# EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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ALLERGAN, INC., ALLERGAN SALES, LLC, : Civil Action
Plaintiffs, :
v. :
ALCON, INC., ALCON LABORATORIES, INC., and ALCON RESEARCH, LTD., :
Defendants. : No. 04-968-GMS

- - -

Wilmington, Delaware
Monday, November 22, 2004
2:00 p.m.
In Chambers

- - -

BEFORE: HONORABLE GREGORY M. SLEET, U.S.D.C.J.

APPEARANCES:

TIMOTHY DEVLIN, ESQ.
Fish & Richardson P.C.
-and-
JONATHAN E. SINGER, ESQ., and
MICHAEL J. KANE, ESQ.
Fish & Richardson, P.C., P.A.
(Minneapolis, Minnesota)

Counsel for Plaintiffs

JOHN W. SHAW, ESQ.
Young Conaway Stargatt & Taylor, LLP
-and-
DANIEL J. THOMASCH, ESQ., and
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(New York, New York)

Counsel for Defendant

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THE COURT: Hello, counsel.

MR. DEVLIN: Good afternoon, Your Honor. Tim Devlin from Fish & Richardson.

(Counsel respond "Good afternoon.")

MR. DEVLIN: I have with me Michael Kane and John Singer, also from Fish & Richardson.

THE COURT: Great. Which office?

MR. SINGER: I am actually from Minneapolis.

MR. SHAW: Good afternoon, Your Honor. John Shaw for defendants. And to our left, Daniel Thomasch from Orrick and Veronica Mullally.

(Counsel respond "Good afternoon.")

THE COURT: I am going to start off by telling you, what we will leave with here are broad strokes, and I will send you back to work on details. I will impose on the plaintiff to set things down in a scheduling order and circulate for my signature next Monday. That will be helpful, if you would do that.

There is not a lot that the parties agree on.

I guess the first thing we should address is the matter that was raised in your letters to me of October 4 and September 30 regarding I think it's Alcon's view that the Court should permit early filing of summary judgment and a counter-position from plaintiff.

MR. THOMASCH: This is the third lawsuit between

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these very parties, the third ANDA lawsuit involving brimonidine products that Alcon has sought to bring to the Court in generic formulations and that Allergan has sought to stop. Both of the prior actions, one of which was briefly in your Court, both of those were resolved on summary judgment and without discovery.

This presents the third of those lawsuits. These are different patents that have been asserted and these are now product patents instead of method patents. There are three patents that are at issue -- three patents that are relevant to this case. And I think I can within probably two minutes tell you exactly where our summary judgment would lie. We have additional defenses that would go beyond this, but right now we would like to be completely focused on two issues that we believe warrant summary judgment.

The three relevant patents all come from one common parent application. So they all share the same specification. That parent application sought claims to a brimonidine product, a chemical product, that would be used to lower interocular pressure in the eyes of individuals suffering from interocular hypertension or glaucoma. That use of brimonidine is well known. It's been out for a long time. And you can't get a patent to that anymore.

What these applications sought was a patent to allow that type of product with something that Allergan

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called an SEC, a solubility enhancing component. They said, we can add this solubility enhancer to brimonidine. It will allow the brimonidine to be used at a higher pH, closer to that of the eye, to where it is applied. And we think that would be beneficial. That is what they sought in the parent application.

Those broad claims were rejected. They were rejected because the use of these types of SECs with brimonidine had been well-documented in the past and there was a past, the Burke '911 patent, that covered exactly that.

What was said by Allergan was, but, while many SECs are disclosed, only one of those was what we call an anionic SEC. The others are nonanionic SECs.

Now, what they say we use is a nonanionic SEC. What they use is an anionic SEC, called CMC.

So they say, yes, the art had many uses of solubility enhancing components with brimonidine, but no one would have thought to select the anionic SEC. We have figured that out. We have figured out, that has surprising benefits that were unexpected. So we can patent that as a separate invention.

So those broad claims were narrowed down in the patent that was directly prosecuted off of the parent application and they received claims to cover the use -- to

cover brimonidine with an anionic SEC.

Now, they haven't sued us on that patent, because it is conceded that we don't have an anionic SEC in our product. So if that is their invention, there is no lawsuit.

From that same parent application, however, they received two additional patents, one by way of a divisional and one by way of a continuation. The divisional patent ultimately came down to -- it was made a divisional because originally the Patent Office said, you have too many inventions in this original patent, and some of them involve a preservative, an oxychloro preservative, and we want you to make that a divisional, a separate patent application. They did. So they then prosecuted the use of brimonidine with an oxychloro preservative. And the Patent Office said, the claim is rejected. That's been done in the art before, that's not new and novel.

In response to that, what Allergan did was dropped the oxychloro preservative. The only reason they had the divisional was because of that preservative, but they just dropped it. And they simultaneously and very unusually added in the requirement that there be an SEC. They did not do what you are required to do in the Patent Office, which is underline the language that you are adding to the claim. They didn't do that. But they added new text to the claim that added an SEC, and the claims ultimately issued.



That leaves us with our first issue, the construction of the phrase a solubility enhancing component other than a cyclodextrin. That phrase is in that patent. We say that, properly construed, that phrase must mean an anionic SEC, because otherwise it is effectively the exact same claim as the broad claim from the parent that was rejected and required them to define their SEC as an anionic SEC.

We say the divisional has to have the exact same claim construction if those five or six words are construed the way we say they should be construed, which is based strictly on the intrinsic evidence, if that construction is given, and the patent claim requires an anionic SEC, then again, we are just like the unasserted '210 patent. They have no claim against us and the case is over on that front.

If the Court were to decide that any SEC met the limitations of that patent, there would be potentially triable issues down the road as to whether we have any sort of SEC in ours. What they claim is an SEC in our product, at least they admit not an anionic SEC.

So we have one claim construction issue on the divisional. If the divisional means the same as the parent application, we believe then the case will be over as to that divisional as to the '337 patent.

