

Public Version

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

APOTEX HOLDINGS INC. *and* APOTEX INC.,

Claimants/Investors,

-and-

THE UNITED STATES OF AMERICA,

Respondent/Party.

Case No. ARB(AF)/12/1

COUNTER-MEMORIAL ON MERITS AND OBJECTIONS TO JURISDICTION OF RESPONDENT UNITED STATES OF AMERICA

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**COUNTER-MEMORIAL ON MERITS AND OBJECTIONS TO JURISDICTION
OF RESPONDENT UNITED STATES OF AMERICA**

1. In accordance with the Tribunal’s First Procedural Order, Respondent United States of America respectfully submits this Counter-Memorial on Merits and Objections to Jurisdiction to the claims of Apotex Inc. and Apotex Holdings Inc., on its own behalf and on behalf of its U.S. enterprise Apotex Corp. (collectively, “Apotex”).¹

¹ Claimants refer to Apotex Inc. as “Apotex-Canada” and to Apotex Corp. as “Apotex-US.” See Memorial of Claimants Apotex Holdings Inc. and Apotex Inc. ¶ 20 n.2, ¶ 21 n.3 (July 30, 2012) (“Memorial”). Because of the complexity of Claimants’ corporate structure (*see infra* ¶ 290), and for clarity, the United States refers to Apotex Inc. as Apotex Inc. and to Apotex Corp. as Apotex Corp.

PRELIMINARY STATEMENT

2. The Tribunal should deny Apotex's improper and unsupported claims concerning the United States' lawful and appropriate exercise of its authority to protect the health of its people. The Tribunal has no jurisdiction to hear Apotex's claims, which in any event fail on the merits.

3. For more than a century, the United States has established laws and regulations to prevent importation of adulterated drugs in order to protect public health. The United States did not relinquish this authority and responsibility when it concluded the NAFTA. Nor did the United States and its NAFTA partners establish Chapter Eleven investment arbitration to resolve complaints by foreign traders whose adulterated drugs have been turned away at the border.

4. The material facts of this case are largely undisputed. In December 2008, the U.S. Food and Drug Administration (FDA) inspected Apotex Inc.'s manufacturing facility in Etobicoke, Ontario following complaints from U.S. consumers, doctors, and pharmacists about problems with Apotex drugs. FDA's eight-day inspection uncovered significant violations of U.S. laws and regulations, including numerous deviations from current good manufacturing practice (cGMP). The investigators informed Apotex of their findings at the close of the inspection. FDA subsequently issued Apotex Inc. a "warning letter," apprising the firm that drugs from its Etobicoke facility were "adulterated" under U.S. law and thus could be denied admission to the United States. FDA further warned Apotex that the agency could withhold approval of drug applications linked to the facility. Apotex Inc. acknowledged the serious problems with its manufacturing practices and promised to implement corrective action.

5. In August 2009, FDA inspected the firm's Signet manufacturing facility in Toronto, Ontario. The inspection was prompted by the serious cGMP deficiencies found at the Etobicoke

facility and by additional complaints FDA had received concerning the quality and efficacy of Apotex drugs. FDA's 14-day inspection uncovered, once again, significant violations of U.S. laws and regulations, including numerous cGMP deficiencies, several of which mirrored those found at Etobicoke. These violations affected many products and confirmed systemic problems with Apotex's entire manufacturing program. FDA found that Apotex had distributed products in the U.S. market contaminated with hair, glue, plastic, nylon, metal, rust, acetate fibers, fluorocarbons, and PVC-based material. FDA also cited Apotex for improperly produced and misbranded drug products; poor cleaning practices; a failure to investigate or report manufacturing problems properly; inadequate production procedures; poor recordkeeping; and a host of other serious failings. FDA placed Apotex's Etobicoke and Signet facilities on "Import Alert," signaling to FDA district offices that drugs from those facilities were deemed to be adulterated and could be detained at the border without physical examination.

6. Apotex did not dispute FDA's cGMP findings or protest having been placed on Import Alert. Nor did Apotex exercise its right to challenge FDA's actions in administrative proceedings or in federal court. And although Apotex now professes ignorance of FDA's 40-year-old Import Alert process, it neglected to mention that its own drugs were the subject of an Import Alert in 1992, when Apotex founder Bernard Sherman participated in a scheme to sell unapproved Apotex drugs in the United States through the mail and through offshore companies.

7. After being placed on Import Alert in August 2009, Apotex accepted responsibility for systemic problems with its manufacturing practices; recalled adulterated drug products from the U.S. market; hired third-party consultants to help bring its facilities into compliance with U.S. law; and pledged to overhaul its operations, management structure, and quality control systems.

8. Apotex's primary regulator, Health Canada, launched its own inspections of the Etobicoke and Signet facilities. Health Canada corroborated FDA's findings, recording 37 "major observations" at the two sites. Health Canada discovered, for instance, "a dead insect or insect fragment" in active pharmaceutical ingredients, prompting Apotex to recall drugs using those ingredients from the Canadian market. Health Canada further faulted Apotex for using the same material to fabricate cytotoxic and non-cytotoxic materials without taking proper precautions to prevent cross-contamination – a violation that alone would have warranted stripping Apotex of its establishment license under Canadian law. Health Canada also discovered that Apotex had, among other violations, misreported test results; released failed products for sale in Canada; failed to conduct timely investigations of potentially unsafe products; and delayed product recalls long after learning of health risks to consumers. Once again, Apotex acknowledged the problems with its manufacturing practices and pledged to address the "system deficiencies highlighted by them." Health Canada opted not to shut down Apotex's facilities – Apotex is Canada's largest supplier of generic drugs – but placed Apotex under close, continuous, on-site supervision for more than a year, ensuring that Apotex followed through with its promised corrective actions.

9. Over the ensuing year, FDA communicated continuously with Apotex on how to achieve sustainable compliance with U.S. law, devoting extraordinary agency resources to the task. Apotex notified FDA that its manufacturing facilities would be first ready for reinspection in October 2010, more than a year after issuance of the Import Alert.

10. The follow-up reinspections of the Etobicoke and Signet facilities in January and February 2011 revealed significant, ongoing cGMP problems, and the FDA investigators recommended against lifting the Import Alert. But after carefully evaluating Apotex's corrective

actions to date and its plan for continued improvements, FDA headquarters decided to lift the Import Alert. Separately, FDA resumed evaluating whether, from a cGMP perspective, it could approve Apotex's drug applications from the Etobicoke and Signet facilities.

11. Apotex does not dispute these facts. It simply downplays their seriousness. Apotex contends, for instance, that:

- The third-party consultant hired “to assess every batch of products released to the US market in the months preceding the import alert . . . confirmed that almost without exception there was no question as to the safety and efficacy of Apotex's products”;
- During testing by Apotex's third-party consultant, “27 products were assessed, and only three failed to meet the criteria”; and
- Apotex recalled drugs from the U.S. market not because of safety and efficacy concerns, but “as a good will gesture on the part of Apotex.”

12. FDA, however, cannot allow companies to market drugs in the United States that “almost without exception” are safe and effective, or that fail testing “only” 11 percent of the time. And when serious manufacturing and quality control problems are identified, “good will gestures” are not enough. As the recent meningitis outbreak in the United States tragically reminds, pharmaceuticals produced in violation of cGMP can be deadly. All companies, foreign and domestic, must comply with current good manufacturing practice to market their drugs in the United States.

13. Apotex now blames the U.S. government for having prevented Apotex from exporting its adulterated drugs to the United States. Apotex believes that the U.S. taxpayer should compensate Apotex for the costs of bringing its manufacturing practices into compliance with U.S. law. And although Apotex previously claimed that the Import Alert violated NAFTA's

trade provisions, Apotex now frames its case as an *investment* dispute, in order to claim money damages.

14. To that end, Apotex claims that Apotex Inc. – a Canadian drug manufacturer with facilities in Canada – is an “investor” that made and sought to make “investments” in the United States. In particular, Apotex Inc. contends that its *applications* for regulatory approval to market its drugs constitute “intangible property” in the United States, despite the fact that FDA has statutory authority to deny or revoke that approval at any time without paying compensation. Apotex has failed to establish that Apotex Inc. made or sought to make any investments in the United States within the meaning of NAFTA Chapter Eleven.

15. Although Apotex Holdings has made investments in the United States (including by establishing Apotex Corp., a U.S. distributor of generic drugs), that is not enough to establish an investment claim under the NAFTA. Chapter Eleven also requires that the challenged measure “relate to,” or have a “legally significant connection” to, the investor or its investment. The sole challenged measure in this case – the Import Alert – did not relate to Apotex Holdings as an investor or to its U.S. investment, Apotex Corp., which continued marketing generic drugs throughout the period of the Import Alert. Apotex contends that the Import Alert prevented Apotex Corp. from receiving drugs from Apotex Inc.’s Etobicoke and Signet facilities. The Import Alert, however, prevented Apotex Inc. from exporting its drugs to any U.S. distributor of Apotex Inc. products, including Apotex Corp. Although Apotex seeks to show that the Import Alert particularly relates to Apotex Corp., because of its relationship with Apotex Inc., its arguments before this Tribunal directly contradict statements Apotex previously has made in U.S. court:

- Apotex contends that Apotex Inc. and Apotex Corp. are “vertically integrated” companies, and yet Apotex previously represented that “Apotex Corp. and Apotex Inc. are maintained as completely separate corporate entities,” and that “Apotex Inc. has no involvement in the day-to-day management” or “day-to-day operations of Apotex Corp.”;
- Apotex contends that Apotex Inc. “commits various resources” to Apotex Corp., and yet Apotex Corp. previously denied receiving “any loans or other capital from Apotex Inc.”;
- Apotex claims that Apotex Corp. “was created in order to market, sell and distribute Apotex products in the US,” and yet Apotex Corp. previously denied that it “acts in concert with [] Apotex Inc. for the purposes of marketing, distributing, and selling generic pharmaceutical products within the United States”;
- Apotex contends that Apotex Inc. and Apotex Corp. are mutually “dependent” in their business operations, and yet Apotex previously represented that “Apotex Corp. is a separate and distinct corporation [that] generates its own capital; purchases its own products and services; chooses which products to market; sells products from companies other than Apotex Inc.; and is responsible for identifying and generating its own customer base”;
- Apotex contends that Apotex Inc. “decides” which products Apotex Corp. will sell, and yet Apotex previously represented that “Apotex Inc. has no involvement in the . . . process by which Apotex Corp. obtains business,” and that only Apotex Corp. “could select which products it would market” in the United States; and
- Apotex contends that Apotex Corp. plays a key role in preparing, submitting, and maintaining Apotex Inc.’s drug applications, and yet Apotex previously represented that “Apotex Inc. prepared, filed and submitted” its applications “in Canada.”

Apotex thus argues one thing to establish jurisdiction before this Tribunal and the opposite when seeking to avoid jurisdiction in U.S. court. The Tribunal should not countenance such opportunism.

16. The Import Alert also is not related to Apotex Inc.’s putative investments – its drug applications for generic drugs. The Import Alert concerned Apotex Inc.’s ability to *export* its products to the United States. The Import Alert did not mention or have any effect on FDA’s consideration of Apotex’s generic drug applications. Rather, FDA was unable to approve the ANDAs during this period because of the underlying cGMP violations. The Import Alert had no

impact of any kind on Apotex Inc.'s alleged investments, and thus Apotex Inc. cannot bring a NAFTA Chapter Eleven claim for that additional reason.

17. Apotex's arguments on the merits are equally unavailing. Apotex does not dispute that its drugs were "adulterated" as a matter of U.S. law. Nor does Apotex challenge the underlying legality of the Import Alert policy, given similar policies by Canada and other States. Instead, Apotex alleges that the United States accorded better treatment to U.S. and foreign companies, in violation of NAFTA Articles 1102 (national treatment) and 1103 (most-favored-nation treatment). Apotex's claims, however, suffer from three defects.

18. First, Apotex cannot establish a national or most-favored-nation treatment claim because the Import Alert (which applied to two of Apotex Inc.'s *Canadian* manufacturing facilities) had no legally significant connection to Apotex as an "investor" or to its "investments," and thus Apotex did not receive any "treatment" for purposes of NAFTA Chapter Eleven.

19. Second, Apotex cannot establish a national treatment claim, because Apotex failed to identify comparators in "like circumstances." Apotex cites FDA's treatment of drug manufacturing facilities *in the United States*, which obviously are not subject to import alerts, and thus are not in "like circumstances" with Apotex Inc.

20. Third, Apotex cannot establish a most-favored-nation treatment claim, because it failed to identify any third-country-owned comparator that received more favorable treatment. One company identified by Apotex, for instance, shut down operations of a non-compliant facility. Another company had two facilities placed on import alert for more than three years, forfeited dozens of drug applications, and set aside \$500 million for potential civil and criminal penalties.

Any suggestion, then, that the United States discriminated in favor of these firms is simply not credible.

21. Apotex's Article 1105 claim is equally baseless. Apotex contends that the United States should have allowed the firm to continue exporting adulterated drugs to the United States until Apotex had been afforded six "procedural safeguards": (1) a hearing (2) with advance notice (3) before an impartial decision-maker (4) at which Apotex could present evidence and contest the decision and (5) obtain a reasoned decision relying on all relevant legal and factual considerations (6) with judicial review of that decision. Failure to provide these, Apotex claims, put the United States in violation of the customary international law *minimum* standard of treatment.

22. And yet Apotex has made no showing for its alleged new rule of customary international law. Apotex does not even purport to establish a general and consistent practice of States followed from a sense of legal obligation requiring these generous "safeguards" *before* blocking the importation of adulterated drugs. Apotex does not address how other States prevent importation of adulterated drugs, and whether those States provide the six "safeguards" claimed by Apotex. Instead, Apotex has plucked this proposed new rule of customary international law from a grab bag of soft law sources, law review articles, working papers, human rights cases, and other sources that have no bearing on the challenged measure. Even if Apotex could demonstrate such a new rule of customary international law, the facts show that the United States actually offered Apotex the "procedural safeguards" it now claims were due, through both administrative and judicial processes. Apotex simply chose not to invoke them.

23. Finally, although the United States is not required to address issues of quantum in this submission, it bears recalling Apotex's assertions that: (1) the Apotex group of companies generates around \$1 billion annually from sales in more than 115 countries; (2) the United States represented 30 percent of Apotex's worldwide market just prior to the Import Alert; and (3) the Import Alert effectively barred access to the United States market for drugs exported from two of its several manufacturing facilities for just under two years. And yet Apotex claims damages in this arbitration from "hundreds of millions of US dollars" to \$ [REDACTED] billion, an amount [REDACTED] greater than its claimed annual U.S. sales, [REDACTED] greater than its annual worldwide sales, and even greater than the value of the entire Apotex group of companies. Apotex's damages claim highlights the absurdity of Apotex's allegations in this case.

24. Because Apotex's claims fall outside the scope and coverage of NAFTA Chapter Eleven, the Tribunal should bifurcate the jurisdictional issues and, for reasons of cost, efficiency, and fairness, decide them as a preliminary matter. The Tribunal should then dismiss Apotex's baseless claims with prejudice and award the United States the full costs of these proceedings.

I. FACTS

A. For More than a Century, FDA Has Been a Worldwide Leader in Regulating Drugs for Public Health

25. The U.S. government has long regulated pharmaceutical products to protect public health. These efforts are led by the U.S. Food and Drug Administration in the U.S. Department of Health and Human Services.

26. In the nation's early days, the United States lagged far behind many other countries in regulating pharmaceutical drugs. Inferior and suspect drugs were often shipped to the United

States, giving it a reputation as “the grand mart and receptacle of all the refuse merchandise” of the world.² In response, the U.S. Congress enacted the Drug Importation Act of 1848, which sought to prevent the importation of “adulterated and spurious drugs and medicines.”³ The act required that all drugs be examined for “quality, purity, and fitness.”⁴ Drugs found to be “adulterated” or “deteriorated” were not to pass the customs house.⁵ Since that time, U.S. officials have been authorized to refuse admission of adulterated drugs.

27. Scientific and commercial innovations brought increased concerns about adulterated pharmaceuticals. In 1901, an antitoxin for treating diphtheria led to a major tetanus outbreak, killing 13 children and raising public concern about pharmaceutical safety.⁶ Congress responded once again, enacting the Biologics Control Act of 1902, which established federal licensing and labeling requirements and authorized inspections of certain vaccine facilities.⁷

28. The work of journalists and popular writers increased public awareness of the growing danger of adulterated food and drugs. Samuel Hopkins Adams published a series of magazine articles in 1905-1906 entitled *The Great American Fraud*, documenting rampant criminality and

² THE FIRST CENTURY OF THE PHILADELPHIA COLLEGE OF PHARMACY, 1821-1921, 131 (Joseph W. England ed., 1922) (stating that “the business of shipping adulterated and cheap drugs to this country had grown to be frightfully enormous,” and citing an 1848 report to Congress declaring that “[t]he United States had become the grand mart and receptacle of all the refuse merchandise of that description, not only from the European warehouses, but from the whole Eastern world.”) [R-7].

³ Drug Importation Act, ch. 70, 9 Stat. 237-39 (1841-1851) [RLA-169].

⁴ *Id.* § 1.

⁵ *Id.* § 3.

⁶ See FDA/Center for Drug Evaluation and Research (CDER), *The History of Drug Regulation in the United States*, at 4 (2006) [R-13].

⁷ The Biologics Control Act of 1902 established licensing and labeling requirements and authorized inspections of “any establishment for the propagation and preparation of any virus, serum, toxin, antitoxin or product aforesaid for sale, barter, or exchange.” Ch. 1378, § 3, 32 Stat. 728-29 (1902) [RLA-168]; CDER, *The History of Drug Regulation in the United States*, at 4 (2006) [R-13].

hucksterism in the pharmaceutical industry.⁸ And Upton Sinclair's 1906 novel *The Jungle* graphically exposed the dangers of an unregulated food industry.⁹

29. Congress once again took action, enacting the Pure Food and Drug Act of 1906.¹⁰ The law prohibited interstate commerce in adulterated or misbranded food and drugs; provided for civil and criminal penalties for violations of the law; and allowed for “any article of food, drug, or liquor” to be seized for confiscation and destruction.¹¹ Notably, the law also authorized the examination, detention, and destruction of any adulterated or misbranded food and drugs offered for import into the United States.¹²

30. These two statutes – the Biologics Control Act of 1902 and the Pure Food and Drug Act of 1906 – effected a sea change in U.S. public health policy. FDA's essential regulatory authorities stem from these two laws, although the agency was not known by its current name until 1930.

1. Recurring Public Health Threats Impelled the United States to Regulate Drug Manufacturing, Authorize Factory Inspections, and Mandate Good Manufacturing Practice

31. Despite major advancements in the law, two public health disasters exposed weaknesses in the regulation of pharmaceutical drugs in the United States. In 1937, a Tennessee company marketed an antimicrobial elixir containing diethylene glycol, a sweet-tasting but lethal chemical

⁸ CDER, *The History of Drug Regulation in the United States*, at 5 (2006) [R-13].

⁹ *Id.*

¹⁰ Pure Food and Drug Act, ch. 3915, 34 Stat. 768 (1906) [RLA-171].

¹¹ *Id.* §§ 1-2, 10.

¹² *Id.* § 11.

used in antifreeze.¹³ Because the company was not required to obtain FDA approval prior to marketing its drug, by the time FDA identified the elixir as the source of the mass poisoning, more than 100 people, including many children, had died.¹⁴

32. In response, Congress enacted the Federal Food, Drug, and Cosmetic Act of 1938, popularly known as the FD&C Act.¹⁵ The purpose of this landmark legislation, the U.S. Supreme Court observed, was to “touch . . . the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.”¹⁶ Among other advancements, the FD&C Act:

- Required new drugs to be shown safe prior to marketing, ushering in a new system for regulating drugs in the United States;¹⁷
- Eliminated the requirement to prove intent to defraud in drug misbranding cases, making it easier to prosecute drug manufacturers;¹⁸
- Authorized court injunctions, augmenting existing penalties, such as seizures and criminal prosecutions;¹⁹ and
- Authorized factory inspections, allowing FDA to monitor drug manufacturing practices, to reduce the risk of adulteration.²⁰

¹³ Carol Ballentine, *Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident*, FDA CONSUMER MAGAZINE (1981) [R-8].

¹⁴ CDER, *The History of Drug Regulation in the United States*, at 6 (2006) [R-13]; see also Carol Ballentine, *Taste of Raspberries, Taste of Death: The 1937 Elixir Sulfanilamide Incident*, FDA CONSUMER MAGAZINE (1981) [R-8].

¹⁵ FD&C Act, Ch. 675, 52 Stat. 1040 (1938) [CLA-242].

¹⁶ *United States v. Dotterweich*, 320 U.S. 277, 280 (1943) [RLA-95].

¹⁷ FD&C Act, Ch. 675, § 505 [CLA-242].

¹⁸ See *id.* §§ 301, 303(a)-(b).

¹⁹ *Id.* § 302.

²⁰ *Id.* § 704.

Notably, the law also authorized FDA to refuse to admit any drug into the United States that “appear[ed]” from examination or “otherwise” to be adulterated, misbranded, or in violation of other drug-approval provisions of the FD&C Act.²¹

33. A second public health disaster followed two decades later. Beginning in 1956, the sedative thalidomide was widely marketed in Europe,²² including to relieve morning sickness in pregnant women. A U.S. company sought permission to sell the drug in the United States, but FDA rejected the application for insufficient proof of safety.²³ In 1961, the drug was determined to cause severe birth defects.²⁴ Although thalidomide was never approved for sale in the United States, it nonetheless was distributed to some 20,000 American patients, including many pregnant women, under the guise of a medical study.²⁵ Many U.S. newborns suffered from the drug, in addition to thousands of children in Western Europe.²⁶

34. This tragedy impelled Congress to strengthen the FD&C Act through enactment of the Kefauver-Harris Amendments of 1962. These amendments, among other things:

- Required that manufacturers prove the effectiveness of drug products prior to marketing them and to report any serious side effects discovered thereafter;²⁷
- Required that evidence of effectiveness be based on adequate and well-controlled clinical studies conducted by qualified experts;²⁸ and

²¹ *Id.* § 801(a).

²² CDER, *The History of Drug Regulation in the United States*, at 8 (2006) [R-13].

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 8, 15.

²⁷ Drug Amendments of 1962, Pub. L. No. 87-781, §§ 102-03, 76 Stat. 780, 781-84 (1962) [CLA-243].

²⁸ *Id.* § 102.

- Transferred to FDA oversight of prescription drug advertising, mandating accurate information about side effects.²⁹

Significantly, the amendments also mandated regular inspections of U.S. production facilities, and authorized FDA to set “good manufacturing practice” for industry.³⁰

35. To that end, in 1963 FDA promulgated regulations governing current good manufacturing practice, or cGMP.³¹ Over the ensuing fifty years, FDA has periodically reassessed and revised its cGMP regulations in order to “accommodate advances in technology and other scientific knowledge that further safeguard the drug manufacturing process and the public health.”³² FDA’s cGMP regulations have been emulated by national and international authorities worldwide, from Health Canada to the World Health Organization.³³

²⁹ *Id.* § 131.

³⁰ *Id.* §§ 101, 201, 510(h).

³¹ Current Good Manufacturing Practice in Manufacture, Processing, Packing, or Holding, 28 FED. REG. 6,385 (June 20, 1963) (originally promulgated at 21 C.F.R. pt. 133; currently codified at 21 C.F.R. pts. 210 and 211) [CLA-281]. CGMP regulations:

provide for systems that assure proper design, monitoring, and control of manufacturing processes and facilities. Adherence to the cGMP regulations assures the identity, strength, quality, and purity of drug products by requiring that manufacturers of medications adequately control manufacturing operations. This includes establishing strong quality management systems, obtaining appropriate quality raw materials, establishing robust operating procedures, detecting and investigating product quality deviations, and maintaining reliable testing laboratories. This formal system of controls at a pharmaceutical company, if adequately put into practice, helps to prevent instances of contamination, mix-ups, deviations, failures, and errors. This assures that drug products meet their quality standards.

FDA, *Facts About Current Good Manufacturing Practices (cGMPs)* [CLA-287].

³² Amendments to the Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals, 73 FED. REG. 51,919, 51,920 (Sept. 8, 2008) (codified at 21 C.F.R. pts. 210, 211) [CLA-286]; *see also* FDA, *CGMP Regulations in the Federal Register* (listing, and briefly explaining, cGMP regulation codifications and revisions since 1963) [RLA-170].

³³ *See, e.g.*, World Health Organization, *GMP Questions and Answers* [R-116].

36. The pharmaceutical industry itself has commended FDA’s drug inspection processes as “extraordinary.”³⁴ The vice-president of a trade association that represents Apotex Inc. and other generic drug manufacturers testified to the U.S. Congress that “the U.S. drug supply remains the safest of anywhere in the world, and the FDA’s drug approval and inspection processes represent the gold standard for regulatory agencies worldwide.”³⁵

2. Drugs Not Manufactured in Accordance with Current Good Manufacturing Practice Are “Deemed to Be Adulterated” and Subject to Enforcement Action

37. The FD&C Act, as amended, prohibits the “introduction or delivery for introduction into interstate commerce” of adulterated drugs.³⁶ A drug is “deemed to be adulterated” if

the methods used in, or the facilities or controls used for, its manufacture, processing, packing, or holding do not conform to or are not operated or administered in conformity with *current good manufacturing practice* to assure that such drug meets the requirements of this chapter as to safety and has the identity and strength, and meets the quality and purity characteristics, which it purports or is represented to possess[.]³⁷

Under the statute, a drug does not actually need to be defective to be “adulterated.” “This kind of adulteration,” FDA has clarified, “means that the drug was not manufactured under conditions that comply with cGMP.”³⁸

³⁴ *FDA User Fees Before the House Subcomm. on Health*, 2012 WLNR 8147796 (Apr. 18, 2012) (statement of David Gaugh, Vice President of Regulatory Sciences, Generic Pharmaceutical Association) (“FDA’s work during this period of growth for the generic industry has been extraordinary.”) [R-94].

³⁵ *Id.*; see also 2012 Board of Directors & Executive Committee, Generic Pharmaceutical Association (listing Apotex’s Jeff Watson as a member of the Board of Directors) [R-85]; Witness Statement of Jeff Watson ¶ 14 (July 30, 2012) (“Watson Statement”) (noting that the Generic Pharmaceutical Association “represents the manufacturers and distributors of finished generic pharmaceutical products, manufacturers and distributors of [active pharmaceutical ingredients], and suppliers of other goods and services to the generic pharmaceutical industry. [The Association] advocates for opportunities for affordable generic pharmaceuticals.”).

³⁶ 21 U.S.C. § 331(a) (2012) [CLA-226].

³⁷ 21 U.S.C. § 351(a)(2)(B) (2012) (emphasis added) [CLA-233].

³⁸ See, e.g., FDA, *Facts about Current Good Manufacturing Practices (cGMPs)* [CLA-287].

38. In assessing minimum cGMP requirements, FDA reviews a variety of manufacturing elements, including organization and personnel; buildings and facilities; equipment; control of components and drug products; containers and closures; production and process controls; packaging and labeling controls; holding and distribution; laboratory controls; records and reports; and returned and salvaged drug products.³⁹ These requirements are identical for domestic and foreign pharmaceutical manufacturing facilities producing drugs for the U.S. market.⁴⁰ Failure to comply with cGMP regulations constitutes a failure to comply with the requirements of the FD&C Act, and renders a drug legally adulterated, regardless of whether a drug product is defective or deficient in any respect.⁴¹

39. On-site inspections of pharmaceutical facilities are critical to ensuring compliance with U.S. law, including cGMP regulations. Specialized FDA personnel – including chemists, microbiologists, and GMP-trained investigators – inspect domestic and foreign drug manufacturing facilities for cGMP compliance.⁴² The size and composition of the investigation team varies depending on personnel availability and the size and technical aspects of the facility, among other factors.⁴³ Inspection staffing is coordinated by FDA’s Office of Regulatory Affairs

³⁹ 21 C.F.R. § 210 (2011) [CLA-250].

⁴⁰ Witness Statement of Dr. Carmelo Rosa ¶15 (Dec. 14, 2012) (“Rosa Statement”).

⁴¹ See, e.g., Letter from Richard Friedman, Director, Division of Manufacturing and Product Quality, FDA-CDER, Office of Compliance, to Lance Lovelock, VP Quality, Apotex Inc., at 1 (June 25, 2009) (“2009 Etobicoke Warning Letter”) [C-41].

⁴² See FDA, *Facts about Current Good Manufacturing Practices (cGMPs)* [CLA-287]; Rosa Statement ¶ 12. Prior to passage of the FDA Safety and Innovation Act of 2012, FDA was required to inspect domestic facilities every two years. See 21 U.S.C. § 360(h) (2009) [CLA-236]; FDA Safety and Innovation Act, Pub. L. No 112-144 § 705, 126 Stat. 993 (2012) (requiring inspections “in accordance with a risk-based schedule”) [CLA-244]; 21 U.S.C. § 360 (2012) [CLA-236]. There was no such requirement with respect to foreign facilities, but FDA has conducted international inspections since 1955, relying on a firm’s advance consent before conducting such an inspection. FDA/ORA Field Management Directive No. 13A (Mar. 16, 2009) [R-39].

⁴³ Rosa Statement ¶ 12.

(ORA), and may include personnel from district offices, the Division of Foreign Field Investigations, and the Center for Drug Evaluation and Research, or CDER.⁴⁴

40. ORA often coordinates foreign inspections with appropriate foreign regulatory authorities, to ensure compliance with any host State requirements.⁴⁵ In contrast to domestic facilities, FDA does not conduct surprise inspections of foreign facilities, whether they are U.S.- or foreign-owned.⁴⁶

41. During inspections, investigators gather documents, samples, and other evidence of manufacturing practices. Significant violations of applicable laws and regulations, including cGMP deviations, may be recorded on a “Form FDA 483 Inspectional Observations,” or Form 483.⁴⁷ During closeout meetings, the investigators present management with a copy of the Form 483 (if one is issued) and discuss their findings.⁴⁸ Investigators later memorialize their findings

⁴⁴ *Id.* ¶¶ 12-13; ORA is responsible for conducting inspections and coordinating with FDA’s six product-oriented centers, including CDER (drugs). *See* FDA, *Small Business Guide to FDA*, at 16, available at <http://www.fda.gov/downloads/ForIndustry/SmallBusinessAssistance/SmallBusinessGuidetoFDA/UCM081030.pdf> (last visited Dec. 4, 2012) [R-114]. Within ORA, the Division of Domestic Field Investigations (DDFI) handles domestic inspections and coordinates with ORA’s network of district offices in the United States. FDA, *Investigations Operations Manual*, § 1.9.2.2.1 (2012) [R-84]. DDFI handles foreign inspections and acts as the “district office” for all foreign inspection activities. *Id.* § 1.9.2.2.2.

⁴⁵ FDA/ORA Field Management Directive No. 13A, at 1-2 (Mar. 2009) [R-39].

⁴⁶ FDA, *Guide to International Inspections and Travel*, § 302.1 [CLA-299]; Rosa Statement ¶ 13. Domestic inspections, by contrast, need not be scheduled in advance, as the FD&C Act authorizes FDA to enter facilities in the United States – whether U.S.-owned or foreign-owned – at any reasonable time. 21 U.S.C. § 374 (2007-2011) [CLA-238].

⁴⁷ Form 483 is standardized and contains the following pre-printed text:

This document lists observations made by the FDA representative(s) during the inspection of your facility. They are inspectional observations; and do not represent final agency determination regarding your compliance. If you have an objection regarding an observation, or have implemented, or plan to implement corrective action in response to an observation, you may discuss the objection or action with the FDA representative(s) during the inspection or submit this information to FDA at the address above. If you have any questions, please contact FDA at the phone number and address above.

See, e.g., Form FDA 483, Inspectional Observations, Apotex Inc., Etobicoke (Dec. 19, 2008) (“2008 Etobicoke Form 483”) [C-34].

⁴⁸ FDA, *Investigations Operations Manual*, § 5.2.3 (2012) (stating the Form 483 “is intended for use in notifying the inspected establishment’s top management in writing of significant objectionable conditions, relating to products

in a narrative Establishment Inspection Report, or EIR.⁴⁹ Investigators and the responsible FDA district office then coordinate their conclusions and recommendations.⁵⁰ If FDA investigators discover significant cGMP violations, they may recommend enforcement action.

42. FDA’s Center for Drug Evaluation and Research, located at FDA’s headquarters in Maryland, then assesses the facility’s cGMP compliance. To that end, CDER may:

- Evaluate evidence collected, observations recorded on Form 483s, responses (if any) from the inspected firm or facility, and Establishment Inspection Reports and related recommendations;
- Review the firm’s regulatory history, the risk to public health, any promised or ongoing corrective action by the firm or facility; and
- Consult with CDER’s regulatory partners.⁵¹

Any recommendation for enforcement action proceeds through multiple levels within FDA.⁵²

43. CDER’s division director reviews ongoing and promised corrective actions before deciding whether to issue a warning letter or take other regulatory action.⁵³ Warning letters invite the warned entity to respond by a specified date and contain contact information for

and/or processes, or other violations of the FD&C Act and related Acts . . . which were observed during the inspection”) [CLA-301]; *id.* § 5.1.1.4 (“Upon completing the inspection and before leaving the premises, provide the highest management official available your inspectional findings on an FDA 483-Inspectional Observations.”); 21 U.S.C. § 374(b) (2007-2011) [CLA-238].

⁴⁹ FDA, *Establishment Inspection Report* (June 2007) (describing the purpose and function of the EIR) [R-16]; FDA, *Investigations Operations Manual*, § 5.10.1 (2012) (noting the required contents of the EIR) [CLA-301].

⁵⁰ FDA, *Investigations Operations Manual*, § 5.10.2 (2012) (noting that an EIR endorsement must be prepared by the supervisor of the investigator(s)) [CLA-301]; FDA, *Establishment Inspection Report* (June 2007) [R-16].

⁵¹ Rosa Statement ¶ 20; *see also* U.S. Government Accountability Office, GAO-08-970, *Drug Safety: Better Data Management and More Inspections Are Needed to Strengthen FDA’s Foreign Drug Inspection Program*, at 14 (2008) (“GAO-08-970”) (detailing, in Figure 1, “FDA’s Process for Managing Inspections of Foreign Establishments”) [R-18].

⁵² Rosa Statement ¶¶ 39-40 (discussing the process for the issuance of the 2009 Etobicoke Warning Letter); *id.* ¶¶ 60-62 (discussing the process in connection with the recommendation to adopt the Import Alert); GAO-08-970, at 14 (detailing, in Figure 1, “FDA’s Process for Managing Inspections of Foreign Establishments”) [R-18]; FDA, *Regulatory Procedures Manual*, Exhibit 4-1, Procedures for Clearing FDA Warning Letters and Untitled Letters (Mar. 2009) [CLA-305].

⁵³ FDA, *Regulatory Procedures Manual* § 4-1-3 (Mar. 2009) [CLA-305]; Rosa Statement ¶ 20.

questions or concerns.⁵⁴ Warning letters are intended to give a firm or facility an opportunity, where possible, to take prompt corrective action.⁵⁵ Warning letters thus seek to achieve voluntary compliance and are a primary means of notifying a firm or facility that it may be subject to enforcement action.⁵⁶ Warning letters, however, are not the exclusive means of giving prior notice of an enforcement action. Notice also may be provided through less formal means, such as discussions with management or issuance of a Form 483 following an inspection.⁵⁷

44. Warning letters, moreover, are not prerequisites to enforcement action.⁵⁸ Issuance of a warning letter may be deemed inappropriate (such as when there are exigent circumstances) or unnecessary (such as when a firm's conduct is repeated, continuing, intentional, flagrant, or criminal).⁵⁹ FDA's Regulatory Procedures Manual, which is published online,⁶⁰ states that FDA "is under no legal obligation to warn individuals or firms that they or their products are in

⁵⁴ See, e.g., 2009 Etobicoke Warning Letter, at 6 [C-41]; Letter from Richard Friedman, Director, Division of Manufacturing and Product Quality, FDA-CDER, Office of Compliance, to Jack Kay, President and COO, Apotex Inc., at 6 (Mar. 29, 2010) ("2010 Signet Warning Letter") [C-138]; FDA, *Regulatory Procedures Manual* § 4-1-10 (Mar. 2009) [CLA-305].

⁵⁵ FDA, *Regulatory Procedures Manual* § 4-1-1 (Mar. 2009) [CLA-305].

⁵⁶ *Id.*

⁵⁷ *Id.* § 10-2-4 (noting alternative warning methods, including: (1) notification by state, municipal or other federal agencies involving the same or similar violations; (2) issuance of the Form 483 (List of Observations) at the conclusion of an inspection; (3) discussion with management by an FDA investigator, documented in the Establishment Inspection Report; (4) recall Classification Notification Letters; (5) properly documented meetings or telephone conversations between agency officials and a firm's top management; and (6) properly documented advisory communications by FDA Center personnel concerning critical scientific issues) [R-36].

⁵⁸ *Id.* § 4-1-1 ("There are instances when issuing a Warning Letter is not appropriate, and, as previously stated, a Warning Letter is not a prerequisite to taking enforcement action.") [CLA-305].

⁵⁹ *Id.* (stating that a warning letter is not appropriate if a firm or facility's conduct (1) "reflects a history of repeated or continual conduct of a similar or substantially similar nature during which time the individual and/or firm has been notified of a similar or substantially similar violation"; (2) "is intentional or flagrant"; (3) "presents a reasonable possibility of injury or death"; (4) constitutes an "intentional and willful" criminal act; or (5) "[w]hen adequate notice has been given by other means" and the "violations have not been corrected, or are continuing").

⁶⁰ The Regulatory Procedures Manual "is a reference manual for FDA personnel. It provides FDA personnel with information on internal procedures to be used in processing domestic and import regulatory and enforcement matters. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public." *Id.*, Introduction [R-38].

violation of the law before taking enforcement action.”⁶¹ The manual reminds “responsible officials in positions of authority in regulated firms” of their “legal duty to implement whatever measures are necessary to ensure that their products, practices, processes, or other activities comply with the law.”⁶² Accordingly, “responsible individuals should not assume that they would receive a warning letter, or other prior notice, before FDA initiates enforcement action.”⁶³

45. FDA may take additional action as an alternative to or concurrently with issuance of a warning letter.⁶⁴ CDER, for instance, may recommend that FDA’s Division of Import Operations and Policy (DIOP) place the firm or facility on an import alert.⁶⁵ Before doing so, DIOP reviews CDER’s recommendation and supporting information. If DIOP agrees with the recommendation, it will obtain internal agency clearance to issue the import alert.⁶⁶

46. An import alert is information sent by DIOP to FDA district offices “concerning unusual or new problems affecting imports which gives background and compliance guidance information for each product and problem.”⁶⁷ The purpose of an import alert is “[t]o identify and disseminate import information (problems, violative trends, etc.) for providing an effective

⁶¹ *Id.* § 4-1-1 [CLA-305]. There are exceptions not relevant here. *See id.* (discussing FDA’s notification requirements when acting under the authority of the subchapter concerning electronic product radiation control).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* These situations include when there is a cGMP violation or the drug “shows short contents, subpotency, or superpotency.” *Id.*

⁶⁵ *Id.* § 9-6 [CLA-309]. “Establishment inspections of foreign manufacturers of FDA regulated products that reveal significant deviations from Good Manufacturing Practices, insanitary conditions, or other practices that result in the articles manufactured at such facilities appearing to be misbranded, adulterated, or otherwise in violation of the FD&C Act as described in Section 801(a) *should* result in the recommendation of detention without physical examination of the articles offered for import from such manufacturer.” *Id.* (emphasis added).

⁶⁶ *Id.*; *see also id.* § 9-13, at 9-51 (detailing the review and clearance procedure that DIOP follows for issuance of import alerts).

⁶⁷ *Id.* at Chapter 11 (Glossary) (defining “Import Alerts”) [R-37].

import coverage program.”⁶⁸ Import alerts thus allow DIOP to disseminate critical information efficiently and effectively throughout the field to prevent the importation of goods that appear to violate the FD&C Act.⁶⁹ The import alert for cGMP violations is Import Alert 66-40, or “Detention Without Physical Examination of Drugs From Firms Which Have Not Met Drug GMPs.”⁷⁰

47. Import alerts are posted on FDA’s website, and a copy may also be sent to the foreign manufacturer. Any interested person can sign up to receive free weekly email notifications regarding new import alerts and updated existing import alerts, through FDA’s website.⁷¹ FDA, however, does not provide notice of an import alert before its issuance. In the case of Import Alert 66-40, this ensures that companies do not flood the U.S. market with adulterated drugs before FDA district offices are alerted to the underlying cGMP violations that prompted the import alert.⁷²

⁶⁸ *Id.* § 9-13 [CLA-309]. The recommendation “may identify one firm, multiple locations of a firm, or specific products from one or more firms as appropriate.” *Id.* § 9-6, at 9-24.

⁶⁹ *See generally id.* § 9-13. A district office’s authority to detain goods offered for import does not depend on an import alert. The district office may, for example, detain and ultimately refuse goods that appear to be adulterated even without an import alert, such as for products that are physically examined. *Id.* § 9.1. The district office also may exercise its discretion to implement the information contained within an Import Alert. *See* Import Alert 66-40, *Detention Without Physical Examination of Drugs From Firms Which Have Not Met Drug GMPs* (Oct. 2, 2009) (“2009 Import Alert 66-40”) (“Districts *may* detain . . . the specified pharmaceutical products from the firms identified in the [attachment] to this alert.”) (emphasis added) [C-110].

⁷⁰ *See, e.g.*, 2009 Import Alert 66-40 [C-110].

⁷¹ *See* FDA, Import Alerts, *available at* <http://www.fda.gov/forindustry/importprogram/importalerts/default.htm> (last visited Dec. 12, 2012) (offering email updates for import alerts) [R-113].

⁷² Rosa Statement ¶ 23.

48. Once satisfied that the appearance of a violation has been removed – by reinspection, an informal detention hearing, a request for removal, or otherwise – CDER will recommend that DIOP remove the facility from the import alert.⁷³

3. Drugs Offered for Import that Appear to Be Adulterated May Be Detained Without Physical Examination

49. Import Alert 66-40 works in tandem with FDA’s authority to detain without physical examination goods offered for import into the United States. Drugs manufactured outside the United States – whether at U.S.-owned or foreign-owned facilities – may be detained if they are determined to be, or appear to be, adulterated. The FD&C Act authorizes FDA to request samples of any drug product “being imported or offered for import into the United States.”⁷⁴ Under the Act, “[i]f it *appears* from the examination of such samples *or otherwise*” that the article is adulterated or misbranded, “then such article shall be refused admission.”⁷⁵ FDA thus is authorized to detain and ultimately refuse admission on evidence other than sampling and analytical results, including when FDA determines that the manufacturing facility has failed to

⁷³ FDA, *Regulatory Procedures Manual* § 9-6, at 9-21 (Mar. 2009) (discussing DIOP’s responsibilities) [CLA-309]; *id.* at 9-25 (“FDA decisions to remove a product, manufacturer, packer, shipper, grower, country, or importer from detention without physical examination should be based on evidence establishing that the conditions that gave rise to the appearance of a violation have been resolved and the agency has confidence that future entries will be in compliance with the Act.”); *id.* at 9-29 (“Firms or products placed on detention without physical examination based on a violative establishment inspection, or because the products appear to have been manufactured in violation of GMPs, may generally be removed from detention without physical examination following a reinspection which in some instances may be performed by a reliable entity other than which performed the initial violative inspection [] that confirms that corrective actions have been instituted and after concurrence by the appropriate Center. In some instances, a firm may present information or documentation sufficient to demonstrate that appropriate corrections are in place to overcome the appearance of a violation and, with the appropriate Center concurrence, may be removed from detention without physical examination.”).

⁷⁴ 21 U.S.C. § 381(a) (2009-2011) [CLA-240].

⁷⁵ *See id.* (emphasis added). There is an exception for bonded goods. *Id.* § 381(b) (“Pending decision as to the admission of an article being imported or offered for import,” delivery of such article may be authorized “to the owner or consignee upon the execution by him of a good and sufficient bond providing for the payment of such liquidated damages in the event of default as may be required pursuant to regulations[.]”).

comply with cGMP regulations.⁷⁶ This is referred to as “detention without physical examination.”⁷⁷

50. When FDA detains a good without physical examination, FDA generally sends the customs broker, owner, or consignee an initial notice stating that the good will be held pending further FDA review.⁷⁸ If the good is detained after further review, FDA sends the customs broker, owner, or consignee a second notice, explaining the reason for the detention and setting a timeframe for a detention hearing. FDA also provides contact information for an agency compliance officer, to respond to questions or concerns.⁷⁹

51. A detention hearing can take many forms, including an in-person meeting, telephone conference, or letter exchange.⁸⁰ The owner or consignee may introduce written or oral testimony to establish the admissibility of any detained goods.⁸¹ A final decision as to the admissibility of detained goods is made only after an opportunity to present testimony has been afforded. If the district office ultimately determines that a violation exists, or appears to exist, then the product will be refused admission.⁸² An owner or consignee may seek reconsideration of the district office’s refusal determination.⁸³

⁷⁶ *Id.* § 381(a); FDA, *Regulatory Procedures Manual* § 9-6, at 9-24 and § 9-7, at 9-30 (Mar. 2009) [CLA-309].

⁷⁷ *See generally* FDA, *Regulatory Procedures Manual* § 9-6 (Mar. 2009) [CLA-309]. Although referred to as “detention,” generally neither FDA nor U.S. Customs and Border Patrol (CBP) has physical custody or control of the articles; the importer has actual possession and posts a bond with CBP. If CBP demands redelivery and the importer is unable to redeliver, however, CBP may assess liquidated damages pursuant to the entry bond for failure to hold the product intact. *See* 19 C.F.R. § 113.62(d)(1) (2010) [RLA-158].

⁷⁸ *See infra* n.233 (citing examples).

⁷⁹ *See* 21 C.F.R. § 1.94 (2012) [CLA-245]; *see infra* n.235 (citing examples).

⁸⁰ FDA, *Regulatory Procedures Manual* § 9-8, at 9-34 (Mar. 2009) [CLA-309].

⁸¹ 21 C.F.R. § 1.94 (2012) [CLA-245]; 21 U.S.C. § 381(a) (2009-2011) [CLA-240]; FDA, *Regulatory Procedures Manual* § 9-8, at 9-33 (Mar. 2009) [CLA-309].

⁸² 21 U.S.C. § 381(a) (2009-2011) [CLA-240]; *see infra* n.238 (citing examples).

⁸³ 21 C.F.R. § 10.33 (2012) [RLA-160]; *id.* § 10.75 (2012) [RLA-161].

52. Detentions without physical examination have been used for nearly four decades, well before Apotex began exporting drugs to the United States.⁸⁴ They are a critical part of FDA's ability to protect U.S. citizens from violative products, as FDA does not have the ability to examine every product under its jurisdiction that is imported into the United States. FDA, in other words, "is a regulatory agency, not a quality control laboratory."⁸⁵ Other countries similarly restrict or ban importation of non-cGMP compliant drugs. Canada and the European Medicines Agency, for instance, recently restricted importation of drugs from a U.S.-based manufacturing facility, Ben Venue Laboratories, for cGMP deficiencies.⁸⁶

53. FDA, moreover, does not have the same regulatory authority over facilities abroad that it has over facilities in the United States, where adulterated drugs can be seized,⁸⁷ facilities can be

⁸⁴ FDA, *Regulatory Procedures Manual* § 9-6, at 9-19 (Mar. 2009) ("Detention without physical examination" was "first used by FDA in 1974.") [CLA-309].

⁸⁵ *Id.* (emphasis omitted).

⁸⁶ Health Canada, Notice to Hospitals, *Health Canada Important Safety Information on Certain Drug Products Imported into Canada from Ben Venue Laboratories* (Aug. 17, 2011), available at http://www.hc-sc.gc.ca/dhp-mps/alt_formats/pdf/medeff/advisories-avis/prof/2011/ben_ven_nth-aah-eng.pdf (last visited Dec. 5, 2012) ("A recent assessment by Health Canada has identified deficiencies in the area of Good Manufacturing Practices (GMP) at the [Ben Venue Laboratories (BVL) Bedford, Ohio] manufacturing site. In light of these deficiencies, Health Canada is allowing only the importation of drugs deemed medically necessary[.]") [R-79]; *EMA Urges Facility Transfer of Cancer Drugs Made by Ben Venue*, 44(13) WASH. DRUG LETTER, 2012 WLNR 6259934 (Mar. 24, 2012) (noting that the "production shutdown" at the Bedford facility "followed a voluntary August recall of lots of three injectable drug products after glass particles were observed floating in a few vials," and that the "recall came two weeks before a Health Canada import alert citing quality concerns at Bedford") [R-93]; Carly Weeks, *Cancer Drug Shortage Will Get Worse*, GLOBE AND MAIL, at A4 (Aug. 19, 2011) ("Health Canada said it had identified shortcomings with the company's manufacturing practices, problems significant enough that the department has increased oversight and clamped down on importations from Ben Venue's plant in Bedford.") [R-80]; European Medicines Agency Press Release, *European Medicines Agency Gives Interim Recommendations to Deal with Shortcomings in Quality Assurance at Ben Venue Laboratories*, EMA/905564/2011 (Nov. 22, 2011) ("The November 2011 inspection of the Ben Venue Laboratories manufacturing site was conducted by the Medicines and Healthcare products Regulatory Agency (MHRA) and the Agence française de sécurité sanitaire des produits de santé (AFSSAPS) as a follow-up to a previous inspection conducted in March 2011 that had been triggered by the European Medicines Agency as part of a reinspection program. This inspection had already led to the restriction in the importation of some medicines to the EU from the Ben Venue site.") [R-83].

⁸⁷ The FD&C Act authorizes seizure of adulterated drugs within the United States. In a seizure action, the U.S. government, as plaintiff, files a Complaint for Forfeiture and obtains a warrant for arrest, directing U.S. Marshals to take possession or constructive custody of an adulterated drug. As an *in rem* proceeding, the adulterated drug is the defendant and the U.S. government asks the court to condemn the drug and declare forfeiture for violation of the law by the drug itself. Prior notice to the owner of the drug seizure action is not required. Indeed, the owner may only

shut down through an injunction,⁸⁸ and distributors of adulterated drugs can be criminally prosecuted.⁸⁹ For facilities abroad, FDA may pursue some of those actions (such as agreement to an injunction, or criminal prosecution through extradition), but significant legal and procedural hurdles prevent meaningful reliance on these typically domestic enforcement tools.⁹⁰ Detention without physical examination thus is an essential tool for ensuring that adulterated drugs are stopped at the border, before they are dispersed throughout the nation, potentially threatening public health.

4. FDA May Revoke or Withhold Approval of Drug Applications for Significant cGMP Violations

54. FDA's drug application and approval process constitutes another important regulatory tool. In order to sell a new drug in the United States, all manufacturers, whether foreign or domestic, must seek regulatory approval by submitting a drug application to FDA. For innovative brand-name drugs, frequently under patent, the applicant submits a "new drug

become aware of the action after the drug has been seized. The owner may then appear in court to claim the drug. If there is no proper claimant for the drug, the U.S. government is entitled to condemnation and forfeiture by default. 21 U.S.C. § 334 (2009) [CLA-231]; *see* FDA, *Regulatory Procedures Manual* § 6-1-1 (Mar. 2009) (citing 21 U.S.C. § 334) [CLA-307].

⁸⁸ The FD&C Act vests jurisdiction in U.S. federal district courts to enjoin the marketing or sale of adulterated drugs. FDA may seek an injunction to stop or prevent violation of the law and to correct the conditions that caused the violation. FDA is not required to show that the law has been violated in order to obtain an injunction. Rather, FDA need only show a likelihood that the law may be violated if an injunction is not entered. FDA, *Regulatory Procedures Manual* § 6-2-2, at 6-31 (Mar. 2009) [CLA-307]. When an injunction is granted by a court, FDA has a continuing duty to monitor the injunction and to advise the court if the defendant fails to obey its terms. In the event of noncompliance, FDA has a number of remedies, including seizure, civil and criminal contempt, and other prosecutions. *Id.* § 6-2-16, at 6-49.

⁸⁹ The FD&C Act authorizes criminal penalties for the introduction of adulterated drugs into interstate commerce, including up to one year in prison, up to a \$1,000 fine, or both. 21 U.S.C. § 333 (2009-2011) [CLA-230]. This fine has been increased for individuals to \$250,000. 18 U.S.C. § 3571(b) (2012) [RLA-157]. The accused typically is given notice and an opportunity to present views prior to FDA's recommendation of a criminal action. No notice is required, however, when it may result in alteration or destruction of evidence or flight of the accused. 21 U.S.C. § 333 (2009-2011) [CLA-230]; FDA, *Regulatory Procedures Manual* § 6-5, at 6-56, 6-59 (Mar. 2009) [CLA-307].

⁹⁰ Seizures are solely a domestic enforcement tool. *See* 21 U.S.C. § 334 (2009) [CLA-231].

application,” or NDA. For generic drugs, the applicant submits an “abbreviated new drug application,” or ANDA.⁹¹

55. Generic drugs generally are less expensive versions of innovative brand-name drugs that are, may be, or previously were protected by patents. The ANDA process is “abbreviated” in that it shortens the time and expense needed for FDA approval, including by allowing an ANDA applicant to rely on FDA’s previous finding of safety and effectiveness for an innovative drug. The ANDA applicant must show that its product is bioequivalent to the innovative drug and identical with respect to the active ingredient, dosage form, strength, route of administration, and, with certain narrow exceptions, labeling.⁹²

56. The ANDA must contain a “full description of the methods used in and the facilities and controls used for, the manufacture, processing, and packing” of its drug.⁹³ This information helps FDA to assess whether the product will be manufactured in compliance with cGMP.⁹⁴

⁹¹ Section 505 of the FD&C Act, as amended, primarily governs the approval of new drug applications for innovative brand-name pioneer drugs and ANDAs for generic drugs submitted to FDA.

⁹² 21 U.S.C. § 355(j)(2)(A)(vi) (2009-2010) (incorporating by reference the requirements in 21 U.S.C. § 355(b)(1)(D) and (F)) [CLA-235]. Apotex suggests that it contracts out certain bioequivalence studies to facilities based in the United States, but provides little detail. *See* Witness Statement of Bernice Tao ¶¶ 15, 18 (“Tao Statement”).

⁹³ *See* 21 U.S.C. § 355(b)(1)(D) (2009-10) [CLA-235]; *see also generally* 21 C.F.R. § 314.94 (2012) (citing also to application requirements under 21 C.F.R. § 314.50 [RLA-163]) [RLA-165].

