**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| ABBOTT LABORATORIES,<br><br>Plaintiff,<br><br>v.<br><br>ANDRX PHARMACEUTICALS, INC., TEVA PHARMACEUTICALS USA, INC., and ROXANE LABORATORIES, INC.,<br><br>Defendants. | ) | **Case No. 05 C 1490**<br><br>Judge Coar<br>Magistrate Judge Brown |

**ABBOTT LABORATORIES' EMERGENCY MOTION FOR ENFORCEMENT OF THIS COURT'S PRELIMINARY INJUNCTION ORDER AGAINST TEVA PHARMACEUTICALS USA, INC. AND FOR AN ORDER TO SHOW CAUSE**

Plaintiff Abbott Laboratories ("Abbott") hereby respectfully moves on an emergency basis for an order enforcing this Court's June 8, 2005 preliminary injunction order against Teva Pharmaceuticals USA, Inc. ("Teva") and for an order to show cause why Teva should not be held in civil contempt of this Court for its violation of the preliminary injunction order. In support of the motion, Abbott states as follows:

## I. SUMMARY OF ARGUMENT

1. Despite this Court's order preliminarily enjoining Teva from, among other things, "offering to sell" or "selling" a generic clarithromycin extended release product, this morning counsel for Teva confirmed that Teva has commenced offering for sale and selling its generic clarithromycin extended release product. Indeed, Teva's counsel confirmed that Teva already has shipped and delivered its generic clarithromycin extended release product to its customers today and could not represent whether any additional shipments are en route.

2. Teva contends that the preliminary injunction order is no longer in effect because the Federal Circuit, in a 2-1 decision, issued an opinion on Thursday, June 22nd, vacating the preliminary injunction. However, under the Federal Rules of Appellate Procedure and applicable case law, that opinion is not final and has no effect on this Court's injunction unless and until a mandate has been issued by the Federal Circuit to this Court. No such mandate has been issued, and no such mandate will issue at least until 7 days after Abbott's forthcoming petition for rehearing has been decided. In short, the preliminary injunction order remains in effect, Teva is, by its own admission, in violation of it, and Abbott is entitled to the relief it seeks in this motion, including an order that Teva immediately cease and desist from violating this Court's preliminary injunction order, in order to maintain the *status quo*. Without such relief on an emergency basis, Abbott is likely to suffer immediate and irreparable harm.

## II. BACKGROUND

3. On June 3, 2005, this Court granted Abbott's motion for a preliminary injunction against Teva regarding Teva's generic clarithromycin extended release product. *See* Exhibit A.

4. On June 8, 2005, this Court entered an order preliminarily enjoining "Teva and its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive notice of this Order by personal service or otherwise, … from commercially manufacturing, using, offering to sell, or selling within the United States or importing into the United States any generic clarithromycin extended release product within the scope of Abbreviated New Drug Application 65-154." *See* Exhibit B. The Court's order further provided that "[t]he Preliminary Injunction will remain in effect until further order of the Court." *Id.*

5. Teva filed a notice of appeal from this Court's preliminary injunction order. On June 22, 2006, a divided panel of the United States Court of Appeals for the Federal Circuit issued an order vacating the preliminary injunction against Teva. *See* Exhibit C. The Federal Circuit's mandate has not yet issued. Because Abbott intends to file a petition for rehearing challenging this decision within the 14 day time period allowed by Fed. R. App. P. 40(a)(1), the mandate will not issue until that petition is resolved. *See* Fed. R. App. P. 41(b), (d).

6. On June 23, 2006, one of Abbott's business partners provided Abbott with a copy of a June 2006 Teva document entitled "TEVA USA Announces Clarithromycin Extended-Release Tablets" (hereinafter the "Teva Product Announcement"), that was obtained from one of the business partner's customers or potential customers. *See* Exhibit D.

7. The Teva Product Announcement is in the form of a letter addressed to Teva's "Valued Customer[s]" from John W. Denman, R.Ph., Teva's National Sales Director. *Id.* The Teva Product Announcement states in pertinent part as follows:

> Teva Pharmaceuticals is pleased to announce the introduction and availability of Clarithromycin Extended-Release Tablets. This new Teva product is AB rated and bioequivalent to Biaxin®* XL Filmtab®*.
>
> Please contact your Teva National Account Manager for pricing information. Teva USA Customer Service Representatives are available toll free at 800-545-8800 to help you with any other information needed.
>
> Below is a brief description of this new Teva USA product. Enclosed please find additional details which you may need when ordering.

