva's Citizen Petitions

Teva has filed no fewer than six citizen petitions under 21 U.S.C. § 355(q),[17] requesting that FDA not approve any ANDAs for Copaxone until any such ANDA meets specific requirements, including:

1. information demonstrating that the proposed generic product contains the identical active ingredient as in Copaxone, not merely an active ingredient that is similar (or even highly similar) to Copaxone's;

2. the results of nonclinical and clinical investigations demonstrating that the immunogenicity risks associated with the proposed generic product are no greater than the risks associated with Copaxone, including a demonstration that the risks of alternating or switching between use of the proposed product and Copaxone are not greater than the risks of using Copaxone without such alternation or switching; and

[15] *Teva Pharms.USA, Inc. v. Sandoz, Inc.*, 572 U.S. __ (2014) (Roberts, Circuit Justice) (Opinion in Chambers, *available at* http://www.supremecourt.gov/opinions/13pdf/13a1003_5h26.pdf (last visited May 11, 2014)).

[16] FDA grants "tentative approval" to an ANDA when all scientific and procedural conditions for approval have been met, but the application cannot be fully approved because approval is blocked by a 30-month stay, some form of marketing exclusivity, or some other barrier to approval arising from patent infringement litigation. *See* 21 U.S.C. § 355(j)(5)(B)(iv)(II)(dd)(AA). The application cannot be finally approved until the agency issues a final approval letter. *See* 21 C.F.R. § 314.105(d); 21 C.F.R. § 314.107(b)(3)(v).

[17] Dkt. No. FDA-2008-P-00529, received on September 26, 2008, and responded to on March 25, 2009; Dkt. No. FDA-2009-P-0555, received on November 13, 2009, and responded to on May 11, 2010; Dkt. No. FDA-2010-P-0642, received on December 10, 2010, and responded to on June 8, 2011;Dkt. No. FDA-2012-P-0555, received on June 4, 2012, and responded to on November 30, 2012; Dkt. No. 2013-P-1128, received on September 12, 2013, and withdrawn by Teva on January 6, 2014; and Dkt. No. FDA-2013-P-1641, received on December 5, 2013, and responded to on May 2, 2014. Another entity, Peptimmune Inc., filed a similar petition under 21 U.S.C. § 355(q) requesting that FDA not approve any ANDAs for Copaxone without first requiring clinical trials. *See* Dkt. No. FDA-2010-P-0531. FDA also denied that petition. *Id.* (response Mar. 29, 2011).

3. the results of comparative clinical investigations in relapsing-remitting multiple sclerosis (RRMS) patients using relevant safety and effectiveness endpoints demonstrating that the proposed generic drug is bioequivalent to Copaxone.[18]

FDA has responded to each of these petitions within the applicable statutory time period. FDA has provided general analysis within some of these responses, but was not ready to make any merits decisions. In its latest response on May 2, 2014, FDA explained that "any decision regarding a requirement of clinical trials to demonstrate bioequivalence, or any other conditions of approval, will be informed by our review of a specific ANDA before us, and must be based on relevant scientific information specific to each product." *Id.* FDA stated that it "continues to actively consider the issues you have raised and the information you have included in your petition." *Id.* FDA was concerned that any merits decision "could, in effect, render a decision on a specific aspect of an ANDA before the Agency has had an opportunity either to fully consider specific data and information in such an application or to provide the procedural rights that accompany FDA actions on applications." *Id.* at 5-6.[19]

D. Litigation

Teva sued FDA on May 8, 2014, seeking a temporary restraining order and/or preliminary injunction that would enjoin FDA from (A) conducting any further administrative proceedings arising out of or related to Teva's December 5, 2013 citizen petition ***and*** from approving a generic version of Copaxone before the Court has ruled on the issues raised in the citizen petition; OR (B) approving a generic version of Copaxone that does not comply with the conditions requested in the Teva's petition for a period of no less than 14 days after the date the

[18] *See* Teva Petition in Dkt. No. FDA-2013-P-1641, at 5.

[19] Teva's campaign to protect its Copaxone monopoly has extended beyond just generic competition. Teva filed an additional citizen petition asking FDA not to approve any full NDAs for a multiple sclerosis drug (*i.e.*, NDAs submitted under 21 U.S.C. § 355(b)(1)), without first referring the matter to an advisory committee and reviewing their conclusions. *See* Docket No. FDA-2013-P-0025 (filed Dec. 31, 2012). FDA denied this petition on March 27, 2013, the same day that it approved a new treatment for multiple sclerosis, NDA 204063 (Tecfidera).

Agency provides a written response addressing the merits of Teva's petition, so as to afford Teva an opportunity to litigate over the written response before generic approval. *See* Pl. Mtn. Temp. Restraining Order at 2.

This Court, Judge Howell, held a hearing on the motion for a temporary restraining order on May 9, 2014, and denied that motion, finding that Teva would suffer no harm before May 24, 2014, and that Teva complained only of economic harm. In addition to setting a briefing schedule, Judge Howell ordered FDA to produce an outline of the contents of the administrative record. FDA is accordingly providing an index of the administrative record, as it exists at this time.[20] *See* Index of Admin. Rcd. (attached as Ex. 2).

ARGUMENT

I. Teva's Complaint Should Be Dismissed

The federal judicial power is limited by Article III of the Constitution to the resolution of "cases" and "controversies." *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). To invoke federal court jurisdiction, a party must establish the existence of a "justiciable controversy" with the adverse party – one that is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

A plaintiff must also establish that its claim is ripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations omitted). The party seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court

[20] This index includes Teva's petitions filed under 21 U.S.C. § 355(q), FDA's responses, as well as comments and other documents within those petition dockets. The index does not include other documents that FDA also has in its administrative files related to issues raised in the petitions, both because they reflect ongoing agency deliberations and contain confidential applicant information.

has jurisdiction. *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). To state a claim upon which relief may be granted, a plaintiff's allegations must "possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) (citations omitted); *see also Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 n. 4 (D.C. Cir. 2008). The court must treat the complaint's factual allegations as true and draw all reasonable inferences therefrom in the plaintiff's favor, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003), but the court need not accept as true legal conclusions cast as factual allegations or inferences unsupported by facts set out in the complaint. *Warren v. Dist. of Columbia*, 353 F.3d 36, 40 (D.C. Cir. 2004).

A. Teva Lacks Standing

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. To invoke federal jurisdiction, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citations omitted); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Int'l Bhd. of Teamsters v. Transp. Sec. Admin.*, 429 F.3d 1130, 1134 (D.C. Cir. 2005). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Defenders of Wildlife*, 504 U.S. at 561.

The "actual injury" must be "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury must be "distinct and palpable" and "actual or imminent," not "conjectural" or "hypothetical." *Id.* (citations omitted). To establish injury in fact, a "plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be

affected by the agency's action." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973); *see also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc) (plaintiff must show that a particularized injury is at least imminent). The requirement of injury in fact is not satisfied "simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury." *Nw. Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986).

Here, Teva has not identified an injury sufficiently imminent and concrete for purposes of Article III standing. Its failure to receive a merits decision on the citizen petition has not caused the currently non-existent injury it does identify: loss of revenue, profits, and other business decisions made as a result of such losses. Indeed, Teva continues to receive revenues for its product of about $8.7 million per day. *See* Pl.'s Exh. G ¶11 (Declaration of John Hassler) (claiming $3.2 billion 2013 revenue from Copaxone alone). Further, there is no date certain as to when Teva will begin to lose revenue based on generic competition. Teva can only speculate if and when FDA may approve an ANDA for Copaxone.

