
Docket No. FDA-2012-P-0317

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

**FOOD AND DRUG ADMINISTRATION
DEPARTMENT OF HEALTH & HUMAN SERVICES**

Concerning

**CITIZEN PETITION BY ABBOTT LABORATORIES
REGARDING BIOSIMILAR APPLICATIONS
THAT CITE BIOLOGICAL PRODUCTS
FOR WHICH THE BLA WAS SUBMITTED TO FDA
BEFORE MARCH 23, 2010**

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February 13, 2013

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

Re: Comments Supporting Citizen Petition No. FDA-2012-P-0317 (April 2, 2012); Petition by Abbott Laboratories Regarding Biosimilar Applications That Cite Biological Products for Which the BLA Was Submitted to FDA Before March 23, 2010

Dear Sir/Madam:

The Washington Legal Foundation (WLF) submits these comments in support of Citizen Petition No. FDA-2012-P-0317, filed by Abbott Laboratories on April 2, 2012. In particular, WLF wishes to respond to comments filed in recent months with respect to the Petition by the Generic Pharmaceutical Association (GPhA), Therapeutic Proteins International, LLC (TPI), and the law firm of Zuckerman Spaeder LLP (Zuckerman).

The Biologics Price Competition and Innovation Act of 2009 (BPCIA), adopted by Congress and signed into law by President Obama on March 23, 2010, creates a pathway whereby firms may seek FDA marketing approval for “biosimilars,” biological products that are highly similar to previously licensed biological products. WLF agrees with Abbott that, in approving biosimilars, FDA will of necessity “use” information supplied to it by the sponsor of the earlier licensed product (often referred to as the “reference product”). As FDA fully recognizes, much of that information – including analytical, preclinical, and clinical data, as well as detailed manufacturing information – qualifies as a trade secret and was provided to FDA with

the explicit understanding that secrecy would be maintained. Under well-established trade secret law, use of trade secrets that results in diminution in the value of the secrets violates the property rights of the trade secret owner.

Any company that submitted a biologics license application (BLA) to FDA after adoption of the BPCIA in 2010 was on notice that FDA would be using information submitted in support of the application to evaluate the safety of biosimilars. Accordingly, the company would have no basis for seeking Fifth Amendment compensation for such use of its trade secret information, because it would have no reasonable investment-backed expectation that its information would not be so used. But many if not all companies that submitted a BLA to FDA before adoption of the BPCIA (including Abbott, which submitted an application for Humira® in 2002) would very reasonably have believed that their trade secret information would not be used to assist their competitors in this manner and, on the basis of that belief, invested heavily in the development of their biological product. Fifth Amendment case law provides that such companies are entitled to “just compensation” for any losses caused by FDA use of their trade secrets to approve biosimilars.

In adopting the BPCIA, Congress did not authorize funding for the payment of compensation to companies whose trade secrets are used (and thereby diminished in value) in connection with approval of a biosimilar. The absence of such funding is a good indication that Congress did not authorize FDA to approve a biosimilar when doing so would trigger a requirement that the federal government pay “just compensation” under the Fifth Amendment’s

Takings Clause. Accordingly, WLF supports Abbott's request that FDA announce that it will not approve any application or any investigational new drug (IND) application for a biosimilar that cites a reference product for which the BLA was submitted to FDA prior to March 23, 2010 – at least until after FDA has made an explicit determination that approval of that specific biosimilar would not trigger federal government liability under the Takings Clause.

It is possible that some sponsors who submitted BLA applications in the months immediately preceding March 23, 2010, lacked a reasonable investment-backed expectation that FDA would neither disclose their trade secrets nor use them as the basis for approving biosimilars, and thus they may lack entitlement to compensation for loss of value of their trade secrets. By 2009, there had been considerable discussion in Congress regarding creation of a pathway for biosimilars, and some sponsors may have developed an understanding that FDA was no longer providing assurance that data supplied in support of BLA applications would never be used for the benefit of competitors. But all available evidence indicates that sponsors who supplied trade secret data in earlier years did so based on a very reasonable understanding that they were doing so for the benefit of their own BLAs only, not for the benefit of their competitors' applications. Until such time as FDA determines, after careful consideration, that the sponsor of the pre-March 2010 reference product at issue reasonably expected that FDA might use its trade secrets to assist competitors, it should not approve an application to market a biosimilar based on that reference product. Any other policy would expose FDA to massive Takings Clause liabilities that Congress has not authorized the agency to incur.