*Id.*

8. The Teva Product Announcement also sets forth the Strength, Size, and Suggested Wholesale Price for Teva's generic clarithromycin extended release product and references additional product information that is enclosed with the letter. *See id.*

9. Upon learning of the Teva Product Announcement, on Friday, June 23, 2006, Abbott's counsel, Ted Dane, contacted Jim Galbraith, counsel for Teva, by phone and email to confirm whether Teva was in fact selling or offering to sell its generic clarithromycin extended release product. *See* Ex. E; Declaration Of Ted G. Dane In Support Of Abbott Laboratories' Emergency Motion For Enforcement of This Court's Preliminary Injunction Order Against Teva Pharmaceuticals USA, Inc. and For An Order to Show Cause ("Dane Decl.") ¶¶2-4. During the phone call to Mr. Galbraith, Mr. Dane noted that sales of Teva's clarithromycin extended release product remained barred by this Court's preliminary injunction until the issuance of the mandate. *See* Ex. E; Dane Decl. ¶¶2-3. Teva's counsel disagreed that such sales would be a violation of the preliminary injunction and would not confirm whether Teva has been soliciting, or intends to solicit, sales of its generic clarithromycin extended release product. *See id.*

10. In a follow-up email, Mr. Dane asked Mr. Galbraith to confirm that Teva would not make any sales of its generic clarithromycin extended release product in the United States before the Federal Circuit's mandate has issued. *See* Ex. E; Dane Decl. ¶4. Mr. Dane also apprised Mr. Galbraith of Abbott's intent to file the instant motion in the event that Mr. Galbraith could not represent that Teva would not offer to sell or sell its generic clarithromycin extended release product prior to the issuance of the mandate. *See id.*

11. Mr. Galbraith responded that Teva did not agree with Abbott's view as to the effectiveness of the Federal Circuit's order. *See* Exhibit F; Dane Decl. ¶5. Mr. Galbraith did not represent that Teva would refrain from selling or offering to sell its generic clarithromycin extended release product prior to the issuance of the mandate. *See id.* Mr. Dane confirmed in a subsequent email to Mr. Galbraith that Abbott intended to protect its rights by seeking appropriate relief from this Court. *See* Exhibit G; Dane Decl. ¶6.

12. Despite repeated and persistent efforts by Abbott's counsel to get Teva's counsel to confirm or deny whether Teva had commenced sales or offers to sell its generic clarithromycin extended release product, *see* Exhibit H; Dane Decl. ¶7, Teva's counsel delayed providing this information until the morning of Monday, June 26, 2006, when Mr. Galbraith confirmed via email that "Teva USA has begun offering for sale and selling clarithromycin ER tablets," *see* Exhibit I. Mr. Galbraith also proposed a compromise regarding the dispute, *see id.*, that counsel for Abbott rejected. *See* Exhibit J; Dane Decl. ¶8.

13. In addition, Mr. Galbraith confirmed that Teva had in fact shipped and delivered product to some of its customers today. Mr. Galbraith could not confirm whether or when additional deliveries were scheduled.

14. Based on the Teva Product Announcement and Teva's counsel's express confirmation that Teva is offering to sell and selling its generic clarithromycin extended release product prior to the issuance of the mandate, Abbott has been left with no choice but to file this motion on an emergency basis to maintain the *status quo* whereby this Court's preliminary injunction against Teva prevents Teva from selling or offering to sell its generic clarithromycin extended release product.

## III. ARGUMENT

### A. This Court Has Jurisdiction to Enforce Its Preliminary Injunction Order and That Order Is In Full Force and Effect

15. This Court has jurisdiction to enforce its preliminary injunction order against Teva even though the preliminary injunction order is on appeal to the Federal Circuit. Generally, "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)

(per curiam). However, "[a] notice of appeal does not stay enforcement of a district court's order. A judge may – and should – enforce an un-stayed injunction while an appeal proceeds. Otherwise the judge deprives the prevailing parties of the benefit of their judgment and rewards defiance." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 565-66 (7th Cir. 2000) (citations omitted).

