

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

THOMAS A. SIMONIAN,

Plaintiff,

v.

NOVARTIS PHARMACEUTICALS CORP.,

Defendant.

Civil Action No. \_\_\_\_\_

**JURY TRIAL DEMANDED**

**COMPLAINT FOR FALSE PATENT MARKING**

Plaintiff THOMAS A. SIMONIAN (“Plaintiff”), by his attorneys, hereby complains against Defendant NOVARTIS PHARMACEUTICALS CORPORATION (“Defendant”) as follows:

**I.**

**NATURE OF THE CASE**

1. This is a *qui tam* action on behalf of the public for false patent marking under 35 U.S.C. §292.

2. As set forth below, Defendant has violated 35 U.S.C. §292(a), by marking certain of its Hypo Tears® branded products with United States Patent Number 4,409,205 (“the ‘205 Patent”) even though the ‘205 Patent is expired, and has been expired since January 16, 2001. On information and belief, Defendant marks certain of its Hypo Tears® branded products with the expired ‘205 Patent with the intent to deceive the public and to gain a competitive advantage in the market.

3. Plaintiff seeks an award of monetary damages against Defendant pursuant to 35 U.S.C. §292(b) of up to \$500 for each offense, with one-half going to the use of the United States and the other half going to the person bringing the action.

**II.**  
**THE PARTIES**

4. Plaintiff is a person residing in Geneva, Illinois.

5. Defendant NOVARTIS PHARMACEUTICALS CORPORATION is a Corporation established under the laws of the State of Delaware with its principal place of business at One Health Plaza, East Hanover, New Jersey 07936.

6. Upon information and belief, Defendant is one of the largest pharmaceutical companies in the world.

**III.**  
**JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

8. Venue properly lies in the Northern District of Illinois pursuant to 28 U.S.C. §§ 1391(c), and 1395(a), because Defendant's falsely marked products were and are offered for sale and sold in this District.

9. This Court has personal jurisdiction over Defendant because it has sold and continues to sell its falsely marked products, in Illinois and in this District and/or in the stream of commerce with knowledge that they would be sold in Illinois and in this District. Upon information and belief, such sales by Defendant are substantial, continuous, and systematic.

**IV.**  
**THE '205 PATENT**

10. The '205 Patent, entitled "Ophthalmic Solution," was filed on January 16, 1981, issued on October 11, 1983 and expired on January 16, 2001. A true and correct copy of the '205 Patent is attached hereto as Exhibit A.

11. Upon information and belief, Hypo Tears® is comprised of polyvinyl alcohol and polyethylene glycol, thereby forming a lubricant for dry eyes.

12. Upon information and belief, the '205 Patent discloses an ophthalmic solution especially adapted for use in normalizing irregularly structured tear films in the eyes of humans and domestic animals. The Abstract of the invention of the '205 Patent states in relevant parts as follows:

*"An ophthalmic aqueous solution having an ionic salt ion content within the range 0.01% to 7.5% expressed as sodium chloride equivalents and comprising a non-ionic synthetic polymer such as polyvinyl alcohol and/or polyethylene glycol, and a non-ionic tonicity adjusting agent. The solution is effective in treating 'dry eye' conditions by causing a normalization of irregularly structured tears and at least retarding the precipitation of protein-like substances from the aqueous layers thereof."*

**V.**  
**COUNT I**

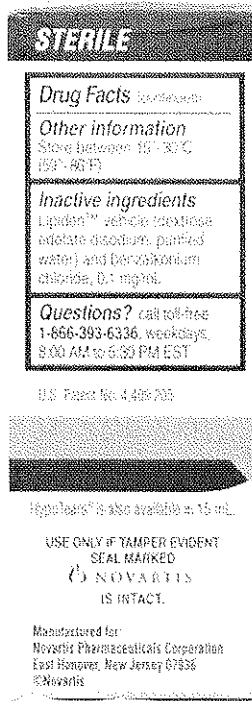
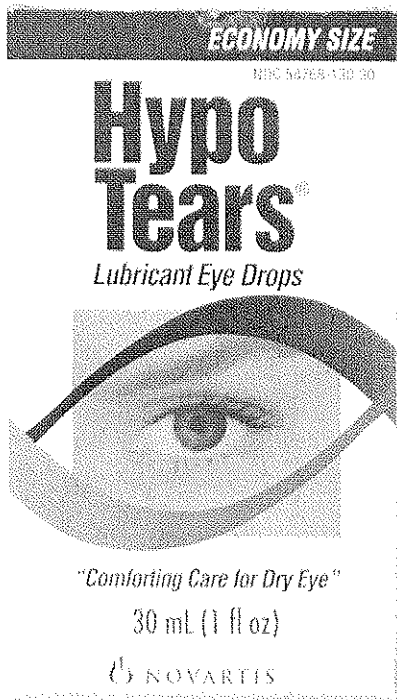
13. Plaintiff incorporates paragraphs 1-12 as if fully set forth herein.

14. Upon information and belief, Defendant has in the past manufactured and marketed, or caused to be manufactured and marketed, and presently manufactures and markets, or causes to be manufactured or marketed, products for sale to the general consuming public, including, for example, its Hypo Tears® branded lubricant eye drops.