I. *Interests of WLF*

The Washington Legal Foundation is a public interest law and policy center with members and supporters in all 50 States. WLF regularly appears before federal and State courts and administrative agencies to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting the property rights of individuals and business entities. It has regularly appeared before the Supreme Court and other federal courts in cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 525 U.S. 302 (2002); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *San Remo Hotel, L.P. v. San Francisco*, 545 U.S. 323 (2005); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

WLF is concerned that approving biosimilars without first giving serious consideration to Fifth Amendment compensation claims that would arise therefrom would seriously erode both property rights and public confidence in the reliability of government promises. If FDA determines that it is free to ignore its past promises of confidentiality to BLA applicants, businesses subject to government regulation will be less willing in the future to spend the massive sums necessary to develop innovative and life-saving products. WLF is also concerned that if FDA fails to undertake the sort of Takings Clause analysis requested by the Petition, it

will cause the United States to incur unbudgeted liability in the years ahead, when the damages inflicted by the destruction of intellectual property are finally assessed by federal courts.

II. *FDA's Statutory Authority*

The federal government has regulated the manufacture and sale of biological products for more than a century, beginning with the Biologics Act of 1902, Pub. L. No. 57-244, 32 Stat. 728 (1902). The Act was revised in 1944 and was recodified as § 351 of the Public Health Service Act of 1944 (PHSA). The details of the PHSA were revised several times in the ensuing decades. Throughout the past 70 years, however, the key provision of the PHSA was a requirement that manufacturers be licensed, and that to obtain licenses they must demonstrate, among other things, that their products met standards designed to ensure the “safety, purity, and potency” of their products. PHSA § 351(d). The current license requirement for biological products is codified at 42 U.S.C. § 262(a).

At the same time, Congress has also applied to biological products many of the regulations applicable to drugs. Congress adopted the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301 *et seq.*, in 1938 to regulate the sale of drugs. The FDCA’s broad definition of a “drug” undoubtedly covers biological products. All requirements of the FDCA apply to biological products, except that “a product for which a license has been approved under [42 U.S.C. § 262(a)] shall not be required to have an approved” NDA pursuant to FDCA § 505, 21 U.S.C. § 355. 42 U.S.C. § 262(j). Congress has nonetheless maintained separate approval pathways for drugs and biological products in recognition of the numerous unique characteristics

of the latter – including the vastly greater chemical complexity of biological products, a complexity that renders it exceedingly difficult for other companies to replicate existing products.

Congress adopted the BPCIA in 2010 to establish a pathway for the approval of biosimilars. Codified principally at 42 U.S.C. § 262(k) & (l), the BPCIA provides that FDA may license a biological product if an application demonstrates, *inter alia*, that the product is either “biosimilar to” or “interchangeable with” a reference product that is already the subject of an approved BLA. § 262(k)(3)(A). Information that must be included in a biosimilar application is set forth in § 262(k)(2)(A). Among other things, the applicant must include “publicly-available information regarding the Secretary’s previous determination that the reference product is safe, pure, and potent.” § 262(k)(2)(A)(ii)(I).

III. FDA’s Administration of the PHSA

Until adoption of the BPCIA in 2010, 42 U.S.C. § 262(a) provided the only means by which a manufacturer could obtain approval of a BLA. That provision imposes on an applicant the burden of demonstrating that its biological product is “safe, pure, and potent.” 42 U.S.C. § 262(a)(2)(C)(i)(I). FDA regulations have long required applicants, in order to make such a demonstration, to submit extensive analytical, preclinical, and clinical data, as well as detailed manufacturing information. Applicants realize that such information provides them with a substantial competitive advantage and thus take numerous steps to ensure that the information remains secret. Importantly for purposes of this Petition, for many decades applicants who

submitted information to FDA in connection with BLAs did so with the explicit understanding that FDA would maintain the secrecy of the information. Indeed, the 2010 adoption of the BPCIA has not changed FDA's position; it continues to insist that it will not release such information to the public.

Since 1974, FDA's confidentiality policy has been set forth in an FDA regulation, 21 C.F.R. § 601.51, and in agency interpretations of that regulation. The regulation provides that information regarding "manufacturing methods or processes" will never be disclosed, § 601.51(f)(1), while safety and effectiveness data may be released under some circumstances following approval of the BLA. § 601.51(e)(1). As Abbott explains in detail in its Petition, FDA repeatedly made clear to manufacturers that safety and effectiveness data would not be disclosed so long as the data remained a trade secret.¹ Indeed, FDA stated when adopting § 601.51 that it was authorizing release under some circumstances only because it understood that the data could *never* be used by competitors for the purpose of obtaining approval of a BLA; each new biological product would have to undergo its own product testing regardless of its similarity to previously approved products. 39 Fed. Reg. 44,602, 641 (Dec. 24, 1974). To the

¹ See, e.g., Petition at 22 n.79 (citing a 1984 letter written by FDA Commissioner Frank E. Young, explaining that although 21 C.F.R. § 601.51(e) provides that safety and effectiveness data will be released following BLA approval except in "extraordinary circumstances," such circumstance are deemed to exist so long as the data retain their status as trade secrets). Young's letter was read into the Congressional Record by Senator Orrin Hatch. See 130 Cong. Rec. 24,977-78 (Sept. 12, 1984). See also Petition at 23-24 (discussing 1996 FDA determination that release to Berlex Laboratories of data submitted to FDA by Biogen in connection with a BLA would be inappropriate, because the data constituted trade secrets and provided Biogen with a competitive advantage over Berlex).

extent that there was ever any possibility that the data could be used for the benefit of competitors, the data retained value as a trade secret and, accordingly, would not be released by FDA.