⁹⁴ ANDA applicants also are required to submit certifications with respect to any patent listed in an FDA publication called *Approved Drug Products with Therapeutic Equivalence Evaluations*, known as the “Orange Book,” in which all drugs approved by the FDA are listed. Pioneer drug manufacturers must list in the Orange Book certain patents (with patent expiration dates) for drugs with approved NDAs. A generic manufacturer, in its ANDA, must make one or more of four certifications for each patent listed for the brand drug: (1) no patent information has been filed; (2) the patent has expired; (3) the generic manufacturer is not seeking ANDA approval until after the patent expires; and (4) the patent is invalid, not infringed by the generic drug, or otherwise not enforceable against the generic manufacturer. 21 U.S.C. § 355(j)(2)(A)(vii) (2012) [CLA-234]; 21 C.F.R. § 314.94(a)(12)(i)(A) (2012) [RLA-165]. A so-called paragraph I or II certification indicates that the applicant believes that no patent bars approval of the ANDA. A paragraph III certification indicates that the applicant will wait until an identified patent expires before going to market with the generic drug, and the ANDA will not be approved until that patent expiration date. A paragraph IV certification indicates the ANDA applicant’s view that an identified patent would not be infringed by the generic drug or is invalid, and thus the ANDA can be approved and the generic drug can be sold before the patent expires. The relevant statute provides that the first ANDA applicant to make a paragraph IV certification

57. An ANDA may be granted “tentative approval” when all scientific and procedural conditions have been met, including cGMP requirements, but approval must be delayed because of a patent or marketing exclusivity.⁹⁵ Tentative approval letters, including those that were sent to Apotex Inc., make clear that an applicant must continue to meet cGMP compliance as a condition of final approval:

Any changes in the conditions outlined in this ANDA and the status of the manufacturing and testing facilities’ compliance with current good manufacturing practices (cGMPs) are subject to agency review before final approval of the ANDA will be made. Such changes should be categorized as representing either “major” or “minor” changes, and they will be reviewed according to [FDA’s Office of Generic Drugs] policy in effect at the time of receipt.⁹⁶

ANDAs that are tentatively approved may not be finally approved if, for example, FDA later determines that the facility in which the product is manufactured is not cGMP compliant. In addition, FDA may revoke final ANDA approvals for a variety of reasons provided by law,⁹⁷ including failure to comply with cGMP regulations.⁹⁸

5. Unapproved Drugs Are Subject to an Import Alert

58. A firm or facility that exports drugs to the United States without an approved ANDA may be placed on Import Alert 66-41, or “Detention Without Physical Examination of Unapproved

with respect to a pioneer drug’s patent may be entitled to 180 days of market exclusivity for its generic drug. 21 U.S.C. § 355(j)(5)(B)(iv) (2012) [CLA-234].

⁹⁵ *Id.* § 355(j)(5)(B)(iv)(II)(dd). Tentative approval does not mean that the drug is an approved drug. *Id.* § 355(j)(5)(B)(iv)(II)(dd)(BB).

⁹⁶ *See, e.g.*, Letter from Gary Buehler, Director, FDA-CDER, Office of Generic Drugs, to Tammy McIntire, President and U.S. Agent for Apotex Inc., at 3 (Sept. 27, 2006) [R-14].

⁹⁷ *See* 21 U.S.C. § 355(e) (2012) (“Withdrawal of approval; grounds; immediate suspension upon finding imminent hazard to public health”) [CLA-234]; 21 C.F.R. § 314.150 (2010) (“Withdrawal of approval of an application or abbreviated application”) [RLA-166]; 21 C.F.R. § 314.151 (2004) (“Withdrawal of approval of an abbreviated new drug application under section 505(j)(5) of the act”) [RLA-167].

⁹⁸ *See* 21 U.S.C. § 355(e) (2009-2010) [CLA-235]; 21 C.F.R. § 314.150(b)(2) (2010) [RLA-166].

New Drugs Promoted in the U.S.”⁹⁹ Apotex drugs were the subject of Import Alert 66-41 in 1992. At that time, Apotex Inc. was not authorized to sell drugs in the United States. But Apotex’s founder and then-president, Bernard Sherman, and various Bahamas-based “sister entities” began selling Apotex drugs in the United States directly through the mail and indirectly through the Bahamian companies.¹⁰⁰ Another drug manufacturer, Syntex, filed suit against Apotex Inc., Mr. Sherman, and various others in U.S. federal court, alleging unfair and deceptive trade practices, trademark infringement, racketeering, and various other counts.¹⁰¹ The court granted Syntex’s request for a preliminary injunction, finding that Syntex was “substantially likely” to prevail on its federal claims that the defendants had sold Apotex drugs to U.S. consumers through the mail, made deceptive representations to U.S. consumers, and improperly used promotional labeling, advertisements, and solicitations.¹⁰²

59. FDA also placed two of the firms on Import Alert 66-41 for selling unapproved Apotex drugs in the United States. Two days later, FDA sent warning letters to the sister entities, copying Bernard Sherman and Apotex Inc., memorializing the agency’s determination that the companies had sold unapproved Apotex drugs using false and misleading statements concerning their safety and efficacy, “in serious violation of United States law.”¹⁰³

⁹⁹ FDA, Import Alert 66-41, *Detention Without Physical Examination of Unapproved New Drugs Promoted in the U.S.* (updated Nov. 28, 2012) (“When evidence exists for the marketing or promotion of unapproved drugs to individuals residing in the United States, the products should be considered for detention without physical examination.”) [R-107].

¹⁰⁰ *Syntex (U.S.A.), Inc. et al. v. Interpharm, Inc., Apotex Inc., Bernard C. Sherman, et al.*, 1993 WL 643372 at *1, *13, n.4 (N.D.Ga. 1993) [RLA-94].

¹⁰¹ *Id.* at *1.

¹⁰² *Id.* at *4-7.

¹⁰³ Letter from Daniel Michels, Director, FDA-CDER, Office of Compliance, to Northam Medication Service, at 1 (Jan. 29, 1992) (copying Bernard C. Sherman and Apotex Inc.) [R-9].

B. Adapting to a Globalized Pharmaceutical Industry, FDA Has Increased the Number and Frequency of Foreign Factory Inspections

60. The pharmaceutical industry is increasingly global, fueling concerns in the United States and elsewhere about the safety of foreign-made drugs.¹⁰⁴ A few decades ago, the United States imported relatively few drug products.¹⁰⁵ Today, by contrast, approximately 40 percent of finished drug products and 80 percent of active pharmaceutical ingredients are imported into the United States from more than 100 countries around the world.¹⁰⁶

61. A recent international drug scare has put into sharp relief the risks of a globalized drug industry. Beginning in 2007, scores died and hundreds developed severe allergic reactions in 11 countries from the use of adulterated heparin, an anticlotting drug widely used for surgery and dialysis.¹⁰⁷ FDA identified a contaminant in the drug's active pharmaceutical ingredient sourced from China.¹⁰⁸ Although the Chinese facility had manufactured this ingredient for the U.S. market since 2004, FDA had never inspected the facility.¹⁰⁹ When FDA did so in February 2008, it discovered "significant deviations" from cGMP, causing its products to be deemed

¹⁰⁴ See Walt Bogdanich, *The Drug Scare that Exposed a World of Hurt*, N.Y. TIMES (Mar. 30, 2008) (reporting concerns arising from an increase in global health scares and noting, for instance, that a "cold medicine containing a poison made in China killed nearly 120 Panamanians in 2006 and early 2007") [R-19].

¹⁰⁵ Duane Marsteller, *As Drug Making Goes Global, Oversight Found Lacking*, USA TODAY (Oct. 21, 2012) [R-90].

¹⁰⁶ U.S. Government Accountability Office, GAO-10-961, *Drug Safety: FDA Has Conducted More Foreign Inspections and Begun to Improve Its Information on Foreign Establishments, but More Progress Is Needed*, at 1 (2010) ("GAO-10-961") [R-49]; *Drug Safety: An Update from FDA: Hearing Before the Subcomm. on Health of the House Comm. on Energy & Commerce*, 111th Cong. (2010) (statement of Joshua M. Sharfstein, M.D., Principal Deputy Commissioner, U.S. Food & Drug Administration) [R-52]; Gardiner Harris, *F.D.A. Confronts Challenge of Monitoring Imports*, N.Y. TIMES (June 20, 2011) [R-77].

¹⁰⁷ Larry Greenemeier, *Heparin Scare: Deaths from Tainted Blood-Thinner Spur Race for Safe Replacement*, SCIENTIFIC AMERICAN, at 8 (Nov. 4, 2008) (reporting 81 deaths in the United States) [R-27]; Gardiner Harris, *U.S. Identifies Tainted Heparin in 11 Countries*, N.Y. TIMES (Apr. 22, 2008), available at http://www.nytimes.com/2008/04/22/health/policy/22fda.html?_r=2&ref=policy&oref=slogin& (last visited Dec. 6, 2012) (identifying affected countries as the United States, Australia, Canada, China, Denmark, France, Germany, Italy, Japan, the Netherlands, and New Zealand) [R-22].

¹⁰⁸ FDA, *Information on Heparin* (updated Apr. 7, 2010) [R-57].

¹⁰⁹ GAO-08-970, at 3 (2008) [R-18]

“adulterated” under U.S. law.¹¹⁰ FDA thereafter issued a warning letter, placed the facility on import alert, requested a voluntary recall of products in the United States, and convened a coordination meeting among international regulators from 11 countries.¹¹¹ Since that time, FDA has placed 33 additional Chinese entities on Import Alert 55-03 – “Detention Without Physical Examination of Different Forms of Heparin and Heparin-Related Products for CGMP Issues.”¹¹² The heparin example, regrettably, is the “tip of the iceberg” of a now-global problem of drug adulteration.¹¹³

62. Improved regulation of foreign-made drugs has become a top public health priority in the United States. Over the past five years, the U.S. General Accountability Office (GAO), an independent investigative arm of Congress, has published seven reports on FDA’s oversight of foreign-manufactured drugs.¹¹⁴ GAO reported that, between 2002 and 2007, FDA annually inspected about eight percent of foreign drug manufacturing facilities.¹¹⁵ GAO concluded that,

¹¹⁰ Letter from Richard Friedman, FDA-CDER, Director, Division of Manufacturing and Product Quality, Office of Compliance, to Dr. Van Wang, General Manager, Changzhou SPL Co., at 1 (Apr. 21, 2008) [R-21].

¹¹¹ FDA, *Updated Questions and Answers on Heparin Sodium Injection* (June 18, 2008), available at <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm112606.htm> (last visited Dec. 5, 2012) [R-23].

¹¹² See FDA, Import Alert 55-03, *Detention Without Physical Examination of Different Forms of Heparin and Heparin-Related Products for CGMP Issues* (Aug. 6, 2012)0

¹¹³ Walt Bogdanich, *The Drug Scare that Exposed a World of Hurt*, N.Y. TIMES (Mar. 30, 2008) (quoting Dr. Roger L. Williams, chief executive of the United States Pharmacopeia, which sets quality standards for medicine and supplements) [R-19].

¹¹⁴ U.S. Government Accountability Office, GAO-08-224T, *Drug Safety: Preliminary Findings Suggest Weaknesses in FDA’s Program for Inspecting Foreign Drug Manufacturers* (2007) [R-15]; U.S. Government Accountability Office, GAO-08-701T, *Drug Safety: Preliminary Findings Suggest Recent FDA Initiatives Have Potential, but Do Not Fully Address Weaknesses in Its Foreign Drug Inspection Program* (2008) (“GAO-08-701T”) [R-17]; U.S. Government Accountability Office, GAO-09-581, *Food and Drug Administration: FDA Faces Challenges Meeting Its Growing Medical Product Responsibilities and Should Develop Complete Estimates of Its Resource Needs* (2009) [R-29]; U.S. Government Accountability Office, GAO-10-960, *Food and Drug Administration: Overseas Offices Have Taken Steps to Help Ensure Import Safety, but More Long-Term Planning Is Needed* (2010) [R-50]; U.S. Government Accountability Office, GAO-11-936T, *Drug Safety: FDA Faces Challenges Overseeing the Foreign Drug Manufacturing Supply Chain* (2011) [R-68]; GAO-08-970 [R-18]; GAO-10-961 [R-49].

¹¹⁵ GAO-08-970, at 23 [R-18].

at that rate, it would take FDA approximately 13 years to inspect each foreign facility once.¹¹⁶ By comparison, domestic drug manufacturing facilities had been inspected at a rate of about once every 2.7 years.¹¹⁷ GAO estimated that FDA would need a sevenfold increase in foreign-inspection funding in order to inspect each foreign facility biennially, which was the frequency prescribed by law for domestic facilities until recent legislation adopted a risk-based approach for drug facility inspection timing.¹¹⁸

63. Recognizing the seriousness of the problem, in 2009 GAO placed “protecting public health through enhanced oversight of medical products” on its “high risk list.”¹¹⁹ GAO thus signaled to Congress its view that improving oversight of medical products is one of the 30 most urgent U.S. government priorities.¹²⁰

64. FDA shares these concerns. The head of the agency acknowledged in August 2009 that there had “been a steep decline in the FDA’s enforcement activity over the past several years,” adding that “[i]n some cases, serious violations ha[d] gone unaddressed for far too long.”¹²¹ She noted the important steps that FDA was taking to address the problem, including:

- Setting post-inspection deadlines, generally giving firms no more than 15 working days to respond to serious problems prior to issuance of a warning letter or any enforcement action;

¹¹⁶ *Id.*

¹¹⁷ *Id.*; see also Duane Marsteller, *As Drug Making Goes Global, Oversight Found Lacking*, USA TODAY (Oct. 21, 2012) (noting trade association of U.S. drug-ingredient manufacturers’ advocacy “for more foreign inspections,” contending that “infrequent inspections give foreign companies an unfair competitive advantage”) [R-90].

¹¹⁸ GAO-08-701T, at 16 (“Our analysis suggests that it could cost the agency \$67 million to \$71 million each year to biennially inspect each of the 3,249 foreign drug establishments on the list that FDA used to plan its fiscal year 2007 GMP surveillance inspections.”) [R-17]; Safety and Innovation Act, Pub. L. No 112-144 § 705, 126 Stat. 993 (2012) [CLA-244].

¹¹⁹ U.S. Government Accountability Office, GAO-09-271, *High-Risk Series: An Update*, at 15 (2009) [R-30].

¹²⁰ *Id.* at 32, 37-38.

¹²¹ Remarks of Margaret A. Hamburg, M.D., Commissioner of Food and Drugs, to the Food and Drug Law Institute, *Effective Enforcement and Benefits to Public Health*, at 2 (Aug. 6, 2009) [C-51].

- Streamlining and expediting the issuance of warning letters, “consistent with the FDA’s longstanding historical practice”;
- Working closely with local, national, and international regulatory partners to ensure rapid responses to potential public health threats;
- Prioritizing enforcement follow-up to warning letters or product recalls, to ensure that firms have made required changes to their practices; and
- Acting “swiftly and aggressively to protect the public,” including by taking, as appropriate, “*immediate* action – even *before* we have issued a formal warning letter.”¹²²

65. Consistent with these steps, FDA has dramatically changed its foreign inspection practices in recent years, in five respects. First, FDA significantly increased the number of foreign inspections it conducts. From 2000-2007, FDA conducted an average of 282 foreign inspections annually.¹²³ By contrast, FDA conducted 372 foreign inspections in fiscal year 2008, 491 in 2009, 525 in 2010, 631 in 2011 and 672 in 2012.¹²⁴

66. Second, FDA has increased the number of warning letters issued to foreign facilities for cGMP violations, indicating less tolerance for such violations. From 2002 through 2008, for example, CDER issued an average of three warning letters per year for cGMP violations.¹²⁵ By contrast, CDER issued 13 warning letters in 2009, 18 warning letters in 2010, and 20 warning letters in 2011.¹²⁶

¹²² *Id.* at 2-3 (emphasis in original).

¹²³ GAO-08-970, at 25 (calculated based on figures in Table 1, covering the most frequently inspected countries) [R-18]; FDA, *Domestic & Foreign Human Drug Inspections (FY 2000 to FY 2013)* (showing the total annual domestic and foreign inspections of drug manufacturing facilities from 2000 through November 15, 2012) [R-106].

¹²⁴ *Id.*

¹²⁵ See FDA, *Search Results for FDA Warning Letters Issued by Center for Drug Evaluation and Research* [R-101].

¹²⁶ See *id.* FDA issued 1,720 warning letters in fiscal year 2011 alone, so these cGMP-related letters, although increasing in number, still reflect only a tiny fraction of the total number of warning letters issued. See FDA Enforcement Statistics Summary (FY 2011), available at <http://www.fda.gov/downloads/ICECI/EnforcementActions/UCM285781.pdf> (last visited Dec. 10, 2012) [R-67].

67. Third, FDA has increased in recent years the number of foreign facilities added to Import Alert 66-40, for cGMP violations. From 2003-2008, FDA added on average only one firm per year to the Import Alert. By contrast, FDA added 10 firms in 2009, 12 in 2010, and 19 in 2011.¹²⁷

68. Fourth, FDA has made staffing changes that have allowed it to increase the number of foreign inspections it conducts. In January 2009, FDA created a U.S.-based dedicated foreign drug cadre for foreign drug inspections,¹²⁸ and it began staffing investigators in select FDA offices abroad.¹²⁹

69. Finally, FDA has steadily devoted more money to foreign inspections. In fiscal year 2007, FDA spent approximately \$10 million inspecting foreign drug facilities.¹³⁰ By fiscal year 2009, thanks in part to a supplemental appropriation from Congress, FDA had quadrupled the funds allocated to foreign inspections.¹³¹

70. And yet much remains to be done. The recent outbreak in the United States of fungal meningitis serves as a tragic reminder of the ongoing need to regulate pharmaceutical products. According to the U.S. Centers for Disease Control and Prevention, at least 36 people have died and more than 500 have suffered infections, strokes, and other illnesses in 19 U.S. states from steroid injections manufactured in unsanitary conditions at a Massachusetts compounding

¹²⁷ See FDA, *Import Alert 66-40 GMP Issues for Human Drugs 2003-2012* (showing the number of firms added and removed from Import Alert 66-40 in those years) [R-86].

¹²⁸ GAO-10-961, at 12-13 [R-49]; Witness Statement of Michael R. Goga ¶ 2 (Dec. 12, 2012) (“Goga Statement”).

¹²⁹ GAO-10-961, at 13 [R-49].

¹³⁰ GAO-08-701T, at 16 [R-17].

¹³¹ GAO-10-961, at 14 [R-49].

facility.¹³² A recent FDA inspection of the facility revealed serious deviations from current good manufacturing practice, including:

- Vials of a sterile injectable drug contained “what appeared to be greenish black foreign matter” and “white filamentous material”;¹³³
- The firm’s testing revealed bacteria and mold inside production hoods, but the “results were not investigated,” “there was no identification of the isolates,” “no product impact assessments [were] performed,” and there was “no evidence that any corrective actions were taken to prevent contamination of the sterile drug products”;¹³⁴
- “Rooftop units serving the firm’s HVAC system were estimated to be located approximately 100 feet from [a] recycling facility,” which “handles such materials as mattresses and plastics”;¹³⁵
- “[A] boiler installed within approximately 30 feet of the entrance to the Prep Room . . . was observed to be leaking water into puddles,” and “wet floor surfaces around the boiler appeared to be soiled with thick white debris and thick black, granular material”;¹³⁶ and
- There was “what appeared to be dark, hair-like discoloration along the gasket and crevices located at the bottom edge of the closed pass through installed within the wall of the . . . Clean Room.”¹³⁷

71. The compounding facility has since ceased production and voluntarily recalled its products.¹³⁸ A federal criminal investigation is underway.¹³⁹ Another firm that shares common

¹³² Centers for Disease Control and Prevention, *Multistate Fungal Meningitis Outbreak – Current Case Count* (Dec. 3, 2012) [R-69].

¹³³ Form FDA 483, Inspectional Observations, New England Compounding Pharmacy Inc. (Oct. 26, 2012) [R-102].

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ FDA News Alert, *New England Compounding Center Issues Voluntary Nationwide Recall of All Products* (last updated Oct. 10, 2012) [R-98]; Todd Wallack, *Grand jury sets sights on compounding pharmacy*, BOSTON GLOBE (Dec. 1, 2012), available at <http://bostonglobe.com/business/2012/12/01/federal-grand-jury-investigating-new-england-compounding-meningitis-outbreak/IIRHC3wOchnaS188UB7EyN/story.html> (last visited Dec. 7, 2012) [R-108].

¹³⁹ See U.S. Dep’t of Justice, Statement of U.S. Attorney C. Ortiz Regarding the New England Compounding Center (Oct. 16, 2012), available at <http://www.justice.gov/usao/ma/news/2012/October/NewEnglandCompoundingCenter>

management with the compounding facility voluntarily agreed, “out of an abundance of caution,” to recall all 2,200 of its drug products from the market and temporarily shut down its manufacturing facilities.¹⁴⁰ This tragedy has put the spotlight, once again, on the need to ensure proper cGMP compliance and quality control.

C. FDA’s Etobicoke Inspection Revealed Significant cGMP Violations and Systemic Problems with Quality Control

72. In April 2008, CDER requested a “directed” (or “for cause”) inspection of Apotex’s Etobicoke facility.¹⁴¹ This request was prompted by numerous consumer complaints and a congressional inquiry about the lack of efficacy of the Apotex drug carbidopa-levodopa, which is used to treat Parkinson’s disease.¹⁴² FDA’s inspection of Apotex Inc.’s manufacturing facility at Etobicoke, Ontario took place in December 2008.¹⁴³ The investigators were assigned to conduct a cGMP inspection, as well as a pre-approval inspection (PAI) of █████ ANDAs.¹⁴⁴ Prior to the inspection, CDER informed lead investigator Debra Emerson of CDERs “for cause” request.¹⁴⁵

Statement.html (last visited Dec. 6, 2012) [R-99]; Todd Wallack, *Grand jury sets sights on compounding pharmacy*, BOSTON GLOBE (Dec. 1, 2012) [R-108].

¹⁴⁰ Ameridose News Release, *Ameridose Issues Recall of all Products* (Oct. 31, 2012), <http://www.ameridose.com/news> (last visited Dec. 4, 2012) [R-103]; FDA Safety Alert, *Ameridose, LLC: Recall of Unexpired Products in Circulation*, at 1 (Oct. 31, 2012), available at <http://www.fda.gov/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/ucm326370.htm> (last visited Dec. 6, 2012) [R-104]; see also Sabrina Tavernise, *Amid Purity Questions, Drug Company Recalls Products*, N.Y. TIMES (Oct. 31, 2012), available at <http://www.nytimes.com/2012/11/01/us/ameridose-announces-recall-amid-questions-about-drugs-sterility.html> (last visited Dec. 6, 2012) [R-105].

¹⁴¹ See Memorandum from Alicia M. Mozzachio, Compliance Officer, CDER, to Michael C. Rogers, Director, International Operations, “Inspection Request” (Apr. 4, 2008) [R-20].

¹⁴² See *id.*

¹⁴³ See generally 2008 Etobicoke Form 483 [C-34]; FDA Establishment Inspection Report (EIR) for Apotex Inc., Etobicoke, Canada (Dec. 10-19, 2008) (“2008 Etobicoke EIR”) [R-26].

¹⁴⁴ 2008 Etobicoke EIR, at 1 [R-26]; Witness Statement of Debra M. Emerson ¶ 5 (Dec. 13, 2012) (“Emerson Statement”).

¹⁴⁵ Emerson Statement ¶ 5.

73. The two FDA investigators interviewed Apotex personnel, reviewed documents, and inspected the warehouse, production rooms, laboratories, and other facilities.¹⁴⁶ The eight-day inspection uncovered significant violations of U.S. laws and regulations, including several deviations from current good manufacturing practice. The investigators' findings suggested not merely isolated instances of adulterated drugs intended for export to the United States, but significant, *systemic* problems with Apotex's entire manufacturing and quality control systems. At a closeout meeting, the investigators presented senior management with 11 written observations on a Form 483 and verbally raised five concerns.¹⁴⁷ The most significant included:

1. Failure to Report Problems

74. Apotex routinely ignored its obligation to give FDA timely notice, through "Field Alert Reports," of problems with Apotex drugs.¹⁴⁸ Federal regulations require firms to alert FDA within three working days of any problems observed in the manufacture of approved drugs.¹⁴⁹ Failure to file reports properly deprives FDA of timely information about problems with drugs in the market, potentially threatening public health. (FDA had cited Apotex for this very problem during a 2006 inspection of the Etobicoke facility.¹⁵⁰)

¹⁴⁶ See Email from Andrew Piper to Ron McArthur et al. (Dec. 19, 2008) (summarizing Etobicoke inspection activities, days 1-8) [C-33].

¹⁴⁷ See *id.*; 2008 Etobicoke EIR, at 35 (noting that an "informal discussion with Apotex's top management (which included among others: Mr. Jack Kay, President and C.O.O.; Mr. Ron McArthur, Executive Vice President Operations; Dr. Jeremy Desai, Executive Vice President R&D; and Mr. Lance Lovelock, Vice President Quality)" was held to discuss "potential 483 items and their relevance," and that "[t]he closing discussion was held later that afternoon with Ms. Carol Austin, Associate Director Compliance and Mr. Andrew Piper, Supervisor QA Audit" to address the Form 483 and five additional concerns, and to issue the Form 483 to Ms. Carol Austin) [R-26].

¹⁴⁸ See 2008 Etobicoke EIR, at 28-30 [R-26]. Apotex also routinely failed to submit Annual Reports on time. See *id.* at 34.

¹⁴⁹ 21 C.F.R. § 314.81(b)(1) (2009-2012) [CLA-273].

¹⁵⁰ FDA Establishment Inspection Report, Apotex Inc., Etobicoke, at 2 (Nov. 20-24, 2006) [C-25]; see also Emerson Statement ¶ 16.

75. The investigators found, for instance, that Apotex had waited *fifteen months* to file a report concerning cross-contamination of the drugs [REDACTED] and [REDACTED].¹⁵¹ This was a serious problem, as a consumer taking [REDACTED] [REDACTED] may be allergic to [REDACTED], but nonetheless exposed to it through cross-contamination.¹⁵² Similarly, Apotex had failed to report, for over six months, a problem with “over-thick” tablets of the heart medication [REDACTED], which meant that consumers could have been receiving an overdose.¹⁵³ Apotex’s late-filed report revealed that it had shipped to the United States 72 bottles of [REDACTED] with potentially “over-thick” tablets.¹⁵⁴

2. Deficient Stability Data

76. FDA further faulted Apotex for its stability data deficiencies. Stability testing generally provides data on how a drug’s potency and quality vary over time under the influence of different environmental factors.¹⁵⁵ Although Apotex changed its raw material supplier for [REDACTED], the firm failed to conduct proper stability testing for the finished product using the new supplier.¹⁵⁶ There was no assurance, therefore, that drugs shipped to the United States were potent and effective for the two years advertised by Apotex.¹⁵⁷

77. FDA also cited Apotex for failing to take action with respect to another product, [REDACTED] (used to treat [REDACTED]), marketed in the United States with a 36-month

¹⁵¹ 2008 Etobicoke Form 483, at 1 [C-34]; Emerson Statement ¶ 14.

¹⁵² See Emerson Statement ¶ 14.

¹⁵³ NDA-Field Alert Report for [REDACTED] (Nov. 18, 2008) [R-28]; see also 2008 Etobicoke Form 483, Observation 4 [C-34]; Emerson Statement ¶ 15.

¹⁵⁴ NDA-Field Alert Report for [REDACTED] (Nov. 18, 2008) [R-28].

¹⁵⁵ See FDA, *Guidance for Industry Q1A(R2) Stability Testing of New Drug Substances and Products*, at 2 (Nov. 2003) (noting the purpose of stability testing, at General Principle (1.3)) [R-12].

¹⁵⁶ 2008 Etobicoke Form 483, Observation 9 [C-34]; 2008 Etobicoke EIR, at 32-33 [R-26]; Emerson Statement ¶ 19.

¹⁵⁷ Emerson Statement ¶ 19.

expiration period. Apotex's stability testing revealed an unknown impurity, which led the firm to reduce the drug's expiration period to 24 months.¹⁵⁸ Apotex, however, never sought to relabel existing product on the market or initiate a voluntary recall.¹⁵⁹

3. Failure to Transfer Methods

78. Apotex routinely transferred test methods from one facility to other facilities, without verifying those methods for conditions at the new facilities.¹⁶⁰ Without such verification, Apotex could not be sure that methods validated at the initial facility would produce equivalent results at the new facilities.¹⁶¹

4. Failure to Investigate Batch Failures

79. Apotex also failed to investigate the causes of batch failures. Apotex, for example, had begun increasing its production of [REDACTED], which is used to treat high blood pressure, but suffered repeated testing failures. The first batch passed testing, but four subsequent batches failed potency specifications. Instead of determining the root cause of the problem, so as to prevent similar problems in the future, Apotex simply rejected the failed batches and continued manufacturing the product without investigation.¹⁶² This practice violates cGMP requirements and is dangerous. Apotex tests only a small portion of a batch, and if the production process consistently yields failed batches, even a "passing" sample provides

¹⁵⁸ 2008 Etobicoke Form 483, Observation 10 [C-34].

¹⁵⁹ Emerson Statement ¶ 20. The investigators also relayed their concern about the firm's repeated failure to meet testing timeframes to ensure the stability of its products through expiry. This is a significant concern, because missing testing timeframes can lead to an inability to trace at what point a drug product failing stability has lost potency or efficacy. 2008 Etobicoke EIR at 35 [R-26]; Emerson Statement ¶ 21.

¹⁶⁰ 2008 Etobicoke Form 483, Observations 1 and 2 [C-34]; 21 C.F.R. § 211.194(a)(2) (2012) (requiring that firms show that testing methods are verified under actual conditions of use) [RLA-162].

¹⁶¹ Emerson Statement ¶ 11.

¹⁶² 2008 Etobicoke EIR, at 11-14 [R-26]; Emerson Statement ¶¶ 22-23.

inadequate assurance that all products in the batch meet specifications.¹⁶³ The root cause of the problem, therefore, must be identified and corrected – which is precisely what Apotex was not doing.

80. In short, FDA’s inspections revealed inadequate “process controls” and serious concerns about “the *capability* and *reliability* of [Apotex’s] processes to consistently manufacture drug products” meeting the requirements of U.S. law.¹⁶⁴ The investigators’ findings were sufficiently serious that they recommended classifying the Etobicoke facility as “Official Action Indicated.” Specifically, the investigators recommended a voluntary recall and Import Alert for certain [REDACTED] products, as well as the withholding of approval of [REDACTED] ANDAs under FDA review.¹⁶⁵

D. Apotex Acknowledged Serious cGMP Violations and Quality Control Problems at Etobicoke

81. At the Etobicoke inspection closeout meeting, Apotex did not contest the investigators’ observations. To the contrary, Apotex was “appreciative of [FDA’s] efforts.”¹⁶⁶ Apotex responded to the Form 483 observations on January 30, 2009, further acknowledging the accuracy of FDA’s findings and pledging certain corrective actions, including:

- Increasing training of its personnel to ensure timely submission of Field Alert and Annual Reports;¹⁶⁷

¹⁶³ See Emerson Statement ¶ 23.

¹⁶⁴ 2009 Etobicoke Warning Letter (emphasis added) [C-41].

¹⁶⁵ See Field Accomplishments Compliance Tracking System (FACTS) Cover Sheet, Apotex Inc., Etobicoke, at 1 (Dec. 10-19, 2008) [R-25]; Emerson Statement ¶ 27.

¹⁶⁶ 2008 Etobicoke EIR, at 35 [R-26].

¹⁶⁷ Apotex Responses to 2008 Etobicoke Form 483, at 2-3 (Jan. 30, 2009) (stating, in the context of the failure to file Field Alert Reports in a timely manner, that “Apotex recognizes that FDA expectations and the intent of its own procedure to notify upon discovery was not met”) [C-37]; *id.* at 7-8 (“The comment is acknowledged, and an assurance is provided that Apotex will ensure timely submission of Annual Reports”).

- Implementing new methods for testing transfers, “effective immediately”;¹⁶⁸
- Complying with all established procedures;¹⁶⁹ and
- Establishing proper production and process controls.¹⁷⁰

E. FDA Warned Apotex that Drugs from Etobicoke Could Be Refused Admission to the United States, and that Its Drug Applications Could Be Denied Approval

82. Shortly after the Etobicoke inspection, FDA received two additional complaints about Apotex drugs. On January 9, 2009, FDA received a report from a hospital worker who had found a round pill in a bottle of triangular-shaped leflumonide pills (a rheumatoid arthritis drug).¹⁷¹ The hospital worker discovered from Apotex’s website that round leflumonide pills contained half the dosage of the triangular-shaped pills.¹⁷²

83. Five days later, FDA received another complaint about Apotex drugs.¹⁷³ A pharmacy technician discovered a tablet in a bottle of tramadol hydrochloride (a synthetic version of codeine used for pain) that had the same markings as other pills in the bottle but was twice the thickness.¹⁷⁴

¹⁶⁸ See *id.* at 1-2 (noting that Apotex Inc. would be initiating corrective actions, including an evaluation of test data, and acknowledging that the firm failed to have data on site for six ANDAs).

¹⁶⁹ *Id.* at 3-4 (“Apotex acknowledges that the controls defined in our work instruction to allow for processing of multiple batches were not being followed”); *id.* at 5 (Jan. 30, 2009) (“The area Manager responsible for the complaints process incorrectly applied the intended change [in the reporting schedule] prior to the procedure becoming effective without using a planned deviation report to document the departure from the approved procedure.”).

¹⁷⁰ *Id.* at 4-5 (“A review of our wet granulation production records reveals some gaps in the level of control defined within the document.”).

¹⁷¹ DQRS/Medwatch Report for Leflumonide, Form FDA 3500 (Jan. 9, 2009) [R-31].

¹⁷² *Id.*

¹⁷³ DQRS/Medwatch Report for Tramadol Hydrochloride, Form FDA 3500 (Jan. 14, 2009) [R-32].

¹⁷⁴ *Id.*

84. Following an intra-agency review, CDER sent Apotex Inc. a warning letter on June 25, 2009, advising the firm that the Etobicoke inspection had revealed “significant deviations” from cGMP regulations.¹⁷⁵ CDER concluded that drugs from the facility were deemed “adulterated” under U.S. law.¹⁷⁶ CDER further advised Apotex that its written response to the observations on the Form 483 from the Etobicoke inspection had failed to “adequately address multiple, serious deficiencies,” including:

- “Failure to thoroughly investigate the failure of a batch or any of its components to meet any of its specifications whether or not the batch has already been distributed”;¹⁷⁷
- “Failure to submit NDA/ANDA field alert reports (FARs) in the required timeframe, within 3 working days of becoming aware of information concerning any significant chemical, physical, or other change or deterioration in the distributed drug product”;¹⁷⁸ and
- “Failure to include a specimen or copy of each approved label and all other labeling in the master production and control record.”¹⁷⁹

85. CDER warned Apotex of two consequences of its serious cGMP violations: First, “[u]ntil all corrections have been completed and FDA has confirmed corrections of the deficiencies and your firm’s compliance with CGMPs, this office may recommend withholding approval of any new applications or supplements listing your firm as a drug product manufacturer.”¹⁸⁰ Second, and significantly, Apotex products “could be subject to refusal of admission,” as “the methods and controls used in their manufacture do not appear to conform to

¹⁷⁵ 2009 Etobicoke Warning Letter, at 1 [C-41].

¹⁷⁶ *Id.* at 1.

¹⁷⁷ *Id.* at 2-3 (citing 21 C.F.R. § 211.192 (2012) [CLA-269]).

¹⁷⁸ *Id.* at 4-5 (citing 21 C.F.R. § 314.81(b)(1) (2009-2012) [CLA-273]).

¹⁷⁹ *Id.* at 6 (citing 21 C.F.R. § 211.186(b)(8) (2012) [CLA-268]).

¹⁸⁰ *Id.*

current manufacturing practice” under U.S. law.¹⁸¹ The letter requested that Apotex respond to FDA’s concerns within 30 days, and recommended that the firm contact one of the FDA officials identified in the letter.¹⁸²

F. FDA’s Signet Inspection Revealed Similar cGMP Violations and Corporate-Wide Problems with Quality Control

86. Because of the significance of the cGMP problems at Etobicoke and the complaints FDA had received about Apotex drugs, CDER requested a “directed” inspection of Apotex’s Signet Campus.¹⁸³ In late July and early August 2009, FDA inspected the Signet Campus, which includes seven facilities that manufacture products for the U.S. market.¹⁸⁴ Because of the size of the Signet Campus, as well as the recent problems with the Etobicoke facility, FDA dispatched four investigators, including two from CDER.¹⁸⁵ The investigators reviewed documents, interviewed Apotex personnel, and inspected the warehouse, production facilities, laboratories, and packaging and labeling facility.¹⁸⁶ The investigators, once again, found many significant

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ FDA Establishment Inspection Report, Apotex Inc., Signet (July 27-August 14, 2009) (“2009 Signet EIR”), at 1 [R-42]. This inspection was scheduled to cover cGMP; to follow up on FDA’s 2006 inspection; and as a pre-approval inspection for ■ pending ANDAs and ■ NDA. Because of the significant cGMP violations, however, the PAI was not concluded. *See id.*; *see also* Witness Statement of Lloyd Payne ¶¶ 8, 10, 14 (Dec. 12, 2012) (“Payne Statement”).

¹⁸⁴ Form FDA 483, Inspectional Observations, Apotex Inc., Signet (Aug. 14, 2009) (“2009 Signet Form 483”) [C-61]; 2009 Signet EIR [R-42]. The investigators were Lloyd Payne (team lead), Walden Lee (chemist), Kristy Zielny, and Brian Belz. 2009 Signet EIR, at 1 [R-42]. FDA had previously inspected Signet in 2006, 2003, and 2000, and had found cGMP deviations in 2006 and 2000. Payne Statement ¶ 8; Form FDA 483, Inspectional Observations, Apotex Inc., Signet (July 13, 2006) (listing one observation, which remained uncorrected at the time of the 2009 inspection) [C-17]; FDA Establishment Inspection Report, Apotex Inc., Signet (June 26-July 13, 2006) [C-20]; Form FDA 483, Inspectional Observations, Apotex Inc., Signet (Sept. 29, 2000) (listing eleven observations) [C-2].

¹⁸⁵ Payne Statement ¶ 9.

¹⁸⁶ *See* 2009 Signet EIR, at 4 (noting that “Mr. Lovelock and Ms. Austin provided or assisted in providing all information and documentation as requested throughout the course of the inspection. They also arranged for meetings with additional individuals as necessary and provided a walkthrough of the production and laboratory facilities”) [R-42]; *id.* at 7-10 (noting the locations and documents reviewed and the individuals responsible and

cGMP violations, several of which were identical to those found at Etobicoke. These deviations affected multiple products and confirmed *systemic* quality-control problems with Apotex's manufacturing apparatus. At the end of the 14-day inspection, the investigators recorded 17 written observations and raised 10 additional verbal concerns with Apotex Inc. management.¹⁸⁷

The most significant included:

1. Contamination of Active Pharmaceutical Ingredients, Raw Materials, and Finished Drugs

87. Apotex had discovered active pharmaceutical ingredients "contaminated with acetate fibers, adhesive/glue, cellulose-based materials, fluorocarbons, hairs, metallic particles, nylon, polyolefins, and protein-based materials."¹⁸⁸ Although Apotex recognized that the contaminated drug batch "pose[d] potential impact on quality and safety," it nonetheless used the batch to manufacture drugs for the U.S. market.¹⁸⁹

88. Apotex had also discovered another batch with "black specks," which it identified as "metallic material, PVC-based material, silicon oxide-based material as well as charred material."¹⁹⁰ Apotex's Quality Unit was concerned that the firm's metal detectors might not properly detect contaminated tablets, and thus rejected the batch. Instead of accepting that determination, however, Apotex "further film coated" the tablets, ran them through a metal

persons interviewed); Email from Carol Austin to Jeremy Desai et al. (July 27, 2009) (noting tours of warehouse and production and a large number of documents requested) [C-46]; Payne Statement ¶¶ 11-13.

¹⁸⁷ 2009 Signet EIR, at 93-96 (noting that daily meetings were held at the end of each inspection day and a closeout meeting was held on the last day of the inspection) [R-42]; Payne Statement ¶ 15.

¹⁸⁸ 2009 Signet Form 483, at 1 [C-61]; 2009 Signet EIR, at 38, 41 [R-42]; Payne Statement ¶ 17.

¹⁸⁹ 2009 Signet EIR, at 38, 41-42 [R-42]; Payne Statement ¶ 17.

¹⁹⁰ 2009 Signet Form 483, at 1 (Observation 1(b)) [C-61]; 2009 Signet EIR, at 38, 43 [R-42]; Payne Statement ¶ 18.

detector, and then released the drugs for the U.S. market.¹⁹¹ The firm also produced and distributed to the U.S. market *additional* drugs from the same contaminated batch.¹⁹²

2. Failure to Report Manufacturing Problems

89. Apotex routinely failed to send required Field Alert Reports on time, thereby depriving FDA of timely access to critical information about problems with Apotex’s manufacturing practices.¹⁹³ As noted, FARs serve as an early warning system, ensuring that significant problems are brought to FDA’s attention, so that FDA can prevent potential health hazards from drugs in distribution. Failure to submit FARs on time thus is a serious regulatory violation.¹⁹⁴

3. Filing Inaccurate and Incomplete Supplements

90. Apotex’s drugs suffered “dissolution” problems.¹⁹⁵ If a drug does not dissolve properly, the consumer will not receive the proper drug dosage, which can be fatal.¹⁹⁶ Apotex altered its drug processing methods as a result of dissolution failures. But when Apotex submitted ANDA supplements for the drug, it failed to inform FDA of the underlying dissolution failures or its new processing methods.¹⁹⁷ When investigators confronted Apotex management, they acknowledged that the information provided to FDA “was inaccurate and incomplete.”¹⁹⁸

¹⁹¹ 2009 Signet Form 483, at 1 (Observation 1(b)) [C-61]; 2009 Signet EIR, at 39, 43-44 [R-42]; Payne Statement ¶ 21.

¹⁹² 2009 Signet EIR, at 44 [R-42].

¹⁹³ 2009 Signet Form 483, at 4-5 (Observation 3) [C-61]; 2009 Signet EIR, at 59-63 [R-42]; Payne Statement ¶ 21.

¹⁹⁴ Rosa Statement ¶ 30.

¹⁹⁵ Payne Statement ¶ 20.

¹⁹⁶ Rosa Statement ¶¶ 29, 51.

¹⁹⁷ 2009 Signet Form 483, at 3-4 (Observation 2) [C-61]; 2009 Signet EIR, at 48-49, 56-57 [R-42].

¹⁹⁸ 2009 Signet EIR, at 59 (noting that in discussions with Apotex officials Bruce Clark, Pradeep Sanghvi, and Bernice Tao, “all three individuals agreed that the information provided in the CBE-30 [supplement] was inaccurate and incomplete”) [R-42].

4. Failure to Follow Established Cleaning and Maintenance Procedures

91. Apotex failed to follow the firm's written procedures for cleaning and maintaining equipment used in the manufacturing, processing, packing, or holding of drug products. Apotex acknowledged, for instance, that "[o]n the Packaging Cleaning logs, it is evident that the date and time for the Performed by and Checked by are being *pre-filled* by one person."¹⁹⁹

92. Other significant problems included:

- **Repackaging failed products:** Apotex repeatedly repackaged and reassigned new batch numbers to products that failed the firm's own quality testing, with no sound rationale or assessment of the potential impact on product quality or safety;²⁰⁰
- **Failure to investigate problems:** Apotex failed to review and investigate the root cause of rejected batches, including those rejected for contamination or lack of imprinting;²⁰¹
- **Inadequate procedures to prevent adulteration:** Apotex lacked adequate written procedures to ensure that its drugs had the identity, strength, quality, and purity Apotex represented them to have, as required under U.S. law;²⁰²
- **Inadequate processes to prevent cross-contamination:** Apotex failed to develop a meaningful program to prevent cross-contamination – a problem FDA had highlighted during an inspection three years earlier;²⁰³
- **Incorrectly formulated drugs:** Apotex used the wrong raw material and incorrect grade of a material in its drug production;²⁰⁴
- **Misbranded drug products and drug packaging:** Apotex failed to imprint capsules and placed the wrong caps on drug packaging bottles;²⁰⁵

¹⁹⁹ Email from Carol Austin to Jeremy Desai et al. (Aug. 6, 2009) (emphasis added) [C-52]; 2009 Signet Form 483, at 7-9 [C-61]; 2009 Signet EIR, at 72-76 [R-42].

²⁰⁰ 2009 Signet Form 483, at 1-2 [C-61]; 2009 Signet EIR, at 39, 43-44 [R-42].

²⁰¹ 2009 Signet Form 483, at 9-10 [C-61]; 2009 Signet EIR, at 76-80 [R-42].

²⁰² 2009 Signet Form 483, at 10 [C-61]; 2009 Signet EIR, at 80-82 [R-42].

²⁰³ 2009 Signet Form 483, at 6-7 [C-61]; 2009 Signet EIR, at 68-71 [R-42].

²⁰⁴ 2009 Signet Form 483, at 5-6 [C-61]; 2009 Signet EIR, at 63-68 [R-42].

²⁰⁵ 2009 Signet Form 483, at 5 [C-61]; 2009 Signet EIR, at 63-68 [R-42].

- **Poor recordkeeping:** Apotex failed to follow record-keeping procedures concerning investigations; batch production and control;²⁰⁶ and cleaning operations and verifications;²⁰⁷
- **Leaking desiccant bags:** Apotex produced 76 batches of various finished drug products packaged with “leaking desiccant bags,” but simply repackaged and released them to the U.S. market, without assessing the impact on product quality;²⁰⁸
- **Failure to monitor shelf-life stability:** Apotex stored drugs in bulk for long periods without implementing proper procedures to evaluate shelf-life stability;²⁰⁹
- **Inadequate packaging procedures:** Apotex failed to follow written procedures for leak-testing of blister packages;²¹⁰ and
- **Faulty water-purification:** Apotex had improperly designed its water-purification system, allowing possible microbial contamination of drug products.²¹¹

93. These were not one-off failures affecting individual drugs or batches.²¹² The nature and gravity of the violations found at Signet – many of which mirrored those found earlier at Etobicoke – reflected the *systemic* nature of Apotex’s cGMP deficiencies.²¹³ The defects in Apotex’s manufacturing practices demonstrated that Apotex was incapable of manufacturing drugs in accordance with U.S. law.

²⁰⁶ 2009 Signet Form 483, at 13-14 [C-61]; 2009 Signet EIR, at 90-92 [R-42].

²⁰⁷ 2009 Signet Form 483, at 7-8 [C-61]; 2009 Signet EIR, at 72-74 [R-42].

²⁰⁸ 2009 Signet Form 483, at 2-3 [C-61]; 2009 Signet EIR, at 40, 45-46 [R-42].

²⁰⁹ 2009 Signet Form 483, at 10 [C-61]; 2009 Signet EIR, at 82-83 [R-42].

²¹⁰ 2009 Signet Form 483, at 11 [C-61]; 2009 Signet EIR, at 83-84 [R-42].

²¹¹ 2009 Signet Form 483, at 14 [C-61]; 2009 Signet EIR, at 92-93 [R-42].

²¹² Payne Statement ¶¶ 16-24.

²¹³ *Id.* ¶¶ 21, 24.

G. Apotex Acknowledged Serious cGMP Violations and Quality Control Problems at Signet

94. At the Signet inspection closeout meeting, Apotex acknowledged deficiencies with its manufacturing practices and promised “corrections for all observations and discussion items.”²¹⁴ Apotex’s president conceded “unacceptable sloppiness” in the firm’s labeling and packaging procedures.²¹⁵ Apotex’s then-vice-president for Quality (who was terminated shortly thereafter)²¹⁶ admitted that “in-process investigations need to be looked at and closed in a timelier manner.”²¹⁷ Apotex acknowledged that its blister-packaging procedure was “not an acceptable practice,” and Apotex would “be figuring out a way to ensure this does not happen again.”²¹⁸ Apotex was asked to contact CDER the next business day to discuss the firm’s intentions for products currently on the US market, and to outline Apotex’s proposed corrective actions in writing within ten days.²¹⁹

²¹⁴ 2009 Signet EIR, at 5 [R-42]. Regarding the failure to follow written procedures for the cleaning and maintenance of equipment, Apotex’s vice-president for Quality, Lance Lovelock, acknowledged “that there needs to be some self-policing in issuing deviations and that this is an opportunity to look at the procedures and processes in place.” *Id.* at 76. Regarding failure to retest and re-examine drug components after storage for long periods, Mr. Lovelock stated that “they now understand the FDA’s expectations regarding expiration dates,” and Mr. Kay seconded his comments. *Id.* at 82. Regarding the lack of a written testing program to assess the stability of drug products, management recognized the deficiencies. *Id.* at 83. Regarding the leaking purified water system, “Mr. Lovelock reported that the USP Purified water systems within each building will be inspected in its design and all threaded unions would be changed to [] welded unions and/or sanitary connections.” *Id.* at 93.

²¹⁵ *Id.* at 72 (noting, in relation to Observation 6, that “Jack Kay stated that this is an example of ‘unacceptable sloppiness’”).

²¹⁶ Apotex, Draft Minutes of Meeting with FDA, at 2 (Mar. 31, 2010) (confirming termination at the end of October 2009) [C-140].

²¹⁷ 2009 Signet EIR, at 80 [R-42].

²¹⁸ *Id.* at 84.

²¹⁹ *Id.* at 96.

H. Apotex Recalled Adulterated Drugs, Hired a Consultant, and Began Investigating Underlying Deficiencies with Its Manufacturing Practices

95. In an August 28, 2009 letter, Apotex committed to “ensuring that necessary actions are taken to address FDA’s concerns” and proposed three corrective actions.²²⁰ First, Apotex reiterated its commitment “to voluntarily recall any batch with known product impact that has already been distributed in the United States,” including “[a]ll batches associated with suspect foreign matter contamination or adulteration” and “out-of-specification (OOS) test results.”²²¹

96. Second, Apotex retained the “services and support of a qualified third party cGMP consulting service . . . to augment existing quality systems and QA functions.”²²² Apotex instructed its consultant to “[c]onduct an immediate, systematic review of ALL deviations for batches manufactured in the past 2 years,” and “[p]rovide concurrent, real time Quality oversight and review of deviations” before shipping drugs to the United States.²²³

97. Third, Apotex pledged to “ensure that adequate root cause investigations, appropriate corrective actions, and preventive actions (i.e., continuous improvement initiatives) are proposed and implemented on a concurrent basis until comprehensive quality systems assessments can be performed[.]”²²⁴

98. Apotex expressed its hope that “the immediate voluntary recall actions, the retaining of an objective third party consulting firm, and timely initiation of a continuous improvement action

²²⁰ Letter from Jeremy Desai, Executive Vice President, Global Research Development and Quality, Apotex Inc., to Edwin Rivera-Martinez, Division of Manufacturing and Product Quality, CDER – Office of Compliance, FDA, at 3 (Aug. 28, 2009) [C-66].

²²¹ *Id.* at 1-2.

²²² *Id.* at 2.

²²³ *Id.*

²²⁴ *Id.* at 2-3.

plan or roadmap will collectively serve to demonstrate our company's commitment to cGMP compliance.”²²⁵

I. FDA Placed the Etobicoke and Signet Facilities on Import Alert, Citing “Significant cGMP Violations”

99. CDER personnel met internally immediately after the Signet inspection to discuss the investigators' Form 483 observations, Apotex's verbal responses, and the Etobicoke EIR.²²⁶

CDER determined that the Signet facility had “significant, systemic CGMP violations” that “posed significant potential public health risks” such that drugs from that facility were “adulterated” within the meaning of U.S. law.²²⁷ CDER further determined that the problems at Signet were similar to those found at Etobicoke,²²⁸ demonstrating “a lack of adequate process controls” and raising “serious concerns regarding the firm's quality and production systems.”²²⁹ CDER expressed concern “about the firm's rationale and decision to only recall 675 batches and not address all products on the US market.”²³⁰

100. Given the number and systemic nature of cGMP violations identified, as well as their potential impact on public health, CDER recommended that “all finished pharmaceutical products” from the Etobicoke and Signet facilities be placed on Import Alert 66-40 until the

²²⁵ *Id.* at 3.

²²⁶ Rosa Statement ¶ 61.

²²⁷ *Id.* ¶ 59.

²²⁸ Memorandum from Director, Division of Manufacturing and Product Quality, CDER – Office of Compliance, to Director, DIOP, at 2 (Aug. 20, 2009) [C-64]; Rosa Statement ¶ 48.

²²⁹ Memorandum from Director, Division of Manufacturing and Product Quality, CDER – Office of Compliance, to Director, DIOP, at 2 (Aug. 20, 2009) (emphasis added) [C-64]; Rosa Statement ¶¶ 61, 66.

²³⁰ Memorandum from Director, Division of Manufacturing and Product Quality, CDER – Office of Compliance, to Director, DIOP, at 2 (Aug. 20, 2009) [C-64]; *see also* FDA, Minutes of Teleconference with Apotex (Aug. 17, 2009) (memorializing Apotex's intention to continue distributing products in the United States) [R-43]; Rosa Statement ¶ 64.

“firm can demonstrate that it is in compliance with CGMPs, and a re-inspection confirms that appropriate corrections have been implemented.”²³¹

101. FDA’s Division of Import Operations and Policy concurred with CDER’s recommendation and issued the Import Alert on August 28, 2009.²³² The Import Alert was limited to products manufactured at the Etobicoke and Signet facilities and did not apply to other Apotex facilities in Canada or elsewhere.

102. Following dissemination of the Import Alert, shipments of Apotex products to the United States were initially held pending FDA review and then detained without physical examination. In accordance with standard procedure, at each step during the importation process, the FDA district office sent a “Notice of FDA Action” to the filer, importer of record, and consignee.²³³ When the products were initially held pending FDA review, Notices of FDA Action were sent (Notice Number 1), explaining that the listed products were being held, and providing contact information for an agency investigator.²³⁴

²³¹ Memorandum from Director, Division of Manufacturing and Product Quality, CDER – Office of Compliance, to Director, DIOP, at 3 (Aug. 20, 2009) [C-64]; *see also* Rosa Statement ¶¶ 61-62.

²³² Email from “ORA HQ DIOP Import Alerts” to Regina Barrell et al. (Aug. 28, 2009) (“All finished form drug products” from Apotex Inc.’s Etobicoke and Signet facilities “have met the criteria for addition to detention without physical examination”) [C-67]; *see also* Rosa Statement ¶ 62.

²³³ Apotex submitted copies of the notices sent to its customs broker, Affiliated Customs Brokers, but generally did not submit copies of all of the notices sent. *See, e.g.*, Notice of FDA Action re: Entry No EG6-1768425-3, Notice No. 1 (Sept. 2, 2009) (sent to Filer, Affiliated Customs Brokers) [C-78]. The United States submits example reprints of the Notices of FDA Action sent in the ordinary course to Apotex. *See, e.g.*, Notices of FDA Action re: Entry No EG6-1768425-3, Notice No. 1 (Sept. 2, 2009) (sent to Importer of Record Apotex Inc. and to Consignee Apotex Corp.) [R-44]. The reprints, however, reflect the initials of the FDA official who reprinted them and, for the initial notice (Notice Number 1), no longer contain the contact information for an agency investigator.