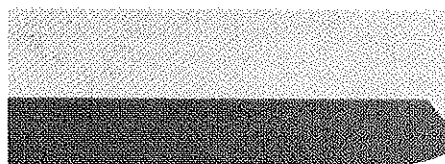
15. The '205 Patent expired on January 16, 2001.

16. Upon information and belief, Defendant has in the past marked, or caused to be marked, and presently marks, or causes to be marked, for example, but not limited to, at least the following products and/or packaging thereof, with the expired '205 patent: Hypo Tears® Lubricant Eye Drops.


17. Hypo Tears® Lubricant Eye Drops is currently sold in packaging marked as shown below (continued on next page):



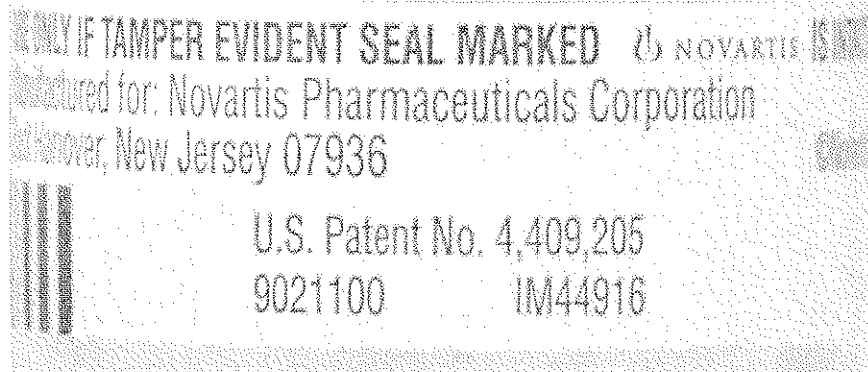
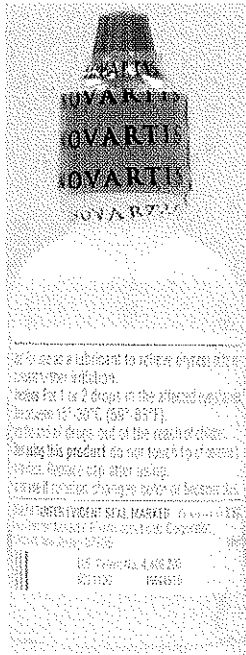
U.S. Patent No. 4,409,205



HypoTears® is also available in 15 mL.

USE ONLY IF TAMPER EVIDENT  
SEAL MARKED  
 **NOVARTIS**  
IS INTACT.

Manufactured for:  
Novartis Pharmaceuticals Corporation  
East Hanover, New Jersey 07936  
©Novartis



18. The instance of false marking shown in paragraph 17 above is representative and not exhaustive.

19. When a patent expires, all prospective rights in the patent terminate irrevocably. Therefore, a product marked with an expired patent is not currently protected by such expired patent.

20. Upon information and belief, Defendant is a sophisticated company and has many decades of experience applying for, obtaining, and litigating patents.

21. Upon information and belief, Defendant has an in-house legal department.

22. Upon information and belief, attorneys in Defendant's in-house legal department are responsible for Defendant's intellectual property and marketing, labeling, and advertising law.

23. Defendant by itself or by its representatives cannot genuinely believe that a patent does not expire and that prospective patent rights apply even after its expiration.

24. Upon information and belief, Defendant knows, or should know (by itself or by its representatives), that the '205 Patent marked on the Hypo Tears® Lubricant Eye Drops has expired.

25. Upon information and belief, Defendant knows, or should know (by itself or by its representatives), that the Hypo Tears® Lubricant Eye Drops are not covered by the expired '205 Patent marked on such products because an expired patent has no prospective patent rights.

26. Upon information and belief, Defendant has previously accused companies of patent infringement and Defendant has been accused of patent infringement.

27. As a sophisticated company with, upon information and belief, in-house attorneys who regularly litigate or oversee litigation of patent infringement cases and who regularly prosecute or oversee patent prosecution, Defendant knows, or reasonably should know, of the requirements of 35 U.S.C. §292.

28. The false patent marking for the Hypo Tears® Lubricant Eye Drops is found on the product packaging. (See paragraph 17 above)

29. Upon information and belief, Defendant intentionally included the expired '205 Patent in the patent markings of the Hypo Tears® Lubricant Eye Drops, in an attempt to prevent competitors from using the same or similar ophthalmic solution.

30. Upon information and belief, Defendant marks the Hypo Tears® Lubricant Eye Drops with the expired '205 Patent for the purpose of deceiving the public into believing that something contained in or embodied in the products is covered by or protected by the expired '205 patent.

31. Each false marking on the Hypo Tears® Lubricant Eye Drops is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.

32. Defendant has wrongfully and illegally advertised a patent right which it does not possess and, as a result, has benefitted commercially and financially by maintaining false statements of patent rights.

33. Upon information and belief, Defendant knows, or reasonably should know, that marking the Hypo Tears® Lubricant Eye Drops with false patent statements was and is illegal under Title 35 United States Code. At a minimum, Defendant had and has no reasonable basis to believe that its use of the false markings was or is proper or otherwise permitted under federal law.

