

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

ELAN PHARMA INTERNATIONAL
LIMITED,

Plaintiff,

vs.

ALCON LABORATORIES, INC., AND
ALCON MANUFACTURING, LTD.

Defendants.

CIVIL ACTION NO. 4:09-CV-32

DEMAND FOR JURY TRIAL

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff Elan Pharma International Limited (Elan) files this Complaint against Alcon Laboratories, Inc., and Alcon Manufacturing, Ltd., (Defendants) and alleges, as follows:

I. THE PARTIES

1. Elan is a company organized and existing under the laws of Ireland, having a business address at Monksland, Athlone, Co. Westmeath, Ireland.

2. Alcon Laboratories, Inc. is a Delaware corporation with its principal place of business in Forth Worth, Texas. Alcon Laboratories, Inc. is qualified to do business in the State of Texas, Filing No. 7906106, and has appointed CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201, as its agent for service of process.

3. Alcon Manufacturing, Ltd. is a limited partnership organized under the laws of Texas, with Alcon Laboratories, Inc. as a general partner. Alcon Manufacturing, Ltd. is qualified

to do business in the State of Texas, Filing No. 14105010, and has appointed CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201, as its agent for service of process.

4. Defendants' principal activity is to develop, manufacture, and sell ophthalmic pharmaceuticals, ophthalmic surgical equipment and devices, and other eye care products.

5. Defendants have done and continue to do business in the State of Texas, including the Eastern District of Texas, by, among other things, committing acts that constitute infringement of Elan's U.S. Patent Nos. 5,429,824 and 5,298,262.

II. JURISDICTION AND VENUE

6. This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. Accordingly, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over Defendants, who have conducted and do conduct business within the State of Texas. Defendants, directly and/or through intermediaries (including distributors, retailers, and others), ships, distributes, offers for sale, sells, and advertises (including the provision of an interactive web page) its products in the United States, the State of Texas, and the Eastern District of Texas. Defendants have purposefully and voluntarily placed one or more of its infringing products into the stream of commerce with the expectation that they will be purchased by consumers in the Eastern District of Texas. These infringing products have been and continue to be purchased by consumers in the Eastern District of Texas. Defendants have committed acts of patent infringement alleged herein within the State of Texas, and more particularly, within the Eastern District of Texas.

8. Venue is proper in the Eastern District of Texas under 28 U.S.C. §§ 1391(b) and 1400(b) because the acts and transactions constituting the violations alleged herein, occurred in

part in this judicial district and the Defendants are found and transact business in this judicial district. Venue is also proper in this district under 28 U.S.C. § 1391(c) because Defendants are entities that are subject to personal jurisdiction in this district.

III. PATENT INFRINGEMENT

9. Elan incorporates by reference paragraphs 1 through 8 as if fully set forth herein.

10. United States Patent No. 5,429,824, entitled “Use of tyloxapol as a nanoparticle stabilizer and dispersant” (the ’824 patent), was duly and legally issued after a full and fair examination on July 4, 1995. Elan is the assignee of all rights, title, and interest in the ’824 patent. A true and correct copy of the ’824 patent is attached as Exhibit A.

11. United States Patent No. 5,298,262, entitled “Use of ionic cloud point modifiers to prevent particle aggregation during sterilization” (the ’262 patent), was duly and legally issued after a full and fair examination on March 29, 1994. Elan is the assignee of all rights, title, and interest in the ’262 patent. A true and correct copy of the ’824 Patent is attached as Exhibit B.

12. The ’824 and ’262 patents are collectively referred to as the “patents-in-suit.”

13. The ’824 patent allows Elan the right to exclude others, including Defendants, from, among other things, making, offering for sale, selling, using and importing:

A composition comprised of nanoparticles consisting essentially of 99.9-10% by weight of an organic crystalline therapeutic or diagnostic agent having tyloxapol adsorbed on the surface thereof in an amount of 0.1-90% by weight and sufficient to maintain an average particle size of less than 400 nm.

