LAW OFFICES
HYMAN, PHELPS & MCNAMARA, P.C.

JAMES R PHELPS
PAUL M HYMAN
ROBERT A DORMER
STEPHEN H McNAMARA
ROGER C THIES
THOMAS SCARLETT
JEFFREY N GIBBS
BRIAN J DONATO
FRANK J SASINOWSKI
DIANE B McCOLL
A WES SIEGNER, JR
ALAN M KIRSCHENBAUM
DOUGLAS B FARQUHAR
JOHN A GILBERT, JR
JOHN R FLEDER
MARC H SHAPIRO

ROBERT T ANGAROLA
(1945-1996)

DIRECT DIAL (202) 737-4282

700 THIRTEENTH STREET, N W
SUITE 1200
WASHINGTON, D C 20005-5929
(202) 737-5600
FACSIMILE
(202) 737-9329
www hpm com

MARY KATE WHALEN
OF COUNSEL

JENNIFER B DAVIS
FRANCES K WU
DAVID B CLISSOLD
CASSANDRA A. SOLTIS
JOSEPHINE M TORRENTE
MICHELLE L BUTLER
ANNE MARIE MURPHY
PAUL L FERRARI
JEFFREY N WASSERSTEIN
MICHAEL D BERNSTEIN
LARRY K HOUCK
DARA S KATCHER*
KURT R KARST*
MOLLY E CHILDS*

*NOT ADMITTED IN DC



June 12, 2003

**BY HAND**

Dockets Management Branch
Food and Drug administration
Department of Health and Human Services
5630 Fishers Lane
Room 1061
Rockville, Maryland 20852

## PETITION FOR STAY OF ACTION

On behalf of Associates of Cape Cod, Inc. ("ACC"), manufacturer of Pyrotell® and other FDA-licensed Limulus amebocyte lysate (LAL) endotoxin tests, the undersigned submits this petition pursuant to 21 C.F.R. § 10.35 to request that the Commissioner of Food and Drugs stay the effect of the Food and Drug Administration's ("FDA's") apparent determination that a recombinant endotoxin detection test intended for in-process and finished product endotoxin testing of human drugs and medical devices does not require premarket approval until the agency has responded to AOCC's June 12, 2003 Citizen Petition.

### A. Decision Involved

On information and belief, FDA has issued a Letter of Designation to Cambrex Bio Science Walkersville, Inc. and/or its affiliates ("Cambrex") concluding that Cambrex's PyroGene™ Recombinant Factor C Endotoxin Detection System ("PyroGene™") does not require premarket approval when used for in-process and/or finished product endotoxin

2603 MAIN STREET
SUITE 760
IRVINE, CALIFORNIA 92614
(949) 553-7400
FAX (949) 553-7433

4819 EMPEROR BOULEVARD
SUITE 400
DURHAM, NORTH CAROLINA 27703
(919) 313-4750
FAX (919) 313-4751

testing of human drugs and medical devices.[1] In its Citizen Petition, ACC requests that the Commissioner reconsider that determination and continue to require premarket approval for all endotoxin tests used for in-process and finished product testing. If FDA refuses, ACC alternatively requests the Commissioner to clarify and reinforce the requirement that sponsors of unapproved and previously approved human and animal parenteral drugs, biological products and medical devices submit data validating the use of unlicensed endotoxin tests, and to deregulate previously licensed endotoxin tests in order to restore a level playing field.

## B. Action Requested

ACC requests that the Commissioner stay the effect of FDA's determination that premarket approval is not required for a recombinant endotoxin tests intended for endotoxin testing of human drugs and medical devices pending final resolution of the issues presented in ACC's June 12, 2003 Citizen Petition.

