APPEAL NO. 2015-1499

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMGEN INC., AMGEN MANUFACTURING LIMITED,

Plaintiffs-Appellants,

v.

SANDOZ INC., SANDOZ INTERNATIONAL GMBH, SANDOZ GMBH,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA IN CASE NO. 3:14-CV-04741-RS, JUDGE RICHARD SEEBORG

BRIEF OF *AMICUS CURIAE* BIOTECHNOLOGY INDUSTRY ORGANIZATION IN SUPPORT OF REVERSAL OR REMAND

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMGEN INC., AMGEN MANUFACTURING LIMITED V. SANDOZ INC., SANDOZ INTERNATIONAL GMBH, SANDOZ GMBH

No. 2015-1499

CERTIFICATE OF INTEREST

Counsel for *amicus curiae* Biotechnology Industry Organization certifies the following:

1. The name of every party or amicus represented by me is:

Biotechnology Industry Organization

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not Applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Biotechnology Industry Organization has no parent corporation and no publicly held company owns 10 percent or more of its stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

O'Melveny & Myers: Lisa B. Pensabene and Filko Prugo.

Date: April 14, 2015 /s/ *Lisa B. Pensabene*

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INTEREST OF *AMICUS CURIAE*[1]

Biotechnology Industry Organization ("BIO") is the largest biotechnology trade organization, representing more than 1,100 member companies and research organizations, from start-ups to Fortune 500 companies, who research and develop biotechnological products, including lifesaving medicines. Biological medicines now treat previously untreatable diseases and have prolonged and improved the lives of countless patients. But, development of a biological medicine can require years of research and a fully capitalized investment that can approach $1 billion. Supporting this investment into innovation for biologic medicines and establishing an abbreviated pathway for biosimilars to reach the market sooner was the goal of the aptly named Biologics Price Competition and Innovation Act ("BPCIA" or "the Act").

BIO played a leading role in the effort to establish the statutory pathway for the abbreviated approval process for biosimilars and the corresponding support for innovation in the BPCIA. Many of BIO's members are global leaders in the development and commercialization of biologics and biosimilars. Indeed, the membership of BIO mirrors the various interests that will be affected by the

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), BIO states that no party or party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and that no person other than BIO, BIO's members, or BIO's counsel contributed money that was intended to fund preparing or submitting this brief. Amgen and Sandoz consented to the filing of this brief.

interpretation of the BPCIA statutory requirements. While both parties to this appeal are members of BIO, neither Amgen nor Sandoz have participated in the development and submission of this brief, and should in no way be presumed to endorse the positions taken herein.

BIO believes that the BPCIA must be interpreted as it was intended -- a balance between the interests of biosimilar applicants and reference product sponsors, as that balance is what will ensure availability of new and existing treatments for the patients whose lives depend on them. BIO takes no position on the state law claims at issue here, but writes to express the prevailing views of its members on the underlying questions of the statutory construction of critical provisions of the BPCIA. BIO urges the Court to consider not just the circumstances of this first case, which come up during a transition period of application of the statute, but also the circumstances to which this statute must be applied for the coming decades.

ARGUMENT

The BPCIA includes a process for resolving patent disputes as a condition of obtaining FDA approval for a biosimilar product under the statute. That process contains multiple exchanges of information, which are phased relative to the regulatory review and market entry of the candidate biosimilar product. To BIO, the BPCIA patent dispute resolution process must be interpreted in accordance

with its purpose -- to provide a significant and real opportunity to resolve patent issues prior to the launch of the biosimilar. Such an opportunity requires notice to the reference product sponsor of the initial submission of the biosimilar application and notice of potential commercial marketing upon approval.

These two notice requirements bookend the BPCIA patent dispute resolution process. The notice that begins the BPCIA patent dispute resolution process is provision of the application under subsection (*l*)(2) after its acceptance for regulatory review. 42 U.S.C. § 262(*l*)(2). Following that notice, the BPCIA process includes pre-litigation identification of relevant patents, offers for licensing, negotiation, and an immediate or "early stage" litigation on patents controlled in number by the biosimilar applicant. The final aspect of patent dispute resolution under the BPCIA is notice of commercial marketing under subsection (*l*)(8) which gives the reference product sponsor 180 days prior to marketing of the biosimilar to seek a preliminary injunction on any patents not already resolved through the BPCIA process ("late stage" preliminary injunction litigation). 42 U.S.C. § 262(*l*)(8). With this phased process, Congress sought to take into account the needs of this industry including the realities of the competitive situation, and balance the interests of the biosimilar applicants and reference product sponsors. It is this balance which supports the goal of the industry: to provide medicines to patients that save and improve lives.