16. This is so because "*Griggs* notes an important limitation on the rule that just one court at a time possesses jurisdiction: the doctrine applies only to 'those aspects of the case involved in the appeal.'" *United States v. Kusay*, 62 F.3d 192, 194 (7th Cir. 1995) (quoting *Griggs*). The issue "whether the addressee of an injunction has complied is not a subject 'involved in the appeal,'" *Union Oil*, 220 F.3d at 566, and thus this Court does retain jurisdiction to enforce its preliminary injunction order until such time as an appellate mandate issues with an order vacating the preliminary injunction.[1] *See Chrysler Motors of Am. v. International Union, Allied Indus. Workers of Am., AFL-CIO*, 909 F.2d 248, 250 (7th Cir. 1990) ("An interlocutory appeal does not divest the district court of jurisdiction… to determine whether [an enjoined party] violated the injunction – which had not been stayed pending appeal…") (citation omitted);

[1] In contrast, until the mandate issues, the Court lacks jurisdiction to dissolve the injunction while on appeal, and lacks jurisdiction to modify the injunction or adjudicate substantial rights involved in the appeal except in order to maintain the *status quo*. *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002) ("While a preliminary injunction is pending on appeal, a district court lacks jurisdiction to modify the injunction in such manner as to 'finally adjudicate substantial rights directly involved in the appeal.' Federal Rule of Civil Procedure 62(c), however, authorizes a district court to continue supervising compliance with the injunction") (citations omitted); *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989) ("the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo and ought not to extend to the point that the district court can divest the court of appeals from jurisdiction while the issue is before [the appellate court] on appeal"); *Robb Container Corp. v. Sho-Me Co.*, 566 F. Supp. 1143, 1158 (N.D. Ill. 1983) (although Fed. R. Civ. P. 62(c) "provides for modification of an injunction pending appeal,… this rule merely expresses the inherent power of a court to maintain the status quo where it deems such action necessary. A district court, in such a situation, lacks jurisdiction to consider new evidence or adjudicate substantial rights directly involved in the appeal"); *see also Chicago Prof'l Sports Ltd. P'shp v. National Basketball Ass'n*, 1995 WL 519753, at *9 (N.D. Ill. Aug. 30, 1995); *Schwinn Bicycle Co. v. Ross Bicycles*, Inc., 1988 WL 48329, at *1 (N.D. Ill. May 9, 1988).

*Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 440 (6th Cir. 1985) ("Where… the district court is attempting to supervise its judgment and enforce its order through civil contempt proceedings, pendency of appeal does not deprive it of jurisdiction for these purposes").[2] In this case, the Court's preliminary injunction against Teva was not stayed and thus remained in effect while the appeal proceeded.

17. This Court's preliminary injunction order remains in full force and effect – despite the Federal Circuit's issuance of an *order* vacating the preliminary injunction against Teva – because the Federal Circuit's order does not become final or operative until that court's *mandate* issues. *See Mary Ann Pensiero, Inc. v. Ltman, Litman, Harris, Brown & Watzman, P.C.*, 847 F.2d 90, 97 (3d Cir. 1988) ("An appellate court's decision is not final until its mandate issues"); *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 947 (2d Cir. 1983) (vacating an injunctive protective order and noting that the district court's order "remains in effect until issuance of the Court's mandate, which, pursuant to Fed. R. App. P. 41(a), will occur

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[2] *See also United States v. United Mine Workers of Am.*, 330 U.S. 258, 293-294 (1947) ("we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings"). The Supreme Court further held that

> 'An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'

*Id.* (citations omitted). In this case, the orderly and proper appellate review proceedings have not concluded, as Abbott's time to file a petition for rehearing challenging the decision has not expired and the mandate has not issued (and will not issue until the petition is resolved). Accordingly, the preliminary injunction against Teva remains in full force and effect and may not be violated by Teva.

21 days after the entry of our judgment herein");[3] Fed. R. App. P. 41 advisory committee's note ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed"); 2A FEDERAL PROCEDURE, L. ED. § 3:1013 (2005) ("Control over an appellate judgment continues until the court mandate issues; *a district court order, though vacated on appeal, remains in effect until the issuance of the appellate court mandate,* pursuant to [Fed. R. App. P.] 41") (emphasis added); *see also Al Najjar v. Ashcroft*, 273 F.3d 1330, 1337 (11th Cir. 2001) (per curiam) (holding that "[t]here can be no question that" an appellate panel's decision affirming a final administrative order of deportation is "final and executable as soon as the mandate issued") (footnote omitted); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (per curiam).

