

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 23-cv-2584-DDD-SKC

TEVA PHARMACEUTICALS USA, INC.,
Plaintiff,

v.

PHILIP J. WEISER, in his official capacity as Attorney General of the State of Colorado, and

PATRICIA A. EVACKO, ERIC FRAZER, RYAN LEYLAND, JAYANT PATEL, AVANI SONI, KRISTEN WOLF, and ALEXANDRA ZUCCARELLI, in their official capacities as members of the Colorado State Board of Pharmacy,

Defendants.

**THE ATTORNEY GENERAL’S REPLY IN SUPPORT OF HIS MOTION TO DISMISS
(ECF NO. 37, FILED DECEMBER 6, 2023)**

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant Philip J. Weiser, in his official capacity as Colorado Attorney General (the “Attorney General”), respectfully submits this Reply in Support of His Motion to Dismiss Plaintiff’s First Amended Complaint [Doc. 29].

REPLY

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER TEVA’S CLAIM.

A. Just compensation is an adequate remedy for any alleged taking that may happen the future.

In its opposition to the Attorney General’s Motion to Dismiss, Teva argues that the legal remedy of damages is not adequate because the Affordability Program purportedly authorizes an “indefinite series of takings.” *See* Doc. 37 at 1. Teva urges this Court to adopt the Eighth Circuit’s

reasoning in *PhRMA* and preemptively enjoin “all future takings” based simply on Teva’s fear that there will be a “multiplicity of suits.” *See id.* at 4-6. But, Teva’s argument is fundamentally flawed for several reasons.

First, Teva’s multiplicity of suit argument runs counter to the overwhelming weight of Fifth Amendment Takings Clause precedent. As discussed in *Knick* and in Supreme Court decisions stretching back to the late 1800’s, the Fifth Amendment only requires “reasonable, certain, and adequate provision for obtaining compensation,” which means that a property owner has “some way to obtain compensation after the fact.” *See Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168, 2176-77 (2019); *see also Williams v. Parker*, 188 U.S. 491, 503-04 (1903); *Hurley v. Kincaid*, 285 U.S. 95, 103-04 (1932). Besides *PhRMA*, Teva has not cited any case that has adopted this “multiplicity of suit” theory to authorize injunctions in the Fifth Amendment Takings Clause context. *See* Doc. 37 at 4-6.¹ By contrast, since *Knick*, numerous federal courts have rejected Takings Clause claims seeking injunctive relief in cases where a multiplicity of suits were theoretically possible. *See, e.g., Virginia Hosp. & Healthcare Ass’n v. Roberts*, No. 3:20-CV-587-HEH, 2023 WL 3132005, at *25-26 (E.D. Va. Apr. 27, 2023) (state law capping hospital reimbursement rates); *Farhoud v. Brown*, No. 3:20-CV-2226-JR, 2022 WL 326092, at *11 (D. Or. Feb. 3, 2022) (eviction moratoriums); *Pakdel v.*

¹ Indeed, many of the cases cited by Teva and the *PhRMA* case actually *refused* to grant an injunction based on the “multiplicity of suits” rationale. *See, e.g., Equitable Life Assur. Soc. of U.S. v. Wert*, 102 F.2d 10, 15 (8th Cir. 1939); *Di Giovanni v. Camden Fire Ins. Ass’n*, 296 U.S. 64, 70-72 (1935). As the Supreme Court noted in *Hale v. Allinson*, 188 U.S. 56, 77 (1903), (which is cited in *PhRMA*, 64 F.4th at 942) and in *DiGiovanni*, 296 U.S. at 71, “[t]he single fact that a multiplicity of suits may be prevented by this assumption of [equity] jurisdiction is not in all cases enough to sustain it.”

City & Cnty. of San Francisco, 636 F. Supp. 3d 1065, 1077-78 (N.D. Cal. 2022) (requirement to provide lifetime tenancy); *Hund v. Cuomo*, 501 F. Supp. 3d 185, 205 (W.D.N.Y. 2020) (Covid-19-related regulation on ticketed musical performances); *Exotic Smoke & Vape v. Cox*, No. 2:22-CV-408, 2022 WL 2316323, at *1 (D. Utah June 28, 2022) (law restricting tobacco retailers). The Takings Clause only requires compensation. The Court should not follow the Eighth Circuit and import a “multiplicity of suit” exception from the equity context that has never existed in the Takings Clause context.

Second, Teva’s multiplicity of suit argument conflicts with how the Tenth Circuit has addressed this issue in similar cases. In *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003), the Tenth Circuit rejected the argument that injunctive relief was available in a case involving a potentially indefinite series of takings. Even though multiple alleged “takings” had already occurred and it was anticipated that more alleged “takings” would happen in the future, *see id.* at 1216, the Tenth Circuit held that no injunctive relief was available and plaintiff was required to seek compensation, *see id.* at 1217-19. Similarly, in *Williams v. Utah Dep’t of Corr.*, the Tenth Circuit dismissed a Fifth Amendment takings claim that challenged a potentially indefinite series of takings of money since just compensation remedies were available. *See* 928 F.3d 1209, 1211, 1213-14 (10th Cir. 2019). The Court should follow the Tenth Circuit’s approach.