Indeed, intervenor and potential generic competitor Sandoz states that Teva is not "privy to recent requests for information by FDA or the specific data that Sandoz and Momenta have developed to address gene expression and immunogenicity questions raised in the most recent citizen petition." *See* Sandoz Mot. to Intervene, Dkt. No. 20-1 (filed May 11, 2014), at 4. No Copaxone ANDA has even been tentatively approved. Thus, the agency's evaluation of these ANDAs is ongoing, and it is possible that the agency could agree with Teva on one or more of the issues it has raised. Therefore, the claimed injury does not currently exist, and Teva cannot show that it is imminent. *Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (requiring a plaintiff to show that "the injury is certainly impending") (citation and quotation marks omitted).

Having no financial or other injury, Teva is left with a claim that FDA's non-merits denial of Teva's citizen petition, without more, constitutes injury-in-fact. Even assuming that Teva were entitled to a full merits decision under 21 U.S.C. § 355(q) – which it is not – this alleged deprivation of a statutory or procedural right does not automatically confer standing. *See Summers*, 555 U.S. at 496-97. An FDA regulation – as to which plaintiff does not claim injury -- does set forth the position that an "interested person" who files a citizen petition has standing to obtain judicial review of final agency action regarding that petition, 21 C.F.R. § 10.45(d), but that regulation does not alter or eliminate the requirements of Article III standing. *See Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999) (holding that FDA regulations deem agency response to citizen petitions as final agency action, but that the action is still subject to Article III standing requirements); *see also Gettman v. DEA*, 290 F.3d 430, 433 (D.C. Cir. 2002) (finding that the "interest" allowing a party to petition an agency at the will of Congress, and the "interest" required for standing in the courts, is "fundamentally the difference between the political branches on the one hand and the Article III courts on the other").

A plaintiff's unwillingness to wait for the appropriate time for review, *i.e.*, when injury becomes sufficiently imminent, does not confer standing. This Court should not reward Teva's impatience with an expansion of the standing doctrine.

B. Teva Lacks Prudential Standing

Teva also lacks prudential standing because it is outside the zone of interests that 21 U.S.C. § 355(q) is meant to protect. Prudential standing "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (citations omitted). The prudential standing doctrine encompasses the requirement that a plaintiff's complaint must fall within the zone of interests protected by the law invoked. *Elk*

Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Congress enacted 355(q) to *limit* the ability of innovators to abuse the citizen petition process to delay generic approvals. This purpose is evident in the content and structure of the statutory provision itself. *See* 21 U.S.C. § 355(q)(1)(A) (FDA "shall not delay approval" of a pending ANDA . . . because of any request to take any form of action relating to the application" unless FDA determines, "upon reviewing the petition, that a delay is necessary to protect the public health."). The statute requires petitioners to submit statements certifying that they have presented any information that is unfavorable to their position, and verifying the truthfulness of the filing and the date that the information became known to the petitioner. 21 U.S.C. §§ 355(q)(1)(H), (I). The statute even invites FDA to deny citizen petitions outright if FDA determines that the petition was submitted with the primary purpose of delaying approval of an application and does not on its face raise valid scientific or regulatory issues. 21 U.S.C. § 355(q)(1)(E). Congress also requires FDA to submit an annual report with the numbers of applications that have been delayed by petitions. 21 U.S.C. § 355(q)(3).

The legislative history underscores this purpose:

> The bill also takes action on the abuse of citizens petitions. FDA has a commonsense policy to allow ordinary citizens or medical experts to submit petitions to the agency about drugs that it is considering approving. This procedure should be used to protect public health -- but too often, it is subverted by those who seek only to delay the entry onto the market of generic drugs.

Remarks by Senator Kennedy, 153 Cong. Rec. S11937-01 (2007); *see also* Remarks by Senator Kennedy, 153 Cong. Rec. S11831-01 (2007) ("The bill . . . will end the abuse of citizens petitions that are too often used not for their intended purpose of brining [sic] important public health concerns to the attention of the FDA, but rather to delay the approval of generic drugs.").

Teva subverts Congress's stated goal of shielding generic applicants from undue delay by (1) seeking to force FDA into deciding a petition before the agency has had a chance to fully evaluate the information in an ANDA and (2) give itself an opportunity to litigate the decision it has forced FDA to render. Teva's interests are directly antithetical to the statute.[21]

Section 355(q) is most assuredly *not* a statute generally directed to authorizing such citizen petitions or imposing a response deadline to protect the petitioner. Citizen petitions are authorized separately by regulation, *see* 21 C.F.R. §§ 10.25, 10.30, and Teva does not argue that FDA's failure to provide a merits response violates any protections afforded by that regulation. Rather, the statute is directly aimed at curbing the abuses of petitioners to protect ANDA sponsors. The requirement of a final decision is not intended to protect a petitioner or guarantee a merits response, but rather to ensure that ANDA approvals will not be delayed by a petition.

In *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075-1076 (D.C. Cir. 1998), the D.C. Circuit held that an innovator had prudential standing to intervene in a case involving a generic exclusivity statute. The court's holding rested on its analysis that the innovator's interests were "arguably protected" or "sufficiently congruent" with the exclusivity statute's goal of rewarding ANDA sponsors who first challenge patents with 180-day exclusivity, which limited generic competition in a manner consistent with the innovator's interests. *Id.* Here, by contrast, Teva's interests are not protected by or even remotely congruent with the statute's goal of curbing citizen petition abuses. Courts remain properly skeptical of parties' similar attempts to twist a statutory regime to favor groups that the statute was not intended to protect. *See Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) (finding that an industry group's "interest

[21] Letters from individual members of Congress expressing concern that FDA has not been issuing substantive responses to petitions, *see* PI Br. at 4, are "isolated statements by individual Members of Congress or its committees, all made after enactment of the statute under consideration, [and] cannot substitute for a clear expression of legislative intent at the time of enactment." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979).

in increasing the regulatory burden of others" fell outside the zone of interests protected by the Clean Air Act). For these reasons, Teva lacks prudential standing to obtain a merits decision under 21 U.S.C. § 355(q).

C. Teva's Claims Are Not Ripe

Teva's requested relief depends entirely on speculation that some FDA decision in the future may be legally or scientifically infirm. None of Teva's specific assertions is susceptible to judicial review unless a particular ANDA is approved. In short, Teva requests that this Court step into FDA's role to determine that an ANDA is not approvable – without even knowing the substance of that ANDA, seeing any of the data, or FDA's ongoing reviews or evaluations of any ANDA. Teva's request should be soundly rejected. Indeed, if this Court were to grant Teva's request, courts would be flooded with anticipatory lawsuits designed to usurp orderly agency decisionmaking.

As the Supreme Court explained in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." The purpose of this doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49.

The ripeness doctrine is rooted in both Article III limitations on judicial power and prudential reasons for declining to exercise jurisdiction. *Reno v. Catholic Soc. Servs., Inc.*, 509

U.S. 43, 58 n.18 (1993). Agency action under the APA does not necessarily equate to a justiciable "case" or "controversy" under Article III. Thus, as the Court of Appeals has explained, "[r]ipeness entails a functional, not a formal, inquiry." *Pfizer*, 182 F.3d at 980.