A. Regulation of Biologics As Compared to Small Molecules

Biologic products are large, complex molecules or mixtures of molecules, manufactured in a living system such as a microorganism, or plant or animal cells.[2] In contrast, a small molecule active ingredient (regulated by the Hatch-Waxman Act) is typically manufactured through chemical synthesis, which means that it is made by combining specific chemical ingredients in an ordered process.

As FDA has noted, as compared with generic drugs, "[t]he implementation of an abbreviated licensure pathway for biological products can present challenges given the scientific and technical complexities that may be associated with the larger and typically more complex structure of biological products, as well as the processes by which such products are manufactured."[3] Thus, to create the BPCIA, the Hatch-Waxman Act was used as a guide, but not copied exactly. In this Court's words, "Congress enacted the BPCIA, borrowing from (though not copying) the Hatch-Waxman Act's process for use of an Abbreviated New Drug Application (ANDA), rather than a full New Drug Application, to obtain approval of generic versions of previously approved drugs." *Sandoz Inc. v. Amgen Inc.*, 773 F.3d 1274, 1276 (Fed. Cir. 2014). The FDA has noted that "[t]he objectives of the

[2] FDA, *Guidance for Industry Biosimilars: Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009* (Feb. 2012), at 2.

[3] *Id.*

BPCI Act are conceptually similar to those of the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) (commonly referred to as the 'Hatch-Waxman Act'), which established abbreviated pathways for the approval of drug products under the Federal Food, Drug, and Cosmetic Act (FD&C Act)."[4]

One important parallel with the Hatch-Waxman Act is the BPCIA's scheme to provide a meaningful opportunity to resolve patent disputes ***before*** product launch. Both Acts established "artificial acts of infringement" in 35 U.S.C. § 271 to permit filing of lawsuits prior to actual sale. *See* 35 U.S.C. § 271(e)(2)(A); 35 U.S.C. § 271(e)(2)(C). And both Acts established an opening bell for such litigation at 20 days following the acceptance of the regulatory application for review by the FDA.[5] The BPCIA adds a series of patent exchanges prior to the filing of litigation to address the more complicated nature of the patent positions for biologics (with a patent list provided by the reference product sponsor providing some of the functions that the Orange Book provides in Hatch-Waxman litigation). *See* 42 U.S.C. § 262(*l*)(3)-(5); 21 U.S.C. § 355(b)(1).

[4] FDA, *Guidance for Industry Biosimilars: Questions and Answers Regarding Implementation of the Biologics Price Competition and Innovation Act of 2009* (Feb. 2012), at 2.

[5] 42 U.S.C. § 262(l)(2) (provision of biosimilar application to reference product sponsor not later than 20 days after acceptance of application for review); 21 U.S.C. § 355(j)(2)(B) (notice to reference product sponsor not later than 20 days after FDA informs the applicant that the application has been filed).

B. The BPCIA Balance of the Needs of Biosimilar Applicants and Biologics Manufacturers

The BPCIA established a balance of interests and protections for both sponsors of reference biologics and biosimilar applicants. The Act provides a process by which applicants could obtain an abbreviated approval for a biosimilar that references an existing biologic. 42 U.S.C. § 262(k). The Act also provides for data exclusivity for the biologic. 42 U.S.C. § 262(k)(7). And, the Act provides a mechanism for resolving patent disputes, including a process of a series of information exchanges which can take 250 days or more. 42 U.S.C. § 262(*l*).

To preserve incentives for biomedical innovation, the statutory pathway for biosimilars includes a 12-year period of data exclusivity for the reference product during which a biosimilar cannot be marketed. Data exclusivity runs concurrently with the patent term for the product.

Data exclusivity status and the relative timing of biosimilar launch are concepts critical to understanding the commercial implications of the interpretation of the BPCIA. Economically, being the first biosimilar on the market conveys an advantage. Sandoz has noted the value of the first-to-market advantage for a biosimilar applicant.[6] For this reason, a biosimilar would want to be able to launch immediately on the expiration of the exclusivity period.