Abbott submitted its BLA for Humira® in 2002. It was FDA's consistent policy up until that date (and in the years that followed) to treat safety and effectiveness data submitted in connection with a BLA as the applicant's proprietary and confidential information, and FDA deemed it inappropriate for the applicant's competitors to be permitted to use that data for their commercial benefit.

IV. *Under Trade Secret Law, FDA Approval of a Biosimilar "Uses" the Trade Secrets That Serve as the Basis for FDA's Determination That the Reference Product Is Safe, Pure, and Potent*

There is no serious disagreement that the data submitted to FDA in connection with a BLA are trade secrets. Trade secrets consist of information that derives value from being neither generally known nor readily ascertainable by others, and that is the subject of efforts reasonably likely to maintain secrecy. Uniform Trade Secrets Act (UTSA) § 1. Data submitted in connection with BLAs routinely meet both criteria, and FDA has never suggested otherwise.

In light of the "trade secret" status of BLA data, both federal and state law impose severe limitations on the use of that data. In particular, the UTSA (which has been adopted by 45 States) prohibits "disclosure *or use* of a trade secret of another without express or implied consent by a person who . . . at the time of disclosure *or use*, knew or had reason to know that his knowledge of the trade secret was . . . acquired under circumstances giving rise to a duty to

maintain its secrecy or limit its use.” UTSA § 1(2)(ii). Accordingly, a key issue in connection with this Petition is whether FDA approval of a biosimilar “uses” the trade secrets that serve as the basis for FDA’s determination that the reference product is safe, pure, and effective. If so, FDA approval of a biosimilar application impinges on the trade secrets – a property right belonging to the sponsor of the reference product.

Abbott has explained at length why approval of a biosimilar “uses” trade secrets in this manner. Petition at 13-20. Accordingly, WLF will not repeat that explanation here. Rather, WLF will respond briefly to arguments advanced by GPhA, TPI, and Zuckerman in support of their claims that FDA does not “use” the underlying data when it approves a biosimilar application.

Both GPhA and Zuckerman focus on § 262(k)(2) & (3) – the statutory provisions that specify information that must be included in a biosimilar application and the criteria that FDA is to apply in determining whether to approve the application. As GPhA and Zuckerman note, neither provision references any of the data submitted to FDA by the sponsor of the reference product. GPhA Comments 4-12; Zuckerman Comments at 4-7. They cite those provisions as evidence that FDA could not possibly “use” any trade secret information in deciding whether to approve a biosimilar application. *Id.*

That argument is based on an overly formalistic understanding of what it means to “use” the safety and effectiveness data. It assumes that once a BLA has been granted, the underlying data loses all significance and that, in deciding whether a biological product should remain on

the market and/or whether biosimilars should be licensed, FDA relies solely on the mere existence of a license for the product. FDA regulation of medical products does not operate in that manner. The FDCA requires FDA to continue to evaluate the safety and effectiveness of drugs and biological products even after they have been granted marketing approval. 21 U.S.C. § 355(k). If new information alters FDA's safety and effectiveness conclusions, it may be required to order changes in the labeling, restrict use of the product, or even withdraw marketing approval. *Id.* To assist the agency with its ongoing monitoring efforts, FDA regulations require manufacturers to submit expedited and accurate reports of post-marketing "adverse drug experiences" on an ongoing basis. 21 C.F.R. §§ 314.80-.81 (2012).

FDA's ongoing determinations regarding whether to amend the terms under which a medical product is being marketed requires FDA to take into account *all* relevant information in its possession. The relevant information includes not only post-marketing information that it has obtained from adverse event reports or other sources, but also safety and effectiveness data submitted by the sponsor in connection with an NDA or a BLA. *See, e.g.*, 21 U.S.C. § 355(e); 21 C.F.R. § 601.5(b)(1)(vi). FDA's determination that a biological product remains safe, pure, and potent and thus may remain on the market entails continual "use" of the safety and effectiveness data submitted to FDA in connection with the BLA. By requiring biosimilar applications to demonstrate biosimilarity to a "reference product" with an approved BLA, 42 U.S.C. § 262(k)(2)(A)(i) presupposes the existence of such a product and, therefore, is based on an understanding that FDA's ongoing use/evaluation of *all* available data has found nothing to

warrant revocation of the product's license. It belies common understanding that approval of a biosimilar application under such circumstances does not entail "use" of the data supporting continued licensure of the reference product.