Finally, Teva’s multiplicity of suits argument is wrong as a practical matter. As discussed in the Defendants’ opposition to Teva’s Motion for Preliminary Injunction, procedural mechanisms exist for Teva to consolidate potential future claims into a single suit, if it so chooses.

see Doc. 20 at 15-16.² Since Teva’s epinephrine auto injectors are identical physical products, only one suit would be necessary given well-established preclusion principles. For example, if Teva properly brought its suit in Colorado state court, and the court determined that the Affordability Program effected a taking, then that ruling would have preclusive effect. *See, e.g., Knick*, 139 S. Ct. at 2167 (noting preclusion principles apply in Taking Clause context and citing *San Remo Hotel v. San Francisco*, 545 U.S. 323 (2005)); *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001) (discussing elements of issue preclusion under Colorado law); *Gallegos v. Colorado Ground Water Comm’n*, 147 P.3d 20, 32 (Colo. 2006) (discussing elements of claim preclusion under Colorado law). Simply put, Teva’s claim that there would be a multiplicity of suits or an “utterly pointless set of activities” is incorrect. A single suit properly brought in Colorado state court at the appropriate time would fully resolve the dispute between the parties.

Here, it is undisputed that just compensation remedies exist under Colorado law. *See* Doc. 20 at 7. If Teva can prove an uncompensated taking has occurred sometime in the future, then it can obtain *full and complete* just compensation with those available state court remedies. *See, e.g.,* Colo. Jury Instr., Civil 36:3 (noting that “value of property actually taken” is its “reasonable market value”); C.R.S. § 38-1-116 (prejudgment interest available); C.R.S. § 38-1-122 (attorneys’ fees available). That is all that is required under the Fifth Amendment Takings Clause. *See Knick*, 139 S. Ct. at 2177. Accordingly, Teva has an adequate remedy at law and is not entitled to injunctive relief.

² Contrary to Teva’s suggestion, the Attorney General has not “dropped” this argument. *See* Doc. 37 at 6. The arguments raised in the Defendants’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction [Doc. 20] were specifically incorporated into the Attorney General’s Motion to Dismiss. *See* Doc. 29 at 4, 6.

B. *Ex Parte Young* does not apply because injunctive relief is not available for Teva's alleged Fifth Amendment Takings claim.

In its opposition to the Attorney General's Motion to Dismiss, Teva argues that the Eleventh Amendment does not bar its suit because it is seeking injunctive and declaratory relief and, therefore, falls under *Ex Parte Young*. See Doc. 37 at 7-8. But, as discussed in the Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction, Doc. 20 at 7-8, 13-16, in the Attorney General's Motion to Dismiss, Doc. 29 at 5-8, and in this Reply: (1) nothing has been taken from Teva so there is no "ongoing violation" of the Fifth Amendment; and (2) Teva has an adequate remedy at law that could provide it with full compensation. Accordingly, *Ex Parte Young* does not apply and the Eleventh Amendment bars their suit against the Defendants. See, e.g., *Virginia Hosp. & Healthcare Ass'n*, 2023 WL 3132005 at *25-26; *Los Molinos Mut. Water Co. v. Ekdahl*, No. 221CV01961DADDMC, 2023 WL 6386898, at *8 (E.D. Cal. Sept. 29, 2023).

C. Teva cannot establish standing or that its claim is ripe.

In its opposition to the Attorney General's Motion to Dismiss, Teva argues that it can mount a "pre-enforcement challenge" because there is a "virtual certainty" that at least one of its products will be involved in the Affordability Program and, therefore, Teva faces a "credible threat of prosecution." See Doc. 37 at 9-11. Teva does not cite any Fifth Amendment cases that support this argument. Teva has failed to do so because its argument has no basis in Takings Clause jurisprudence.

Given the Fifth Amendment's unique nature, the "pre-enforcement" and "credible threat of prosecution" concepts do not apply to Teva's claims. The Fifth Amendment does not prohibit governmental interference with private property *per se*, it only requires compensation in the event of a taking. See, e.g., *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.* 482