The other patent came off the same



specification. They immediately canceled all the claims by way of preliminary amendment, put in new claims. The new claims have an upper limit on the amount of the active ingredient in the product. This product was previously sold at .2 percent, and when they canceled the claims they put a limit in and they claimed the use of the product with up to .15 percent. There is not a word in the specification that mentions .15 percent. There is not a word in the specification that mentions an upper limit.

So we have a straightforward lack of written description, invalidity based on absence of written description, requires no discovery whatsoever. The only issue is looking at the specification, does that specification support the revised claims which added the new matter of up to .15 percent.

So in the case of the continuation patent, it is a written description summary judgment argument. No discovery required. We simply want to look at the claim and spec and say there is no support for these claims because nothing in the claim relates to the amount. Indeed, everything in the specification is .2 percent or higher, every chart, every example. It would only teach one to use that much. There is nothing there that would even suggest that you go to a lower amount.

In the first patent, where we have the issue of



how does the Court define the term solubility enhancing component, is it defined the same way as it was defined with regard to the main patent, there, again, it's simply a matter of a limited amount of prosecution history and the specification and the claims. Again, if it is defined as an anionic SEC, there is no factual dispute. And so, in our mind, there is no discovery whatsoever.

Now, if we were to potentially lose either aspect of that, there could be facts in dispute in the case.

So we would not -- we are not seeking to in any way delay this case. We have every reason to want to make this case go quickly. We believe we have an absolute right to be on the market. But by law, as soon as they file a lawsuit, the FDA is now prohibited from approving our product until such time as we resolve this lawsuit or until we get out in 36 months. So the mere making of an allegation in this context as opposed to the normal situation has a very, very difficult effect on us.

And this has happened twice to us in the past, and both times we received summary judgments that allowed us to go late to the market but nevertheless to get to the market earlier than we would have if we hadn't been allowed to make a summary judgment motion.

That is what we seek here. What we would like to do, with the Court's permission, is initiate the process by

writing Your Honor a letter. We can easily do it within the space parameters that you allocate, and we can lay out our entire motion for summary judgment, why it would be appropriate for you to hear it. That is, frankly, our entire approach to this case, because as of February 28th we should be allowed to be on the market but we will not be allowed to be on the market, the FDA will not approve our product if this case just exists.

THE COURT: So you really seek to combine the summary judgment and Markman process because there is --

MR. THOMASCH: The Markman process only with regard to one phrase in one patent, the solubility enhancing component. We do cite to a 2004 case where the Federal Circuit affirmed summary judgment that did just that in the University of Rochester case. This is really, it is an extremely straightforward claim construction issue, and really questions whether or not there is a reason to interpret the claim differently from the patent that came down to become the '210 patent, which they didn't assert against us, and the divisional application of that same patent.

THE COURT: You have alluded to the possibility of remaining factual issues.

MR. THOMASCH: The main factual issue on that patent that we are now discussing. They claim we have an



SEC, a solubility enhancing component.

THE COURT: Do will we still have a case left to try?

MR. THOMASCH: There would be a case left to try on that. We say we don't have such a component. We say what we have is a viscosity enhancer and that is a different animal altogether. But the parties are in agreement, whatever it is, it is not anionic. If the requirement is it has to be anionic, then the game is over. If you were to say any type of SEC would meet the limitation, we would have to have a trial to decide whether we even have any type of SEC.

THE COURT: Assuming I rule in your favor.

MR. THOMASCH: It's over.

THE COURT: Case-dispositive.

MR. THOMASCH: Case-dispositive. Completely dispositive, with one-term claim construction on one patent. No claim construction necessary on the other patent. They have added a limitation when they amended the claims. They added a maximum amount of active ingredient claim. And there is not a word in the specification that supports that limit.

THE COURT: Okay.

MR. SINGER: Quite naturally, I disagree, Your Honor. First off, let me sort of ground this.

Counsel, and in their letters and report, keeps raising the prior lawsuits. Indeed, this is the third



lawsuit between the parties, one of which was initially before you, before being transferred out to Judge Carter in California.

This case really does not have anything to do with those prior lawsuits. What those lawsuits were about, if the Court has not taken the time to read the decision, was a statutory interpretation of the Hatch-Waxman Act. There are actually landmark cases cited by patent practitioners across the country citing which types of patents can be asserted under Hatch-Waxman and which cannot.

At the time Allergan filed the previous lawsuits, that was an undecided issue. In fact, two district courts decided the way Allergan viewed the statute, that we were permitted to bring these claims. But ultimately, the Federal Circuit decided Allergan was not permitted to bring those claims.

So the summary judgment that is being referred to by the other side was an issue of statutory interpretation. The merits of Allergan's infringement claim under those patents were actually never addressed. Indeed, if you go into Judge Carter's earlier decision, what Judge Carter said was, had Allergan been permitted to bring this claim under the Hatch-Waxman issue, there were genuine issues of fact for trial.

So our infringement claim was well-grounded.



Ultimately, the Hatch-Waxman was interpreted not to permit it under the statutory provisions. So let's talk about this case, because this is what matters. That's the past.

What is going on in this case, in our view, is sort of an effort to try it by surprise. A lot of what I heard today is sort of the first time what I have heard about their defense. We have been asking about their defenses, and to their credit, we did receive the required certification before the lawsuit was filed detailing some of what I heard today.

At the Rule 26 conference, I asked what the defenses would be, what would be the subject of the summary judgment motion, and I was not told. Again, in the letter to you of September 30, it also did not list that. But responding to the merits of what counsel has said, let's talk about the upper limit concentration.

Indeed, what is going on here, we have two patents, each covering a different invention. As you will see in the Rule 26(f) report, we explain the differing inventions. The old formulation of brimonidine was at about .2 percent. And there are various side effects with brimonidine, including drowsiness and other things, where one always desires to get that active ingredient down. It's always good to have less of these medications, if you can maintain the same effectiveness of the drug.

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What Allergan's scientists discovered is that you are surprisingly able to formulate at a much higher pH than people would have thought possible given the chemical nature of brimonidine. Brimonidine, the old product, was formulated at about 6.6 pH, which is slightly acidic pH, a slightly acidic formulation.

