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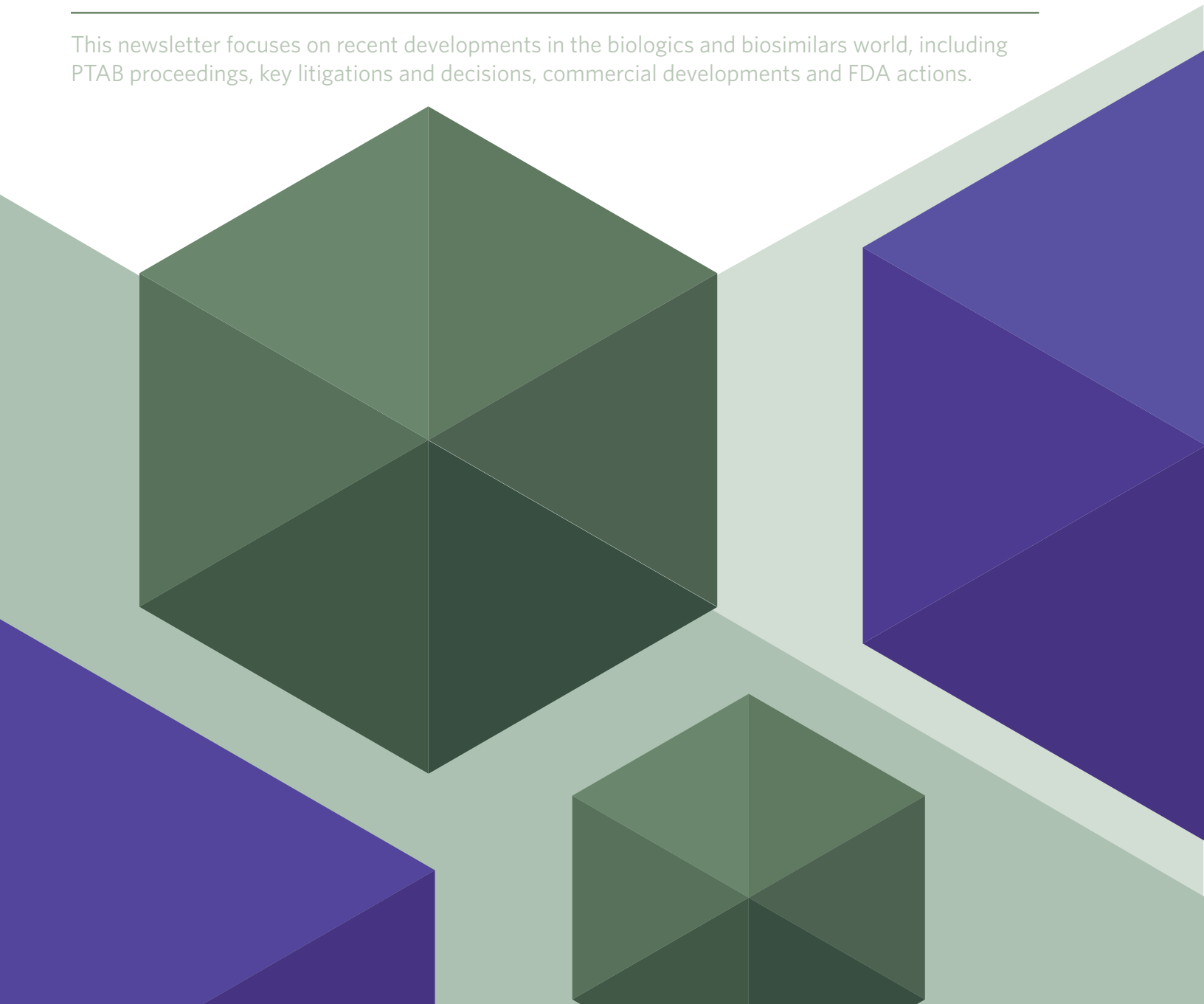
INTELLECTUAL PROPERTY NEWSLETTER

April 2019

THE BIO-QUARTERLY:
WILLKIE'S BIOLOGICS AND BIOSIMILARS NEWSLETTER

This newsletter focuses on recent developments in the biologics and biosimilars world, including PTAB proceedings, key litigations and decisions, commercial developments and FDA actions.



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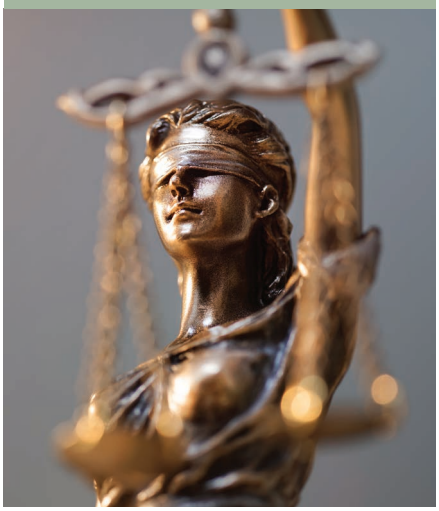