²³⁴ *See, e.g.*, Notice of FDA Action re: Entry No EG6-1768425-3, Notice No. 1 (Sept. 2, 2009) (sent to Filer, Affiliated Customs Brokers) [C-78]; Notices of FDA Action re: Entry No EG6-1768425-3, Notice No. 1 (Sept. 2, 2009) (sent to Importer of Record Apotex Inc. and to Consignee Apotex Corp.) [R-44]. Apotex asserts that it received notice of the designated hold from its customs broker on September 1, 2009. Memorial ¶ 187 (citing Email from Juanita Zaziski to Ranjitkumar Sukanthy et al. (Sept. 1, 2009), which provided a copy of an initial Notice of FDA Action to Apotex [C-68]); *id.* ¶ 190 (citing Email from Juanita Zaziski to Ranjitkumar Sukanthy et al. (Sept. 1, 2009), which memorialized the inquiry with FDA and briefly described the Import Alert to Apotex) [C-73]; *but see*

103. Once the products were screened and detained without physical examination, Notices of FDA Action were sent (Notice Number 2), providing the status of the listed products.²³⁵ These notices explained that the listed products were being detained and “were subject to refusal,” because “it appear[ed] that the methods used in or the facilities or controls used for the manufacture, processing, packing, or holding do not conform to or [were] not operated or administered in conformity with current good manufacturing practices.”²³⁶ These notices also apprised Apotex of its right to submit testimony in advance of any decision to refuse admission of the products to the United States, and they provided contact information for an agency compliance officer.²³⁷

104. Apotex did not avail itself of the opportunity to submit testimony. After the time to submit testimony had lapsed, the FDA district office refused admission of certain Apotex products, and sent Notices of FDA Action explaining that decision.²³⁸

id. ¶ 194 (stating that “[i]t was only at this point in time” on September 3, 2009, “that FDA notified Apotex of the Import Alert.”).

²³⁵ *See, e.g.*, Notice of FDA Action re: Entry No EG6-1768425-3, Notice No. 2 (Sept. 4, 2009) (sent to Filer, Affiliated Customs Brokers) [C-84]; Notices of FDA Action re: Entry No EG6-1768425-3, Notice No. 2 (Sept. 4, 2009) (sent to Importer of Record Apotex Inc. and to Consignee Apotex Corp.) [R-44]. Not all Apotex products, however, were detained without physical examination. *See* Memorial ¶ 192 n.261 (noting that a shipment from Apotex Inc.’s Richmond Hill facility was initially held pending review and then released); Notice of FDA Action re: Entry No EG6-1770729-4, Notice No. 2 (Oct. 2, 2009) (noting that the listed product was released for import) [C-111].

²³⁶ *See, e.g.*, Notice of FDA Action re: Entry No EG6-1768425-3, Notice No. 2 (Sept. 4, 2009) (sent to Filer, Affiliated Customs Brokers) [C-84]; Notices of FDA Action re: Entry No EG6-1768425-3, Notice No. 2 (Sept. 4, 2009) (sent to Importer of Record Apotex Inc. and to Consignee Apotex Corp.) [R-44].

²³⁷ *Id.* (“You have the right to provide oral or written testimony, to the Food & Drug Administration, regarding the admissibility of the article(s) or the manner in which the article(s) can be brought into compliance. This testimony must be provided to FDA on or before the dates shown above [September 25, 2009].”).

²³⁸ *See, e.g.*, Notices of FDA Action (Sept. 28, 2009) [C-108].

J. Apotex Accepted Responsibility for Its Systemic Problems and Pledged to Overhaul Its Operations, Management Structure, and Quality Control System

105. Apotex informed FDA in a September 3, 2009 letter that it took FDA's concerns "very seriously" and acknowledged the "systemic nature" of the problems raised by FDA.²³⁹ Apotex assured FDA that it was in the "process of evaluating, with the aid of independent expert consultants, our entire quality System, the management structure, roles and responsibilities and manufacturing operations systems supporting our products" and "taking global actions to improve effectiveness of our Quality System at all Apotex sites."²⁴⁰ Apotex committed to perform a full quality systems review to identify and rectify compliance issues.²⁴¹

106. That same day, Apotex and FDA held a telephone conference to discuss the Import Alert and corrective action required of Apotex. At no point did Apotex deny its cGMP violations or protest the resulting Import Alert. Instead, Apotex merely inquired whether additional issues beyond the cGMP concerns had prompted the Import Alert.²⁴² CDER advised Apotex that its

²³⁹ Apotex Responses to 2009 Signet Form 483, at 7 (Sept. 3, 2009) (attached to letter) [C-81]. Apotex acknowledged, for instance, that "there are instances where components or drug products are not rejected when they fail to conform to the qualities they are purported to possess" (*id.* at 1); that "this level of detail was not included within the deviation report detailing this change and should have been" (*id.* at 3); that "a lack of review, inadequate scale-up development and lack of a risk assessment were part of the root cause" (*id.* at 10); that "Apotex's current process related to Field Alert Reports was modified following the inspection of our Etobicoke facility in response to the observation that FARs were not being filed in a timely fashion" (*id.* at 13); that "Apotex is committed to ensure that potential issues are communicated to FDA within 3 working days via the Field Alert Report Process" (*id.* at 13-14); that "Apotex acknowledges that the investigation into this incident lacked sufficient detail" (*id.* at 28); that "the investigation in Q-Notification 200068475 is inadequate in that it does not provide a detailed accounting as to why only one box of capsules was determined to be implicated by the observed missing imprint" (*id.* at 30); that "there were two noted instances where a batch record could not be found during the course of the inspection" (*id.* at 39); and that, "in the future, no batch will be released to the market in the absence of the required batch records" (*id.* at 39).

²⁴⁰ Letter from Lance Lovelock, Vice President, Quality, Apotex Inc., to CDER, International Compliance Team, at 1 (Sept. 3, 2009) [C-81].

²⁴¹ *Id.* Apotex agreed, among other things, to retain an independent consulting company to aid in dealing with issues noted during the inspection and to perform "a full Quality Systems review to identify other compliance gaps that may exist" and work with an independent consulting firm to evaluate and investigate instances of foreign matter and "develop a process for on-going evaluation and investigation to ensure consistent and cGMP-compliant decisions are made[.]" *Id.* at 7-8.

²⁴² FDA, Minutes of Teleconference with Apotex (Sept. 3, 2009) [R-45].

voluntary recall did “not meet with the FDA’s expectations given the significance of the documented GMP violations” and it requested details on Apotex’s “global corrective actions.”²⁴³

107. A week later, on September 11, FDA met with Apotex to discuss the firm’s compliance obligations in greater detail.²⁴⁴ During the meeting, FDA reiterated its serious concerns regarding Apotex’s facilities, noting that “[s]imilar significant CGMP deficiencies” had been found at both Etobicoke and Signet, including:

- “Corporate culture of reprocessing and retesting products into specification;”
- “Poor, inadequate, or incomplete OOS [out-of-specification] and process deviations investigations;”
- “Non-timely submission of Field Alert Reports” and;
- “Failure to have an appropriate global quality culture and system,” with “deficiencies” found in “all six [key cGMP] systems for the manufacture of drugs/drug products” and a “lack of root cause determinations and effective corrective actions to ensure reliable and reproducible manufacturing processes are in place[.]”²⁴⁵

108. Apotex’s senior management, once again, did not dispute FDA’s cGMP findings. Indeed, Apotex Inc.’s president, Jack Kay, acknowledged that it was Apotex’s “job, not FDA’s to make sure that our systems are acceptable.”²⁴⁶ Nor did Apotex question, let alone protest,

²⁴³ *Id.*

²⁴⁴ Apotex Compliance Presentation to FDA, at slide titled “Chronology Signet,” bullet no. 10 (Sept. 11, 2009) [C-92].

²⁴⁵ CDER Office of Compliance, International Compliance Branch – Apotex Inc. Meeting Slides, slides titled “FDA’s Current Concerns” (Sept. 11, 2009) (emphasis added) [C-93]; *see also* Apotex, Minutes of Meeting with FDA, at 7 (Sept. 11, 2009) (noting that in response to Apotex’s request to lift the Import Alert promptly, that the FDA “Commissioner had made it very clear that a reinspection would be necessary to close out actions of this kind”) [C-94]. CDER also raised the data integrity of Apotex’s manufacturing supplements, which had been identified as an issue during the Signet inspection. CDER stressed that “Apotex needed to be concerned” about the matter, and requested the firm to provide further clarification. *Id.* at 8 [C-94]. The Signet inspection revealed a data integrity problem with Apotex’s manufacturing supplement for [REDACTED]. *Id.*

²⁴⁶ Apotex, Meeting Minutes with FDA, at 4 (Sept. 11, 2009) [C-94].

having been placed on Import Alert. To the contrary, Apotex again acknowledged FDA's concerns, pledging to take the following additional steps:

- (1) Retain independent consultants to conduct a Product Quality Assessment (PQA) on all U.S. products and a comprehensive audit at all PQA facilities;
- (2) Review its corporate functions with a view to overhauling its systems and complying with cGMP;
- (3) Independently verify implementation of regulatory commitments and an action plan;²⁴⁷ and
- (4) Develop new protocols and action plans for FDA's review.²⁴⁸

109. FDA, for its part, pledged to work with Apotex to "provide timely feedback on whatever is provided."²⁴⁹ FDA also agreed to "assign high priority to keeping open communication" going forward.²⁵⁰ At the same time, however, CDER informed Apotex that it would recommend lifting the Import Alert only after reinspection of the two facilities, which was contingent on:

- (1) "Significant assurance that sustainable CGMP conformance has been instituted"; and
- (2) "Robust evaluation and comprehensive resolution of systemic deficiencies throughout all quality systems."²⁵¹

110. CDER closed the meeting by noting that "*the ball is now in Apotex's court.*"²⁵²

²⁴⁷ Apotex Compliance Presentation to FDA, at slides titled "Key Actions and Commitments" (Sept. 11, 2009) [C-92].

²⁴⁸ Apotex, Meeting Minutes with FDA, at 4-5 (Sept. 11, 2009) [C-94].

²⁴⁹ *Id.* at 7-8.

²⁵⁰ *Id.* at 9.

²⁵¹ CDER Office of Compliance, International Compliance Branch – Apotex Meeting Slides, slide titled "Reinspections" (Sept. 11, 2009) [C-93]; *see also* Apotex, Meeting Minutes with FDA, at 2 (Sept. 11, 2009) ("FDA would require reinspection and that they will reinspect when they have assurance that GMP conformance has been instituted and that all deficiencies have been resolved.") [C-94].

²⁵² Apotex, Meeting Minutes with FDA, at 9 (Sept. 11, 2009) (emphasis added) [C-94].

K. Health Canada Corroborated FDA's Findings and Shared FDA's Concerns

111. FDA relayed its findings on Etobicoke and Signet to Health Canada.²⁵³ After reviewing FDA's reports and Apotex's response, Health Canada requested that Apotex provide "evidence as to why products being made at these two sites should not be recalled from the Canadian market."²⁵⁴ Health Canada initially understood that Apotex would "undertake a voluntary recall in Canada of the same products that were subject to the recall in the US,"²⁵⁵ but Apotex declined to do so.²⁵⁶ Instead, Apotex agreed to recall from the Canadian market only 22 batches of three different drugs manufactured at the Etobicoke and Signet facilities.²⁵⁷

112. Apotex publicly characterized the recall as "minor in nature," arguing that "[a]ll lots met specifications."²⁵⁸ In fact, the recalled batches reflected serious cGMP problems. Some batches were recalled because of the "discovery of a dead insect or insect fragment on the top of API [Active Pharmaceutical Ingredient] in two drums at the point the drums were opened prior to dispensing material."²⁵⁹ The remaining batches were recalled because they contained an unexplained "light green colour," apparently having been contaminated by packaging dye.²⁶⁰

113. Despite systemic problems affecting Apotex's manufacturing practices, Apotex nonetheless declined to recall additional drugs from the Canadian market, seeking to justify its

²⁵³ Rosa Statement ¶ 63.

²⁵⁴ Email from Jeremy Desai to Jeff Watson et al. (Sept. 2, 2009) [C-76].

²⁵⁵ Email from Sharon Mullin to Bruce Clark (Sept. 4, 2009) [C-87].

²⁵⁶ Email from Sharon Mullin to Bruce Clark (Sept. 7, 2009) [C-87].

²⁵⁷ Letter from Lance Lovelock, Apotex Vice President, Quality, to Richard Kirchner, Manager, Ontario Operational Centre (Acting), Health Canada (Sept. 8, 2009) [C-88].

²⁵⁸ Apotex Press Statement, "Important Information on Apotex Health Products," at 1 (Sept. 17, 2009), available at <http://www.apotex.com/ca/en/about/press/20090917.asp> (last visited Dec. 4, 2012) [C-104].

²⁵⁹ Letter from Lance Lovelock, Apotex Vice President, Quality, to Richard Kirchner, Manager, Ontario Operational Centre (Acting), Health Canada (Sept. 8, 2009) [C-88].

²⁶⁰ *Id.* (noting that the "most likely source" of the contamination was printing dye).

limited recall on grounds that some “products are either not sold in Canada or are produced and tested differently”; the impact on other products was “limited to US batches”; and Apotex believed “that appropriate steps were in place to ensure that any foreign matter present was identified and dealt with appropriately.”²⁶¹

114. Health Canada rejected Apotex’s explanation, publicly stating its intention “to undertake a thorough review of [Apotex’s] Good Manufacturing Practices.”²⁶² Health Canada launched rigorous inspections, which were “exceptional not only in terms of length, but also in terms of [the] size of the team.”²⁶³ Fourteen investigators participated in the inspections, as opposed to the normal two or three investigators.²⁶⁴ The inspections also occurred over two months, as opposed to the normal ten days.²⁶⁵

1. Health Canada’s Inspection of the Signet Facility Revealed Numerous, Serious, Recurring, Systemic cGMP Problems

115. Health Canada’s inspection of the Signet facility uncovered many serious cGMP problems. Early in Health Canada’s inspections, it became apparent that Apotex took a more lax approach to cGMP than Health Canada. In an email to FDA, Lance Lovelock wrote that Health Canada had “expressed a significant concern” about Apotex’s production of [REDACTED], which is used to treat sickle-cell disease and manufactured at Signet.²⁶⁶ Mr. Lovelock admitted

²⁶¹ Letter from Lance Lovelock, Vice President, Quality, Apotex Inc., to Sharon Mullin, Director, HPFB Inspectorate, Compliance & Enforcement Coordination Division (Sept. 9, 2009) [C-90].

²⁶² Health Canada Press Statement, “Important Information on Apotex Health Products” (Sept. 17, 2009) [C-101].

²⁶³ Witness Statement of Edmund Carey ¶ 43 (July 29, 2012) (“Carey Statement”); accord Witness Statement of Jeremy B. Desai ¶ 57 (July 30, 2012) (“Desai Statement”) (“Health Canada’s inspection in the fall of 2009 was very extensive and lasted for several weeks.”); Witness Statement of Bruce D. Clark ¶ 43 (July 27, 2012) (“Clark Statement”) (“This was not a normal inspection.”).

²⁶⁴ Carey Statement ¶ 43.

²⁶⁵ *Id.*

²⁶⁶ Email from Lance Lovelock to Edwin Rivera-Martinez (Oct. 9, 2009) [R-47].

to FDA that Health Canada’s “level of concern seems very high relative to our medical assessment of this molecule and its potency which is low.”²⁶⁷

116. At the end of the inspection, Health Canada recorded 26 separate observations, including 18 Risk 2 observations (*i.e.*, “major observations”)²⁶⁸ and four repeat Risk 2 observations.²⁶⁹

The deficiencies identified by Health Canada included:

a) Co-mingling toxic and nontoxic material

117. Apotex used the same equipment to fabricate “cytotoxic material” (*i.e.*, material toxic to cells) that it used for fabricating non-cytotoxic material, without implementing adequate containment measures to prevent cross-contamination and without properly cleaning the equipment.²⁷⁰

118. Apotex immediately committed to cease manufacturing any cytotoxic products at Signet. This concession allowed Health Canada to record this observation in the second-highest, rather than the highest, risk category, which would have resulted in a “non-compliant” rating, potentially costing Apotex its establishment license.²⁷¹

²⁶⁷ *Id.*

²⁶⁸ See Health Canada, Health Products and Food Branch Inspectorate, Risk Classification of Good Manufacturing Practices (GMP) Observations, GUI-0023, at 15 (Appendix B) (defining “Risk 2” (or “Major Observation”) as an “[o]bservation that may result in the production of a drug not consistently meeting its marketing authorization.”) [R-97].

²⁶⁹ Health Canada, Inspection Exit Notice for Signet (Oct. 14, 2009) [C-112].

²⁷⁰ *Id.* at 3.

²⁷¹ *Id.*; see also Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 1 (Nov. 17, 2009) (“Apotex further commits that no cytotoxic products will be manufactured at the 150 Signet Road Facility.”) [C-119].

b) Misreporting test results and releasing failed products for sale

119. Apotex recorded in its log that it had rejected a drug lot because the engraving was not visible on the tablet. In fact, Apotex simply “reworked” the batch – *i.e.*, subjected the failed batch to alternative, unapproved manufacturing processes²⁷² – attempting to sort the tablets by thickness.²⁷³ The sorted tablets, however, once again failed quality testing.²⁷⁴ The tablets were then subjected to a “visual inspection,” but also failed that inspection.²⁷⁵ Despite three failed inspections, the lot was repackaged and “released for sale.”²⁷⁶ Health Canada faulted Apotex for the lack of “scientific justification” for its actions, and for having focused on the “cosmetic issue,” rather than the cause or impact of the underlying problem.²⁷⁷

120. Apotex acknowledged that manufacturing drugs with illegible engraving is “a Major A defect based on Apotex internal standard[s].”²⁷⁸ Apotex noted that it had “recently undertaken some changes in management and organization,” and pledged to “ensure that only conforming product will be released to the market.”²⁷⁹

²⁷² Health Canada defines “rework” as “[s]ubjecting an in-process drug, a bulk process intermediate or final product of a single batch/lot to an alternate manufacturing process (i.e. a manufacturing step that is not part of the validated manufacturing process) due to a failure to meet predetermined specifications.” Terms and Conditions Annex for 2010 Drug Establishment License 100375-A, Glossary of Terms, at 4 (Dec. 31, 2009) [C-126].

²⁷³ Health Canada, Inspection Exit Notice for Signet, at 8 (Oct. 14, 2009) [C-112].

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 8-9. In another example of this practice, after three validation batches of one drug failed initial testing, the batches “were retested using a different apparatus and a slightly different technique and all results passed.” *Id.* at 7.

²⁷⁸ Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 15-16 (Nov. 17, 2009) [C-119].

²⁷⁹ *Id.* at 16. Health Canada warns companies that most situations involving “misrepresentation or falsification of products or data will generate a [Non-Compliant] rating, irrespective of the category of products involved.” Health Canada, Health Products and Food Branch Inspectorate, Risk Classification of Good Manufacturing Practices (GMP) Observations, GUI-0023, at 3 [R-97].

c) Delaying product recalls long after learning of health risks to consumers

121. Apotex delayed recalling products for months after obtaining “multiple drug release failures” during product testing.²⁸⁰ After discovering an “initial failing result” in September 2008, Apotex initiated an investigation.²⁸¹ But Apotex delayed conducting a “Health Hazard Assessment” for an additional five months, until February 2009.²⁸² Apotex then delayed another three months before taking action, despite having determined that the drug may “*cause serious toxic reactions and pose a significant health risk in some patients.*”²⁸³ Health Canada concluded:

Despite [Apotex’s determination regarding the possible health risks] and the preceding failing stability results at 3 separate time points, the lot was not recalled until May 19, 2009. The recall happened 253 days after the initial failing stability dissolution testing result and 104 days after the completion of the Health Hazard Assessment.²⁸⁴

In fact, Apotex still had not completed its investigation a full year after discovering the problem.²⁸⁵

122. Recognizing this serious problem, Apotex informed Health Canada:

Apotex acknowledge[s] that our current procedures for product recall and stability failure investigations are deficient. The recall procedure . . . will be revised to include timelines required for key actions. A new work instruction will be implemented describing the procedure for stability failure investigations, which will include instructions for immediate actions to be taken on the batch and product impacted by confirmed stability OOS [out of specification] results Apotex is committed to implement an organizational structure within the Quality Unit and appropriate resources are delegated to fully support these procedures.²⁸⁶

²⁸⁰ Health Canada, Inspection Exit Notice for Signet, at 12 (Oct. 14, 2009) [C-112].

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* (emphasis added).

²⁸⁴ *Id.* at 12-13.

²⁸⁵ *Id.* at 13 (“Note that as of September 30, 2009, the investigation was still in draft and open status had not been signed off by quality.”).

²⁸⁶ Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 26 (Nov. 17, 2009) [C-119].

d) Selling products known to have failed testing

123. Apotex failed to investigate properly, and in a timely manner, problems with drug “stability” (*i.e.*, how well a drug retains its quality over time and under different conditions).²⁸⁷ Health Canada’s investigation revealed that “Apotex continued to market a product with packaging that *it knew would not meet stability testing specifications*[.]”²⁸⁸ Apotex acknowledged that its practice “is not appropriate” and pledged “to stop this practice”; “to cease packaging of this product in the current . . . packaging format”; and to “recall[] from the market” all batches of the product.²⁸⁹

e) Failing to conduct timely investigations of potentially unsafe products

124. Health Canada concluded that “[e]vidence presented to support a preliminary investigation into [an] unknown compound was dated . . . 11 months after the initial identification of the excursion and 2 months after the expiry of the batch,” and yet “there still was *no knowledge as to whether the compound posed a health risk*.”²⁹⁰

125. Apotex “acknowledge[d] that the procedure and process for stability failure investigations requires improvement to ensure that future investigations are thorough and that

²⁸⁷ Health Canada defines “stability testing” as “[t]esting conducted to provide evidence on how the quality of a drug product varies with time under the influence of a variety of environmental factors such as temperature, humidity, and light, and to establish a re-test period for the drug substance or a shelf life for the drug product and recommended storage conditions.”). Terms and Conditions Annex for 2010 Drug Establishment License 100375-A, Glossary of Terms, at 4 (Dec. 31, 2009) [C-126].

²⁸⁸ Health Canada, Inspection Exit Notice for Signet, at 4 (Oct. 14, 2009) [C-112]. Health Canada also found that several batches of another drug “did not meet drug release specifications,” and yet three lots “were released for commercial sale.” *Id.* at 6. Apotex informed Health Canada that it had stopped manufacturing the affected drugs. Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 9 (Nov. 17, 2009) [C-119] (“As of August 2008, no batches of [REDACTED] tablets have been manufactured and the master production documents have been placed on hold.”).

²⁸⁹ Letter from Carol Austin, Associate Director, Compliance, Apotex to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 4 (Nov. 17, 2009) [C-119].

²⁹⁰ Health Canada, Inspection Exit Notice for Signet, at 5 (Oct. 14, 2009) (emphasis added) [C-112].

there is sufficient, documented rationale to support the conclusion of the investigation.”²⁹¹

Apotex thus pledged to implement a “new procedure for stability failure investigations,” which would include “instructions for immediate actions to be taken” and “requirements for full review of documentation, examples for root cause analysis and rationale required to support[] the conclusion.”²⁹²

f) Repeatedly producing drugs with black specks

126. Apotex failed to properly investigate a recurring problem of black specks on drugs, dismissing one occurrence as an “isolated incident.”²⁹³ Health Canada concluded that Apotex had failed to properly investigate several other recorded instances, “which detailed [an] ongoing issue with black specks in the granulation[.]”²⁹⁴

127. Apotex subsequently agreed to implement a “new corporate-wide” investigation program to address ongoing production problems involving black specks.²⁹⁵

g) Producing a drug with a metal fragment

128. Apotex discovered a metal fragment in a drum used for making drugs, and yet there was “no evidence that that this drum was segregated and not used in production.”²⁹⁶ Unsurprisingly,

²⁹¹ Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 8 (Nov. 17, 2009) [C-119].

²⁹² *Id.*

²⁹³ Health Canada, Inspection Exit Notice for Signet, at 9 (Oct. 14, 2009) [C-112].

²⁹⁴ *Id.*

²⁹⁵ Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 19 (Nov. 17, 2009) [C-119].

²⁹⁶ Health Canada, Inspection Exit Notice for Signet, at 9 (Oct. 14, 2009) [C-112].

a metal fragment also found its way into a drug tablet, having passed undetected through Apotex's metal detector.²⁹⁷

129. Apotex retained a consultant to investigate the failed metal detector, but it never adequately explained to Health Canada the underlying source of the metal fragment in the drug lot.²⁹⁸

130. Health Canada may designate a facility “non-compliant” if there are “numerous Risk 2 observations or several repeat risk 2 observations from previous inspections.”²⁹⁹ The occurrence of many Risk 2 observations indicates that “the company does not control its processes and operations sufficiently.”³⁰⁰ Repeat risk 2 observations indicate that the company had failed to implement corrective actions from previous inspections or establish “adequate preventative actions in a timely manner to avoid recurrence of such deviations.”³⁰¹ Having recorded 18 Risk 2 observations and four repeat Risk 2 observations during the Signet inspection, Health Canada could have designated the facility “non-compliant,” potentially leading to suspension or termination of Apotex's establishment license.³⁰²

²⁹⁷ *Id.*

²⁹⁸ *Id.*; *see also* Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 17-18 (Nov. 17, 2009) [C-119].

²⁹⁹ Memorandum from Anthony Lostracco to Stephanie Reid, Re: Recent Inspection of Apotex / FDA Concerns, at 1 (June 2011) [R-76]; *see also* Health Canada, Health Products and Food Branch Inspectorate, Risk Classification of Good Manufacturing Practices (GMP) Observations, GUI-0023, at 4 [R-97].

³⁰⁰ Health Canada, Health Products and Food Branch Inspectorate, Risk Classification of Good Manufacturing Practices (GMP) Observations, GUI-0023, at 4 [R-97].

³⁰¹ *Id.*

³⁰² *Id.*

2. Health Canada's Inspection of the Etobicoke Facility Similarly Revealed Numerous, Serious, Recurring, Systemic cGMP Problems

131. Health Canada's inspection of the Etobicoke facility raised equally serious problems. Health Canada recorded 26 separate observations, including 19 Risk 2 observations and four repeat Risk 2 observations.³⁰³ Once again, these findings would have justified Health Canada designating the Etobicoke facility "non-compliant," potentially leading to the suspension or termination of Apotex's establishment license.³⁰⁴

132. Health Canada faulted Apotex, for example, for having failed to investigate "stability failures" in a thorough and timely matter.³⁰⁵ With respect to one drug that failed stability testing, ten percent of the tested "tablets were completely black when the coating was removed" and "the black particles did not dissolve in the sample solvent."³⁰⁶ Health Canada concluded that Apotex had made "no attempt to identify what the black particles were or determine the root cause of their formation."³⁰⁷ Apotex, moreover, offered "insufficient rationale to support the conclusion that no corrective or preventative measures were necessary[.]"³⁰⁸ Health Canada found Apotex's actions particularly troubling, given that previous samples also had failed stability testing and "exhibited similar colour change."³⁰⁹

³⁰³ Health Canada, Inspection Exit Notice for Etobicoke (Nov. 4, 2009) [C-116].

³⁰⁴ Health Canada, Health Products and Food Batch Inspectorate, Risk Classification of Good Manufacturing Practices (GMP) Observations, GUI-0023, at 3 [R-97].

³⁰⁵ Health Canada, Inspection Exit Notice for Etobicoke, at 3 (Nov. 4, 2009) [C-116].

³⁰⁶ *Id.* at 4.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

133. Health Canada also faulted Apotex’s recurring failures of quality control. It noted, for instance, that when 28 batches of a drug manufactured for the U.S. market failed testing, they were “rescreened” and released for sale in Canada.³¹⁰

134. Apotex did not dispute Health Canada’s observations. To the contrary, Apotex informed Health Canada that “Apotex acknowledges the observations in this exit notice and is committed to addressing them and the *system deficiencies* highlighted by them.”³¹¹ Apotex sought to convince Health Canada that it should be permitted to continue manufacturing drugs, stressing that it had “developed an overall project plan to ensure that Apotex’s Quality Systems are appropriate for the manufacture of pharmaceutical products.”³¹² To that end, Apotex claimed to have:

- “implemented a new organizational structure within the Quality Unit and delegated appropriate resource[s] to support the revised procedure/process”;³¹³
- “stopped the practice of rework” – *i.e.*, subjecting failed drugs to alternative, unapproved manufacturing processes³¹⁴ – pledging that “[a]ll existing procedures related to rework and reprocessing will be *revoked or revised* to prohibit these actions”;³¹⁵
- “suspended” production of a problem drug;³¹⁶ and

³¹⁰ *Id.* at 12.

³¹¹ Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 1 (Dec. 8, 2009) (emphasis added) [C-123]; *see also id.* at 4 (“Apotex acknowledges that the investigation conducted for the stability OOS [out of specification] related compounds results obtained for ██████████ at the 6 month time point testing was deficient.”); *id.* at 7 (“Apotex acknowledges that the investigation conducted for the stability OOS assay results obtained for ██████████ at the 12 month time point testing was deficient.”); *id.* (“Apotex acknowledges that our current procedure and process for stability failure investigations requires improvement to ensure that investigations are thorough and are completed in a timely manner.”); *id.* at 21 (“Apotex acknowledges that investigations are not always completed / approved in a timely manner.”).

³¹² *Id.* at 1.

³¹³ *Id.* at 5.

³¹⁴ *See supra* n.272 (Health Canada definition of “rework”).

³¹⁵ Letter from Carol Austin, Associate Director, Compliance, Apotex, to Anthony Lostracco, Health Products and Food Branch Inspectorate, Health Canada, at 9-10 (Dec. 8, 2009) (emphasis added) [C-123].

³¹⁶ *Id.* at 6 (noting suspension of the manufacturing of ██████████ tablets).

- committed “to a complete comprehensive review of the critical process parameters for the manufacturing process” for another problem drug.³¹⁷

Apotex asked Health Canada for additional time to implement the necessary corrective actions, noting “many of the timelines established by the teams to address the issue[s] noted occur within the next six months,” but “some of the actions are longer term in order to fully address the concerns.”³¹⁸

L. Health Authorities Around the World Banned Drugs from the Etobicoke and Signet Facilities

135. Other public health authorities shared the concerns expressed by FDA and Health Canada. Apotex’s own internal documents, in fact, graphically illustrate broad international recognition of the seriousness of the problems at Etobicoke and Signet.

1. The New Zealand Drugs Authority Imposed an Import Ban, Threatened a Complete Product Recall, and Admonished Apotex that if It Were a New Zealand Company, It Would Be Shut Down

136. The New Zealand drugs authority, Medsafe, deemed Apotex’s manufacturing practices sufficiently troubling as to justify a total import ban of products from the two Apotex facilities.³¹⁹ Senior officials at Medsafe reviewed FDA’s inspection reports for Etobicoke and Signet as well as Apotex’s response to those reports.³²⁰ Apotex-New Zealand relayed Medsafe’s reaction to senior management at Apotex Inc.: “They said the reports are of *extreme concern to them and seem to be indicative of systemic failure* in the QA [Quality Assurance] systems across

³¹⁷ *Id.* at 22.

³¹⁸ *Id.* at 1.

³¹⁹ See Email from Colin Ferguson to Craig Baxter et al. (Sept. 10, 2009) [C-91].

³²⁰ See *id.*

both sites.”³²¹ According to Medsafe, “the problem is not limited to just the product entering USA.”³²² Rather, “fundamental failures in the QA system at the two sites (‘a plethora of things’) means the potential for other products to be affected is high.”³²³

137. Medsafe identified “two major options”: (1) “Under Section 37 of the Medicines Act, *prohibit further imports of Apotex products into New Zealand*”; or (2) “Under Section 36, as the products may not be of acceptable quality, require Apotex to prove why Medsafe should have confidence in the products.”³²⁴ Medsafe informed Apotex that it was “leaning toward the first option, i.e. following the FDA’s lead in banning imports.”³²⁵ Medsafe further informed Apotex that it would assemble a team urgently over the weekend to receive any further reports from Apotex.³²⁶

138. After further discussion with Apotex headquarters, Medsafe became even more alarmed. Apotex’s vice-president for regulatory and medical affairs, Bruce Clark, reported to senior Apotex officials: “We just finished the telecon with NZ authorities and clearly they are not happy that they do not have a customized picture of what Apotex is doing to satisfy safety concerns for their market.”³²⁷ Medsafe “very clearly stated to us that if they are not provided a satisfactory position from Apotex, they will be taking decisive action which we can understand to be an *import ban* with [the] possibility of *full recall* of all products.”³²⁸ Medsafe

³²¹ *Id.* (emphasis added).

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* (emphasis added).

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Email from Bruce Clark to Lance Lovelock et al. (Sept. 12, 2009) [C-99].

³²⁸ *Id.* (emphasis added).

acknowledged “that there are some products that are critical supply products and they have to take that into account,” but “that does not overshadow what they expect to come from us as an action plan.”³²⁹ Mr. Clark added: “Just to emphasize the tone they took, it was stated that if the [Form] 483 findings had been made for a NZ company by Medsafe, *they would have shut them down.*”³³⁰

139. Given the seriousness of the problems at the Etobicoke and Signet sites, Medsafe demanded that Apotex immediately provide:

- (1) A full justification as to why we [Apotex] should be allowed to continue to supply into the NZ market: this would include all steps taken to rectify the “serious failure of our quality systems” and ensure that product made now is different than what was being done at the time of the 483. This had to be specific to the NZ products and this answer has to be focused on why they should not impose an import ban.
- (2) General overview of the NZ products and how risk is managed for those products and why a withdrawal or recall of products on the market should not be mandatory.³³¹

Apparently unsatisfied with Apotex’s response, Medsafe placed an import ban on drugs from the Etobicoke and Signet facilities.³³² It also publicly announced that it was “working closely with other regulatory authorities and Apotex to obtain assurance that issues identified in the FDA

³²⁹ *Id.*

³³⁰ *Id.* (emphasis added).

³³¹ *Id.*

³³² Clark Statement ¶ 45 (noting that Medsafe placed an “import ban” on Apotex).

audit have been resolved by Apotex.”³³³ Medsafe indicated that the import ban would remain in place until “Medsafe is satisfied that Apotex had improved its manufacturing practices.”³³⁴

2. The Australian Drugs Authority Imposed an “Import Suspension” and Mandated Product Recalls

140. Australia’s drugs authority, the Therapeutic Goods Administration (TGA), was similarly alarmed by the cGMP violations at Apotex’s Etobicoke and Signet facilities. Apotex-Australia’s managing director informed senior management at Apotex Inc. that “TGA ha[d] been in discussions / contact with Medsafe, FDA and Health Canada,” in accordance with the “Rapid Alert Protocol” established by key health regulators worldwide.³³⁵ According to Apotex, its local Australian subsidiary “proposed a *voluntary* ban on imports from Etobicoke and Signet[.]”³³⁶ In fact, TGA imposed on Apotex-Australia the following “[n]on negotiable” demands:³³⁷

1. “Suspend all shipments of products manufactured by the Signet and Etobicoke sites for Australia with immediate effect . . . until Health Canada has completed its review of the Signet site”,³³⁸ and
2. “Initiat[e] a voluntary recall of [REDACTED] batches,” which were tainted with a “green colour.”³³⁹

³³³ Joint Media Release, Ministry of Health & PHARMAC, “Import of Apotex Products Under Close Monitoring” (Sept. 17, 2009) [C-102]. Apotex-New Zealand “signed a voluntary import restriction agreeing that it will not import [into New Zealand] products manufactured at the Signet Drive and Etobicoke sites in Canada.” Letter from Stewart Jessamine, Medsafe Group Manager, to Colin Robertson, Managing Director, Apotex NZ Ltd. (Oct. 20, 2009) [C-113].

³³⁴ Joint Media Release, Ministry of Health & PHARMAC, “Import of Apotex Products Under Close Monitoring” (Sept. 17, 2009) [C-102].

³³⁵ Email from Roger Millichamp to Craig Baxter et al. (Sept. 11, 2009) [C-95].

³³⁶ Memorial ¶ 212 (emphasis added).

³³⁷ Email from Roger Millichamp to Craig Baxter et al. (Sept. 11, 2009) [C-95].

³³⁸ *Id.*

³³⁹ *Id.*; Letter from Lance Lovelock, Apotex Vice President, Quality, to Richard Kirchner, Manager, Ontario Operational Centre (Acting), Health Canada (Sept. 8, 2009) [C-88].

Apotex-Australia's managing director stressed the importance of keeping this "voluntary" import suspension completely secret, including from Australian consumers:

The "voluntary suspension" of shipments is confidential – This will not go to any website or publication that is accessible to consumers, customers, competitors media etc in Australia.³⁴⁰

He added: "Keep it that way also in Canada please."³⁴¹

141. TGA specified that it would allow Apotex to ship products to Australia only when "Health Canada is OK with the plans that Apotex HQ has put in place" to remedy the various cGMP deficiencies.³⁴²

3. The European Union Banned Importation of Products from Etobicoke and Signet

142. The European Union drugs authority was similarly troubled by the problems at Apotex's Etobicoke and Signet facilities. The Dutch drugs authority, acting as the supervisory inspectorate for the European Union, publicly announced that: "The European Medicines Agency (EMA), the Medicines Evaluation Board (MEB) and the Netherlands Health Care Inspectorate (IGZ) have been made aware of Good Manufacturing Practices (GMP) problems with two manufacturing sites in Canada, belonging to the company Apotex."³⁴³ "As a precautionary measure," the IGZ "requested that Apotex temporarily cease the import and distribution of all products imported in the European Economic Area (EEA) that were

³⁴⁰ Email from Roger Millichamp to Craig Baxter et al. (Sept. 11, 2009) [C-95].

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ IGZ News Release, "Apotex Stops Import and Distribution of Medicinal Products from Canada" (Oct. 26, 2009) [C-114]. As Apotex notes: "The European Medicines Agency (EMA) had indicated to Apotex that all communications in this respect should be handled through IGZ," which "had agreed to act as the supervising inspectorate to manage communications that would come from various EU member states' inspectorates." Memorial ¶ 213.

manufactured at one of the manufacturing sites,” with the exception of one drug that was “excluded from the suspension of import and distribution, because it is considered to be an essential product by some European Union (EU) Member States.”³⁴⁴ The IGZ thus imposed a near-blanket import ban on Apotex products from the Etobicoke and Signet facilities.³⁴⁵

M. Health Canada Put the Etobicoke and Signet Facilities Under Close, Continuous, On-Site Supervision for More Than a Year

143. The serious, systemic problems identified at the Etobicoke and Signet facilities spurred Health Canada to action. Health Canada’s principal concern, naturally, was the public health and safety of Canadian consumers.³⁴⁶ But Health Canada also was keen to get Apotex into sustainable compliance as quickly as possible. At the time, Canada was suffering from a national drug shortage, which reportedly made it difficult for Canadian patients to obtain antibiotics, antidepressants, and many other essential and commonly-used drugs.³⁴⁷ Apotex is said to be the largest generic drug company in Canada, with a 24-percent share of the Canadian market.³⁴⁸ Apotex reports that nearly one in five prescriptions in Canada is filled with an Apotex drug.³⁴⁹ Unsurprisingly, Health Canada not only committed “substantial resources” to inspecting

³⁴⁴ IGZ News Release, “Apotex Stops Import and Distribution of Medicinal Products from Canada” (Oct. 26, 2009) [C-114].

³⁴⁵ See Clark Statement ¶ 45 (“The Netherlands Health Care Inspectorate (IGZ) also imposed, as a precautionary measure, an import ban on Apotex’s products imported into the European Economic Area.”).

³⁴⁶ See Health Canada, “About Health Canada,” available at <http://www.hc-sc.gc.ca/ahc-asc/activit/about-appropos/index-eng.php> (last visited Dec. 5, 2012) [R-82].

³⁴⁷ *Drug Shortages Must be Addressed – Pharmacists* (Nov. 2, 2010), CBC News, available at <http://www.cbc.ca/news/canada/calgary/story/2010/11/02/calgary-pharmacy-drug-shortage.html> (last visited Dec. 5, 2012) (reporting national drug shortage that began in 2009) [R-64].

³⁴⁸ Desai Statement ¶ 22.

³⁴⁹ Apotex Press Release, “Important Information on Apotex Health Products” (Sept. 17, 2009) [C-104].

Apotex's facilities,³⁵⁰ but also pledged to "monitor and ensure effective implementation of [Apotex's] corrective actions."³⁵¹

144. To that end, Health Canada imposed a series of extraordinary "terms and conditions" for the issuance of Apotex's 2010 establishment license, which remained in effect throughout the calendar year.³⁵² Under Canadian regulations, Health Canada imposes such "terms and conditions" where there is a concern that the drugs will be "unsafe for use" or where the terms and conditions are "necessary to prevent injury to the health of consumers."³⁵³

145. *First*, Apotex was required to submit *weekly* written progress reports to Health Canada, apprising it, for instance, if:

- "A batch is rejected for *any reason*";³⁵⁴
- "Stability testing results do not meet stability testing specifications for *any reason*";³⁵⁵
- "A batch requires reprocessing *at any stage*";³⁵⁶ or
- "Foreign material is found within a drug product batch."³⁵⁷

146. *Second*, in the event of any such occurrence, Apotex was required to "conduct a full investigation to determine the root cause of the event and the impact of the event in relation to

³⁵⁰ Memorial ¶ 5.

³⁵¹ Letter from Stewart Jessamine, Medsafe Group Manager, to Colin Robertson, Managing Director, Apotex NZ Ltd. (Oct. 20, 2009) [C-113].

³⁵² Terms and Conditions Annex for 2010 Drug Establishment License 100375-A, at 3 (Dec. 31, 2009) ("These terms and conditions are valid until December 31, 2010") [C-126].

³⁵³ Food and Drug Regulation C.01A.008(4) [RLA-173], cited in Terms and Conditions Annex for 2010 Drug Establishment License 100375-A (Dec. 31, 2009) [C-126].

³⁵⁴ Terms and Conditions Annex for 2010 Drug Establishment License 100375-A, at 2 (Dec. 31, 2009) (emphasis added) [C-126].

³⁵⁵ *Id.* (emphasis added).

³⁵⁶ *Id.* (emphasis added).

³⁵⁷ *Id.*

the manufacturing process, the batch in question and other batches which are currently in-process and on the market.”³⁵⁸

147. *Third*, Apotex was required to submit monthly updates of any such investigations, furnishing Health Canada with any applicable “summary of future investigation plans with scientific justification” and “a copy of the final investigation report including all attachments, batch disposition decisions, corrective / preventative actions, and related e-mails.”³⁵⁹

148. *Fourth*, Apotex was “prohibited from reworking commercial batches.”³⁶⁰ This requirement was aimed at putting an end to Apotex’s practice of retesting failed batches using different techniques until they passed inspection, instead of rejecting failed batches and ascertaining the root cause of the failure.

149. *Fifth*, Apotex was required to submit monthly progress reports on, among other things, “quality system improvements being implemented” and “key quality metrics,” including batch rejections, consumer complaints, and unimplemented or untimely corrective or preventative actions.³⁶¹

150. Finally, Apotex was required to submit to *monthly site visits* by Health Canada. These recurring visits were aimed at:

- (1) monitoring Apotex’s compliance with the terms and conditions of its continued operations;
- (2) discussing Apotex’s “plan to reduce overdue investigations / corrective and preventative actions”; and

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 3.

³⁶¹ *Id.*

- (3) discussing serious “deviations” from cGMPs, such as: “Cleaning issues”; “Material substitution”; “stability failures”; “leaking desiccants”; “Batches released with incorrect results”; use of batches “beyond vendor expiry”; drug recalls; and “Foreign material” – *i.e.*, “[e]xtraneous material or contaminants.”³⁶²

Only on this basis, and under Health Canada’s close, continuous, on-site supervision, Apotex’s drug establishment license was extended for a year, until December 31, 2010.³⁶³

N. In Accordance with Canada’s “Mutual Recognition Agreements,” Other Drug Authorities Accepted Health Canada’s Compliance Determinations

151. Health Canada’s compliance determination permitted other States to recognize that decision without having to conduct their own independent follow-up inspections. Canada is party to Mutual Recognition Agreements (MRAs) with Australia, New Zealand, Switzerland, and the European Union.³⁶⁴ These agreements provide “assurance that equivalent GMP standards are applied by the Parties of the MRA and removes the need for additional inspection and re-controls at import.”³⁶⁵ The agreements further require the parties to “mutually recognise . . . the conclusions of inspections of manufacturers carried out by the relevant inspection services of the other Party.”³⁶⁶

³⁶² See, e.g., Agenda for Health Canada’s Site Visit (Feb. 22, 2010) [C-130]; Agenda for Health Canada’s Site Visit (Mar. 29, 2010) [C-139]; Agenda for Health Canada’s Site Visit (Apr. 22, 2010) [C-145]; Terms and Conditions Annex for 2010 Drug Establishment License 100375-A, Glossary of Terms, at 4 (Dec. 31, 2009) (defining “foreign material”) [C-126].

³⁶³ Establishment License 100375-A (Dec. 31, 2009) [C-126].

³⁶⁴ Memorial ¶ 209; The European Agency for the Evaluation of Medicinal Products, *Mutual Recognition Agreements Between the EU and the Respective Parties Australia, Canada, New Zealand and Switzerland: Guide to the MRAs in Operation*, at 11 (May 5, 2003) [C-7].

³⁶⁵ *Id.* at 3.

³⁶⁶ *Id.*

152. Thus, in accordance with Canada’s MRAs, and on the basis of Health Canada’s commitment to its MRA partners to “ensure effective implementation of corrective actions,”³⁶⁷ foreign health regulators recognized Health Canada’s decision to allow Apotex to resume exporting drugs from the Etobicoke and Signet facilities into their respective territories.³⁶⁸ Notably, Australia’s acceptance of the two sites as “Compliant” was conditional “pending the corrective action measures for the deficiencies identified.”³⁶⁹

153. Canada has not concluded a Mutual Recognition Agreement with the United States, and thus the United States was not bound by Health Canada’s decisions with respect to Apotex’s Etobicoke and Signet facilities. Instead, consistent with FDA’s regulations and practice, FDA required Apotex to submit to reinspections before products from those facilities could be exported to the United States.³⁷⁰ Apotex required more than a year to request those reinspections.³⁷¹

³⁶⁷ See, e.g., Letter from Stewart Jessamine, Medsafe Group Manager, to Colin Robertson, Apotex NZ Ltd. Managing Director, at 1 (Oct. 20, 2009) (citing Health Canada’s “stated intention to monitor and ensure effective implementation of corrective actions”) [C-113].

³⁶⁸ See, e.g., *id.* (noting consideration given to Health Canada’s (1) “compliance status” for the Signet facility; (2) “‘exit meeting’ report”; (3) “stated intention to monitor and ensure effective implementation of corrective actions”; and (4) “intention to re-inspect the site prior to the renewal of Apotex’s establishment license”); Letter from Stewart Jessamine, Medsafe Group Manager, to Colin Robertson, Apotex NZ Ltd. Managing Director, at 1 (Nov. 24, 2009) (noting the same findings regarding the Etobicoke site) [C-121]; Email from Mark Dickson to Roger Millichamp (Nov. 11, 2009) (agreeing to lift the voluntary import ban, and inviting Apotex to implement, at the earliest opportunity, relevant changes to its manufacturing principles for product quality review as well as other functions) [C-118].

³⁶⁹ Email from Mark Dickson to Roger Millichamp (Nov. 11, 2009) [C-118].

³⁷⁰ Apotex, Draft Minutes of Meeting with FDA, at 6 (Mar. 31, 2010) (noting FDA reinspections required for lifting of Import Alert) [C-140]; FDA, Minutes of Meeting with Apotex, at 3 (Mar. 31, 2010) (same) [R-54]; Memorial ¶ 236 (same).

³⁷¹ Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex, to Carmelo Rosa, Acting Branch Chief, International Compliance Branch, FDA et al., at 1 (Aug. 27, 2010) (requesting “re-inspection by FDA of our Etobicoke facility in early October” 2010) [C-166]; Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex, to Carmelo Rosa, Acting Branch Chief, International Compliance Branch, FDA et al., at 1 (Sept. 29, 2010) (stating that “Apotex requests re-inspection by FDA of our Signet facility”) [C-169].

O. FDA Actively Worked with Apotex to Facilitate Its Compliance Efforts

154. In the meantime, FDA continued to place a high priority on maintaining open dialogue with Apotex in support of its compliance efforts. Throughout the remainder of 2009 and into 2010, FDA received and reviewed material provided by the firm and communicated continuously with Apotex concerning those efforts.

1. FDA Allowed Apotex Inc. to Export “Compassionate Use” Drugs to the United States

155. Apotex had requested permission to ship two investigational new drugs to the United States for compassionate use. CDER recommended that Apotex prioritize these products in Apotex’s Product Quality Assessment,³⁷² conditioning Apotex’s supply of the two drugs on an independent third-party quality assessment.³⁷³ Apotex agreed, reconfirming that it would provide a quality assessment protocol for FDA’s review.³⁷⁴

156. Days later, Apotex requested guidance concerning an urgent medical need to ship an investigational new drug to patients in the United States.³⁷⁵ FDA agreed to a limited release of the drug, provided that Apotex confirm its testing of the materials, as previously agreed.³⁷⁶

³⁷² Apotex, Draft Minutes of Meeting with FDA, at 5 (Sept. 11, 2009) [C-94]; *see also* Apotex, Draft Minutes of Meeting with FDA, at 1 (Sept. 17, 2009) [C-103]. Apotex confirmed that the investigational new drugs would be treated as a priority and that Lachman Consulting Services (LCS) would conduct the PQAs because of the “size of the task.” *Id.*

³⁷³ Apotex, Draft Minutes of Meeting with FDA, at 1-2 (Sept. 17, 2009) [C-103]. This independent third-party quality assessment would be performed for each batch of drugs intended to be sent to the United States and would include review of the batch records and GMP records, and triple retesting using separate samples. *Id.*

³⁷⁴ *Id.* at 3 (noting that “Dr. Desai indicated that while we had originally intended to provide to FDA a protocol for the PQA at the end of this week, because we had only just engaged Lachman’s a revised timeline would be approximately the end of the day on Monday (September 21)”).

³⁷⁵ Email from Lance Lovelock to Giuseppe Randazzo (Sept. 23, 2009) [C-107].

³⁷⁶ Email from Giuseppe Randazzo to Lance Lovelock (Sept. 24, 2009) [C-107].

2. FDA Expressed Concerns About Other “Serious Issues” Reported by Apotex

157. FDA remained concerned, however, about reports of ongoing problems at the Etobicoke and Signet facilities. Despite Apotex’s commitment to improve its quality systems and resolve outstanding violations, Apotex’s Field Alert Reports highlighted ongoing problems. Apotex, reported, for instance, the presence of residue and foreign material in drug batches and the possibility of cross-contamination. FDA convened a telephone conference to express its concern that Apotex had not yet resolved these “serious issues.”³⁷⁷ In response, Apotex agreed to provide, among other things, a protocol to test for cross-contamination, a copy of Apotex’s cleaning procedures, information on the design of problematic equipment, and certain reports on the impacted batches.³⁷⁸

3. FDA Sent Apotex a Warning Letter Concerning Serious cGMP Violations Found at the Signet Facility, Advising Apotex that Its Corrective Actions to Date Were Insufficient

158. On March 29, 2010, FDA sent Apotex a warning letter with respect to the Signet facility,³⁷⁹ highlighting the most significant outstanding issues from the Signet inspection, including:

- Contamination,³⁸⁰
- Failure to meet test specifications;³⁸¹

³⁷⁷ FDA, Draft Minutes of Teleconference with Apotex, at 1 (Jan. 27, 2010) [R-51].

³⁷⁸ *Id.* at 1-4.

³⁷⁹ 2010 Signet Warning Letter [C-138].

³⁸⁰ *Id.* at 2 (noting contamination of certain generic drug products with “acetate fibers, adhesive/glue, cellulose-based materials, fluorocarbons, hairs, metallic particles, nylon, polyolefins, and protein-based materials,” and black particles identified “as metallic material, PVC-based material, silicone oxide-based material, and charred material”; some of which were released and shipped to the United States). The failure of quality control unit to follow responsibilities and procedures applicable to release of the drug product violated 21 C.F.R. § 211.22(d). *Id.*

³⁸¹ *Id.* at 2-3 (noting the failure of certain process validation batches of differing strengths of a generic drug product, oxcarbazepine, to meet dissolution test specifications). The Warning Letter further cited a lack of adequate written

- Failure to investigate batch discrepancies and batch failures;³⁸² and
- Failure to implement adequate cleaning and maintenance procedures to prevent contamination.³⁸³

159. The warning letter also cited Apotex’s “violation of the Field Alert reporting requirements.”³⁸⁴ The reports – many of which had been filed late – indicated contamination found in Apotex’s manufacturing equipment, prompting FDA to express concern “with the continuing CGMP violations demonstrated at your facilities and failure to report FAR related events within three days of becoming aware of a problem.”³⁸⁵

160. The letter noted that Apotex’s September 3, 2009 response to the investigators’ observations had been “inadequate and lack[ed] sufficient corrective actions.”³⁸⁶ The letter thus reminded Apotex that until the firm could demonstrate cGMP compliance, CDER would continue to “recommend withholding approval of any new applications or supplements” from the Signet facility.³⁸⁷

procedures for production and process controls to assure that drug products have the identity, strength, quality, and purity they purport to have, in violation of 21 C.F.R. § 211.100(a). *Id.* at 2.

³⁸² *Id.* at 3-4 (noting a failure to thoroughly investigate batch discrepancies and failures, regardless of whether the batch was distributed, involving a violation of 21 C.F.R. § 211.192). After providing examples of such failures, FDA’s Warning Letter provided that: “Your response to the FDA-483 is inadequate in that it does not address the inability of your quality unit to conduct adequate investigations, determine the root cause, or establish adequate preventive and corrective actions for the problems found[.]” *Id.* at 4.

³⁸³ *Id.* at 4-5. This citation involved a violation of 21 C.F.R. § 211.67(a). *Id.* at 4.

³⁸⁴ *Id.* at 5. Untimely FARs are a violation of 21 C.F.R. § 314.81(b)(I)(i)-(ii). *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 1.

³⁸⁷ *Id.* at 6 (noting that “failure to correct these violations will result in FDA continuing to deny entry of articles manufactured at Apotex Inc., Toronto, Canada into the United States” and that, because Apotex was currently under Import Alert, articles were subject to refusal of admission under U.S. law as failing to conform to current good manufacturing practice).