14. As an example, and not to be limited to only a single infringing product, Defendants offer for sale, import, and/or sell a composition, its Azopt[®] “brinzolamide ophthalmic suspension,” that infringes Elan’s ’824 patent as described above and as attached in Exhibit A.

15. The '262 patent allows Elan the right to exclude others, including Defendants, from, among other things, making, offering for sale, selling, using and importing:

A method for of making nanoparticles having a surface modifier adsorbed on the surface and an anionic or cationic cloud point modifier associated therewith, comprised of contacting said nanoparticles with the cloud point modifier for a time and under conditions sufficient to increase the cloud point of the surface modifier.

16. As an example, and not to be limited to only a single infringing product, Defendants make, offer for sale, imports, and/or sell a composition, its Azopt[®] “brinzolamide ophthalmic suspension,” that infringes Elan’s ’262 patent as described above and as attached in Exhibit B.

17. Defendants have infringed and/or continue to infringe each of the patents-in-suit. Defendants are liable for direct infringement and/or indirect infringement by way of inducement or contributory infringement of each of the patents-in-suit under 35 U.S.C. § 271.

18. Defendants’ acts of infringement have caused damage to Elan. Elan is entitled to recover from Defendants the damages sustained by Elan as a result of Defendants’ wrongful acts in an amount subject to proof at trial.

19. Defendants will continue to infringe each of the patents-in-suit unless enjoined by this Court. As a result of the infringing conduct of Defendants, Elan has suffered, and will continue to suffer, irreparable harm for which there is no adequate remedy at law. Accordingly, Elan is entitled to permanent injunctive relief against such infringement pursuant to 35 U.S.C. § 283.

20. Throughout 1995 and 1996, pursuant to a number of contractual arrangements with NanoSystems LLC, Alcon sought and obtained from NanoSystems LLC assistance in formulating brinzolamide. Throughout 1995 and 1996, NanoSystems LLC owned the '824 and

'262 patents. In 1998, Elan Corporation, PLC acquired NanoSystems LLC and subsequently transferred ownership of the '824 and '262 patents to Elan Pharma International Limited.

21. Alcon and NanoSystems entered contractual agreements relating to NanoSystems' development of a brinzolamide formulation using its nanoparticle technology. Those agreements included a Confidentiality Agreement, an Experimentation and Evaluation Agreement, and an Optimization Agreement.

22. Sometime after 1998 Alcon began selling Azopt®.

23. Accordingly, Defendants' past infringement and/or continuing infringement has been deliberate and willful. This case is therefore an exceptional case, which warrants an award of treble damages and attorneys' fees to Elan in accordance with 35 U.S.C. § 285.

VII. DEMAND FOR JURY TRIAL

24. Pursuant to Federal Rule of Civil Procedure 38(b), Elan hereby demands a jury trial for all issues in this case that properly are subject to a jury trial.

VII. PRAYER FOR RELIEF

WHEREFORE, Elan prays for the following relief:

- a. A judgment that Defendants have infringed each of the patents-in-suit under 35 U.S.C. § 271;
- b. A judgment and order requiring Defendants to pay Elan damages under 35 U.S.C. § 284, including treble damages for willful infringement as provided by 35 U.S.C. § 284;
- c. A judgment and order requiring Defendants to pay Elan pre-judgment and post-judgment interest on the damages award;

- d. A judgment and order finding this to be an exceptional case and requiring Defendants to pay the costs of this action (including all disbursements) and attorneys' fees as provided by 35 U.S.C. § 285;
- e. A judgment and order that Defendants, their officers, agents, servants, directors, and employees, subsidiaries, parents, attorneys, and those persons in active concert, on behalf of, in joint venture, or in participation with Defendants, be permanently enjoined from further infringing each of the patents-in-suit; and
- f. Such other and further relief as the Court deems just and equitable.

Respectfully submitted,

BAKER BOTTS L.L.P.

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