I am trying to get my chemistry straight. Below 7 is acidic and above 7 is basic.

The new product is actually a basic formulation. So this is a switch and a very surprising switch, that you can formulate at these higher pH's, thereby reducing the concentration of brimonidine, getting less medicine to patients and less side effects.

This is the about the benefit of this invention.

With respect to the invalidity summary judgment motion, I don't understand it. To say that there is no mention of about .15 in the application elevates form over substance to the extreme. In the patent application, there is a disclosure of a formulation of .1451. The claim limitation at issue is about .15. If .1451 is not about .15, I don't know what is. So if a summary judgment motion is going to be made, all that is going to result from that is us responding that there is support in the written description for about .15.

Under the Federal Circuit authorities cited by

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them, and cited by us, the issue of whether or not there is disclosure to support about .15 is strictly a matter of fact. And what you will have is a dispute, and I suspect a dispute between experts. If they are going to tell me they are not going to make this motion without expert testimony, that is fine. We intend to put on experts to show there is support for this limitation. So we will have a dispute between experts as to whether or not it exists.

Frankly, we think -- as I said, we don't understand how .15 isn't about .1451. They are awfully close. Under the Federal Circuit authorities, there is clearly support for that limitation.

With respect to an early summary judgment, we think it would be a distraction. We are entitled to discovery, both in terms of their contentions, which we have not fully gotten, what they intend to use to support them, as well as any facts they intend to rely on, and indeed whether or not their scientists, for example, in Alcon would agree as persons of skill whether .1451 is about .15. These are the kinds of things that we think discovery is meant to explore and we think we are entitled to.

And we are not proposing a very long schedule here. This is not something which we are saying requires years and years to do. We have put forward a close of all discovery I believe August of next year and fact discovery

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closing sooner than that. It is not something we are saying requires years and years to do, but rather can be done in eight months' time.

Second, with respect to the other patent, the SEC patent. There is, apparently, a Markman dispute over the meaning of the term solubility enhancing component. I would submit that under Federal Circuit law it would be error for this Court to construe the term solubility enhancing component to mean anionic solubility enhancing component. There are a variety of reasons, not limited to which there is a dependent claim in the patent. The broad claim says solubility enhancing component. A dependent claim says wherein said solubility enhancing component is anionic. They are violating the doctrine of claim differentiation, among other doctrines that would be violated, to construe those terms to mean the exact same thing.

With respect to the file history mentioned by counsel, it was not that these claims were somehow passed on forever. The Court is very familiar with the patent practice at the U.S. PTO.

The examiner did indeed reject claims at the outset. Those claims were then withdrawn without prejudice by the applicant. And he specifically said that they intended to resubmit them at a later date for examination. And they were, in fact, resubmitted for examination at a

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later date, and the examiner allowed them.

So to the extent we are going to have a summary judgment motion here, we think we ought to go through the process of having these contentions laid out, such that this isn't trial by surprise, which we think would be unfair and an inappropriate use of the parties' time.

THE COURT: It's the exception in patent cases counsel come in at this stage of the process and ask for early summary judgment and/or Markman. I am on the Bench now more than six years. I think it's happened twice. Each of us carries roughly 50 patent cases on this Court.

MR. THOMASCH: I am very much aware of the load, Your Honor, and the desire not to add to it.

THE COURT: I wasn't going there yet. I was going to get there.

MR. THOMASCH: It is the unusual nature. This is an ANDA lawsuit, which gives rights to the plaintiff merely by the filing of a complaint without any showing.

THE COURT: That explains the defendants' interest in an earlier trial date. I understand the market economics that are driving this. This is obviously not this Court's first experience with an ANDA lawsuit.

Unfortunately, both organizations, both businesses, are unable to resolve your differences amicably, at least thus far, and you are in a litigation environment.

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That necessarily subjects you to a process that I make every effort on this Court, in this chambers, to accommodate with the economics of matters, with an eye on those things, because we are obliged, as judges, to oversee the just and speedy determination of disputes.

But where I have, as we have here, a disagreement, apparently vigorous disagreement, I am not in a position, obviously, to determine the merits of the parties' positions on this particular issue. Essentially, I would need to, in order to do that, interrupt other matters in order to insert this into a position where we could provide for a letter-briefing or whatever briefing regime and have me gear up with the technology and entertain argument, to the exclusion of other matters that are, quite frankly, ahead of you, and some, quite frankly, involving ANDAs, one that is burning on my desk at present.

So while I am sensitive to defendants' concerns and expressed needs, I don't think I am convinced, given the opposition from the plaintiff, that it would be the appropriate thing to do for me today to say, yeah, we are going to do an early summary judgment process in this case. If both parties agreed that it would benefit the process, I might be otherwise inclined.

MR. THOMASCH: That could never happen in an ANDA context because their only goal is delay.

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THE COURT: Well, let me interrupt. You are an advocate, I am sure a fine one. I am sure we have equally fine advocates on the other side.

That is a bit of hyperbole, it's got to be, with respect -- I am sure delay is in their interest.

MR. THOMASCH: For the first 30 months, delay and victory are one and the same. After 30 months they do have an interest in victory. For now, those two are contemporaries.

We don't ask Your Honor today to give us the right to make a summary judgment motion. Our request is much more limited. We would like permission from Your Honor to initiate the process by writing a letter to Your Honor to set forth in some greater detail than can be absorbed or than I can articulate here as to why it would be appropriate, why it is straightforward, why this will have to be dealt with eventually.

And the one thing that seems clear to us is, whether or not they claim that there are defenses -- of course they are going to claim there are defenses -- they don't require discovery. This can be done based on a review of the record, a review of the spec, a review of the claims.

THE COURT: Counsel, you are going to make that argument in greater detail in a written submission and in further subsequent oral discussion much more comprehensively than you have been able to make it today. But this Court is going to be met with an equally urgent and comprehensive argument in contra.