FDA also continues to "use" the underlying safety and effectiveness data in determining that the reference product is not "misbranded," a determination that (as FDA has repeatedly emphasized) is independent of its determination that the product's licensing should not be revoked. In a recent U.S. Supreme Court filing, FDA stated that a medical product (whether brand-name or generic) cannot be assumed to be safe and effective for its intended use based *solely* on the fact that it is being marketed in compliance with the terms of its approved NDA, ANDA, or BLA. The federal government's brief (which was signed by HHS) stated that an FDA-approved drug or biological product bearing FDA-approved labeling may nonetheless be "misbranded if, *inter alia*, it is 'dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.'" Brief for the United States as Amicus Curiae in *Mutual Pharmaceutical Co. v. Bartlett*, U.S. Supreme Ct. No. 12-142, at 6 (filed Jan. 22, 2013) (citing 21 U.S.C. § 352(j)). HHS asserted that the misbranding provision applies "to any 'drug,' whether or not it has been approved by FDA." *Id.* (citing 21 U.S.C. §§ 321(g)(1), 352).² It follows from HHS's assertions that FDA approval of a

² Based on those assertions, HHS concluded that federal drug law would not preempt a state-law tort action based on a claim that an FDA-approved generic product violated state law because it was dangerous to health as marketed and thus "misbranded" within the meaning of 21 U.S.C. § 352. *Id.* at 23-24.

biosimilar application entails a finding that the agency's *ongoing review* of the safety and effectiveness of the reference product has turned up nothing to suggest that the reference product is misbranded (*e.g.*, dangerous to health when used as directed) – a finding that of necessity requires “use” of the trade secret information supplied to FDA by the sponsor of the reference product.

Moreover, it cannot seriously be disputed that FDA approval of a biosimilar will injure the sponsor of the reference product by, *inter alia*, substantially decreasing the value of its trade secrets. As Abbott notes, well-recognized unfair competition law provides that conduct that in any way exploits a trade secret will be deemed a “use” of the trade secret if it “is likely to result in injury to the trade secret owner.” Restatement of the Law (Third) Unfair Competition § 40, cmt. c. GPhA, TPI, and Zuckerman have no answer to this evidence of FDA “use” of trade secrets in connection with approval of biosimilar applications.

Neither GPhA nor Zuckerman cites any trade secret case law in support of their arguments that approval of biosimilar applications does not constitute “use” of the trade secrets of the sponsor of the reference product. Both content themselves with criticizing the case law cited by Abbott. They both note, for example, that one of the cases cited by Abbott, *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc.*, 958 F.2d 896 (9th Cir. 1992), did not raise Takings Clause issues; while the Takings Clause claims in another case, *Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal. App. 4th 1135 (2006), arose in the context of the use of pesticide-related trade secrets, not pharmaceutical-related trade secrets. GPhA Comments at 11

n.14; Zuckerman Comments at 7 n.16. But Abbott did not cite those cases in support of its interpretation of the Takings Clause; rather, it cited them to demonstrate that under trade secret law, approval of a biosimilar application would constitute “use” of trade secrets. Both cases are squarely on point and stand as unrebutted statements of trade secret law.

GPhA asserts that FDA has, in unrelated contexts, rejected Abbott’s interpretation of what constitutes “use” of a trade secret. GPhA Comments at 7-9 (citing FDA rejection of Takings Clause-related Citizen Petitions relating to approval of NDAs under 21 U.S.C. § 355(b)(2)). Those Citizen Petitions are sufficiently far afield from the biosimilar approval process at issue here so as to have limited relevance to Abbott’s claims. Any relevance is further reduced by the failure of the petition responses, when discussing what constitutes “use” of trade secret data, to provide any reasoned explanation for the conclusions reached.

Moreover, whether a defendant has interfered with property rights by “using” the plaintiff’s trade secrets raises legal issues that are largely resolved by state law, not federal law. The Petition asserts that approval of a biosimilar application for adalimumab would constitute a Fifth Amendment taking of Abbott’s property, but the extent of its property rights and the sorts of protection to which that property is entitled are largely questions of state law. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law.”). Accordingly, the appropriate place to look for the answer to whether approval of a

biosimilar application constitutes “use” of the trade secrets of the sponsor of the reference product is state-law sources, not statements made by FDA in unrelated contexts.

V. *Many Sponsors of Approved BLAs Provided Trade Secret Information to FDA in Reasonable Reliance on FDA Assurances That It Would Not Use the Information to Benefit Their Competitors, and Thus They Would Be Entitled to “Just Compensation” Under the Takings Clause if FDA Were to Use Their Trade Secrets in Approving Biosimilar Applications*

The Takings Clause of the Fifth Amendment requires the federal government to provide “just compensation” to the owner of private property whenever it takes that property for a public purpose. The Petition conclusively demonstrates that the approval of biosimilar applications will constitute a Fifth Amendment “taking” of the private property of the many companies that reasonably expected that FDA would not use their trade secrets to assist their competitors.