To determine whether an agency decision is ripe for review, courts examine "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. In evaluating the fitness of an issue for judicial review, courts should consider whether the issue is "purely legal" and whether the agency action is final, *id.*, or, on the other hand, whether "the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). With respect to the hardship factor, there must be a "sufficiently direct and immediate" impact on the plaintiff's "day-to-day business," such that the plaintiff faces the dilemma of either complying with the challenged agency action or risking prosecution for failure to do so. *Abbott Labs.*, 387 U.S. at 152. A court must also consider "whether judicial intervention would inappropriately interfere with further administrative action." *Ohio Forestry Ass'n*, 523 U.S. at 733. Finally, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

1. Teva's Claims Are Not Fit For Judicial Review

Teva's complaint "rests upon contingent future events," ignores this Court's need for "further factual development of the issues," and asks this Court to "interfere with administrative action." First, the claims are not fit for review because they raise complex scientific issues falling within FDA's primary jurisdiction to determine approvability of ANDAs. The agency has not yet resolved those issues, and Teva's attempt to have this Court, rather than the agency,

wade through them has no precedent. *See* PI Br. at 8. Even if this Court wanted to decide, for example, the relevance of Teva's gene expression studies to ANDA approvals, and whether any differential gene upregulation would impact immunogenicity risk, Congress has assigned that function to FDA, which has the scientific expertise to evaluate and decide in the first instance whether specific data in an ANDA meets the requirements for approval.

Teva wants the Court to evaluate and decide scientific disputes such as: (1) how much and what type of characterization of an ANDA product would be necessary to provide assurance that it has the "same" active ingredient as Copaxone; (2) what type of testing, if any, should be done to ensure that any ANDA product does not have any greater immunogenicity risk than Copaxone; and (3) what types of scientific testing should be required to establish that any ANDA product is bioequivalent to Copaxone.[22] The regulations described in the Statutory and Regulatory Background section B, *supra*, contemplate more than one way to meet the statutory criteria. Given the unique scientific characteristics of different pharmaceutical products, FDA cannot make final decisions on whether the statutory criteria have been satisfied in the abstract. FDA's scientific assessments and conclusions depend on the particular drug application. This quintessentially agency function must be completed before any meaningful judicial review is possible. *See Abbott*, 387 U.S. at 148.

2. Teva's Claims are Unripe

The overwhelming weight of judicial authority supports awaiting an FDA decision on scientific approvability issues within the context of an ANDA. In another case concerning a citizen petition under 21 U.S.C. § 355(q), *AstraZeneca Pharmaceuticals v. FDA*, 850 F. Supp. 2d 230 (D.D.C. 2012), FDA declined to substantively decide an issue raised in the citizen petition, as it did for Copaxone. AstraZeneca nevertheless sued, and the court dismissed the complaint as

[22] *See* Teva Petition, Dkt. No. FDA-2013-P-1641, at 5.

unripe, noting that "FDA provided a sound and reasonable rationale for refusing to resolve the abstract question raised in the company's twin citizen petitions outside of the 'procedural protections . . . of application review.'" 850 F. Supp. 2d at 242. The court found "that the FDA's interest in crystallizing its policies before they are subjected to a court's scrutiny is compelling, and outweighs whatever interest AstraZeneca has in securing immediate judicial review." *Id.* at 246.

Teva argues that the subsequent actions that FDA took in that case (approval of ANDAs shortly after the court dismissed plaintiff's claims) only underscore that it is entitled to judicial review now, and that it needs a protective window to ensure its ability to obtain effective judicial review. The court was indeed frustrated with the timing in that case,[23] but the timing exigency was created by AstraZeneca, the innovator, who sought preapproval judicial review before its claims were ripe, as Teva has done here. FDA later explained in its appeal brief:

> FDA had not yet made a final decision when it argued that the case was not ripe, and its objection to jurisdiction was fully in accordance with principles of judicial review under the Administrative Procedure Act. AstraZeneca created the timing exigency for the parties and the court by demanding a final FDA decision before FDA had made that decision. FDA's so-called "tactical decision" to seek dismissal of a suit as unripe resulted in judicial review of final agency action, which is exactly the way that such suits under the APA are intended to proceed. Further, FDA's refusal to disclose in advance any not-yet-final intention to approve a competitor's application is required by statute and FDA's disclosure regulations. 18 U.S.C. § 1905; 21 C.F.R. § 20.61(c); 21 C.F.R. § 314.430.

U.S. Brief, *AstraZeneca Pharmaceuticals LP v. FDA*, No. 12-5227 at 51 (filed Dec. 17, 2012).

Moreover, here, no ANDAs have been tentatively approved for Copaxone, whereas there were several such tentative approvals in *AstraZeneca*. 850 F. Supp. 2d at 243. Because of the

[23] *AstraZeneca Pharmaceuticals v. FDA*, 872 F. Supp. 2d 60, 74-76 (D.D.C. 2012). The court expressed frustration that FDA did not provide early views on the legal exclusivity issues in that case. *Id*. at 76 n.13. Even if FDA could have provided such views in *AstraZeneca*, however, the fundamental, scientific approvability issues at issue here would be much less amenable to an advisory decision.

patents that expire on May 24, 2014, if FDA had already determined that any Copaxone ANDA were approvable as of that date, FDA would have issued tentative approvals. Under these circumstances, Teva can only speculate about the possibility of an imminent ANDA approval.

The *AstraZeneca* court relied on *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999), which further supports dismissal of this case as unripe. Pfizer filed a citizen petition seeking a determination that its product was a unique dosage form and that no other ANDA could be accepted or approved. *Id.* at 977. FDA denied the petition before any ANDA was approved in a response similar to FDA's recent response to Teva: FDA "simply refused to affirm the negative proposition that no other extended release mechanism could ever be deemed under the statute to constitute the same dosage form as Pfizer's osmotic pump." *Id.* at 979. The D.C. Circuit dismissed Pfizer's claim challenging the petition response as unripe, reasoning that "judicial intervention at this time could lead to 'piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.'" *Id.* at 980 (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980)).

Similarly, in *Mylan Pharmaceuticals Inc. v. FDA*, 789 F. Supp. 2d 1 (D.D.C. 2011), the court held that a claim was "not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated.'" *Id.* at 11-12. In *Mylan*, as in *Pfizer*, the court determined that uncertainties about the approvability of an ANDA presented "open factual questions that the FDA needs to determine. This Court should not prematurely intrude in that process, but rather afford 'the agency . . . the opportunity to apply its expertise.'" *Id.* at 12.

The federal defendants are aware of only one case, *Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1313 (D.C. Cir. 2010), in which a plaintiff has obtained judicial relief before FDA made its decision, and that was only because Teva raised a purely legal issue that was the

subject of precedent directly on point. By sharp contrast, Teva's claims here require resolution of complex *factual* issues that have not been developed and are not squarely before this Court. Until FDA resolves these issues, this case will not be ripe for judicial resolution. Indeed, upon review of a particular ANDA, FDA may determine that the scientific concerns raised in Teva's petitions are meritorious.

3. Withholding Judicial Review Will Not Cause Teva Hardship

Nor has Teva demonstrated that withholding judicial review now will cause a direct and immediate impact on its day-to-day operations. Teva, like any other NDA holder, would like the opportunity to effectively challenge an FDA decision before it has been made so that it need not face any generic competition (in the event it prevails in its judicial challenge) and so that approval of any potential competition is delayed (while its judicial challenge is being litigated regardless of ultimate outcome). But the APA only provides for judicial review of final agency actions, and FDA has not made any final, substantive decision about the issues that Teva raised in its petitions.