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Quite frankly, just looking down the road a little bit, if you were to put yourself in my position, the plaintiff cries foul. Says prejudice. Let the discovery process play itself out. We have a right to have that happen.

MR. THOMASCH: We are okay with that. We do not wish to stop them from taking discovery during the process of briefing and argument of the summary judgment motion. We may have discovery on many, many issues that will of course add to the expense of the parties and potentially the time of the Court to the extent there are discovery disputes about other issues. But we are prepared to do that while simultaneously saying, there are two very specific issues, one per patent, that we want to bring on summary judgment. It is of course my burden to show that factual disputes aren't involved. All they have to do is raise a factual dispute and they win. They don't have to try the whole case.

But I would not bring this motion if I didn't think it was going to succeed. While the last two cases were both about statutory interpretation, in those situations, Mr. Singer vigorously pushed for discovery. The Court said, let's deal with these threshold issues first, and they were

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ultimately decided our way.

Discovery won't be necessary if our legal arguments, two legal arguments, are correct. And they are very straightforward arguments. We could have short limits on the briefing, as far as time and pages.

THE COURT: You contend your arguments are based on the file wrapper.

MR. THOMASCH: The file wrapper, the spec and the claims, that's it.

THE COURT: You say.

MR. SINGER: One of his legal arguments isn't a legal argument at all. It is a fact argument, whether or not a claim has support, sufficient written description for the claim. The about .15 issue, that is not a legal argument at all. That is a factual argument. They claim it doesn't. We claim it does. We think we are right. They think they are right. That's a factual dispute.

MR. THOMASCH: The Federal Circuit has many times agreed that you can have summary judgment on this issue. It says up to about .15 percent. It is an upper limit. There is law on, if you are going to put a limit in your claims, there is certain support you need, the only place for that support is in the spec. Your Honor can look at the spec and make this decision. This case wouldn't go to a jury anyway. Your Honor will ultimately deal with these issues.

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It is an ANDA issue lawsuit. There is no money at issue. It is a right to get on the marketplace. It will before you as a finder of fact, but you may decide at this stage of the case, as a matter of law, this can only go one way because there is not support in the spec for the up to, the limitation of up to .15 percent.

If it's a disputed fact, you deny the summary judgment motion. But the Federal Circuit says you can do this. The Rochester case says absolutely.

THE COURT: I understand. But your opponent suggests that the Court is going to need to hear from experts on this particular point. You say no.

MR. THOMASCH: Absolutely not. Whether it is there or not the Court can gather by reading the specification.

THE COURT: Why can't I read the specification and simply resolve the issue?

MR. SINGER: The issue on a written description claim is what in the specification discloses to one of ordinary skill whether the inventor was in possession of the claimed invention. Mr. Thomasch says that there is not a word there. And the limitation is about .15. That's what we are talking about, is a limitation of about .15 in some of the dependent claims. Again, I pointed here today to something that is .1451 that I think notifies someone of

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ordinary skill that there is about .15 in the specification. And we would put forward an expert to say that, under the view of the person of ordinary skill in the art, that specification discloses the limitation about .15. And that is at the end of the day an issue of fact.

The Rochester case, which they keep alluding to -- I actually teach a course in my spare time about biotech patent matters. The Rochester case figures heavily in that course. That case is akin to our first case, where there was an issue of statutory interpretation.

In the Rochester case, what happened, Your Honor, it wasn't about an upper limit of anything in the case. What happened in that case was -- this is a famous drug, the Cox II inhibitors, Vioxx, which has been in the news. This case was about a university that had discovered a method of screening drugs to identify those that might inhibit Cox II but not inhibit Cox I, and therefore provide these benefits, which you have read about in the news.

They didn't discover at all the existence of such a drug. What they discovered was a way to screen for such drugs. Nonetheless, they claimed any drug that inhibited Cox II. And what the Federal Circuit said in that case was that you can't claim the Cox II inhibitor drug from a patent that is about screening. It is not about upper limits at all.

What this case is about, this is a classic

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written description dispute about whether or not a limitation is supported by the factual disclosure of the specification and whether or not the various formulations in the patent -- and there are a bunch of them, there are a bunch of examples, there is an extensive table with I think 20 or so formulations, there is a graph which shows further formulations -- whether those, as a matter of fact, are enough to support about .15. I think as a matter of fact, we think it is, but they contend that it isn't, which is a matter for trial.

One other point, with respect to -- actually, two other points. With respect to this delay point, about 30 months, that is absolutely true, that the filing of a lawsuit stays any FDA approval for 30 months. We are proposing a trial date that is well in advance of the 30-month stay, almost a year in advance. The FDA is on record that the average ANDA takes over 20 months to approve. Now, I don't know what Mr. Thomasch is referring to in respect to February 28th. Maybe they have some communication from the FDA that they expect to approve on February. That may happen. It may not happen.

But at the end of the day, what Allergan seeks here is a vindication of its patent rights, not delay of Alcon's generic competition.

Finally, with respect to issue of trial, I think

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Mr. Kane can speak to this, but the issue of whether or not this goes to a jury is a matter of dispute between the parties. This is a disputed issue. We welcome the opportunity to brief the Court on it. It is not settled by the Federal Circuit.

There are a variety of approaches that courts have taken. I think some courts have taken ANDA cases and put them to the jury, I think the District of New Jersey. Others have not. I think the Northern District of Illinois is one notable Court where they have not gone to the jury. I think the District of Massachusetts has taken a third way and said the Federal Circuit has not spoken as to whether or not these things go to the jury, we are going to do an advisory jury so we don't have to redo this later on.

So this is not as black and white in terms of the jury issue as Mr. Thomasch says. And we would welcome -- I think the parties both believe it is an issue that requires further exploration for the Court. The Court has to decide one way or the other. But it is not a simple issue that it doesn't go to the jury.

MR. THOMASCH: Your Honor, we both misspoke. If I could just correct two statements. I misspoke when I mentioned the University of Rochester with respect to the '834 patent with the upper limit. With regard to the upper limit I meant to cite the Purdu Pharma versus Falding case.