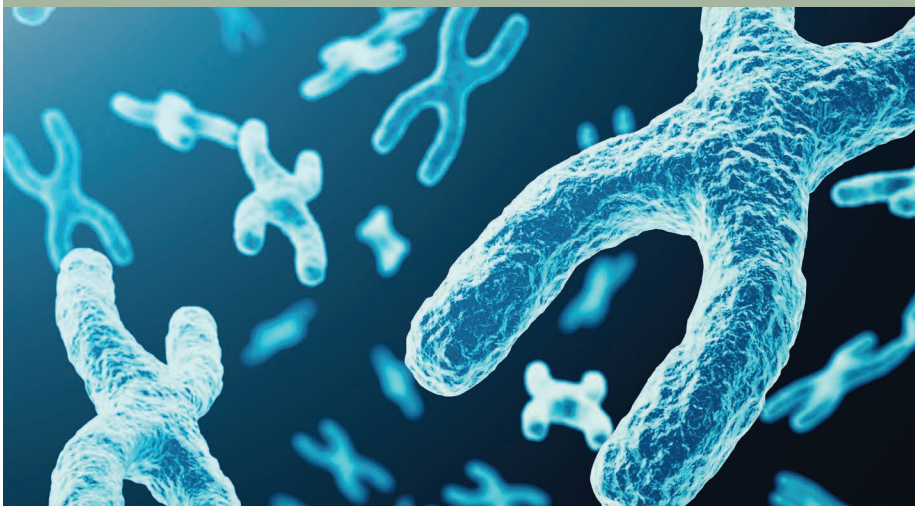

Key developments at the Patent Trial and Appeal Board ("PTAB") regarding biologics and biosimilars

PTAB Quarterly Update

Final Written Decisions

The PTAB issued the following Final Written Decisions relating to biologics during the past quarter.

Dupilumab (DUPIXENT®):

On February 14, 2019, the PTAB issued Final Written Decisions for Sanofi et al.'s two petitions against Immunex's patent, U.S. Patent No. 8,679,487 (the "'487 patent"; IPR2017-01879, -1884). The '487 patent is directed towards compositions and methods for treating certain conditions induced by interleukin-4 ("IL-4") by administering an IL-4 antagonist to the patient. The PTAB ruled in favor of Immunex in IPR2017-01879, but ruled in favor of the petitioners in IPR2017-01884, finding that all claims of the '487 patent are unpatentable as obvious over the prior art. Sanofi filed both petitions around the same time, but on different grounds.

In IPR2017-01879, Sanofi argued that certain claims of the '487 patent were invalid as anticipated over a U.S. patent publication, the '132 publication, under 35 U.S.C. § 102(e). The question before the PTAB was whether the '132 publication's disclosures represented the "work of another," as required under § 102(e). The PTAB found that even though the '132 publication has a different inventive entity than the '487 patent, the patentee was able to establish that the '132 publication's disclosures were derived from the '487 patent inventors. The patentee submitted declarations from their inventors, in addition to contemporaneous meeting minutes, which the PTAB credited. The PTAB determined that the petitioners failed to satisfy their burden in proving that the portions of the '132 publication relied-upon for anticipation represent the work of another to qualify as prior art under § 102(e).

In IPR2017-01884, the PTAB found that all claims of the '487 patent were invalid as obvious over two references: Hart and Schering-Plough. The PTAB first construed the term "human antibody," a term that appeared in each challenged claim, in favor of the petitioners to include partially human antibodies. On the merits, the PTAB found that Hart teaches every limitation of claim 1 except that it is a murine instead of a human antibody, and that Schering-Plough fills that gap through its description of techniques for humanizing murine anti-hIL-4R blocking antibodies. Moreover, the PTAB found that an ordinary artisan would have been motivated to combine the two references because it was well-known in the art that humanization decreases immunogenicity. Thus, all claims of the '487 patent were held unpatentable as obvious.

Other Developments:

Galcanezumab (EMGALITY®):

On February 19, 2019, the PTAB instituted review of three of Eli Lilly's petitions against three of Teva's patents, U.S. Patent Nos. 9,340,614 (IPR2018-01422), 9,266,951 (IPR2018-01423), and 9,346,881 (IPR2018-01424). All three patents are directed towards human or humanized monoclonal anti-CGRP antagonist antibodies. Eli Lilly asserted that certain claims of the three patents were obvious over four prior art references. The PTAB found that Eli Lilly had shown that the combination of the references teaches or suggests the anti-GCRP antagonist antibodies recited in the claims, and that a person of ordinary skill in the art would have had a reason to combine such references with a reasonable expectation of success. Teva had argued that there was no reason to humanize the murine antibody disclosed in the prior art nor that the antibody would be useful *in vivo* as a therapeutic antibody. Because the claims were not limited to the full-length antibody disclosed in the art, and do not recite any limitation regarding *in vivo* use as a therapeutic antibody, the PTAB rejected Teva's arguments. Teva also argued that the PTAB should deny institution under § 325(d) because the petitions were based on substantially the same prior art and arguments already considered during prosecution of a related patent. Although some of the references were cumulative with the art disclosed during prosecution, the PTAB found that there was new, non-cumulative evidence asserted by the Petitioner based on at least one of the references, and rejected Teva's contention.