To be sure, judicial review of a merits decision after the agency has acted can be grueling for courts and the parties, but would not likely be any more onerous than the current schedule that Teva's suit has imposed. Nothing prevents Teva from seeking judicial recourse if and when FDA approves an ANDA on a basis that Teva deems insufficient. The burden of participating in such a proceeding at some future time "[does] not constitute sufficient hardship for the purposes of ripeness." *See Fla. Power & Light v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998); *see also Ohio Forestry Ass'n*, 523 U.S. at 735; *Biovail*, 448 F. Supp. 2d at 165. Teva will not suffer any hardship if judicial review is postponed until such time as FDA may take concrete action on a particular ANDA. Then, and only then, will FDA have analyzed the relevant facts and made the

requisite scientific and administrative determinations to permit meaningful judicial review upon the record.

II. Teva's Motion For A Preliminary Injunction Should Be Denied

Preliminary injunctive relief is an "extraordinary and drastic" remedy that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008); *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *see also Mpoy v. Fenty*, 674 F. Supp. 2d 163, 165 (D.D.C. 2009) ("Injunctive relief is an extraordinary remedy, and plaintiff bears a substantial burden to obtain it."). To obtain a preliminary injunction, a party must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction would serve the public interest. *Winter*, 555 U.S. at 20.

It is "particularly important" for a movant to demonstrate likely success on the merits. *Astellas Pharma U.S., Inc. v. FDA*, 642 F. Supp. 2d, 10, 16 (D.D.C. 2009) ("[A]bsent a 'substantial indication' of likely success on the merits, 'there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.'"). Moreover, a party seeking preliminary injunctive relief must demonstrate an actual "likelihood" of success on the merits, not merely the existence of "questions 'so serious, substantial, difficult and doubtful, as to make them fair ground for litigation . . . .'" *Munaf*, 553 U.S. at 690 (citations omitted). Nor is a mere "possibility" of irreparable harm sufficient to justify such relief:

> Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. . . . Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter, 555 U.S. at 22 (citations omitted, emphasis in original).

A. Teva Is Not Likely To Succeed On The Merits

Teva has no likelihood of success on the merits because, as demonstrated above, it lacks standing, its claims are unripe, and the complaint is subject to dismissal in its entirety due to lack of jurisdiction. *See AstraZeneca*, 850 F. Supp. 2d at 233. Even if this Court did have jurisdiction, Teva would not be entitled to any relief because its substantive arguments are meritless.

1. FDA Has Reasonably Interpreted and Applied 21 U.S.C. § 355(q)

Congress did not intend for 21 U.S.C. § 355(q) to empower NDA holders to seek a preliminary FDA decision that would effectively impede approval of competitors' ANDAs. On the contrary, Congress enacted this provision expressly to *prevent* delays of ANDA approvals due to FDA's consideration of issues raised in citizen petitions.

Under § 355(q), if an ANDA is ready for approval, FDA can only delay that approval if, pursuant to a citizen petition, it finds that a delay is necessary to protect the public health. 21 U.S.C. § 355(q)(1)(A)(ii); *see also* Guidance at 8. FDA must then decide the issues presented in the petition within 150 days or it will be considered to have taken final agency action. 21 U.S.C. §§ 355(q)(1)(F), (q)(2). Thus, when an ANDA is ready for approval but for a petition, the statute operates to provide a certain timeframe for resolution of issues raised by the petition within 150 days.[24]

Petitioners like Teva have sought to turn this scheme on its head where, as here, the ANDA is not ready for approval. Such petitioners argue that FDA must make a merits decision on the petition before an ANDA is ready for approval in an effort to subject the agency's petition

[24] If approval were delayed beyond the 150-day deadline, the ANDA sponsor would be the aggrieved party, and it would likely resolve any outstanding issues administratively with FDA within the context of the ANDA.

response to judicial review.[25] But, as described above, courts are skeptical of this skewed reading of § 355(q), or of similar attempts to require courts to decide issues before ANDA approval. *AstraZeneca*, 850 F. Supp. 2d 230; *Pfizer*, 182 F.3d 975; *Mylan*, 789 F. Supp. 2d 1.

FDA has described its general practice for responding to citizen petitions under 21 U.S.C. § 355(q) in a final guidance document. When a petition requests that FDA take action but the agency is not yet ready to make a final approvability decision, FDA "considers the review status of the affected application(s) in determining whether it would be appropriate for the Agency to respond to the request to take the action requested in the petition within the 180-day timeframe." Guidance at 12.

FDA has also adduced the tension between 21 U.S.C. § 355(q) provisions creating "final Agency action" for petition decisions and the procedural rights that applicants have within the ANDA approval process. The petition responses "carry with them none of the procedural rights for the affected applicants that attached to a decision to deny approval of an application." *Id*. at 12-13. The agency explained the problem with those competing provisions:

> If we were to respond substantively to a petitioner's request regarding the approvability of a certain aspect of a pending application before we have taken a final action on the approvability of the application as a whole, such response could interfere with the statutory and regulatory scheme governing the review of applications and related procedural rights of applicants. There is no evidence that in enacting section [355](q), Congress intended to limit applicants' procedural rights by requiring that the Agency make decisions that constitute final Agency action on the approvability of specific aspects of a pending application (e.g., the acceptability of a proposed trade name, specific claims proposed in a drug product's labeling) on a piecemeal basis outside of the process established under the Act and regulations.

Id. at 13.

[25] Indeed, Teva argues that this Court should conduct "an expedited trial" to decide this case, PI Br. at 8, although most petition and ANDA approval challenges are resolved by summary judgment, including for complicated drugs, based on the court's review of the administrative record after a final decision. *See Sanofi*, 842 F. Supp. 2d at 209-10 (upholding FDA's approval of enoxaparin on summary judgment).

Accordingly, FDA concluded:

> [W]e do not interpret section [355](q) to require a substantive final Agency action within 180 days on the approvability of a specific aspect of a pending application when a final decision on the approvability of the application as a whole has not yet been made and when to render such a decision could deprive an applicant of procedural rights established by statute and regulations. In such a situation, we would expect to deny a petition without comment on the substantive approval issue.

Id.

When it determines that it cannot issue a merits decision within the 150-day deadline, FDA generally issues a response to assure petitioners that FDA is evaluating the issues. For Teva's petitions, for example, FDA described its broad discretion to determine whether an ANDA product has the "same" active ingredient as an innovator drug, and stated that FDA "may require an ANDA sponsor to show, among other things, equivalence to the physicochemical properties of Copaxone, and/or equivalence of structural signatures for Copaxone's polymerization chemistry, and/or equivalence in biochemical assays." *See* FDA response, FDA-2009-P-0555 (May 11, 2010), at 9-10. FDA has also responded to Teva's assertions that Copaxone is a colloidal complex, not a solution, for purposes of a bioequivalence waiver: "Although nano-sized association complexes of varying sizes are known to exist in Copaxone, there exists no evidence that such complexes result in insoluble, thermodynamically stable forms that are considered characteristic of colloidal suspensions." FDA response, FDA-2012-P-0555 (Nov. 30, 2012), at 9.