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The University of Rochester case was a case where claim construction was used in the context of a summary judgment motion such as we seek in the other case.

I believe that Mr. Singer misspoke when he has said repeatedly that the term is about .15 percent. The claim language is up to about, and the up to is the maximum limit, which is essential to our argument that we are dealing with an upper limit. And the simple disclosure of any number in the patent that would be below that we would suggest does not give you an upper limit.

They will put in an expert affidavit saying this, if you believe that this is a matter in which it is a battle of the experts, our motion should be denied. Our point will not be that our expert is more persuasive or that we necessarily even have an expert. Our point will be that on the specification, and under guiding Federal Circuit precedent, we cannot find an upper limit in a claim where there is no upper limit in a specification. It's that straightforward. The Court may accept or reject our argument. But it won't get into a battle of the experts. If you find that you need assistance from an expert on this, you will deny our motion I am sure.

THE COURT: There is a contention that you misspoke inadvertently.

MR. SINGER: I don't believe I did. There are a

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variety of claims in the patent. I believe Mr. Thomasch was saying up to .15. There is a limitation up to about .15. I believe there is also a limitation -- let me pull it out -- of up to .15. There is also a limitation of .15. And I believe there is a limitation of about .15. Those are four different claims that we have in the patent.

THE COURT: I am going to deny your request. I understand.

MR. THOMASCH: Thank you for considering it, Judge.

THE COURT: It is an interesting argument. We will, as counsel has suggested, need to at some point address or perhaps build into this process the ability to address the jury versus nonjury issue, since there is not agreement on that.

Regardless, the Court will not be available for trial on the schedule that is suggested by the defendants.

As it happens, purely coincidentally, the Court does have March 6 available, as has been proposed by the plaintiff as a date for the commencement of either a jury or nonjury trial.

We are going to schedule this, in terms of the allotment of time, as if it were a jury trial, and if that should change based on subsequent submissions, we will have the luxury of reducing the number of days allotted to try the

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case.

Given that, the Court's availability, it strikes me that the schedule proposed by the plaintiff as to both fact and expert discovery makes some sense. I will hear from the defendants if you disagree with that.

MR. THOMASCH: No, Your Honor. If Your Honor has indicated that it is going to accept plaintiffs' date for trial, then we would not thereafter argue that it's nonsensical to put the discovery cutoff dates where they are. We would, however, ask the Court to consider both an early Markman and an early right of summary judgment after some discovery is taken so that all issues involving this case don't need to proceed, even if you limit us to one summary judgment only, I am prepared to accept that limitation, if Your Honor would just allow us to make that summary judgment motion earlier in the case rather than later, because time is what this case is all about.

THE COURT: How do you feel about that?

MR. SINGER: Your Honor, if we could explore through discovery what their defenses are through the contention process, I think we proposed a Markman hearing that was somewhat earlier in the process.

THE COURT: It's in the eye of the beholder. Let's see if counsel agrees. I am available for Markman on June the 7th at 9:30. That's close to what you propose. One

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day.

What is your view of early Markman?

MR. THOMASCH: Ours was April 1. If we are going to trial, there may be multiple claims that need to be construed in both patents. There is this separate issue of one claim in one patent, one claim term.

THE COURT: There is only a two-month difference in the Markman schedules that you propose.

MR. THOMASCH: The real issue is not Markman, Your Honor. The real issue is the date on which we may make a summary judgment motion, which the plaintiffs have attempted to hold off until November 1, 2005. We would like, of course, to make that summary judgment motion in 2004. There is about 11 months separating us on that. That is the key issue. If we were permitted to make the summary judgment motion, for instance, in March of 2005, we could make that motion, imbedded in that motion --

THE COURT: Let me interrupt for a second. November summary judgment process doesn't work for the Court. In your discussions, what you are going to need to keep in mind is, I try to preserve about four months from the completion of briefing for any summary judgment motion that is permitted. And you will need to build into that process an exchange of letters, consistent with what I suspect you know is my practice that will enable that letter-writing

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exchange to be completed at least seven days in advance of the teleconference.

MR. SINGER: Fair enough. We will abide by that, Your Honor.

THE COURT: Then you set up, you can get other scheduling orders, they are out there, that will guide you in terms of setting a cutoff for case-dispositive, the filing of case-dispositive motions and the language that I employ.

MR. THOMASCH: The question I would ask is when is the earliest date on which we may initiate that process?

THE COURT: I am going to leave that to your discussion, your attempted agreement. I do want to get back to your proposal, because I don't know that I got a response exactly, where defendants would seek to have summary judgment on the one issue, or is it two?

MR. THOMASCH: Two issues but one motion on those two issues. One per patent.

THE COURT: And limit itself in the leadup to trial to just those two issues, whether you are willing to engage -- which would, I assume counsel is arguing, should permit an earlier process, sooner rather than later summary judgment engagement.

MR. SINGER: If we were permitted the chance to do discovery and seek contention discovery, proper contention discovery and also deposition discovery where relevant, I

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don't see that that is a problem in the sense of them filing a motion sometime after that process has been sort of undertaken.

THE COURT: That is fine. It may be the case, you may not be willing to do this, I don't know, I don't know if it is possible to do this, you may want to stage your discovery, your fact and expert discovery -- not expert, fact discovery we are talking about, in terms of getting those issues, that discovery resolved and done, should the Court be willing to engage an early process on these two issues, a limited process on these two issues, if that is possible, then the Court would entertain the submission, a proposed schedule that would accommodate that. But I will not hear any other summary judgment beyond that, if we are talking early.

MR. THOMASCH: If we are able to do early, we would be willing to limit ourselves.

THE COURT: I don't know what the plaintiffs' view of summary judgment is and whether it intends to seek summary judgment.

MR. SINGER: I don't know what their other defenses are, Your Honor. I can't respond to that. With respect to some of the issues, certainly, we are open to the plaintiff seeking summary judgment on certain issues, to obviously confine the trial in an appropriate way. But until

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we get discovery as to what defenses they intend to rely on, we have heard today of two, but we received a letter from them in July that had about ten defenses. And for us to sort of pick and choose, we need to know which ones they intend to put forward. If all of them, so be it.