4. FDA Met with Apotex to Assess Compliance Efforts and Discuss Next Steps, Including Reinspection

161. Five months after Apotex made its initial commitment to improve its quality systems, Apotex requested an in-person meeting to report on the firm's progress.³⁸⁸ In advance of the meeting, Apotex sent CDER a package of discussion materials.³⁸⁹ Far from assuaging FDA's concerns, the additional material reinforced those concerns. Apotex reported that its third-party consultant's quality assessment was "consistent with recent FDA inspectional observations and the recent Warning Letter citations" and "*confirmed that system level improvements were needed for all six [cGMP] systems.*"³⁹⁰

162. Apotex and FDA met to discuss the material on March 31, 2010. At no time during the meeting did Apotex dispute FDA's cGMP findings, complain about the recent Signet warning letter, or challenge having been placed on Import Alert. To the contrary, Apotex acknowledged the serious problems with its facilities, briefed FDA on the firm's ongoing or proposed corrective

³⁸⁸ FDA, Minutes of Meeting with Apotex, at 1 (Mar. 31, 2010) (noting that "[o]n February 4, 2010, Apotex, Inc. requested a face-to-face meeting to report on the progress of their instituted program, aimed at reviewing and enhancing manufacturing 'operations' at its Etobicoke and Signet facilities") [R-54].

³⁸⁹ Apotex sent FDA a copy of the firm's "Global Quality Systems Revitalization Corrective Action Plan," which Apotex presented as a "comprehensive cGMP evaluation and subsequent revitalization of all Quality Systems across all development and manufacturing sites of Apotex." Apotex Global Quality Systems Revitalization Corrective Action Plan, Rev. 1 (attached to Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Paul Balcer, CDER – Office of Compliance (Mar. 17, 2010) [C-136]), at 6 [C-132]. According to the Plan, it was undertaken in "response to regulatory and consultant findings and observations reported in late 2008 and throughout much of 2009." The action plan was designed to "help direct Apotex towards achieving a state of sustainable compliance." *Id.*

³⁹⁰ Jeff Yuen & Associates, Inc. (JYA), Final Summary Report for Apotex Corrective Action Plan Audit, at 2 (Mar. 17, 2010) (emphasis added) [C-137]. The Summary Report also notes that Apotex took the regulatory inspections and "its regulatory obligations seriously, and has acknowledged the observations and comments put forward by both the HPFBI and the FDA. Apotex initiated efforts to address these findings and to enhance its quality programs so as to regain the confidence of these regulatory authorities and to provide assurance to all that Apotex products are manufactured in compliance with the best quality standards and practices possible." *Id.* at 5. JYA further remarked that at the conclusion of its audit: "similar findings consistent with recent regulatory inspections were noted particularly with respect to Quality Systems, Laboratory Controls, and Production Controls inclusive of Packaging/Labeling Controls." *Id.* at 5-6.

actions, and introduced three outside consultants retained to help in that regard.³⁹¹ In its opening remarks, Apotex advised FDA that it was:

- Enhancing leadership and accountability for Quality functions;
- Aggressively addressing issues raised by FDA, Health Canada, and third-party experts;
- Redesigning and implementing systems to ensure sustainable regulatory compliance;
- Hiring 250 full-time employees, including 150 in Quality; and
- Spending \$ [REDACTED] on outside experts to help meet the firm's September 2009 commitments.

163. Apotex stated that it “gets” FDA’s concerns and was “committed to improving quality systems and to getting it right” in order to quickly return to the U.S. market.³⁹³ Apotex conceded that there were ongoing compliance issues – acknowledging, for example, that Field Alert Reports had been submitted late;³⁹⁴ that a final Product Quality Assessment report was not yet

³⁹¹ Apotex, Draft Minutes of Meeting with FDA, at 1-5 (Mar. 31, 2010) [C-140]; FDA, Minutes of Meeting with Apotex, at 1-4 (Mar. 31, 2010) [R-54].

³⁹² Apotex, PowerPoint Presentation to FDA, Apotex Inc. – Compliance Update Presentation to FDA (Mar. 31, 2010), slide titled “Opening Remarks” (emphasis added) [R-53].

³⁹³ Apotex, Draft Minutes of Meeting with FDA, at 2 (Mar. 31, 2010) (noting that Jack Kay stated that “[e]xecutive management is committed to improving quality systems and to getting it right,” and that “Apotex wants to return as quickly as possible to [the] US market”) [C-140]; *see also* FDA, Minutes of Meeting with Apotex, at 1 (Mar. 31, 2010) (noting that Jack Kay “stated that the company “gets it” and has implemented changes in [a] number of processes and that the organization and its executives are committed to global quality system”) [R-54].

³⁹⁴ Apotex, PowerPoint Presentation to FDA, Apotex Inc. – Compliance Update Presentation to FDA, slide titled “Apotex Preliminary Comments to March 29, 2010 Warning Letter” (Mar. 31, 2010) [R-53]. Apotex’s formal response to the Signet Warning Letter also “continue[d] to acknowledge the significance of the observations cited in the FDA-483s and Warning Letters issued to the [sic] Etobicoke and Signet.” Letter from Stephen Simmons, Vice President, Corporate Quality, Global Research, Development & Quality, Apotex Inc., to Richard Friedman, Director, Division of Manufacturing and Product Quality, CDER – Office of Compliance (Apr. 17, 2010) (attaching Apotex Response to Signet Warning Letter) [C-144]. Among other things noted in this response, Apotex committed to “recall all impacted batches on the market that were reported” in the listed FARs issued in October, November, and December 2009. *Id.* at 16-17.

available for certain products;³⁹⁵ and that 11 percent of products tested had failed to meet established criteria.³⁹⁶

164. Apotex further reported that its “Quality Systems Assessments” had identified deficiencies within and across all three of its Canadian facilities (Etobicoke, Signet, and Richmond Hill), as well as at its Bangalore site.³⁹⁷ Apotex noted, however, that Richmond Hill and Bangalore were now operating in a “better state of compliance based on stricter application and stronger enforcement of quality principles across all six Quality Systems.”³⁹⁸ Apotex did not request reinspection during its presentation.

165. For its part, CDER explained to Apotex that FDA had “invested an extraordinary amount of resources conducting reviews, inspections and evaluation” of Apotex’s information.³⁹⁹

CDER officials provided Apotex with feedback and recommendations, stressing from the outset

³⁹⁵ FDA, Minutes of Meeting with Apotex (Mar. 31, 2010), at 3 (noting that “Apotex is to provide a summary of Wave 2 products to FDA in April 2010”) [R-54]; *see also* Apotex, Draft Minutes of Meeting with FDA, at 1, 3 (Mar. 31, 2010) (noting that “Apotex will provide a summary of Wave 2 products to FDA in April” and that Jeremy Desai stated that Wave 2 products report for the PQAs “will be available soon”) [C-140].

³⁹⁶ Apotex, Draft Minutes of Meeting with FDA (Mar. 31, 2010), at 3 (citing failures in three of 27 products assessed in Wave 1) [C-140]; Apotex, PowerPoint Presentation, Apotex Inc. – Compliance Update Presentation to FDA, slide titled “PQAs [Q4-2009 to Present], WAVE-1 Products Failing PQA Criteria” (Mar. 31, 2010) (citing failures to meet PQA criteria for [REDACTED] tablets, [REDACTED] capsules, and [REDACTED] capsules) [R-53]; *id.* at slide titled “PQAs [Q4-2009 to Present], Products Requiring Further Action, Wave-2 Products – Summary of Findings” (citing a failure to meet PQA criteria for [REDACTED]). Apotex also acknowledged the significance of its data integrity problems, devoting much of its presentation to discussing manufacturing supplements. Apotex confirmed that it had given “careful attention” to FDA concerns, that it had implemented “interim controls . . . to prevent recurrence,” and that it was “committed to integrity and transparency in all communications with FDA.” *Id.* at slide titled “Manufacturing Supplements Investigation (cont.), Conclusions.”

³⁹⁷ Apotex, PowerPoint Presentation to FDA, Apotex Inc. – Compliance Update Presentation to FDA, slide titled “GQSA/Enhancement Program (cont.), Phase 1: Quality Systems Assessments (QSAs), Scope of Work and Summary of Findings/Recommendations” (Mar. 31, 2010) [R-53].

³⁹⁸ *Id.*

³⁹⁹ FDA, PowerPoint Presentation, CDER Office of Compliance Apotex Inc. Meeting, slide titled “FDA Message” (Mar. 31, 2010) [R-55].

that FDA wanted Apotex to reach “sustainable compliance.”⁴⁰⁰ At the same time, however, CDER advised Apotex that it needed to identify the “root cause [of problems] and communicate deviations rapidly to build an environment of quality.”⁴⁰¹

166. As the meeting drew to a close, CDER officials offered their blunt assessment: based on the documentation provided, Apotex had not yet made the required progress.⁴⁰² FDA was “not confident that all sites have a clear understanding of FDA requirements, including cGMPs.”⁴⁰³ CDER instructed Apotex to request reinspection after it had resolved issues identified in the warning letters, but made clear that reinspection was contingent on:⁴⁰⁴

⁴⁰⁰ FDA, Minutes of Meeting with Apotex, at 1 (Mar. 31, 2010) [R-54]; *see also* Apotex, Draft Minutes of Meeting with FDA, at 2 (Mar. 31, 2010) [C-140].

⁴⁰¹ Apotex, Draft Minutes of Meeting with FDA, at 2 (Mar. 31, 2010) [C-140]. CDER further noted that it could not reconcile Apotex’s outside consultant’s assessment that there were no “significant deficiencies” with Apotex’s batch assessment process with FDA’s own observations of charred material found in product batches, explaining that it wished to see, among other things, a “root cause analysis on the company’s quality system to understand how certain batches got on the market.” FDA, Minutes of Meeting with Apotex, at 2 (Mar. 31, 2010) [R-54]; *see also* Apotex, Draft Minutes of Meeting with FDA, at 3-4 (Mar. 31, 2010) [C-140]. CDER also expressed concern that its consultant had conducted limited sampling of products and asked Apotex to provide documentation on its training and how deviations were fixed. *Id.* at 3 (noting that the consultant’s “approach of a limited sampling of batches assumes all batches are in control. What is needed is to ensure [Apotex] build[s] quality into products.”). Contrary to Apotex’s assertion, FDA did not “soften[] its stance” on the data integrity issues involved in Apotex’s supplements. Memorial ¶ 237. CDER remained concerned about the data integrity issues identified with Apotex’s manufacturing supplements. CDER questioned Apotex’s review to date, advised the firm that it needed to ensure that all trends were checked and that all problems encountered were detailed in the supplements, and requested a follow-up telephone conference on this issue. FDA, Minutes of Meeting with Apotex, at 3 (Mar. 31, 2010) [R-54]; *see also* Apotex, Draft Minutes of Meeting with FDA, at 5 (Mar. 31, 2010) [C-140]. Apotex filed an addendum to the supplement and was notified of its approval on November 13, 2009. *See* Apotex, PowerPoint Presentation to FDA, Apotex Inc.– Compliance Update Presentation to FDA, slide titled “Manufacturing Supplements Investigation, Steps Taken Since Sept. 11, 2009 Meeting” (Mar. 31, 2010) [R-53]; *see also* Apotex, Draft Minutes of Meeting with FDA, at 5 (Mar. 31, 2010) [C-140].

⁴⁰² Apotex, Draft Minutes of Meeting with FDA, at 6 (Mar. 31, 2010) [C-140]. In particular, Mr. Rosa remarked that although Apotex was “moving in the right direction,” he did not believe that Apotex was yet “there.” *Id.*

⁴⁰³ FDA, PowerPoint Presentation to Apotex, CDER Office of Compliance Apotex Inc. Meeting, slide titled “FDA Message” (Mar. 31, 2010) [R-55]. FDA also reminded Apotex management that it expected the firm to “show a transformation” and that reinspection was required to verify compliance with cGMP. *See* Apotex, Draft Minutes of Meeting with FDA, at 6 (Mar. 31, 2010) [C-140].

⁴⁰⁴ Apotex, Draft Minutes of Meeting with FDA, at 6 (Mar. 31, 2010) (clarifying that FDA would “only give Apotex approval for lifting the import alert based on inspection[s],” not “documents”) [C-140]. FDA also outlined for Apotex precisely what areas the Agency would focus on during reinspection. *See id.* at 6-7. FDA listed issues such as having an upfront design for fixing problems (“get to [the] root cause”) and noted that it would review in detail Apotex’s [p]reventive maintenance and cleaning.” *Id.* at 6. FDA emphasized that it wanted to see how Apotex’s

- 1) Significant assurance that sustainable CGMP conformance has been instituted, and;
- 2) Robust evaluation and comprehensive resolution of potential data integrity issues.

–These pervasive issues can only be remedied through systemic and transformational changes at your firm.⁴⁰⁵

Noting that there was “work to do,” CDER explained that it expected “responses to questions raised today before resuming further review.”⁴⁰⁶

167. Apotex did not disagree with this approach. Apotex believed it was making progress, but conceded that “the touchdown hasn’t been scored yet.”⁴⁰⁷ The parties confirmed that Apotex would complete several action items and provide FDA with additional reports, documentation on employee training, clarification on the manufacturing supplements, and a written response to the Signet warning letter.⁴⁰⁸

168. At no point did Apotex complain that FDA had done anything other than facilitate Apotex’s efforts to bring its facilities back into cGMP compliance.⁴⁰⁹ The day after the meeting, in fact, Apotex thanked CDER for have facilitated the “worthwhile” meeting, and acknowledged

corporate governance worked, stressing that Apotex needed to be attentive to quality (“Quality starts with Production”). *Id.* at 7.

⁴⁰⁵ FDA, PowerPoint Presentation to Apotex, CDER Office of Compliance Apotex Inc. Meeting, slide titled “FDA Message continued” (Mar. 31, 2010) [R-55].

⁴⁰⁶ Apotex, Draft Minutes of Meeting with FDA, at 7 (Mar. 31, 2010) [C-140].

⁴⁰⁷ *Id.*

⁴⁰⁸ FDA, Minutes of Meeting with Apotex, at 3-4 (Mar. 31, 2010) [R-54]; Apotex, Draft Minutes of Meeting with FDA, at 1 (Mar, 31, 2010) [C-140].

⁴⁰⁹ It was not until December 13, 2010, that Apotex, through its attorneys, complained to officials at FDA with respect to FDA’s actions in connection with the scheduled reinspections of the Etobicoke and Signet sites. *See* Letter from Carmen Shepard and Kate Beardsley, Buc & Beardsley LLP, to Ralph Tyler, Chief Counsel, Office of Chief Counsel, FDA, and Deborah Autor, Director, CDER – Office of Compliance (Dec. 13, 2010) [C-185].

that “the time and effort put in by everyone at FDA is very much appreciated.”⁴¹⁰ Apotex reiterated its appreciation a month later, stating: “We realize that you have devoted significant resources to Apotex-related matters over the last nine months, and we appreciate that commitment.”⁴¹¹

5. FDA Continued to Work with Apotex to Address Ongoing Compliance Issues and to Review Apotex Proposals to Re-enter the U.S. Market

169. Throughout 2010, FDA continued to work with the firm to address unresolved compliance issues. FDA thus maintained open, regular communication with Apotex management, including through frequent telephone conferences.⁴¹²

170. During this period, however, FDA continued receiving a steady stream of Field Alert Reports, including *ten* FARs from Apotex’s Richmond Hill facility.⁴¹³ This prompted another telephone conference with Apotex in June 2010.⁴¹⁴ These FARs – many of which were filed late – indicated product contamination from a plasticizer as well as metal fragments found in nasal and ophthalmic products.⁴¹⁵ Officials in FDA’s Division of Manufacturing and Product Quality

⁴¹⁰ Email from Bruce Clark to Paul Balcer (Apr. 1, 2010) [R-56].

⁴¹¹ Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Rosa Motta, Acting Branch Chief, International Compliance Branch, FDA, and Carmelo Rosa, Team Leader, International Compliance Branch, FDA, at 4 (May 13, 2010) [C-148].

⁴¹² *See, e.g.*, FDA, Minutes of Teleconference with Apotex (May 7, 2010) [R-59]. FDA remained concerned that Apotex had not reviewed enough supplements to identify trends and failures in relation to quality issues. Later, Apotex submitted a draft protocol for reviewing additional manufacturing supplements. *See* Email from Bernice Tao to Carmelo Rosa, at 5 (June 21, 2010) (attaching Letter from Bruce Clark, Vice President, Regulatory and Medical Affairs, Apotex Inc., to Carmelo Rosa, Acting Branch Chief, International Compliance, FDA (June 21, 2010) regarding “Apotex Inc. Manufacturing Supplements”) [C-150]. FDA subsequently approved the protocol. Email from Carmelo Rosa to Jeremy Desai (July 21, 2010) (stating that FDA had reviewed Apotex’s “proposed protocol of June 21, 2010 to re-evaluate the drug supplements” and agreeing with Apotex’s “justification to review the referenced supplements submitted to the agency since 2004, and [Apotex’s] detailed approach”) [C-156].

⁴¹³ FDA, Minutes of Teleconference with Apotex, at 1 (June 14, 2010) [R-61].

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

were very concerned that Apotex had failed to initiate a product recall.⁴¹⁶ FDA requested a follow-up teleconference two days later.⁴¹⁷

171. Despite these ongoing compliance issues, Apotex sought approval to export certain drugs to the United States prior to reinspection of the Etobicoke and Signet facilities.⁴¹⁸ Although FDA continued to allow Apotex to export an investigational new drug, “under the direct oversight of [Apotex’s] third party consultant,”⁴¹⁹ FDA reminded Apotex that “any decision to resume distribution [would] be evaluated by the agency during the next FDA inspection.”⁴²⁰ FDA also declined to approve Apotex’s request for a special pre-approval inspection for one of its drug applications from Signet,⁴²¹ because “conducting only a PAI before the cGMP re-inspection in

⁴¹⁶ *Id.* (stating that the “firm continues to release these products without initiating a product recall, which is concerning to DMPQ International Compliance Branch”).

⁴¹⁷ *Id.* at 2 (stating that “FDA notified Apotex about the outstanding FARs and requested that all information on them be discussed at a teleconference on Wednesday, June 16, 2010”).

⁴¹⁸ *See* Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Rosa Motta, Acting Branch Chief, International Compliance Branch, FDA, and Carmelo Rosa, Team Leader, International Compliance Branch, FDA, at 4 (May 13, 2010) (proposing resumption of shipment of certain drug products and attaching, at Attachment C – Products to be Shipped from Indianapolis Warehouse, the list of products proposed for export prior to reinspection) [C-148]; *see also* Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Carmelo Rosa, Acting Branch Chief, International Compliance Branch, FDA, and Hidee Molina, Team Leader, International Compliance Branch, FDA (June 25, 2010) (requesting special consideration to resume shipment of “shortage drugs” to the U.S. market and proposing a protocol for third-party oversight by consulting firm, LCS) [C-152]; Email from Carmelo Rosa to Jeremy Desai (July 21, 2010) (noting that there was no “market shortage” for those drugs, and thus there was no need for a “compassionate use” exception) [C-156].

⁴¹⁹ Email from Carmelo Rosa to Jeremy Desai (July 21, 2010) (stating that “the agency will continue to allow importation of [REDACTED] tablets, [REDACTED] currently under a treatment IND protocol and under the direct oversight of your third party consultant, as previously agreed”) [C-156].

⁴²⁰ Email from Carmelo Rosa to Kate Beardsley (June 13, 2010) [R-60].

⁴²¹ Apotex requested FDA to conduct a special pre-approval inspection of one of the Signet facilities for the sterile injection chemotherapy drug docetaxel, which was required before FDA could approve Apotex’s application for that drug. Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Rick Friedman, Director, Division of Manufacturing & Product Quality, Center for Drug Evaluation and Research, FDA (Oct. 6, 2010) [C-170]. Despite admitting that FDA’s original plan to conduct the pre-approval inspection when it conducted its cGMP reinspection of Signet “made sense,” and that a pre-approval inspection “likely cannot be completed in time to meet a November launch date” for docetaxel, Apotex nevertheless requested the advance inspection. *Id.* at 3.

this case would, at best, produce incomplete or inconclusive results and be an unproductive use of Agency resources.”⁴²²

P. FDA Diligently Scheduled and Conducted Inspections of Apotex’s Etobicoke and Signet Facilities

172. In June 2010, one of Apotex’s third-party consultants stated that it was “prepared to certify” that the Etobicoke facility was “in compliance with GMP.”⁴²³ Health Canada, moreover, gave the Etobicoke⁴²⁴ and Signet⁴²⁵ facilities “compliant” ratings a month later, in July 2010. Apotex, however, apparently concluded that neither Etobicoke nor Signet was ready for an FDA inspection at the time. Apotex first requested, in an August 27 letter, that FDA reinspect the Etobicoke facility in *October 2010*.⁴²⁶ Apotex further requested, in a September 29, 2010 letter, that FDA reinspect the Signet facility, without specifying any preferred timetable.⁴²⁷

⁴²² Letter from Deborah Autor, Director, CDER – Office of Compliance, to Carmen Shepard and Kate Beardsley, Buc & Beardsley, LLP, at 7 (Dec. 23, 2010) [C-186].

⁴²³ Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex, to Carmelo Rosa, Acting Branch Chief, International Compliance Branch, FDA, and Hidee Molina, Team Leader, International Compliance Branch, FDA, at 1 (Aug. 27, 2010) [C-166].

⁴²⁴ *Id.* at 2.

⁴²⁵ Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Carmelo Rosa, Acting Branch Chief, International Compliance Branch, FDA, and Hidee Molina, Team Leader, International Compliance Branch, FDA, at 1 (Sept. 29, 2010) [C-169].

⁴²⁶ Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Carmelo Rosa, Acting Branch Chief, International Compliance Branch, FDA, and Hidee Molina, Team Leader, International Compliance Branch, FDA, at 1 (Aug. 27, 2010) (stating that “Apotex requests re-inspection by FDA of our Etobicoke facility in early October”) [C-166].

⁴²⁷ Letter from Jeremy Desai, Executive Vice President, Global Research, Development & Quality, Apotex Inc., to Carmelo Rosa, Acting Branch Chief, International Compliance Branch, FDA, and Hidee Molina, Team Leader, International Compliance Branch, FDA, at 1 (Sept. 29, 2010) (stating merely “Apotex requests re-inspection by FDA of our Signet facility”) [C-169].

173. CDER made a high priority request for an inspection of Apotex's Etobicoke facility on September 22, 2010.⁴²⁸ A similar high priority request for reinspection was made for the Signet facility on October 14, 2010.⁴²⁹ The reinspections initially were scheduled for November 29 through December 17, 2010.⁴³⁰ This was an extraordinarily fast turnaround for FDA, given that requests for reinspection of foreign facilities typically require several months' planning.⁴³¹

174. In an October 26, 2010 letter to Melvin Szymanski, FDA's Supervisor of the Dedicated Foreign Drug Cadre, Apotex wrote to confirm that the inspections would include a pre-approval inspection for Apotex's pending ANDAs.⁴³² PAIs require investigation of specific drug products and thus go beyond cGMP inspections.⁴³³ On November 4, 2010, Apotex sent CDER a list of [REDACTED] ANDAs for which it hoped to have pre-approval inspections, noting Apotex's preferred prioritization.⁴³⁴

⁴²⁸ Memorandum from Carmelo Rosa, Team Leader, International Compliance Branch, to Director, International Operations (Sept. 22, 2010) (requesting a "priority inspection at Apotex, Inc. (Etobicoke)" and characterizing the inspection as "Priority: High") [R-62].

⁴²⁹ Memorandum from Carmelo Rosa, Acting Branch Chief, International Compliance Branch, to Director, International Operations (Oct. 14, 2010) (requesting a "priority inspection at Apotex Inc." located at "150 Signet Drive" and characterizing the inspection as "Priority: High") [R-63].

⁴³⁰ FDA, Official Notification of Inspection for Etobicoke and Signet (Oct. 21, 2010) [C-172].

⁴³¹ Rosa Statement ¶ 74.

⁴³² Letter from Stephen Simmons, Vice President, Corporate Quality, Apotex Inc., to Melvin Szymanski, Supervisor of the Dedicated Foreign Drug Cadre, Division of Field Investigations, FDA, at 1 (Oct. 26, 2010) [C-173]; *accord* Tao Statement ¶ 67.

⁴³³ FDA, *Compliance Program Guidance Manual 7346.832*, Ch. 46 at Page 2 of 35 (Apr. 12, 2010) (stating that a "pre-approval inspection (PAI) is performed to contribute to FDA's assurance that a manufacturing establishment named in a drug application is capable of manufacturing a drug, and that submitted data are accurate and complete") [R-58]; *accord* Tao Statement ¶ 29 ("During a PAI, FDA verifies the accuracy of the data contained in the ANDA, particularly relating to chemistry and manufacturing information. A PAI covers any and all facilities involved in the manufacturing and testing of the new generic drug product.").

⁴³⁴ Email from Bernice Tao to Irma Rivera (Nov. 4, 2010) (stating an intention to "facilitate your discussions regarding PAI" and further acknowledging "that we have a fairly substantial number of pending ANDAs (total number of [REDACTED])" and attaching a worksheet that "lists the priority ANDA/NDAs totaling [REDACTED]") [C-175].

175. On November 10, 2010, FDA informed Apotex that the inspection team would include two investigators and a chemist.⁴³⁵ In internal emails, Apotex vice-president for Corporate Quality, Stephen Simmons, noted that it “seems like a small team given the scope of the audit . . . and the need to do PAIs.”⁴³⁶

176. FDA ultimately reached the same conclusion. After a change in lead investigators resulted in a smaller team,⁴³⁷ personnel from CDER and the Foreign Drug Cadre met on November 22, 2010 to plan the inspection.

177. During that pre-inspection briefing, FDA personnel determined that the inspection should be postponed in order to compile a team sufficient to address all of the outstanding cGMP issues and perform PAIs for the most important of Apotex’s pending ANDAs. This decision was immediately communicated to Apotex.⁴³⁸ In an internal Apotex email, Mr. Simmons related his discussion with Mr. Szymanski:

Melvin [Szymanski] said the number of PAIs plus the scope of the GMP audit is too much for [the lead investigator] to handle on her own. He wants to have four investigators—2 chemists and 2 investigators Melvin indicated he realizes this will be a major issue for us but he has to do what is right.”⁴³⁹

The inspection was immediately rescheduled to start on January 24, 2011.

⁴³⁵ Email from Melvin Szymanski to Stephen Simmons (Nov. 10, 2010) (noting that “Mike Goga will be the lead with another CSO and Chemist”) [C-177].

⁴³⁶ Email from Stephen Simmons to Jeremy Desai et al. (Nov. 10, 2010) [C-177].

⁴³⁷ Goga Statement ¶¶ 6-8 (stating that, while he was originally scheduled to inspect the Apotex Inc. facilities in December, he switched inspections with another investigator, but when he returned from an inspection in Italy, he learned that he would be leading the Apotex inspection, which was scheduled for January 24-February 11).

⁴³⁸ Email from Melvin Szymanski to Stephen Simmons (Nov. 22, 2010) (stating that “[t]his inspection will be postponed until 1/24-2/24/11 to be able to get an inspectional team of investigators and chemist together, review the [REDACTED] pending applications as well as evaluate corrections made by the firm to correct both Warning Letters” and noting “[t]his confirms our telephone call of earlier today”) [R-65].

⁴³⁹ Email from Stephen Simmons to Jude Vethanayagam et al. (Nov. 22, 2010) [C-180].

178. In the meantime, Apotex’s lawyers sent a letter to FDA’s Chief Counsel and the Director of FDA’s Office of Compliance on December 13, 2010, complaining about the rescheduling of the Etobicoke and Signet inspections.⁴⁴⁰ In this letter, Apotex stated – *for the first time* – that “Apotex believed then and believes now that the import alert is not warranted.”⁴⁴¹ This statement is belied by Apotex’s repeated acknowledgements between August 2009 and December 2010 of the serious cGMP deficiencies at its Etobicoke and Signet facilities and its failure ever to have objected to the Import Alert.

179. Apotex’s lawyers – also for the first time – attacked FDA’s authority to issue the Import Alert, arguing that it violated the NAFTA.⁴⁴² Tellingly, Apotex complained that the Import Alert violated NAFTA’s *trade* provisions, not its investment provisions.⁴⁴³ Given that in the previous year Apotex had submitted to arbitration two other claims against the United States under Chapter Eleven of the NAFTA, Apotex can hardly be deemed ignorant of the difference between measures affecting trade and investment.

180. FDA responded in detail to Apotex’s lawyers on December 23, 2010, recalling Apotex’s “numerous, repeated, and systemic cGMP violations.”⁴⁴⁴ FDA noted that, for example, Apotex had failed to conduct investigations “concerning the rejection of 554 batches of various drug

⁴⁴⁰ Letter from Carmen Shepard and Kate Beardsley, Buc & Beardsley LLP, to Ralph Tyler, Chief Counsel, Office of Chief Counsel, FDA, and Deborah Autor, Director, CDER – Office of Compliance, FDA (Dec. 13, 2010) [C-185].

⁴⁴¹ *Id.* at 1.

⁴⁴² *Id.* at 10-11 (accusing FDA of violating NAFTA’s objectives of the “elimination of trade barriers, facilitation of cross-border movement of goods and services and promotion of conditions of fair competition,” citing to NAFTA Art. 301, GATT Art. III, and decisions of WTO panels and the WTO Appellate Body).

⁴⁴³ *Id.*

⁴⁴⁴ Letter from Deborah Autor, Director, CDER – Office of Compliance, to Carmen Shepard and Kate Beardsley, Buc & Beardsley LLP, at 1 (Dec. 23, 2010) [C-186].

products, at least 2 of which may have nonetheless been shipped to the United States.”⁴⁴⁵ FDA further pointed out that:

[FDA] investigators found Apotex had used active pharmaceutical ingredient (API) contaminated with hairs, acetate fibers, adhesive/glue, nylon, and metallic particles (among other things) to manufacture one product; failed to reject batches of another product found contaminated with various material such as metallic, silicone oxide-based, and PVC-based materials; and multiple instances when Apotex repackaged and reassigned new batch numbers to products that failed the firm’s own quality testing[.]⁴⁴⁶

With respect to the rescheduling of the inspections, FDA first noted that:

Apotex took well over a year and a half from the conclusion of the [Etobicoke] inspection, and a full year from the time FDA placed Apotex products on Import Alert status, to implement corrective action sufficient for Apotex itself to conclude the site is compliant and ready for re-inspection and notify FDA. Apotex did not report that the Signet facility was ready for re-inspection for still another month[.]⁴⁴⁷

181. FDA further explained that the delay was caused by Apotex asking “that FDA go several steps further, requesting that the Agency prioritize various pending . . . [PAIs] to facilitate approval of various applications, which have been on hold as a consequence of Apotex’s cGMP violations.”⁴⁴⁸ FDA stated that, as a result:

Agency personnel . . . conducted an initial pre-inspection briefing on November 22, 2010, and at that time determined to revise the inspection start date. The change was made to ensure that appropriate personnel are not only available, but also sufficiently prepared, to conduct an inspection of the scope and magnitude necessary in this case.⁴⁴⁹

⁴⁴⁵ *Id.* at 2.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 3.

⁴⁴⁸ *Id.* at 4.

⁴⁴⁹ *Id.* Ms. Autor detailed the health issues at stake in the reinspection: “FDA observed very serious, recurring deviations from required cGMP standards designed to ensure the quality, purity, strength, and identity of drug products distributed in the United States. They are indicative of broad problems with Apotex’s quality and production controls, and implicate multiple systems and numerous products. It is critical that FDA make every effort to assemble and adequately prepare the right team to conduct an inspection of the scope and depth needed to

FDA explained at length the administrative issues that prevented FDA from inspecting Apotex's facilities on Apotex's preferred timetable:

FDA has pursued re-inspection in good faith. There are certain administrative conditions associated with conducting foreign inspections, which require time to overcome, including the need to recruit personnel to do the work, assess the availability of travel funds, coordinate travel arrangements, and satisfy various procedural requirements for obtaining travel clearances We also prioritize and schedule inspections in an effort to make the most efficient, effective use of limited resources, from travel budgets to personnel Finally, the agency must balance Apotex's request to insert a comprehensive, high-priority cGMP inspection amidst a full complement of other inspectional assignments and priorities, many of which were planned many months in advance, and others that may involve more urgent public health needs. *We can not simply set aside other priorities because Apotex is, at last, ready*; FDA must also strive to minimize disruption to other ongoing planned work that affects other stakeholders and the public health.⁴⁵⁰

Q. The Etobicoke and Signet Reinspections Revealed “Systemic and Ongoing Objectionable Conditions,” Causing the FDA Investigators to Recommend Maintaining the Import Alert

182. The reinspections of the Etobicoke and Signet facilities commenced on January 24, 2011. These reinspections were led by Michael Goga, who was joined by three others: another investigator, a chemist, and a microbiologist.⁴⁵¹ Apotex acknowledged that “the inspection was extremely thorough and was well led, by Michael Goga.”⁴⁵²

183. The reinspections of the Etobicoke and Signet facilities demonstrated continuing, significant cGMP problems at both Apotex facilities. In Mr. Goga's view, Apotex was not ready

confirm these issues have been addressed, and that products manufactured at these sites are safe and effective for their intended uses.” *Id.* at 7.

⁴⁵⁰ *Id.* at 7 (emphasis added); *see also supra* ¶ 62 (discussing GAO Reports that concluded that it would take FDA 13 years to inspect each foreign facility once).

⁴⁵¹ Goga Statement ¶ 8.

⁴⁵² Letter from Jeremy Desai, Chief Operating Officer, Apotex Inc., to Richard Friedman, Director, Division of Manufacturing and Product Quality, FDA, CDER, Office of Compliance, at 1 (Mar. 1, 2011) [C-197]; *see also* Carey Statement ¶¶ 59-60 (“The inspectors were cordial. Mr. Michael Goga, the lead inspector, was very professional. . . . The inspection was very thorough, especially at Signet.”); Tao Statement ¶ 71 (“The four investigators were very thorough, but fair.”).

for reinspection – a view shared by Health Canada.⁴⁵³ As a result, the investigators had to focus their time and energy on the cGMP violations, and were unable to complete the requested PAIs.⁴⁵⁴

1. FDA Investigators Found Continuing cGMP Problems at the Etobicoke Facility

184. The Establishment Inspection Report for Etobicoke indicates that the “[c]urrent inspection uncovered significant systemic and on-going objectionable conditions. Corrective action has not been fully implemented to every objectionable condition cited during the December 2008 inspection.”⁴⁵⁵ The investigators found, for example, that Apotex’s quality assurance protocol had no timeframe for making recall decisions once a problem warranting a recall had been identified. This deficiency resulted, for instance, in a *fifteen-month delay* between the discovery of metal particles in drugs that had been shipped throughout Canada and the recall of that drug from the Canadian market.⁴⁵⁶

185. Mr. Goga and his team also found that Apotex had no policy for determining when an investigation should be initiated for “yield” deviations. “Yield” refers to how much product results from the combination of ingredients; in other words, if Apotex had 100 kilograms of raw ingredients, the combination of those ingredients into the product should result in a specific

⁴⁵³ Goga Statement ¶ 26.

⁴⁵⁴ *Id.* ¶ 24; *see also* FDA Establishment Inspection Report (EIR), Apotex Inc., Etobicoke, at 1 (February 3-10, 2011) (“2011 Etobicoke EIR”) (“Full coverage was not afforded to each of the ANDAs due to the outstanding GMP deficiencies that were encountered at the establishment. At the conclusion of the inspection, Dr. Desai was informed that we would be recommending a withhold to the █████ pending ANDAs.”) [R-72]; FDA Establishment Inspection Report (EIR), Apotex Inc., Signet (1/24/2011 – 2/11/2011) (“2011 Signet EIR”) (similar) [R-71]; *see also* Email from Carmelo Rosa to Carmen Shepard (June 9, 2011) (stating that “the team was unable to conduct the PAI because of the time it took to evaluate the corrections implemented after the issuance of the two [warning letters]”) [C-246].

⁴⁵⁵ 2011 Etobicoke EIR, at 1 [R-72].

⁴⁵⁶ *Id.* at 23 (Observation 1).

weight of acceptable product less than 100 kilograms.⁴⁵⁷ If the actual yield deviates from the anticipated yield, there may be a problem in the production of the product.⁴⁵⁸ Apotex had no policy with respect to when a yield deviation would result in an investigation at different stages of the production process.⁴⁵⁹

186. In addition, Mr. Goga observed brown material – later identified as cardboard – on the interior of a screw cap being placed on a bottle of Apotex medications. Although Apotex now casually dismisses this concern,⁴⁶⁰ at the time of the inspection Apotex undertook great effort to identify the material and indicated that “corrective actions were on-going to address the deficiencies.”⁴⁶¹ Apotex later undertook additional training and new procedures to prevent this deficiency in the future.⁴⁶²

187. Investigators also cited Apotex for failing to properly transfer testing methods.⁴⁶³ This was a recurring cGMP deficiency, which had been noted in several earlier inspections of Apotex facilities.

188. As a result of these deficiencies, the inspection team issued a Form 483 to Apotex listing five cGMP deficiencies at the Etobicoke facility.⁴⁶⁴ The Establishment Inspection Report notes that “Dr. Desai accepted the FDA 483 and made commitments to add additional resources to

⁴⁵⁷ Goga Statement ¶ 22.

⁴⁵⁸ *Id.*

⁴⁵⁹ 2011 Etobicoke EIR, at 23-24 (Observation 2) [R-72]; *see also* Goga Statement ¶ 22.

⁴⁶⁰ Memorial ¶ 272, n.396.

⁴⁶¹ 2011 Etobicoke EIR, at 25 (Observation 3) [R-72].

⁴⁶² Apotex Responses to 2011 Etobicoke Form 483, at 4 (Mar. 1, 2011) [C-198].

⁴⁶³ 2011 Etobicoke EIR [R-72], at 4; *see also* Goga Statement ¶ 17.

⁴⁶⁴ Form FDA 483, Inspectional Observations, Apotex Inc., Etobicoke (Feb. 11, 2011) (“2011 Etobicoke Form 483”) [C-193].

reduce the cycle times for quality unit activities. He also stated in response to the inspectional observations that ‘we will be all over this stuff.’⁴⁶⁵

189. Most importantly, Mr. Goga and his colleagues recommended that CDER maintain “Official Action” with respect to Etobicoke, specifying that the Import Alert should remain in place and that all pending applications be withheld.⁴⁶⁶

2. FDA Investigators Similarly Found Continuing cGMP Problems at the Signet Facility

190. The FDA inspection team found even worse conditions at the Signet facility. The Establishment Inspection Report for Signet notes that “the inspection identified twenty-two new or on-going deficiencies,”⁴⁶⁷ all of which were cited in a Form 483 issued to Apotex.⁴⁶⁸ The investigators concluded that “the previous inspectional observations have not been fully corrected.”⁴⁶⁹

191. Apotex was cited for a “failure to thoroughly review any unexplained discrepancy *whether or not the batch has been already distributed.*”⁴⁷⁰ This was an issue of particular concern in previous FDA and Health Canada inspections of Apotex facilities.⁴⁷¹ In particular, FDA investigators found at least seven different examples of Apotex’s failure to investigate

⁴⁶⁵ 2011 Etobicoke EIR, at 5 [R-72].

⁴⁶⁶ FACTS Cover Sheet, Apotex Inc., Etobicoke, at 1 (Feb. 3-11, 2011) [R-73]; Facsimile from Michael Goga to DFI/International Operations (Feb. 11, 2011) [R-74]; *see also* Goga Statement ¶ 29.

⁴⁶⁷ 2011 Signet EIR, at 2 [R-71].

⁴⁶⁸ Form FDA 483, Inspectional Observations, Apotex Inc., Signet (Feb. 11, 2011) (“2011 Signet Form 483”) [C-194].

⁴⁶⁹ 2011 Signet EIR, at 30 (Observation 1) [R-71].

⁴⁷⁰ 2011 Signet Form 483, at 1 [C-194].

⁴⁷¹ *See supra* ¶¶ 79, 84, 92, 124-125, 146.

black specks in its products, a specific deficiency that was noted in the previous inspections.⁴⁷² For example, Apotex's own documents showed that Apotex technicians observed black specks on one drug product during granulation. The tablet was sent to a laboratory, which could not determine the underlying cause. Apotex decided to release the product on the theory that the black specks were cellulose, a theory postulated but never resolved by the laboratory.⁴⁷³ Mr. Goga and his team concluded that "[t]he 3rd party laboratory report . . . does not support [Apotex's] conclusion of cellulose as the black speck."⁴⁷⁴

192. The Signet facility also was cited for, among other things:

- Lacking a "yield" limit that would trigger an investigation (an issue also found at Etobicoke);⁴⁷⁵
- Relying on unrepresentative samples of each lot to determine conformance with written specifications;⁴⁷⁶
- Failing to follow procedures to prevent objectionable microorganisms in drug products required to be sterile;⁴⁷⁷
- The presence of "orange colored cephalosporin powder" (an antibiotic) on testing equipment, a computer mouse, and a laboratory seat;⁴⁷⁸
- Failing to have certain quality control procedures in writing, or failing to follow such procedures;⁴⁷⁹ and
- Failure to follow written procedures to prevent contamination of products.⁴⁸⁰

⁴⁷² 2011 Signet EIR, at 30-34 (Observation 1) [R-71].

⁴⁷³ 2011 Signet Form 483, at 1-2 [C-194]; 2011 Signet EIR, at 31-32 [R-71].

⁴⁷⁴ 2011 Signet EIR, at 31 [R-71].

⁴⁷⁵ 2011 Signet Form 483, at 2 (Observation 2) [C-194]; 2011 Signet EIR, at 34 (Observation 2) [R-71].

⁴⁷⁶ 2011 Signet Form 483, at 3-4 (Observation 4) [C-194]; 2011 Signet EIR, at 36-37 (Observation 4) [R-71].

⁴⁷⁷ 2011 Signet Form 483, at 4 (Observation 5) [C-194]; 2011 Signet EIR, at 37-38 (Observation 5) [R-71].

⁴⁷⁸ 2011 Signet Form 483, at 5 (Observation 11) [C-194]; 2011 Signet EIR, at 48 (Observation 11) [R-71].

⁴⁷⁹ 2011 Signet Form 483, at 2-3 (Observation 3) [C-194]; 2011 Signet EIR, at 35-36 (Observation 3) [R-71].

⁴⁸⁰ 2011 Signet Form 483, at 6 (Observation 14) [C-194]; 2011 Signet EIR, at 57 (Observation 14) [R-71].

193. The FDA team also observed a demonstration of the production of the [REDACTED], for which Apotex had requested a PAI. At several stages of the demonstration, the sterile nature of the production was violated by Apotex technicians. After the demonstration, Dr. Desai, Apotex's COO, called the demonstration a "disaster."⁴⁸¹

194. As was the case for the Etobicoke facility, the inspection team recommended that the Import Alert remain in place for the Signet facility.⁴⁸² In response to the investigators' findings during the Signet investigation, Dr. Desai acknowledged to Mr. Goga that it is clear that Apotex is "not meeting FDA's expectations."⁴⁸³

3. Apotex Acknowledged cGMP Violations at Both Facilities and Pledged Additional Corrective Actions

195. Apotex responded to the Form 483s for Etobicoke and Signet on March 1, 2011, several weeks after the close of the inspections.⁴⁸⁴ In his letter to the FDA, Dr. Desai wrote:

I would also like to assure you that we take the observations very seriously. I have personally reviewed the content of these communications with my Senior Management Team to stress the importance of current Good Manufacturing Practices (cGMPs) and our commitment to maintaining a strong Quality Culture. You have my personal commitment that we will take a comprehensive approach in addressing the Form FDA 483 observations.⁴⁸⁵

196. Apotex did not deny many of the investigators' observations. For example, with respect to Apotex's failure to have a policy in place dictating the time in which a recall would be issued,

⁴⁸¹ 2011 Signet EIR, at 19 [R-71]; *see also* Goga Statement ¶ 25.

⁴⁸² FACTS Cover Sheet, Apotex Inc., Signet, at 1 (Jan. 24-Feb. 11, 2011) [R-70].

⁴⁸³ 2011 Signet EIR, at 2 [R-71].

⁴⁸⁴ Letter from Jeremy Desai, Chief Operating Officer, Apotex Inc., to Richard Friedman, Director, Division of Manufacturing and Product Quality, Office of Compliance, Center for Drug Evaluation and Research, FDA (Mar. 1, 2011) [C-197].

⁴⁸⁵ *Id.*

Apotex committed to adopt such a policy “by the end of March 2011.”⁴⁸⁶ Similarly, Apotex committed to adopt a new policy for yield limits prior to re-entry to the U.S. market, and in any event prior to the end of June 2011.⁴⁸⁷

197. Despite the 27 observations listed for the two facilities, Apotex argued that the Import Alert should be lifted due to various global efforts undertaken by Apotex to improve quality. These efforts, which only confirmed the appropriateness of the issuance of the Import Alert, included:

- The “ambitious overhaul of all its Quality systems” as the first step in a more permanent change to the Apotex philosophy, processes and culture of Quality;⁴⁸⁸
- Apotex’s improved corporate governance, quality culture, and quality systems which, according to Dr. Desai, meant that Apotex was “operating as a new organization, self regulating, accountable and dedicated to making quality safe and effective products for all our markets”;⁴⁸⁹
- Apotex’s new clear metrics to monitor regulatory compliance on firm-wide and site-specific bases;⁴⁹⁰
- Apotex’s major personnel changes since 2009, including new site directors for Quality at Etobicoke and Signet;⁴⁹¹
- Apotex’s claim that it was in the process of establishing a new unit that would “ensure all Apotex quality standards are applied regarding release, complaints, investigations, change management, quality agreements for Apotex products manufactured externally at third party manufacturing sites”;⁴⁹²
- Apotex’s continued retention of third-party cGMP consultants;⁴⁹³ and

⁴⁸⁶ Apotex Responses to 2011 Etobicoke Form 483 (attached to letter), at 2 (Mar. 1, 2011) [C-198].

⁴⁸⁷ *Id.* at 9.

⁴⁸⁸ Letter from Jeremy Desai, Chief Operating Officer, Apotex Inc., to Richard Friedman, Director, Division of Manufacturing and Product Quality, Office of Compliance, Center for Drug Evaluation and Research, FDA, at 2 (Mar. 1, 2011) [C-197].

⁴⁸⁹ *Id.* at 4.

⁴⁹⁰ *Id.* at 4-5.

⁴⁹¹ *Id.* at 5-6.

⁴⁹² *Id.* at 8.

⁴⁹³ *Id.* at 8-9.

- Apotex performance of quality and regulatory compliance assessment for every product it planned to re-introduce into the U.S. market.⁴⁹⁴

R. After Evaluating Apotex’s Existing and Promised Corrective Actions, FDA Lifted the Import Alert on the Etobicoke and Signet Facilities

198. FDA reviewed the two Form 483s for Etobicoke and Signet, the two lengthy Establishment Inspection Reports and attachments, and Apotex’s detailed responses and attachments.⁴⁹⁵ After carefully evaluating all evidence, FDA informed Apotex on May 6, 2011 that it would classify Apotex’s Etobicoke facility as “acceptable.”⁴⁹⁶

199. Three days later, on May 9, CDER sent a memo to DIOP recommending that the Etobicoke facility be removed from the Import Alert.⁴⁹⁷ CDER’s recommendation was supported by a further memorandum dated June 7.⁴⁹⁸ On June 15, 2011, DIOP accepted CDER’s recommendation and removed Apotex’s Etobicoke facility from the Import Alert.⁴⁹⁹

200. With respect to the Signet facility, FDA requested additional information from Apotex on May 20, 2011 concerning four of the investigators’ 22 observations. FDA requested, for instance, “a list of all the batches that are partially released, where some part of the batch is

⁴⁹⁴ *Id.* at 10.

⁴⁹⁵ *See Rosa Statement ¶ 82.*

⁴⁹⁶ Letter from Maan Abduldayem, Compliance Officer, CDER, International Compliance Branch, to Jeremy Desai, COO, Apotex Inc., at 1 [C-233]

⁴⁹⁷ Memorandum from Carmelo Rosa, Branch Chief, CDER, International Compliance Branch, to Director of Policy, Division of Import Operations and Policy (May 9, 2011) [C-234].

⁴⁹⁸ Memorandum from Denise Penn, CDER, Imports Policy Team to Division of Import Operations and Policy (June 7, 2011) [C-241].

⁴⁹⁹ Email from Director, Division of Import Operations and Policy to Import Program Managers (June 15, 2011) [C-245].

rejected, quarantined, or placed on hold.”⁵⁰⁰ Apotex responded to these requests on June 10, 2011.⁵⁰¹

201. Health Canada was planning its own inspection of the Signet facility in May and June 2011. Given the 22 violations found by the FDA investigators in January and February 2011 and Apotex’s stated commitment to resolving those issues, FDA waited for the results of the Health Canada inspection.⁵⁰² Health Canada’s inspection, which lasted 16 days, focused specifically on cGMP violations observed in FDA’s January-February 2011 inspection and FDA’s follow-up requests.⁵⁰³

202. After reviewing Apotex’s response to its May 20, 2011 inquiry and Health Canada’s inspection findings, FDA notified Apotex on July 1, 2011 that it deemed the Signet facilities “acceptable.”⁵⁰⁴ That same day, CDER requested that the Signet facilities be removed from the Import Alert.⁵⁰⁵ CDER’s recommendation was supported by a further memorandum dated July

⁵⁰⁰ Letter from Maan Abduldayem, Compliance Officer, CDER, International Compliance Branch, to Jeremy Desai, COO, Apotex Inc., at 1 (May 20, 2011) [C-237].

⁵⁰¹ Letter from Jeremy Desai, COO, Apotex Inc., to Maan Abduldayem, Compliance Officer, CDER, International Compliance Branch (June 10, 2011) [C-242].

⁵⁰² See Email from Carmelo Rosa to Carmen Shepard (June 29, 2011) (“We have completed our review of [*inter alia*] information provided by Health Canada[.]”) [C-246].

⁵⁰³ Contact Report for Health Canada Inspection (May 24, 2011) (Health Canada inspector Anthony Lostracco “indicated that FDA has provided further clarity and requested for them to look into [specified] items[.]”) [C-238]; see also Contact Report for Health Canada Inspection (June 10, 2011) (noting additional follow-up items requested by FDA) [C-243].

⁵⁰⁴ Letter from Maan Abduldayem, Compliance Officer, FDA-CDER, International Compliance Branch, to Jeremy Desai, COO, Apotex Inc. (July 1, 2011) [C-247].

⁵⁰⁵ Memorandum from Carmelo Rosa, Acting Division Director of International Drug Quality, CDER, Office of Manufacturing and Product Quality, to Director of Policy, Division of Import Operations and Policy (July 1, 2011) [C-249].

8.⁵⁰⁶ DIOP accepted CDER's recommendation, and thus removed the Signet facility from the Import Alert on July 29, 2011.⁵⁰⁷

S. Once the Etobicoke and Signet Facilities Were Deemed "Acceptable," FDA Diligently Pursued Pre-Approval Inspections for Apotex's New Generic Drug Applications

203. After FDA declared the two facilities "acceptable," FDA determined that just [REDACTED] of Apotex's pending ANDAs – all for products to be manufactured at the Etobicoke facility – required a pre-approval inspection. As noted, although a PAI includes a cGMP component, it also includes additional components specific to the drug applications for which the firm seeks approval. Thus, although the facilities were deemed "acceptable" in terms of cGMP, the PAIs had to be conducted before the ANDAs could be approved.

204. The January-February 2011 inspections of the Etobicoke and Signet facilities were intended to include PAIs. But as it became apparent to the investigators that there continued to be significant cGMP violations at these two facilities, they chose to focus on the compliance issues and did not have time to complete the PAIs.⁵⁰⁸

205. FDA scheduled PAIs for the [REDACTED] ANDAs for products that would be manufactured at Etobicoke for September 19-28, 2011. As a result of the inspection, a two-item Form 483 was issued, specific to two of the drugs under review in the PAI.⁵⁰⁹ Apotex responded to this Form 483 on October 12, 2011, noting that "[t]he inspection was thorough and was well led," and that

⁵⁰⁶ Memorandum from Marybet Lopez, CDER, Import Operations Branch, to Division of Import Operations and Policy (July 8, 2011) [C-250].

⁵⁰⁷ Email from Division of Import Operations and Policy to Import Program Managers (July 29, 2011) [C-252].

⁵⁰⁸ Goga Statement ¶ 24.

⁵⁰⁹ Form FDA 483, Inspectional Observations, Apotex, Inc., Etobicoke (Sept. 28, 2011) [C-265]; FDA Establishment Inspection Report (EIR), Apotex Inc., Etobicoke at 1 (Sept. 19 - Sept. 28, 2011) [R-81].

“[t]hroughout the course of the inspection, the investigators were found to be cordial, competent and professional.”⁵¹⁰

206. Despite the two observations on the Form 483, the FDA investigators recommended that the facility was acceptable for the pre-approval products.⁵¹¹ According to Apotex’s notes from the inspection, the FDA investigators observed that “the quality systems described in the reports to today have improved ‘quite a bit’” from the previous inspections.⁵¹²

207. Upon reviewing the investigators’ reports and Apotex’s October 12, 2011 response to the Form 483, FDA recommended an acceptable cGMP status for Apotex’s pending ANDA applications in November 2011.⁵¹³

II. THE TRIBUNAL LACKS JURISDICTION OVER ANY OF APOTEX’S CLAIMS

A. Chapter Eleven Reflects the NAFTA Parties’ Limited Consent to Arbitration

208. The NAFTA Parties established limited jurisdiction for the arbitration of claims brought under Chapter Eleven. A claimant must meet all of the jurisdictional requirements of Chapter Eleven as a condition of the NAFTA Parties’ consent to arbitration. Clear expression of consent is universally accepted as a *sine qua non* of international adjudication.⁵¹⁴ The International Court of Justice, for instance, requires an “unequivocal indication of a voluntary and indisputable

⁵¹⁰ Letter from Jeremy Desai, COO, Apotex Inc., to Steve Lynn, Division of Manufacturing and Product Quality, CDER – Office of Compliance, FDA (Oct. 12, 2011) [C-268].

⁵¹¹ See FDA Establishment Inspection Report, Apotex Inc., Etobicoke at 1 (Sept. 19 – Sept. 28, 2011) [R-81].

⁵¹² Contact Report for FDA Inspection (Sept. 28, 2011) [C-266].

⁵¹³ Accord Memorial ¶ 285.

⁵¹⁴ See, e.g., *Ethyl Corp. v. Canada*, NAFTA/UNCITRAL, Award on Jurisdiction ¶ 59 (June 24, 1998) (“The sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration Rules is the consent of the Parties.”) [CLA-26].

acceptance” of consent.⁵¹⁵ The Iran-United States Claims Tribunal similarly has required “express language” establishing a State’s consent to jurisdiction.⁵¹⁶ And a NAFTA Chapter Eleven tribunal has concluded that a claimant is not “entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”⁵¹⁷

209. NAFTA tribunals have confirmed that the claimant bears the burden of proving that its claims fall within an investment tribunal’s jurisdiction. As the *Gallo* tribunal observed:

Both parties submit, and the Tribunal concurs, that the maxim “who asserts must prove,” or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage[.]⁵¹⁸

210. The *Phoenix Action* tribunal similarly concluded, after canvassing arbitral case law, that “all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits.”⁵¹⁹ Jurisdiction in this case thus requires proof that Apotex Holdings or Apotex Inc. is an

⁵¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, 1993 I.C.J. 325, 342 (Order of Sept. 13) (internal quotation marks omitted) [RLA-103]; see also BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 261 (1987) (observing that “the principle of competence requires that a tribunal should decide [jurisdiction] strictly in accordance with its constitutional law, on pain of nullity”) [RLA-142].

