MYLAN PHARMACEUTICALS INC
781 Chestnut Ridge Road • P. O. Box 4310 • Morgantown, West Virginia 26504-4310 U.S.A. • (304) 599-2595

0988 '06 JUN 13 P4:21

June 12, 2006

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

Re: Citizen Petition by Mylan Pharmaceuticals Inc.:
Exclusivity Determination for Risperidone Tablets

Dear Sir or Madam:

Mylan Pharmaceuticals Inc. ("Mylan") requests that FDA award Mylan 180-day generic marketing exclusivity with respect to its abbreviated new drug application ("ANDA") for Risperidone tablets, 0.25mg, 0.5mg, 1mg, 2mg, 3mg, and 4mg. With the recent expiration of the 30-month stay of approval, this matter is ripe for determination by FDA.

As explained in detail below, under the provisions of the Food, Drug & Cosmetic Act ("FDCA") governing notice of Paragraph IV certifications that went into effect as of August 18, 2003, FDA should base exclusivity determinations on the date notice was given by an ANDA applicant of its Paragraph IV certification, not the date the certification was filed with FDA. Because Mylan was the first applicant to develop and submit an ANDA for all strengths of Risperidone tablets and to provide notice of its Paragraph IV patent certification to the NDA holder and the patentee, Mylan is eligible for sole 180-day generic marketing exclusivity. The following timeline serves as the factual basis for Mylan's position:

- **November 29, 2001**: Mylan submitted an ANDA for the 0.5mg, 1mg, and 4mg strengths of Risperidone. Mylan's ANDA as originally submitted included a Paragraph III certification to the U.S. Patent No. 4,804,663 (the "'663 Patent").
- **January 30, 2002**: Mylan amended its ANDA to add the 0.25mg, 2mg, and 3mg strengths of Risperidone.
- **November 19, 2003**: Mylan amended its ANDA to include a Paragraph IV certification to the '663 Patent. Mylan simultaneously sent notice of its Paragraph IV certification to the patent owner and the NDA holder.

2006P-0245 CP1

Department—Fax Numbers
Accounting (304) 285-6403
Administration (304) 599-7284
Business Development (304) 598-5419
Corporate Services (304) 285-6482
Human Resources (304) 598-5406
Information Systems (304) 285-6404
Label Control (800) 848-0463
Legal Services (304) 598-5408
Maintenance & Engineering (304) 598-5411
Medical Unit (304) 598-5445
Product Development (304) 285-6411
Purchasing (304) 598-5401
Quality Assurance (304) 598-5407
Quality Control (304) 598-5409
Regulatory Affairs (304) 285-6407
Research & Development (304) 285-6419
Sales & Marketing (304) 598-3232

- **December 30, 2003**: Janssen filed suit against Mylan alleging infringement of the '663 Patent. Janssen also filed suit against Dr. Reddy's Laboratories ("DRL") the same day.

Mylan believes that DRL submitted an original ANDA containing a Paragraph IV certification to the '663 Patent prior to November 19, 2003, the date of Mylan's patent amendment. However, Mylan also believes that DRL did not send notice of its Paragraph IV certification to the NDA holder and the patentee until weeks after Mylan sent notice of Mylan's Paragraph IV certification on November 19, 2003. FDA should award Mylan exclusivity under these facts because Mylan was the first applicant to perfect and complete its Paragraph IV filing by sending the notice letter required by statute.

As of August 18, 2003, the filing of an ANDA with a Paragraph IV certification – a certification "that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug" -- triggers a mandatory notice requirement on behalf of the ANDA applicant. The ANDA applicant must inform both the patent holder and the company that submitted the NDA on which the ANDA relies that it has made a Paragraph IV certification, and the ANDA applicant must provide additional information, including a detailed factual and legal statement of the basis for the patent certification. 21 U.S.C. § 355(j)(2)(B). The notice requirement applicable to ANDAs for Risperidone tablets was established by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA"), Pub. L. No. 108-173, 117 Stat. 2066 (December 8, 2003), because both Mylan and DRL filed their respective paragraph IV certifications after August 18, 2003.

The pertinent statutory notice provision states:

> (i) AGREEMENT TO GIVE NOTICE- An applicant that makes a certification described in subparagraph (A)(vii)(IV) shall include in the application a statement that the applicant will give notice as required by this subparagraph.
> (ii) TIMING OF NOTICE- An applicant that makes a certification described in subparagraph (A)(vii)(IV) shall give notice as required under this subparagraph—
> (1) if the certification is in the application, not later than 20 days after the date of the postmark on the notice with which the Secretary informs the applicant that the application has been filed; or (2) if the certification is in an amendment or supplement to the application, at the time at which the applicant submits the amendment or supplement, regardless of whether the applicant has already given notice with respect to another such certification contained in the application or in an amendment or supplement to the application.