MR. THOMASCH: We do have multiple defenses if the case were to proceed to trial. We have two that we view as case-dispositive without requiring discovery.

THE COURT: Here is what we will do, given the sincere assertions here today that these contentions would be truly case-dispositive, and given your apparent willingness -- you haven't voiced an objection yet -- to perhaps staging discovery in a manner that would enable the parties to tee that matter up for summary judgment consideration sooner rather than later -- is that a fair assessment? Are you willing to do that?

MR. SINGER: We are willing to do that so long as we receive sufficient discovery. The view on discovery I think is very different. We are hearing from counsel that no discovery is required. We think substantial discovery is required. So it's sort of a -- Your Honor, absolutely, I don't want to stand in the way of these kind of defenses, but we have a fundamental disagreement about whether discovery is necessary.

THE COURT: You are entitled to that. I am not

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attempting to strong-arm you in that regard. I qualify, if it is possible, after a further meet-and-confer, for the parties to agree on that, I am willing to grant permission to file that motion today. You will still have -- you won't -- but the plaintiff will still have the opportunity to engage my typical summary judgment practice later on down the road if you desire. That is, seeking permission. You will have to build that into the schedule, seeking permission. But the defendants will have fired across your bow and that will be it.

MR. THOMASCH: We have for clarification provided our entire file, the regulatory file seeking approval for this product. They have had that for months.

THE COURT: I am not going to micromanage.

MR. THOMASCH: Discovery has been ongoing in that sense. We produced voluminous materials already.

THE COURT: I hear you. I am not going to -- everybody around this table operates in the Court's view under the presumption that you are professionals, you are officers of the Court, and that you are not engaged in dilatory tactics, engaging in dilatory tactics. Therefore, I don't expect that that is going to happen. So to the extent that plaintiff disagrees with you, that he has sufficient discovery to be able to resist your motion, I am going to expect that counsel are going to act like professionals in

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that regard and do what you can do to provide that information and the opportunity to get that information.

MR. THOMASCH: We will absolutely do so, recognizing if he has been deprived discovery that is under the Federal Rules a basis for denying our motion which the rules would otherwise allow us to make as soon as this issue is joined.

THE COURT: It certainly is.

MR. THOMASCH: It is a basis to deny it. We can't gain through that.

THE COURT: Again, I don't attribute any poor motives to either counsel, or the parties themselves. Not yet.

I am speaking in broad strokes here. Does that make sense to counsel?

MR. KANE: It does, Your Honor. If I could chime in. The only issue I guess I have is, if in fact we are -- what I thought I heard the Court say, you were available for a June 7 Markman hearing, at least one of their summary judgment motions is going to be dependent upon a Markman issue. And the way they are characterizing the second it almost sounds like it may be also a Markman issue. I am --

THE COURT: I thought there was only one term.

MR. THOMASCH: There is only one Markman issue. That is in the divisional that relates to whether the SEC is

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any SEC or only an anionic SEC.

MR. KANE: The reason I said it sounds like there is two actually, Your Honor, Mr. Thomasch has been saying because of the language in the claim that says up to about, that's the basis of his written description argument, which sounds to me like it could potentially implicate some Markman rulings. Be that as it may, whether one or two Markman issues, if we are going to have a Markman hearing on June 7th, I am wondering if it make sense to tie the summary judgment motions to that same hearing so the Court could deal with the Markman issues at one time.

THE COURT: You know, I will agree to that. I normally don't engage that process. Chief Judge Robinson does. We have a little bit of a different approach. But I have been wanting to experiment with that anyway. We will do that. Do you agree?

MR. THOMASCH: We would like to do it in advance. As I understand what counsel is asking for is our briefing for summary judgment and briefing for the Markman to occur together, leading up to the Markman post-briefing on June 7th.

THE COURT: Well, I am not sure.

MR. THOMASCH: That is the way Chief Judge Robinson has done it in the past.

MR. KANE: That is what I believe I was

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anticipating.

MR. THOMASCH: We would like to do it earlier. But if Your Honor will permit us to do so, we will. If Your Honor will not permit us, we will take the first date Your Honor will permit us to do it.

THE COURT: What you are going to need to give my chambers guidance on, my staff guidance on, is we are going to need potentially two Markman dates, I guess.

MR. THOMASCH: If we did it early on, because you did at one point say they could hold off, we could take our shot now. Our shot now would require just the Markman on the limited amount, and we do have Federal Court cites for cases in which Markman has been imbedded in the rulings without a separate Markman hearing.

THE COURT: No. There is plenty of precedent for that. That is not a concern.

MR. THOMASCH: We would do it just for that. We would theoretically need another Markman if we were to lose and there were other claims to be construed before trial.

THE COURT: That is my point. Do you agree or disagree with that?

MR. SINGER: I think that's correct, Your Honor. I think we could do the summary judgment Markman on the two motions on the June 7 hearing and we could do another Markman to the extent there were -- again, I don't know what there

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is, but we could do that later on in advance of trial. We could even do it in the context of motions in limine.

MR. THOMASCH: I understood June 7 to be the Markman, and what we were thinking about was in advance of that just dealing with the summary judgment motions that would have the one term. But ultimately, I don't think we should be delaying from what the plaintiff proposed for the Markman date.

THE COURT: What is your view as to whether you can get the discovery done for the early summary judgment process?

MR. SINGER: By June 7. I think that is very feasible.

THE COURT: Before June 7, to enable the Court to have an earlier than June 7 Markman.

MR. SINGER: We have not gotten responses to their -- we served our discovery requests quite promptly.

MS. MULLALLY: Today.

MR. SINGER: We actually served them on Friday, which is right after the Rule 26(f) meeting was held. We held it I think about two weeks ago today, and we served our discovery requests promptly. We have not gotten initial disclosures from the other side.

MR. THOMASCH: They are not due.