Eculizumab (SOLIRIS®):

On February 28, 2019, Amgen filed three petitions against three of Alexion's patents, U.S. Patent Nos. 9,725,504 (IPR2019-00739), 9,718,880 (IPR2019-00740), and 9,732,149 (IPR2019-00741). All of the patents are directed to eculizumab and/or methods of treatment with eculizumab. The petitions each assert anticipation and/or obviousness grounds based on overlapping references. Hillmen, the primary reference relied upon by Amgen, discloses the results of a clinical trial studying the effects of administering pharmaceutical compositions of eculizumab. In a representative ground, Amgen argued that Hillmen disclosed each and every limitation of certain claims, except for eculizumab's amino acid sequence. Amgen argues that Alexion admitted during prosecution that Hillmen's eculizumab possesses the claimed amino acid sequences, and therefore, the claims should be held invalid as anticipated and/or obvious. The patent owner may file a preliminary response for each of the petitions by June 6, 2019.

Other Biologic-Related Patents:

On March 7, 2019, Kashiv Biosciences filed two petitions against two of Amgen's patents, U.S. Patent Nos. 8,940,878 (IPR2019-00791) and 9,643,997 (IPR2019-00797). Both patents are directed towards methods for purifying proteins. In both petitions, Kashiv Biosciences argued that certain claims were anticipated and/or obvious over several prior art references. The patent owner may file a preliminary response for each of the petitions by June 14, 2019.

For questions, or for copies of any of the decisions, please contact us here.

Key appellate and district court decisions, new suits, settlements, and other notable events

Litigation Quarterly Update

Key Appellate Developments

Momenta v. Bristol-Myers Squibb. On February 7, 2019, the Court of Appeals for the Federal Circuit issued an opinion dismissing Momenta's appeal from the Final Written Decision in IPR2015-01537, in which the PTAB upheld the patentability of all challenged claims of Bristol-Myers' U.S. Patent No. 8,476,239. The Federal Circuit ruled that because Momenta had withdrawn from its agreement with Mylan to collaborate in developing a biosimilar of Bristol-Myers' ORENCIA® (abatacept), Momenta lacked Article III standing to pursue the appeal. In addition, because Momenta was no longer engaged in any potentially infringing activity, the appeal was dismissed as moot.

Pfizer v. Chugai. Also on February 7, 2019, Pfizer filed a pair of appeals to the Court of Appeals for the Federal Circuit challenging two IPR Final Written Decisions in favor of Chugai Pharmaceutical. As reported in the PTAB Quarterly Update last quarter, on November 28, 2018, the PTAB issued Final Written Decisions finding that Pfizer did not show by a preponderance of the evidence that claims of U.S. Patent Nos. 7,332,289 and 7,927,815 were invalid. The two related patents do not claim a particular biologic drug, but are directed towards a method of removing contaminant DNA from a protein/antibody-containing sample.

Key District Court Decisions

Amgen v. Sanofi. On February 25, 2019, a jury in the District of Delaware returned a mixed verdict regarding the validity of certain claims of two patents covering Amgen's REPATHA® (evolocumab). The jury found that two of the asserted claims of U.S. Patent No. 8,829,165 and the sole asserted claim of U.S. Patent No. 8,859,741 did not lack written description. However, two other asserted claims of the '165 patent were found invalid on that same ground. No claims of either patent were found to be invalid for lack of enablement. The trial in this non-BPCIA suit was limited to the question of validity because Sanofi and co-defendant Regeneron stipulated before trial that their PRALUENT® (alirocumab) biologic would infringe the asserted claims of the patents-in-suit.

New Litigation

Coherus v. Amgen. Coherus filed a new BPCIA complaint in the District of Delaware on January 24, 2019 against Amgen, alleging that Amgen's AMGEVITA™ (adalimumab-atto) biosimilar, launched in Europe on October 16, 2018, infringes three related Coherus patents claiming stable aqueous pharmaceutical compositions comprising adalimumab (a newly issued fourth patent

in the same family was added to the suit in an amended complaint filed on March 5, 2019). AMGEVITA™ has not yet launched in the United States, but Coherus asserts in its complaint that Amgen manufactures AMGEVITA™ in the United States for sale in Europe. This suit is particularly noteworthy because it is the first time that one biosimilar maker has sued the maker of another biosimilar.

Sandoz v. Amgen. On February 21, 2019, Sandoz filed a new suit under the BPCIA and the Declaratory Judgement Act in the Northern District of California seeking declaratory judgments that Sandoz's currently marketed ZARXIO® (filgrastim-sndz) and its as-yet unapproved pegfilgrastim biosimilar do not infringe Amgen's U.S. Patent No. 9,643,997, and that the '997 patent is invalid. The '997 patent is in the same family as U.S. Patent No. 8,940,878, which was the subject of an earlier suit between the parties in which summary judgment of noninfringement was granted in favor of Sandoz on December 19, 2017 (oral arguments in Amgen's appeal of this decision were heard by the Federal Circuit on March 4, 2019). Both patents are directed towards a purification process for "proteins expressed in a non-mammalian system." During the district court litigation regarding the '878 patent, Amgen informed Sandoz by letter that it believed it could reasonably assert a claim for infringement of the '997 patent, but declined Sandoz's invitation to amend its complaint in that suit to include such a claim, and has not filed suit in the intervening 20 months.

