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VIA FEDEX

Dockets Management Branch
Food and Drug Administration
Room 1061
5630 Fishers Lane
Rockville, MD 20857

Re: Docket No. 01P-0248

Dear Sirs:

The undersigned, on behalf of Apotex, Inc., submits this response to the May 16, 2001 citizen petition filed on behalf of the Federal Trade Commission ("FTC"), Docket No. 01P-0248, and to the July 19, 2001 response of GlaxoSmithKline ("GSK") to FTC's citizen petition.

Apotex supports FTC's petition and urges FDA to provide a prompt response for two reasons. First, the guidance and clarification that FTC has requested FDA to provide regarding the patent listing procedure under 21 U.S.C. § 355(b)(1) and (c)(2) will serve to clarify the issues in Apotex's pending suit to obtain removal from the Orange Book of several GSK patents relating to paroxetine hydrochloride, *Apotex, Inc. v. Thompson*, No. 1:00 CV 00729 (D.D.C.). Second, FDA's response is likely to be useful to the FTC in its broad investigation of patent listing practices in the drug industry. There are many approved drugs that exist in multiple polymorphic forms (e.g., ranitidine hydrochloride) or in different hydrated forms (e.g., terazosin hydrochloride). It is likely that the listed patents that FTC has asked all "name brand" companies to identify will include patents on different, unapproved forms of approved drugs.

FTC's petition reflects the breadth of its on-going investigation. The guidance and clarification that FTC seeks is not limited to a particular drug. While GSK characterizes

01P-0248

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FTC's petition as a request for reconsideration of FDA's response to Apotex's citizen petition, Docket No. 00P-0499, seeking delisting of GSK patents relating to paroxetine hydrochloride, FTC makes no such request. Apotex believes that FTC's use of the citizen petition procedure to obtain guidance from FDA on regulatory matters that are directly relevant to its broad investigation is entirely appropriate.

While FTC's inquiries focus on the patent listing procedure in general, the arguments that GSK offers in its attempt to justify the listing in the Orange Book of its recently issued patents relating to paroxetine hydrochloride emphasize the need for a response by FDA in order to clarify the patent-listing issues in *Apotex, Inc. v. Thompson.* GSK's arguments are designed to evade and obscure what should be a simple and straight-forward analysis: whether, under the unambiguous requirements of § 355(b)(1) and (c)(2) and FDA's equally unambiguous regulation, 21 C.F.R. § 314.53(b), any of its patents claim the drug that is the subject of GSK's approved NDA.

For example, GSK asserts that, because its approved labeling for Paxil® includes the established name, "paroxetine hydrochloride," its approved NDA covers all forms of paroxetine hydrochloride, including forms that GSK claims to have invented after FDA approved the NDA in 1992. GSK response at 6. To anyone familiar with the NDA approval process and the labeling requirements of 21 C.F.R. § 201.57(a), this is errant nonsense. GSK has sought and obtained FDA's approval only to market paroxetine hydrochloride hemihydrate. The fact that GSK, in compliance with the foregoing regulation, labels its approved drug product with the established name, "paroxetine hydrochloride," along with the proprietary name Paxil® and a chemical name that identifies the approved active ingredient as the hemihydrate form, is irrelevant to the patent-listing dispute.

In similar fashion, GSK asserts that, because some of its clinical studies that it submitted with its NDA were done with an anhydrate form of paroxetine hydrochloride, its NDA and FDA's approval was not limited to the hemihydrate form that is the active ingredient in Paxil®, but covered any and all anhydrate forms then known or thereafter discovered. *Id.* GSK does not try to suggest that these clinical studies were sufficient to establish the safety and efficacy of the anhydrate form used in some clinical studies or to suggest that it sought FDA's approval to market that form, much less other, then purportedly unknown anhydrate forms of paroxetine hydrochloride.

GSK also tries to invoke FDA's treatment of the "same drug" requirement of § 355(j)(2)(A)(ii) as a basis for the listing of its anhydrate patents under the separate requirements of § 355(b)(1) and (c)(2). GSK response at 5. GSK ignores FDA's discretion, recognized in *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313 (D.C. Cir. 1998), to approve an ANDA for a drug having a different chemical structure than the approved NDA drug, where the difference in chemical structure has no clinical significance. This, of course, has nothing whatever to do with the separate patent listing requirements of the Act and FDA's implementing regulation.

GSK has asserted the same arguments in its opposition to Apotex's renewed motion for preliminary injunction to secure removal of several GSK patents from the Orange Book. Apotex has responded to those arguments, but the risk of judicial confusion is real. FDA's response to the clarification sought by FTC in its citizen petition will remove this risk and frame the core issue that the court must decide: whether any of GSK's new patents claims the approved drug.

Finally, FDA's response to the citizen petition is likely to be valuable in other patent listing disputes. Some of GSK's irrelevant arguments have been made before and, no doubt, will be made again. *See, e.g., Zenith Laboratories, Inc. v. Abbott Laboratories*, No. 96-1661, 1996 U.S. Dist. LEXIS 22567 (D.N.J. 1996). FDA's response to the citizen petition will put these arguments to rest. Indeed, FDA's response is likely to discourage other NDA-holders from submitting similar patents on new polymorphs or new hydrated forms not approved by FDA for listing in the Orange Book.

Very truly yours,

LORD, BISSELL & BROOK

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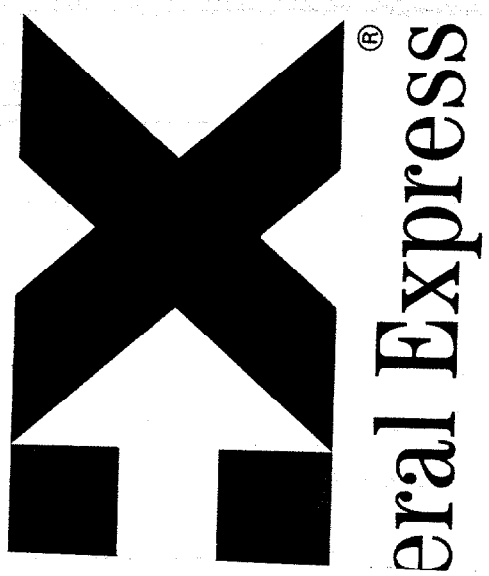

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