U.S. 304, 315 (1987). The Fifth Amendment does not require compensation be paid in advance or contemporaneously with a taking. *Knick*, 139 S. Ct. at 2167-68, 2177. The “mere enactment of legislation which authorizes condemnation of property cannot be a taking.” *Danforth v. United States*, 308 U.S. 271, 286 (1939). Rather, “a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it.” *Knick*, 139 S. Ct. at 2170. Thus, when it comes to per se takings, which Teva alleges is at issue here, a Fifth Amendment claim becomes justiciable when the physical property is actually taken or when the government attempts to assess a fine. *See, e.g., Horne v. Dep’t of Agric.*, 569 U.S. 513, 525 (2013) (noting that agency order imposing a fine was sufficient injury for federal jurisdiction for takings claim); *Valancourt Books, LLC v. Garland*, 82 F.4th 1222, 1234-35, 1239 (D.C. Cir. 2023) (noting that “demand for money that operates upon an identified property interest can violate the Takings Clause” and concluding government demand letter effected a taking); *Miller v. Campbell Cnty.*, 945 F.2d 348, 354 n.9 (10th Cir. 1991) (“The taking did not occur when the resolutions were adopted; rather the taking occurred when the plaintiffs were actually required permanently to vacate their premises.”). When it comes to regulatory takings, a Fifth Amendment claim becomes justiciable when there is finality on how the challenged regulation will apply to the property in question. *See, e.g., N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1226 (10th Cir. 2021).³ In neither case can a plaintiff bring a “pre-enforcement” Takings Claim for a hypothetical “future taking.” *See, e.g., Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 814 (10th Cir. 2021) (noting that “no just compensation was due to any particular individual for a

³ Contrary to Teva’s suggestion, *see* Doc. 37 at 11 n.3, the Attorney General has not dropped its prudential ripeness argument.

yet-to-occur taking” so court lacked jurisdiction to consider takings claim “relative to future takings.”).

Teva ignores these Fifth Amendment principles. Instead, it points to cases arising in the First Amendment context to argue that it can make a pre-enforcement challenge in the Takings Clause context. *See* Doc. 37 at 8-11 (citing *Bella Health & Wellness v. Weiser*, No. 123CV00939DDDSKC, 2023 WL 6996860 (D. Colo. Oct. 21, 2023); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1168 (10th Cir. 2021)). A credible fear of prosecution gives rise to standing in the First Amendment context because of the chilling effect the threat has on the exercise of First Amendment rights. *See, e.g., Susan B. Anthony List*, 573 U.S. at 159-60 (discussing cases); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003). But, in the Fifth Amendment context, there is no constitutional right to vindicate until an uncompensated taking actually occurs. *See Knick*, 139 S. Ct. at 2167-68. Teva has no constitutional interest in avoiding a taking, so it cannot use the “credible fear of prosecution” concept to make a pre-enforcement challenge and enjoin a taking that has not even happened.

It is undisputed that Colorado has not taken anything from Teva pursuant to the Affordability Program. Teva urges this Court to assume that the Affordability Program will necessarily impact Teva’s products. However, a plaintiff cannot have Article III standing based on hypothetical future injury. Furthermore, a takings claim is not ripe until a taking has actually happened. Because it is undisputed that a taking has not happened here, Teva’s Fifth Amendment Taking Clause claim must be dismissed.

II. TEVA’S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE THE STATE ENACTED THE AFFORDABILITY PROGRAM PURSUANT TO ITS POLICE POWER

Finally, Teva argues that the reimburse or resupply requirement is a taking for public use, and not designed to eliminate a threat to public safety and merely commandeers Teva’s property so the public can use it, and therefore does not fall under the principle articulated in *Lech*. See Doc. 37 at 11-13. However, Teva’s promotional materials undercut its argument. “Anaphylaxis can be life threatening” and “can happen within minutes,” so Teva counsels patients to “[a]lways carry your Epinephrine Injection (Auto-Injector) with you because you may not know when anaphylaxis may happen.” See <https://www.tevaepinephrine.com/>. Having access to an epinephrine autoinjector may mean the difference between life and death for Coloradans with severe allergies. The Affordability Program addresses the threat to the public’s health and safety caused by the manufacturers’ price gouging of these products, and is akin to regulations that require hospitals to provide emergency life-saving care regardless of a patient’s ability to pay. See, e.g., 42 U.S.C. § 1395dd (the Emergency Medical Treatment and Labor Act). The Affordability Program was enacted to protect human life.

It is clear that Teva wants to continue charging roughly \$300 for its epinephrine autoinjectors, see Doc. 22 at ¶ 29, even though it appears that these products only cost around \$8 to produce, see, e.g., <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20230203/-1/13968> (Feb. 3, 2023 House Health and Insurance Committee Hearing on HB23-1002, comments of Rep. Mabrey at 11:16 am). But, Teva should not prevent certain at-risk Coloradans from obtaining access to this life saving medication. Teva has not provided any epinephrine auto-injectors to

anyone pursuant to the Affordability Program yet. If Teva ever does provide replacement auto-injectors or reimbursements pursuant to the Affordability Program, it will be doing so pursuant to a state regulation that “controls the use of property by the owner for the public good” and that was enacted under the state’s police power to regulate the sale of drugs and protect human life. That would not constitute a taking under the Takings Clause, so Teva’s complaint must be dismissed. *See Lech*, 791 F. App’x at 718-19.

CONCLUSION

Because this court lacks subject matter jurisdiction and Teva has failed to state a claim, the Attorney General requests that the Court dismiss the Amended Complaint.

DATED: December 13, 2023.

PHILIP J. WEISER

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STATEMENT OF COMPLIANCE

I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(II).

s/ Pawan Nelson