18. This is just as true where the order at issue is a preliminary injunction. *See McBride v. Coleman*, 955 F.2d 571, 575 n.5 (8th Cir. 1992) (holding that an injunction that is vacated on appeal remains in effect, despite the announcement of the appellate court's vacatur opinion, until the mandate issues).

19. The mandate does not issue automatically upon entry of an appellate order or judgment. Rather, absent an order from the Federal Circuit shortening or extending the time for the mandate's issuance, the Federal Circuit's mandate will not issue until at least 21 days from the entry of judgment. *See* Fed. R. App. P. 41(b) ("The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for

[3] Although the court in *Bridge* was relying on the pre-1994 version of Rule 41, its analysis regarding the effectiveness of the district court's order prior to the issuance of the mandate remains valid, as the changes to Rule 41 were directed primarily to a separate issue, namely the change made to Fed. R. App. P. 40(a) extending the time period for a petition for rehearing where the United States is a party to civil action to 45 days. *See* 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3987.

stay of mandate, whichever is later"); Fed. R. App. P. 40(a)(1) ("Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment"). Moreover, the timely filing of a petition for rehearing automatically "stays the mandate until disposition of the petition…, unless the court orders otherwise." *See* Fed. R. App. P. 41(d).

20. A party may not act based on an appellate court's order until the "appellate process… has run its course" and the mandate issues. *See United States v. Thorp*, 655 F.2d 997, 998-99 (9th Cir. 1981) (per curiam). These systemic delays in the issuance of the mandate are specifically built into the Federal Rules of Appellate Procedure in order to allow a period of time for a party to file a petition for rehearing to correct errors in, or seek reversal of, the order before it becomes final. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1100 (10th Cir. 1988) (per curiam) ("Petitions for rehearing under Fed. R. App. P. 40(a) are permitted to enable parties to notify, and to correct, errors of fact or law on the issues already presented"), *overruled on other grounds*, *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

21. Teva's argument that the Federal Circuit's order became effective upon entry runs contrary to the plain language of the Federal Rules of Appellate Procedure. Those Rules have a built-in delay for finality in order to ensure that the order is truly final, and this built-in delay may be shortened only by the appellate court. *See*, *e.g.*, Fed. R. App. P. 40(a)(1) and 41(b); *see also* Fed. R. App. P. 41 advisory committee's note ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed").

22. The solitary case on which Teva relies, *10280 Northfield Rd., LLC v. Village of Northfield*, 2000 U.S. DIST. LEXIS 5679 (N.D. Ohio Apr. 17, 2000), offers no justification or support for Teva's violation of this Court's preliminary injunction order. In *10280 Northfield*,

the Village of Northfield adopted a 1996 ordinance that the plaintiff challenged as unconstitutional. The district court denied the plaintiff's request for a permanent injunction prohibiting enforcement of the statute. On appeal, the Sixth Circuit reversed, declared the ordinance unconstitutional, and remanded with instructions to permanently enjoin enforcement of the ordinance. Within days after the Sixth Circuit's opinion was issued, the Village enacted a second ordinance and the plaintiff filed a second lawsuit challenging the constitutionality of the second ordinance and seeking a permanent injunction.

23. In order to resolve the plaintiff's motion for a permanent injunction of the second ordinance, the court had to construe the impact and effect of the Sixth Circuit's opinion. Recognizing the critical importance of the mandate for a district court's jurisdiction to act on an injunction, the district court noted that "[j]udgments of courts of appeals are *not* self-executing," and that it "did not (and could not) enter the permanent injunction until after receipt of the mandate." 2000 U.S. DIST. LEXIS 5679, at *12-13 (emphasis added).

24. That fact, however, was irrelevant to the issue before the court. Because, under Ohio state law, "an unconstitutional law cannot be *enforced* against anyone, with or without a permanent injunction prohibiting its enforcement" *id.* at *14 (emphasis added), the court held that the plaintiff did not require entry of an injunction to act without regard for the unconstitutional statute. The case thus does not address the issue here – whether an injunction that a court has entered remains operative until the mandate issues. As the cases and authorities cited by Abbott demonstrate, the answer to that question is clearly yes. Accordingly, Teva's reliance on *10280 Northfield* is misplaced.