In addition to concerns about applicants' procedural rights, FDA explained that, "[d]epending upon the nature and specificity of a petition, [statutory and regulatory] limitations on disclosure also may circumscribe the Agency's ability to respond substantively to issues

raised in a petition that affect a pending application." Guidance at 13 n.17. This is particularly true where, as here, the petitions relate to competitors' products.

FDA thus endeavors to reconcile the statutory requirement that FDA respond to the petitions with the rights of an applicant to appropriate protections. FDA's careful evaluation of these provisions is entitled to deference under *Chevron,USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1281 (D.C. Cir. 2004) (upholding FDA's resolution of conflicting statutes).

2. Teva's Reliance on § 355(q) Is Meritless

Teva argues that § 355(q) requires FDA to take a final, substantive action on the merits of its petition, relying on 21 U.S.C. § 355(q)(1)(F) ("The Secretary shall take final agency action on a [citizen] petition not later than 150 days after the date on which the petition is submitted."). PI Br. at 32. But as explained above, to the extent that requiring a final merits decision would be irreconcilable with procedural rights and disclosure aspects of the ANDA review process, FDA has reasonably declined to interpret 355(q) to require a substantive final agency decision, or to otherwise consummate its decisionmaking process on the innovator's timeframe. *See* PI Br. at 33. Because Teva's citizen petition raises issues that are inseparable from ANDA approval, and no ANDA is yet ready for approval, FDA has met its statutory duty.

Elsewhere in 21 U.S.C. § 355, Congress specified that FDA must make a "final, substantive" decision on a different type of petition related to FDA determinations of reasons for voluntary withdrawal of a listed drug. *See* 21 U.S.C. § 355(w) ("Deadline for determination on certain petitions. The Secretary shall issue a final, *substantive* determination on a petition submitted pursuant to [21 C.F.R. § 314.161(b)] . . . no later than 270 days after the date the

petition is submitted.") (emphasis added). Clearly, Congress knew how to specify that a decision must be "substantive" within the same statute, but did not choose to use that word within 355(q).

Further, actions can be "final" and yet nonjusticiable, as here. *See Toilet Goods Ass'n v. Gardner,* 387 U.S. 158, 163-63 (1967) (holding that challenge to final agency regulation was not yet ripe: "We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here."). FDA's decision on Teva's petition is "final" in the sense that FDA's statutory obligation to respond to Teva's petition within the 150-day deadline has been fulfilled, and the docket to the petition has closed. Section 355(q)(2)(A) itself recognizes that "final" is a fluid concept, noting that FDA will be "considered to have taken final agency action" if it makes a decision "within the meaning of [21 C.F.R. § 10.45], or if the 150 day period expires. The statute may "consider" FDA to have taken final agency action, but the courts must independently evaluate any such artificial finality for purposes of justiciability.

Teva also argues that FDA has ignored § 355(q)(1)(A)(ii), which states that "[c]onsideration of the petition shall be separate and apart from review of the approval of any application." PI Br. at 35 ("The statute thus expressly forbids FDA from tying its consideration of a citizen petition to its review of an ANDA."). But FDA has not ignored this "technical" amendment to section 355(q).[26] FDA considers the citizen petition issues within the context of the petition docket, and reviews the ANDA in accordance with the distinct review process set

[26] *See* Correcting Technical Errors in the Enrollment of H.R. 3580, 153 Cong. Rec. H10798-01 (Sept. 25, 2007).

forth in § 21 U.S.C. § 355(j). In accordance with the statute, FDA has issued a response to Teva's petition, and the docket is now closed. FDA is continuing its review of any ANDAs.[27]

Indeed, it is Teva that would prefer to merge the substantive decisions on the petition and ANDA approval. Teva plainly filed its multiple petitions in order to delay, if not foreclose, approval of competing generic products. But where, as here, a petition asks for relief that is expressly intertwined with the agency's review and approval of any ANDAs, it is not reasonable to interpret this provision to require the agency to evaluate the merits of the same issues presented in both separately, which could lead to inconsistency.

In addition to its statutory arguments, Teva suggests that its reading of § 355(q) is good policy because it will allow Teva to obtain meaningful, pre-approval judicial review so that no assertedly inferior ANDA product will be able to harm MS patients. PI Br. at 8-9. The practical result of Teva's interpretation, however, would enable any interested person (innovator, public interest group, etc.) to demand a substantive agency response on multiple types of drug applications (ANDA, 21 U.S.C. § 355(b)(2) applications, and biosimilar applications under 42 U.S.C. § 262(k)) at any time in the approval process. As Teva's own serial petitions demonstrate, the scientific information underlying FDA approvals accumulates over time. Requiring FDA to prejudge a complex scientific issue before it is fully vetted is a poor, non-science-based policy. Such a system would flood courts with piecemeal legal challenges asking courts to make scientific decisions on particular aspects of an application without the benefit of an administrative record setting out the agency's assessment of the application as a whole.

Teva's interpretation would be unfair to ANDA applicants. Teva glosses over this concern, asserting that FDA could tell an applicant that it was not approvable and then conduct a

[27] As a courtesy, FDA intends to provide a substantive explanation to Teva regarding its citizen petitions if and when FDA approves any ANDAs, but such an explanation would be separate from the petition docket.

hearing to afford procedural protections. PI Br. at 36-37. This assumes, however, that the timing of the ANDA review process can occur within 150 days and is entirely within FDA's control, so that FDA in any given case can determine whether an ANDA is approvable. These assumptions find no basis in reality. The evidence FDA relies on to approve or not approve an application accumulates over time. FDA may ask for additional data, and the ANDA sponsor may need additional time to conduct appropriate testing, or otherwise take time to respond to FDA communications. The ANDA approval process timeframe is distinct from and cannot be constrained by the artificial timeframe in 21 U.S.C. § 355(q), and the hearing that Teva envisions would not protect ANDA applicants when the ANDA reviews are not complete.

Teva's approach also entirely ignores FDA's concerns about disclosure of ANDA proprietary information and FDA deliberations as part of any substantive citizen petition response. FDA is required by statute and regulation to protect confidential ANDA information before approval,[28] and FDA also claims deliberative process privilege for its own consideration of approval issues until an approval is final.[29] FDA has properly determined in this instance that it cannot violate disclosure laws and will not waive any privileges to satisfy Teva's curiosity about the status of FDA's reviews of its competitors' ANDAs.

Teva's assumption that this Court can review the approvability of ANDAs for Copaxone without reference to those ANDAs is not only wrong, it is also disingenuous. In fact, before Congress enacted 21 U.S.C. § 355(q), Teva argued against the very strategy it is undertaking here when it was seeking approval of a complex generic drug, enoxaparin:

> Aventis' submissions reveal a clear and disturbing strategy — specifically, we anticipate that Aventis will continue to periodically submit new supplements

[28] *See* 21 U.S.C. § 331(j); 21 C.F.R. § 20.61; 21 C.F.R. § 314.430.
[29] *See* 21 C.F.R. § 20.62.

> introducing new allegedly relevant information, all of which Aventis will argue preclude FDA from approving enoxaparin ANDAs.

Teva Comment to Dkt. No. FDA-2003-P-0273 (formerly FDA Dkt No. 2003P-0064) (Aug. 20, 2004), at 6 (attached as Ex. 3).

