Zydus tries novel strategy on Strattera

For most of the time since the patent litigation over Eli Lilly's attention deficit hyperactivity disorder (ADHD) drug Strattera (atomoxetine hydrochloride) began in 2007, the case has followed a fairly typical path. The FDA says the first abbreviated new drug application (ANDA) – or applications – containing paragraph IV certifications to the key Strattera patent 5,658,590 were submitted on 29 May 2007 (see Figure 1), exactly one year before the end of atomoxetine's new chemical entity (NCE) exclusivity.

As Lilly started suing over the '590 patent – which expires on 26 May 2017 – it became clear that as many as 10 companies may have submitted their ANDAs on the first day possible and would likely share 180-day market exclusivity if their patent challenges succeeded. "Although Strattera is a successful product – Lilly reported US brand sales of more than US$445 million in 2009 – a generic market with so many players offers much lower rewards than some of the filers may have anticipated," commented Thomson Reuters, which compiles a database of paragraph IV patent certifications (see Figure 2).

But one ANDA filer, India's Zydus Cadila, took a different path in December 2007 by stipulating that the '590 patent – the only patent listed against Strattera in the Orange Book maintained by the US Food and Drug Administration (FDA) – was valid, enforceable and covered its proposed generic atomoxetine. "At that point, Zydus was no longer a party to the ongoing litigation," Thomson Reuters noted.

Having granted Lilly summary judgement of infringement and denied the ANDA filers' motions for summary judgement of invalidity, a New Jersey district court in August this year determined that the '590 patent was invalid for lack of enablement and utility. Because Lilly had not submitted test results showing that atomoxetine could be used to treat ADHD – and because a person of ordinary skill in the art would not have recognized the claimed method's utility in light of the specification – the patent was not properly enabled. The FDA promptly granted final approval to atomoxetine ANDAs filed by firms including Actavis, Aurobindo, Mylan, Sandoz, Sun, Teva, and Zydus.

"It is at this point that things began to get unusual," remarked Thomson Reuters. While Lilly's appeal against the district court's ruling was hardly unexpected, the US Court of Appeals for the Federal Circuit barred generic launches pending resolution of the appeal (**Generics *bulletin***, 3 September 2010, page 23). Because Zydus was no longer a party to the district-court litigation, the Indian firm was not named in the appeal or injunction.

Realising its error, Lilly sought unsuccessfully to add Zydus as a named defendant-appellee. The Indian firm then in late October initiated a declaratory judgment action against Lilly in the New Jersey district court, arguing that it was restricted from launching by neither the Court of Appeals' injunction nor the 2007 consent judgement barring it from entering the market during the life of the '590 patent, a life it said ended with the district court's invalidity ruling. In mid-November, Zydus stipulated that it would not market atomoxetine commercially until either the district court delivered a declaratory-judgment ruling or ended the injunction, or the Court of Appeals confirmed the '590 patent was invalid. An appeals hearing is scheduled for 9 December.

"Zydus could find itself in the paradoxical position of being the only company to enjoy generic exclusivity, having failed to pursue its patent challenge where others succeeded," Thomson Reuters observed. G

KEY DETAILS: STRATTERA

Brand:	Strattera
Active ingredient:	atomoxetine hydrochloride
Delivery form:	10mg, 18mg, 25mg, 40mg, 60mg, 80mg and 100mg capsules
Brand owner:	Eli Lilly
Annual US brand sales:	US$288 million*
First paragraph IV filing accepted by FDA:	29 May 2007
Known paragraph IV filers:	Actavis, Apotex, Aurobindo, Glenmark, Mylan, Sandoz, Sun, Synthon, Teva, Zydus Cadila
Patents at issue – expiry dates:	5,658,590 – 26 May 2017
District court location:	New Jersey Court of Appeals (Federal Circuit)
Litigation references:	Lilly vs Actavis *et al* 2010-1500 Zydus vs Lilly 2:10-cv-05584
Other FDA Orange Book patents with expiry dates:	None

* nine-month US brand sales reported by Lilly.

Figure 1: Key details of paragraph IV challenges to Eli Lilly's Straterra (atomoxetine) attention deficit hyperactivity disorder drug in the US (Source – Thomson Reuters)

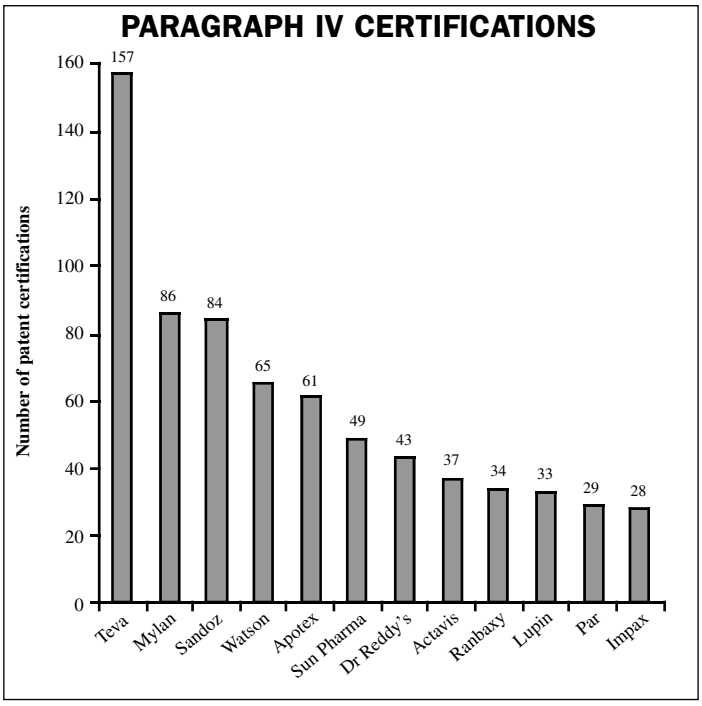

Figure 2: Numbers of paragraph IV patent certifications recorded by Thomson Reuters to September 2010 (Source – Thomson Reuters)