21 U.S.C. § 355(j)(2)(B).

MMA changed the notice requirements for Paragraph IV certifications, effective August 18, 2003. *See* MMA Section 1101(c) (regarding effective date). Previously, the statute did not explicitly require the filer of an original ANDA containing a Paragraph IV certification to give notice of its patent certification within any specific time frame. The applicant merely had to promise that it "will give" notice at some time in the future. However, under the pre-MMA notice provision, an applicant who amended an ANDA to include a Paragraph IV certification was required to give notice "when", *i.e.*, at the same time as, the ANDA was amended.[1] This dichotomy in the pre-MMA statute supported FDA's conclusion that an original ANDA containing a Paragraph IV certification was deemed filed as of the date the ANDA was accepted for filing, whereas a Paragraph IV certification contained in an amendment became effective only when the applicant sent notice of its amended certification. The courts have upheld this view. *Purepac Pharmaceutical Co. v. Thompson,* 354 F.3d 877 (D.C. Cir. 2004) (*"Purepac"*) (affirming FDA's decision that the date notice of a Paragraph IV certification is sent determines eligibility for exclusivity in the case of amended ANDAs).[2]

MMA amended those notice provisions effective August 18, 2003 and eliminated the dichotomy between original ANDAs and amendments. Under MMA, notice of all Paragraph IV certifications, regardless whether made in an original submission or an amendment, now must be given no later than a specified date in order to perfect, or complete a Paragraph IV certification. Therefore, MMA eliminated a critical statutory underpinning of FDA's rationale for discriminating between Paragraph IV certifications contained in original submissions and those contained in amendments. For Paragraph IV certifications made on or after August 18, 2003, the rule that a certification is deemed made when notice is given, which was previously applicable only to amendments, should now be applied to all exclusivity determinations, regardless whether the patent certification was made in an original submission or by amendment. FDA's pre-MMA methods for determining the priority of Paragraph IV certifications contained in original submissions versus those contained in amendments cannot survive MMA's new requirement that notice of the certification be given in <u>all</u> circumstances. Continuing to treat original applications and amendments differently after August 18, 2003, would be arbitrary, capricious, and contrary to law.

---

[1] FDA explained this distinction in its approval letter for Ivax's ANDA for metformin extended release tablets, 500mg, dated October 28, 2003, and again in related litigation. *See Purepac Pharmaceutical Co. v. Thompson*, Case No. 1:03-cv-02210-TPJ (D.D.C. November 8, 2003) (Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 11-13) (hereinafter referred to as the "FDA's Metformin Brief").

[2] In *Purepac*, two applicants each submitted patent amendments to pending ANDA's to add Paragraph IV certifications to a patent that was newly listed in the Orange Book. Purepac filed its patent amendment on May 26, 2000 but did not send notice to the NDA holder and patentee until June 13, 2000. TorPharm submitted its patent amendment by mail on June 13, 2000 and gave notice to the NDA holder and patentee the same day. However, TorPharm's Amendment was submitted by mail and did not reach FDA until June 16, 2000 and was deemed filed as of that date. FDA concluded, and the courts affirmed, that because Purepac "completed both tasks first" (submitting the certification and giving notice), FDA properly awarded 180 day exclusivity to Purepac. 354 F.3d at 888-90.

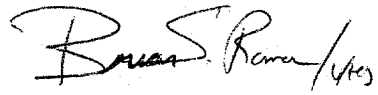
Basing exclusivity determinations on the date notice is given rather than on filing dates is also consistent with the policies underlying the Hatch-Waxman amendments and MMA. FDA and the courts have often said that the 180-day generic marketing exclusivity is "an incentive to the first generic drug manufacturer to expose itself to the risk of patent litigation." *See* FDA's Metformin Brief, at 8 (*citing Mova Pharm Corp. v. Shalala*, 140 F.3d 1060, 1064 (D.C. Cir. 1998)). Here, Mylan was the first applicant to expose itself to the risk of patent litigation over Risperidone tablets because Mylan was the first applicant to send notice of its Paragraph IV certification to Janssen Pharmaceutica.

Although it is true that the MMA's notice provision establishes different timelines for giving notice of Paragraph IV certifications in original applications and amendments, and Mylan is not contending that DRL failed to meet its obligation to send notice in a timely fashion, the fact remains that Mylan completed both acts required by the statute first. It makes no difference that DRL may have complied fully with the statute by sending notice of its certification after FDA notified DRL that its original ANDA had been accepted for filing. The MMA's notice provisions establish a clear requirement that all ANDA applicants who submit Paragraph IV certifications, regardless whether they certify in an original application or an amended application, must give notice of the certification in order for the certification to be effective. Mylan performed that act first and should be deemed the first applicant.

Therefore, Mylan respectfully requests that the Agency award 180-day generic marketing exclusivity to Mylan for all strengths of Risperidone tablets, and that FDA not approve other ANDAs for Risperidone tablets in any strength until at least 180-days after Mylan's exclusivity is triggered.

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition.

Sincerely,



Brian S. Roman,
Vice President and General Counsel