HUMIRA® Antitrust Litigation. On March 18, 2019, UFCW Local 1500 Welfare Fund, a New York-based union of grocery store workers, filed a class-action antitrust suit in the District Court for the Northern District of Illinois, on behalf of its members and others similarly situated, alleging that AbbVie had engaged in anticompetitive behavior to protect its profits from HUMIRA® (adalimumab). In the complaint, the union alleged that AbbVie's "patent thicket" of over 100 patents covering the drug, as well as eight recent settlements with biologic makers that will delay biosimilar competition in the United States until 2023, constitute abuse of the patent monopoly and agreements in restraint of trade in violation of antitrust laws. The union argues that the combined effect of these alleged abuses is to extend AbbVie's monopoly over the adalimumab market in the United States far beyond the 2016 expiration of the patent claiming the adalimumab molecule itself. Since the union filed its complaint, at least seven other unions and municipal governments have followed suit. Most of the cases have either already been consolidated as related cases or are pending consolidation.

Genentech v. Immunex. On March 29, 2019, Genentech filed a new BPCIA action in the District of Delaware. In its complaint, which was filed under seal with a redacted version released to the public on April 8, 2019, Genentech accused Immunex and its parent company Amgen of infringing 14 patents related to AVASTIN® (bevacizumab) by filing a supplemental BLA with the FDA in August 2018. This is the third suit by Genentech against Amgen over MVASI™ (bevacizumab-awwb), its proposed bevacizumab biosimilar. The 14 patents-in-suit in this latest action were all included in Genentech's earlier suits against Amgen, with the exception of newly asserted U.S. Patents Nos. 9,493,744 and 9,714,293, both of which are directed to methods of producing biologic products.

Genentech v. Pfizer. Genentech filed a new action pursuant to the BPCIA on April 5, 2019, alleging that Pfizer's proposed biosimilar to Genentech's AVASTIN® (bevacizumab) has infringed and will infringe 22 expired and unexpired patents related to the manufacture and use of bevacizumab. Genentech seeks judgment of infringement, a declaratory judgment of future infringement, damages (including an enhancement for purportedly willful infringement), an accounting, attorneys' fees and costs, and an injunction barring manufacture or marketing of Pfizer's biosimilar until all of the asserted patents have expired. In addition, Genentech also seeks a judgment barring Pfizer from seeking a declaratory judgment regarding any of the

asserted patents due to Pfizer's alleged noncompliance with 42 U.S.C. § 262(*l*)(2)(A).

Settlements and Stipulations

AbbVie v. Coherus. One day after filing suit against Amgen, Coherus announced that it had reached a global settlement agreement with AbbVie, resolving all pending disputes between the parties regarding CHS-1420, Coherus's proposed biosimilar to AbbVie's HUMIRA® (adalimumab). Under the terms of the settlement, announced on January 25, 2019, AbbVie will grant Coherus a nonexclusive, royalty-bearing license to all of AbbVie's adalimumab-related IP starting on December 15, 2023. As detailed in the last edition of the Litigation Quarterly Update, this is the latest in a wave of settlements that AbbVie has inked with various biosimilar makers seeking to introduce adalimumab biosimilars. This is the eighth such agreement, all of which delay adalimumab biosimilar entry into the United States market until 2023. As discussed above, these settlements have been cited as evidence of anticompetitive behavior in multiple antitrust suits that have recently been filed against AbbVie.

For questions, or copies of any of the decisions or documents discussed herein, please click here.

New biologic and biosimilar launches, and other marketplace developments

Market Quarterly Update

Pricing and Reimbursement Updates

As discussed in this issue's feature article, a variety of proposed legislation regarding drug pricing is currently before Congress. For more information on these bills, please see the feature article.

On February 19, the United States Supreme Court struck down a Maryland state "anti-gouging" law which allowed its Attorney General to sue manufacturers who introduced "unconscionable" price increases, holding that it was an improper restriction on interstate commerce. Following that decision, Maryland lawmakers introduced new efforts to regulate drug pricing, including a bill aimed at pricing transparency, as well as one that would create an independent five-member commission to review prices and set limits on spending by state entities, including insurers, pharmacies, and hospitals. Similar measures have been proposed in other states, with the Colorado legislature recently introducing a prescription drug transparency bill.

On March 12, the White House released a proposed budget and an accompanying fact sheet describing its efforts to lower drug prices. Among the proposals was a three-part plan to "modernize" the Medicare Part D drug benefit, which would involve eliminating cost-sharing on generic drugs and biosimilars for low-income beneficiaries; excluding manufacturer discounts from the calculation of beneficiary out-of-pocket costs; and establishing a beneficiary out-of-pocket maximum. The budget would also modify Medicare Part B drug payment by authorizing the HHS secretary to leverage Part D negotiation power for drugs covered by Part B, as well as requiring accurate reporting of Average Sales Price (ASP) data for Part B drugs and establishing an inflation limit for reimbursement. The administration also seeks to encourage biosimilar development by amending the Public Health Service Act so that proposed biosimilars would not need to meet separate monograph standards for non-biologic drugs.

