



- Claim 10 of United States patent number 8,882,938 (limited to literal infringement; no doctrine of equivalents);
- Claims 3 and 13 of United States patent number 9,579,359;
- Claims 16 and 26 of United States patent number 10,729,739;
- Claims 3, 5, 8, and 14 of United States patent number 10,973,870;
- Claim 2 of United States patent number 9,415,085; and
- Claim 2 of United States patent number 10,695,398.

The parties have agreed to stipulate to a dismissal of all claims and counterclaims for United States patent numbers 8,841,081 and 9,877,999 patents (“the S-ALP patents”).

Eliminating the S-ALP patents removes an entire patent family from the litigation, narrowing the issues for trial and eliminating one of Plaintiffs’ expert witnesses (Dr. Celestia Higano). The parties’ stipulation as to the S-ALP patents also renders moot Plaintiffs’ Motion in Limine #1.

For the avoidance of doubt, Plaintiffs’ agreement to dismiss the S-ALP patents is solely in response to the Court’s January 3, 2022 oral order directing the parties to narrow issues for trial. Plaintiffs’ position is that the dismissal should be without prejudice. Fresenius Kabi’s position is that the dismissal should be with prejudice.

#### **INVALIDITY DEFENSES**

Fresenius Kabi has narrowed its invalidity defenses by removing the following invalidity defenses from those it intended to present at trial:

- Withdrawing Section 101 invalidity assertion for the ’085 patent;
- Withdrawing Section 101 invalidity assertion for the ’398 patent;
- Withdrawing Section 101 argument for the ’870 patent;
- Withdrawing written description argument for “select” as to the ’085 patent;

- Withdrawing written description argument for “select” as to the ’398 patent; and
- Withdrawing anticipation argument for the ’398 patent.

The Section 101 and “select” arguments remove those issues from the case, as this agreement addresses all places where they appeared. Withdrawing the anticipation argument for the ’398 patent renders moot Plaintiffs’ Motion in Limine #2. And withdrawing the Section 101 arguments renders moot Plaintiffs’ Motion in Limine #3, which addressed one of the three patents where that argument was raised.

In addition, the parties have been discussing several stipulations as to the various families of patents.

#### **ADDITIONAL PROVISIONS FOR STREAMLINING TRIAL PRESENTATION**

The parties have also agreed, subject to the Court’s approval, that Fresenius Kabi’s expert witnesses’ invalidity testimony will include rebuttal testimony on secondary considerations (rather than recalling each witness in rebuttal) and that Plaintiffs’ expert witness’s testimony on infringement of the ’938 patent will include his testimony on the secondary consideration of copying. The parties believe that allowing these witnesses to testify a single time will further help to streamline the trial.

#### **TRIAL TIME AND POST-TRIAL BRIEFING**

In light of the Court’s January 3, 2022 oral order (D.I. 176), the parties jointly request that the total time for trial be twenty-two (22) hours, divided evenly between the parties.

The parties jointly propose the following schedule for post-trial briefing:

- Three weeks after the close of trial
  - Opening briefs on which the party bears the burden of proof, limited to 45 pages

- Findings of fact on which the party bears the burden of proof
- Three weeks after the opening briefs are filed
  - Responsive briefs, limited to 45 pages
  - Responsive findings of fact

With respect to the findings of fact, the parties jointly request that the page limit for each parties' findings (opening and responsive) be limited to a combined total of 150 pages, allocated between the opening and responsive findings by the parties.

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