Congress adopted the BPCIA for the purpose of reducing health care costs, both for itself and for other purchasers of biological products. Those cost savings are to be effected by reducing the profits that would otherwise flow to the manufacturers of biological products, by increasing competition and thereby forcing down prices. Congress concluded that although forcing down prices – and thereby decreasing the profitability of producing biological profits – might lead to a reduced number of new, life-saving biological products by reducing incentives to engage in research and development, any such detriments were outweighed by the BPCIA’s cost-saving potential. The Constitution does not restrict Congress’s right to undertake such cost-benefit calculations.

The federal government is not permitted, however, to reduce health-care costs by taking

private property. Reduced health-care costs may be a laudable goal, but the Constitution does not permit it to be accomplished at the expense of property rights. The Fifth Amendment's Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Supreme Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), is directly on point and requires a finding that approving biosimilar applications would require that Takings Clause compensation be paid to many if not most sponsors of approved BLAs that were filed before adoption of the BPCIA in 2010. *Monsanto* involved Takings Clause claims arising from EPA's use of confidential data supplied to the agency pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, 7 U.S.C. § 136 *et seq.* Congress amended FIFRA in 1972 to require that before a pesticide could be registered by EPA (a prerequisite to selling the pesticide within the United States), its manufacturer was required to demonstrate to EPA's satisfaction that the pesticide would not cause "unreasonable adverse effects on the environment." The amendment also: (1) prohibited EPA from disclosing information supplied by a manufacturer as part of the registration process and designated by the manufacturer as a trade secret; and (2) imposed limitations on EPA's authority to use information supplied by a registration applicant to support a subsequent application pertaining to a similar chemical. The law was amended again in 1978 to lift some of the restrictions on use of registration information submitted by pesticide manufacturers, and to limit their ability to

demand compensation for use of their data to support others' registration applications.

Monsanto, a company that had supplied pesticide registration information during the 1972-78 period, filed suit to enjoin enforcement of the 1978 amendments on the grounds that they took its intellectual property rights (its trade secret rights to the data it supplied to EPA) without providing the "just compensation" required by the Fifth Amendment.

The Court largely upheld Monsanto's right to pursue Takings Clause claims with respect to data it submitted to EPA between 1972 and 1978. 467 U.S. at 1010-13. While recognizing that the Court has often considered a wide variety of factors in determining whether government restrictions on property rights constitute a "taking" for Fifth Amendment purposes, the Court deemed one factor to be dispositive with respect to the 1972-78 claims: Monsanto's reasonable investment-backed expectations that information it supplied to EPA would not be disclosed and would not be used by EPA to approve registration applications submitted by Monsanto's competitors. The Court deemed Monsanto's expectations to be reasonable given that EPA "had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use." *Id.* at 1011. The Court explained:

With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitutes a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data. That the data retain usefulness for Monsanto even after they are disclosed – for example, as bases from which to develop new products or to refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries – is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right. The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would

destroy the competitive edge.

Id. at 1011-12. The Court concluded that Monsanto would be entitled to compensation under the Takings Clause if it could show in later proceedings: (1) the data it submitted to EPA constituted trade secrets under Missouri law; (2) EPA's use or disclosure of the data conflicted with the assurances of confidentiality or exclusive use provided by the federal government; and (3) any funds awarded to Monsanto under a statutorily-created arbitration regime did not "adequately compensate for the loss in market value of the data that Monsanto suffers because of EPA's use or disclosure of the trade secrets." *Id.* at 1013-14.

Monsanto demonstrates that if the federal government begins granting biosimilar applications with respect to reference products for which BLAs were filed before the adoption of the BPCIA in March 2010, it will face significant Takings Clause liability to sponsors of those approved BLAs. As explained above, *supra* at 7, for many decades FDA provided explicit assurances to the biotech industry that it would maintain the confidentiality of data supplied in connection with BLAs to the extent that the data offered any competitive advantage to the supplier of the data, and that it would not use the data to approve biosimilars because FDA had no authority to do so. In light of FDA's explicit assurances, biotech companies' expectations that confidentiality and use restrictions would be maintained was certainly "reasonable." Those expectations were also "investment-backed"; indeed, biotech companies routinely invest more than \$1 billion dollars to develop a biological product and to win approval for their BLAs. *See, e.g.,* Henry Grabowski, *Follow-on Biologics: Data Exclusivity and the Balance Between*

Innovation and Competition, 7 NATURE REVIEWS DRUG DISCOVERY 479, 482 (2008) (estimating that research and development costs for a new biological product range from \$1.24 billion to \$1.33 billion).³