When it previously served its interests, Teva also recognized that any answer to questions raised about ANDA approvals would need to be made within the context of the individual ANDAs:

> In conclusion, Aventis' petition raises only issues that should be addressed within the existing ANDA review process. All relevant chemistry data can be reviewed within the Office of Generic Drugs for ANDAs submitted under section 505(j) of the Food, Drug & Cosmetic Act. We respectfully request that the Agency deny the Aventis petition and review the "sameness" of generic enoxaparin products as part of the standard ANDA review, according to its current regulations.

Id. at 7.

This Court should not indulge Teva's novel, self-serving legal strategy, which contradicts both common sense and longstanding principles of administrative law.

3. Teva is Not Entitled to the Relief That it Seeks

Teva's requests for relief masquerade as creative solutions to a dilemma that Teva itself has imposed by demanding pre-approval judicial review, but at bottom are directly contrary to established law and are unworkable. Teva's first alternative would enjoin FDA from further considering Teva's December 5, 2013 petition, and from approving any Copaxone ANDA "that does not comply with the conditions requested in the Teva Citizen Petition unless and until this Court enters a final judgment holding that such ANDA products need not comply with the conditions requested in the Teva Citizen Petition." This proposal would transfer consideration of the petition issues in the first instance to this Court and require this Court to wade through Teva's voluminous submissions to make scientific approvability determinations about ANDAs.

This, for all the reasons previously stated, would ignore FDA's authority to decide ANDA approval issues and impose unworkable burdens on this Court to consider complex scientific issues that Congress left to FDA.

The second proposal is little better, and would enjoin FDA from approving any Copaxone ANDAs until fourteen days after FDA provides a written response substantively addressing Teva's petition – in order to allow time for Teva to challenge, and this Court to rule on, the response. Although this proposal would permit FDA to decide the relevant issues in the first instance, it would subject ANDAs to unwanted pre-approval judicial review. It would also prejudice FDA's ability to support its decision with information from the ANDA files, which would not yet be available for the record, and by requiring FDA to decide whether to waive important privileges.

Teva repeatedly refers to Judge Bates' frustration in *Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 13 (D.D.C. 2008), in which Judge Bates *denied* Hi-Tech's order for a preliminary injunction to obtain an early exclusivity decision on a legal issue before ANDA approval. PI Br. at 1, 4. As frustrated as Judge Bates may have been, judicial review in that case took place *after* the agency took action, and not before. *See Hi-Tech Pharmacal Co. v. United States FDA*, 587 F. Supp. 2d 13, 17 (D.D.C. 2008). The court ultimately required FDA to notify the parties of its intent to issue an exclusivity decision within 12 hours, 587 F. Supp. 2d at 13, which FDA did, and FDA issued the decision in the courtroom without it first being subject to judicial review.[30] Thus, Teva's proposal does not resemble the approach used by Judge Bates in *Hi-Tech* because it would give Teva the very relief that he determined plaintiff in that case was not entitled to receive.

[30] *See* PI Br., Att. A, at 15 (delaying effective timing of approval for approximately an hour and a half). .

Teva's request for relief also belied its argument that it is entitled to a substantive "final" decision that reflects the consummation of the agency's decisionmaking and has a concrete effect on the parties. *See* PI Br. at 3. Teva purports to seek such a decision, yet also demands the ability to challenge any such decision before it is truly final, and before any party has felt its concrete effects. Teva cannot have it both ways simply because this product may be more important to it than others. And despite Teva's fears that it would not be able to obtain judicial review quickly enough after an approval decision, Teva was able to obtain a hearing on a temporary restraining order in this case within a few hours of filing it, and without even demonstrating that it could possibly suffer any harm until after any such TRO would expire.[31] This process, set forth by the APA and the Federal Rules of Civil Procedure, *see* 5 U.S.C. § 704; Fed. R. Civ. P. 65, balances the interests of all parties.

Teva's brazen request is akin to a party requesting advance notice of a judicial decision because it is concerned about any immediate effects of that decision and its ability to obtain meaningful appellate review. But the Federal Rules of Civil and Appellate Procedure address that situation by providing for immediate stays and expedited appellate review. Fed. R. Civ. P. 62; Fed. R. App. P. 8. So too here: Teva must live in accordance with the existing protections under the rules, just as every other party must.

* * *

Teva asks the Court to assume that any FDA approval of an ANDA will be unsound, and that judicial review before actual approval is necessary to protect the public from an ANDA

[31] In addition, generic entry may occur later than approval for a number of reasons, such as supply or distribution problems, or concerns about patent infringement liability. *See Wyeth v. FDA*, No. 09-1810, Dkt. No. 5 (D.D.C. Sept. 24, 2009) (ANDA product shipped about 7 days after approval, after which innovator filed for a temporary restraining order). Notably here, Teva has asserted an additional patent not listed in the Orange Book that does not expire until September 1, 2015. *See* Teva Provides Update On Copaxone Litigation (July 26, 2013), *available at* http://www.tevapharm.com/Media/News/Pages/2013/1841693.aspx.

product that Teva asserts might be inferior because Copaxone is not fully characterized. PI Br. at 8-9. But Teva previously argued that a generic applicant could establish "sameness" without such full characterization: "In reality, an ANDA may be submitted, and approved, even for a drug which is not 'fully characterized,' so long as FDA, in the course of its administrative review of the ANDA, concludes that the generic product meets all statutory approval criteria, including 'sameness' of the active ingredient." Teva Comment to Dkt. No. FDA-2003-P-0273 (Aug. 20, 2004), at 2.

FDA agreed with this position and explained its decision in a citizen petition response issued on the day that FDA approved a complex ANDA product, which approval was upheld over challenge. *Sanofi-Aventi,* 842 F. Supp. 2d at 209-10. When it stood in the shoes of a generic competitor, Teva argued that an ANDA could be approved for a drug that was not fully characterized. Now, in its new-found position as an innovator, Teva contradicts itself.

If and when FDA does approve an ANDA, such approval would be based on the statutory and regulatory approval requirements. But at this stage, Teva is not entitled to judicial review of a decision that FDA has not even yet made, nor any presumption that such a decision would not satisfy applicable approval requirements or compromise public health.

For all of these reasons, Teva has not shown that it is likely to succeed on the merits and its request for preliminary injunctive relief should therefore be denied.

B. Teva Has Not Shown That It Will Suffer Irreparable Harm In The Absence Of A Preliminary Injunction

Not only has Teva failed to make the requisite showing of likely success on the merits of its claims, it has failed to demonstrate that it will suffer irreparable harm absent a preliminary injunction. Courts insist that only *irreparable* harm that is *likely* justifies the issuance of a preliminary injunction. *Winter,* 555 U.S. at 22. Indeed, "if a party fails to make a sufficient

showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors." *Astellas*, 642 F. Supp. 2d at 16.[32] Irreparable injury is a "very high standard." *Ark. Dairy Coop., Inc. v. USDA*, 576 F. Supp. 2d 147, 160 (D.D.C. 2008); *Bristol-Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 220 (D.D.C. 1996). The injury alleged must be certain, great, actual, and imminent. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Further, it must be "more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff." *Gulf Oil Corp. v. Dep't of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981).

1. Teva Cannot Show Current or Imminent Financial Losses

Teva projects financial harm to the company based on the potential launch of generic competition; obviously, no launch has occurred, and therefore there is no harm. *See, e.g.*, Hassler Decl. Despite Teva's efforts to convince the Court that the alleged harm is imminent – May 24, 2014 – it offers no actual evidence in support. There is no certainty that FDA will approve any generics on that date. At this point, it is a "mere possibility," and therefore Teva's alleged resulting harms are not cognizable. *See Winter*, 555 U.S. at 22 (requiring more than a "mere possibility" of harm for the issuance of an injunction).