MR. SINGER: No one is criticizing. We are

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simply saying what has and hasn't been done. From my perspective, we think a fair opportunity for discovery here on these two issues is going to take three or four months.

With respect to a June 7 Markman date, we are talking about briefing in advance of that, that that fits perfectly. We do not and we think it was unfair in fact to sort of propose they file a summary judgment -- I think the notion was they wouldn't object to discovery ongoing during the summary judgment process. There are rules, and we have to respond to briefing, and there is very short time limits.

THE COURT: Fair enough. We will use that as the June 7th, as the date for this so-called earlier process.

MR. THOMASCH: That actually rolls our real Markman back even later than the plaintiff proposed. We proposed April. They proposed June. And now we are going to be later than June.

THE COURT: You could agree not to disagree. It could come to pass --

MR. THOMASCH: Could we have an opportunity to try within ourselves to see if one or two stages, to let Your Honor decide with letters back, if we can't agree, then you just make the call?

THE COURT: I don't want letters back. You can contact chambers by phone if you can't agree, and we will set a teleconference.

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MR. THOMASCH: That would be fine.

THE COURT: I don't want letters back. I have enough to read. See what you can do. If you can agree on an earlier date, then that is fine. I am not going to express a view.

MR. SHAW: Could we put the June 7 date in our calendar so we don't lose that?

THE COURT: It is on the calendar, at 9:30.

We won't be able to set, assuming two summary judgment, potential summary judgment -- we will need one teleconference for summary judgment then, because I have granted permission, assuming agreement on the discovery, underlying discovery matters, process, we won't need a teleconference for that. So you will need to, when you have agreed whether that is going to occur, you are going to have to dial up chambers and get a date so you can insert that into your schedule, that you have agreed upon. Do you follow?

MR. DEVLIN: I understand, Your Honor. We need a teleconference in advance of the briefing for the full sweep of summary judgment motions.

MR. SINGER: Later on in the case. Fair enough. Thank you, Your Honor.

MR. DEVLIN: We will call your chambers sometime in the summer to get that.

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THE COURT: Ms. Tyer-Daly will give you a date for that once you have put the other details --

MR. THOMASCH: The next thing I understand we will do when we leave is we will shortly confer with each other to see if we can reach an agreement under which discovery would begin, leading to an early summary judgment motion by the defendants --

THE COURT: On discrete issues.

MR. THOMASCH: Which would be our one shot on summary judgment in the case. If we reach agreement on that, we will let Your Honor know. And you have agreed, I think, that if we reach agreement on that, that will be all right by you.

THE COURT: Yes.

MR. THOMASCH: If we don't reach agreement on that, we will contact Your Honor for a conference to see where that leaves us.

THE COURT: Yes because I expect where there is a potential disagreement is just in terms of time that you are going to need.

MR. THOMASCH: I think we now understand our range of options.

THE COURT: All right. You have agreed on -- motions to amend on or before December 1.

MR. THOMASCH: Your Honor, I wonder if it would

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be permissible if I could leave. Chief Judge Robinson has me in front of her in final pretrial in 30 seconds.

THE COURT: You better go.

MR. THOMASCH: Thank you, Your Honor, counsel.

(Mr. Thomasch leaves conference room.)

THE COURT: December 1, you are going to do initial disclosures on or before November 24.

MR. SINGER: I don't mean to interrupt, Your Honor. I think, other than the one issue on the summary judgment, I think that we are in agreement with the trial date of March 6 as to what the calendar ought to be, as a general matter, with the middle, that one issue remaining. We had talked about it on the phone beforehand, and we recognized our disagreement. There was agreement as to amount of time discovery would take to go forward.

THE COURT: Your pretrial order date is January 9, that is close of business, '06. February 6, '06, 10:00 o'clock for our pretrial conference.

There remains the question of jury versus non. There is also an issue of advice of counsel and willfulness as well. We can take them in either order.

MR. SINGER: I would make a suggestion that we could deal with the issue on advice of counsel as well as jury through whatever process the Court would want, whether letter briefs or whatnot, and leave that for the Court's

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ultimate decision. These are somewhat novel issues. There is some new case law on the point I think that is cited by counsel for Alcon, on the willfulness point. We disagree with their narrowly circumscribing it to this case. I could lay out the disagreement if you want to hear it. It is just another disagreement between the parties. I would suggest we could handle it through letter briefing. It would be very straightforward.

THE COURT: Will it impact discovery?

MR. SINGER: The willfulness issue would impact. We had proposed that near the end of discovery, typically, I think, for willfulness, that the opinion of counsel discovery go forward, so if a discovery cutoff was in August, I think we are proposing willfulness discovery go forward beginning in June of 2005.

MS. MULLALLY: We should address it before we get there.

THE COURT: You should want to submit letter briefs if you can't agree in advance of that time.

MR. SINGER: Perhaps, if we are going to be before the Court on June 7, it is another matter that could be taken up at that time?

THE COURT: We could possibly do that. I guess we won't need much time for actual claim construction on June 7.

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MS. MULLALLY: No.

THE COURT: So we could certainly address that then. So I would like that briefing ten days in advance, ten business days in advance of the June 7 hearing.

MS. MULLALLY: Just on willfulness.

THE COURT: Yes. Just on that issue. We are talking about the jury issue. Do you want to address jury versus non as well at that time?

MR. SINGER: We could. I don't want to overburden the Court.

THE COURT: We could do that. I was thinking we could address it at the pretrial conference. Perhaps you would like to know before that time. Yes, we should. That will materially affect the work that you have to do on the pretrial order. Yes, that makes sense.

MR. SHAW: Letter briefs, Your Honor, the same length?

THE COURT: Five, five and three, yes, that's good. Five-page opening, five-page answer, three-page reply. Lest there be any -- there will be a fairly lengthy scheduling order. You should probably put the briefing schedule in the scheduling order that you have agreed on. I suggest you brief on the Local Rule. If you find the press of time is going to not enable the Court to have enough time to address any given issue, you might want to brief on a more expedited schedule, given that they are only letter briefs, and not a full-blown briefing process.