[6] Sandoz Inc.'s Opposition to Amgen's Motion for a Preliminary Injunction at 3, *Amgen Inc. v. Sandoz Inc.*, No. 14-04741, 2015 WL 1264756 (N.D. Cal. Mar.

The Act considers data exclusivity with regard to the patent dispute resolution process. The Act permits the application for a biosimilar to be filed four years after the reference biologic's first licensure. 42 U.S.C. § 262(k)(7)(B). At that point, eight years of data exclusivity would remain -- easily enough time to engage in the 250-day or more patent exchanges of the Act and subsequent litigation. This circumstance would exist for biologics that recently received FDA approval and for biologics that will receive it in the future.

However, the instant case does not involve a reference biologic that recently received approval, as Amgen's product has been on the market since before 2000. Here and for other products (including all products in the current litigations over the Act) there is no data exclusivity remaining at the time of the biosimilar application.

Applicants for biosimilar versions of biologic products without data exclusivity or near that exclusivity's end may view participation in the *entire* 250-day or more patent exchange as strategically undesirable -- those applicants may feel that expediency trumps the benefits, such as patent certainty, of the statutory

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19, 2015), ECF No. 71-4 (arguing against a permanent injunction as "jeopardiz[ing] the first-to-market advantage in which it has invested years of effort and tens of millions of dollars").

information exchange and dispute resolution process.[7] And, if the district court opinion is upheld, they may view participation in *any* part of the process as optional. However, that perspective does not account for the interests of the reference product sponsor, or of downstream market participants.

To add further complications to the balance of interests, for many upcoming applications, multiple biosimilar application filers are expected.[8] In these circumstances, each filer will be evaluating strategies to obtain valuable positioning in the market place, including the first to market advantage.

C. The Needs of the Industry and Interpretation of the BPCIA

Any statutory interpretation should take into account the needs of this industry, including the realities of the competitive situation described above. The interpretation must be balanced between the interests of the biosimilar applicants and the biologic reference product sponsors. In BIO's view, the BPCIA's notice

[7] As one such applicant said, "for drugs like infliximab that received FDA approval in the late 1990s, § 262 exclusivity has already expired" and "requiring the roughly 280-day patent information exchange process to precede litigation would give the reference drug owner a new and unwarranted 280-day exclusivity extension" that "cannot be what Congress intended." Hospira's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 23, *Hospira, Inc. v. Janssen Biotech, Inc.*, 113 U.S.P.Q.2d 1260 (S.D.N.Y. 2014) (No. 14-7049), ECF No. 42.

[8] At least Pfizer, Sandoz, and Boehringer Ingelheim have announced plans for a rituximab biosimilar. Additionally, Apotex has already filed the second biosimilar application for filgrastim. Apotex Press Release, *Apotex targets Amgen's Blockbuster with Latest Biosimilar App* (Feb. 18, 2015), *available at* http://www.apotex.com/global/about/press/20141217.asp.

procedures (a first notice upon acceptance of the application and a second notice prior to commercial marketing) balance the interests of biologic reference product sponsors and biosimilars to address the needs of both for a significant and real opportunity to resolve patent issues prior to the launch of the biosimilar.

i. Significant and real opportunity to resolve patent issues prior to launch of the biosimilar

From all sides' perspectives, a significant and real opportunity to resolve patent issues prior to the launch of the biosimilar is sensible. It is advantageous to no one (most importantly, patients) to have the uncertainty of a preliminary injunction, or, worse yet, the uncertainty of launch under the cloud of a possible subsequent judgment of infringement, and a court attempting to craft a remedy. The biologic reference product sponsor should not effectively lose its exclusionary rights in its patents because of an insufficient opportunity or information to enforce those rights prior to biosimilar launch. Nor should a biosimilar face the specter of significant and possibly business-crippling damages upon launch without the opportunity for resolution of patent issues prior to launch.

This was the intent of Congress -- the BPCIA "ensure[s] that litigation surrounding relevant patents will be resolved expeditiously and prior to the launch

of the biosimilar product, providing certainty to the applicant, the reference product manufacturer, and the public at large."[9]

In fact, the aim of this case and other recent litigation about biosimilars has been resolution of patent issues prior to launch of the biosimilar, albeit through different mechanisms. In addition to this case, two other disputes on potential biosimilars have been subject to action by the courts. One relates to etanercept, the reference product Enbrel®. *Sandoz Inc. v. Amgen Inc.*, 773 F.3d 1274 (Fed. Cir. 2014) (affirming dismissal of Sandoz's declaratory judgment action for lack of subject matter jurisdiction). The other (including four different actions) relates to infliximab, the reference product Remicade®.[10] In every case, both the biosimilar applicant and the reference product sponsor cite the need for a prompt, real opportunity to resolve patent disputes before launch of the biosimilar.