For the full fact sheet, which includes several other proposals, please contact us here.

As reported in the October edition of this newsletter, the renegotiated trilateral trade deal between the United States, Canada, and Mexico, the USMCA, includes a provision extending market exclusivity for reference-listed drugs to 10 years in Canada and Mexico, and enshrines the current 12-year period in the United States in the agreement. According to news reports, this portion of the Agreement has been a stumbling block for Democrats in the House of Representatives, who indicated in late March that they will not support the

USMCA in its current form over concerns that Congress would not be able to later shorten the exclusivity period.

For a summary of other IP provision of the Agreement, please contact us here.

Other Market Developments

On March 25, Thermo Fisher announced that it had purchased Cambridge, Mass.-based Brammer Bio for $1.7 billion cash. According to a press release, Brammer Bio is a contract development and manufacturing organization, focusing on manufacturing viral vectors for gene and cell therapies.

On March 20, Pfizer announced it had secured a 15% stake in Paris-based Vivet Therapeutics, with an exclusive option to acquire all outstanding shares. According to a press release, Pfizer and Vivet will collaborate to develop VTX-801, a gene therapy currently in early-stage clinical trials for Wilson Disease. The deal is worth up to $635.8 million, subject to certain clinical, regulatory, and commercial milestones.

On March 4, Biogen announced its purchase of Oxford University-spinoff Nightstar Therapeutics, in a deal worth $877 million. According to its website, Nightstar's development has focused on gene therapies for the treatment of various retinal diseases; its lead candidate, NSR-REP1, is currently in Phase 3 clinical trials for the treatment of choroideremia.

On February 21, Merck announced by press release that it had entered into a definitive agreement to acquire Seattle-based Immune Design through a tender offer worth $300 million. Immune Design's immunotherapy pipeline includes one candidate in Phase 2 trials for certain types of Non-Hodgkin's lymphoma, as well as multiple vaccines.

On February 5, GlaxoSmithKline and Merck KGaA announced a global alliance to jointly develop and commercialize Merck's M7824, an immuno-oncology therapy currently in eight clinical trials, including studies for non-small cell lung and biliary tract cancers, according to a press release. Merck will receive an upfront payment worth about $338 million, with a total potential deal value of up to $4.2 billion, subject to approval and commercial milestones.

Key developments at the FDA regarding biologics and biosimilars

FDA/Regulatory Quarterly Update

New and Updated Guidance from the FDA

Pediatric Information Incorporated Into Human Prescription Drug and Biological Product Labeling (March 2019)

In March 2019, the FDA issued a final guidance intended to assist applicants in determining the appropriate placement and content of pediatric information in human prescription drug and biological product labeling as described in the regulations for the content and format of labeling for human prescription drug and biological products. The guidance provides four scenarios with examples of pediatric use statements to be used in the Pediatric Use subsection of labeling: (1) when the pediatric indication is supported by evidence of safety and effectiveness of the drug, (2) when the available evidence does not support a pediatric indication because the results were negative or inconclusive, (3) when there is no evidence to support a pediatric indication because the studies have not been conducted or are ongoing, and (4) when a drug is contraindicated in pediatric patients based on the available evidence.

Non-proprietary Naming of Biological Products: Update (March 2019)

In March 2019, the FDA issued an updated draft guidance on the naming of biological products, stating that it will no longer retroactively assign 4-letter suffixes to approved biologics. The FDA stated that it will continue to assign suffixes to newly approved biologics, biosimilars, or interchangeable biosimilars. Interchangeable biosimilars will also receive a name which comprises a core name and a suffix. Furthermore, if a product is initially approved as a biosimilar and later determined to be interchangeable with the reference product, its name, including the suffix, will not change.

Regarding vaccines, the guidance stated that the FDA is still evaluating whether the currently available naming system is sufficiently robust to ensure that dispensing practices are safe without requiring distinguishable proper names.

The FDA also announced that it will not add suffixes to the names of transition products, such as insulin, somatropin, etc. As we previously reported, transition products are products initially approved through NDAs which will be deemed BLAs as of March 20, 2020.

Labeling for Human Prescription Drug and Biological Products Approved Under the Accelerated Approval Regulatory Pathway (January 2019)

In January 2019, the FDA released a guidance intended to assist applicants in developing the Indications and Usage section of labeling for human prescription drug and biological products that are approved under the accelerated approval regulatory pathway as defined in section 506(c) of the Federal Food, Drug, and Cosmetic Act (FD&C Act). The Indications and Usage section should state the end point (and its limitations) used in the clinical trials, also cross-referenced, that provided the evidence necessary to support the accelerated approval. If approval was obtained based on a surrogate or intermediate clinical endpoint, the applicant must conduct additional post-marketing clinical trials and further describe the drug's clinical benefit in a brief summary.

The guidance also addresses labeling considerations for indications that were approved under accelerated approval and for which the clinical benefit subsequently has been verified and the statements concerning limitations of usefulness and continued approval should be revised or removed as appropriate.