25. To sum up, in this case, the mandate has not yet issued. The Federal Circuit has not issued an order shortening the time period for issuance of the mandate, and Teva has not filed

a motion to expedite the mandate's issuance. Moreover, Abbott intends to timely file a petition for rehearing before the expiration of the 14 day period provided by Fed. R. App. P. 40(a)(1), which will automatically "stay[] the mandate until disposition of the petition…, unless the court orders otherwise." *See* Fed. R. App. P. 41(d). Consequently, this Court's preliminary injunction against Teva remains in full force and effect.

**C. Teva's Sales And Offers To Sell, Including The Teva Product Announcement, Violate This Court's Preliminary Injunction Order**

26. This Court's preliminary injunction order prohibits "Teva and its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive notice of this Order by personal service or otherwise, … from commercially manufacturing, using, offering to sell, or selling within the United States or importing into the United States any generic clarithromycin extended release product within the scope of Abbreviated New Drug Application 65-154." *See* Ex. B.

27. It is indisputable that Teva is violating the terms of this Court's preliminary injunction, as Teva has conceded that it is offering to sell and selling its generic clarithromycin extended release product. *See* Ex. H.

28. Moreover, there can be no question that the Teva Product Announcement is an "offer to sell" generic clarithromycin extended release product within the meaning of 35 U.S.C. § 271. The Federal Circuit relies on "the norms of traditional contractual analysis" to determine if an offer to sell gives rise to liability under 35 U.S.C. § 271. *See MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1376 (Fed. Cir. 2005). Thus, an "offer to sell" occurs where the defendant communicates "a manifestation of willingness to enter a bargain, so made as to justify another person in understanding that his assent to that bargain is

invited and will conclude it." *Id.* (internal quotation marks and citations omitted). That is clearly the case with respect to the Teva Product Announcement.

29. In *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373 (Fed. Cir.1998), the court found that even though defendants disavowed on the face of their price quote letters that they were making offers to sell, the letters could be "regarded as 'offer[s] to sell' under section 271 based on the substance conveyed in the letters, *i.e.*, a description of the allegedly infringing merchandise and the price at which it can be purchased." *Id.* at 1379; *see also id.* ("One of the purposes of adding 'offer [ ] to sell' to section 271(a) was to prevent exactly the type of activity [defendant] has engaged in, *i.e.*, generating interest in a potential infringing product to the commercial detriment of the rightful patentee.").

30. The Teva Product Announcement contains a detailed description of its extended release tablets and the price at which those tablets are to be sold. Teva does not even attempt to conceal its desire to sell this product by disclaiming that this "New Product Announcement" is an offer to sell. To the contrary, Teva refers to the "introduction and *availability*" of its clarithromycin tablets; provides a customer service number for the customer to call for more information; and describes the enclosed product labeling as "additional information which you may need *when ordering*." *See* Ex. D (emphasis added). Accordingly, the Teva Product Announcement is an "offer to sell" within the meaning of 35 U.S.C. § 271.

31. Given Teva's counsel's admission that Teva has made actual offers to sell and has made sales, *see* Ex. H, and because the Court's preliminary injunction order against Teva is still in full force and effect, there can be no question that such offers – or actual sales – regarding Teva's generic clarithromycin extended release product violate the express terms of this Court's

preliminary injunction against selling or offering to sell a generic clarithromycin extended release product. *See* Ex. B.

**D. Teva Should Be Ordered to Comply With the Preliminary Injunction and Immediately Cease and Desist All Sales and Offers to Sell Its Generic Clarithromycin Extended Release Product in the United States**

32. Teva is violating this Court's preliminary injunction order by selling, or offering to sell, its generic clarithromycin extended release product. Indeed, Teva's counsel has confirmed that Teva has made actual deliveries to some of its customers *today*. For the reasons set forth in Abbott's papers in support of its motion for a preliminary injunction, Abbott will suffer irreparable harm if Teva is permitted to infringe Abbott's patents. That is no less true today than when the Court issued the preliminary injunction. Indeed, the same analysis that led the Court to conclude that the balance of harms favored issuance of the preliminary injunction – *i.e.*, Abbott's assertion that "it will face devastating loss of market share" absent a preliminary injunction and Teva's "reluctance or inability to quantify the hardship, if any, it will face if an injunction is incorrectly entered," *see* Ex. A at 28-30, – applies with equal force here.