2. Teva's Projected Financial Losses Do Not Constitute Irreparable Harm

In this circuit, mere economic loss – even irrecoverable economic loss, such as plaintiff alleges here – does not constitute irreparable harm unless the financial injury is so great as to threaten the continued existence of the movant's business. *Mylan Labs, Inc. v. Leavitt*, 484 F. Supp. 2d 109, 123 (D.D.C. 2007); *see also Astellas*, 642 F. Supp. 2d at 22 ("it is well-settled that

[32] As Judge Kavanaugh has pointed out, "the *Winter* Court rejected the idea that a strong likelihood of success could make up for showing only a possibility (rather than a likelihood) of irreparable harm. In other words, the Court ruled that the movant always must show a likelihood of irreparable harm." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., joined by Henderson, J., concurring).

economic loss alone will rarely constitute irreparable harm"); *Hi-Tech*, 587 F. Supp. 2d at 11 ("In this jurisdiction, harm that is 'merely economic' in character is not sufficiently grave under this standard."); *Coal. for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 168-69 (D.D.C. 2008) (finding that "degree of harm" asserted by coalition of pharmaceutical manufacturers did not approach "the level required in this case (*i.e.* so severe as to cause extreme hardship to the business or threaten the very existence of Coalition members)"); *Apotex v. FDA*, No. 06-0627, 2006 WL 1030151 at *17 (D.D.C. Apr. 19, 2006) (where plaintiff did not establish that lost sales and market share would cause "extreme hardship" to company, claim of harm fell "well short of the serious, irretrievable damage to its business required to warrant a preliminary injunction"); *R.J. Reynolds Tobacco Co. v. FDA*, 823 F. Supp. 2d 36, 50 (D.D.C. 2011) ("the standard for irreparable economic harm in our Circuit is so demanding that the proof of even tens of millions of dollars in economic detriment does not necessarily suffice").

Thus, in order to prevail on its motion for preliminary injunctive relief, plaintiff must make "a strong showing" that any economic loss it would suffer in the absence of preliminary injunctive relief "would significantly damage its business above and beyond a simple diminution in profits." *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000); *see also Biovail Corp*, 448 F. Supp. 2d at 164 ("the fact that the plaintiff will face competition in the market and may lose profits if [FDA approves a generic competitor] is insufficient to establish irreparable harm"). Teva does not come close to satisfying this standard.

a. Teva's Projected Financial Losses for the Relevant Time Period Are Only a Small Percentage of Its Overall Profits

Teva fails to limit its financial loss projections to the finite period of time that is really at issue. *See, e.g.*, Hassler Decl. ¶15 (calculating losses for the final 7 months of 2014); *id.* ¶ 11 (discussing Copaxone revenue for all of 2013). The relevant time period is from the time of

generic launch to the time the case is resolved on the merits – not the rest of 2014, as Teva indicates. *See Apotex*, 2006 WL 1030151 at *17 ("the actual relevant period for assessing harms is probably only a few months" – from the time of generic launch to the time the case is resolved on the merits). The government would agree to expedited briefing on any such claim, and thus the matter would almost certainly be resolved in a matter of weeks, not even months. As a result, Teva's estimates of reduced *annual* revenue due to potential generic competition are immaterial. *Bristol-Myers*, 923 F. Supp. at 221 ("If it ultimately prevails on the merits, Bristol's total sales will be insignificantly affected over the duration of the litigation.").

Focusing then on the relevant period, as well as information Teva provided to its investors, Teva's projected losses are significantly less than what it predicts in its brief and in its declaration. To start, Teva claims that, after May 24 and to the end of 2014, it will sustain [redacted] in lost net revenue due to generic competition. *See* Hassler Decl. ¶ 15. However, in a December 2013 statement to investors, Teva stated that expected net revenue loss due to generic competition from June 1, 2014 to the end of 2014 would be approximately $546 million for 2014 – *i.e.*, $78 million per month.[33]

Especially viewed within the context of Teva's overall operation, this projected loss of $78 million per month is insignificant. Conveniently, Teva provides various figures relating to specialty medicines, *see id.* ¶¶11-15, but no information on its total profits or the scope of its business – the very information that would allow the Court to assess the actual harm the company would suffer if forced to face generic competition as to one product. Teva was the largest generic manufacturer and the ninth largest pharmaceutical company in the world in 2013,

[33] *See* News Release, Teva Pharm. Indus. Ltd., Teva Provides 2014 Financial Outlook (Dec. 10, 2013), *available at* http://ir.tevapharm.com/phoenix.zhtml?c=73925&p=irol-newsArticle&ID=1883417&highlight (last visited May 10, 2014) ("Teva estimates that each month of delay of generic competitors to Copaxone in the U.S. will contribute on average approximately $78 million to net revenues.").

earning over $24 billion in sales, which averages to over $2 billion per month.[34] Teva's portfolio consists of about 50 brand-name and 375 generic products.[35]

Therefore, even assuming that this litigation would last a month and that Teva would lose $78 million during the pendency of the litigation, such a loss reflects about 3.9% of its sales *for that month*. Decreased sales for a single product – out of 50 brand-name and 375 generic products – due to foreseeable generic competition will not cause "extreme hardship" to Teva, much less threaten its existence. *Compare Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) (for subsidiary of large pharmaceutical company, $31 million loss representing less than one percent of its sales was "not irreparable harm . . . nor would it threaten the company's very existence.") (internal quotations and citation omitted), *with Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) (recognizing injury to a small company with one product).

Teva claims that "greater precision in estimating lost market share and revenue [is] very difficult," *see* Hassler Decl. ¶16, but again, the claim is belied by publicly available information. Teva has all but conceded publicly that generic competition will not harm its financial health or viability. Teva's 2014 Financial Outlook, for example, lays out various scenarios regarding generic approval or nonapproval, and explains in detail how Teva plans to maintain significant MS-product-line revenue while continuing its growth in other areas by adding 10 new specialty product submissions, 6 new product launches, and new therapeutic entities.[36] The Court should take Teva at its word that the company is optimistic about its financial health regardless of generic competition to Copaxone.