In addition, this guidance addresses labeling considerations when the FDA withdraws approval of an indication that had been approved through the accelerated approval pathway while other indications for the drug remain approved. If an indication is withdrawn, the Indications and Usage section should be revised to state whether there is a lack of evidence or whether there are significant safety concerns regarding the withdrawn indication.

Personnel Changes at the FDA

On March 5, 2019, FDA Commissioner Scott Gottlieb, MD, announced that he will be stepping down from his position in one month. Ned Sharpless, MD, currently the Director of the National Cancer Institute, will serve as the acting FDA commissioner.

Earlier this year, in February, Leah Christl, PhD, director of the therapeutic biologics and biosimilars staff in the office of new drugs in the FDA's Center for Drug Evaluation and Research also stepped down. Dr. Christl was replaced by Sarah Yim, MD, previously director of the Division of Clinical Review in the Office of Bioequivalence (OB), Office of Generic Drugs (OGD).

Recent FDA Biologics and Biosimilar Approvals

FDA Approves CIMZIA® (certolizumab pegol)

On March 28, 2019, the FDA approved UCB's CIMZIA® (certolizumab pegol) injection for treatment of adults with a certain type of inflammatory arthritis called non-radiographic axial spondyloarthritis (nr-axSpA), with objective signs of inflammation. CIMZIA® is the first treatment for nr-axSpA approved by the FDA.

FDA Approves TRAZIMERA™ (trastuzumab-gyyp)

On March 11, 2019, the FDA approved Pfizer's TRAZIMERA™ (trastuzumab-gyyp), as a biosimilar to Genentech Inc.'s HERCEPTIN® (trastuzumab) for patients with HER2-overexpressing breast cancer. TRAZIMERA™ is a HER2/neu receptor antagonist indicated for the same conditions as HERCEPTIN® such as the treatment of HER2-overexpressing breast cancer and HER2-overexpressing metastatic gastric or gastroesophageal junction adenocarcinoma.

FDA Approves HERCEPTIN HYLECTA™ (trastuzumab and hyaluronidase-oysk)

On February 28, 2019, the FDA approved Genentech Inc.'s HERCEPTIN HYLECTA™, for subcutaneous use. HERCEPTIN HYLECTA™ is a combination of trastuzumab, a HER2/neu receptor antagonist, and hyaluronidase, an endoglycosidase, for the treatment of HER2-overexpressing breast cancer.

FDA Approves ONTRUZANT® (trastuzumab-dttb)

On January 18, 2019, the FDA approved Merck's ONTRUZANT® (trastuzumab-dttb), as a biosimilar to Genentech Inc.'s HERCEPTIN® (trastuzumab) for patients with HER2-overexpressing breast cancer. ONTRUZANT® is a HER2/neu receptor antagonist indicated for the same conditions as HERCEPTIN® such as the treatment of HER2-overexpressing breast cancer and HER2-overexpressing metastatic gastric or gastroesophageal junction adenocarcinoma.

Biologics and Biosimilars Under Development

On April 3, 2019, Sandoz announced that it has resubmitted to the FDA its ABLA for its proposed biosimilar pegfilgrastim. The newly resubmitted application contains information addressing the FDA's concerns delineated in a Complete Response Letter in July 2016.

On April 1, 2019, Daiichi Sankyo announced acceleration to the first half of 2019 of its ABLA for [fam-] trastuzumab deruxtecan for the treatment of patients who previously received KADCYLA® (ado-trastuzumab emtansine). [Fam-] trastuzumab deruxtecan is an antibody–drug conjugate which delivers cytotoxic chemotherapy to cancer cells via a human epidermal receptor 2 (HER2) antibody attached to a topoisomerase I inhibitor and a tetrapeptide-based linker.

On March 15, 2019, Celltrion announced positive results for CT-P16, a bevacizumab biosimilar, in a Phase 1 trial which showed equivalent pharmacokinetics between the proposed biosimilar and its EU- and US-licensed reference products.

On January 24, 2019, Allergan and Amgen announced positive results of a combined Phase 1 and Phase 3 trial evaluating ABP 798, a proposed biosimilar to rituximab, in comparison with RITUXAN® in patients with rheumatoid arthritis.

For questions, or copies of the documents discussed herein, please click here.

This article provides a summary of recent legislative developments and commentary

FEATURED ARTICLE

House Energy & Commerce Committee Reviews and Passes Several Bills Addressing Generic and Biosimilar Competition

Recently, lowering the cost of prescription drugs has been front and center for both the White House and Congress. The White House passed a budget that contained a key proposal to encourage the availability of more generics and streamline the regulatory process for biosimilars. Similarly, several legislators have (re) introduced bills aiming to prevent drug makers from blocking competitors from entering the market, increase patients' access to generic drugs, and boost competition. More specifically, the bills are addressing barriers to market entry by generics, transparency issues, and reverse payment settlements that may delay generic or biosimilar market entry. This article will provide an overview of the currently pending legislation.