The efforts of GPhA and Zuckerman to distinguish *Monsanto* are unavailing. They assert that sponsors of approved BLAs cannot demonstrate the same level of assurances of confidentiality as were present in *Monsanto* because there the assurance were set forth explicitly in a federal statute, while here the assurances came largely in the form of statements by senior FDA personnel. GPhA Comments at 16-19; Zuckerman Comments at 9-10. But nowhere does *Monsanto* suggest that an assurance of confidentiality and exclusive use must be set forth in a statute in order to be cognizable under the Takings Clause. All that is required is that the property owner's expectations be "reasonable." WLF deems it eminently "reasonable" for regulated companies, when making investment decisions, to rely on the repeated statements of senior regulatory officials that trade secret data submitted to the federal government will be kept confidential and will not be used to assist those companies' competitors. The reasonableness of that reliance was buttressed by the absence of any statutory/regulatory authorization for a follow-on pathway, as well as by FDA's regulation governing trade secrets.

When considering Takings Clause claims, the Supreme Court has never demanded that

³ Indeed, the fact that a Takings Clause claimant invests heavily in a regulated field after receiving government assurances of confidentiality has been interpreted by courts as evidence that the claimant's expectations of continued confidentiality were both reasonable and investment-backed. See, e.g., *Maine Education Assoc. Benefits Trust v. Cioppa*, 695 F.3d 145, 155 n.7 (1st Cir. 2012).

claimants demonstrate the high level of government assurances for which GPhA and Zuckerman are advocating. For example, the claimant in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), was a coastal landowner who was denied a permit to build a house on beachfront property that he had purchased for several hundred thousand dollars. The Court upheld his claim for compensation under the Takings Clause despite the absence of evidence that prior to his purchase South Carolina had provided him with any sort of assurance that he would be permitted to build a house. It was sufficient, the Court held, that similarly situated landowners had been permitted to build homes and thus that he had no reason to believe that he would not be permitted to build. 505 U.S. at 1031.

GPhA and Zuckerman argue that *Monsanto* is inapplicable where the government destroys the trade secret by merely using the confidential data instead of releasing it to the public. GPhA Comments at 18; Zuckerman Comments at 5. *Monsanto* contains no such limitation, a limitation that makes little sense in light of trade secret law, which deems both unauthorized use of a trade secret and unauthorized disclosure of a trade secret to be objectionable. *See supra* at 8.

GPhA argues that “reasonable expectations must also take into account the regulatory environment, including the foreseeability of changes in the regulatory scheme.” GPhA Comments at 19. WLF does not necessarily disagree; but the foreseeability of changes in the regulatory scheme does not excuse efforts by the federal government to renege on explicit assurances that the biotech industry has relied on, to the tune of billions of dollars. The federal

government is largely free to alter regulatory schemes on a prospective basis; but the Takings Clause requires it to pay compensation to individuals and businesses when the changed regulatory scheme retroactively unsettles their reasonable investment-backed expectations and thereby destroys their property.

GPhA and Zuckerman also argue that it was unreasonable for biotech companies to believe FDA's assurances in light of enactment of the Hatch-Waxman Act in 1984. They note that Hatch-Waxman allowed drug companies to file ANDAs and to obtain marketing authority for generic drugs by relying on safety and effectiveness data submitted to FDA in the NDA for the reference drug, yet FDA never offered to provide compensation to brand-name drug companies for the use of their data. They assert that that history made it unreasonable for BLA applicants to expect compensation in the event that FDA ever decided to approve biosimilar applications. GPhA Comments at 17; Zuckerman Comments at 9-10.

The Hatch-Waxman experience is largely irrelevant to the issues raised by this Petition because the expectations of brand-name drug manufacturers were so vastly different from the expectations of sponsors of approved BLAs. Indeed, the history of the procedures governing market entry for generic drugs under the FDCA prior to 1984 suggests that there was considerable uncertainty whether full NDAs – or any NDAs at all – were required for generic drug products that contained old, well-established active ingredients. *See Tri-Bio Labs., Inc. v. United States*, 836 F.2d 135, 138 (3d Cir. 1987). For example, FDA explicitly permitted generic versions of pre-1962 drugs to enter the market without requiring applicants to provide data

establishing safety and effectiveness. 34 Fed. Reg. 2673 (Feb. 27, 1969); 35 Fed. Reg. 6574 (Apr. 24, 1970). While the status of generic versions of drugs first marketed after 1962 was less clear, at least until 1983 many generic manufacturers came to market with post-1962 drugs, claiming they were “old” drugs not subject to NDA requirements. *See United States v. Generix Drug Corp*, 654 F.2d 1114 (5th Cir. Unit B, 1981), rev’d, 460 U.S. 453 (1983). Accordingly, in the years preceding adoption of the Hatch-Waxman Act in 1984, brand-name drug manufacturers had no reasonable expectations that FDA would not authorize generic versions of their drug products or that FDA would refrain from relying on their safety and effectiveness data when approving generics. Nor, in light of the Act’s explicit language, have brand name manufacturers had any such expectations with respect to post-1984 drugs. In the absence of such expectations, it is unsurprising that the right of brand-name manufacturers to Fifth Amendment compensation in the wake of Hatch-Waxman was never litigated.