Length of trial. There is only two matters I have, length of trial and settlement. We have three patents in this case.

MR. SINGER: Two.

THE COURT: Okay. I will ask plaintiff first, since you proposed the greatest length of time, why do you think we need two weeks?

MR. SINGER: That was in the event it was a jury trial, Your Honor.

THE COURT: I am saying, why would we need that?

MR. SINGER: Two patents, in terms of both empaneling a jury and also putting forward, I think we will have about three experts, we have two inventors, that was we thought probably three to four trial days for the plaintiff, in terms of also, I don't know what their witness list on the other side is, in terms of who developed the products.

THE COURT: I could see seven days, perhaps. We will set it down for seven trial days, assuming, again, a jury trial. You will get, I think, an adequate amount of time each day in front of the jury, no less than five and a half hours to have the jury's attention per day. We don't spend a lot of time picking juries around here. Okay? Anything else?

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Settlement. Have there been discussions?

MS. MULLALLY: We did discuss it.

MR. SINGER: There is not a whole lot there.

THE COURT: Is it the view of the parties that referral to our Magistrate Judge would make sense?

MR. SINGER: I don't think so.

THE COURT: Why do you say that?

MR. SINGER: The issue here, from the plaintiffs' perspective, is vindication of its patent rights. We believe the right to exclude is sort of the fundamental right of Allergan's. And there is not, at this juncture, any change from our client's standpoint from that position.

MS. MULLALLY: Our client believes they have the right to be on the market, because Allergan has enjoyed its 3.5 years of exclusivity, and that's all they are entitled to because we don't infringe, and the other patent is invalid.

THE COURT: All right. I will expect to see you at trial.

MR. DEVLIN: Your Honor, the four-month period you would like to have after summary judgment briefing before trial?

THE COURT: Ideally, before the pretrial conference, because if you can get a ruling from me before that time, again, that will affect what you have to do in terms of preparing your pretrial order.

MR. DEVLIN: Thank you.

THE COURT: Actually, the pretrial order -- but that's about three weeks. If you can't work it out so that I get that time period between pretrial order and close of briefing, then just push it. But it usually works to the disadvantage of the parties. That means you do work that you may not otherwise have had to do, depending upon how the Court is going to rule, if there is summary judgment.

Anything else, counsel?

(Conference concluded at 3:07 p.m.)

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# EXHIBIT B

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

| | |
|---|---|
| ALLERGAN, INC., and ALLERGAN SALES, LLC.,<br><br>Plaintiffs,<br><br>v.<br><br>ALCON INC., ALCON LABORATORIES, INC., and ALCON RESEARCH, LTD.,<br><br>Defendants. | **Civil Action No: 04-968-GMS** |

**NOTICE OF DEPOSITION OF OREST OLEJNIK**

Pursuant to Rule 30(a) of the Federal Rules of Civil Procedure, defendants, Alcon Inc., Alcon Laboratories, Inc. and Alcon Research Ltd. (collectively "Alcon"), by their counsel will take the deposition upon oral examination of Orest Olejnik, Ph. D. at the offices of Orrick, Herrington & Sutcliffe LLP, 4 Park Plaza, Irvine, California 92614-2558, commencing at 9.00 a.m. on April 18, 2005, and continuing thereafter until completed.

The deposition will be transcribed by an officer authorized to administer oaths, and may be recorded by videographic, audiographic, or other means.

Dated: April 11, 2005

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**CERTIFICATE OF SERVICE**

I, Josy W. Ingersoll, Esquire hereby certify that on April 11, 2005, 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:

William J. Marsden, Jr., Esquire
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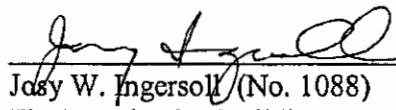
Wilmington, DE 19801

I further certify that on April 11, 2005, I caused a copy of the foregoing document to be served by hand delivery on the above-listed counsel of record and on the following non-registered participants in the manner indicated:

**BY FEDERAL EXPRESS**

Jonathan E. Singer, Esquire
Fish & Richardson, P.A.
3300 Dain Rauscher Plaza
60 South Sixth Street
Minneapolis, MN 55402

YOUNG CONAWAY STARGATT & TAYLOR, LLP



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Attorneys for Defendants

# EXHIBIT C

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

| | |
|---|---|
| ALLERGAN, INC., and ALLERGAN SALES, LLC.,<br><br>Plaintiffs,<br><br>v.<br><br>ALCON INC., ALCON LABORATORIES, INC., and ALCON RESEARCH, LTD.,<br><br>Defendants. | **Civil Action No: 04-968-GMS** |

**NOTICE OF DEPOSITION OF CARLOS FISHER**

Pursuant to Rule 30(a) of the Federal Rules of Civil Procedure, defendants, Alcon Inc., Alcon Laboratories, Inc. and Alcon Research Ltd. (collectively "Alcon"), by their counsel will take the deposition upon oral examination of Carlos Fisher, Esq. at the offices of Orrick, Herrington & Sutcliffe LLP, 4 Park Plaza, Irvine, California 92614-2558, commencing at 9.00 a.m. on July 26, 2005, and continuing thereafter until completed.

The deposition will be transcribed by an officer authorized to administer oaths, and may be recorded by videographic, audiographic, or other means.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Dated:July 5, 2005

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**CERTIFICATE OF SERVICE**

I, Karen E. Keller, Esquire hereby certify that on July 5, 2005, 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:

William J. Marsden, Jr., Esquire
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I further certify that on July 5, 2005, I caused a copy of the foregoing document to be served on the following non-registered participants in the manner indicated:

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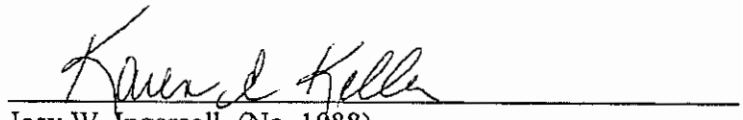

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