⁵¹⁶ See, e.g., *Grimm v. Iran*, Case No. 71, Award No. 25-71-1 (Feb. 18, 1983), 2 IRAN-U.S. CL. TRIB. REP. 78, 80 (1983) (holding that if Iran and the United States “had intended to bring [the claims] within the ambit of the Tribunal’s jurisdiction, it can be assumed that they would have done so by incorporating express language to that effect.”) [RLA-112].

⁵¹⁷ *Fireman’s Fund Ins. Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question ¶ 64 (July 17, 2003) (“[T]he Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”) [RLA-107].

⁵¹⁸ *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) (citation omitted) [RLA-137].

⁵¹⁹ *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009) [CLA-71].

“investor” with a covered “investment,” as those terms are defined in Chapter Eleven of the NAFTA.

211. Apotex Inc. has brought a claim under NAFTA Article 1116, which permits claims by an “investor of a Party” on its own behalf.⁵²⁰ Apotex Holdings has brought a claim under Article 1116 (as the indirect owner of Apotex Inc.) and Article 1117 (on behalf of its U.S. enterprise Apotex Corp.).⁵²¹

212. Articles 1116 and 1117 must be read together with Article 1101(1), which states in part:

This Chapter applies to measures adopted or maintained by a Party relating to:

- i. investors of another Party;
- ii. investments of investors of another Party in the territory of the Party[.]

⁵²⁰ Article 1116(1) states:

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
 - (a) Section A or Article 1503(2) (State Enterprises), or
 - (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A,and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

[CLA-1].

⁵²¹ Article 1117(1) states:

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
 - (a) Section A or Article 1503(2) (State Enterprises), or
 - (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

[CLA-1].

Article 1101(1) has been described as “the gateway leading to the dispute resolution provisions of Chapter 11.”⁵²² As such, “the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met[.]”⁵²³

213. Article 1101(1) contains three important jurisdictional limitations. *First*, it establishes that Chapter Eleven applies only to “*measures* adopted or maintained by a Party.”⁵²⁴ The NAFTA’s definition of “measure” is “central to the operation of Article 1101, and by extension the operation of Chapter 11,” as a NAFTA Party has consented to jurisdiction under Chapter Eleven only where it has adopted or maintained a measure.⁵²⁵

214. *Second*, the measure adopted or maintained by a Party must “relate to” the investor or its investment. The three NAFTA Parties, Chapter Eleven tribunals, and the disputing parties agree that Article 1101(1) requires a “legally significant connection” between a challenged measure and the investor or its investment.⁵²⁶

215. *Third*, Article 1101(1) clarifies that Chapter Eleven applies only to investors of another NAFTA Party whose investments are “in the territory” of the Party that adopted or maintained

⁵²² *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award ¶ 106 (Aug. 7, 2002) [CLA-36].

⁵²³ *Methanex Corp.*, First Partial Award ¶ 106 [CLA-36]; *see also Bayview Irrigation District v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award ¶ 85 (June 19, 2007) (“The role of Article 1101 in determining the scope of the jurisdiction of tribunals established to hear Chapter Eleven claims is clear from the title of the Article. It defines the ‘scope and coverage’ of the entirety of Chapter Eleven, including both the scope and coverage of the substantive protections accorded to investors and investments by Chapter Eleven Section A and the scope of the rights to submit disputes to arbitration under Chapter Eleven Section B.”) [CLA-22].

⁵²⁴ The NAFTA defines a “measure” as including “any law, regulation, procedure, requirement or practice.” NAFTA art. 201 [CLA-1].

⁵²⁵ MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER THE NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1101-28b (2008 Supp.) [RLA-147].

⁵²⁶ *See infra* ¶¶ 267-271.

the challenged measure.⁵²⁷ As the *Grand River* tribunal observed: “Prior NAFTA tribunals have held, following extensive briefing and argument, that they do not have jurisdiction over claims that are based upon injury to investments located in one NAFTA Party on account of actions taken by authorities in another.”⁵²⁸

216. Apotex has acknowledged that, under Articles 1116 and 1117, the United States has consented to arbitrate only if Apotex Inc. or Apotex Holdings qualifies as an “investor of a Party” that has incurred (on its own behalf or on behalf of its qualifying enterprise) loss or damage arising out of a breach of Chapter Eleven’s substantive protections by the United States.⁵²⁹ Apotex must show, therefore, that Apotex Inc. or Apotex Holdings sustained losses as an “investor of a Party,” and not merely as a foreign trader.

217. An “investor of a Party” is defined in NAFTA Article 1139 as including a “national or enterprise” of another NAFTA Party “that seeks to make, is making or has made an investment.”⁵³⁰ NAFTA Chapter Eleven, in contrast to many other international investment agreements,⁵³¹ contains a closed list of the types of qualifying assets that constitute “investments.”⁵³² Each of the three NAFTA Parties has confirmed that “Article 1139 of the

⁵²⁷ NAFTA art. 1101(1)(b) [CLA-1]; see also *Bayview Award* ¶ 105 (“It is clear that the words ‘territory of the Party’ [in Article 1101(1)(b)] do not refer to the territory of the Party of whom the investors are nationals. [The phrase] requires investment in the territory of another NAFTA Party – the Party that has adopted or maintained the measures challenged.”) [CLA-22].

⁵²⁸ *Grand River Enterprises Six Nations Ltd. et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 87 [CLA-29]; see also *Bayview Award* ¶ 105 (in order to qualify as an “investor” under Articles 1101(1) and 1139, “one must make an investment in the territory of another NAFTA State, not in one’s own”) [CLA-22].

⁵²⁹ Memorial ¶ 336 (referencing NAFTA arts. 1116(1) and 1117(1)).

⁵³⁰ NAFTA art. 1139 (emphasis added) [CLA-1].

⁵³¹ See Barton Legum, *Defining Investment and Investor: Who is Entitled to Claim?*, 22(4) ARB. INT’L 521, 521 (2006) (observing that “the definitions of ‘investment’ in contemporary treaties tend to be broad and open-ended, with a list of specific types of covered investments which is indicative rather than definitive”) [RLA-141].

⁵³² See, e.g., Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12(2) ICSID REV. – FOR. INV. L.J. 287,

NAFTA identifies an *exhaustive list* of property rights and interests that may constitute an ‘investment’ for purposes of Chapter Eleven.”⁵³³

218. Chapter Eleven tribunals similarly recognize that the definition of investment in Article 1139 is closed and “not illustrative.”⁵³⁴ The *Grand River* tribunal observed, for instance, that Article 1139 “prescribes an *exclusive* list of elements or activities that constitute an investment for purposes of NAFTA.”⁵³⁵

219. As set forth below, Apotex has failed to establish: (1) that Apotex Inc. is an investor that made, was making, or sought to make investments in the United States; and (2) that the Import Alert is a measure that “relates to” Apotex Inc. or Apotex Holdings, or to their alleged investments. Accordingly, the Tribunal lacks jurisdiction over any of Apotex’s claims, and thus should dismiss all claims in their entirety.

355-56 (1997) (“In addition, in contrast to the all-inclusive definitions of covered investments found in most of the other treaties, the NAFTA’s definition provides an exhaustive (though admittedly very broad) enumeration, rather than an open-ended, illustrative list, of covered assets or investments that the NAFTA requires be related to an ‘enterprise,’ to ‘business purposes’ or to a ‘commitment of resources’ to ‘economic activity’ in the host State. In addition, the definition in the NAFTA specifically excludes from the scope of covered investments commercial contracts for the sale of goods or services. More than most of the other treaties, the NAFTA can in other words be seen as providing a definition of covered investments, and hence of covered investment disputes, that attempts clearly to distinguish them from trade and other non-investment assets and disputes.”) (citations omitted) [RLA-140].

⁵³³ *Methanex Corp.*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) (emphasis added) [CLA-35]; see also *Marvin Feldman v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Counter-Memorial of Respondent Mexico ¶ 313 (quoting same) [RLA-116]; *Methanex Corp.*, Second Submission of Canada Pursuant to Article 1128 ¶ 59 (Apr. 30, 2001) (“The definition of ‘investment’ in NAFTA Article 1139 provides a list of investments covered by Chapter Eleven This definition is exhaustive, not illustrative.”) [RLA-117].

⁵³⁴ *Grand River Enterprises Award* ¶ 82 [CLA-29].

⁵³⁵ *Id.*

B. Apotex Inc. Is Not a Qualified Investor with Covered Investments in the United States

220. Apotex has failed to establish that Apotex Inc. is an “investor” that made or sought to make “investments” in the United States, as it claims.⁵³⁶ Apotex describes Apotex Inc. as the “largest Canadian-owned pharmaceutical company,” with operations in “Montreal, Richmond Hill, Toronto, Etobicoke, Mississauga, Brantford, Windsor, Winnipeg, London, Calgary and Vancouver.”⁵³⁷ Apotex states on its website that its drugs “are exported to over 115 countries around the globe,” and that “[e]xport markets represent an ever growing portion of the total sales.”⁵³⁸ Apotex further states that it has “established a presence through subsidiaries, joint ventures or licensing agreements in Australia, Belgium, Czech Republic, Italy, Mexico, Netherlands, New Zealand, Poland, Turkey, and the UK, to name just a few.”⁵³⁹ Notably, Apotex does not list the United States as a country in which Apotex Inc. has established a presence, because Apotex Inc. has no presence of any kind in the United States. Indeed, Apotex’s own statements make clear that:

- “Apotex Corp. is not a subsidiary of Apotex Inc.”,⁵⁴⁰
- Apotex Inc. “does not reside or have a place of business in the United States”,⁵⁴¹
- Apotex Inc. does not claim to have any employees in the United States;⁵⁴²

⁵³⁶ Memorial ¶¶ 343-45, 353-403 (claiming that Apotex Inc. is an “investor” that made, and sought to make, “investments” in the United States, within the meaning of Article 1139).

⁵³⁷ Apotex, “About Apotex,” *available at* <http://www.apotex.com/ca/en/about/default.asp> (last visited Nov. 7, 2012) [R-109].

⁵³⁸ *Id.*

⁵³⁹ Apotex, “Corporate Overview,” *available at* http://www.apotex.com/nl/en/aboutapotex/about_corporateover.asp (last visited Nov. 7, 2012) [R-110].

⁵⁴⁰ *In re: Rosuvastatin Calcium Patent Litigation*, No. 08-md-1949-JJF (D. Del.), Apotex Corp.’s Proposed Findings of Fact and Conclusions of Law – Noninfringement of the ‘314 Patent ¶ 1 (Feb. 12, 2010) [RLA-82].

⁵⁴¹ *Apotex Inc. v. United States*, NAFTA/UNCITRAL, Claimant Apotex Inc.’s Counter-Memorial on Respondent’s Objection to Jurisdiction ¶ 50 & n.56 (Aug. 1, 2011) [RLA-102].

⁵⁴² Memorial ¶¶ 353-409 (describing Apotex Inc.’s alleged investments).

- Apotex Inc. does not claim to have established a company in the United States;⁵⁴³
- Apotex Inc. does not claim to share in the income or profits of any U.S. company;⁵⁴⁴
- Apotex Inc. does not claim to have an equity or debt interest in any U.S. company;⁵⁴⁵
- Apotex Inc. does not itself develop, test or manufacture its products in the United States;⁵⁴⁶
- Apotex Inc. prepares its abbreviated new drugs applications entirely in Canada;⁵⁴⁷ and
- Apotex Inc. submits its drug applications to FDA through a U.S. agent.⁵⁴⁸

221. In short, Apotex Inc. is a Canadian company that exports its products to the United States from outside the United States. Apotex Inc. nonetheless claims to hold two kinds of “investments” in the United States for purposes of NAFTA Chapter Eleven:

- (1) “intangible property,” through its abbreviated new drug applications, and;
- (2) “interests arising from the commitment of capital” made “in and into” the United States.

Apotex has failed to substantiate either claim.

1. Apotex Inc.’s Drug Applications Are Not “Property” within the Meaning of Article 1139(g)

222. Apotex Inc. claims to have made an “investment” for purposes of Article 1139 in its abbreviated new drug applications filed with FDA.⁵⁴⁹ Specifically, Apotex argues that its

⁵⁴³ *Id.* (describing Apotex Inc.’s alleged investments).

⁵⁴⁴ *Id.* (describing Apotex Inc.’s alleged investments).

⁵⁴⁵ *Id.* (describing Apotex Inc.’s alleged investments).

⁵⁴⁶ *See, e.g., Pfizer Inc. v. Apotex Inc. and Apotex Corp.*, No. 1:08-cv-00948 (LDD) (D. Del.), Declaration of Bernice Tao (Feb. 10, 2009) ¶ 17 (“Apotex Inc. conducted all of the research, development and manufacturing of the generic. . . products that are the subject of its ANDA. All of this work was performed in Canada[.]”) [RLA-92]

⁵⁴⁷ *See, e.g., id.* ¶ 18; *see also id.* ¶ 25 (“None of the relevant work regarding Apotex Inc.’s ANDA product, the preparation of the ANDA, or the filing of the ANDA occurred or was otherwise performed in Delaware. All such work occurred in Canada.”).

⁵⁴⁸ Memorial ¶ 82 (noting that Mr. Krishnan of Apotex Corp. is Apotex Inc.’s agent for submitting ANDAs).

applications constitute ““real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes,”” within the meaning of Article 1139(g).⁵⁵⁰ Apotex’s ANDAs, however, are not property in the United States within the meaning of that article.

223. All three NAFTA Parties agree that Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven.⁵⁵¹ The NAFTA, in contrast with other treaties, does not list intellectual property rights or “licenses, authorizations, permits, and similar rights” as among investments covered under Article 1139.⁵⁵²

224. Apotex thus resorts to other legal instruments and arbitral practice outside the NAFTA context to place a “broad” and “expansive” reading on the meaning of “property.”⁵⁵³ But as the *Grand River* tribunal recognized, “on jurisdictional aspects, NAFTA awards are more relevant and appropriate than decisions in non-NAFTA investment cases.”⁵⁵⁴ Chapter Eleven tribunals

⁵⁴⁹ *Id.* ¶ 343 (“Apotex [Inc.] holds a number of investments in the US, including hundreds of marketing authorizations to market and sell pharmaceutical products in the US.”).

⁵⁵⁰ *Id.* ¶ 353 (quoting NAFTA art. 1139(g) [CLA-1]).

⁵⁵¹ See *Methanex Corp.*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) (“Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an ‘investment’ for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of ‘investment’ in Article 1139, however, encompass a mere hope that profits may result from prospective sales[.]”) [CLA-35]; *Methanex Corp.*, Second 1128 Submission of Canada ¶ 59 (Apr. 30, 2001) (“The definition of ‘investment’ in NAFTA Article 1139 . . . is exhaustive, not illustrative.”) [RLA-117]; *Methanex Corp.*, Second 1128 Submission of Mexico ¶ 19 (May 15, 2001) (“[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.”) [RLA-118].

⁵⁵² See, e.g., 2012 U.S. Model Bilateral Investment Treaty art. 1 (listing intellectual property rights as well as licenses, authorizations, permits, and similar rights conferred pursuant to domestic law as possible forms of “investment”) [CLA-12]; The Dominican Republic-Central America-United States Free Trade Agreement art. 10.28 (signed at Washington Aug. 5, 2004), 43 I.L.M. 514 (CAFTA-DR) (same) [CLA-9].

⁵⁵³ Memorial ¶¶ 355-58.

⁵⁵⁴ *Grand River Enterprises Award* ¶ 61 [CLA-29].

consistently have declined to recognize as “property” mere contingent “interests.”⁵⁵⁵ Apotex’s ANDAs constitute such contingent interests, because FDA has significant discretion to withhold or refuse approval of the applications⁵⁵⁶ – and even when finally approved, the ANDAs are revocable by the government for a host of reasons provided by law, including for reasons unrelated to the drug product itself.⁵⁵⁷

225. Apotex also relies upon U.S., Canadian, and Mexican law recognizing various forms of intellectual property such as copyrights, patents, and domain names, but notably not ANDAs or their equivalent.⁵⁵⁸ In particular, Apotex points to U.S. law with respect to government-issued licenses⁵⁵⁹ in an attempt to broaden the scope of “intangible property” under Article 1139(g).

⁵⁵⁵ See *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 142, 257-58 (Mar. 31, 2010) (finding that “[e]xpropriation cannot affect potential interests[,]” and that the expectation of contracts executed in the future was an “uncertain expectation, like the goodwill considered in *Oscar Chinn*, [that] does not appear to provide a solid enough ground on which to construct a legitimately affected interest”) [CLA-32]; *Bayview* Award ¶ 118 (finding no property rights where, among other things, exploitation or use of the water requires the grant of a concession under Mexican law, which such concession does not guarantee the existence or permanence of the water) [CLA-22]; *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (Jan. 26, 2006) (“[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”) [CLA-30]; *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 118 (Dec. 16, 2002) (finding no “right” to tax rebates where the right was conditioned upon presentation of certain invoices) [CLA-31]; see also *Methanex Corp.* Final Award on Jurisdiction and Merits, Part IV, Chapter D ¶ 17 (Aug. 3, 2005) (noting that “items such as goodwill and market share may . . . in a comprehensive taking . . . figure in valuation,” “[b]ut it is difficult to see how they might stand alone” as an investment under Article 1139) [CLA-34]; *The Oscar Chinn Case*, P.C.I.J., ser. A/B No. 63, at 88 (1934) (“The Court . . . is unable to see in his original position – which was characterized by the possession of customers and the possibility of making a profit – anything in the nature of a genuine vested right.”) [RLA-122]; GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961) (“A property right, in order to qualify for the protection of the international law rules must be an actual legal right, as distinct from a mere economic or other benefit, such as a situation created by the law of a State in favour of some person or persons who are therefore interested in its continuance.”) [RLA-144].

⁵⁵⁶ See 21 U.S.C. § 355(j)(4)(A) (2012) (providing grounds to withhold approval of an application) [CLA-234]; *id.* § 355(d) (providing grounds for refusing to approve an application); 21 C.F.R. § 314.127 (2012) [CLA-277].

⁵⁵⁷ See 21 U.S.C. § 355(e) (2012) (providing reasons for withdrawal of approval if the drug is found to be unsafe, if patent information was not filed, or if the application contains any untrue statement of material fact) [CLA-234]; *id.* § 355(j)(6) (providing for withdrawal of approval if the abbreviated application refers to a listed drug for which approval has been suspended or withdrawn); 21 C.F.R. § 314.150 (2012) [RLA-166]; *id.* § 314.151 [RLA-167].

⁵⁵⁸ Memorial ¶¶ 360-65.

⁵⁵⁹ *Id.* ¶ 361.

226. As the host State of Apotex’s putative “investments,” it is appropriate to look to the law of the United States in this regard.⁵⁶⁰ Apotex’s analogy to licenses, however, is unavailing.⁵⁶¹ Even if Apotex’s *applications* could be construed as licenses or permits, it is well established in U.S. law that revocable government-granted licenses or permits do not confer property interests that give rise to claims for compensation.⁵⁶² This is all the more so where an individual voluntarily enters into a heavily regulated field, such as the U.S. pharmaceutical market. As Apotex acknowledges, any person wishing to sell new drugs on the U.S. market must apply for a marketing authorization from the FDA.⁵⁶³ Generic manufacturers submit abbreviated new drug applications in order to market and sell generic products in the United States.⁵⁶⁴ Apotex also acknowledges that FDA may decline to grant tentative approval, or refuse to approve an application, if the firm violates current good manufacturing practice.⁵⁶⁵ Following approval, an applicant must regularly submit documentation to FDA,⁵⁶⁶ and FDA may revoke approved

⁵⁶⁰ See, e.g., Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of “property . . . [w]e necessarily draw on municipal law sources”) [R-153].

⁵⁶¹ Apotex relies on U.S. law concerning due process. See Memorial ¶ 361. Although due process may protect against arbitrary government deprivation of certain licenses previously granted, courts determine the scope of “property” for purposes of compensation using a different analysis. See, e.g., *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 372, n.27 (Ct. Fed. Cl. 2004) (noting dissimilar concepts of “property” for purposes of the Taking Clause and the Due Process Clause) [RLA-72]. Moreover, deprivation of Apotex’s ANDAs is not at issue here. Apotex complains that the challenged measure *delayed* FDA’s approval of the ANDAs, not that the challenged measure *revoked* any ANDAs already approved. Memorial ¶¶ 277 *et seq.* Indeed, Apotex has not shown that the challenged measure affected any previously-approved ANDAs. Apotex’s theory is that the Import Alert impacted its ability to engage in cross-border trade in those approved drugs.

⁵⁶² See *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that attachments subject to “revocable” and “contingent” licenses, which the President could nullify, did not provide the plaintiff with any “property” interest that would support a constitutional claim for compensation) [RLA-79]; *Mike’s Contracting, LLC v. United States*, 92 Fed. Cl. 302, 310 (Ct. Fed. Cl. 2010) (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim) [RLA-87].

⁵⁶³ Memorial ¶ 61.

⁵⁶⁴ *Id.* ¶¶ 62 *et seq.*

⁵⁶⁵ *Id.* ¶¶ 71-72.

⁵⁶⁶ *Id.* ¶ 75.

ANDAs for cGMP violations. It was against a similar backdrop of “pervasive” federal regulation that the Court of Federal Claims recently held that an “airworthiness certificate” for an aircraft was not a cognizable property interest, the suspension of which could give rise to compensation. The “certificate at issue was part of a system of pervasive federal regulation that prevented [the plaintiff] from having a ‘vested’ interest in the certificate or in its use of the helicopter for purposes allowed by the certificate.”⁵⁶⁷ The court concluded:

In such a context, the plaintiff could never have had a vested interest in its airworthiness certificate or in commercial aviation; rather those interests were created by the federal regulations with which it must comply in order to hold an airworthiness certificate. The certificate was at all times since its issuance subject to suspension by the [Federal Aviation Administration].⁵⁶⁸

Notably, the Court of Federal Claims so held even though the “airworthiness certificate,” like an ANDA, could be sold or transferred. Thus, the fact that Apotex may transfer or alienate its applications is insufficient to transform its ANDAs into “property.”

227. Moreover, Apotex concedes – as it must⁵⁶⁹ – that property “must be capable of exclusive possession or control.”⁵⁷⁰ And yet Apotex’s applications lack this critical stick in the property rights “bundle.” The U.S. Court of Appeals for the Federal Circuit has recognized the “exclusivity” element of property as “the right to sole and exclusive possession – the right to

⁵⁶⁷ *Mike’s Contracting*, 92 Fed. Cl. at 308-09 (citations omitted) [RLA-87].

⁵⁶⁸ *Id.* at 309 (citations omitted).

⁵⁶⁹ See, e.g., Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 COLLECTED COURSE OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270-71 (1982) (noting that the owner of property has the protection of law with respect to use, alienation, and power to exclude others, quoting K. KATZAROV, THE THEORY OF NATIONALISATION 103 (1964): “the content given to property by the law from remotest times . . . has a positive and negative aspect: . . . it is exclusive, which means that it confers upon its holder the power to forbid any other person to perform an act of disposal”) [R-153].

⁵⁷⁰ Memorial ¶ 360 (quoting *G.S. Rasmussen & Assoc. v. Kalitta Flying Serv., Inc.* 958 F.2d 896, 902-03 (9th Cir. 1992)).

exclude strangers, or for that matter friends, but especially the Government.”⁵⁷¹ Apotex has no power, however, to prevent the government from exercising its statutory authority to withhold or revoke ANDAs, and thus it cannot “exclude” the government from its ANDAs. Apotex’s applications, moreover, do not even confer market exclusivity with respect to the relevant drugs; any other generic manufacturer can submit an ANDA and be approved to market or sell the same drug, with the same chemical formulation, in the United States.⁵⁷² Apotex’s ANDAs, therefore, lack the requisite exclusivity that would confer a cognizable “property interest” under U.S. law.⁵⁷³

228. No additive property interest is conveyed, moreover, by a 180-day statutory grant of market exclusivity to certain ANDA filers.⁵⁷⁴ “Exclusivity” in this context prevents FDA from approving subsequent ANDAs during the exclusivity period. Moreover, the statute does not guarantee exclusivity in the market.⁵⁷⁵ In any event, Apotex does not allege that the import alert interfered with its ability to exercise 180-day exclusivity.⁵⁷⁶

⁵⁷¹ *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993) (emphasis omitted) (quoting *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991)) [RLA-88].

⁵⁷² Consequently, there would be no legal basis, such as in the context of patent infringement litigation, to prevent others from doing so.

⁵⁷³ See, e.g., *Arctic King Fisheries*, 59 Fed. Cl. at 371 (noting that licenses and permits, including the fishing license at issue, lack “one or more indicia of property – they were not freely transferable, could not be wielded to exclude others from the resource in question and could be modified or revoked by the granting agency”) [RLA-72]; *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1374, 1382-83 (Fed. Cir. 2004) (finding that the holder of a revoked fishing license did not have a claim for a taking of intangible property where it did not have the right to exclude others from the mackerel and herring fishing areas governed by the permit) [RLA-67].

⁵⁷⁴ Apotex argues that the marketing exclusivity is a “valuable protected interest, which can also be traded.” Memorial ¶ 373.

⁵⁷⁵ In some instances another generic may sell during the exclusivity period under license from the original patent holder, and in other instances FDA may confer “shared exclusivity.” See 21 U.S.C. § 355(j)(5)(iv)(II)(bb) (2012) [CLA-234]; FDA, *Guidance for Industry: 180-Day Exclusivity When Multiple ANDAs Are Submitted on the Same Day* (July 2003) [R-11]. Exclusivity may also be forfeited by operation of the statute. See 21 U.S.C. § 355(j)(5)(D) (2012) [CLA-234].

⁵⁷⁶ Apotex alleges that it may have been eligible for 180-day exclusivity for [REDACTED] capsules and [REDACTED] tablets, but does not allege that the Import Alert affected exclusivity for these drugs. See Tao Statement ¶ 74.

229. Nor is the fact that ANDAs may, in some circumstances, be considered assets for tax purposes determinative of whether they are “property” for purposes of the NAFTA or are compensable under U.S. law.⁵⁷⁷ As the Court of Federal Claims recently stated in a case involving elimination of peanut quotas:

While stating the well-accepted proposition that benefits conferred by federal legislation have attributes of property under tax law and may be treated as an asset, these rulings shed no light on the issue of whether peanut quotas constitute property protected by the Fifth Amendment and do not challenge the rule that an expectation or benefit alone fails to qualify as a protected property right.⁵⁷⁸

230. Furthermore, Apotex’s current position that its applications are “property” under U.S. law is belied by its conduct in recent litigation. In 2007, Apotex sued FDA under the Administrative Procedure Act, seeking to enjoin the Agency’s decision to revoke final ANDA approval of a generic drug. The court upheld FDA’s motion to dismiss Apotex’s complaint.⁵⁷⁹ Apotex did not claim that it was entitled to compensation under the U.S. Constitution or that its ANDAs constituted “property.”

231. Finally, even if Apotex’s ANDAs were recognized as property under U.S. law, they would not be property *in the United States*. Apotex acknowledges that its ANDAs are prepared

⁵⁷⁷ See Memorial ¶ 374. Apotex mistakenly relies on an Internal Revenue Service memorandum as supporting its argument that ANDAs constitute “intangible property” under the NAFTA. See Internal Revenue Service, Office of Chief Counsel, Memorandum (Sept. 27, 2011) [CLA 312-A]. The memorandum – which expressly notes that it “may not be used or cited as precedent” – does not support Apotex’s claim. The memorandum addresses cost recovery of capitalized attorney fees incurred in connection with ANDAs (for example, to determine whether a U.S. taxpayer is entitled to an amortizable deduction for those fees). The memorandum does not address U.S. tax law consequences of ANDA-related transactions outside the United States or opine, more broadly, on how ANDAs are treated under U.S. law – to say nothing of how they are treated under a treaty such as the NAFTA. To the extent Apotex considers its ANDAs U.S. property for tax law purposes, it has provided no evidence that it paid U.S. taxes on its ANDA-related transactions.

⁵⁷⁸ *Members of the Peanut Quota Holders Association, Inc. v. United States*, 60 Fed. Cl. 524, 529-31 (2004) (citations omitted) (holding also that “Plaintiffs could not have held a reasonable investment-backed expectation that the quotas would continue because the peanut quotas were regulated heavily and had been subject to a litany of reductions and changes by Congress.”) [RLA-86].

⁵⁷⁹ See *Apotex Inc. v. FDA*, 508 F.Supp.2d 78, 89 (D.D.C. 2007) (upholding FDA’s revocation of approved ANDA for Apotex’s generic drug omeprazole) [RLA-71].

and held by Apotex Inc. *in Canada*.⁵⁸⁰ As Article 1101(1) makes clear, NAFTA Chapter Eleven protects “investments of investors of another Party *in the territory of the Party*.” Because Apotex’s ANDAs are not “in the territory of the United States,” they are not covered investments under NAFTA Chapter Eleven.

232. In sum, Apotex’s applications do not constitute “intangible property” in the United States for purposes of 1139(g). They lack a key attribute of property (exclusivity), and they are not held in the United States. At most, Apotex’s applications are statutorily-created and revocable contingent interests held in Canada, and thus cannot constitute an investment in the United States for purposes of NAFTA Chapter Eleven.

2. Apotex Has Failed to Establish Any Interests Arising from the Commitment of Capital or Other Resources in the United States under Article 1139(h)

233. Apotex claims to have obtained “interests arising from the commitment of capital” in the United States under Article 1139(h) from three separate activities:⁵⁸¹

- (1) procuring “contract research” for ANDAs from “specialized firms” in the United States;⁵⁸²
- (2) “commit[ting] various resources in the United States in relation to the filing and maintaining of its [ANDAs]”; and⁵⁸³
- (3) funding “costly patent litigation before US courts.”⁵⁸⁴

None of these activities constitutes an investment within the meaning of Article 1139(h). That provision defines “investment” as including:

⁵⁸⁰ See *supra* n.547.

⁵⁸¹ Memorial ¶ 401.

⁵⁸² *Id.* ¶ 80.

⁵⁸³ *Id.* ¶ 399; see also *id.* ¶¶ 82, 400.

⁵⁸⁴ *Id.* ¶¶ 85, 398.

- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
 - (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or
 - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]

234. Article 1139(h) thus covers *interests* arising from the *commitment of capital* or other resources *in the territory* of a respondent State to economic activity *in that territory*. Simple cross-border trade interests, by contrast, are not sufficient to establish jurisdiction under the NAFTA. As the *Canadian Cattlemen* tribunal concluded, under Article 1139(h):

[M]ere cross-border trade interests are not sufficient to trigger Chapter Eleven – something more permanent – such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory – is necessary for a contractual claim for money based on cross-border trade to rise to the level of an investment.⁵⁸⁵

235. An example of an Article 1139(h) investment is found in *Mondev v. United States*.⁵⁸⁶

The Canadian claimant in that case established that, through its wholly-owned U.S. limited partnership, it had obtained interests arising from contractual rights to develop large parcels of property in downtown Boston.⁵⁸⁷ The tribunal concluded that, through the rights acquired in these construction contracts, “Mondev’s claims involved ‘interests arising from the commitment of capital or other resources in the territory’” of the United States, which fit squarely within the definition of investment in Article 1139(h).⁵⁸⁸ The three “interests” claimed by Apotex Inc. are

⁵⁸⁵ See *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶ 144 (Jan. 28, 2008) [CLA-47].

⁵⁸⁶ *Mondev International, Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002) [CLA-39].

⁵⁸⁷ *Id.* ¶¶ 37, 80.

⁵⁸⁸ *Id.* ¶ 80.

nothing like Mondeve's interests, nor are they anything like "turnkey contracts" or "concessions," the other two examples of contracts giving rise to investments under Article 1139(h).

a) Contracts for cross-border services fall squarely outside of Article 1139(h)

236. Apotex claims interests arising from the procurement of "contract research" for ANDAs by "specialized firms" in the United States.⁵⁸⁹ Article 1139(h), however, does not recognize as "investments" mere contracts for services in the United States.⁵⁹⁰ On the contrary, Article 1139(i) specifically *excludes* from the definition of investment such interests. Article 1139 states in relevant part:

[I]nvestment does *not* mean . . .

- (i) claims to money that arise solely from
 - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party[.]⁵⁹¹

Contracts for research services in the United States are "commercial contracts for the sale of . . . services," and thus expressly fall outside the NAFTA's definition of investment. They cannot, therefore, form the basis of Apotex Inc.'s investment claim.⁵⁹²

⁵⁸⁹ Memorial ¶¶ 77, 80.

⁵⁹⁰ *Id.* ¶ 80.

⁵⁹¹ NAFTA art. 1139(i) (emphasis added) [CLA-1].

⁵⁹² Even if Apotex were entirely dependent upon contract goods or services in the United States, that still would not make Apotex an investor in the United States. As the *Bayview* tribunal observed: "The economic dependence of an enterprise upon supplies of goods – in this case, water – from another State is not sufficient to make the dependent enterprise an 'investor' in that other State." *Bayview* Award ¶ 104 [CLA-22].

b) Apotex has not committed capital or other resources in the United States to maintain and use its ANDAs

237. Apotex claims that Apotex Inc. “commits various resources in the United States in relation to the filing and maintaining of its [ANDAs],” in two respects.⁵⁹³ *First*, Apotex claims that:

Apotex [Inc.] relies on a full-time employee based in Weston, Florida to act as its agent and liaison with FDA concerning the filing of ANDAs. Apotex [Inc.’s] agent works with a team of six people in carrying out this work. In particular, this team addresses any questions that FDA may have once an ANDA has been filed.⁵⁹⁴

Apotex asserts that Apotex Inc. “*funds* this team’s work through a 2005 services agreement with Apotex [Corp.]”⁵⁹⁵

238. The 2005 services agreement, by its terms, does not require Apotex Inc. to “fund” any aspect of Apotex Corp.’s work. Instead, the contract calls for just the opposite – Apotex Corp. pays Apotex Inc. for certain administrative support.⁵⁹⁶ Clearly, then, Apotex Inc. cannot claim that this contract gives it an “interest” arising from the commitment of capital in the United States; its evidence shows that it made no such commitment of capital.

239. *Second*, Apotex claims that:

Apotex [Inc.] uses resources in Apotex [Corp.’s] Florida office to comply with the post-approval reporting obligations for its ANDAs, such as preparation and submission of annual reports, drug safety reports, and management of drug labels and patient information leaflets. In doing so, Apotex [Inc.] *commits capital and*

⁵⁹³ Memorial ¶ 399.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.* (emphasis added).

⁵⁹⁶ Services Agreement Between Apotex Inc. and Apotex Corp. ¶¶ 3, 4.1 (July 1, 2005) (“In consideration of Apotex [Inc.] providing the services herein for and on behalf of [Apotex] Corp, Corp shall pay to Apotex during the Term hereof the sum of [REDACTED] on a monthly basis for all services rendered by Apotex to Corp pursuant to paragraph 4[.]”) [C-14].

other resources in the United States for the purpose of maintaining – and using – its ANDAs.⁵⁹⁷

This statement is both unsupported and directly contrary to representations Apotex has made in U.S. courts. When Apotex Inc. was seeking to avoid jurisdiction in U.S. courts, it denied giving any such “capital or other resources” to Apotex Corp., stating: “Plaintiffs have not shown that Apotex Corp. receives *any financing* from or through Apotex Inc.”⁵⁹⁸ Apotex Corp. further represented that it “has not received *any loans or other capital* from Apotex Inc.”⁵⁹⁹

240. Thus, when Apotex Inc. is seeking to establish jurisdiction before this Tribunal, it claims to “commit capital and other resources” to Apotex Corp. Yet when Apotex Inc. is seeking to avoid jurisdiction in U.S. courts, it denies having given “any financing” or any “loans or other capital” to Apotex Corp. Apotex cannot have it both ways. It should not be permitted to “blow hot and cold – to affirm at one time and to deny at another.”⁶⁰⁰

c) Apotex’s U.S. litigation expenses do not give rise to investment interests in the United States

241. Apotex contends that, “[a]s part of the preparation of its ANDAs, Apotex [Inc.] also regularly engages in costly patent litigation before US courts.”⁶⁰¹ Apotex stresses that U.S.

⁵⁹⁷ Memorial ¶ 400 (emphasis added).

⁵⁹⁸ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 6 (Nov. 2, 2009) (emphasis added) [RLA-77].

⁵⁹⁹ *Id.* (emphasis added) (citing McIntire testimony).

⁶⁰⁰ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141 (quoting English Court of the Exchequer in *Cave v. Mills* (1862)) [RLA-142]; *see also Oil Field of Texas, Inc. v. Government of Iran*, Case No. 43, Award, 1 IRAN-U.S. CL. TRIB. REP. 347 (1982) (quoting same) [RLA-121 at 23].

⁶⁰¹ Memorial ¶ 398 (“As part of the preparation of its ANDAs, Apotex [Inc.] also regularly engages in costly patent litigation before US courts In bringing patent litigations, Apotex [Inc.] incurs court costs, legal fees and other related expenses, all of which have to be borne in the United States.”); *see also* Witness Statement of Gordon Fahner ¶ 45 (July 30, 2012) (“Fahner Statement”) (“Apotex [Inc.] expends about [REDACTED] annually in legal fees in the US, the lion share of which is attributed to various ANDA-related litigations (such as lawsuits involving

litigation is a “required element of Apotex’s business in the US.”⁶⁰² Apotex thus claims to spend “██████████ every year in attorney’s fees in the US,” which are paid by Apotex Inc.⁶⁰³ Apotex considers these “litigation expenses” to form part of Apotex Inc.’s “investment” in the United States under Article 1139(h),⁶⁰⁴ arguing that the “returns achieved by Apotex on its ANDAs arise in significant part from a substantial commitment of resources to patent litigation in the US.”⁶⁰⁵

242. Apotex has failed to explain, however, how mere litigation expenses constitute investment interests. If a Canadian exporter could transform itself into an “investor” with an “investment” in the United States simply by filing lawsuits, then presumably every such exporter could bring its trade-related disputes to investment arbitration under the NAFTA. NAFTA Chapter Eleven, however, expressly defines the “investors” and “investments” entitled to protection so as to prohibit such bootstrapping – including by expressly declining to recognize as an “investment” such cross-border contracts for services.⁶⁰⁶

243. In any event, Apotex’s statements flatly contradict representations Apotex Inc. made in U.S. courts. When seeking to avoid jurisdiction in U.S. courts, Apotex Inc. denied that “ANDA

challenge to a patent and/or defense of an ANDA submission). At any given point in time, Apotex handles between 50 to 60 ANDA litigations in the US courts.”).

⁶⁰² Fahner Statement ¶ 46.

⁶⁰³ Memorial ¶ 41.

⁶⁰⁴ Desai Statement ¶ 27 (“Apotex makes significant investments in the US every year in order to conduct ANDA-related litigation. Currently, Apotex has 50 to 60 ongoing ANDA litigations and the firm invests ██████████ per year in legal fees in the US – just on patent and ANDA litigations.”)

⁶⁰⁵ Memorial ¶ 85; *see also* Witness Statement of Kiran Krishnan ¶ 19 (July 27, 2012) (“Krishnan Statement”) (“Apotex does not hesitate to invest in litigation in the US courts, although we may not be the first company to submit the application. To give an example, in the case of ██████████, we invested ██████████ to open up the market for this product through court litigation.”).

⁶⁰⁶ NAFTA art. 1139(i) (excluding from the definition of “investment” in Chapter Eleven “commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party”) [CLA-1].

litigation is a ‘key part of Apotex Inc.’s regular business activities’” in the United States.⁶⁰⁷

Apotex argued that “Apotex Inc. is in the business of developing and manufacturing generic drugs – not litigation.”⁶⁰⁸ It added that “Apotex Inc.’s compliance with its obligations under . . . [U.S. law] cannot support Plaintiffs’ contention that litigation is part of Apotex Inc.’s business model.”⁶⁰⁹ Apotex Inc. even dismissed U.S. litigation as a mere “by-product” of its efforts to gain access to the U.S. market, stating: “The fact that, as a by-product of its attempts to gain entry into the U.S. market, Apotex Inc. is often named as a defendant in ANDA litigation, does not transform such participation in litigation into a ‘regular business activity’ in Delaware or a ‘persistent course of conduct’ within the meaning of [Delaware’s long-arm statute]” that would give rise to personal jurisdiction in Delaware.⁶¹⁰

244. Apotex, in fact, expressly rejected the argument that it now makes in this arbitration – *i.e.*, that it “regularly engages in costly patent litigation before US courts”⁶¹¹ as a “required element of Apotex’s business in the US”⁶¹² – stating:

To the extent that Plaintiffs contend that Apotex Inc. has engaged counsel in the United States in connection with litigation in Delaware, and that counsel has engaged local Delaware counsel as required by local rules, Plaintiffs merely attempt to bolster their contention that jurisdiction is proper based on Apotex

⁶⁰⁷ *Astrazeneca Pharmaceuticals, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJJ-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of its Motion to Dismiss, at 4 (May 5, 2008) (emphasis added) [RLA-75].

⁶⁰⁸ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJJ (D. Del.), Apotex Inc.’s Response to Plaintiffs’ Objections to Report and Recommendation of Magistrate Judge Granting Apotex Inc.’s Renewed Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 6 (Jan. 11, 2010) (emphasis altered) [RLA-81].

⁶⁰⁹ *Id.* at 7; *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc and Apotex Corp.*, No. 1:07-cv-00809 JJJ-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 3 (Nov. 2, 2009) (“[I]t’s unlikely that Apotex Inc. embraces litigation as part of its business model[.]”) [RLA-77].

⁶¹⁰ *Astrazeneca Pharmaceuticals, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJJ-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of its Motion to Dismiss, at 4 (May 5, 2008) [RLA-75].

⁶¹¹ *See supra* n.601.

⁶¹² Fahner Statement ¶ 46.

Inc.'s litigation without establishing any continuous and systematic contacts on Apotex Inc.'s behalf. *Each suit is discrete and does not evince a regular or persistent course of conduct in Delaware.*"⁶¹³

Again, Apotex cannot have it both ways. Apotex cannot be permitted to make arguments to obtain jurisdiction before this international Tribunal when it has made the opposite arguments to avoid the jurisdiction of U.S. courts.⁶¹⁴

3. Apotex Mistakenly Concludes that the NAFTA Protects Interests Arising from the Commitment of Capital *Outside* the Host State

245. Apparently recognizing that it cannot establish any interests arising from the commitment of capital *in* the United States, Apotex seeks to lighten its burden by reading the territoriality requirement out of Article 1139(h) altogether. Apotex argues that the interests arising from the commitment of capital or other resources "in" the host State should be read to mean "*within or without* the host State," so long as the capital or other resources are "committed or devoted to economic activity in the territory of the host State."⁶¹⁵

246. Apotex's interpretation is clearly incorrect. There is no basis to conclude that the NAFTA Parties intended the word "in" to mean "within or without." Apotex's reading of Article 1139(h) contradicts (1) the ordinary meaning of Article 1139(h) read in context and in light of

⁶¹³ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.'s Reply Brief to Plaintiffs' Opposition to Apotex Inc.'s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 3-4 (emphasis added) (Nov. 2, 2009) [RLA-77].

⁶¹⁴ In addition, the legal fees Apotex may have incurred in the course of its U.S. litigation do not constitute "investments" because they are commercial contracts for services, which are squarely excluded from NAFTA's definition of investment in Article 1139(i).

⁶¹⁵ Memorial ¶ 393.

the NAFTA's object and purpose;⁶¹⁶ (2) the NAFTA Parties' shared understanding of Article 1139(h); and (3) the unanimous views of other NAFTA Chapter Eleven tribunals.

a) Apotex's interpretation is contrary to the ordinary meaning of Article 1139(h) read in context and in light of the NAFTA's object and purpose

247. Article 1139 defines "investment" as including:

- (h) interests arising from the commitment of capital or other resources *in the territory of a Party* to economic activity *in such territory*, such as under
 - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
 - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]⁶¹⁷

The provision makes clear that the investor's *interests* must arise from the *commitment* of capital or other resources *in* the territory of a Party to economic activity *in* such territory.

248. The French-language version of Article 1139(h) supports this ordinary meaning.⁶¹⁸ It states:

- (h) les *intérêts* découlant de l'engagement de capitaux ou d'autres ressources *sur le territoire* d'une Partie pour une activité économique exercée *sur ce territoire*, par exemple en raison: . . .⁶¹⁹

⁶¹⁶ See Vienna Convention on the Law of Treaties, art. 31(1), 1155 U.N.T.S. 331 (*opened for signature* May 23, 1969) ("VCLT") ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.") [CLA-17]. The International Court of Justice concluded that Article 31 of the Vienna Convention reflects customary international law. See, e.g., *Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. 1045, 1059 (Judgment of Dec. 13) [RLA-114]. Although the United States is not a party to the Vienna Convention, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. See Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties (Oct. 18, 1971), S. Ex. L. 92d Cong., 1st Sess., reprinted in 65 DEP'T ST. BULL. No. 1694, at 684, 685 (Dec. 13, 1971) [RLA-96].

⁶¹⁷ NAFTA art. 1139(h) (emphases added) [CLA-1].

⁶¹⁸ NAFTA art. 2206 ("The English, French and Spanish texts of this Agreement are equally authentic.") [CLA-1].

⁶¹⁹ Emphases added.

This confirms that the “interests” claimed as an investment must arise from the commitment of capital “in the territory” of a Party, and that the commitment of such capital must be to economic activity “in such territory.”

249. Apotex cites the Spanish-language text of NAFTA for a different interpretation. That provision reads:

(h) la participación que resulte del capital u otros recursos destinados para el desarrollo de una actividad económica en territorio de otra Parte, entre otros, conforme a: . . .

Apotex reads this provision as supporting its view that interests arising from capital or other resources may be committed “within or without” the host State. Mexico, however, has flatly rejected that interpretation. In a non-disputing Party submission in *S.D. Myers v. Canada*, for instance, Mexico has acknowledged, and even emphasized, the territoriality element in Article 1139(h):

In Mexico’s submission, where an investment is claimed to exist by virtue of advances of expenditures, a tribunal must find that there have been the kinds of expenditures that are described in the Article 1139 definition of investment (*i.e.* (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;) in order to find that the U.S. party has made an investment in Canada within the meaning of Chapter Eleven.⁶²⁰

250. This ordinary meaning of Article 1139(h) is confirmed by its context. Article 1139(h) is not a freestanding article; it forms part of the definition of “investment” in the investment chapter of a free trade agreement. The interpretation of this provision necessarily is informed by

⁶²⁰ *S.D. Myers v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United Mexican States (Damages Phase) ¶ 31 (Sept. 12, 2001) (emphasis in original) [RLA-132].

other provisions of Chapter Eleven, including its scope and coverage provision, Article 1101.

Article 1101(1) states that Chapter Eleven applies only to measures adopted or maintained by a Party relating to:

- (1) “investors or another Party” (which is defined as a Party “that seeks to make, is making or has made an *investment*”); and
- (2) “investments of investors of another Party *in the territory of the Party.*”

If an investment is not “in the territory of the Party,” it is not an investment for purposes of NAFTA Chapter Eleven. That is, as the *Canadian Cattlemen* tribunal observed:

“investors” are inextricably linked to “investments,” which Article 1101 limits to “foreign investments” – that is to say, investments of a party *in the territory of another Party* whose measure is at issue.”⁶²¹

As such, “only investors with *foreign investment*, and not domestic investors such as Claimants engaging in cross-border trade, fall within the scope of Chapter Eleven.”⁶²²

251. This interpretation is further confirmed by the U.S. Statement of Administrative Action (SAA), an instrument submitted to the U.S. Congress in connection with the conclusion of the NAFTA that explains the Treaty’s content⁶²³ and which has been accepted by the other Parties as an instrument related to the NAFTA. The SAA states that Chapter Eleven “applies where such firms or nationals make or seek to make investments *in another NAFTA country.*”⁶²⁴ The SAA

⁶²¹ *Canadian Cattlemen* Award on Jurisdiction ¶ 126 [CLA-47].

⁶²² See *id.* at ¶ 140 (emphasis added) [CLA-47]; see also *Canadian Cattlemen*, Submission of the United Mexican States ¶ 13 (Mar. 1, 2007) (“An ‘Investor of a Party’ is a person that seeks to make, is making, or has made an ‘investment,’ and Chapter Eleven applies to measures relating only to ‘investments’ of an investor of a Party in the territory of another NAFTA Party that has adopted or maintained the measure. Accordingly, the obligations of Chapter Eleven are owed by a NAFTA Party only to an ‘investor’ of another Party that seeks to make, is making, or has made an investment *within its territory.* This derives from the fact that the term ‘investment’ is used to define ‘investor.’”) (emphasis added) [RLA-105].

⁶²³ North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., 589 (1993) [RLA-97].

⁶²⁴ *Id.* at 140 (emphasis added).

further specifies that Part A of Chapter Eleven (titled “Investment”) “sets out each government’s obligations with respect to investors from other NAFTA countries and their *investments in its territory*.”⁶²⁵

252. This ordinary meaning of Article 1139(h), read in context, fully accords with the object and purpose of NAFTA Chapter Eleven. Apotex recognizes that, under NAFTA Article 102(1)(c), the agreement seeks to “increase substantially investment opportunities in the territories of the Parties.”⁶²⁶ Apotex contends, however, that “[r]eading Article 1139(h) only to apply [to] interests resulting from commitment of capital or resources already invested in the host State would defeat this objective,” as it “would not *increase* investment in the host State.”⁶²⁷

253. NAFTA tribunals have routinely rejected Apotex’s interpretation. The *Bayview* tribunal observed, for instance, that the “clear and ordinary meaning that is borne by the text of NAFTA Chapter Eleven” is that Article 102(1)(c) “refers to, and can only sensibly be considered as referring to, opportunities for *foreign investment* in the territory of each Party made by investors of another Party.”⁶²⁸ The *Metalclad* tribunal confirmed that Article 1139(h) evidences the Parties’ intent “to promote and increase *cross-border* investment opportunities[.]”⁶²⁹ The *Canadian Cattlemen* tribunal further observed:

The drafters of Chapter Eleven thus carefully differentiated between the underlying cross-border service and the commitment of financial resources pursuant to a requirement of the country to which the services are exported. The exclusion makes *no exception for those cross-border service providers that have investments in their home country that enable them to provide the services*

⁶²⁵ *Id.* (emphasis added).

⁶²⁶ Memorial ¶ 386.

⁶²⁷ *Id.* ¶ 387.

⁶²⁸ *Bayview* Award ¶ 100 (emphasis added) (quoting the submission of the United States) [CLA-22].

⁶²⁹ *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, Award ¶ 75 (Aug. 30, 2000) (emphasis added) [CLA-33].

The precise textual distinction of this Article, and the absence of provisions addressing home country investment, thus reinforce the conclusion that Chapter Eleven is not intended to apply to interests arising merely from cross-border trade activities.⁶³⁰

254. The ordinary meaning of Article 1139(h), read in context and in light of the NAFTA's object and purpose, thus contradicts Apotex's reading. The text is not ambiguous or obscure and cannot be said to lead to absurd results. There is, therefore, no basis for the Tribunal to resort to "supplementary means" of interpretation under Article 32 of the Vienna Convention, such as previous texts of NAFTA Chapter Eleven.⁶³¹ As one commentary notes:

An apt example for the exercise required by Art 32 is the decision in the *United States – Measures Affecting Gambling* case where the WTO Appellate Body, after investigating the ordinary meaning, context and subsequent developments, concluded that the meaning of the commitments made by the United States are *still ambiguous* and felt, thus, that it was "required, in this case, to turn to the supplementary means of interpretation provided for in Art 32 of the Vienna Convention."⁶³²

The ordinary meaning of Article 1139(h), read in context and in light of the treaty's object and purpose, reveals there is no ambiguity in the text, obviating any need to resort to supplemental means of interpretation.

⁶³⁰ See *Canadian Cattlemen Award on Jurisdiction* ¶ 147 (emphasis added) [CLA-47].

⁶³¹ See VCLT art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.") [CLA-17]; see also RICHARD K. GARDINER, *TREATY INTERPRETATION* 328 (2008) ("The Vienna rules look to ambiguity that remains *after the application of the general rule*, that is after deploying all relevant elements of the whole of article 31, not merely ambiguity of dictionary sense. The context, subsequent agreement, subsequent practice, etc. may resolve any such ambiguity without the need for determination by supplementary means.") (emphasis added) [RLA-152]. Although Claimants purport to invoke Chapter Eleven's *travaux préparatoires*, there are no *travaux préparatoires* in the proper sense of the term. Rather, there are 42 versions of the NAFTA Chapter Eleven negotiating text publicly available.

⁶³² VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 584 (O. Dörr & K. Schmalenbach eds., 2012) (quoting WTO Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R ¶ 195 (2005)) (emphasis added) [RLA-154].

b) The three NAFTA Parties have consistently rejected the interpretation of Article 1139(h) given by Apotex

255. Even if Article 1139(h) somehow were “still ambiguous,” the three NAFTA Parties have clarified its terms through their concordant, common, and consistent practice.

256. The United States stated in the *Canadian Cattlemen* cases that “the NAFTA’s terms read in context and in light of the Treaty’s object and purpose, leave no doubt that the scope and coverage of NAFTA Chapter Eleven extends only to investors that seek to make, are making or have made investments in the territory of the Respondent State, and to the investments those investors own or control.”⁶³³

257. Mexico confirmed, in a non-disputing Party submission in the *Canadian Cattlemen* cases, that “none of the NAFTA Parties undertook any obligation with respect to investments located outside of its territory or with respect to ‘investors’ who are not seeking to make, are not making and have not made investments *in its territory*.”⁶³⁴

258. Canada likewise confirmed its understanding that Chapter Eleven applies only to investors that have, or are seeking to make, investments in the territory of the disputing Party.⁶³⁵

⁶³³ *Canadian Cattlemen*, Memorial on the Preliminary Issue of Respondent United States of America, at 2-3 (Dec. 1, 2006) [CLA-48].

⁶³⁴ *Canadian Cattlemen*, Submission of the United Mexican States ¶ 2 (Mar. 1, 2007) (emphasis added) [RLA-105].

⁶³⁵ See *S.D. Myers*, Government of Canada Counter-Memorial ¶¶ 218-52 (Oct. 5, 1999) (arguing that because the claimant did not have an investment in Canada, the claim was not within the scope of Chapter Eleven) [RLA-131]; see also Department of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, Extract, Canada Gazette, Part I, 147 (Jan. 1, 1994) (reporting contemporaneously with NAFTA’s conclusion that Chapter Eleven was intended to build upon Canada’s experience with “investment agreements both to protect the interests of Canadian investors abroad and to provide a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad.”) [CLA-3]; *Canadian Cattlemen* Award on Jurisdiction ¶ 168, n.16 (“Both the Canadian and U.S. statements seem unambiguous in indicating that Chapter Eleven is intended to protect cross-border investors and investments. There is no counterpart document in Mexico; however, the Mexican government position is clear by virtue of its submission in this case under Article 1128 and by virtue of its submission in the *Bayview* case.”) (internal citations omitted) [CLA-47].