34. Upon information and belief, Defendant's marking of its Hypo Tears® Lubricant Eye Drops with the expired '205 Patent, as described above and/or as will be further later evidenced, has wrongfully quelled competition with respect to such products to an immeasurable extent thereby causing harm to the United States in an amount which cannot be readily determined.

35. Upon information and belief, for at least the reasons set forth herein, Defendant has wrongfully and illegally advertised patent rights which it does not possess, and, as a result, has likely benefitted in at least maintaining its considerable market share with respect to the herein described Hypo Tears® Lubricant Eye Drops in the market place.

36. For at least the reasons provided herein, and/or for reasons which will be later evidenced, each expired patent which is marked on a product contributes to causing harm to the Plaintiff, the United States and the general public.

37. Thus, each expired patent marked on a product, directly or on the packaging thereof, multiplied by the number of products and/or packaging materials on which it appears is a separate "offense" pursuant to 35 U.S.C. §292(a).

**VI.**  
**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendant as follows:

- (a) A decree that Defendant has falsely marked products in violation of 35 U.S.C. §292;
- (b) An award of monetary damages, pursuant to 35 U.S.C. § 292, in the form of a civil monetary fine of \$500 per false marking “offense,” or an alternative amount as determined by the Court, one half of which should be paid to the United States of America;
- (c) An accounting for any falsely marked products not presented at trial and an award by the Court of additional damages for any such falsely marked products;
- (d) All costs and fees incurred as a result of the prosecution of this action; and
- (e) Such other and further relief, at law or in equity, to which Plaintiff is justly entitled.

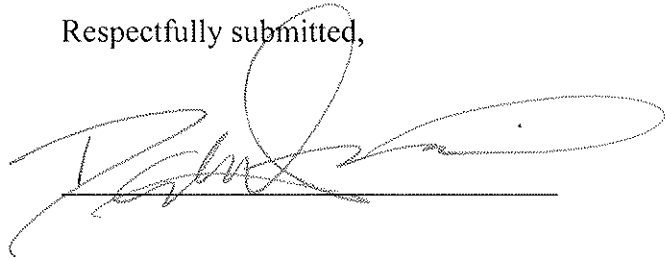


**VI.**  
**DEMAND FOR JURY TRIAL**

Pursuant to Federal Rules of Civil Procedure Rule 38, Plaintiff hereby demands a jury trial on all issues triable by jury.

Dated: February 25, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Vanek', is written over a horizontal line. The signature is stylized and cursive.

*Attorneys for Plaintiff*

Joseph M. Vanek  
IL State Bar No. 6197046  
David P. Germaine  
IL State Bar No. 6274984  
Jeffrey R. Moran  
IL State Bar No. 6283573  
VANEK, VICKERS & MASINI, P.C.  
111 S. Wacker Drive, Suite 4050  
Chicago, Illinois 60606  
(312) 224-1500 Telephone  
(312) 224-1510 Facsimile  
E-mail: [jvanek@vaneklaw.com](mailto:jvanek@vaneklaw.com)  
E-mail: [dgermaine@vaneklaw.com](mailto:dgermaine@vaneklaw.com)  
E-mail: [jmoran@vaneklaw.com](mailto:jmoran@vaneklaw.com)

Bruce S. Sperling  
IL State Bar No. 2687925  
Robert D. Cheifetz  
IL State Bar No. 6210105  
SPERLING & SLATER, P.C.  
55 West Monroe Street  
Suite 3200  
Chicago, Illinois 60603  
(312) 641-3200 Telephone  
(312) 641-6492 Facsimile  
E-mail: [bss@sperling-law.com](mailto:bss@sperling-law.com)  
E-mail: [robc@sperling-law.com](mailto:robc@sperling-law.com)

Eugene M. Cummings  
IL State Bar No. 556394  
David M. Mundt  
IL State Bar No. 6243545  
David Lesht  
IL State Bar No. 6180985  
Martin Goering  
IL State Bar No. 6286254  
Konrad V. Sherinian  
IL State Bar No. 6290749  
Panasarn Aim Jirut  
IL State Bar No. 6281877  
Jessica Rissman  
IL State Bar No. 6300680  
EUGENE M. CUMMINGS, P.C.  
One North Wacker Drive, Suite 4130  
Chicago, Illinois 60606  
(312) 984-0144 Telephone  
(312) 984-0146 Facsimile  
E-mail: [ecummings@emcpc.com](mailto:ecummings@emcpc.com)  
E-mail: [dmundt@emcpc.com](mailto:dmundt@emcpc.com)  
E-mail: [dlesht@emcpc.com](mailto:dlesht@emcpc.com)  
E-mail: [mgoering@emcpc.com](mailto:mgoering@emcpc.com)  
E-mail: [ksherinian@emcpc.com](mailto:ksherinian@emcpc.com)  
E-mail: [ajirut@emcpc.com](mailto:ajirut@emcpc.com)  
E-mail: [jrissman@emcpc.com](mailto:jrissman@emcpc.com)