## C. Statement of Grounds

Under 21 C.F.R. § 10.35(e), a stay of action shall be granted if:

(1) The petitioner will otherwise suffer irreparable injury[;]

---

[1] Counsel for ACC have contacted officials in FDA's Office of the Ombudsman and the Center for Biologics Evaluation and Research regarding the basis of Cambrex's claim. These officials confirmed that FDA has not issued any new public document or policy statement concerning the regulatory status or regulation of endotoxin tests. ACC is aware, however, that Cambrex representatives are showing customers a "letter from FDA" stating that no premarket approval is required for PyroGene™. Counsel for ACC has filed a Freedom of Information Act request to obtain any communications (i.e., the Request for Designation and Letter for Designation) between Cambrex and FDA concerning the regulatory status of PyroGene™. While FDA's regulations say that a petition for stay should be filed within 30 days of the decision, the regulations also permit the Commissioner to consider a petition filed after 30 days. 21 C.F.R. § 10.35(g). ACC does not know the date of the FDA's decision because it has not been released to the public. Therefore, the 30-day limitation should clearly not apply here.

(2) The petitioner's case is not frivolous and is being pursued in good faith[;]

(3) The petitioner has demonstrated sound public policy grounds supporting the stay[; and]

(4) The delay resulting from the stay is not outweighted [sic] by public health or other public interests.

All of these criteria are met in this case.

If a stay is not granted, ACC will suffer irreparable injury in the form of lost market share and unrecouped resources. ACC has invested substantial time and capital to develop and meet the FDA approval requirements for its currently marketed LAL endotoxin tests. The rigorous approval requirements and post-marketing controls (e.g., good manufacturing practices ("GMPs")) that FDA has applied to such tests for the past 30 years has appropriately limited the number of suppliers to those companies that can produce safe and effective products. The agency's surreptitious determination that a similarly situated product for the same use is exempt from premarket approval and, by logical extension, other regulatory controls, opens the floodgates to unlicensed competition, which will rapidly erode ACC's market share. In Bracco Diagnostics, Inc. v. Shalala, the court found that loss of market share "[w]hile . . 'admittedly economic,'" constituted an injury without "'adequate compensatory or other corrective relief' that [could] be provided at a later date."[2]

Further, in reliance on a 30-year-old regulatory framework in which premarket approval has consistently been required for such tests, ACC has devoted substantial time and resources to develop its own recombinant endotoxin test for FDA approval, and has spent nearly $30,000,000 to build a new state-of-the-art, CGMP-compliant manufacturing facility in which to produce its products. Implementation of the agency's unexplained departure from the long-standing premarket approval requirement will nullify this work. ACC will be unable to recoup these investments due to immediate competition from unlicensed products that do not have to bear the costs of regulatory compliance.

---

[2] 963 F. Supp. 20, 29 (D.D.C. 1997) (quoting Hoffmann LaRoche v. Califano, 453 F. Supp. 900, 903 (D.D.C. 1978)).

As ACC's Citizen Petition demonstrates, its case is not frivolous and is being pursued in good faith. Moreover, sound public policy grounds support the grant of a stay. As detailed in ACC's Citizen Petition, FDA originally imposed the requirement for premarket approval of in-process and finished product endotoxin tests because of the critical role these products play in assuring the safety of drugs, biological products and medical devices. Further, FDA's abrupt, unexplained departure from a 30-year regulatory framework constitutes arbitrary and capricious action under the Administrative Procedure Act,[3] and there is strong public interest in requiring federal agencies to adhere to applicable laws.[4] Finally, the delayed marketing and use of unlicensed endotoxin tests for in-process and finished product testing of FDA-regulated products which may result from the requested stay is not outweighed by any public health or other public interest. On the contrary, it is in the interest of public health to assure that only reliable endotoxin tests are used to screen drugs and devices.

**D. Conclusion**

For the reasons set forth above, ACC urges the Commissioner to stay the effect of FDA's determination that premarket approval is not required for a recombinant endotoxin tests used for in-process and finished product testing of human drugs and medical devices until the agency has considered and responded to ACC's Citizen Petition.

Respectfully submitted,

Robert A. Dormer
Jennifer Davis
Counsel for Associates of Cape Cod, Inc.

RAD/JBD/tee

---

3 See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

4 See, e.g., Mova v. Shalala, 955 F. Supp. 128, 131 (D.D.C. 1997), aff'd, 140 F.3d 1060 (D.C. Cir. 1998).