259. Accordingly, as the *Canadian Cattlemen* tribunal correctly concluded, there is a “concordant, common, and consistent” practice among the three NAFTA Parties within the meaning of Article 31(3)(b) of the Vienna Convention confirming that NAFTA Chapter Eleven is “applicable only to investors of one NAFTA Party who seek to make, are making, or have made, an investment *in another NAFTA Party*.”⁶³⁶ The Parties’ concordant, common, and consistent statements of their intent with respect to a treaty provision provide the best evidence of the meaning of that provision.⁶³⁷ Each of the three NAFTA Parties has specifically disclaimed that Chapter Eleven includes any intent to accord its protections to investments made in their home territories.

c) NAFTA tribunals unanimously recognize the NAFTA Parties’ interpretation of Article 1139(h) and reject the interpretation given by Apotex

260. Apotex has failed to cite any arbitral case law supporting its interpretation of Article 1139(h). That is because NAFTA Chapter Eleven tribunals have unanimously accepted the NAFTA Parties’ interpretation and have rejected Apotex’s interpretation. The *Canadian Cattlemen* tribunal, for instance, rejected the Canadian claimants’ argument that their “investments” in Canada could constitute “investments” for purposes of Article 1139 in a

⁶³⁶ See *Canadian Cattlemen* Award on Jurisdiction ¶¶ 189, 127 (emphasis added) [CLA-47]; VCLT art. 31(3)(b) (“There shall be taken into account, together with the context . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]”) [CLA-17].

⁶³⁷ See, e.g., Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT’L L. 203, 223 (1957) (observing that “a consistent [subsequent State] practice must come very near to being conclusive as to how the treaty should be interpreted.” (emphasis omitted)) [RLA-143]; *Islamic Republic of Iran v. United States of America*, Case No. B/1 (Counterclaim), Award No. ITL 83-B1-FT ¶ 109 (Sept. 9, 2004), 38 IRAN-U.S. CL. TRIB. REP. 77, 116 (“The importance of . . . subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty[.]”) (quoting International Law Commission) [RLA-113]; NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 251 (7th ed. 2002) (“On désigne par l’expression ‘interprétation authentique’, celle qui est fournie directement par les parties, par opposition à l’interprétation non authentique, donnée par un tiers.”) (“The expression ‘authentic interpretation’ designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party.”) (translation by counsel) [RLA-151].

Chapter Eleven arbitration against the United States.⁶³⁸ The tribunal concluded that “[s]ubparagraph (h), in discussing turnkey, construction, and other types of contractual interests, requires a commitment of capital or other resources ‘*in the territory of a Party to economic activity in such territory*’” for such interests to be considered an ‘investment.’”⁶³⁹

261. The *Grand River* tribunal concluded that “Chapter Eleven would be applicable only to investors of one NAFTA Party who seek to make, are making, or have made an investment *in another NAFTA Party*: absent those conditions, both the substantive protection of Section A and the remedies provided in Section B of Chapter Eleven are unavailable to an investor.”⁶⁴⁰ For purposes of Article 1139(h), the tribunal framed the question as whether the Canadian claimants had “significant activities” in the territory of the United States that could give rise to an investment under Article 1139(h).⁶⁴¹ The tribunal determined that the claimants’ activities, similar to those of Apotex, “centered on the manufacture of cigarettes at Grand River’s manufacturing plant in Canada for export to the United States.”⁶⁴² It thus concluded that “such activities and investments by investors in the territory of one NAFTA party do not satisfy the jurisdictional requirements for a claim against another NAFTA party.”⁶⁴³

⁶³⁸ See *Canadian Cattlemen Award on Jurisdiction* ¶ 142 [CLA-47].

⁶³⁹ *Id.* (emphasis supplied by tribunal).

⁶⁴⁰ *Grand River Enterprises Award* ¶ 87 (emphasis added) [CLA-29]; see also NAFTA art. 1139 (defining “investor of a Party” as a national or enterprise of a Party “that seeks to make, is making, or has made an investment[.]”) [CLA-1]; *Bayview Award* ¶ 105 (in order to qualify as an “investor” under Articles 1101(1) and 1139, “one must make an investment in the territory of another NAFTA State, not in one’s own”) [CLA-22].

⁶⁴¹ *Grand River Enterprises Award* ¶ 5 [CLA-29].

⁶⁴² *Id.*

⁶⁴³ *Id.*

262. The *Bayview* tribunal framed the “crucial question” as whether the U.S. “Claimants have an investment ‘in the territory of [Mexico].’”⁶⁴⁴ It is not sufficient, the tribunal concluded, that the U.S. claimants made an investment in the United States:

They must demonstrate that they were seeking to make, were making, or had made, an investment in Mexico. If they cannot demonstrate that, they will not qualify as “investors” for the purposes of these claims.⁶⁴⁵

Because the claimants could not satisfy that burden, the tribunal determined that it lacked jurisdiction and dismissed the case.⁶⁴⁶

263. In short, Apotex asks this Tribunal to set aside (1) the ordinary meaning of Article 1139(h), read in context and in light of the NAFTA’s object and purpose; (2) the concordant, common, and consistent practice among the three NAFTA Parties; and (3) the unanimous views of NAFTA Chapter Eleven tribunals. Instead, Apotex asks this Tribunal to accept the extraordinary claim that the NAFTA Parties intended that the word “in” in Article 1139(h) signify both “within” and “without.” There is no basis for this Tribunal to do so. Apotex has not established that NAFTA Chapter Eleven protects interests arising from the commitment of capital outside of the host State.

C. Article 1101 Requires a “Legally Significant Connection” between the Challenged Measure and the Investor or Its Investment

264. Apotex acknowledges that the “[t]he sole challenged measure in this case is an ‘Import Alert’ issued in Maryland by the U.S. Food and Drug Administration.”⁶⁴⁷ Article 1101(1) makes

⁶⁴⁴ *Bayview* Award ¶ 112 (brackets in original) [CLA-22].

⁶⁴⁵ *Id.* ¶ 108.

⁶⁴⁶ *Id.* at 28 (Decision).

⁶⁴⁷ *See* Letter from Barton Legum to Tribunal, at 3 (Oct. 10, 2012) (noting the parties’ agreement and quoting U.S. Response to Apotex’s Reply on Place of Arbitration (Sept. 26, 2012)).

clear that Chapter Eleven applies only to measures adopted or maintained by a Party “relating to” investors of another Party or investments of investors of another Party in the territory of the Party. The Import Alert did not relate to Apotex Inc. or Apotex Holdings as “investors,” or to their alleged “investments” in the United States.

265. The “relating to” provision in Article 1101(1) was first addressed in the *Methanex* arbitration. There, the challenged measures concerned restrictions by the state of California on the use of the gasoline additive MTBE.⁶⁴⁸ Methanex manufactured a component of MTBE, methanol, but not MTBE itself. The question thus arose whether measures restricting MTBE “related to” the investor and its investment within the meaning of Article 1101(1).

266. Methanex Corp. argued that, for purposes of NAFTA Chapter Eleven, “it is sufficient that the measures ‘affect’ the investor or its investment.”⁶⁴⁹ It further argued that because the California measures were “primarily aimed at eliminating methanol and MTBE from the market and at favouring the US domestic ethanol industry,” those measures necessarily “related to” the claimant and its investment.⁶⁵⁰

267. The three NAFTA Parties unanimously rejected the claimant’s interpretation. The United States argued that, “in the context of Article 1101(1), the phrase ‘relating to’ requires a *legally significant connection* between the disputed measure and the investor.”⁶⁵¹ Were it otherwise, “untold numbers of local, state and federal measures that merely have an incidental impact on an

⁶⁴⁸ *Methanex Corp.* First Partial Award ¶ 22 [CLA-36]. MTBE stands for methyl tertiary-butyl ether. *Id.*

⁶⁴⁹ *Id.* ¶ 131.

⁶⁵⁰ *Id.* ¶ 132.

⁶⁵¹ *Id.* ¶ 130 (citing U.S. position).

investor or investment might be treated, quite wrongly, as ‘relating to’ that investor or investment.”⁶⁵²

268. Canada confirmed the United States’ interpretation. In a non-disputing Party submission in *Methanex*, Canada stated that “for a measure to come within the scope and coverage of NAFTA Chapter Eleven, NAFTA Article 1101 requires that the measure must ‘relate’ to an investor or an investment and not merely ‘affect’ it.”⁶⁵³ Canada stressed that the tribunal “must give meaning to the words chosen by the drafters of the NAFTA.”⁶⁵⁴ Canada thus expressly “agree[d] with the United States that the term ‘relating to’ requires a significant connection between the measure at issue and the essential nature of investment.”⁶⁵⁵

269. Mexico also confirmed the United States’ interpretation. In a non-disputing Party submission, Mexico rejected Methanex Corp.’s “contention that measures that merely ‘affect’ investors or investments are covered by Chapter Eleven.”⁶⁵⁶ Mexico observed that the NAFTA Parties “deliberately selected ‘relating to’ in Article 1101 in order to require something more [than] a mere ‘effect’ . . . before measures could be arbitrable under Chapter Eleven.”⁶⁵⁷ “The significance of this distinction,” Mexico argued, “is that measures that ‘relate to’ investors or

⁶⁵² *Id.* ¶ 130 (citing U.S. position).

⁶⁵³ *Methanex Corp.*, Second Submission of Canada Pursuant to NAFTA Article 1128 ¶ 11 (Apr. 30, 2001) [RLA-117].

⁶⁵⁴ *Id.* ¶ 13 (“One of the corollaries of the “general rule of interpretation” in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” (quoting *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 23 (1996)).

⁶⁵⁵ *Id.* ¶ 23 (internal quotation marks omitted).

⁶⁵⁶ *Methanex Corp.*, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 7 (May 15, 2001) [RLA-118].

⁶⁵⁷ *Id.* (citation omitted).

investments have a closer degree of connection than measures that merely ‘affect’ them.”⁶⁵⁸

Accordingly, “[t]he test adopted for the purposes of Article 1101 must reflect the NAFTA drafters’ intent to require a more *direct nexus* between the measure and the investor or its investment than mere effect, as evidenced by the text’s considered use of ‘relating to.’”⁶⁵⁹

270. All three NAFTA Parties thus expressly agree that the phrase “relating to” in Article 1101 requires a *legally significant connection* between the challenged measure and the investor or its investment. These concordant, common, and consistent views of all of the NAFTA Parties may be deemed the authentic interpretation of the treaty, to be applied by NAFTA tribunals constituted under Chapter Eleven.⁶⁶⁰

271. The *Methanex* tribunal, after reviewing the three NAFTA Parties’ submissions, accepted that “the phrase ‘relating to’ in Article 1101(1) NAFTA signifies something more than the *mere effect* of a measure on an investor or an investment and that it requires a *legally significant connection* between them, as the USA contends.”⁶⁶¹

272. Other NAFTA Chapter Eleven tribunals similarly recognize and have given effect to this important jurisdictional limitation in the NAFTA. The tribunal in *Bayview v. Mexico*, for instance, concluded:

The simple fact that an enterprise in one NAFTA State is affected by measures taken in another NAFTA State is not sufficient to establish the right of that enterprise to protection under NAFTA Chapter Eleven: it is the relationship, the

⁶⁵⁸ *Id.* ¶ 8 (internal brackets omitted).

⁶⁵⁹ *Id.* (emphasis added).

⁶⁶⁰ See VCLT art. 31(3)(b) (stating that subsequent practice of the parties “shall be taken into account, together with the context”) [CLA-17]; *Canadian Cattlemen Award on Jurisdiction* ¶ 189 (finding that certain statements and submissions made by the NAFTA Parties amounted to “a practice that is concordant, common and consistent,” for purposes of art. 31(3)(b) of the Vienna Convention) [CLA-47].

⁶⁶¹ *Methanex Corp. First Partial Award* ¶ 147 (emphasis added) [CLA-36].

legally significant connection, with the State taking those measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures.⁶⁶²

As Apotex itself appears to recognize, a measure that merely affects an investor or its investment thus cannot satisfy the “legally significant connection” standard.⁶⁶³

273. Here, the sole challenged measure – the Import Alert – did not relate to Apotex Inc. with respect to its putative U.S. investments. Nor did it relate to Apotex Holdings as an investor with respect to any U.S. investment, including Apotex Corp.

D. The Import Alert Did Not Relate to Apotex Inc. as an Alleged Investor or to Its Alleged Investments

274. Apotex contends that the Import Alert “relates to” Apotex Inc. because it caused FDA to stop processing the firm’s pending or new ANDAs and rendered its existing ANDAs useless.⁶⁶⁴ Apotex is mistaken. The Import Alert had no legally significant connection to Apotex’s ANDAs. The Import Alert, as discussed, had a single function: to apprise FDA district offices that Apotex Inc.’s Etobicoke and Signet facilities were not cGMP-compliant and that drugs from those facilities could therefore be detained without physical examination.⁶⁶⁵ The Import Alert did not prevent FDA from reviewing ANDAs or prevent Apotex from using its existing ANDAs.

⁶⁶² *Bayview Award* ¶ 101 (emphasis added) [CLA-22].

⁶⁶³ Memorial ¶¶ 410-15 (favorably citing the “legally significant connection” standard articulated in *Methanex* and *Cargill*).

⁶⁶⁴ *Id.* ¶ 412. Apotex has not alleged, and cannot allege, that the Import Alert “relates to” any of its other supposed investments in the United States, *e.g.* litigation expenses and contracts for services from U.S. agents.

⁶⁶⁵ *See supra* ¶ 46.

1. The Import Alert Had No Impact on Apotex Inc.'s Pending or New ANDAs

275. Apotex erroneously argues that as a “direct consequence” of the Import Alert, “FDA refused to take further action” on Apotex Inc.’s pending ANDAs and “refused to act on new ANDAs filed by the company.”⁶⁶⁶ In fact, the bar that prevented approval of Apotex’s unapproved ANDAs was not the Import Alert, but Apotex’s own cGMP failures. If the ANDA applicant’s facility is not cGMP-compliant, FDA may withhold approval of an ANDA regardless of whether an import alert has been issued. In other words, although Apotex’s cGMP violations resulted in both the Import Alert and FDA’s refusal to approve Apotex’s pending ANDAs, the Import Alert did not itself relate to ANDA approval. FDA could have refused to approve Apotex’s ANDAs regardless of whether it imposed an import alert.

276. This requirement is clearly stated in U.S. law. The Code of Federal Regulations authorizes FDA to “refuse to approve an abbreviated application for a new drug under section 505(j) of the act” for a number of stated reasons, including if:

- (1) The methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the drug product are inadequate to ensure and preserve its identity, strength, quality, and purity[.]⁶⁶⁷

Thus, if a facility does not adequately comply with cGMP, FDA may withhold approval of an ANDA. This provision, by contrast, does not state that FDA may refuse to approve an ANDA if a facility is on import alert. Indeed, there is no reference to import alerts in this provision, because import alerts have no relation whatsoever to approval or non-approval of ANDAs.

⁶⁶⁶ Memorial ¶ 412.

⁶⁶⁷ 21 C.F.R. § 314.127(a)(1) (2012) [CLA-277]; *see also* 21 U.S.C. § 355(j)(4)(A) (2012) (FDA may refuse to approve an ANDA where “the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the drug are inadequate to assure and preserve its identity, strength, quality, and purity”) [CLA-234].

277. Apotex clearly understands this. In May 2009, long before Apotex was placed on Import Alert (and before the 2009 Signet inspection), Apotex asked FDA why a supplement to a pending ANDA could not be approved, writing: “Yesterday I was informed that a [supplement] we had submitted for one of our products could not be approved because of an outstanding regulatory compliance action for our facility. *My assumption is that this is in relation to the [Etobicoke 2008] inspection.*”⁶⁶⁸ FDA confirmed Apotex’s assumption, responding: “Significant violations to GMPs found during the course of an inspection, and/or our review of the inspectional findings may have an impact on pending applications/supplements.”⁶⁶⁹

278. This point was made clear again in FDA’s warning letter to Apotex concerning its Etobicoke facility – a letter sent months before FDA placed the Etobicoke facility on Import Alert. FDA stated that, in accordance with 21 C.F.R. § 314.127(a)(1), CDER “may recommend withholding approval of any new applications or supplements listing your firm as a drug product manufacturer” until FDA had determined that Etobicoke was cGMP-compliant.⁶⁷⁰

279. FDA again relied on this regulation in an August 2010 letter (again, before Apotex was placed on Import Alert), notifying Apotex of FDA’s inability to approve a pending ANDA:

[W]e cannot approve this application in its present form because the Center for Drug Evaluation and Research (CDER) is unable to find that the methods used in, and the facilities and controls used for, the manufacture, processing, packaging, or holding of [REDACTED] Capsules . . . by Apotex Inc. in Etobicoke, Ontario, Canada and Apotex Inc. in Toronto, Ontario, Canada, *comply with current good manufacturing practice (cGMP) regulations.*

[...]

⁶⁶⁸ Email from Carol Austin to Heriberto Negrón-Rivera (May 8, 2009) (emphasis added) [R-40].

⁶⁶⁹ Email from Carmelo Rosa to Carol Austin (May 12, 2009) [R-41].

⁶⁷⁰ 2009 Etobicoke Warning Letter, at 6 [C-41].

Until such time that you can demonstrate to the Agency that the problems have been corrected and the Agency's concerns are otherwise satisfied, your application cannot be approved.⁶⁷¹

280. Thus, 21 C.F.R. § 314.127(a)(1) and contemporaneous documents make clear that FDA declined to approve Apotex's ANDAs because of the firm's cGMP failures, not because of the Import Alert.⁶⁷² Indeed, under U.S. law, CDER could have refused to approve Apotex's ANDAs for cGMP violations regardless of whether DIOP placed Apotex's Etobicoke and Signet facilities on the Import Alert.

281. To obtain approval of its ANDAs while Etobicoke and Signet were on the Import Alert, Apotex could have transferred the technology necessary to produce its ANDA products to a different Apotex facility (or to a third-party facility) not on Import Alert, supplementing its ANDA to reflect the transfer.⁶⁷³

282. Dr. Desai admitted in this arbitration that Apotex could have transferred its ANDAs to other companies or other Apotex facilities, but he asserts that "the technical transfer of processes takes a long time and new stability data would have been needed," and that Apotex lacked "the capacity to manufacture the products made at Etobicoke and Signet" at a different Apotex facility.⁶⁷⁴ But this is directly contrary to representations Apotex made in U.S. courts in patent litigation over the drug modafinil. Another drug company had tried to block Apotex from obtaining a period of market exclusivity, arguing that the Import Alert and (more specifically and

⁶⁷¹ Letter from Keith Webber, Deputy Director, CDER – Office of Pharmaceutical Science, to Apotex Corp., at 1, 2 (Aug. 4, 2010) [C-159].

⁶⁷² *See also* 21 U.S.C. § 355(j)(4)(A) (2012) [CLA-234].

⁶⁷³ 21 C.F.R. § 314.70(a) (2011) [RLA-164]

⁶⁷⁴ Desai Statement ¶ 89.

accurately) Apotex's cGMP violations constituted a "barrier to FDA approval" of the modafinil ANDA.⁶⁷⁵ Apotex rejected the argument, representing to the court in April 2010 that:

Apotex has plants throughout the world. The import alert and related [warning] letters apply to only two Apotex facilities. While Apotex's ANDA for modafinil identifies one of two Ontario facilities as the manufacturing site, Apotex can file appropriate technology transfer documents with the FDA that would allow manufacture at another FDA approved Apotex manufacturing site. See, 21 CFR 314.70(a). Apotex continues to manufacture product at such sites and to import such product into the United States because those facilities are not subject to the import alert.⁶⁷⁶

283. Apotex further noted that two of Apotex's facilities (Richmond Hill and Bangalore) had recently passed FDA's cGMP inspections and thus were available to manufacture drugs for the U.S. market.⁶⁷⁷ Thus, contrary to Dr. Desai's current testimony, Apotex's contemporaneous court submissions suggest that it could have transferred ANDAs to other Apotex facilities and that those ANDAs could have been approved on that basis regardless of the Import Alert.

2. The Import Alert Had No Impact on Apotex Inc.'s Existing ANDAs

284. The Import Alert also had no legally significant effect on Apotex Inc.'s *approved* ANDAs. Apotex argues that the Import Alert rendered Apotex Inc.'s approved ANDAs "useless for the purpose for which Apotex [Inc.] had acquired them: marketing the products covered by the ANDAs in the US."⁶⁷⁸ Apotex's approved ANDAs remained approved during the period of the Import Alert,⁶⁷⁹ even though FDA could have withdrawn approval of the ANDAs due to the

⁶⁷⁵ *Apotex Inc. v. Cephalon, Inc.*, No. 06-cv-02768 MSG (E.D. Pa.), Order ¶ 17 (Mar. 15, 2011) [RLA-69].

⁶⁷⁶ *Apotex Inc. v. Cephalon, Inc.*, No. 06-cv-02768 MSG (E.D. Pa.), Response of Apotex to Cephalon's Request for Conference, at 2 (Apr. 21, 2010) [RLA-70]. Apotex also acknowledged that its ANDA for modafinil would not have been finally approved until 2012, for reasons wholly apart from the Import Alert. *Id.* at 3.

⁶⁷⁷ *See* Memorial ¶ 242.

⁶⁷⁸ *Id.* ¶ 412.

⁶⁷⁹ *Id.* ¶ 412.

cGMP violations at Etobicoke and Signet.⁶⁸⁰ The Import Alert advised FDA personnel only that finished drug products from Apotex Inc.'s Etobicoke and Signet facilities met criteria for detention without physical examination.

285. Apotex thus was free to transfer the technology necessary to manufacture those drugs to another Apotex facility or to a third party, as Apotex expressly contemplated in the modafinil litigation papers. The Import Alert, therefore, presented no legal impediment to Apotex's continued use of its ANDAs. There is no basis, therefore, to Apotex's argument that the Import Alert rendered its ANDAs "useless for the purpose for which Apotex [Inc.] had acquired them: marketing the products covered by the ANDAs in the US."⁶⁸¹

286. Because the Import Alert had no effect on Apotex's pending or approved ANDAs, there is no legally significant connection between the Import Alert and those ANDAs. Apotex thus has failed to establish that the Import Alert "relates to" Apotex Inc. as an investor or to its alleged U.S. investments.

E. The Import Alert Did Not Relate to Apotex Holdings as an Investor or to Its U.S. Investment, Apotex Corp.

287. Apotex claims that Apotex Holdings has made a number of investments in the United States, including:

- (1) Apotex Corp., a Delaware company indirectly owned by Apotex Holdings that sells generic drugs in the United States;⁶⁸²

⁶⁸⁰ See 21 C.F.R. § 314.150(2) (2010) (permitting FDA to withdraw approval of an ANDA if FDA finds "[t]hat on the basis of new information before FDA, evaluated together with the evidence available when the application or abbreviated application was approved, the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the drug are inadequate to ensure and preserve its identity, strength, quality, and purity and were not made adequate within a reasonable time after receipt of written notice from the agency[.]") [RLA-166].

⁶⁸¹ Memorial ¶ 412.

⁶⁸² *Id.* ¶¶ 339-40.

- (2) Starplex Scientific Corp., a Delaware company indirectly owned by Apotex Holdings that makes plastic bottles for drugs produced at Apotex’s Signet and Etobicoke facilities;⁶⁸³
- (3) Aposherm Realty Inc., a Delaware company that leases manufacturing facilities to Starplex;⁶⁸⁴ and
- (4) ApoPharma USA Inc., a Maryland company created in 2010 and indirectly owned by Apotex Holdings.⁶⁸⁵

Of those, Apotex Holdings claims only Apotex Corp. as an “investment” for purposes of Apotex’s NAFTA Chapter Eleven claim.⁶⁸⁶

1. The Import Alert Neither Applied to Apotex Corp., Directly or Indirectly, Nor Imposed any Legal Impediment to Its Business Operations

288. Apotex contends that because “Apotex Holdings indirectly owns and controls Apotex [Corp.], which is an enterprise incorporated under the laws of Delaware and an investment in the territory of the USA,” that “fact alone satisfies the jurisdictional requirements of Article 1101.”⁶⁸⁷ Apotex is mistaken. Having an investment in the territory of another Party is not sufficient to establish jurisdiction under NAFTA Chapter Eleven. As discussed, the challenged measure also must “relate to” the investor or its U.S. investment in order to satisfy the jurisdictional requirements of Article 1101(1).

289. The Import Alert does not “relate to” Apotex Holdings in its capacity as an investor or to its claimed U.S. investment, Apotex Corp., within the meaning of Article 1101(1). That is, there

⁶⁸³ *Id.* ¶ 49.

⁶⁸⁴ *Id.* ¶ 49.

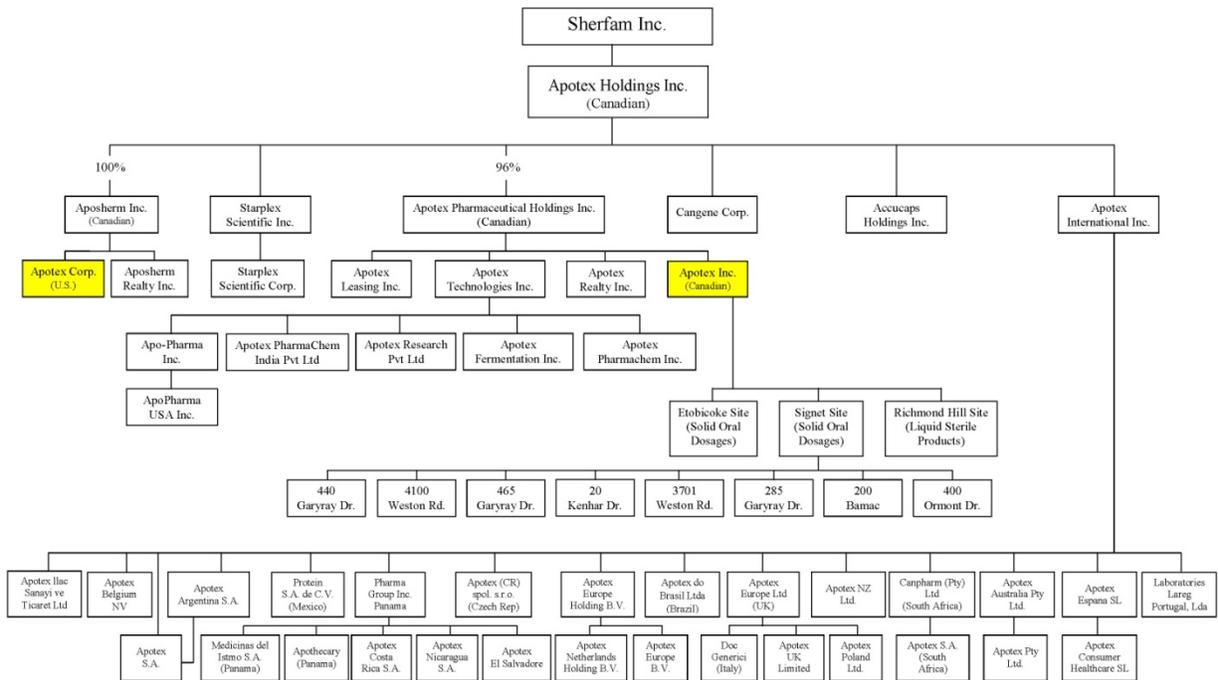
⁶⁸⁵ *Id.* ¶ 50.

⁶⁸⁶ *Id.* ¶¶ 351-52.

⁶⁸⁷ *Id.* ¶ 408.

is no legally significant connection between the challenged measure and the investor or its investment, for two principal reasons.

290. *First*, the Import Alert concerns products manufactured by Apotex Inc. Apotex Inc. does not own or control, directly or indirectly, the U.S. enterprise Apotex Corp. Rather, Apotex Corp. is owned by Aposherm Inc., a Canadian company, which in turn is owned by Apotex Holdings, another Canadian company.⁶⁸⁸ As Apotex’s corporate chart demonstrates, Apotex Inc. and Apotex Corp. are elements of a large international conglomerate, but there is no relationship of ownership or control between the two entities:⁶⁸⁹



⁶⁸⁸ *Id.* ¶¶ 20-21.

⁶⁸⁹ The United States has prepared this chart based on information supplied by Apotex and on publicly available sources. It does not purport to be a complete or current representation of Apotex’s entire corporate structure.

291. Because the Import Alert was directed to products manufactured by Apotex Inc., and not Apotex Corp., and because there is no relationship of ownership or control between Apotex Inc. and Apotex Corp., there was no legally significant connection between the Import Alert and Apotex Corp.

292. *Second*, Apotex does not and cannot claim that the Import Alert was *applied* to Apotex Holdings or to its U.S. investment, Apotex Corp. Apotex acknowledges, in fact, that the “Import Alert specifically named Apotex [Inc.] as the affected party,” such that drugs exported to the United States from two of Apotex Inc.’s Canadian manufacturing facilities were subject to detention.⁶⁹⁰ Apotex nonetheless contends that Apotex Corp. was “directly impacted by the Import Alert,” as it “lost sales and market shares [*sic*] in the US because it could no longer supply the products it sold, and was contractually obliged to sell, in the US.”⁶⁹¹ The Import Alert, however, affected *all* U.S. distributors of Apotex Inc.’s drugs, including Apotex Corp. Apotex’s own recall documents indicate that there are at least 82 distributors and 113 wholesale dealers of Apotex Inc.’s products in the United States.⁶⁹² But the Import Alert did not prohibit any U.S. dealers or distributors, including Apotex Corp., from continuing to procure and sell drugs from: (1) other of Apotex’s Canadian manufacturing facilities (*e.g.*, Richmond Hill);⁶⁹³ (2)

⁶⁹⁰ Memorial ¶ 412.

⁶⁹¹ *Id.* ¶ 411.

⁶⁹² Letter from John Hinnen, Project Leader, Quality Assurance – Product Support, Apotex Inc., to Wanda Lenger, Recall & Emergency Coordinator, Florida District Office, FDA (Sept. 4, 2009) (enclosing Recall Report Format Questionnaire which reports to FDA’s Recall and Emergency Coordinator that 82 distributors and 113 wholesale dealers of Apotex Inc.’s products in the United States received recall product and will receive notices by mail or courier) [C-83].

⁶⁹³ *See* Apotex Corp. Press Statement, “Apotex to Distribute Important Transdermal System for Management of Chronic Pain in the U.S. Market” (Oct. 20, 2009), *available at* <http://www.apotex.com/us/en/about/press/20091020.asp> (last visited Dec. 12, 2012) (“Apotex has over 6,000 employees worldwide and produces over 300 medicines in 4,000 dosages, in 21 facilities in North America.”) [R-48].

other Apotex facilities worldwide (e.g., Bangalore); or (3) non-Apotex facilities in the United States, Canada, or elsewhere.

293. Apotex cites the decision in *Cargill v. Mexico* as supporting its claim that the Import Alert “relates to” Apotex Corp.⁶⁹⁴ That case, however, provides no such support. The investor in that case, Cargill Inc., is a U.S. manufacturer of high fructose corn syrup (HFCS). Cargill established a large Mexican subsidiary, Cargill de Mexico, which operated in 10 Mexican states and employed over 1,000 people.⁶⁹⁵ Cargill de Mexico was established to import HFCS from Cargill Inc.’s U.S. facilities and distribute it within Mexico.⁶⁹⁶ Cargill Inc. claimed that Mexico imposed various measures to protect the domestic cane sugar industry in Mexico, in violation of NAFTA Chapter Eleven. Mexico had issued a decree requiring Mexican importers of HFCS from the United States – in that case, Cargill de Mexico – to obtain a permit from the secretary of the economy. If an importer failed to obtain a permit, its HFCS imports were subject to tariffs ranging from 156 percent to 210 percent, as compared to the NAFTA tariff rate at that time of 2 percent to 3 percent.⁶⁹⁷ Cargill de Mexico applied for a permit, but never received one.⁶⁹⁸

294. The tribunal observed that the measure “directly affected the business of Cargill de Mexico,” as it was targeted at Mexican importers, rather than foreign exporters.⁶⁹⁹ The tribunal further observed that the measure met the “causal connection requirement as well.”⁷⁰⁰ That is,

⁶⁹⁴ *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009) [CLA-23].

⁶⁹⁵ *Id.* ¶ 167.

⁶⁹⁶ *Id.* ¶¶ 66-67.

⁶⁹⁷ *Id.* ¶ 117.

⁶⁹⁸ *Id.* ¶¶ 120, 343.

⁶⁹⁹ *Id.* ¶ 173.

⁷⁰⁰ *Id.* ¶ 174.

the “import permit requirement not only had an immediate and direct effect on the business of Cargill de Mexico but also constituted a *legal impediment* to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.”⁷⁰¹ Cargill de Mexico, the investment in that case, could no longer legally operate without obtaining a permit that the Mexican government declined to grant. The tribunal concluded that Mexico, “in an attempt to further its goals regarding United States trade policy, targeted the few suppliers of HFCS that originated in the United States,” which “all but annihilated a series of investments for the time that the permit requirement was in place.”⁷⁰²

295. In this case, by contrast, Apotex does not and cannot allege that the United States applied the Import Alert to Apotex Corp., or that the Import Alert constituted a “legal impediment” to Apotex Corp.’s operations. In fact, Apotex admits that, during the time of the Import Alert, Apotex Corp. “engaged more actively in contract manufacturing with third parties who manufactured drug products that Apotex [Corp.] sold.”⁷⁰³

296. Just two months after the Import Alert was adopted, for instance, Apotex Corp. signed an “exclusive agreement” with Hisamitsu Pharmaceutical of Japan to distribute Hisamitsu’s transdermal patch for chronic pain.⁷⁰⁴ Apotex Corp. claimed that the deal expanded its drugs “portfolio” and opened the door to a \$1.2 billion market.⁷⁰⁵

⁷⁰¹ *Id.* ¶ 175 (emphasis added).

⁷⁰² *Id.* ¶ 300.

⁷⁰³ Memorial ¶ 46.

⁷⁰⁴ See Apotex Corp. Press Statement, “Apotex to Distribute Important Transdermal System for Management of Chronic Pain in the U.S. Market” (Oct. 20, 2009), available at <http://www.apotex.com/us/en/about/press/20091020.asp> (last visited Dec. 12, 2012) [R-48].

⁷⁰⁵ See *id.* (announcing that it was “excited to include this important, quality product in our portfolio and to be able to offer it to our valued healthcare partners”).

297. Six months later, Apotex Corp. entered into an agreement with GlaxoSmithKline (GSK) that garnered Apotex Corp. \$300 million and an additional “guaranteed minimum of \$180 million to be earned through sales of GSK products,” including for the “exclusive supply and distribution” of the popular antidepressant drug Paxil.⁷⁰⁶

298. The suggestion, then, that the Import Alert imposed a *legal impediment* to Apotex Corp.’s business of selling generic drugs is manifestly false. Like any distributor that lost access to one of its suppliers, Apotex Corp. readily began procuring products from other suppliers. The impact that the Import Alert had on Apotex Corp. was no different, legally, from that felt by any of the many other U.S. companies that imported drugs from Apotex Inc.’s Etobicoke and Signet facilities. As the *Methanex* tribunal recognized, the “threshold provided by Article 1101(1)” cannot “be met by suppliers to [the claimant] who suffered as a result of the [claimant’s] alleged losses,” nor by “suppliers to those suppliers and so on, towards infinity.”⁷⁰⁷ Were that true:

Article 1101(1) would provide no significant threshold to a NAFTA arbitration. A threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all; and the attractive simplicity of Methanex’s interpretation derives from the fact that it imposes no practical limit. It may be true, to adapt Pascal’s statement, that the history of the world would have been much affected if Cleopatra’s nose had been different, but by itself that cannot mean that we are all related to the royal nose. The Chaos theory provides no guide to the interpretation of this important phrase; and a strong dose of practical common-sense is required.⁷⁰⁸

A similar dose of common sense compels the obverse: Under NAFTA Chapter Eleven, a measure affecting a foreign supplier cannot be said to affect, legally, every domestic company which that supplier supplies.

⁷⁰⁶ *Mylan Inc. et al. v. Smithkline Beecham Corp. et al.*, No. 10-cv-4809 (JAP), 2012 WL 603804, at *2 (D.N.J. Feb. 23, 2012) (noting terms of settlement agreement) (capitalization altered) [RLA-90].

⁷⁰⁷ *Methanex Corp.* First Partial Award ¶ 137 [CLA-36].

⁷⁰⁸ *Id.*

2. Apotex's Arguments on How the Import Alert "Relates To" Apotex Corp. Are Legally Irrelevant, Inconsistent with Evidence in the Record, or Directly Contrary to Apotex's Representations in U.S. Court

299. Apotex offers several explanations as to how the Import Alert has some "legally significant connection" to Apotex Corp. that distinguishes it from the dozens of other U.S. distributors of Apotex Inc.'s products. Apotex's explanations, however, are legally irrelevant. Apotex Inc. does not claim to own or control Apotex Corp., and mere business linkages between affiliated manufacturers and distributors are insufficient to establish a legally significant connection.

300. But even if Apotex's linkages were legally relevant, they are factually incorrect. Every one of Apotex's statements contradicts evidence in the record or arguments Apotex has made in U.S. courts. As illustrated below, Apotex routinely says one thing in order to create jurisdiction before this Tribunal while saying precisely the opposite when seeking to avoid jurisdiction in U.S. courts.

a) Apotex Corp. is not the sole U.S. consignee of shipments of Apotex Inc.'s products

301. Apotex claims that Apotex Corp. "was *the* consignee of the shipments of product interrupted by the Import Alert."⁷⁰⁹ This is incorrect. Prior to and during the period of the Import Alert, Apotex Corp. was not the sole consignee of shipments of drug products from Apotex Inc.'s Etobicoke and Signet facilities.⁷¹⁰ Apotex's own recall documents, in fact,

⁷⁰⁹ Memorial ¶ 411 (emphasis added).

⁷¹⁰ See FDA, *Apotex Inc. – Signet Shipments – Non-Apotex Entities as Consignees (2006-2009)* [R-118]; FDA, *Apotex Inc. – Etobicoke Shipments – Non-Apotex Entities as Consignees (2006-2009)* (FDA-prepared spreadsheets showing a large number of consignees other than Apotex Corp. that received shipments of drugs from Apotex Inc.'s Etobicoke and Signet facilities between 2006 and 2009) [R-119]; FDA, *Apotex Inc. – Detained Shipments – Non-Apotex Entities as Consignees (2009-2012)* (showing a number of consignees other than Apotex Corp. that did not

identify at least 339 consignees in the United States who received Apotex Inc. products.⁷¹¹ The suggestion, then, that Apotex Corp. was “was *the* consignee of the shipments of product interrupted by the Import Alert” is either misleading or untrue.⁷¹²

b) Apotex Corp. and Apotex Inc. are not “vertically integrated” companies

302. In this arbitration, Apotex contends that Apotex Corp. and Apotex Inc. “operate as closely integrated companies at the operational level.”⁷¹³ Apotex claims that, as “vertically integrated” companies,⁷¹⁴ Apotex Inc. and Apotex Corp. “share a number of important functions, including the Regulatory Affairs, Quality Assurance, Information Systems, Financial Reporting and other functions.”⁷¹⁵ In that regard, Apotex Corp.’s director of Regulatory Affairs claims to “report directly to” Apotex Inc.’s Global Vice President for Regulatory Affairs.⁷¹⁶

303. In U.S. courts, however, Apotex has argued precisely the opposite, representing that “Apotex Corp. and Apotex Inc. are each maintained as completely separate corporate entities,”⁷¹⁷

receive shipments following the addition of Apotex Inc.’s Etobicoke and Signet facilities to Import Alert 66-40) [R-115].

⁷¹¹ Letter from John Hinnen, Project Leader, Quality Assurance – Product Support, Apotex Inc., to Wanda Lenger, Recall & Emergency Coordinator, Florida District Office, FDA (Sept. 4, 2009) (enclosing Recall Report Format Questionnaire, which states in Section 6 that 339 consignees received recall product) [C-83]; Distribution List for Recall Product (referred to as “5–Consignees.xls” in the Questionnaire) [R-5].

⁷¹² Memorial ¶ 411.

⁷¹³ Fahner Statement ¶ 35.

⁷¹⁴ Memorial ¶ 35; *see also* Fahner Statement ¶ 26 (“Apotex operates as a vertically integrated business”).

⁷¹⁵ Fahner Statement ¶ 35; *see also* Watson Statement ¶ 28 (“The two companies are closely integrated in many areas . . . [and] share a number of important functions, including Regulatory Affairs, Quality Assurance, Information Systems, Financial Reporting and other functions”); Memorial ¶ 42 (“Apotex [Corp.] is integrated within the Apotex group. It shares centralized functions, such as finance, intellectual property, human resources and information technology, with Apotex [Inc.]”).

⁷¹⁶ Krishnan Statement ¶ 14 (“I report directly to Mr. Ross McLean, who is Apotex [Inc.’s] Global Vice President for Regulatory Affairs, based in Toronto.”).

⁷¹⁷ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of its Motion to Dismiss, at 11 (May 5, 2008) [RLA-75]; *see also id.*, Ex. B, Declaration of Tammy L. McIntire ¶ 4 (May 2, 2008) (“Apotex Corp. and Apotex Inc. are each maintained as completely separate corporate entities.”). At that time, Ms. McIntire served as President of Apotex Corp. *Id.* ¶ 1;

and that “the decisions of Apotex Inc. should not be imputed to Apotex [Corp.]”⁷¹⁸ Apotex has emphasized in U.S. courts that:

- “Apotex Corp. is not a subsidiary of Apotex Inc.”;⁷¹⁹
- “Apotex Inc. has no involvement in the *day-to-day management* of Apotex Corp.”;⁷²⁰
- “Apotex Inc. has no involvement in the day-to-day *operations* of Apotex Corp. or the process by which Apotex Corp. obtains business”;⁷²¹
- “Although Plaintiffs attempt to collapse the actions of Apotex Inc., which develops and manufactures generic pharmaceutical products for worldwide distribution, with those of Apotex Corp., which markets and sells generic pharmaceutical products in the United States, Plaintiffs fail to establish any control over Apotex Corp.’s day-to-day operations by Apotex Inc.”;⁷²²
- “Apotex Corp. may not be considered Apotex Inc.’s agent under the Delaware long-arm statute”;⁷²³
- “Apotex Corp. is merely the designated U.S. agent for purposes of accepting service of process for Apotex Inc. in the United States”;⁷²⁴ and
- “To the extent there are Apotex Inc. employees serving as officers and directors of Apotex Corp., and to the extent that Ms. McIntire [Apotex Corp.’s then-president] receives feedback from Apotex Inc. pertaining to the performance of Apotex Corp. employees, these considerations are insignificant when combined with Apotex

Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp., No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 4 (Nov. 2, 2009) (“Apotex Corp. is a separate and distinct corporation.”) [RLA-77].

⁷¹⁸ *In re: Rosuvastatin Calcium Patent Litigation*, 719 F.Supp.2d 388, 396 (D. Del. 2010) [RLA-80].

⁷¹⁹ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Proposed Findings of Fact and Conclusions of Law—Noninfringement of the ’314 Patent ¶ 1 (Feb. 12, 2010) [RLA-82].

⁷²⁰ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of its Motion to Dismiss, at 11 (May 5, 2008) (emphasis added) [RLA-75].

⁷²¹ *Id.*, Ex. B, Declaration of Tammy L. McIntire (May 2, 2008) ¶ 6 (emphasis added).

⁷²² *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 6 (Nov. 2, 2009) [RLA-77].

⁷²³ *Id.* at 11.

⁷²⁴ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Corp.’s Brief in Support of its Motion to Dismiss, at 1 (Jan. 31, 2008) [RLA-73a]; *see also id.* at 4 (“Apotex Corp. is only Apotex Inc.’s designated agent in accordance with the Federal Regulations.”).

Corp.’s (1) independent methods of financing its operations; (2) responsibility for its day-to-day management; and (3) self-generated business opportunities.”⁷²⁵

Thus, while Apotex highlights the corporate relationship between Apotex Inc. and Apotex Corp.

in order to create jurisdiction in this case, when resisting jurisdiction in United States courts,

Apotex has argued:

The Court should *not consider the corporate relationship* between Apotex Inc. and Apotex Corp (which is not a parent-subsiary in any event), or the fact that Apotex Corp. may some day [*sic*] distribute generic Crestor manufactured by Apotex Inc. if the ANDA is approved Since Apotex Inc. alone is the only identified applicant, Apotex Inc. alone should be the only defendant[.]⁷²⁶

c) Apotex Corp. receives no “loans or other capital” from Apotex Inc.

304. In this arbitration, Apotex claims that Apotex Inc. “commits various resources in the United States in relation to the filing and maintaining of its [ANDAs],” in two respects.⁷²⁷ *First,*

Apotex claims:

Apotex [Inc.] relies on a full-time employee based in Weston, Florida to act as its agent and liaison with FDA concerning the filing of ANDAs. Apotex [Inc.’s] agent works with a team of six people in carrying out this work. In particular, this team addresses any questions that FDA may have once an ANDA has been filed. Apotex [Inc.] *funds* this team’s work through a 2005 services agreement with Apotex [Corp.]⁷²⁸

305. This statement is false or misleading. As discussed above, the 2005 services agreement, by its terms, does *not* call for Apotex Inc. to “fund” Apotex Corp. or any “team” at Apotex Corp.

⁷²⁵ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 10-11 (Nov. 2, 2009) [RLA-77].

⁷²⁶ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Corp.’s Reply Brief in Support of its Motion to Dismiss, at 4 (Apr. 14, 2008) (emphasis added) [RLA-74].

⁷²⁷ Memorial ¶ 399.

⁷²⁸ *Id.* ¶ 399 (citing Services Agreement Between Apotex Inc. and Apotex Corp. (July 1, 2005) [C-14]) (emphasis added).

On the contrary, the contract calls for Apotex Corp. to pay Apotex Inc. for certain administrative support.⁷²⁹ The contract, Apotex Corp. confirmed in U.S. courts, is for the “outsourcing [of] certain administrative functions to Apotex Inc.”⁷³⁰

306. *Second*, Apotex claims in this arbitration that:

Apotex [Inc.] uses resources in Apotex [Corp.’s] Florida office to comply with the post-approval reporting obligations for its ANDAs, such as preparation and submission of annual reports, drug safety reports, and management of drug labels and patient information leaflets. In doing so, Apotex [Inc.] *commits capital and other resources* in the United States for the purpose of maintaining – and using – its ANDAs.⁷³¹

307. In U.S. courts, however, Apotex Corp. denied receiving any “capital or other resources” from Apotex Inc., stating: “Plaintiffs have not shown that Apotex Corp. receives *any financing* from or through Apotex Inc.”⁷³² Citing the sworn testimony of Apotex Corp.’s president, Apotex Inc. stated that “Apotex Corp. has not received *any loans or other capital* from Apotex Inc.”⁷³³ Apotex Inc. stressed that “Apotex Corp. generates its *own revenue* from the marketing, sale, and distribution of various pharmaceutical products in the United States,” from which it “pays its employees, provides employee benefits, purchases liability insurance, purchases

⁷²⁹ Services Agreement Between Apotex Inc. and Apotex Corp. ¶¶ 3, 4.1 (July 1, 2005) (“In consideration of Apotex [Inc.] providing the services herein for and on behalf of [Apotex] Corp, Corp shall pay to Apotex during the Term hereof the sum of [REDACTED] on a monthly basis for all services rendered by Apotex to Corp pursuant to paragraph 4”) [C-14].

⁷³⁰ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 10 (Nov. 2, 2009) (emphasis added) [RLA-77].

⁷³¹ Memorial ¶ 400 (emphasis added).

⁷³² *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 6 (Nov. 2, 2009) (emphasis added) [RLA-77].

⁷³³ *Id.* (emphasis added).

products to sell, and pays for administrative services.”⁷³⁴ Apotex’s argument that it “funds” and “commits capital” to Apotex Corp. thus is contradicted by both the record evidence and Apotex’s own sworn statements in U.S. courts.

d) Apotex Corp. was not “set up specifically” to sell Apotex drugs

308. In this arbitration, Apotex argues that Apotex Corp. “was created *in order to* market, sell and distribute Apotex products in the US.”⁷³⁵ Indeed, Apotex emphasizes that Apotex Corp. was “set up *specifically* to market, distribute and sell the Apotex products on the US market.”⁷³⁶

Although Apotex admits that Apotex Corp. sells drugs that are not manufactured by Apotex Inc., it claims that “selling third-party products is not a strategic goal of the company.”⁷³⁷

309. In U.S. courts, however, Apotex Corp. denied that it “acts in concert with[] Apotex Inc. for the purposes of marketing, distributing, and selling generic pharmaceutical products within the United States.”⁷³⁸ Apotex stressed that Apotex Inc. is but one of Apotex Corp.’s many

⁷³⁴ *Id.* (emphasis added, internal citations omitted).

⁷³⁵ Memorial ¶ 41 (emphasis added); *see also* Fahner Statement ¶ 33 (“Apotex [Corp.] markets and distributes in the United States Apotex products manufactured by Apotex Inc.”).

⁷³⁶ Desai Statement ¶ 24 (emphasis added); *see also* Memorial ¶ 41 (contending that Apotex Corp. “was created in order to market, sell and distribute Apotex products in the US”); Fahner Statement ¶ 33 (“Apotex [Corp.] markets and distributes in the United States Apotex products manufactured by Apotex Inc.”).

⁷³⁷ Witness Statement of John Flinn ¶ 51 (July 30, 2012) (“Flinn Statement”).

⁷³⁸ *Astrazeneca Pharmaceuticals LP et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJJ-LPS (D. Del.), Answer, Defenses and Counterclaims of Defendants Apotex Inc. and Apotex Corp., at 5 ¶ 13 (Jan. 28, 2009) (denying allegations in claimants’ complaint) [RLA-76].

suppliers,⁷³⁹ emphasizing that “Apotex Corp. does not market every generic pharmaceutical product manufactured by Apotex Inc.”⁷⁴⁰ To the contrary:

- “Apotex Corp. markets pharmaceutical products, including *some* of those manufactured by Apotex Inc.”⁷⁴¹
- “Apotex Corp. selects which Apotex Inc. products Apotex Corp. will market”;⁷⁴² and
- “Apotex Corp. markets pharmaceutical products made by manufacturers other than Apotex Inc. In 2007, approximately fifteen percent of Apotex Corp.’s sales resulted from products not manufactured by Apotex Inc.”⁷⁴³

Apotex’s statement to this Tribunal that Apotex Corp. “was set up *specifically* to market, distribute and sell the Apotex products on the US market”⁷⁴⁴ thus is belied by representations Apotex has made to U.S. courts.

e) Apotex Corp. and Apotex Inc. are not mutually “dependent”

310. In this arbitration, Apotex contends that Apotex Corp. and Apotex Inc. are mutually dependent in their business operations, including “in a number of areas that are key to their

⁷³⁹ See, e.g., *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of Its Motion to Dismiss, at 14 (May 5, 2008) (“Apotex Corp. is located in Florida, and it distributes and sells, throughout the United States, pharmaceutical products manufactured by Apotex Inc. and other suppliers.”) [RLA-75].

⁷⁴⁰ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Post-Trial Rebuttal Brief—Noninfringement, at 15 (Apr. 16, 2010) (“These facts . . . preclude a finding that Apotex Corp. intends to benefit directly if the FDA approves ANDA No. 079145.”) [RLA-83].

⁷⁴¹ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Proposed Post-Trial Findings of Fact and Conclusions of Law – Noninfringement, at 1 (Apr. 16, 2010) (emphasis added) [RLA-84]; see also *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of Its Motion to Dismiss (May 5, 2008), Ex. B, Declaration of Tammy L. McIntire ¶ 1 (May 2, 2008) (“Apotex Corp. sells pharmaceutical products, including products manufactured by Apotex Inc., a Canadian-based pharmaceutical company.”) [RLA-75].

⁷⁴² *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Proposed Post-Trial Findings of Fact and Conclusions of Law – Noninfringement, at 1 (Apr. 16, 2010) (citation omitted) [RLA-84].

⁷⁴³ *Id.* (citations omitted).

⁷⁴⁴ Desai Statement ¶ 24 (emphasis added); see also Memorial ¶ 41 (contending that Apotex Corp. “was created in order to market, sell and distribute Apotex products in the US”); Fahner Statement ¶ 33 (“Apotex [Corp.] markets and distributes in the United States Apotex products manufactured by Apotex Inc.”).

respective operations.”⁷⁴⁵ Apotex thus argues that “prior to the Import Alert, Apotex [Corp.] was dependent on Apotex [Inc.’s] supplies of products.”⁷⁴⁶ Apotex Inc., in turn, was said to have been “dependent on Apotex [Corp.’s] marketing and distribution expertise[.]”⁷⁴⁷

311. In U.S. courts, however, Apotex has stressed that Apotex Corp. and Apotex Inc. are operationally and financially *independent* of each other. In pleadings in U.S. courts in 2009-2010, Apotex stressed that:

Apotex Corp. is a separate and distinct corporation. It generates its own capital; purchases its own products and services; chooses which products to market; sells products from companies other than Apotex Inc.; and is responsible for identifying and generating its own customer base.⁷⁴⁸

Further clarifying the companies’ independence, Apotex stated that Apotex Corp.:

- “finances its operations independent of Apotex Inc.”;⁷⁴⁹
- “manages its own financial plans”;⁷⁵⁰
- “authorizes its own expenditures”;⁷⁵¹
- “creates its own forecasts”;⁷⁵²
- “commits to its own contracts”;⁷⁵³
- “determines which customers will receive shipments”;⁷⁵⁴

⁷⁴⁵ Watson Statement ¶ 27.

⁷⁴⁶ Flinn Statement ¶ 29.

⁷⁴⁷ *Id.*

⁷⁴⁸ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 4 (Nov. 2, 2009) [RLA-77].

⁷⁴⁹ *Id.* at 10.

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

⁷⁵² *Id.*

⁷⁵³ *Id.*

- “sells products from companies other than Apotex Inc.”;⁷⁵⁵
- “does not market every generic pharmaceutical product manufactured by Apotex Inc.”;⁷⁵⁶ and
- does not “benefit directly” from FDA approval of Apotex Inc.’s ANDAs.⁷⁵⁷

Apotex’s statement to this Tribunal that Apotex Inc. and Apotex Corp. are “dependent” upon each other is thus belied by representations Apotex has made in U.S. courts.⁷⁵⁸

f) Apotex Inc. does not “decide” which products Apotex Corp. will market

312. In this arbitration, Apotex claims that Apotex Corp. *recommends* which drugs to sell in the United States, but Apotex Inc. makes the *decision*. Apotex states that Apotex Corp. “plays a key role in the strategic decision-making process of launching new lines of products in the US market” through its participation in Apotex Inc.’s “product selection team” (PST).⁷⁵⁹ The PST’s “mandate is to *decide* whether a proposed new product represents a good opportunity for Apotex and how that opportunity should be exploited.”⁷⁶⁰ Apotex Corp. personnel are said to “participate[] in strategic discussions conducted by PST” and “provide input” into “the decision-

⁷⁵⁴ *Id.*

⁷⁵⁵ *Id.* at 4.