Finally, Zuckerman asserts that even if approval of biosimilar applications would be deemed a taking, the BPCIA already provides sponsors of approved BLAs with all the compensation they are due. Zuckerman notes that the BPCIA provides manufacturers of biological products exclusivity periods before they can be subjected to biosimilar competition, thereby assuring that they receive some compensation for the use of their trade secrets.

Zuckerman Comments at 15-16.⁴ That argument is without merit. While the exclusivity periods

⁴ For example, the BPCIA delays approval of a biosimilar until at least 12 years after the reference product was first licensed and delays submission of a biosimilar application until at least four years after the reference product was first licensed. 42 U.S.C. § 262(k)(7)(A) & (B).

afforded to manufacturers of biological products by the BPCIA undoubtedly have some monetary value, that exclusivity is worth considerably less than the profits they would generate if FDA were to honor its commitment not to use their trade secret data in approving biosimilars. Supreme Court case law is clear that once a court determines that a property owner has suffered a taking, he is entitled to recover *all* his losses. A partial payment has never been deemed sufficient to eliminate the constitutional requirement to provide “just compensation.” If the rule were as Zuckerman suggests, a government could seize land worth \$1 million, pay the owner \$100,000, and then deny further compensation by contending that such a payment is adequate because the owner has not lost all value. *Monsanto* rejects such sleight of hand in computing “just compensation.” *Monsanto*, 467 U.S. at 1012 (stating that when the government seizes trade secret information from an individual or business, Fifth Amendment compensation is to be based on “[t]he economic value” of the loss of “the competitive advantage over others” that the owner of the trade secret previously enjoyed “by virtue of its exclusive access to the data.”). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (“Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.”).

VI. *Congress Did Not Authorize FDA to Approve Any Biosimilar For Which the Reference Product Pre-Dates the BPCIA, Unless FDA Has Determined Explicitly That the Reference Product Sponsor Is Not Entitled to Compensation*

In adopting the BPCIA, Congress did not authorize funding for the payment of compensation to companies whose trade secrets are used (and thereby diminished in value) in

connection with approval of a biosimilar. The absence of such funding is a good indication that Congress did not authorize FDA to approve a biosimilar when doing so would trigger a requirement that the federal government pay “just compensation” under the Fifth Amendment’s Takings Clause. Accordingly, WLF supports Abbott’s request that FDA announce that it will not approve any license application or any IND application for a biosimilar that cites a reference product for which the BLA was submitted to FDA prior to March 23, 2010 – at least until after FDA has made an explicit determination that approval of that specific biosimilar would not trigger federal government liability under the Takings Clause.

FDA adoption of such a policy would not, as GPhA asserts, amount to non-enforcement of the BPCIA. GPhA Comments at 20-21. Rather, it is the most reasonable interpretation of what Congress intended. The absence of any mechanism for paying potentially massive “just compensation” claims to biotech companies indicates that Congress did not authorize FDA to confiscate trade secret rights that those companies reasonably expected would be honored. Neither the BPCIA’s statutory language nor its legislative history includes any indication that Congress reached any conclusions regarding the strength of the Takings Clause claims that sponsors of approved BLAs were likely to raise in response to the Act. In the absence of such an indication, the most logical conclusion is that Congress intended that FDA should make such determinations on a case-by-case basis *before* approving a biosimilar.

That was the method of statutory construction urged by the United States in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a case in which the Supreme Court heard a Takings

Clause challenge to a federal statute that required some coal companies to fund the pension obligations of other coal companies that had gone out of business. A principal issue in the case was whether Congress had intended to permit the plaintiffs to seek injunctive relief against the statute, or whether their only avenue for relief was to seek a damage award in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1). The United States urged the Court to adopt, as a rule of statutory interpretation, a presumption that Congress would prefer federal agencies not to take authorized actions if the likely result of those actions would be that the federal government would incur large Takings Clause “just compensation” liabilities:

There is a threshold question whether the district court properly entertained petitioner's request for an injunction, even if the Coal Act did effect a taking. . . . In our view, when a court decides whether an action lies in district court for equitable relief to prevent the operation of a federal statute that allegedly amounts to a taking, the court should decide whether, in light of the statute's language, context, and history, Congress intended to pay compensation if the governmental action could be implemented only if accompanied by compensation, or whether Congress intended rather to have the legislation enjoined if it were found to constitute a taking. Cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-1019 (1984). In this case, neither the text nor the legislative history of the Coal Act indicates whether Congress meant to allow suits by coal companies for compensation in the Court of Federal Claims under the Tucker Act. But because the Coal Act regulates a private relationship among the miners, their union, and the coal companies, it is most unlikely that Congress intended that the United States Treasury would be liable to the coal companies if the contributions they challenge here were deemed to be a taking. It is far more likely that, were the Coal Act found to result in a taking, Congress would have wanted the Act to be enjoined as applied to the challenger, and then to reserve to itself the opportunity to determine legislatively what course of action to adopt. Thus, the district court properly entertained petitioner's suit for equitable relief on the taking claim.