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[9] *Biologics and Biosimilars: Balancing Incentives for Innovation: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 9 (July 14, 2009) (statement of Rep. Eshoo).

[10] *Celltrion Healthcare Co. Ltd. v. Kennedy Trust for Rheumatology Research*, No. 14-2256, 2014 WL 6765996 (S.D.N.Y. Dec. 1, 2014) (dismissing Celltrion's declaratory judgment action for lack of subject matter jurisdiction); *Hospira, Inc. v. Janssen Biotech, Inc.*, 113 U.S.P.Q.2d 1260 (S.D.N.Y. 2014) (dismissing Hospira's declaratory judgment action for lack of subject matter jurisdiction); Complaint, *Janssen Biotech, Inc. v. Celltrion Healthcare Co., Ltd.*, No. 15-10698 (D. Mass. filed Mar. 6, 2015), ECF No. 1 (alleging infringement based on BPCIA); Celltrion's Complaint for Declaratory Judgment, *Celltrion Healthcare Co. Ltd. v. Janssen Biotech, Inc.*, No. 14-11613 (D. Mass. filed Mar. 31, 2014), ECF No. 1 (voluntarily dismissed on October 24, 2014 before a ruling on Janssen's motion to dismiss).

In the etanercept action, the biosimilar applicant, Sandoz, filed a declaratory judgment action for non-infringement and invalidity at the beginning of phase III clinical trials, before the biosimilar application was (or could be) filed.[11] In that action, Sandoz argued that "[b]y filing its complaint in 2013, Sandoz sought to ensure sufficient time for the litigation so that it would be able to obtain a final district court judgment before its intended commercial marketing"[12] and reasoned that "companies will not launch biosimilar products with billion-dollar damages claims outstanding."[13] Amgen argued that the case was not ripe because no application had been filed and, if and when one was, the action should proceed via the BPCIA, which included "a framework to allow patent disputes to unfold prior to market entry by a biosimilar."[14] This Court affirmed the district court's dismissal of the action for lack of subject matter jurisdiction, but the panel did "not

[11] Complaint for Declaratory Judgment of Patent Invalidity and Non-Infringement at ¶ 42, *Sandoz Inc. v. Amgen Inc.*, No. 3:13-cv-2904, 2013 WL 6000069 (N.D. Cal. Nov. 12, 2013), ECF No. 1 ("Sandoz recently initiated a Phase III clinical study" and "[t]he first patient was enrolled in June 2013.").

[12] Corrected Nonconfidential Brief of Plaintiff-Appellant Sandoz Inc. at 18, *Sandoz Inc. v. Amgen Inc.*, 773 F.3d 1274 (Fed. Cir. 2014) (No. 2014-1693), ECF No. 29.

[13] *Id.* at 23.

[14] Corrected Nonconfidential Opposition Brief of Defendants-Appellees, Amgen Inc. and Hoffmann-La Roche Inc. at 54, *Sandoz Inc. v. Amgen Inc.*, 773 F.3d 1274 (Fed. Cir. 2014) (No. 2014-1693), ECF No. 44.

address the district court's interpretation of the BPCIA." *Sandoz Inc. v. Amgen Inc.*, 773 F.3d 1274, 1275 (Fed. Cir. 2014).

The infliximab actions also began with a series of declaratory judgment actions filed by the biosimilar applicant. There, Celltrion and its partners filed the declaratory judgment actions after completing phase III clinical testing but prior to the biosimilar application. *Celltrion Healthcare Co. Ltd. v. Kennedy Trust for Rheumatology Research*, No. 14-2256, 2014 WL 6765996 at *3 (S.D.N.Y. Dec. 1, 2014). Arguing for declaratory judgment jurisdiction, Celltrion said that "the BPCIA thus provides a mechanism to ripen otherwise unripe patent disputes before the 12-year term expires and 'ensure[s] that litigation surrounding relevant patents will be resolved expeditiously and prior to the launch of the biosimilar product, providing certainty to the applicant, the reference product manufacturer, and the public at large.'"[15] The declaratory judgment actions were resolved by Celltrion's voluntary dismissal and the district court's grant of motions to dismiss for lack of subject matter jurisdiction in the two related actions. *Celltrion Healthcare Co., Ltd. v. Kennedy Trust for Rheumatology Research*, No. 14-2256, 2014 WL 6765996 at *3 (S.D.N.Y. Dec. 1, 2014); *Hospira v. Janssen Biotech, Inc.*, 113

