Buchanan Ingersoll & Rooney PC
Attorneys & Government Relations Professionals

1700 K Street, N.W., Suite 300
Washington, DC 20006-3807
T 202 452 7900
F 202 452 7989
www.buchananingersoll.com

Edward John Allera
202 452 7985
edward.allera@bipc.com

Barbara A. Binzak Blumenfeld
202 452 7906
barbara.binzak@bipc.com

May 29, 2014

VIA ELECTRONIC SUBMISSION
(www.regulations.gov)

Division of Dockets Management
U.S. Food and Drug Administration
5630 Fishers Lane
Room 1061, HFA-305
Rockville, MD 20852

Re: **Docket FDA-2013-P-0119 – Supplement to Petition for Reconsideration and Petition for Stay of Action (Ferring Pharmaceuticals Inc.)**

Dear Sir or Madam:

As counsel to Ferring Pharmaceuticals Inc. ("Ferring" or "the Company"), we submit to the above-referenced docket this Supplement to our Petition for Reconsideration and Petition for Stay of Action[1] ("Petition for Reconsideration") regarding the U.S. Food and Drug Administration's ("FDA's" or "the Agency's") determination that Ferring's fixed-combination Prepopik® (sodium picosulfate, magnesium oxide, and anhydrous citric acid) for oral solution is not eligible for five-year new chemical entity ("NCE") exclusivity under the Agency's new statutory interpretation.[2] Ferring[3] and two other parties[4] all separately petitioned the Agency for this new statutory interpretation, which FDA accepted. However, FDA did not apply the new interpretation to Ferring's Prepopik (or the other two petitioners' products).

This Supplement highlights additional information that has emerged since Ferring filed the Petition for Reconsideration which reinforces Ferring's position, and the Company

[1] March 21, 2014.

[2] Letter from Janet Woodcock to David M. Fox, Theodore M. Sullivan, Edward John Allera, and Joy J. Liu (February 21, 2014).

[3] Ferring Citizen Petition (January 29, 2013), Docket No. FDA-2013-P-0119.

[4] Gilead Citizen Petition (January 8, 2013), Docket No. FDA-2013-P-0058; Bayer Citizen Petition (April 19, 2013), Docket No. FDA-2013-P-0471.

respectfully requests that FDA consider and apply this new information during its decisionmaking process.

I. FDA'S CONCERNS ABOUT APPLYING THE NEW INTERPRETATION TO THE PETITIONERS THAT REQUESTED THE CHANGE ARE MOOT

Although FDA agreed with the arguments presented by the original three petitioners that were seeking this legally correct interpretation of five-year NCE exclusivity as it applies to fixed-combination drug products, the Agency did not apply the newly articulated interpretation to these petitioners' products, including Prepopik. Among the reasons for FDA's decision was that "if the new interpretation were to be applied to products for which ANDAs [abbreviated new drug applications] already have been filed, it could impose a burden on the ANDA sponsors, who relied on our existing interpretation in filing their application."[5]

To the best of our knowledge, neither Ferring's Prepopik nor Gilead's Stribild® has been referenced in any generic drug application. At the time FDA issued its response, only Bayer's product Natazia® had been the subject of a Paragraph IV notification, indicating that an ANDA had been filed. Subsequent events in this Paragraph IV litigation have rendered moot FDA's concern about reliance on the Agency's prior interpretation of NCE exclusivity, thus removing an important, albeit erroneous, basis for FDA's argument that it should not apply the newly articulated interpretation to Ferring's Prepopik.

In the Natazia litigation, Bayer sued Lupin Pharmaceuticals ("Lupin") for patent infringement of its Patent 8,071,577 ("'577 Patent").[6] The parties recently settled this case, with Lupin agreeing in the Stipulation of Dismissal[7] to amend its ANDA by changing the Paragraph IV certification to the '577 Patent to a Paragraph III certification. The practical result is that Lupin will not introduce its to-be-approved ANDA to the market until the '577 Patent expires (May 13, 2026).

Because Natazia's current three-year exclusivity expires on March 14, 2015, converting the awarded three-year exclusivity to five-year exclusivity that would expire in 2017 would not negatively impact Lupin's ANDA approval status. Any reliance that Lupin may have had on FDA's previous NCE exclusivity policy is now irrelevant. As a result, FDA's concern that applying the new exclusivity interpretation to the original three petitioners' products would cause undue hardship on existing ANDA sponsors is no longer valid and cannot support FDA's decision to deny five-year NCE exclusivity to Ferring's Prepopik.