Brief of United States in *Eastern Enterprises v. Apfel*, U.S. Supreme Court No. 97-42 (1998), at 38-39 n.30.

The plurality opinion in *Eastern Enterprises* adopted that position in large measure. The

plurality determined that the federal district court had properly exercised jurisdiction over the Takings Clause plaintiffs' claims for injunctive relief because, it determined, Congress had not passed the Coal Act with a contemplation that the United States might end up being required under the Takings Clause to reimburse coal companies for payments they made pursuant to that statute. *Eastern Enterprises*, 524 U.S. at 521 (plurality).⁵

WLF urges FDA to employ a similar method of statutory interpretation in implementing the BPCIA. Because there is no evidence that Congress contemplated that the United States could be required to pay "just compensation" claims to biotech companies, FDA should not approve a biosimilar application for any reference product for which a BLA was submitted before March 23, 2010, unless and until FDA has determined that the sponsor of the reference product, at the time the BLA was submitted, lacked a reasonable investment-backed expectation that its trade secret data would not be disclosed or used by FDA.

As the Petition demonstrates, most pre-March 2010 sponsors did, indeed, have reasonable investment-backed expectations of confidentiality and exclusive use. Those who submitted BLAs years in advance of March 2010 undoubtedly had such expectations, based on repeated assurances to that effect from senior FDA officials and the absence of any serious discussion of the possibility that FDA might some day be authorized to base its approval of biosimilars on confidential data submitted to the agency by BLA applicants. Indeed, TPI

⁵ None of the other opinions in the case took issue with the plurality's analysis of the jurisdictional question, or with its conclusions regarding congressional intent.

concedes that “Congress did not begin exploring [the possibility of providing a pathway for approval of biosimilars] until 2004,” two years after Abbott filed its BLA for Humira®.

The reasonableness of expectations that confidentiality and exclusivity of trade secret data would be maintained in perpetuity may have declined somewhat as the date on which the BPCIA was ultimately adopted drew near. It is possible that some sponsors who submitted BLA applications in the months immediately preceding March 23, 2010 lacked a reasonable investment-backed expectation that FDA would neither disclose their trade secrets nor use them as the basis for approving biosimilars, and thus they may lack entitlement to compensation for loss of value of their trade secrets. By 2009, there had been considerable discussion in Congress regarding creation of a pathway for biosimilars, and some sponsors may have developed an understanding that FDA was no longer providing assurance that data supplied in support of BLA applications would never be used for the benefit of competitors. But all available evidence indicates that sponsors who supplied trade secret data in earlier years did so based on a very reasonable understanding that they were doing so for the benefit of their own BLAs only, not for the benefit of their competitors’ applications.

WLF wishes to emphasize that a sponsor’s reasonable investment-backed expectations cannot be discounted based on evidence that the sponsor contemplated the likelihood that Congress might someday create a follow-on pathway for biological products. For Takings Clause purposes, the relevant question is *not* whether sponsors should have assumed that the federal government would eventually authorize use of trade secret data as the basis for approving

follow-on products, but whether they should have assumed that they would be denied “just compensation” for such use despite repeated assurances that their trade secrets would remain inviolate.

Until such time as FDA determines, after careful consideration, that the sponsor of the pre-March 2010 reference product at issue reasonably expected (at the time it submitted its trade secret information) that FDA would make uncompensated use of the trade secrets to assist competitors, FDA should not approve an application to market a biosimilar based on that reference product. Any other policy would expose FDA to massive Takings Clause liabilities that Congress has not authorized the agency to incur.

VII. Conclusion

WLF respectfully requests that FDA grant Abbott's petition by interpreting the BPCIA in the manner set forth herein and by placing a hold on any application for approval of a biosimilar unless and until FDA has determined that the sponsor of the reference product, at the time the BLA was submitted, lacked a reasonable investment-backed expectation that its trade secret data would not be disclosed or used by FDA to assist a competitor. WLF further requests FDA to acknowledge that, under well-accepted principles of trade secret law, any approval of a biosimilar would constitute "use" of safety and effectiveness data submitted to FDA in confidence.

Sincerely,

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Chief Counsel

/s/ Cory L. Andrews
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