⁷⁵⁶ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Post-Trial Rebuttal Brief—Noninfringement, at 15 (Apr. 16, 2010) [RLA-83].

⁷⁵⁷ *Id.* at 14 (“Plaintiffs have not shown that Apotex Corp. intends to benefit directly if the FDA approves ANDA No. 079145.”).

⁷⁵⁸ Flinn Statement ¶ 29.

⁷⁵⁹ Fahner Statement ¶¶ 33, 84.

⁷⁶⁰ Watson Statement ¶ 31 (emphasis added); *see also* Fahner Statement ¶¶ 33, 84-87 (“The main responsibility of PST is to review potential opportunities for new launches and make decisions as to which opportunities to pursue.”).

making process.”⁷⁶¹ That is, “[o]n the basis of [Apotex Corp.’s] *recommendations*, Apotex [Inc.] makes a *decision* whether to launch a particular new drug” in the United States.⁷⁶²

313. In U.S. courts, however, Apotex has represented that “Apotex Inc. has *no involvement* in the . . . process by which Apotex Corp. obtains business.”⁷⁶³ Apotex, in fact, expressly *denied* that “Apotex Inc.’s PST determines which products Apotex Corp. will market” in the United States, observing that *only* “Apotex Corp. could select which products it would market” in the United States.⁷⁶⁴

314. Apotex’s statement to this Tribunal that Apotex Inc., through its PST, “decides” which products Apotex Corp. will sell is thus belied by representations Apotex has made in U.S. courts.

g) Apotex Corp. plays no “substantive role” in the ANDA process

315. In this arbitration, Apotex argues that “while *most* of the product development and application preparation work is done by Apotex [Inc.] personnel in Canada,”⁷⁶⁵ Apotex Corp. nonetheless plays a key role in preparing, submitting, and maintaining ANDAs.⁷⁶⁶ Thus, according to Apotex:

⁷⁶¹ Fahner Statement ¶ 87; *see also* Flinn Statement ¶ 18 (noting that Apotex Corp. “gathers market intelligence on the US market that is used by Apotex [Inc.] in making decisions to launch a new product”); Watson Statement ¶ 31 (“The PST includes key members of management from Apotex [Inc.] as well as other strategic markets.”).

⁷⁶² Flinn Statement ¶ 21 (emphasis added); *see also* Desai Statement ¶ 89 (“Apotex [Corp.] could not distribute any products from Etobicoke and Signet while these two facilities remained on Import Alert. As such, *we* [i.e., Apotex Inc.] considered alternative sourcing for Apotex [Corp.] while the Import Alert was in effect.”) (emphasis added).

⁷⁶³ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of Its Motion to Dismiss (May 5, 2008), Ex. B, Declaration of Tammy L. McIntire ¶ 6 (May 2, 2008) (emphasis added) [RLA-75].

⁷⁶⁴ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 9-10 (Nov. 2, 2009) [RLA-77].

⁷⁶⁵ Memorial ¶ 81 (emphasis added).

⁷⁶⁶ *Id.* ¶¶ 82-84.

- “Throughout the ANDA process, Mr. Krishnan at Apotex [Corp.] located in Florida, USA acts as [Apotex Inc.’s] agent and is the primary contact person for FDA correspondence and communications regarding the ANDAs,” including responding to “questions from FDA during the review of the ANDAs”;⁷⁶⁷
- Apotex Corp. “employs a full-time agent,” Mr. Krishnan, and “[a]ny Apotex [Inc.] application must be, and is, *submitted* in his name”;⁷⁶⁸
- Mr. Krishnan’s “main task is to track Apotex’s Abbreviated New Drug Applications (ANDAs) and *ensure timely approval* by [the] Office of Generic Drugs, FDA”;⁷⁶⁹
- Mr. Krishnan “handles all follow-up correspondence with FDA concerning applications”;⁷⁷⁰
- Mr. Krishnan “work[s] with IP and patent lawyers in the US to develop a strategy for filing new applications”;⁷⁷¹
- Mr. Krishnan “assists in negotiating the resolution of complex issues with FDA”;⁷⁷² and
- “[N]o ANDA can be maintained without significant reporting to FDA on an annual basis, as well as pharmacovigilence [*sic*] reports on a quarterly or annual basis. This is largely handled by a staff of seven salaried employees in Apotex [Corp.’s] offices in Florida.”⁷⁷³

316. In U.S. courts, however, Apotex downplayed any role for Apotex Corp. in the ANDA process, stating:

- “Apotex Inc. *prepared, filed and submitted* the ANDA that is the subject of this dispute. All of this work was done in Canada”;⁷⁷⁴

⁷⁶⁷ Tao Statement ¶ 23.

⁷⁶⁸ Memorial ¶ 82 (emphasis added).

⁷⁶⁹ Krishnan Statement ¶ 15 (emphasis added).

⁷⁷⁰ Memorial ¶ 82; *see also* Watson Statement ¶ 32 (contending that Apotex Corp. “assists the Apotex group in their dealings with FDA,” including by “assisting Apotex [Inc.] in filing and tracking their new drug applications . . . as well as preparing, filing and tracking supplemental reports, annual reports and other FDA-required reports.”).

⁷⁷¹ Krishan Statement ¶ 18.

⁷⁷² Tao Statement ¶ 23.

⁷⁷³ Memorial ¶ 83 (emphasis added).

⁷⁷⁴ *Pfizer Inc. et al. v. Apotex Inc. and Apotex Corp.*, No. 1:08-cv-00948 (LDD) (D. Del.), Declaration of Bernice Tao ¶ 18 (Feb. 10, 2009) (emphasis added) [RLA-92]; *id.* ¶ 25 (“None of the relevant work regarding Apotex Inc.’s ANDA product, the preparation of the ANDA, or the filing of the ANDA occurred or was otherwise performed in Delaware. All such work occurred in Canada.”).

- “Apotex Inc. conducted *all* of the research, development and manufacturing of the generic . . . products that are the subject of its ANDA,” and “[a]ll of this work was performed in Canada”;⁷⁷⁵
- “This ANDA and *all supporting materials* therefor were prepared by Apotex Inc. employees in Canada”;⁷⁷⁶
- “Apotex Inc. submitted the ANDA at FDA’s Office of Generic Drugs in Maryland”;⁷⁷⁷
- “[T]here is no allegation that Apotex Corp. was ‘actively involved’ in the ANDA process here. Instead, Apotex Corp. was merely the U.S. entity who signed the papers on behalf of the Canadian applicant (Apotex Inc.)”;⁷⁷⁸
- “Apotex Corp. employees did not have *any substantive involvement* in the preparation of ANDA No. 079145”;⁷⁷⁹
- “As Apotex Inc.’s U.S. agent . . . Mr. Krishnan serves as an administrative link between FDA and Apotex Inc.”; he “receives correspondence concerning ANDA No. 079145 from one entity and then forwards that correspondence to the second entity”;⁷⁸⁰
- “It is the applicant who submits an ANDA to the FDA. Apotex Corp. is not the applicant identified in ANDA No. 079145. Therefore, Apotex Corp. did not submit ANDA No. 079145”;⁷⁸¹

⁷⁷⁵ *Id.* ¶ 17 (emphasis added).

⁷⁷⁶ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Brief in Support of Its Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 2 (Jan. 31, 2008) (emphasis added) [RLA-73].

⁷⁷⁷ *Pfizer Inc. et al. v. Apotex Inc. and Apotex Corp.*, No. 1:08-cv-00948 (LDD) (D. Del.), Declaration of Bernice Tao ¶ 19 (Feb. 10, 2009) [RLA-92].

⁷⁷⁸ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Corp.’s Reply Brief in Support of its Motion to Dismiss, at 5 (Apr. 14, 2008) [RLA-74].

⁷⁷⁹ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Post-Trial Rebuttal Brief—Noninfringement, at 14 (Apr. 16, 2010) (emphasis added) [RLA-83]; *see also id.*, Apotex Corp.’s Proposed Findings of Fact and Conclusions of Law—Noninfringement of the ’314 Patent, at ¶ 12 (Feb. 12, 2010) (“Mr. Krishnan had no substantive involvement in the preparation of ANDA No. 079145.”) [RLA-82].

⁷⁸⁰ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Proposed Findings of Fact and Conclusions of Law—Noninfringement of the ’314 Patent, at ¶ 11 (Feb. 12, 2010) (citations omitted) [RLA-82].

⁷⁸¹ *Id.* at 6 ¶ 2; *see also In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Post-Trial Rebuttal Brief—Noninfringement, at 8 (Apr. 16, 2010) (“Because the FDA’s regulations control the inquiry as to who submits the ANDA, the cases relied upon by the Plaintiffs are wrong as a matter of law to the extent they suggest that someone other than an ANDA applicant may submit an ANDA.”) [RLA-83]; *id.* at 11 (“FDA regulations define ‘applicant’ as ‘any person who submits an application or abbreviated application or an amendment or supplement to them under this part to obtain FDA approval of a new drug . . . and any person who owns an approved application or abbreviated application.’”).

- “Apotex Corp. merely serves as a conduit between Apotex Inc. and the FDA”;⁷⁸²
- “Apotex Corp. has no involvement in the preparation or submission of Apotex Inc.’s ANDA”;⁷⁸³
- “Apotex Corp. has effectively done nothing more than act as Apotex Inc.’s designated agent for transmitting the ANDA to the FDA and for accepting service of process,” having, “at best, only *tertiary participation*” in making certifications in the filing of the ANDA;⁷⁸⁴
- “FDA considers the act of signing ANDA-related documents to be *ministerial*. There is no reason for courts to attribute greater significance to who signs the ANDA than the FDA does”;⁷⁸⁵ and
- “Apotex Corp.’s signing of the ANDA as required by the statute for ministerial purposes should not be enough [to support a claim] either, even if Apotex Corp. may someday distribute generic rosuvastatin calcium in the United States.”⁷⁸⁶

Any suggestion to this Tribunal that Apotex Corp. plays a key role in preparing, submitting, and maintaining ANDAs is belied by representations Apotex has made in U.S. courts.

h) U.S. litigation is not a “required element” or “key part” of Apotex’s regular business activities in the United States

317. Apotex contends that, “[a]s part of the preparation of its ANDAs, Apotex [Inc.] also regularly engages in costly patent litigation before US courts.”⁷⁸⁷ Apotex Inc. claims that U.S.

⁷⁸² *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Proposed Post-Trial Findings of Fact and Conclusions of Law—Noninfringement, at 6 (Apr. 16, 2010) [RLA-84].

⁷⁸³ *Pfizer Inc. et al. v. Apotex Inc. and Apotex Corp.*, No. 1:08-cv-00948 (LDD) (D. Del.), Declaration of Bernice Tao ¶ 18 (Feb. 10, 2009) [RLA-92].

⁷⁸⁴ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF (D. Del.), Apotex Corp.’s Brief in Support of its Motion to Dismiss, at 5 (Jan. 31, 2008) (emphasis added) [RLA-73a].

⁷⁸⁵ *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Corp.’s Post-Trial Rebuttal Brief—Noninfringement, at 11 (Apr. 16, 2010) [RLA-83]; *see also id.* at 10 (“This regulation does not distinguish between the signature of the applicant, attorney, agent, or other authorized official.”).

⁷⁸⁶ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Corp.’s Reply Brief in Support of its Motion to Dismiss, at 6 (Apr. 14, 2008) (emphasis added) [RLA-74].

⁷⁸⁷ Memorial ¶ 398 (“As part of the preparation of its ANDAs, Apotex [Inc.] also regularly engages in costly patent litigation before US courts In bringing patent litigations, Apotex [Inc.] incurs court costs, legal fees and other related expenses, all of which have to be borne in the United States”); *see also* Fahner Statement ¶ 45 (“Apotex [Inc.] expends about [REDACTED] annually in legal fees in the US, the lion share of which is attributed to

litigation is a “required element of Apotex’s business in the US,”⁷⁸⁸ and that it spends “[REDACTED] every year in attorney’s fees in the US.”⁷⁸⁹ Apotex claims that “Apotex [Corp.] operates under a specific business model, designed to identify new business opportunities and open up the US market of generic drugs through litigation in the US.”⁷⁹⁰

318. In U.S. courts, however, Apotex denied that “ANDA litigation is a ‘key part of Apotex Inc.’s regular business activities’” in the United States,⁷⁹¹ representing:

- “Apotex Inc. is in the business of developing and manufacturing generic drugs – not litigation”;⁷⁹²
- “Apotex Inc.’s compliance with its obligations under [U.S. law] cannot support Plaintiffs’ contention that litigation is part of Apotex Inc.’s business model”;⁷⁹³
- “[I]t’s unlikely that Apotex Inc. embraces litigation as part of its business model”;⁷⁹⁴
- “The fact that, as a *by-product* of its attempts to gain entry into the U.S. market, Apotex Inc. is often named in ANDA litigation, does not transform such participation in litigation into a ‘regular business activity’” that would give rise to personal jurisdiction in U.S. courts;⁷⁹⁵ and

various ANDA-related litigations (such as lawsuits involving challenge to a patent and/or defense of an ANDA submission). At any given point in time, Apotex handles between 50 to 60 ANDA litigations in the US courts.”).

⁷⁸⁸ Fahner Statement ¶ 46.

⁷⁸⁹ Memorial ¶ 41.

⁷⁹⁰ *Id.*

⁷⁹¹ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of its Motion to Dismiss, at 4 (May 5, 2008) [RLA-75].

⁷⁹² *In re: Rosuvastatin Calcium Patent Litigation*, No. 1:08-md-01949 JJF (D. Del.), Apotex Inc.’s Response to Plaintiffs’ Objections to Report and Recommendation of Magistrate Judge Granting Apotex Inc.’s Renewed Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 6 (Jan. 11, 2010) (emphasis altered) [RLA-81].

⁷⁹³ *Id.* at 7.

⁷⁹⁴ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 3 (Nov. 2, 2009) [RLA-77].

⁷⁹⁵ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief in Support of its Motion to Dismiss, at 4 (May 5, 2008) (emphasis added) [RLA-75].

- “To the extent that Plaintiffs contend that Apotex Inc. has engaged counsel in the United States in connection with litigation in Delaware, and that counsel has engaged local Delaware counsel as required by local rules, Plaintiffs merely attempt to bolster their contention that jurisdiction proper based on Apotex Inc.’s litigation without establishing any continuous and systematic contacts on Apotex Inc.’s behalf. Each suit is discrete and does not evince a regular or persistent course of conduct in Delaware.”⁷⁹⁶

Apotex’s statements to this Tribunal that Apotex Inc. “regularly engages” in U.S. litigation as a “required element of Apotex’s business in the US” thus are belied by representations it has made in U.S. courts.

319. Apotex’s own evidence and statements in U.S. courts thus undermine Apotex’s claim in this arbitration that Apotex Corp. has some special relationship with Apotex Inc. such that the Import Alert – which applied only to Apotex Inc. – had a “legally significant connection” with Apotex Corp. but not with the hundreds of other consignees, wholesale dealers, and distributors of Apotex Inc.’s products in the United States. Because the Import Alert is not a measure that “relates to” Apotex or its investments, the Tribunal has no jurisdiction over its claims, which should be dismissed.

320. Apotex has failed to carry its burden of showing that this dispute falls within the scope of NAFTA Chapter Eleven. Apotex Inc. has not demonstrated that it had or sought to make an investment in the United States, through its ANDAs or otherwise. Furthermore, the Import Alert – which applied only to Apotex Inc. (not Apotex Corp.) and only served to restrict exports from Apotex Inc. – did not “relate to” (*i.e.*, have a legally significant connection to) either of the claimed investments in this case, Apotex Corp. or the ANDAs. As discussed below, this

⁷⁹⁶ *Astrazeneca Pharmaceuticals LP, et al. v. Apotex Inc. and Apotex Corp.*, No. 1:07-cv-00809 JJF-LPS (D. Del.), Apotex Inc.’s Reply Brief to Plaintiffs’ Opposition to Apotex Inc.’s Renewed 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Transfer to the Middle District of Florida, at 3-4 (Nov. 2, 2009) [RLA-77].

arbitration should be bifurcated to address these serious jurisdictional deficiencies before the Parties spend more time and money addressing the merits of this case. Following a hearing on the jurisdictional objections, all of Apotex's claims should be dismissed for lack of jurisdiction.

III. ASSUMING *ARGUENDO* THAT THE TRIBUNAL HAS JURISDICTION, APOTEX'S CLAIMS FAIL ON THE MERITS

A. Apotex Has Failed to Establish a National Treatment Claim (Article 1102) or a Most-Favored-Nation Treatment Claim (Article 1103)

321. Apotex has failed to establish the required elements of a national treatment claim under Article 1102 or a most-favored-nation treatment claim under Article 1103.

322. Article 1102 requires that each NAFTA Party accord to investors of another Party, and to their investments, "treatment no less favorable than that it accords, in like circumstances, to its own investors [or investments] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."⁷⁹⁷

323. The principal purpose of a national treatment obligation, such as the one contained in Article 1102, is to level the investment playing field by requiring States to refrain from giving a competitive advantage to domestic investors or investments based on nationality.⁷⁹⁸ Article 1102 is not intended to prohibit all differential treatment among investors and investments, but to ensure that the NAFTA Parties do not treat investors and investments "in like circumstances" differently based on their NAFTA-Party nationality.⁷⁹⁹

⁷⁹⁷ NAFTA art. 1102(1)-(2) [CLA-1].

⁷⁹⁸ See, e.g., KENNETH VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 240 (2009) [RLA-149].

⁷⁹⁹ See *Pope & Talbot v. Canada*, NAFTA/UNCITRAL, U.S. First Article 1128 Submission ¶ 3 (Apr. 7, 2000) [RLA-123]; *Pope & Talbot*, U.S. Second Article 1128 Submission ¶ 3 (May 25, 2000) [RLA-125]; *Pope & Talbot*, Mexico's Supplemental Article 1128 Submission, Section A.1 at 2 (May 25, 2000) ("[T]he objective of Article 1102 is to prohibit discrimination between investors of the Parties on the basis of their nationality.") [RLA-124]; *Methanex Corp.*, Canada's Fourth Article 1128 Submission ¶ 5 (Jan. 30, 2004) (Article 1102 "prohibits treatment

324. Establishing a national-treatment violation is a fact-specific inquiry calling for a three-step analysis. To prove a violation of Article 1102, Apotex must demonstrate that Apotex Inc. or Apotex Holdings, or their alleged investments:

- (1) Were accorded *treatment* by the United States with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments;
- (2) Were *in like circumstances* with the identified domestic investors or investments; and
- (3) Received treatment *less favorable* than that accorded to the identified domestic investors or investments, on the basis of Apotex’s Canadian nationality.⁸⁰⁰

As the *UPS* tribunal confirmed, “[f]ailure by the investor to establish one of those three elements will be fatal to its case.”⁸⁰¹ “This is a legal burden that rests squarely with the Claimant,” the tribunal added, and “[t]hat burden never shifts to the Party.”⁸⁰²

325. The most-favored-nation treatment obligation in Article 1103 requires that each NAFTA Party accord to investors of another Party, and to their investments, “treatment no less favorable than that it accords, in like circumstances, to investors [or investments] *of any other Party or of a non-Party* with respect to the establishment, acquisition, expansion, management, conduct,

which discriminates on the basis of the foreign investment’s nationality.” [RLA-119]; *see also Loewen Group, Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 139 (June 26, 2003) (recognizing that Article 1102 proscribes only “nationality-based discrimination and . . . demonstrable and significant indications of bias and prejudice on the basis of nationality”) [CLA-49]; *S.D. Myers* First Partial Award ¶ 252 (considering “whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals,” and “whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty”) [CLA-43].

⁸⁰⁰ *United Parcel Service of America Inc. (UPS) v. Government of Canada*, NAFTA/UNCITRAL, Award ¶¶ 83-84 (May 24, 2007) [CLA-51]. Apotex adopted this standard in its other NAFTA Chapter Eleven claims against the United States, but now suggests a different standard. *Compare Apotex Inc. v. United States*, NAFTA/UNCITRAL, Statement of Claims ¶ 9 (Jan. 17, 2011) (adopting the *UPS* tribunal’s three-part test) [RLA-101] and Memorial ¶ 428 (arguing that “[t]wo basic elements are required to establish a violation of Article[s] 1102 or 1103: like circumstances and less favorable treatment”).

⁸⁰¹ *UPS* Award ¶ 84 [CLA-51].

⁸⁰² *Id.*

operation, and sale or other disposition of investments.”⁸⁰³ Establishing a violation of Article 1103 is the same as establishing a violation of Article 1102, except that the applicable comparator in step two is a *foreign* investor or its investments.⁸⁰⁴

326. Neither Article 1102 nor Article 1103 prohibits discrimination with respect to investments in the territory of another Party. The United States, therefore, is not obligated to accord national or most-favored-nation treatment to Apotex’s investments in Canada.⁸⁰⁵

327. Apotex has failed to demonstrate the required elements of its Articles 1102 or 1103 claims. First, because the Import Alert did not “relate to” Apotex as an “investor” or to any “investments” in the United States, the United States accorded no “treatment” to “an investor of a Party” or “investments.” Apotex thus cannot establish a national treatment claim under Article 1102 or a most-favored-nation treatment claim under Article 1103. Second, Apotex has not shown that it is in “like circumstances” with any U.S. comparator, and thus it cannot establish a national treatment claim under Article 1102. Third, Apotex has not shown that any foreign comparator in like circumstances received better treatment, and thus Apotex cannot establish a most-favored-nation treatment claim under Article 1103.

1. The United States Accorded Apotex and Its Alleged Investments No “Treatment” in the United States

328. National treatment and most-favored-nation treatment claims first require that the investor demonstrate that the host State has accorded “treatment” to the investor or its investment

⁸⁰³ NAFTA art. 1103(1)-(2) (emphasis added) [CLA-1].

⁸⁰⁴ NAFTA art. 1103 [CLA-1]; *accord* Memorial ¶ 426 (“Articles 1102 and 1103 thus impose an identical obligation with respect to investors and investments of investors of another Party, the sole difference being the nationality of the comparator.”).

⁸⁰⁵ NAFTA art. 1101 [CLA-1].

“with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” This clause provides a narrower range of protection than that contained in many other investment treaties.⁸⁰⁶

329. Apotex has failed to establish that the United States, by adopting the challenged measure, accorded Apotex treatment with respect to any investments in the United States. As established above, the Import Alert did not relate to Apotex Inc. or Apotex Holdings as *investors* in the United States with respect to any *investments* that Apotex made, was making, or sought to make in the United States.⁸⁰⁷ To the contrary, the challenged measure was directed at Apotex Holdings’ *Canadian* investment (Apotex Inc.) and in particular to two of Apotex Inc.’s *Canadian* manufacturing facilities, at Etobicoke and Signet.⁸⁰⁸ Because the sole challenged measure had no legally significant connection to Apotex Holdings or Apotex Inc. as investors or to their investments (as those terms are defined in Article 1139), Apotex cannot show any “treatment” accorded “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” And because the United States did not accord such “treatment,” Apotex’s Article 1102 and Article 1103 claims necessarily fail.

⁸⁰⁶ See KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 248 (2009) [RLA-149].

⁸⁰⁷ See *supra* Section II.D-E.

⁸⁰⁸ See, e.g., Letter from Carmen M. Shepard and Kate C. Beardsley, Buc & Beardsley LLP, to Ralph S. Tyler, Chief Counsel, FDA and Deborah M. Autor, Director, CDER – Office of Compliance, at 1, 10 (Dec. 13, 2010) (stating that “FDA issued an import alert for Apotex [Inc.’s] Signet and Etobicoke facilities Since then, the U.S. market has been closed to drug products manufactured at those sites, and no drugs have been approved from these sites,” and arguing that the Import Alert violated NAFTA Article 301, which concerns trade in goods and national treatment) [C-185]; Letter from Deborah M. Autor, Director, CDER – Office of Compliance, to Carmen M. Shepard and Kate C. Beardsley, Buc & Beardsley LLP, at 4 (Dec. 23, 2010) (addressing Apotex’s “arguments about the Agency’s import alert and approach to [DWPE] only insofar as they may be read to complain specifically of the treatment of Apotex products from Etobicoke or Signet”) [C-186].

2. Apotex Failed to Show that It Is in “Like Circumstances” with Any Domestic Comparators

330. Even if Apotex could demonstrate such “treatment,” Apotex’s Article 1102 claim still would fail. Article 1102 requires Apotex to demonstrate, as a critical second step,⁸⁰⁹ that it and its investments, if established, are in “like circumstances” with investors of the host State and their investments. Apotex recognizes that identifying appropriate comparators is a highly fact-specific inquiry,⁸¹⁰ and that simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances.⁸¹¹ Apotex also recognizes that generic drug companies “must be subject to a comparable legal regime or regulatory requirements” to be in like circumstances⁸¹² and that “the ‘like circumstances’ analysis logically narrows to the group of close comparators” whose “circumstances closely correspond to those of the claimant.”⁸¹³

331. The *Grand River* tribunal confirmed that the appropriate comparators under Article 1102 (and Article 1103) are those that are subject to like legal requirements.⁸¹⁴ After canvassing NAFTA Chapter Eleven decisions, the *Grand River* tribunal stated:

While each case involved its own facts, tribunals have assigned important weight to “like legal requirements” in determining whether there were “like circumstances.” The *ADF* tribunal thus emphasized that both the claimant and its U.S. competitors were subject to the same U.S. “Buy America” provisions. *Pope*

⁸⁰⁹ See MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER THE NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1102-20 (2009) [CLA-343].

⁸¹⁰ *Pope & Talbot* Award on the Merits of Phase 2 ¶ 75 (Apr. 10, 2001) (discussing the meaning of “like circumstances” and stating that “[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.”) [CLA-42]; Memorial ¶ 432 (quoting same).

⁸¹¹ Memorial ¶¶ 433, 438.

⁸¹² *Id.* ¶ 438 (citing *Grand River Enterprises* Award ¶ 166 (“NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in ‘like circumstances’ under Articles 1102 or 1103.”) [CLA-29]).

⁸¹³ *Id.* ¶ 436 (citing *Methanex* Final Award, Part IV, Ch. B ¶ 17 [CLA-34]).

⁸¹⁴ *Grand River Enterprises* Award ¶ 166 [CLA-29].

& Talbot found that the relevant comparators were lumber exporters subject to the same restrictive legal regime as the claimant, so there was no denial of national treatment if exporters in other unregulated provinces were not so limited. *Feldman v. Mexico* found the relevant comparators for purposes of MFN analysis to be a limited group of cigarette exporters subject to the same legal requirements as the claimant. The *Methanex* tribunal (citing *Pope & Talbot*) emphasized the importance of assuring that purported comparators face similar regulatory requirements. Looking at the question from the other direction, *UPS v. Canada* found a key difference between the parties there to be that Canada Post was subject to legal requirements under national law and international postal agreements that did not affect UPS.⁸¹⁵

332. And yet Apotex invites the Tribunal to evaluate comparators that are not in “like legal circumstances.”⁸¹⁶ Apotex’s sole challenged measure is FDA’s decision to place Apotex’s Etobicoke and Signet facilities on Import Alert 66-40. Import Alert 66-40 operates in conjunction with Section 801(a) of the FD&C Act, which authorizes FDA district offices to detain at the U.S. border, without physical examination, drugs that appear to be adulterated because they were not manufactured in conformity with current good manufacturing practice. Section 801(a) applies to any goods – regardless of U.S. or foreign ownership – that are being offered for import into the United States. Section 801(a) cannot apply to goods that are manufactured in the United States – regardless of U.S. or foreign ownership – unless they are

⁸¹⁵ *Id.*

⁸¹⁶ Apotex’s reference to “the trade and investment-liberalizing objectives stated in [NAFTA] Article 102(1)” cannot transform the like circumstances analysis to avoid territoriality. Memorial ¶ 431. As the *Canadian Cattlemen* tribunal observed, while Chapter Eleven “must be considered in light of its larger context,” that “does not mean that Chapter Eleven itself must bear the whole weight of the diverse purposes set out in Article 102. Those purposes, it is clear, apply to the treaty in its complex entirety, and some are wholly irrelevant to Chapter Eleven [P]articular segments of the treaty may reflect a much more limited set of purposes than the overall purposes clause sets forth.” *Canadian Cattlemen* Award on Jurisdiction ¶ 166 [CLA-47]. The *Canadian Cattlemen* claimants argued, like Apotex here, that the general NAFTA objectives required Chapter Eleven to be extended to cover claims brought by investors arising out of investments located in their home State. But the tribunal rejected that argument, concluding: “The fact that the NAFTA indisputably seeks to promote economic integration among industries in the three States Parties does not mean that the border has been eliminated for purposes of investor protection, no matter how similar or integrated the industries on each side of the border may be.” *Id.* ¶ 169.

exported and then re-imported.⁸¹⁷ Goods from facilities inside the United States that fail to meet cGMP requirements may be subject to seizures, and the facilities and their management may be subject to injunctions and civil and criminal penalties, but those goods are not subject to an import alert. Goods and facilities inside the United States, therefore, are not subject to the same legal regime as goods and facilities outside the United States.

333. For purposes of its national treatment claim under Article 1102, Apotex contends that it is in like circumstances with “a number of US and third-country investors and investments” with drug manufacturing facilities in the United States.⁸¹⁸ These include:

- Baxter Healthcare Corporation (Puerto Rico);
- L. Perrigo Company (Michigan);
- Hospira, Inc. (North Carolina);
- Sandoz Inc. (Colorado and North Carolina); and
- Teva Parenteral Medicines, Inc. (California).⁸¹⁹

But because these facilities do not export drugs to the United States, their products are not regulated under Section 801(a) of the FD&C Act and are not subject to import alerts. They are, therefore, not appropriate comparators. The appropriate comparator for a national treatment

⁸¹⁷ Had Apotex maintained, for instance, its injectable drug manufacturing facility located in Chicago, Illinois, Section 801(a) of the FD&C Act would not have applied to drugs manufactured at that facility. *See* Desai Statement ¶ 16 (“This facility closed in 2004.”).

⁸¹⁸ Memorial ¶ 444.

⁸¹⁹ *Id.* Apotex is not in like circumstances with companies manufacturing drugs in the United States for another reason. The *Pope & Talbot* tribunal observed, in the context of its “like circumstances” analysis, that “[d]ifferences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.” *Pope & Talbot Award on the Merits of Phase 2* ¶ 78 [CLA-42]. Section 801(a) of the FD&C Act, and the Import Alert guidance established thereunder, protects the public health, does not distinguish between companies or facilities on the basis of nationality, and is consistent with the investment objectives of the NAFTA. Indeed, as Apotex acknowledges, FDA is not the primary regulator outside of its territory and it does not have the resources to examine every drug that is offered for import into the United States. *See supra* ¶ 52.

claim under Article 1102 is a United States-owned pharmaceutical company with foreign facilities subject to Section 801(a) of the FD&C Act and import alerts. Although all U.S. pharmaceutical companies with manufacturing facilities abroad are subject to the same regulatory regime, Apotex has not alleged that any of these companies received better treatment with respect to those foreign facilities. Apotex, in fact, has identified *no national comparator* in like circumstances, and thus its Article 1102 claim necessarily fails.⁸²⁰

3. Apotex Has Failed to Establish Less Favorable Treatment with Respect to Any Comparator

334. There are three potential comparators for Apotex’s most-favored-nation treatment claim under Article 1103: Sandoz Canada Inc., Teva, and Ranbaxy.⁸²¹ All three of these foreign-owned firms have facilities outside the United States that manufacture drugs for export to the U.S. market, and thus those goods are subject to Section 801(a) of the FD&C Act and are eligible for Import Alert 66-40. But even assuming *arguendo* that the United States accorded “treatment” to these putative “investors” with respect to any “investments,” the United States in no way accorded “treatment” more favorable than the “treatment” accorded to Apotex and its alleged investments.

⁸²⁰ See, e.g., *Loewen Award* ¶ 140 (“What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.”) [CLA-49].

⁸²¹ Apotex also mentions Taro Pharmaceuticals in a footnote in its fact section, although Messrs. Bradshaw and Johnson do not address the firm in their ostensibly “comprehensive” treatment of comparators. See Memorial ¶ 334, n.504; *id.* ¶ 298. Although Bradshaw and Johnson mention Jelfa Pharmaceutical, Apotex does not address the firm in its Memorial. See Expert Report of Sheldon T. Bradshaw, J.D. and Ron M. Johnson ¶¶ 148-153 (July 30, 2012) (“Bradshaw Report”). Indeed, the legal section of Apotex’s Memorial does not identify Ranbaxy, Taro, or Jelfa as foreign investors in like circumstances that allegedly received more favorable treatment. See Memorial ¶ 444 (identifying “Baxter, Hospira, Novartis/Sandoz, Perrigo, and Teva” as “US and third-country investors and investments in like circumstances with Apotex and its investments”); *id.* ¶ 451 (stating that “none of Baxter, Hospira, Novartis/Sandoz, Perrigo and Teva was prevented from selling its products on the US market”). Ranbaxy, however, appears to have been in circumstances most like Apotex’s, because both companies received multiple warning letters identifying cGMP violations at more than one foreign facility.

335. Apotex claims that Sandoz Canada Inc., a Novartis subsidiary, received more favorable treatment. Apotex observes that FDA sent a warning letter in November 2011 to Novartis concerning serious cGMP violations at Sandoz Canada’s Boucherville, Quebec, facility, but did not put the facility on import alert.⁸²² Apotex fails to inform the Tribunal, however, why Sandoz Canada was not placed on import alert. Shortly after receiving the warning letter, the company announced publicly:

In light of the November 2011 FDA Warning Letter, Sandoz Canada has further intensified its ongoing efforts to ensure high quality standards across its manufacturing operations. As part of these efforts, *we will temporarily suspend or discontinue the production of certain products at our Boucherville site*, most of which have alternatives in the marketplace, to prioritize production of most medically necessary products, and focus on the supply of critical medicines to the Canadian market.⁸²³

Thus, in response to FDA’s warning letter, Sandoz Canada essentially *shut down* production at its Boucherville manufacturing facility, save for medically necessary drugs and “critical medicines” to be distributed in Canada. This action obviated any need to place it on Import Alert 66-40. The suggestion, then, that Sandoz Canada received “more favorable” treatment than Apotex received is not credible.

336. Apotex also claims that Teva received more favorable treatment, because Teva received two FDA warning letters but was not subject to enforcement action. The first warning letter was

⁸²² Memorial ¶¶ 320-26; Letter from Steven Lynn, Acting Director, Office of Manufacturing and Product Quality, CDER – Office of Compliance, to Joseph Jimenez, Chief Executive Officer, Novartis International AG (Nov. 18, 2011) [C-273].

⁸²³ See *Drug Shortage Feared as Quebec Plant Retools*, CBC NEWS (Feb. 20, 2012), available at <http://www.cbc.ca/news/health/story/2012/02/20/sandoz-drug-shortage.html> (last visited Dec. 6, 2012) (emphasis added) [R-92]; see also Sean Silcoff, *Sandoz Canada’s Production Slows to a Crawl After Harsh Criticism from U.S. Regulators*, GLOBE & MAIL (Feb. 19, 2012), available at <http://www.theglobeandmail.com/globe-investor/sandoz-canadas-production-slows-to-a-crawl-after-harsh-criticism-from-us-regulators/article547346/> (last visited Dec. 6, 2012) (stating that “Sandoz said it had committed a total of over \$170-million (U.S.) to improve quality at the Boucherville plant as well as two other plants in Colorado and North Carolina that were also cited in the FDA letter” and that “Sandoz said those ‘remediation’ efforts were already under way when it received the FDA letter”) [R-91].

sent to Teva Parenteral Medicines Inc., which operates in Irvine, California.⁸²⁴ As a U.S.-based facility, its drug products are not subject to Section 801(a) of the FD&C Act (or to an import alert), and thus Teva Parenteral Medicines Inc. is not in like circumstances with Apotex. But even if it were, it did not receive more favorable treatment. Shortly after receiving the December 2009 warning letter, Teva Parenteral Medicines Inc. *halted all manufacturing and distribution* at that facility.⁸²⁵ Production did not resume until April 2011.⁸²⁶ Again, there was no need for FDA to undertake any enforcement action (such as a seizure or injunction), given that the company voluntarily shut down production for more than a year to address the cCMP violations.

337. A second warning letter was sent to Teva Pharmaceuticals Inc. concerning a Jerusalem-based facility, one of Teva's 56 manufacturing facilities worldwide.⁸²⁷ When determining whether to take enforcement action, FDA applies a risk-based approach, assessing the seriousness of the violations; the risk of those violations to consumers; the company's responses to the violations; and whether the products may be medically necessary and in short supply.⁸²⁸ FDA's analysis produced a different conclusion for Teva's products from its Jerusalem facility than for Apotex's products from its Etobicoke and Signet facilities.⁸²⁹ This result demonstrates

⁸²⁴ Letter from Alonza E. Cruse, FDA District Director, to Jeffrey D. Herzfeld, Senior Vice President and General Manager, Teva Parenteral Medicines, Inc. (Dec. 11, 2009) [C-124].

⁸²⁵ See Thomas Gryta, *Teva Resumes Manufacturing at Irvine, Calif. Plant*, WALL ST. J. MARKETWATCH (Apr. 26, 2011), available at <http://www.marketwatch.com/story/teva-resumes-manufacturing-at-irvine-calif-plant-2011-04-26> (last visited Dec. 6, 2012) [R-75].

⁸²⁶ See *id.*; see also *Brief: Teva Fires 65 Employees at California Plant*, BUSINESSWEEK (Oct. 18, 2012) (noting that "Teva said it spent \$375 million for improvements and reopened its factory in Irvine," but that it had "not yet resumed full production") [R-100].

⁸²⁷ Memorial ¶ 332; Letter from Richard L. Friedman, Director, Division of Manufacturing and Product Quality, CDER – Office of Compliance, to Shlomo Yanai, President and CEO, Teva Pharmaceutical Industries Ltd. (Jan. 31, 2011) [C-191]; Bradshaw Report ¶ 145.

⁸²⁸ See Rosa Statement ¶ 20.

⁸²⁹ Letter from Brian L. Belz, Compliance Officer, CDER – Division of International Drug Quality, to Shlomo Yanai, President and CEO, Teva Pharmaceutical Industries Ltd. (Sept. 9, 2011) [C-256].

merely that FDA's expert assessments are fact-specific, not that FDA treated Teva more favorably than Apotex.⁸³⁰

338. Finally, Apotex cites to a 2012 "consent decree of permanent injunction" with Ranbaxy Laboratories, Ltd.⁸³¹ Ranbaxy may be an apt comparator, given that FDA sent Ranbaxy warning letters identifying cGMP problems at two of Ranbaxy's foreign facilities that were similar to those found at Apotex's Etobicoke and Signet facilities, including:

- Inadequate measures to prevent potential cross-contamination;
- Inadequate batch production and control records;
- Failure to investigate rejected products and determine the root cause of the problem;
- Inadequate sterile processing operations; and
- Inaccurate records for the cleaning and use of equipment.⁸³²

The very day that FDA issued the warning letters, in September 2008, it placed the two Ranbaxy facilities on Import Alert 66-40.⁸³³

⁸³⁰ Apotex also asserts that FDA "continued to approve" Teva ANDAs from the Jerusalem facility that was the subject of the warning letter and points to the approval of "ANDA #090289 on June 3, 2011, ANDA #076361 on June 20, 2011, and ANDA #090199 on August 22, 2011." See Bradshaw Report ¶ 147. ANDA #090289 and ANDA #076361, however, did not use that Jerusalem facility at the time of their approval and ANDA #90199 was approved after that facility was determined to be acceptable.

⁸³¹ Memorial ¶ 125 (citing Bradshaw Report ¶ 81).

⁸³² See FDA News Release, *FDA Issues Warning Letters to Ranbaxy Laboratories Ltd., and an Import Alert for Drugs from Two Ranbaxy Plants in India* (Sept. 16, 2008), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2008/ucm116949.htm> (last visited Dec. 6, 2012) [R-24]. As reported in Ranbaxy's corporate profile, "Ranbaxy Pharmaceuticals Inc. (RPI), a wholly owned subsidiary of Ranbaxy Laboratories [Ltd.] (RLL), was established in the U.S. in 1994. RPI began marketing FDA approved generic products in the U.S. in 1998 after receiving its first FDA approval for Cefaclor, a broad spectrum anti-infective agent." *Company Profile*, RANBAXY, available at <http://www.ranbaxyusa.com/CorporateProfile.aspx> (last visited Dec. 6, 2012) [R-111].

⁸³³ See FDA News Release, *FDA Issues Warning Letters to Ranbaxy Laboratories Ltd., and an Import Alert for Drugs from Two Ranbaxy Plants in India* (Sept. 16, 2008), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2008/ucm116949.htm> (last visited Dec. 6, 2012) [R-24].

339. Under a 2012 consent decree, filed the same day as a complaint seeking an injunction, Ranbaxy voluntarily agreed to:

- Refrain from manufacturing drugs for the U.S. market from two facilities in India (as well as a facility in New York) until FDA verified that those drugs can be produced in compliance with cGMP;
- Comply with all FDA data integrity requirements before FDA would resume review of its drug applications from the two Indian facilities, hire a third-party expert to review its applications, and withdraw any applications found to contain untrue statements or certain data irregularities; and
- Relinquish its 180-day marketing exclusivity for several of its generic drug applications.⁸³⁴

Ranbaxy also reportedly set aside over \$500 million to cover potential civil and criminal liabilities,⁸³⁵ and agreed to withdraw approved ANDAs for 27 drugs.⁸³⁶

340. Ranbaxy's two foreign facilities were placed on import alert for more than three years, much longer than Apotex's two foreign facilities. Ranbaxy was required to relinquish 180-day market exclusivity for drugs; Apotex was not. Ranbaxy reportedly set aside \$500 million for potential civil and criminal liability; Apotex set aside [REDACTED]. One of Ranbaxy's facilities was also placed on FDA's Application Integrity Policy, under which FDA stopped all substantive scientific review of any new or pending drug application that contained data from that facility.⁸³⁷

⁸³⁴ See U.S. Dep't of Justice News Release, *U.S. Files Consent Decree for Permanent Injunction Against Pharmaceutical Ranbaxy Laboratories* (Jan. 25, 2012), available at <http://www.justice.gov/opa/pr/2012/January/12-civ-105.html> (last visited Dec. 6, 2012) [R-88]; FDA News Release, *Department of Justice Files Consent Decree of Permanent Injunction Against Ranbaxy* (Jan. 25, 2012), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm289224.htm> (last visited Dec. 6, 2012) [R-87].

⁸³⁵ See Adi Narayan, *Ranbaxy Falls Most Since March on Proposed Settlement Costs: Mumbai Mover*, BLOOMBERG (Jan. 27, 2012), available at <http://www.bloomberg.com/news/2012-01-27/ranbaxy-may-forgo-200-million-in-lost-sales-after-settlement-kotak-says.html> (last visited Dec. 6, 2012) [R-89].

⁸³⁶ See *Ranbaxy Laboratories Limited; Withdrawal of Approval of 27 Abbreviated New Drug Applications*, FED. REGISTER (Aug. 22, 2012) [R-96].

⁸³⁷ See FDA New Release, *FDA Takes New Regulatory Action Against Ranbaxy's Paonta Sahib Plant in India* (Feb. 25, 2009), available at

By contrast, FDA did not halt its *reviews* of Apotex's ANDAs, but only the *approvals*. Ranbaxy clearly did not receive better treatment than Apotex received.

341. To the extent that the Import Alert accorded Apotex any treatment,⁸³⁸ that treatment was not less favorable than treatment accorded to any of the comparators identified by Apotex. Indeed, Apotex's own contemporaneous documents confirm that Apotex did not receive unfavorable treatment. During the Signet inspection, Apotex's vice-president for Quality reported to Apotex's vice-president for regulatory and medical affairs:

[FDA's] focus on GMP and the strong stance taken on issues is not simply a reaction to the Warning Letter or singling out Apotex. This is a new yard stick that FDA appears committed to using on everyone.⁸³⁹

342. Apotex clearly recognized that FDA was treating the firm just as it treated every other firm. Apotex's discrimination claims under Articles 1102 and 1103 must fail.

343. Finally, even assuming *arguendo* that Apotex had provided comparators in like circumstances for its Article 1102 claim⁸⁴⁰ and that it had demonstrated that FDA had failed to

<http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm149532.htm> (last visited Dec. 11, 2012) [R-35].

⁸³⁸ To the extent that the Import Alert accorded treatment to Apotex Corp., that treatment was no different from the treatment accorded to any other U.S.-based distributor or consignee of drugs from the Etobicoke and Signet facilities. That treatment, moreover, was not less favorable than the treatment accorded to the distributors and consignees of the proper comparators' drugs.

⁸³⁹ Email from Lance Lovelock to Bruce Clark (Aug. 12, 2009) [C-58]; *see also* email from Juanita Zaziski to Sukanthy Ranjithkumar (Sept. 1, 2009) ("Per my brief conversation with Erica @ FDA they have received a new notice (list) for finished products that are now flagged by FDA as an *import alert*. Due to this FDA will be conducting a closer evaluation of imports when they are flagged. This will be affecting many importers not just Apotex.") (emphasis in original) [C-73].

⁸⁴⁰ Even if Apotex were in like circumstances with U.S.-owned domestic facilities, Apotex fails to establish that it was accorded less favorable treatment on the basis of its Canadian nationality. Apotex, for example, cites Baxter Healthcare's receipt of "21 Warning Letters addressing significant violations at multiple business units and facilities." Memorial ¶ 303 (citing Bradshaw Report ¶ 113). Apotex asserts that Baxter was nonetheless permitted to operate without "FDA sanctions or interference." *Id.* ¶ 307 (citing Bradshaw Report ¶ 113). Apotex's assertions, however, are misleading, and its conclusion of less favorable treatment is incorrect, for several reasons. *First*, Apotex submits no proof of discrimination on the basis of nationality, as required by Article 1102. *Second*, of the warning letters issued since 1997, Apotex fails to mention that, before the 2011 warning letter that it cites, the most

enforce its cGMP requirements with the same force that it did in Apotex's case – neither of which is true – Apotex still would not have a viable claim under Articles 1102 or 1103. As the *Thunderbird* tribunal explained:

[E]ven if Thunderbird had established without doubt that Mexico's line of conduct with respect to gambling operations was not uniform and consistent, one cannot overlook the fact that gambling is illegal in Mexico. In the Tribunal's view, it would be inappropriate for a NAFTA tribunal to allow a party to rely on Article 1102 of the NAFTA to vindicate equality of non-enforcement within the sphere of an activity that a Contracting Party deems illicit.⁸⁴¹

Here, too, it would be inappropriate for this Tribunal to excuse Apotex's failure to comply with decades-old U.S. laws and regulations to protect public health simply because other companies allegedly succeeded in evading such compliance.

B. Apotex Has Failed to Demonstrate a Violation of the Minimum Standard of Treatment Under Article 1105(1)

344. Apotex alleges that issuance of the Import Alert constituted a breach of the customary international law minimum standard of treatment, as reflected in NAFTA Article 1105(1).

Specifically, Apotex claims that international law requires “certain procedural safeguards in deciding the rights and interests of individual parties” in “administrative decision-making.”⁸⁴²

These include (1) a hearing (2) with advance notice (3) before an impartial decision-maker (4) at

recent FDA warning letter issued to a Baxter facility concerning cGMP violations for finished pharmaceutical drugs is from 2001. *See* Letter from Maridalia Torres, San Juan District Director, FDA, to Robert L. Parkinson, Chairman, President, and CEO, Baxter Healthcare Corp. (Jan. 20, 2011) (addressing two cGMP violations and a misbranding issue at Baxter's Jayuya, Puerto Rico facility, which along with Baxter's Guayama, Puerto Rico facility, failed to submit certain NDA Field Alert Reports) [C-189]; Letter from Raymond V. Mlecko, Chicago District Director, FDA, to Harry J. Kraemer, Jr., President and CEO, Baxter Healthcare Corp. (Nov. 2, 2001), *available at* <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2001/ucm178330.htm> (last visited Dec. 8, 2012) (addressing cGMP violations at a Baxter Healthcare Corp. facility located in Round Lake, Illinois) [R-10]. *Third*, Apotex asserts that “FDA continued to approve marketing applications prior to the closeout date as evidenced by approval of NDA #020118 on October 15, 2010.” Bradshaw Report ¶ 119. That NDA, however, had been approved *nearly two decades earlier*, on September 18, 1992. *See* Drugs@FDA, Approval History for NDA 020118 [R-112].

⁸⁴¹ *Thunderbird* Award ¶ 183 [CLA-30].

⁸⁴² Memorial ¶¶ 458-59 (and accompanying caption) (capitalization altered).

which the individual may present evidence and contest the decision and (5) obtain a reasoned decision relying on all relevant legal and factual considerations and (6) affording judicial review of the validity of any decision.⁸⁴³ Apotex alleges that failure to afford these six “procedural safeguards” in connection with issuance of the Import Alert constituted a breach of the minimum standard of treatment under customary international law.

345. Apotex’s proposed new rule of customary international law is flawed in at least three respects. *First*, Apotex’s claim rests on a fundamental misunderstanding of the customary international law minimum standard of treatment. Customary international law is derived from the general and consistent practice of States followed from a sense of legal obligation. And yet Apotex cites no relevant State practice or *opinio juris* to support its proposed new rule of customary international law. Nor does Apotex discuss, let alone distinguish, the many Chapter Eleven decisions that reject Apotex’s proposed new rule of customary international law.

346. *Second*, the authority Apotex cites does not actually support (and at times affirmatively contradicts) its proposed new rule. Apotex cites soft law sources and scholarship concerning procedural rights in “trials” and “administrative proceedings” and then injects those rights into administrative “decision-making.” Apotex concludes that every administrative action affecting an alien’s “rights and interests” requires the six “procedural safeguards” that are accorded during trials or administrative proceedings. Apotex’s conclusion, however, rests on the erroneous assumption that any rights accorded during trials and administrative proceedings necessarily apply to general administrative decision-making outside of adjudication – including when, as here, the agency is given significant discretion by law, in the interests of protecting public health.

⁸⁴³ *Id.* ¶ 466.

347. *Third*, even if Apotex’s erroneous assumption were correct, the United States afforded Apotex the six “procedural safeguards” it claims under its proposed new rule of customary international law. Apotex simply declined to invoke them. Apotex’s failure to assert available rights under domestic law is to its own detriment and cannot be the subject of a Chapter Eleven claim.

1. Apotex’s Proposed New Rule of Customary International Law Reflects Its Misunderstanding of the Formation and Content of the Minimum Standard of Treatment

348. NAFTA Article 1105(1) requires that the NAFTA Parties “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”⁸⁴⁴ The NAFTA Free Trade Commission has clarified, through a binding interpretation, that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens” and that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by [that standard].”⁸⁴⁵

349. The minimum standard of treatment is an umbrella concept incorporating a set of rules that have crystallized over centuries and form part of the customary international law of State

⁸⁴⁴ NAFTA art. 1105(1) [CLA-1].

⁸⁴⁵ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ 2 (July 31, 2001), available at <http://www.state.gov/documents/organization/38790.pdf> (“NAFTA FTC Interpretation”) [CLA -5]. NAFTA art. 1131(2) (“An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”) [CLA-1]. Numerous NAFTA Chapter Eleven tribunals and the Supreme Court of British Columbia are in accord. *See, e.g., Thunderbird Award* ¶¶ 192-93 [CLA-30]; *Methanex Corp. Final Award*, Pt. IV, Ch. C. ¶¶ 9-10, 20-23 (noting that even if the interpretation had altered the meaning of Article 1105(1) – which it did not – it nonetheless would be “entirely legal and binding on a tribunal seised with a Chapter 11 case”) [CLA-34]; *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶¶ 90-91 (Apr. 30, 2004) [CLA-52]; *Loewen Award* ¶¶ 124-28 [CLA-49]; *ADF Group, Inc. v. United States of America*, Award ¶¶ 175-78 (Jan. 9, 2003) [CLA-18]; *UPS Award* ¶¶ 96-97 [CLA-51]; *Mondev Award* ¶¶ 100-125 [CLA-39]; *United Mexican States v. Metalclad Corp.*, ¶¶ 61-65 (Sup. Ct. B.C.) (May 2, 2001) [CLA-394].

responsibility for injuries to aliens.⁸⁴⁶ These rules seek to ensure that the treatment of aliens does not fall below a minimum floor or “civilized standard.”⁸⁴⁷

350. Unlike national and most-favored-nation treatment standards, which are relative standards that vary depending on treatment accorded to other investors, the minimum standard of treatment contained in Article 1105(1) is an absolute standard.⁸⁴⁸ It contains rules that States, “regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.”⁸⁴⁹

351. The protections afforded in Article 1105(1) extend to “investments of investors of another Party.” As such, only those rules of State responsibility that relate to a foreign investor’s economic stake or property interests in the host State inform the minimum standard of treatment obligation in Article 1105(1).⁸⁵⁰

352. A rule crystallizes into customary international law over time through a general and consistent practice of States that is adhered to from a sense of legal obligation.⁸⁵¹ Establishing

⁸⁴⁶ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 506 (6th ed. 2003) (“[A]s we have seen, there is no single standard but different standards relating to different situations.”) [RLA-145]; *Cargill Award* ¶ 268 [CLA-23].

⁸⁴⁷ Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 38 MICH. L. REV. 445, 454 (Feb. 1940) [CLA-330].

⁸⁴⁸ *Pope & Talbot*, Fourth Article 1128 Submission of the United States of America ¶ 8 (Nov. 1, 2000) (stating that “[u]nlike national treatment, the international minimum standard is an absolute, rather than relative, standard of international law that defines the treatment a State must accord aliens regardless of the treatment the State accords to its own nationals”) [RLA-126].

⁸⁴⁹ OECD Directorate for Fin. and Enter. Affairs, *Working Papers on International Investment No. 2004/3, Fair and Equitable Treatment Standards in International Investment Law*, at 8 n.32 (2004) [CLA-347].

⁸⁵⁰ *Grand River Enterprises*, Counter-Memorial of Respondent United States of America, at 91 & n.326, (Dec. 22, 2008) (quoting the commentary to the OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, *reprinted in* 7 I.L.M. 117 (1968) [CLA-346], as stating that “the minimum standard of treatment reflects the ‘well-established general principle of international law that a State is bound to respect and protect the *property* of nationals of other States.’” (emphasis added)) [RLA-111].

⁸⁵¹ *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) [RLA-139]; *see also* 2012 U.S. Model Bilateral Investment Treaty Annex A – Customary International Law (“The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5

such a rule of customary international law thus requires proof of (1) general and consistent State practice and (2) *opinio juris*.⁸⁵²

353. Sufficiently broad State practice and *opinio juris* thus far have coincided to establish minimum standards of State conduct in only a few areas, such as the requirements to provide compensation for expropriation;⁸⁵³ to provide full protection and security (or a minimum level of internal security and law);⁸⁵⁴ and to refrain from denials of justice.⁸⁵⁵ In the absence of an international law rule governing State conduct in a particular area, a State is free to conduct its affairs as it deems appropriate.⁸⁵⁶

[Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation.”) [CLA-12]; United States-Chile Free Trade Agreement annex 10-A – Customary International Law (June 6, 2003) (same) [RLA-99]; CAFTA-DR, Annex 10-B (same) [CLA-9]; Memorial ¶ 457, n.642 (acknowledging standard).