[15] Plaintiffs' Memorandum of Law in Opposition to Defendant Kennedy Trust's Motion to Dismiss the Complaint or to Stay the Action at 3, *Celltrion Healthcare Co., Ltd. v. Kennedy Trust for Rheumatology Research*, No. 14-2256, 2014 WL 6765996 (S.D.N.Y. Dec. 1, 2014), ECF No. 23 (citation omitted).

U.S.P.Q.2d 1260 (S.D.N.Y. 2014). Thereafter, following acceptance of its biosimilar application by the FDA, Celltrion provided Janssen with its biosimilar application (but not certain further information) and Janssen sued for infringement. In that Complaint, Janssen, the reference product sponsor, identified the goals of the BPCIA as "to facilitate the orderly resolution of patent disputes before a biosimilar product could enter the market"[16] and "to ensure that disputes over patent rights will take place in an orderly fashion, with the least possible uncertainty, brinksmanship, and burden on the parties and the court."[17]

In the instant case, Sandoz argued to the District Court that "Congress introduced the BPCIA to create both a new regulatory pathway for the approval of biosimilar products, and patent-resolution mechanisms by which the originator of a biological medicine (the reference product sponsor or 'Sponsor') and a biosimilar applicant ('Applicant') can resolve potential patent disputes ***prior to the launch of the biosimilar product***, so that patients and the healthcare system could access affordable and effective biosimilar products as soon as possible."[18] Similarly,

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[16] Complaint at ¶ 5, *Janssen Biotech, Inc. v. Celltrion Healthcare Co., Ltd.*, No. 15-10698 (D. Mass. filed Mar. 6, 2015), ECF No. 1.

[17] *Id.* at ¶ 74.

[18] Defendant Sandoz Inc.'s Notice of Motion and Cross-Motion for Judgment on the Pleadings; Memorandum of Points and Authorities in Support thereof; and Opposition to Amgen's Motion for Judgment on the Pleadings at 1, *Amgen Inc. v. Sandoz Inc.*, No. 14-04741, 2015 WL 1264756 (N.D. Cal. Mar. 19, 2015), ECF No. 45 (emphasis added).

Amgen observed that "[t]he system not only benefits the reference product sponsor and the biosimilar applicant, but also benefits courts and FDA by reducing unnecessary disputes over patents and benefits the public by ensuring any disputes are identified and court intervention is sought ***before commercial marketing of the biosimilar*** product begins."[19]

ii. Notice of application and notice of commercial marketing

No entity appears to dispute that the effectiveness of the statutory pathway, and its goal of a real opportunity to resolve patent issues prior to the launch of the biosimilar, depends on the provision of information by the biosimilar applicant. The question is what notice does the statute require.

To begin, the apparent consensus of the necessity of notice is illustrated by this and the above-described recent litigation about biosimilars -- all cases involved some form of notice of the filing (or potential filing) of the biosimilar application and commercial marketing:

- In the instant case, the day after FDA accepted its biosimilar application, Sandoz sent a letter informing Amgen of Sandoz's biosimilar application and of

[19] Notice of Motion and Motion by Amgen for Partial Judgment Under Rule 12(C) or, in the Alternative, Motion for Partial Summary Judgment Under Rule 56 at 12, *Amgen Inc. v. Sandoz Inc.*, No. 14-04741, 2015 WL 1264756 (N.D. Cal. Mar. 19, 2015), ECF No. 35 (emphasis added).

Sandoz's intent to immediately market its product upon FDA approval, expected "in or around Q1/2 of 2015."[20]

- In the infliximab cases (*Janssen v. Celltrion*), Celltrion provided notice of filing of the application, the biosimilar application and a purported 180-day notice of commercial marketing.[21]
- In the etanercept case (*Sandoz v. Amgen*), "prior to filing its [declaratory judgment action], Sandoz wrote to Amgen, providing notice of its intention to commercially launch its product upon FDA approval, and requesting a covenant not to sue."[22] Sandoz stated in its complaint that "Sandoz is preparing to file an application with the FDA for regulatory approval to market and sell etanercept in the United States."[23]

[20] Defendant Sandoz Inc.'s Reply in Support of Its Cross-Motion for Judgment on the Pleadings, Ex. A at 1, *Amgen Inc. v. Sandoz Inc.*, No. 14-04741, 2015 WL 1264756 (N.D. Cal., Mar. 19, 2015), ECF No. 61.