Targeting Barriers to Generic Entry: The CREATES Act, the FAIR Generics Act and the BLOCKING Act

A number of recent bills have targeted barriers to entry for generics and biosimilars. The Creating and Restoring Equal Access to Equivalent Samples (CREATES) Act of 2019 (H.R. 965) is intended to prevent branded companies from withholding samples of their medicines from generic/biosimilar makers in an effort to delay or prevent generic/biosimilar product development. This legislation would require brands to sell "sufficient quantities" of their products at "commercially reasonable" prices to competitors who need samples for research for their ANDAs or ABLAs. However, before obtaining samples of a drug covered by REMS, the generic/biosimilar manufacturers must have FDA pre-approved proposed safety protocols. The Act also allows the FDA to adopt additional safety protocols before authorizing a company to receive samples of a REMS-covered drug. If a brand-name manufacturer refuses access to samples of its product, the CREATES Act allows a generic/biosimilar manufacturer to bring an action in federal court for injunctive relief and, in certain particularly egregious cases, limited damages may be awarded as a deterrent. However, the brand-name manufacturers have a defense against frivolous litigation by showing that the product is available for purchase on market-based terms without any restrictions to eligible manufacturers. The CREATES Act has received wide, bipartisan support, including 29

co-sponsors, and a parallel bill is pending before the Senate (S. 340). However, the bill is staunchly opposed by the brand-name pharmaceutical industry. On April 3, 2019, the House Energy & Commerce Committee passed the bill by voice vote.

The Fair Access for Safe and Timely (FAST) Generics Act (H.R. 985) was introduced by a bipartisan group of representatives and also aims to bring down the costs of prescription drugs by addressing the issue of access to necessary samples of reference product by generic manufacturers. Similar to the CREATES Act, this bill seeks to facilitate access to reference product samples, which would result in a decrease in pharmaceutical costs. This bill was considered during a March 13, 2019 House Energy & Commerce Committee hearing but was not advanced out of committee by the House Health Subcommittee.

Another bill targeting barriers to entry for generics is the Bringing Low-cost Options and Competition while Keeping Incentives for New Generics (BLOCKING) Act of 2019 (H.R. 938). The BLOCKING Act would allow the FDA to discourage parking of 180-day exclusivity by a first generic applicant while addressing ANDA deficiencies by amending FDC Act § 505(j)(5)(B)(iv) (the 180-day exclusivity period section) to add some new conditions on when a subsequent Paragraph IV ANDA can be approved, and thus, when 180-day exclusivity is triggered. In particular, the BLOCKING Act would allow the FDA to approve a subsequent filer "on the date that is 180 days after the earlier of" the date of first commercial marketing of the first applicant (the current rule), or the "applicable date", which is defined as the date on which the following conditions are met: (aa) but for the first applicant 180-day exclusivity, the approval of such an application could be made effective; (bb) 30 months have passed since the submission of an application by a first applicant; (cc) approval of an application submitted by a first filer is not precluded; and (dd) no application by any first filer is approved when (aa), (bb), and (cc) are met. The bill faced strong opposition from the Association for Accessible Medicines, which argued that the bill had the unintended consequence of weakening the 180-day exclusivity period and thus would ultimately reduce generic competition. On April 3, 2019, the House Energy & Commerce Committee passed the bill by voice vote, an action lauded by the Pharmaceutical Care Management Association, which stated that this legislation was an important step in achieving increased competition in the market and lower prescription drug costs.

Lastly, the Fair and Immediate Release (FAIR) of Generic Drugs Act (H.R. 1506) would allow any generic filer who wins a patent challenge in court or is not sued for patent infringement by the brand manufacturer to share in the 180-day exclusivity period of first applicants that enter into patent settlements that delay entry. This bill has a similar provision to the BLOCKING Act, in that it addresses the issue of "parked" 180-day exclusivity. This bill was considered during a March 13, 2019 House Energy & Commerce Committee hearing but was not advanced out of committee by the House Health Subcommittee.

Increasing Transparency: The Purple Book Continuity Act, the Orange Book Transparency Act and the Biologic Patent Transparency Act

Several pending bills aim to address transparency issues in the biosimilar/generic process. The Purple Book Continuity Act of 2019 (H.R. 1520) would amend the Public Health Service Act to codify the publication of approved biological products in the Purple Book, in a similar format and with similar requirements to the Orange Book. The Act specifies that the Purple Book would be published electronically on FDA's website and updated routinely, and directs the FDA to consider the types of patents that should be listed in the Purple Book. On April 3, 2019, the bill was approved by voice vote by the House Energy & Commerce Committee.

Similarly, the Biologic Patent Transparency Act (S. 659) aims to create a single, easily searchable list that includes detailed information about the biologics, in addition to explicit information about the patents associated with each product. It was introduced on March 6, 2019 by a bipartisan group of five senators. The bill would require patent owners to submit to the FDA a list of patents associated with the biologic within 30 days of approval. The bill would require additional information such as the official and proprietary name of each biologic product, the date of licensure and application number for each product, the marketing status, dosage form, route of administration, reference product if applicable, and any period of exclusivity associated with the product. The sponsors of the bill noted that the act is an attempt to stop patent gaming that prevents access to lower-cost biologics. The Association for Accessible Medicines supports the bill while brand-name industry supporters were critical of the bill, arguing that it was inconsistent with the BPCIA patent dance.

