IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ELAN PHARMA INTERNATIONAL LIMITED, Plaintiff, v. ABRAXIS BIOSCIENCE, INC., Defendant.	)	C. A. No. 06-438-GMS

DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR NEW TRIAL

Pursuant to Federal Rule of Civil Procedure 50(b), defendant Abraxis BioScience, Inc. ("Abraxis") hereby renews its motion for judgment as a matter of law, and moves in the alternative for a new trial, for: (1) non-infringement of the '363 patent, (2) invalidity of the '363 and '025 patents for failure to meet the enablement and written description requirements, (3) inequitable conduct as to the '363 and '025 patents, and (4) damages.

The grounds for Abraxis's renewed motion for judgment as a matter of law, as will be more fully set forth in Abraxis's brief, are as follows:

1) Abraxane does not infringe claims 3 and 5 of the '363 patent because:

   a. Elan failed to show that (i) any Abraxane nanoparticles contain entirely crystalline medicament; (ii) Abraxane's absorbed surface modifier is non-crosslinked; or (iii) any Abraxane nanoparticles are both entirely crystalline and non-crosslinked; or

   b. as Elan concedes, most Abraxane nanoparticles contain amorphous medicament, and the '363 patent does not cover a mostly amorphous product;

2) Claims 1, 3, 5, 10 and 11 of the '363 patent are invalid under 35 U.S.C. § 112 because the specification fails to enable or adequately describe:

a. the full scope of claimed drug and surface modifier combinations;

b. particles "essentially free of contaminants"; or

c. a small percentage of particles of crystalline medicament in a formulation with mostly amorphous particles;

3) Claims 1-3 and 13-15 of the '025 patent are invalid under 35 U.S.C. § 112 because the specification fails to enable or adequately describe:

a. the full scope of claimed drug and surface modifier combinations;

b. a small percentage of particles of crystalline medicament in a formulation with mostly amorphous particles; or

c. the claimed methods of the '025 patent in all mammalian species.

4) The '363 patent is unenforceable due to inequitable conduct because Elan made false representations and withheld information during prosecution concerning contamination or the ability to practice the full scope of the claimed invention that were material, and did so with intent to deceive;

5) The '025 patent is unenforceable due to inequitable conduct because Elan made false representations and withheld information during prosecution concerning the applicability of the claimed invention to species other than dogs or the ability to practice the full scope of the claimed invention that were material, and did so with intent to deceive;

6) The award of damages in an amount of $55,230,000 has no foundation in evidence, as Elan's royalty calculations were based on incomparable license agreements and a

speculative calculation of Abraxis's profits applied to sales of entire Abraxane vials when Elan alleged that only a small fraction of Abraxane's particles infringed.

Abraxis also hereby moves for a new trial pursuant to Fed. R. Civ. P. 59. The grounds for this motion, as will be more fully set forth in Abraxis' brief, are as follows:

1) The clear weight of evidence does not support the verdict;

2) Elan's tactics in disclosing its "more-than-one particle" infringement theory only on the eve of trial were untimely and prejudicial;

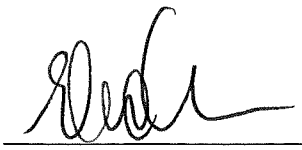
3) Elan's expert, Dr. Eric Munson, was erroneously allowed to testify at trial regarding the crystalline limitation of the '363 patent; or

4) The award of damages was excessive, warranting a new trial or remittitur of the damage award to a nominal amount.

Briefing for these motions will proceed in accordance with the parties' stipulation governing post-trial briefing, on the Court's approval of the same, which has been filed this date as D.I. 632.

Dated: June 30, 2008

YOUNG CONAWAY STARGATT & TAYLOR, LLP



Josy W. Ingersoll (#1088)
jingersoll@ycst.com
Elena C. Norman (#4780)
enorman@ycst.com
Karen E. Keller (#4489)
kkeller@ycst.com
Michele Sherretta Budicak (#4651)
mbudicak@ycst.com
Jeffrey T. Castellano (#4837)
jcastellano@ycst.com
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801
(302) 571-6600

OF COUNSEL:

MORRISON & FOERSTER, LLP

Michael A. Jacobs
425 Market Street
San Francisco, CA 94105-2482
(415) 268-7000
MJacobs@mofo.com

Emily A. Evans
Eric S. Walters
Erik J. Olson
755 Page Mill Road
Palo Alto, CA 94304-1018
(650) 813-5600
EEvans@mofo.com
EWalters@mofo.com
EJOlson@mofo.com

Attorneys for Defendant
ABRAXIS BIOSCIENCE, INC.

CERTIFICATE OF SERVICE

I, Elena C. Norman, Esquire, hereby certify that on June 30, 2008, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

Steven J. Balick, Esquire
ASHBY & GEDDES
500 Delaware Avenue, 8th Floor
Wilmington, DE 19801

I further certify that on June 30, 2008, I caused a true and correct copy of the foregoing document to be served by e-mail and hand delivery on the above-listed counsel of record and on the following non-registered participants in the manner indicated:

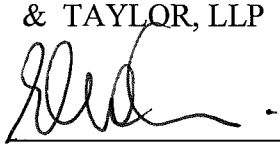
BY E-MAIL

Linda Glover, Esquire
Stephen Scheve, Esquire
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
steve.scheve@bakerbotts.com

Paul F. Fehlner, Esquire
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, NY 10112-4498
paul.fehlner@bakerbotts.com

William J. Sipio, Esquire
1375 Brentwood Road
Yardley, PA 19067
sipz25@aol.cm

YOUNG CONAWAY STARGATT
& TAYLOR, LLP



Josy W. Ingersoll (No. 1088)
jingersoll@ycst.com
Elena C. Norman (No. 4780)
enorman@ycst.com
Karen E. Keller (No. 4489)
kkeller@ycst.com
Michele Sherretta Budicak (No. 4651)
mbudicak@ycst.com
Jeffrey T. Castellano (No. 4837)
jcastellano@ycst.com
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, Delaware 19899
(302) 571-6600

Attorneys for Defendant
ABRAXIS BIOSCIENCE, INC.