---

[5] Letter from Janet Woodcock to David M. Fox, Theodore M. Sullivan, Edward John Allera, and Joy J. Liu (February 21, 2014), at 17.

[6] Bayer Pharma AG v. Lupin Ltd., Case 1:12-cv-01592 (D.Del.) (Complaint filed November 28, 2012).

[7] Filed March 12, 2014.

II. COMMENTS ON THE EXCLUSIVITY DRAFT GUIDANCE SUPPORT IMMEDIATE IMPLEMENTATION OF THE NEW INTERPRETATION, INCLUDING APPLICATION TO FERRING

At the same time FDA issued its response to the original three petitioners, the Agency published for comment a draft guidance outlining its newly articulated interpretation of five-year NCE exclusivity as applied to fixed-combination drug products ("Exclusivity Draft Guidance").[8] FDA stated in that document that "[i]f the new interpretation is adopted," then FDA will apply it prospectively, not to fixed-combination products "that were approved prior to adopting the new interpretation."[9] Ferring flatly disagrees with the legality and practicality of this delayed implementation approach, as outlined in its Petition for Reconsideration and in its comments to the Exclusivity Draft Guidance docket.[10]

No other public comments to the Exclusivity Draft Guidance docket supported a delayed implementation of FDA's new interpretation. On the contrary, the public comments supported a timely implementation of the new interpretation (described as "as soon as possible,"[11] "as quickly as possible,"[12] "expeditiously,"[13] or "immediately").[14] Furthermore, many of the comments argued that the new interpretation should be applied to approved new drug applications ("NDAs") for which the Agency had not received an ANDA or § 505(b)(2) NDA.[15]

---

[8] FDA, "Draft Guidance for Industry: New Chemical Entity Exclusivity Determinations for Certain Fixed-Combination Drug Products" (February 2014), *available at* http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm121568.htm.

[9] Exclusivity Draft Guidance, at 1.

[10] Letter from Edward John Allera, Buchanan Ingersoll & Rooney PC, to Docket No. FDA-2013-D-1675 (April 25, 2014).

[11] PhRMA comments (April 25, 2014), at 2; Helsinn Healthcare SA comments (April 24, 2014), at 2.

[12] Cubist Pharmaceuticals, Inc. comments (April 18, 2014), at 2.

[13] BIO comments (April 25, 2014), at 1.

[14] Specialty Pharma Association comments (April 28, 2014), at 2; Merck Sharp & Dohme Corp. comments (April 24, 2014), at 2.

[15] *See, e.g.,* BIO comments (April 25, 2014), at 4 ("...[i]t is entirely appropriate for FDA to begin applying NCE exclusivity immediately – including to recently approved products for which no 505(b)(s) [sic] applications or ANDAs have yet been submitted."); Helsinn Healthcare SA comments (April 24, 2014), at 2 ("If the agency will not be able to expeditiously finalize the *Draft Guidance* and begin applying the new policy, then Helsinn respectfully requests that, when the new standard goes into effect, FDA apply it to qualifying NDAs that were approved before the final guidance document issued, and for which no ANDA has been received or 505(b)(2) NDA has been filed at the time the *Draft Guidance* is finalized."); PhRMA comments (April 25, 2014), at 5 ("PhRMA encourages FDA to apply its policy change to all products subject to any application or applications that are new or are currently pending before FDA."); *Id.* at 5, fn. 21 ("FDA also should consider how to apply the new policy to approved

There was also support for applying the new interpretation to already-approved NDAs,[16] including the original three petitioners who advocated for the policy change. For example, BIO commented that its support of timely implementation of the new interpretation "should not be construed, however, as agreement with FDA's decision to apply its position going forward only (and thus not applying the reinterpretation to petitioners' applications)."[17] A commenter from The Hebrew University of Jerusalem also urged FDA to apply its new interpretation "to the three fixed-combination NDAs that were the subjects of the Petitions."[18]

Commenters on the Exclusivity Draft Guidance clearly agree that there is no reason for the Agency to delay implementing its new interpretation of five-year NCE exclusivity to fixed-combination drug products. Moreover, many of the commenters[19] supported applying the new interpretation to the original three petitioners or, at a minimum, to previously-approved NDAs with no pending ANDAs or § 505(b)(2) NDAs. As addressed in the previous Section, Ferring believes there is currently no pending ANDA or 505(b)(2) NDA for any of the original three petitioners' drug products.