[34] *See* IMS Health Top 20 Global Corporations 2013, http://www.imshealth.com/deployedfiles/imshealth/Global/Content/Corporate/Press%20Room/Global_2013/Top_20_Global_Corporations_2013.pdf (last visited May 10, 2014).
[35] *See* Teva Generics, http://www.tevagenerics.com (last visited May 10, 2014) (search in "did you know?" section).
[36] *See* Teva 2014 Financial Outlook, *available at* http://ir.tevapharm.com/phoenix.zhtml?c=73925&p=irol-irhome (last visited May 10, 2014).

b. Teva Has Offset Any Projected Financial Losses With a New Copaxone Product

Further diminishing the illusion of harm, Teva has been vigorously converting users of the Copaxone dosage form at issue in this case to the new 40 mg/mL dosage form, for which Teva has listed patents that do not expire until 2030. As of April 18, 2014, the company had succeeded in converting 31% of Copaxone prescriptions in the United States to the new 40 mg/mL dosage form.[37]

In these circumstances, Teva cannot credibly suggest that the loss of some portion of Copaxone sales to generic competition during the pendency of this litigation would seriously harm its overall business. *See Mylan v. Shalala*, 81 F. Supp. 2d at 43 ("Mylan has all but conceded that its estimated lost revenues . . . will not cause serious damage to the company."); *LG Elecs. USA, Inc. v. DOE*, 679 F. Supp. 2d 18, 36 (D.D.C. 2010) (citing cases). "Monetary figures are relative, and depend for their ultimate quantum, on a comparison with the overall financial wherewithal of the corporation involved." *Mylan v. Leavitt*, 484 F. Supp. 2d at 123.

c. Alleged Harm to Patients [redacted] Is Speculative and Uncertain

Teva threatens [redacted] and adverse effects for patients because it will have to dismantle Sharing Solutions, its patient support program. This asserted harm requires two layers of speculation to come to fruition: a potential decrease in Copaxone revenues, coupled with speculation that hypothetical generic competitors will be "unable or unwilling to offer" comparable services. *Id*. ¶28. Even if Teva's speculation about what hypothetical generic competitors will do is accurate, Teva does not claim the company would choose to dismantle its

[37] *See* Briefing.com: Hourly in Play (May 1, 2014), *available at* lexis.com (stating that 31% of prescriptions for Copaxone in US are for the new 40 mg/mL product as of April 18, 2014); *see also* Teva 2014 Financial Outlook, *available at* http://ir.tevapharm.com/phoenix.zhtml?c=73925&p=irol-irhome (last visited May 10, 2014) (stating that Teva plans to convert 30,000 of the roughly 85,000 American Copaxone users to the new, 40 mg/mL dosage form of Copaxone by late May).

patient support program based on the losses projected in the time needed to litigate this case. *Id.* ¶¶ 28-29.

More importantly, Teva's Copaxone patient support program is a voluntary undertaking, and its cessation would also be voluntary. Although Teva may disadvantage patients by depriving them of the program, any harm to these patients [redacted] would result from Teva's own business decision, not any decision of FDA. In short, Teva, not FDA, chooses the dollar amount to place on patient support programs for their products. *Cf. Viropharma, Inc. v. Hamburg*, 777 F.Supp.2d 140, 147 (D.D.C. 2011) (finding no causation between FDA's actions and "harms" that plaintiff "*elected* to take in response" to potential future actions). Furthermore, while Teva's brief focuses solely on the claimed benefits of the Sharing Solutions program, Teva expanded that program in large part to market its new Copaxone dosage form.[38]

2. Sovereign Immunity Does Not Obviate The Need For Teva to Show Serious Injury

Teva claims that, based on sovereign immunity, it would be unable to recover damages from FDA if the agency unlawfully approves a generic competitor, and therefore any loss of income suffered by the company is "per se" irreparable harm. PI Br. at 40–41. Teva's "per se" construction of the irreparable harm standard would effectively eviscerate any requirement that plaintiffs demonstrate anything other than a nominal degree of loss, and would fly in the face of the requirement to demonstrate harm that is truly "irreparable." *See N. Air Cargo v. USPS*, 756 F. Supp. 2d 116, 125 n.6 (D.D.C. 2010) ("[P]rospective injunctive relief would often cease to be an 'extraordinary remedy' in cases involving government defendants" if it were available whenever a plaintiff cannot recover damages from the defendant due to defendant's sovereign

[38] *See* Andrew Pollack, Supreme Court to Hear Appeal of Generic Drug Case, N.Y. Times, Apr. 1, 2014, at B3.

immunity.) The cases cited by the company do not express the prevailing view in this circuit, as noted above.[39]

Instead, courts have concluded that even if the harm is irrecoverable because the government is immune from suits seeking monetary damages, "it remains incumbent on plaintiffs to demonstrate . . . that they are threatened with serious *injury*." *ViroPharma, Inc v. Hamburg*, 898 F. Supp. 2d 1, 25 (D.D.C. 2012) (J. Huvelle). *See also N. Air Cargo*, 756 F. Supp. 2d at 125 n.6 ("While the Court agrees that irrecoverable financial loss may constitute irreparable injury in some cases, this Court is of the opinion that a party asserting such a loss is not relieved of its obligation to demonstrate that its harm is 'great.'" (quoting *Wis. Gas Co.*, 758 F.2d at 674)); *Gulf Oil Corp.*, 514 F. Supp. at 1026 ("[I]njury must be more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff."). As discussed above, Teva has not shown that its harm will be great.

For all of these reasons, Teva cannot meet its burden of establishing that it will suffer irreparable injury in the absence of a preliminary injunction.

C. The Balance Of Harms And The Public Interest Weigh Against The Entry Of Preliminary Injunctive Relief

Teva has also failed to show that any harm it may suffer in the absence of injunctive relief outweighs the potential harm to FDA, potential generic competitors, and the public. Teva chose to bring this suit prematurely. It is not yet clear whether and upon what basis FDA may approve any ANDAs for drugs referencing Copaxone. Teva's interest in securing advance knowledge of whether and on what basis a generic competitor may be approved before the FDA makes an approval decision is far outweighed by the agency's substantial institutional interest in

[39] Teva relies on *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 77 (D.D.C. 2010), but this case does not stand for a "per se" construction of irreparable harm in the context of sovereign immunity. Instead, the *Smoking Everywhere* court recognized economic harm as irreparable because it was substantial enough to meet the standard adopted by the majority of courts in this circuit. 680 F. Supp. 2d at 77.

not being forced to decide generic approval issues outside the context of a particular ANDA, or to disclose factual issues under consideration within the confidential context of those ANDAs. FDA appropriately declined to render an advisory opinion on the type of evidence it may ultimately decide to require for any ANDA approvals. FDA's interest in making final decisions on issues like those presented here on a case-by-case basis in the normal course of its review process, outweighs any harm to Teva from having to wait for a final agency decision before seeking judicial review.[40]

Moreover, the public and potential ANDA applicants may be harmed by the requested relief. If FDA were to determine that an ANDA referencing Copaxone meets the statutory criteria for approval, preventing FDA from acting to approve the application during the pendency of litigation on the merits of this case would delay that approval, thereby directly harming the public, which benefits from the increased competition – and, thereby, lower prices – incident to FDA's approval of a generic drugs. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("Congress sought to get generic drugs into the hands of patients at reasonable prices – fast."). Further, any harm that would befall Teva must be weighed against the interests of ANDA applicants that would be deprived of revenue from sales of their drugs until the litigation is resolved. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998) (when weighing the harm to the innovator against the harm to an ANDA, "that balance of harm results roughly in a draw"). For all of these reasons, the balance of harms and the public interest weigh heavily against granting the requested injunctive relief.

[40] Indeed, Teva's position does not serve the Court's interest in judicial economy. *See, e.g., Hill Dermaceuticals, Inc. v. FDA*, 524 F. Supp. 2d 5, 12 (D.D.C. 2007) (concluding that an order preventing FDA from approving ANDAs until it answered a citizen petition would not "promote judicial economy or efficiency. If a stay were granted today, judicial resources would be exhausted to protect [plaintiff] and the public from a theoretical harm not at all certain to occur. . . . [G]ranting a stay would send a signal to other drug manufacturers that they can seek and receive extraordinary judicial relief at a time when such relief is premature. This scenario would burden the court system and hinder judicial efficiency.").

CONCLUSION

For the foregoing reasons, Teva's motion for a preliminary injunction should be denied.

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