[21] Complaint at ¶ 104, 123, *Janssen Biotech, Inc. v. Celltrion Healthcare Co., Ltd.*, No. 15-10698 (D. Mass. filed March 6, 2015), ECF No. 1.

[22] Corrected Nonconfidential Brief of Plaintiff-Appellant Sandoz Inc. at 18, *Sandoz Inc. v. Amgen Inc.*, 773 F.3d 1274 (Fed. Cir. 2014) (No. 2014-1693), ECF No. 29.

[23] Complaint for Declaratory Judgment of Patent Invalidity and Non-Infringement at ¶ 43, *Sandoz Inc. v. Amgen Inc.*, No. 13-2904, 2013 WL 6000069 (N.D. Cal. Nov. 12, 2013), ECF No. 1.

While the forms and effects of the notices required are disputed, the biosimilar applicants' actions in each case tacitly acknowledge that notice at two points is required -- (1) notice upon application and (2) notice of commercial marketing.

The process envisioned by the BPCIA involves pre-litigation identification of relevant patents, offers for licensing, negotiation, and two stages of litigation -- an immediate or "early stage" on patents controlled in number by the biosimilar applicant and a second possible preliminary injunction "late stage" on patents not involved in the first early stage. 42 U.S.C. § 262(*l*)(6); 42 U.S.C. § 262(*l*)(8).

This scheme cannot work in any way without (at a minimum) the reference product sponsor being given notice that a biosimilar application referencing one of its products has been submitted to FDA and who submitted the application. And, the BPCIA gives but one mandatory form for that notice, provision of the biosimilar application. Within 20 days of acceptance of the application -- in the words of the statute, the application itself "shall" be provided. The statute provides no other form for the notice. And, indeed, no other form could provide the information that is needed to continue the rest of the exchanges contemplated by the BPCIA: without the application, the patents that can be asserted cannot be listed (42 U.S.C. § 262(*l*)(3)(A)), and the contentions cannot be formulated to be exchanged (42 U.S.C. § 262(*l*)(3)(B)-(C)).

No alternative public source of certain notice exists. The filing of the application and its owner will not be made public by FDA. And, a biosimilar applicant may decide not to publicly disclose that it has submitted an application or that the application is undergoing review by FDA. It makes little sense for Congress to devise a carefully orchestrated process for exchanging information, and identifying and enforcing patents that might only begin if the reference product sponsor serendipitously discovered from public sources that a biosimilar application had been filed.

The 180-day notice of commercial marketing is the end point of the patent dispute resolution exchanges of the BPCIA. Under the BPCIA scheme, the 180-day notice of commercial marketing effectuates litigation on patents that were listed but ***not*** part of the early stage litigation.[24] In other words, the 180-day notice

[24] The statute says:

(B) Preliminary injunction

After receiving the [180-day] notice under subparagraph (A) and before such date of the first commercial marketing of such biological product, the reference product sponsor may seek a preliminary injunction prohibiting the subsection (k) applicant from engaging in the commercial manufacture or sale of such biological product until the court decides the issue of patent validity, enforcement, and infringement with respect to any patent that is—
(i) included in the list provided by the reference product sponsor under paragraph (3)(A) or in the list provided by the subsection (k) applicant under paragraph (3)(B); and
(ii) not included, as applicable, on—
(I) the list of patents described in paragraph (4); or

requirement specifies the ***end*** of an ordered patent information exchange process, not the beginning. Sandoz appears to argue that the 180-day notice of commercial marketing can substitute for the biosimilar's application as the starting bell for patent disputes between the parties. But, the statute provides for two separate forms of notice, at two separate times, with two different purposes.

In terms of this timing, the language, structure, and purpose of the BPCIA all require a product to be "licensed" before a notice of commercial marketing so as to provide an opportunity for a preliminary injunction to be sought prior to launch to protect against imminent irreparable harm. The statutory language includes the timing of the notice of commercial marketing -- this notice may be given when a product has been "licensed under subsection (k)." And, this structure correlates to the regulatory process. Early stage exchanges at longest would take about 8 months, ending at a time close to approval (FDA has committed to a review process of 10 months for most biosimilar applicants[25]), and thus close to this final opportunity for notice and the beginning of any late stage litigation.