III. CONGRESS RECENTLY RAISED QUESTIONS ABOUT FDA'S USE OF AND RELIANCE ON DRAFT GUIDANCE

Finally, Congress has recently raised significant questions about FDA's use of draft guidance documents "to make substantive policy changes." On May 6, 2014, the Ranking Member of the Senate HELP Committee, joined by three HELP Committee colleagues, issued a letter to FDA Commissioner Margaret Hamburg that requested specific information from the Agency about its development and use of, and timeframes related to, draft guidance.[20] Specifically, the Senators raised several concerns: (1) the FDA website does not differentiate between final and draft guidance documents; (2) draft guidances are not being timely revised, finalized, or withdrawn; (3) without final guidance documents, drafts are distributed "for comment purposes only," yet they remain FDA's current thinking on a topic; and (4) FDA-

---

applications in appropriate circumstances. This may be particularly appropriate where, for example, an application has been recently approved (especially after issuance of the Draft Guidance) and/or no ANDA or 505(b)(2) application has been submitted that references the application.").

[16] *See, e.g.,* PhRMA comments (April 25, 2014), at 7 ("...FDA should implement this policy with respect to previously approved fixed-combination products.").

[17] BIO comments (April 25, 2014), at 2.

[18] Comments from Prof. Israel Agranat, The Hebrew University of Jerusalem (April 25, 2014), at 5.

[19] Other commenters suggested applying the new interpretation to NDAs "currently under review" by the Agency (Cubist Pharmaceuticals, Inc. comments (April 18, 2014), at 1), or to all NDAs approved on or after the date that the Exclusivity Draft Guidance was published (Merck Sharp & Dohme Corp. comments (April 24, 2014), at 2).

[20] Letter from Sens. Lamar Alexander, Richard Burr, Johnny Isakson, and Orrin G. Hatch to Margaret Hamburg, FDA (May 6, 2014).

issued guidances "seemingly do[] not take into account, or may even conflict with, the scientific community." The Senators requested that FDA reply to five specific questions pertaining to the Agency's use of these guidance documents.

Congress' concerns about FDA reliance on draft guidance documents – such as the Exclusivity Draft Guidance – mirrors the concerns Ferring raised in its Petition for Reconsideration. Furthermore, these concerns highlight the fact that FDA should have implemented the new interpretation of five-year NCE exclusivity for fixed-combination drug products directly from the FFDCA, without issuing the Exclusivity Draft Guidance, as Ferring argued in its Petition for Reconsideration.[21]

IV. VERIFICATION

Although Ferring does not believe that a verification under FFDCA § 505(q) is required for this Supplement to its Petition for Reconsideration, the Company is nonetheless including the verification in the event the Agency deems it necessary:

I certify that, to my best knowledge and belief: (a) I have not intentionally delayed submission of this document or its contents; and (b) the information upon which I have based the action requested herein first became known to me on or about April 1, 2014. If I received or expect to receive payments, including cash and other forms of consideration, to file this information or its contents, I received or expect to receive those payments from the following persons or organizations: Ferring Pharmaceuticals Inc. I verify under penalty of perjury that the foregoing is true and correct as of the date of the submission of this petition.

* * * * *

[21] Ferring Petition for Reconsideration, at 32-36.

V. CONCLUSIONS

We respectfully request that FDA consider the information in this Supplement during its review of Ferring's Petition for Reconsideration. Please do not hesitate to contact us directly with any comments or questions (Edward John Allera – (202) 452-7985; edward.allera@bipc.com); Barbara A. Binzak Blumenfeld – (202) 452-7906; barbara.binzak@bipc.com).

Respectfully submitted,

Edward John Allera

Barbara A. Binzak Blumenfeld

Counsel to Ferring Pharmaceuticals Inc.

cc (via electronic mail only):

Elizabeth Dickinson, J.D.
Chief Counsel, FDA

Janet Woodcock, M.D.
Director, Center for Drug Evaluation and Research

cc (via www.regulations.gov):

Docket FDA-2013-P-0058

Docket FDA-2013-P-0471