33. Teva has no legitimate justification for violating this Court's preliminary injunction order. As explained above, the Federal Circuit order vacating the preliminary injunction against Teva does not permit Teva to violate the preliminary injunction order because the Federal Circuit's order is not effective until the mandate issues. Accordingly, in order to preserve the *status quo* pending the issuance of the mandate, Teva should be ordered to comply with the preliminary injunction order and immediately cease and desist all sales and/or offers to sell, including all deliveries or shipments of, its generic clarithromycin extended release product in the United States.

**E. Teva Should Be Ordered To Show Cause Why It Should Not Be Held In Contempt for Violating This Court's Preliminary Injunction Order**

34. In order to establish civil contempt for violation of a preliminary injunction, Abbott must demonstrate by clear and convincing evidence that the Court entered a lawful order and that Teva violated this Court's order, though the violation need not be willful. *See Board of Trustees of Bricklayers Local 74 Fringe Benefit Funds v. Michael J. Vorkapic, Inc.*, 2001 WL 649501, at *2 (N.D. Ill. June 8, 2001); *EEOC v. Paragon Rest., Inc.*, 1999 WL 231678, at *5 (N.D. Ill. Mar. 26, 1999).

35. As discussed above, there can be no doubt that this Court entered a lawful preliminary injunction order that currently is in effect pending the Federal Circuit's disposition of Abbott's forthcoming petition for rehearing and ultimate issuance of a mandate. Further, there can be no doubt that Teva has violated the preliminary injunction order by offering to sell or selling its generic clarithromycin extended release product. Indeed, Teva's violation of the preliminary injunction is willful and intentional. Had Teva felt strongly about their position, they could (and should) have moved on Friday for expedited issuance of the mandate. Teva did not do so, and instead began selling and making offers to sell, while buying itself time to commence shipments by delaying confirmation of those sales and offers to sell from Friday to Monday. Accordingly, Teva's audacious violation of this Court's preliminary injunction order warrants a finding of contempt.

36. "In terms of civil contempt, a court has broad discretion to fashion a remedy based on the nature of the harm and the probable effect of alternative sanctions." *EEOC v. Dial Corp.*, 2001 WL 1945089, at *3 (N.D. Ill. Dec. 6, 2001). Contempt "sanctions are designed to serve either or both of the following two purposes: (1) to compel compliance with a court order,

and (2) to compensate the complainant for losses resulting from the opposing party's noncompliance with a court order." *Id.*

37. Accordingly, pursuant to Local Rule 37.1, Abbott respectfully requests that this Court issue an Order requiring Teva to appear before this Court to show cause why it should not be adjudged in civil contempt of this Court and that the Court ultimately hold Teva in contempt. In addition, Abbott respectfully requests that the Court impose monetary sanctions on Teva in an amount sufficient to compel compliance, as well as Abbott's reasonable counsel fees under Local Rule 37.1(a). *See Paragon*, 1999 WL 231678, at *5 ("Upon a finding of civil contempt, the court may award attorneys' fees [and] expenses incurred in bringing the contempt complaint"); *accord Board of Trustees*, 2001 WL 1945089, at *6.

## IV. CONCLUSION

WHEREFORE, for the reasons set forth above, Abbott respectfully requests that the Court enter an order (a) requiring Teva to comply with the preliminary injunction order and to immediately cease and desist all sales and/or offers to sell, and deliveries or shipments of, its generic clarithromycin extended release product in the United States; (b) requiring Teva to show cause why it should not be held in civil contempt for violating this Court's preliminary injunction order; (c) holding Teva in civil contempt for violating this Court's preliminary injunction order; (d) imposing sanctions on Teva for Teva's violation of this Court's preliminary injunction order in an amount sufficient to compel compliance; (e) awarding Abbott its reasonable attorneys' fees incurred in connection with this Motion; and (f) awarding Abbott any other relief this Court deems just and appropriate.

Dated: June 26, 2006

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies under penalty of perjury that a copy of the foregoing **Abbott Laboratories' Emergency Motion For Enforcement of This Court's Preliminary Injunction Order Against Teva Pharmaceuticals USA, Inc. and For An Order to Show Cause**, was served on the following on June 26, 2006:

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Dated: June 26, 2006 s/ Michael A. Flomenhoft