(II) the lists of patents described in paragraph (5)(B).
42 U.S.C. § 262 (*l*)(8)(B) (emphasis added).

[25] FDA, *Biosimilar Biological Product Authorization Performance Goals and Procedures Fiscal Years 2013 through 2017* at 3, *available at* http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/TherapeuticBiologicApplications/Biosimilars/UCM281991.pdf.

As is clear from its title, "[n]otice of commercial marketing and preliminary injunction," and its text, the purpose of 42 U.S.C. § 262(*l*)(8) is a final opportunity for a preliminary injunction prior to launch to protect against imminent irreparable harm triggered by a notice of commercial marketing of a "licensed" product. This stated purpose of the 180-day notice is inconsistent with the argument that such notice can be provided at ***any*** time. For example, notice of commercial marketing given at the time of submission of the biosimilar application is illusory -- whether, when and under what conditions the application might be approved are unknown, and resulting untimely and unripe litigation is the antithesis of the ordered dispute resolution process universally agreed to be a goal of the BPCIA.

Contrary to what has been argued below about this timing providing an extra 6 months of exclusivity -- the so-called "12.5 years of exclusivity" -- it does not. Congress envisioned that patent disputes could be resolved during the 12-year data exclusivity window. The statute contemplates in 42 U.S.C. § 262(k)(7) that FDA approval could occur prior to the expiration of exclusivity, and indeed, given that the application can be filed at the 4-year mark with 8 years of data exclusivity remaining, FDA approval with remaining exclusivity appears to be the prevailing scenario envisioned by Congress. The BPCIA in that circumstance prevents making the approval "effective" until exclusivity expiration. 42 U.S.C. § 262(k)(7)(A). As a result, requiring FDA approval before providing the 180-day

notice of commercial marketing would not require an additional waiting period and would not provide an "extension of exclusivity" where FDA approval is obtained at least 180 days before exclusivity expires.

The fact that other possible exclusivity scenarios exist does not change the wording of the statute or make its application unfair. As to biosimilar applications filed late in the exclusivity time period, it is the biosimilar applicant that chooses when to file its application with the FDA and whether to address all patent questions during the "early stage." 42 U.S.C. § 262(*l*)(5)(A) ("The subsection (k) applicant shall notify the reference product sponsor of the number of patents that such applicant will provide to the reference product sponsor."); 42 U.S.C. § 262(*l*)(5)(B)(ii)(I) ("[T]he number of patents listed by the reference product sponsor under clause (i)(II) may not exceed the number of patents listed by the subsection (k) applicant under clause (i)(I)."). The biosimilar applicant's choice of when to file the application or to defer the litigation over listed patents until "late stage" preliminary injunction litigation comes with timing consequences. In some instances, those choices may fairly delay a biosimilar applicant's ability to launch its product even after biosimilar approval has been made effective upon expiration of the reference product's data exclusivity.

For reference products with no data exclusivity that were developed with no expectation of a biosimilar pathway, a notice of commercial marketing would

provide a modest 6-month respite before commercial launch of the approved biosimilar product to resolve patent disputes before biosimilar launch, which accords with Congress' intent for patent dispute resolution to at least begin before a potentially infringing biosimilar product is launched.

No doubt arguments will be raised that, in the circumstances of this particular case (in which data exclusivity has expired), the application of the statute results in timing that is not optimal for the biosimilar applicant. But, the abbreviated biosimilar application pathway sought to be used here, created by the BPCIA, carried conditions and safeguards for both sides.

CONCLUSION

Biosimilars applicants and biologic reference product sponsors, now and in the future, must follow the BPCIA requirements to take advantage of that abbreviated pathway and the protections afforded to innovation. The statute should be interpreted as Congress drafted it, with that future in mind.

Date: April 14, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2015, I caused a copy of the foregoing BRIEF OF *AMICUS CURIAE* BIOTECHNOLOGY INDUSTRY ORGANIZATION IN SUPPORT OF REVERSAL OR REMAND to be served by electronic means (by email or CM/ECF).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word-processing system used to prepare it, this brief contains 4,978 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) by using Microsoft Office Word in Times New Roman 14 point font.

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