⁸⁵² Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, T.S. No. 933 (1945) (describing customary international law as “international custom, as evidence of a general practice accepted as law”) [CLA-16]; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Merits), 1986 I.C.J. 14 ¶ 207 (June 27) (“[F]or a new customary rule to be formed, not only must the acts concerned amount to a settled practice, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”) (internal quotation marks and citations omitted) [RLA-120].

⁸⁵³ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-192 (1965) (describing wrongful taking of property under international law) [RLA-138].

⁸⁵⁴ See, e.g., *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award ¶¶ 67-77 (June 27, 1990) [CLA-57]; *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award ¶ 6.06 (Feb. 21, 1997) [RLA-100].

⁸⁵⁵ JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 4 (2005) (“[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.”) [RLA-148]; *id.* at 60 (“The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.”); *Chattin Case (United States v. Mexico)*, 4 R.I.A.A. 282, 286-87, at ¶ 10 (July 23, 1927) (“Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.”) (emphasis omitted) [RLA-106]; *Loewen*, Award ¶ 132 (June 26, 2003) (stating that a denial of justice may arise where there has occurred a “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”) [CLA-49].

⁸⁵⁶ *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, ¶¶ 44-46 (Sept. 7) (rejecting any implied “[r]estrictions upon the independence of States,” and noting that States enjoy “a wide measure of discretion which is only limited in certain cases by prohibitive rules.”) [RLA-133]; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 52 (July 8) (“State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.”) [RLA-115].

354. The burden is on the claimant to establish the existence of a rule of customary international law.⁸⁵⁷ “The Party which relies on a custom,” therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.”⁸⁵⁸ The claimant also bears the burden of demonstrating that the State has engaged in conduct that has violated that rule.⁸⁵⁹

355. Chapter Eleven does not permit a claimant to challenge a legal regime existing at the time of its investment, only the application of that regime. As the *GAMI* tribunal observed: “NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest.”⁸⁶⁰ Rather, “[t]he duty of NAFTA tribunals is . . . to appraise whether and how preexisting laws and regulations are applied to the foreign investor.”⁸⁶¹

356. Chapter Eleven also reflects the high degree of deference that international law accords States in regulatory decision-making. The *S.D. Myers* tribunal stated, for instance:

⁸⁵⁷ *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Aug. 27) (quoting *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) [RLA-104], which states that “[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party”) [RLA-130]; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12 (6th ed. 2003) (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.”) [RLA-145].

⁸⁵⁸ *Asylum (Colombia v. Peru)*, at 276 [RLA-104]; see also *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶ 21 (June 8, 2009) (“As an evidentiary matter, the evolution of a custom is a proposition to be established. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish [T]he burden of doing so falls clearly on the party asserting the change.”) [CLA-28].

⁸⁵⁹ See, e.g., *Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Award ¶ 74 (Apr. 29, 1999) (“[I]t is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.”) (internal quotation marks omitted) [RLA-135]; BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 334 (1987) (“[T]he general principle [is] that the burden of proof falls upon the claimant[.]”) [RLA-142]; *Feldman* Award ¶ 177 (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.” (quoting *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Adopted 23 May 1997, WT/DS33/AB/R, at 14)) [CLA-31].

⁸⁶⁰ *GAMI Investments Inc. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 94 (Nov. 15, 2004) [CLA-27].

⁸⁶¹ *Id.* ¶ 93.

When interpreting and applying the “minimum standard,” a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern government is through internal political and legal processes, including elections.⁸⁶²

357. The *Thunderbird* tribunal similarly observed, in the context of the claimant’s gambling operations in Mexico:

The role of Chapter Eleven in this case is therefore to measure the conduct of Mexico towards *Thunderbird* against the international law standards set up by Chapter Eleven of the NAFTA. Mexico has in this context a wide regulatory ‘space’ for regulation; in the regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals. Mexico can permit or prohibit any forms of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has wide discretion with respect to how it carries out such policies by regulation and administrative conduct.⁸⁶³

358. The *Thunderbird* tribunal further emphasized that “it is not up to the Tribunal to determine how [the State regulatory authority] should have interpreted or responded to the [claimant’s proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).”⁸⁶⁴

359. Far from interfering with the manner in which States resolve administrative matters, international law accords a strong presumption of regularity to administrative “decisions rendered by the official authorities of a State acting in the sphere of their duties and in matters

⁸⁶² *S.D. Myers* First Partial Award ¶ 261 [CLA-43].

⁸⁶³ *Thunderbird* Award ¶ 127 [CLA-30].

⁸⁶⁴ *Id.* ¶ 160.

over which they have internal jurisdictional power.”⁸⁶⁵ Indeed, it is well established that even a proven violation of domestic law in an administrative procedure does not constitute a violation of customary international law.⁸⁶⁶

360. The *GAMI* tribunal drew four general conclusions for assessing regulatory action under Article 1105:

(1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole – not isolated events – determines whether there has been a breach of international law. It is in this light that *GAMI*’s allegations with respect to Article 1105 fall to be examined.⁸⁶⁷

361. The *Genin v. Estonia* case illustrates the high burden a claimant faces in seeking to prove a violation of the minimum standard of treatment for regulatory action.⁸⁶⁸ In that case, the Bank of Estonia (Estonia’s central bank) revoked the license of a commercial bank, the Estonian Innovation Bank (EIB), principally owned by the claimant. EIB received no formal notice that its license was being revoked, no invitation to attend the revocation meeting, and no opportunity

⁸⁶⁵ *Flegenheimer Claim*, Italian-United States Conciliation Commission, Decision No. 182, 14 R.I.A.A. 327, 344, at ¶ 32 (Sept. 20, 1958) (holding that the commission “could not disregard the scope of the presumption of truth *omnia rite acta praesum[untur]*” in evaluating the administrative decision at issue) [RLA-108]; see also *Methanex Corp. Partial Award* ¶ 45 (citing the “legal presumptions of innocence and the legal doctrine *omnia praesumuntur rite esse acta*”) [CLA-36].

⁸⁶⁶ *ADF Award* ¶ 190, at 283-84 (Jan. 9, 2003) (concluding that “something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)”) [CLA-18]; JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 5 (2005) (“To the extent that national courts disregard or misapply national law, their errors do not generate international responsibility unless they have misconducted themselves in some egregious manner[.]”) (emphasis omitted) [RLA-148].

⁸⁶⁷ *GAMI Award* ¶ 97 [CLA-27].

⁸⁶⁸ *Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001) [RLA-109].

to challenge the decision before it became final.⁸⁶⁹ The claimant brought a claim under the U.S.-Estonia bilateral investment treaty alleging, among other breaches, violations of fair and equitable treatment and the prohibition against impairment by arbitrary or discriminatory measures of the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments.⁸⁷⁰

362. Although the tribunal “censure[d]” Estonia for according EIB woeful treatment⁸⁷¹ and hoped that it would “exercise its regulatory and supervisory functions regarding procedure with greater caution in the future,”⁸⁷² it nevertheless rejected all of claimant’s claims.⁸⁷³ In discussing the applicable standard, it stated:

[T]he Tribunal understands it to require an ‘international minimum standard’ that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a wilful neglect

⁸⁶⁹ *Id.* ¶¶ 363-65 (finding that, despite the lack of (1) formal notice, (2) representation at the license revocation meeting, and (3) opportunity to challenge the decision, “the Bank of Estonia acted within its statutory discretion when it took the steps that it did, for the reasons that it did, to revoke EIB’s license,” and that the Central Bank’s decision did “not rise to the level of a violation of any provision of the BIT”).

⁸⁷⁰ *Id.* ¶¶ 1-3, 11, 13 (describing the claimant’s request for arbitration under the U.S.-Estonia BIT and the invocation of several provisions of the BIT, including Article II(3)(a) and Article II(3)(b)). Article II(3) of the treaty provides: “(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law[;] (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a party.” Treaty Between the Government of the Republic of Estonia and the Government of the United States of America for the Encouragement and Reciprocal Protection of Investment (“U.S.-Estonia BIT”), arts. II(3)(a), (b) (Apr. 19, 1994), TIAS 97-216 [RLA-98]. *See also id.* U.S.-Estonia BIT, Letter of Submittal, S. TREATY DOC. NO. 103-08 (1994) (“Paragraph 3 [of Article II] guarantees that investment shall be granted ‘fair and equitable’ treatment. It also prohibits Parties from impairing, through arbitrary or discriminatory means, the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investment. This paragraph sets out a minimum standard of treatment based on customary international law.”).

⁸⁷¹ *Genin Award* ¶ 381 (concluding that “the awkward manner by which the Bank of Estonia revoked EIB’s license, and in particular the lack of prior notice of its intention to revoke EIB’s license and of any means for EIB or its shareholders to challenge that decision prior to its being formalized, cannot escape censure”) [RLA-109].

⁸⁷² *Id.* ¶ 372.

⁸⁷³ *Id.* ¶¶ 316-17, 365, 373.

of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.⁸⁷⁴

The tribunal concluded that even though the Bank of Estonia had given EIB no notice, no invitation to attend the revocation meeting, and no ability to challenge the revocation decision, the treatment had not fallen below the minimum standard.⁸⁷⁵

363. When considering whether the Bank of Estonia’s conduct violated the treaty, the tribunal concluded that:

[T]he Bank of Estonia acted within its statutory *discretion* when it took the steps that it did, for the reasons that it did, to revoke EIB’s license. Its ultimate decision cannot be said to have been arbitrary or discriminatory[.]⁸⁷⁶

364. When reviewing administrative agency actions, U.S courts likewise afford regulators wide discretion. As a general rule, U.S. courts must uphold a challenged agency action unless the petitioner shows that the action is “arbitrary and capricious.”⁸⁷⁷ “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”⁸⁷⁸ Furthermore, courts give particularly broad deference to decisions within

⁸⁷⁴ *Id.* ¶ 367 (emphasis in original).

⁸⁷⁵ *Id.* ¶¶ 363-67.

⁸⁷⁶ *Id.* ¶ 363 (emphasis added); *see also Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award ¶ 691 (Dec. 7, 2011) (denying a claim under an autonomous fair and equitable treatment standard and concluding that the regulations that led to the incriminated decisions were taken “in the course of exercising [the regulatory authority’s] obligations to implement the food and safety regulations”; that such “regulations by a state reflect a clear and legitimate public purpose”; and that “Claimant may not have expected that the State would refrain from adopting regulations in the public interest” or “that the Romanian authorities would refrain from implementing those regulations”) [RLA-134].

⁸⁷⁷ 5 U.S.C. § 706(2)(A) (2012) (noting the standard of judicial review for challenged agency action as including “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”) [CLA-221]; *see also id.* §706(2)(B)-(F) (including additional standards of judicial review for challenged agency action: “(B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court”).

⁸⁷⁸ *Motor Vehicles Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) [RLA-89].

an agency's specific area of technical expertise: "We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."⁸⁷⁹

365. National courts, including those in the United States and Canada, accord a high degree of deference to administrative actions.⁸⁸⁰ Apotex has not demonstrated, and cannot demonstrate, that customary international law accords a lesser degree of deference to administrative actions than domestic systems. Indeed, as the *Genin* and *Thunderbird* decisions indicate, the international minimum standard of treatment governing administrative action indisputably falls far below the domestic standard provided under U.S. law. FDA's exercise of authority to protect public health by stopping the importation of adulterated drugs – an area within its technical expertise and statutory discretion – cannot be said to fall below the minimum standard of treatment by any definition. Apotex's 1105(1) claim should be dismissed.

2. The Authority Cited by Apotex Does Not Support Its Proposed New Rule of Customary International Law

366. Apotex contends that "international law requires due process in administrative decision-making concerning specific persons."⁸⁸¹ Apotex contends, in particular, that before a State may

⁸⁷⁹ *City of Shoreacres v. Watworth*, 420 F.3d 440, 445 (5th Cir. 2005) (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983) (internal quotation marks omitted)) [RLA-78]; see also *National Ass'n of Home Builders et al. v. Defenders of Wildlife et al.*, 551 U.S. 644, 658 (2007) ("Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'") (quoting *Motor Vehicles*, 463 U.S. at 43) [RLA-91].

⁸⁸⁰ See *Glamis*, Rejoinder of Respondent United States of America, at 209-10 (Mar. 15, 2007) (discussing the deference U.S. and Canadian courts give to administrative authorities) [RLA-110].

⁸⁸¹ Memorial, at 135 (capitalization in caption altered).

stop adulterated drugs from entering its territory, customary international law requires that it provide the exporter (1) a hearing (2) with advance notice (3) before an impartial decision-maker (4) at which the exporter may present evidence and contest the decision and (5) obtain a reasoned decision relying on all relevant legal and factual considerations and (6) affording judicial review of the validity of any decision.⁸⁸²

367. Apotex offers no relevant State practice for this extraordinary proposition. As the *Glamis* tribunal recognized: “Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions.”⁸⁸³ This factual inquiry can be undertaken using a variety of sources, such as citation to statutes, regulations, or case law. Here, Apotex has introduced no statutes, regulations, or case law as reflecting State practice to establish its proposed new rule of customary international law.

368. Instead, Apotex relies on soft law sources, law review articles, and human rights, trade, and European Union decisions. According to Apotex, these sources confirm that the customary international law minimum standard of treatment requires States to provide the same level of due process rights in administrative decision-making that it provides during trials or administrative proceedings.⁸⁸⁴ And yet not one source cited by Apotex supports that proposition.

369. Apotex relies heavily on the 1965 *Restatement (Second) of the Foreign Relations Law of the United States*, which of course is not a source of customary international law. In any event, the *Restatement (Second)* undercuts Apotex’s argument in two respects. First, the provision

⁸⁸² *Id.* ¶ 466.

⁸⁸³ *Glamis Award* ¶ 607 [CLA-28].

⁸⁸⁴ *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, art. 5.2 (noting that the obligation to provide fair and equitable treatment, as part of the customary international law minimum standard of treatment, “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world”) [CLA-12].

Apotex cites, Section 181, does not address “due process in administrative decision-making,” as Apotex suggests.⁸⁸⁵ To the contrary, it states that, under international law, a “*trial or other proceeding* to determine the rights or liabilities of an alien” must be “fair.”⁸⁸⁶ Apotex extrapolates from this principle that “international law requires due process in *administrative decision-making* concerning specific persons.”⁸⁸⁷ But a “trial or other proceeding” is not the same as “*administrative decision-making* concerning specific persons.”⁸⁸⁸

⁸⁸⁵ Memorial ¶¶ 460-61.

⁸⁸⁶ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 181 (1965) (emphasis added) [RLA-138]. Apotex also cites to Article 1804 of the NAFTA [CLA-1] for the proposition that administrative proceedings must be “fundamentally fair.” Memorial ¶¶ 467-68. There is no legal link between Chapters Eighteen and Eleven of the NAFTA. In any event, Article 1804 helps refute, not establish, Apotex’s suggestion that “one size fits all” for administrative proceedings. Article 1804 states:

With a view to administering in a consistent, impartial and *reasonable* manner all measures of general application affecting matters covered by this Agreement, each Party shall ensure that in its administrative proceedings applying measures referred to in Article 1802 to particular persons, goods or services of another Party in specific cases that:

- (a) *wherever possible*, persons of another Party that are directly affected by a proceeding are provided *reasonable* notice, *in accordance with domestic procedures*, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;
- (b) such persons are afforded a *reasonable* opportunity to present facts and arguments in support of their positions prior to any final administrative action, *when time, the nature of the proceeding and the public interest permit*; and
- (c) its procedures are *in accordance with domestic law*.

NAFTA art. 1804 (emphasis added) [CLA-1]. Article 1804 thus explicitly recognizes that administrative proceedings vary, depending on the context. There is no “one size fits all” rule for the process to be included in administrative proceedings.

⁸⁸⁷ Memorial, at 135 (capitalization in caption altered).

⁸⁸⁸ The *Restatement (Second)* provision cited by Apotex, Section 181, does not define “proceedings.” RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 181 (1965) [RLA-138]. And although Article 1804 of the NAFTA sets forth obligations with respect to “Administrative Proceedings,” the term is not defined in NAFTA Chapters 2 (General Definitions) or 18 (Administrative and Institutional Provisions). NAFTA, Chapter Two, Chapter Eighteen [CLA-1]. Apotex has not introduced a single example of State practice showing that the “decision” to adopt an Import Alert constitutes a “proceeding” as used by Section 181. It is simply not feasible to apply the legal process Apotex asserts is required before every administrative decision is made. Customary international law requires no such thing.

370. Second, Section 181 expressly recognizes that not all due process protections are “required in all types of proceedings.”⁸⁸⁹ Account must be taken of the “seriousness of the consequences to the alien” (including possible criminal penalties) and “the extent to which the exercise of administrative *discretion* is reasonably involved in the determination of the case.”⁸⁹⁰ The *Restatement (Second)* thus notes that “specific safeguards may not all be necessary or practicable,” for instance, when granting or revoking certain licenses, permits, or franchises.⁸⁹¹ Thus, even if Apotex were challenging an administrative proceeding rather than general administrative decision-making, its reliance on the *Restatement (Second)* still would be misplaced.

371. Apotex’s reliance on CAFTA-DR is similarly misguided.⁸⁹² Apotex notes that, in CAFTA-DR, “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative *adjudicatory proceedings* in accordance with the principle of due process embodied in the principal legal systems of the world.”⁸⁹³ Again, Apotex improperly extrapolates from a rule governing administrative adjudicatory proceedings – which connotes a formal process for dispute-resolution⁸⁹⁴ – with a general rule governing all administrative decision-making.

⁸⁸⁹ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 181, cmt. b (1965) (stating that “it is clear that [the due process factors listed in § 181] are not all required in all types of proceedings”) [RLA-138].

⁸⁹⁰ *Id.* (emphasis added).

⁸⁹¹ *Id.* (“In an administrative proceeding to determine, for example the issuance or revocation of a license to engage in a particular occupation, the specific safeguards may not all be necessary or practicable. Other examples of administrative proceedings in which the circumstances may not call for each of the specific safeguards are the granting or denying of a variance under a zoning ordinance, the granting and termination of parole to a convicted criminal, the exercise of executive clemency, the waiver or assessment of a penalty for overdue taxes, the granting of a permit to travel in a restricted area, and the granting of a public utility franchise.”).

⁸⁹² Memorial ¶ 463, n.650.

⁸⁹³ *Id.* (quoting CAFTA-DR art. 10.5(2) [CLA-9]).

⁸⁹⁴ BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “adjudication” as “[t]he legal process of resolving a dispute; the process of judicially deciding a case.”) [RLA-174]; *see also* CAFTA-DR art. 10.18(4) (noting limitations on the

372. Apotex’s reliance on secondary scholarly sources is similarly unhelpful. Apotex, for instance, cites to a book chapter entitled “Minimum Standards of Procedural Justice in Administrative Adjudication,” which does not purport to address the minimum standards of procedural justice in *non-adjudicative* administrative decision-making.⁸⁹⁵ Apotex further cites to a working paper entitled *The Rule of (Administrative) Law in International Law*⁸⁹⁶ for the following proposition:

[T]he rule of law translates today into certain procedural requirements for the deployment of legal process that include the right to a hearing before a decision is made, the right to have the decision made in an unbiased and impartial fashion, the right to know the basis of the decision so that it can be contested, the right to reasons for the official’s decision, and the right to a decision that is reasonably justified by all relevant legal and factual considerations. And in order to make these rights effective one must add the right to have the validity of the decision tested in a court of law.⁸⁹⁷

373. Although Apotex has lifted this proposition virtually verbatim from the working paper, it has left out essential context. The original source states:

consent to arbitrate when the claimant or an enterprise “has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for *adjudication* or resolution”) (emphasis added) [CLA-9]. U.S. law governing administrative adjudications also supports this point. “Adjudication” is defined by the APA to mean an “agency process for the formulation of an order[.]” 5 U.S.C. § 551(7) (2012) [RLA-155]. The meaning is fleshed out in a section in the APA entitled “Adjudications,” which sets forth a formal process for the administrative adjudications within its scope and provides for a variety of formal legal process. 5 U.S.C. § 554(b) (2012) [RLA-156]. Additionally, Section 554 states that “all interested parties” must have the opportunity to submit and have considered such things as facts and argument. *Id.* § 554(c). And it provides certain rules for agency employees who preside over hearings. *Id.* § 554(d). Case law of the U.S. Supreme Court supports the principle that not every administrative action is an adjudication. *International Telephone and Telegraph Corp. Comm. Equipment and Systems Div. v. Local 134 Int’l Brotherhood of Elec. Workers*, AFL-CIO, 419 U.S. 428, 447-48 (1975) (recognizing that not all proceedings are “adjudications”) [RLA-85].

⁸⁹⁵ Memorial ¶ 466, n.656 (citing Giacinto della Cananea, *Minimum Standards of Procedural Justice in Administrative Adjudication*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 63 (Stephan W. Schill ed., 2010) (emphasis added) [CLA-332]).

⁸⁹⁶ *Id.* (citing David Dyzenhaus, *The Rule of (Administrative) Law in International Law* 3 (NYU Sch. of Law ILLJ, Working Paper No. 2005/1) [CLA-328]).

⁸⁹⁷ *Id.* ¶ 466 (citing David Dyzenhaus, *The Rule of (Administrative) Law in International Law* 3 (NYU Sch. of Law ILLJ, Working Paper No. 2005/1) [CLA-328]).

Judges of the *common law family of legal orders* presume that individuals whose interests are affected by decisions of the public officials who staff the administrative state have certain rights. *The package of rights will depend on many factors*, including the way in which doctrine has developed in the particular legal order, the nature of the interest affected, the impact of the decision on the interest, and, assuming the official is acting on the basis of authority delegated by statute, on what the statute actually prescribes. However, *in the abstract the package at its fullest may include*: the right to a hearing before the decision is made, the right to have the decision made in an unbiased and impartial fashion, the right to know the basis on which the official intends to decide so that it can be contested, the right to reasons for the official's decision, and the right to a decision that is reasonably justified by all the relevant legal and factual considerations. All the rights except for the very last one are usually grouped into the category of procedural rights. They pertain to the way in which the decision is made, in contrast to the last which gives the individual the right to a substantively sound decision. And in order to make these rights effective one has to add one more right to the package – the right to have the validity of the decision tested in a court of law.⁸⁹⁸

374. Thus, according to this author, the “package of rights” in the “common law” “will depend on many factors,” but “in the abstract” and “at its fullest *may include*” the six rights identified by Apotex.⁸⁹⁹ The author does not address, and does not purport to address, the customary international law minimum standard of treatment. Apotex’s suggestion to the contrary is misleading at best.

375. Apotex’s remaining authority is equally unavailing. Apotex cites, for example, human rights, trade, and European Union authority as establishing a right to “fair administration.”⁹⁰⁰ But none of this authority relates to the customary international law minimum standard of

⁸⁹⁸ David Dyzenhaus, *The Rule of (Administrative) Law in International Law* 3 (NYU Sch. of Law ILLJ, Working Paper No. 2005/1) (emphasis added) [CLA-328].

⁸⁹⁹ *Id.* (emphasis added).

⁹⁰⁰ Memorial ¶ 467.

treatment for administrative decision-making.⁹⁰¹ It does not address relevant State practice or *opinio juris*. It is simply not relevant.

3. The United States Afforded Apotex the Due Process It Claims Under Its Proposed New Rule of Customary International Law

376. Even if there were a rule of customary international law requiring States to afford full due process protections in all administrative decision-making, the United States' actions in this case would fully satisfy any such requirement. Apotex's four allegations to the contrary are factually incorrect or misstate U.S. law.

377. *First*, Apotex alleges that because the same entity within FDA – the Center for Drug Evaluation and Research – recommended and adopted the Import Alert, “[n]o impartial administrative authority was provided to decide whether to adopt” the Import Alert.⁹⁰² This is both legally irrelevant⁹⁰³ and, as shown by Apotex's own evidence, factually inaccurate. Apotex submitted a memorandum from CDER to the Division of Import Operations and Policy

⁹⁰¹ *Id.* (citing (1) a WTO case, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the WTO Appellate Body, Doc. WT/DS58/AB/R (Oct. 12, 1998) (involving the harvesting and trade in shrimp, including certification procedures regarding whether harvesting methods utilized were ones which protected sea turtles) [CLA-82]; (2) a European Court of Human Rights (“ECHR”) case, *Imbrosicia v. Switzerland*, no. 13972/88, Ser. A, No. 275 (Nov. 24, 1993) (a case involving criminal prosecution for the importation of heroin, including whether the Convention for the Protection of Human Rights and Fundamental Freedoms mandated that the accused had a right to an attorney in pre-trial proceedings) [CLA-97]; (3) another ECHR case, *Fischer v. Austria*, no. 16922/90, ECHR Ser. A No. 312 (Apr. 26, 1995) (discussing whether the Convention for the Protection of Human Rights and Fundamental Freedoms mandated that the government of Austria provide an Austrian citizen with an oral hearing before a tribunal before revoking a “refuse-tipping” license due to high levels of toxic substances being found in the groundwater) [CLA-94]; and (4) an Inter-American Court of Human Rights case, *Baena Ricardo et al. v. Panama*, Inter-Am. Ct. H.R., Ser. C, No. 72 (Feb. 2, 2001) (discussing, *inter alia*, whether the Panamanian authorities had violated the American Convention on Human Rights' provisions relating to fair trials and judicial protection by dismissing workers involved in a work stoppage without holding a prior administrative proceeding) [CLA-105]).

⁹⁰² Memorial ¶ 471 (stating that “[t]he same organ that proposed the measure decided to adopt it”).

⁹⁰³ Even if the same entity within the FDA had recommended and authorized the Import Alert, this does not establish that the decision-maker lacked impartiality, or that the decision was unfair. Apotex has not established that customary international law requires that two separate “organs” recommend and make an administrative decision in order for the decision-maker to be impartial or for the decision to be fair.

clarifying that CDER *recommends* Import Alerts, but DIOP issues them.⁹⁰⁴ Apotex's own expert report, moreover, notes that:

DIOP will prepare a clearance package . . . and send the package to the appropriate Center, ORO [Office of Regional Operations], and the Office of Chief Counsel for clearance Upon clearance, *DIOP will issue the Import Alert*.⁹⁰⁵

DIOP will seek internal agency clearance to issue the Import Alert only if it concurs with CDER's recommendation.⁹⁰⁶ There is no question, then, that the same FDA office did not both recommend and issue the Import Alert.

378. *Second*, Apotex alleges that FDA failed to provide advance notice of the Import Alert, or the reasons for its issuance, so that Apotex could present its defense prior to its issuance.⁹⁰⁷

Advance notice of an Import Alert has never been required under United States law, nor is it even required for formal enforcement actions.⁹⁰⁸ Advance notice of an import alert, moreover, would permit a firm to flood the U.S. market with adulterated drugs, thereby undermining the very protections to public health afforded by U.S. law.⁹⁰⁹ This concern is not abstract. In 2006, Apotex exported to the United States a six months' supply of a drug in the brief 23-day period

⁹⁰⁴ Memorandum from Director, Division of Manufacturing and Product Quality, CDER – Office of Compliance, Division of Import Operations and Policy, at 1-2 (Aug. 20, 2009) (“recommend[ing]” and “request[ing]” that DIOP revise Import Alert 66-40 to include “all finished pharmaceutical products manufactured by Apotex Inc.” at both the Etobicoke and Signet sites) [C-64].

⁹⁰⁵ Bradshaw Report ¶ 102 (citing Chapter 9 regarding Import Operations and Actions of the FDA's Regulatory Procedures Manual [CLA-309]) (emphasis added). Moreover, FDA procedures state that “[w]hen a recommendation for detention without physical examination is received, DIOP will review the recommendation including supporting data/information and review national detention data (if necessary) to determine whether detention without physical examination is appropriate.” FDA, *Regulatory Procedures Manual* § 9-6 (Mar. 2009) [CLA-309].

⁹⁰⁶ FDA, *Regulatory Procedures Manual* § 9-13, at 9-51 (Mar. 2009) [CLA-309] (detailing the review and clearance procedure that DIOP follows for issuance of import alerts).

⁹⁰⁷ Memorial ¶ 472.

⁹⁰⁸ FDA, *Regulatory Procedures Manual*, at 4-2 (Mar. 2009) [CLA-305].

⁹⁰⁹ Rosa Statement ¶ 23 (stating that “FDA typically does not give advance notice of an Import Alert for cGMP violations, so that the firm does not have the opportunity to flood the U.S. market with adulterated drugs before the Import Alert is in effect”).

between Apotex's launch of a product, a competitor's request for preliminary injunction that followed shortly thereafter, and the issuance of that injunction.⁹¹⁰

379. In any event, FDA did send Apotex a warning letter following the Etobicoke inspection, putting Apotex on notice that its products "could be subject to refusal of admission" as a result of cGMP violations.⁹¹¹ FDA also informed Apotex at the end of the Signet inspection that its facility was not cGMP compliant.⁹¹² Apotex thus had ample notice that its facilities were subject to an Import Alert.

380. *Third*, Apotex contends that "FDA never presented Apotex with reasons for its adoption of the Import Alert."⁹¹³ The reasons for the Import Alert – "significant cGMP deviations" – are spelled out clearly and abundantly in the Form 483s, Establishment Inspection Reports, the warning letter sent to Apotex, and in FDA's many meetings and telephone calls with the firm.⁹¹⁴

⁹¹⁰ *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1373 (Fed. Cir. 2006) [RLA-93].

⁹¹¹ 2009 Etobicoke Warning Letter [C-41].

⁹¹² See 2009 Signet Form 483 (listing 17 observations); see also FDA, *Regulatory Procedures Manual* § 10-2-4 (Mar. 2009) (noting that issuance of a Form FDA 483 may constitute prior notice) [R-36].

⁹¹³ Memorial ¶ 475. This asserted "fact" is incorrect. As explained in more detail above in Section I.I-J of this Counter-Memorial, the FDA did, in fact, provide the reasons to Apotex for the Import Alert in detail and on more than one occasion.

⁹¹⁴ See, e.g., 2008 Etobicoke Form 483 (noting 11 observations, including deviations from cGMP and other regulatory provisions) [C-34]; 2009 Signet Form 483 (noting 17 observations, including deviations from cGMP and other regulatory provisions) [C-61]; 2008 Etobicoke EIR (detailing 11 observations and five verbal concerns, including deviations from cGMP and other regulatory provisions) [R-26]; 2009 Signet EIR (detailing 17 observations and 10 verbal concerns, including deviations from cGMP and other regulatory provisions) [R-42]; 2009 Etobicoke Warning Letter, at 1 (stating that the 2008 Etobicoke inspection "revealed significant deviations from U.S. current good manufacturing practice (CGMP) regulations" and a failure to submit Field Alert Reports (FARs) to FDA as required by law) [C-41]; 2010 Signet Warning Letter, at 1 (stating that during the 2009 Signet inspection "investigators from the Food and Drug Administration (FDA) identified significant violations of the Current Good Manufacturing Practice (CGMP) regulations" and a failure to submit Field Alert Reports (FARs) to FDA as required by law) [C-138]; FDA, Minutes of Teleconference with Apotex, at 2 (Aug. 17, 2009) (noting Dr. Carmelo Rosa's concern about Apotex Inc.'s "decision to continue distributing in the US market considering that Apotex acknowledges significant deficiencies") [R-43]; FDA, Minutes of Teleconference with Apotex, at 1 (Sept. 3, 2009) (noting that Edwin Rivera Martinez "explained that since the Etobicoke site received a Warning Letter and significant GMP violations were found during the Signet inspection (August), an Import Alert is appropriate") [R-45]; Apotex, Minutes of Meeting with FDA, at 2 (Sept. 11, 2009) (noting that Edwin Rivera Martinez stated that "FDA remains concerned that they had found similar deficiencies at both the Etobicoke and Signet facilities") [C-

381. *Fourth*, Apotex alleges that FDA provided no opportunity to Apotex to contest the evidence against it or to obtain and present witnesses and evidence prior to the adoption of the Import Alert, and that the opportunities it had after the adoption were allegedly inadequate.⁹¹⁵ In fact, Apotex had at least three avenues to contest FDA’s decisions, or otherwise seek relief to address its complaints in this arbitration:

- (1) Apotex could have administratively challenged FDA’s determinations that the Etobicoke and Signet facilities were not cGMP compliant;⁹¹⁶
- (2) Apotex could have exercised its right to present evidence in detention hearings after its drug shipments had been detained without physical examination;⁹¹⁷ and
- (3) Apotex could have sued FDA under the Administrative Procedure Act for any alleged unreasonable delay in being removed from the Import Alert or approval of its ANDAs.⁹¹⁸

94]; FDA, PowerPoint Presentation to Apotex, CDER Office of Compliance Branch, International Compliance Branch, Apotex Inc. Meeting, at slide titled “FDA: Meeting Objectives” (Sept. 11, 2009) (noting “[s]imilar significant CGMP deficiencies found at both facilities”) [C-93]; Apotex, PowerPoint Presentation to FDA, Compliance Presentation to FDA, at slides titled “Chronology Etobicoke” and “Chronology Signet” (Sept. 11, 2009) (listing the chronology of events for Etobicoke and Signet including a July 9, 2009 teleconference with FDA, an August 28, 2009 teleconference with FDA, a September 3, 2009 teleconference with FDA, and the September 11, 2009 meeting with FDA) [C-92]; FDA, Minutes of Meeting with Apotex, at 1 (Mar. 31, 2010) (noting that Rick Friedman “stated that Apotex has multiple manufacturing facilities that are of concern to the Agency, and at present, some are not in [a] state of control and have continued significant violations”) [R-54]; FDA, Minutes of Meeting with Apotex, at 3 (May 7, 2010) (noting that “FDA has asked that Apotex provide overall corrective actions for the Entobicoke [*sic*] and Signet manufacturing sites”) [R-59].

⁹¹⁵ Memorial ¶¶ 473-74.

⁹¹⁶ 21 C.F.R. §§ 10.25(a), 10.30 (2012) [RLA-159]; *id.* § 10.75 (2012) [RLA-161].

⁹¹⁷ 21 U.S.C. § 381(a) (2011) [CLA-239] and 21 C.F.R. § 1.94 (2012) [CLA-245]. Apotex’s own evidence shows that it was informed of the right to present testimony. *See, e.g.*, Notice of FDA Action for Entry Number: EG6-1768425-3, Notice Number 2, at 2 (Sept. 4, 2009) (stating below the list of products subject to “Detention Without Examination”: “You have the right to provide oral or written testimony, to the Food & Drug Administration, regarding the admissibility of the article(s) or the manner in which the article(s) can be brought into compliance. This testimony must be provided to FDA on or before the dates shown above.”) [C-84]. The “Respond By” date is noted as “September 25, 2009.” *Id.* In addition, the notice provides the full name, address, phone number, fax number, and e-mail address of the ORA District Office Compliance Officer to whom any response should be made. *Id.* Similar information is provided on Notices of FDA Action found at C-85 and C-86.

⁹¹⁸ In fact, relying on the Administrative Procedure Act (citing 5 U.S.C. §§ 551-53, 701-06), Apotex recently filed a suit against FDA for its alleged delay in making a compliance determination for certain facilities and the resulting delay in approval of two of its ANDAs. *See Apotex Inc. & Apotex Corp. v. U.S. Department of Health and Human Services*, No. 1:12-cv-01647 (D.D.C.), Complaint for Declaratory, Injunctive and Other Relief (Oct. 3, 2012) [RLA-68]. Apotex requested the court to order FDA to make the necessary compliance determination. *Id.* ¶ 1.

382. Although Apotex claims that U.S. litigation is part of its “business model,”⁹¹⁹ it declined to exercise any judicial or administrative right to challenge FDA’s decisions.⁹²⁰ Thus, it is not that Apotex was unable to challenge FDA’s actions in court or administratively, but rather that Apotex chose not to exercise the rights it was afforded.

4. Apotex Cannot Use NAFTA’s MFN Clause to Expand the Scope of Article 1105

383. Because Apotex cannot demonstrate a violation of the customary international law minimum standard of treatment in Article 1105, it attempts to import (through NAFTA Article 1103) allegedly more favorable provisions from the U.S.-Jamaica bilateral investment treaty.⁹²¹ Apotex contends that “the imposition of the Import Alert was the result of administrative proceedings during which it had no possibility to be heard and to defend itself,”⁹²² in violation of the U.S.-Jamaica BIT provision requiring that each Party “provide effective means of asserting claims and enforcing rights with respect to investments[.]”⁹²³ Apotex further contends that the Import Alert was “taken in violation of the most elementary due process rules,”⁹²⁴ in violation of the U.S.-Jamaica BIT provision prohibiting the parties from impairing, “by unreasonable or

⁹¹⁹ Memorial ¶ 41.

⁹²⁰ Import Alerts are not final agency action and thus are not subject to judicial review. *But see Smoking Everywhere, Inc. v. FDA* 680 F. Supp. 2d 62, 69. n.8 (D.D.C. 2010) *aff’d on other grounds sub nom., Sottera, Inc. v. FDA*, 627 F.3d 891 (D.C. Cir. 2010) (“Even more boldly, FDA also argues that its import decisions are committed to agency discretion and thus are not subject to any judicial review FDA’s argument goes much too far. Agency action is committed to agency discretion by law only where ‘the statute is drawn so that a court would have *no meaningful standard* against which to judge the agency’s discretion.’ (citation omitted) Here, there is such a standard: whether the article under inspection is ‘adulterated, misbranded, or in violation of section 355.’”) [CLA-184].

⁹²¹ *See* Memorial ¶¶ 478-87.

⁹²² *Id.* ¶ 483.

⁹²³ *Id.* ¶ 482 (quoting U.S.-Jamaica BIT, art. II(6) [CLA-103]).

⁹²⁴ *Id.* ¶ 486.

discriminatory measures[,] the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.”⁹²⁵

384. Apotex has not alleged, let alone demonstrated, that these provisions of the U.S.-Jamaica BIT would provide Apotex with more favorable treatment than NAFTA Article 1105 with respect to Apotex’s due process claims. They would not. Like Article 1105, neither the “effective means” nor the “unreasonable or discriminatory” provisions of the U.S.-Jamaica BIT provided Apotex with the right to “due process” in non-adjudicatory administrative decisions, as Apotex claims. Thus, Apotex would have been entitled to the same treatment under the U.S.-Jamaica BIT as that provided in NAFTA Chapter Eleven.

385. Furthermore, while Apotex claims that these protections form part of “fair and equitable treatment,”⁹²⁶ Apotex cannot use the most-favored-nation treatment provision in Article 1103 to expand the scope of fair and equitable treatment. In July 2001, the three NAFTA Parties, acting through the cabinet-level Free Trade Commission, issued a binding interpretation on the scope of the fair and equitable treatment obligation under Article 1105(1). The Commission clarified that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”⁹²⁷ The Commission also stated that “a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”⁹²⁸

⁹²⁵ *Id.* ¶ 484 (quoting U.S.-Jamaica BIT, art. II(2)(b) [CLA-103]).

⁹²⁶ *Id.* at 134 (“The Import Alert Denied Apotex Fair and Equitable Treatment”).

⁹²⁷ NAFTA FTC Interpretation ¶ 2(2) [CLA-5].

⁹²⁸ *Id.* ¶ 2(3).

386. The three NAFTA Parties later confirmed, through subsequent submissions commenting on that interpretation, that the most-favored-nation treatment obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1). In a submission in *Pope & Talbot*, Canada stated that “Article 1103 can no longer be relevant or constitute an issue with respect to the interpretation of Article 1105, as the interpretation of the latter is set out in the Note of Interpretation, which is binding on the Tribunal.”⁹²⁹ Canada further stated that “Article 1131(2) interpretations bind tribunals in stating the governing law, and the NAFTA cannot operate so as to create a conflict between Article 1103 and the interpretation.”⁹³⁰ Canada added:

In acting in their plenary capacity as the Free Trade Commission, the Parties act as the guardians of the Treaty. They have the legal right to clarify the meaning of the obligations that they agreed to undertake and have specified in the NAFTA a mechanism for doing so. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the Agreement was ratified and implemented. Once they exercise their power, a tribunal must comply with the Commission’s interpretation. A refusal to do so would be an act in excess of the governing law jurisdiction that is vested in the Tribunal under Article 1131.⁹³¹

387. Mexico and the United States agreed with Canada’s position. In a non-disputing Party submission in that case, Mexico stated that it “fully concurs with Canada in the views expressed in Canada’s letter . . . to the Tribunal regarding the NAFTA Free Trade Commission’s interpretation” and “also concurs with Canada that Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.”⁹³²

⁹²⁹ *Pope & Talbot*, Letter from Meg Kinnear, General Counsel, Trade Law Division, Canada, to Tribunal, at 3 (Oct. 1, 2001) [RLA-128].

⁹³⁰ *Id.* (emphasis added).

⁹³¹ *Id.* at 3-4.

⁹³² *Pope & Talbot*, Letter from Hugo Perezcano Díaz, Consultor Jurídico de Negociaciones, Mexico, to Tribunal, at 1 (Oct. 1, 2001) [RLA-127].

388. In its own non-disputing Party submission, the United States similarly informed the *Pope & Talbot* tribunal that it “fully concurs with Canada in the views expressed in Canada’s letter . . . regarding the NAFTA Free Trade Commission’s interpretation” and “also concurs with Canada that Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.”⁹³³

389. The NAFTA Parties thus unanimously agreed that the most-favored-nation treatment obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1). These common, concordant views of all of the States Parties may be deemed the authentic interpretation of the treaty, to be applied by NAFTA tribunals constituted under Chapter Eleven.⁹³⁴

390. To the extent Apotex could show that it was entitled to different treatment under the U.S.-Jamaica BIT than under NAFTA Chapter Eleven with respect to its due process claims, Apotex nonetheless cannot expand the scope of NAFTA Article 1105 through a most-favored-nation treatment claim.

IV. REQUEST FOR BIFURCATION

391. In accordance with Article 45 of the ICSID Arbitration (Additional Facility) Rules, the Tribunal should address its objections to jurisdiction as a preliminary question, separate from the merits of the dispute.

⁹³³ *Pope & Talbot*, Sixth Submission (Corrected) of the United States of America ¶ 2 (Oct. 2, 2001) [RLA-129].

⁹³⁴ See VCLT art. 31(3)(b) (stating that subsequent practice of the parties “shall be taken into account, together with the context”) [CLA-17].

392. Bifurcation in this case is not only permitted by the applicable arbitration rules, but also compelled by reasons of economy, efficiency, and fairness. The United States' jurisdictional objections raise issues that are distinct from the merits and are based on a straightforward application of the NAFTA. If sustained, moreover, these objections will eliminate Apotex's entire claim. Although the United States, as ordered by the Tribunal, has submitted its Counter-Memorial on the Merits, much work remains, including document production, expert reports on quantum, and additional rounds of pleading. Bifurcating this case would save the significant time and expense of further pleading and adjudicating fact-intensive issues of liability and quantum. The United States thus respectfully asks the Tribunal to bifurcate the proceedings and to adopt the pleading schedule set out in Paragraph 14.2.8 ("scenario 2") of the Tribunal's First Procedural Order.

A. The Governing Arbitration Rules and Arbitration Practice Support Bifurcation in This Case

393. The ICSID Additional Facility Rules permit this Tribunal to address jurisdictional issues as a preliminary question, separate from the merits of the dispute. Article 45(2) states:

Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.

Article 45(4) adds:

Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

394. Bifurcation is “standard procedure” in ICSID arbitration.⁹³⁵ A recent survey concluded that at least 45 ICSID tribunals have bifurcated their proceedings.⁹³⁶ Forty-three of those 45 cases were split between jurisdiction and merits.⁹³⁷ The same study found that 10 of 19 ICSID Additional Facility cases had been bifurcated. Eight of those 10 cases were split between jurisdiction and merits.⁹³⁸

395. In this regard, the ICSID Additional Facility Rules are consistent with other arbitration rules. All principal arbitration rules involving States, in fact, allow for bifurcation of jurisdictional and merits issues, and most have a presumption in favor of bifurcation.⁹³⁹

396. It is no surprise, then, that NAFTA Chapter Eleven tribunals routinely bifurcate issues of jurisdiction and merits.⁹⁴⁰ Indeed, Apotex itself accepted bifurcation of jurisdiction and merits in

⁹³⁵ CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 534 (2d ed. 2009) (“ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction.”); *id.* at 537 (“In the practice of ICSID tribunals, treatment of jurisdictional issues as preliminary questions is standard procedure.”) [RLA-34].

⁹³⁶ Lucy Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28 J. INT’L ARB. 105, 106 (2011) [RLA-35].

⁹³⁷ *Id.*

⁹³⁸ *Id.*

⁹³⁹ *See, e.g.*, ICSID Arbitration Rules, art. 41(3) (“Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.”) [RLA-36]; Permanent Court of Arbitration (PCA) Optional Rules for Arbitrating Disputes Between Two States, art. 21(4) (“In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”) [RLA-37]; PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State, art. 21(4) (same) [RLA-38]; PCA Optional Rules for Arbitration Involving International Organizations and States, art. 21(4) (same) [RLA-39]; Iran-United States Claims Tribunal Rules of Procedure (1983), art. 21(4) (same) [RLA-40]; *see also* UNCITRAL Arbitration Rules (1976), art. 21(4) (same) [RLA-41]; Inter-American Commercial Arbitration Commission Rules of Procedure (2002), art. 18(4) (same) [RLA-42]; Swiss Rules of International Arbitration (2012), art. 21(4) (“In general, the arbitral tribunal should rule on any objection to its jurisdiction as a preliminary question.”) [RLA-43].

⁹⁴⁰ *See, e.g.*, *Canadian Cattlemen*, Procedural Order No. 1 ¶ 3.6 (Jan. 28, 2008) (establishing schedule for briefing and hearing preliminary jurisdictional issue separate from the merits) [RLA-44]; *Canfor Corp. v. United States*, NAFTA/UNCITRAL, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings ¶ 55 (Jan. 23, 2004) (treating respondent’s jurisdictional objection as a preliminary question) [CLA-356]; *Loewen*, Decision on Jurisdiction (Jan. 5, 2001) (addressing respondent’s objections to competence and jurisdiction separate from the merits) [RLA-45]; *Methanex Corp.*, Minutes of Order of the Second Procedural Meeting, Item 5 (Sept. 7, 2000) (establishing schedule for briefing and hearing preliminary issues of jurisdiction and

the two NAFTA Chapter Eleven claims it previously brought against the United States, in which it advanced many of the same jurisdictional arguments that it advances here.⁹⁴¹

397. There are sound reasons for the routine bifurcation of proceedings in arbitration, including investor-State arbitration. Bifurcation helps ensure that a tribunal hears and decides cases only when both parties have clearly expressed their consent to arbitration.⁹⁴² This principle applies with even greater force in cases involving States, as it is a “basic rule of international law and a principle of international relations that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established.”⁹⁴³ As Judge Lauterpacht observed, it is a

admissibility separate from the merits) [RLA-46]; *Gallo*, Communication A30 ¶ 10 (Aug. 30, 2010) (establishing a procedure for jurisdictional objections separate from the merits) [RLA-47]; *UPS*, Decision of the Tribunal on the Filing of a Statement of Defence ¶ 16 (Oct. 17, 2001) (“[J]urisdictional issues [are] . . . frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter.”) [RLA-48]; *Ethyl Corp.* Award on Jurisdiction (June 24, 1998) (deciding preliminary issues separate from the merits) [CLA-26]; *Bayview* Award ¶ 10 (recalling tribunal’s decision to decide question of jurisdiction separate from the merits) [CLA-22]; *GAMI*, Procedural Order No. 2 ¶ 1 (May 22, 2003) (deciding to address preliminary issues separate from proceeding on the merits) [RLA-49]; *Waste Management* Award § 3 (recalling tribunal’s decision to decide question of jurisdiction separate from the merits) [RLA-50].

⁹⁴¹ See *Apotex Inc. v. United States*, NAFTA/UNCITRAL, Transcript of First Procedural Meeting of the Arbitral Tribunal, at 47:3-6 (Nov. 30, 2010) [R-2]; *Apotex Inc. v. United States*, NAFTA/UNCITRAL, Procedural Order No. 1 ¶ 62 (Dec. 16, 2010) [RLA-51]. The jurisdictional issues have been pleaded and heard and the parties are awaiting a decision.

⁹⁴² See *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, 1952 I.C.J. 93, 103 (Judgment of July 22) (“[T]he jurisdiction of the Court . . . depends on the will of the parties.”) [CLA-83]; see also Sigvard Jarvin, *Objections to Jurisdiction*, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 97, 97 (Lawrence Newman & Richard Hill eds., 2d ed. 2008) (“The arbitrator’s jurisdiction is based on the will of the parties, whether expressed in a contract in general terms covering a future dispute or in a separate agreement covering an existing dispute. The authority to hear the parties and make an award exists only through the agreement of the parties.”) [RLA-52].

⁹⁴³ SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 99 (5th ed. 1995) [RLA-53]; see also *Mavrommatis Palestine Concession Case (Greece v. United Kingdom)*, 1924 P.C.I.J. (Ser. A) No. 2, at 57-58 (Aug. 30) (dissenting opinion of Moore, J.) (“There are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has no[] jurisdiction.”) [RLA-54].

“fundamental principle of international judicial settlement” that a tribunal “not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt.”⁹⁴⁴

398. For this reason, the *SPP v. Egypt* tribunal properly found that an arbitral tribunal must examine a State’s “objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties.”⁹⁴⁵ Given the extraordinary nature of Apotex’s “investment” claim – which Apotex admits relates to a measure concerning a Canadian company’s manufacturing facilities *in Canada* – it is essential that the Tribunal first determine whether Apotex has proven that the United States consented to arbitrate its dispute.

B. The United States’ Jurisdictional Arguments Are Distinct from Its Merits Arguments and Are Based on a Straightforward Application of the NAFTA

399. Issues of jurisdiction and merits in this case are separate and distinct, which further supports the U.S. request for bifurcation.⁹⁴⁶ In the above argument supporting its jurisdictional objections, the United States demonstrated that (1) Apotex Inc. is not an “investor” that made or sought to make “investments” in the territory of the United States; and (2) the Import Alert does

⁹⁴⁴ *Certain Norwegian Loans (France v. Norway)*, 1957 I.C.J. 9, 58 (July 6) (separate opinion of Lauterpacht, J.) [RLA-55].

⁹⁴⁵ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction ¶ 63 (Apr. 14, 1988), 3 ICSID REP. 131, 143 [RLA-56].

⁹⁴⁶ See, e.g., Carolyn Lamm et al., *International Centre for Settlement of Investment Dispute*, in THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 77, 89 n.70 (Chiara Giorgetti ed., 2012) (“Bifurcation may be appropriate when the determination of facts needed to decide the jurisdictional objections is independent from the issues that would arise in an examination of the merits of the case (i.e. the tribunal in its discretion assesses whether they are intertwined); or when the facts that must be considered at the preliminary stage are largely separate, and the parties and arbitrators can concentrate on relevant preliminary issues, and they need not expend time and resources engaging in an intensive investigation of what are typically more complex issues of a dispute’s merits when examining those issues may ultimately prove unnecessary to the resolution of the case.”) [RLA-57]; FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION § 1362 (Emmanuel Gaillard & John Savage eds., 1999) (observing that if “jurisdiction appears to be a separate issue and the substantive issues to be resolved by the tribunal if it retains jurisdiction are complex, it will generally be appropriate to decide by way of a separate award”) [RLA-58].

not “relate to” (a) Apotex Holdings in its capacity as an “investor” or to its U.S. investment, Apotex Corp.; or (b) Apotex Inc. in its capacity as an “investor” or to its putative U.S. investments, its abbreviated new drug applications.⁹⁴⁷ For purposes of the merits, by contrast, Apotex claims that the manner in which the Import Alert was adopted and maintained with respect to two of Apotex Inc.’s Canadian manufacturing facilities violated NAFTA Chapter Eleven.⁹⁴⁸ There is no relevant overlap between issues of jurisdiction (*i.e.*, whether Apotex’s claims fall within the scope and coverage of NAFTA Chapter Eleven) and merits (*i.e.* whether the challenged Import Alert violated the United States’ obligations of national treatment, most-favored-nation treatment, and minimum standard of treatment).

C. Because the United States’ Jurisdictional Objections Should Terminate the Entire Case without Additional Fact-Finding, Cost and Efficiency Compel Bifurcation

400. Finally, the U.S. request for bifurcation should be granted because the United States’ jurisdictional objections, if upheld, will eliminate Apotex’s entire case. These objections thus would obviate the need for further briefing and proceedings on the merits. It would be “a waste of time and money for an arbitral tribunal to have conducted an arbitration from beginning to end if its award then proves to be invalid for lack of jurisdiction.”⁹⁴⁹ The better course, therefore, is to “hear arguments on the issue of jurisdiction as a preliminary matter and render an interim award on the point,” which “enables the parties to know where they stand at a relatively early stage.”⁹⁵⁰

⁹⁴⁷ See *supra* Section II.

⁹⁴⁸ See, e.g., Memorial ¶¶ 422, 453, 487.

⁹⁴⁹ Sigvard Jarvin, *Objections to Jurisdiction*, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 97, 102 (Lawrence Newman & Richard Hill eds., 2d ed. 2008) [RLA-52].

⁹⁵⁰ *Id.*; see also REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 375 (Nigel Blackaby et al. eds., 2009) (“There is no point in spending time and money on a complicated factual investigation if the dispute may be resolved by the determination of a legal point as a preliminary issue.”) [RLA-63]; GARY B. BORN, INTERNATIONAL

401. In sum, bifurcation is not only consistent with the governing arbitration rules but is the most fair, efficient, and economical way to proceed in this matter. If the United States prevails on its objections, the case will be dismissed in its entirety. Each of the United States' jurisdictional objections involves issues distinct from the merits of the claims. All of the U.S. jurisdictional objections thus should be determined as a preliminary matter.

CONCLUSION

402. For the foregoing reasons, the United States respectfully requests that the Tribunal (1) bifurcate the proceedings and decide the United States' jurisdictional objections as a preliminary matter; (2) dismiss Apotex's claims in their entirety and with prejudice; and (3) order that Apotex bear the costs of these proceedings, including the United States' costs for legal representation and assistance.

COMMERCIAL ARBITRATION 993-94 (2009) ("Although no absolute rules can be prescribed, the more appropriate course for the arbitral tribunal is generally to conduct a preliminary proceeding on credible good faith jurisdictional challenges. That permits the parties to fully address the issue and, if jurisdiction is lacking, avoids the expense of presenting the case on the merits. It also avoids forcing a party, who may not be subject to a tribunal's jurisdiction, to litigate the merits of its claims in what may be an illegitimate forum.") [RLA-64]; STEWART A. BAKER & MARK D. DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 106 (1992) ("In many cases, the potentially dispositive issue of the tribunal's jurisdiction should be decided before the parties have been put to the trouble and expense of making out a full case on the merits.") [RLA-65].

Dated: December 14, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa Grosh". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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