The Orange Book Transparency Act of 2019 (H.R. 1503) aims to ensure that the Orange Book is accurate and up-to-date by requiring manufacturers to share complete and timely information with the FDA, as well as ensuring that patents listed in the Orange Book are relevant to the approved drug product. The Act also requires the prompt removal of patents found to be invalid by a court or by the Patent Trial and Appeal Board. The Act also directs the FDA to reconsider the types of patents that should be listed in the Orange Book within one year of enactment. The bill was advanced out of committee by a voice vote on April 3, 2019 by the House Energy & Commerce Committee.

Reverse Payment Settlements: The Protecting Consumer Access to Generic Drugs Act

The Protecting Consumer Access to Generic Drugs Act of 2019 (H.R. 1499) aims to prevent brand name drug and biologic manufacturers from compensating generic and biosimilar makers to delay the entry of generic and biosimilar products. Current law requires the FTC (or another plaintiff) to prove that pay-for-delay agreements harm consumers. Although the Supreme Court found in 2013 that pay-for-delay deals are not presumptively illegal, they are still subject to antitrust scrutiny, even when the generic can enter the market before the expiration of the patent. The Act would prohibit these pay-for-delay agreements for both new drugs and biological products and would create a civil penalty to further dis-incentivize parties from reaching such agreements. An exception was carved out for agreements in which the brand manufacturer's payment to the generic company covers reasonable litigation expenses (limited to $7.5 million) and/or an agreement not to sue the generic manufacturer for patent infringement. The bill was approved by voice vote on March 27, 2019, with an amendment, by the Health Subcommittee. According to the Republican members of the subcommittee, the changes to the bill were necessary to ensure that the bill does not work retroactively because the bill, in its original form, could have the unintended effect of pulling generic drugs off the market if previous agreements would be deemed illegal. On April 3, 2019, the bill was passed by voice vote by the House Energy & Commerce Committee.

Challenging the Validity of a Patent: The Hatch-Waxman Integrity Act of 2019

The Hatch-Waxman Integrity Act of 2019 (H.R. 990 and S. 344) requires ANDA and ABLA applicants to resolve patent disputes in federal district courts *or* PTO proceedings, such as IPRs and PGRs, but not both. In a statement about the bill, sponsor Thom Tillis explained that "the Hatch-Waxman Integrity Act of 2019 would require a generic manufacturer wishing to challenge a brand-name drug patent to choose between the Hatch-Waxman framework, which affords certain advantages

such as being able to rely on the drug innovator's safety and efficacy studies for FDA approval, and inter partes review, or IPR, which is cheaper and faster than Hatch-Waxman litigation but does not provide the advantages of a streamlined generic approval process." The Act was originally proposed by Senator Orrin Hatch as an amendment to the CREATES Act discussed above. The Senate version of the Act (S. 344) has been referred to the U.S. Senate Health, Education, Labor, and Pensions Committee for consideration. The House version of the Act (H.R. 990) is being reviewed by both the U.S. House Energy and Commerce Committee and the U.S. House Financial Services Committee.

Latest Developments - Three New Senate Bills Targeting Drug Prices

On April 11, 2019, three new bills were introduced by Sen. Bill Cassidy, R-La., aiming to speed up the approval process for generic drugs which in turn would lower drug prices.

The Reforming Evergreening and Manipulation that Extends Drug Years (REMEDY) Act (S. 1209) would amend Section 505(j)(7)(A) of the FDC Act (21 U.S.C. 355(j)(7)(A)) to require the holder of an approved application to notify the Under Secretary of Commerce for Intellectual Property if the USPTO has cancelled (and has been upheld on appeal) any claim of a patent listed in the Orange Book. The Secretary would then be allowed to remove the patent from the list with respect to the drug. The Act was referred to the Committee on Health, Education, Labor, and Pensions.

The Protecting Access to Biosimilars Act of 2019 (S. 1140) aims to prevent an approved application that is deemed to be a license for a biological product under § 351(k)(7) of the PHS Act pursuant to section 7002(e)(4) of the BPCIA to not be treated as having been first licensed under subsection (a) for the purposes section 351(k)(7) of the PHS Act and thus would not be eligible for exclusivity under 351(k)(7)(A) and (B) of the PHS Act. This Act is aimed at focusing on the market exclusivity for insulin. The Act was referred to the Committee on Health, Education, Labor, and Pensions.

The Ensuring Timely Access to Generics Act of 2019 (S. 1169) would essentially codify the FDA Draft Guidance on the use if Citizen Petitions by brand-name manufacturers as an attempt to delay the market entry of a generic (see our discussion in our previous issue of the newsletter). The Act was referred to the Committee on Health, Education, Labor, and Pensions.

For copies of the bills discussed above or additional insights into their legislative histories, please click here.

Save the Date: Willkie and Taylor Wessing will be co-hosting the second in our series of 2019 Biosimilars webinars on Wednesday, May 29, 2019. We hope you will join us!

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