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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALLERGAN SALES, LLC and ALLERGAN, INC. Plaintiffs, v. SANDOZ, INC. and ALCON LABORATORIES, INC. Defendants.	Civil Action No. 2:17-cv-10129-WHW-CLW *Electronically Filed* [redacted] PUBLIC VERSION - REDACTED

PLAINTIFFS ALLERGAN SALES, LLC'S AND ALLERGAN, INC.'S BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Statutes

Other Authorities

TABLE OF AUTHORITIES (cont'd)

I. INTRODUCTION

Plaintiffs Allergan Sales, LLC and Allergan, Inc. (collectively, "Allergan") respectfully move for a preliminary injunction to preserve the status quo and prevent a generic launch that would irreparably destroy the market for Allergan's Combigan®, a sight-saving treatment for glaucoma and ocular hypertension.

Allergan is likely to succeed on the merits. Defendant Sandoz's generic product is a copy of Combigan®. The patents-in-suit, U.S. Patent Nos. 9,770,453, 9,907,801, and 9,907,802 all cover Combigan® and, accordingly, Sandoz's generic copy as well. All three patents claim the precise combination of salts used to make Combigan®, and therefore solve the "claiming problem" used by Sandoz to obtain non-infringement rulings on prior patents in December 2017. As admitted in Sandoz's Answer and Counterclaims, (*see* Dkt. 18 at Answer ¶¶ 28-30), the new patents cover this combination of salts, and Sandoz uses both of them. There is no real dispute that the sale of Sandoz's generic product will induce and contribute to the direct infringement of the claims by physicians under long-settled principles of pharmaceutical patent law.

These three patents are also valid, and no validity attack by Sandoz will be successful. In prior litigations between the parties, Sandoz has repeatedly attacked the validity of claims with limitations that are nearly identical to those before this Court now, relying over and over on the same art that Allergan expects Sandoz to raise again here. Multiple district court rulings, and two Federal Circuit rulings, have rejected Sandoz's attempts. This Court should do likewise.

Unless enjoined by this Court, a launch of Sandoz's generic product will result in imminent and immediate lost revenues and market share, irreversible price erosion, harm to Allergan through the loss of valuable employees responsible for the manufacture and sale of Combigan®, lost R&D revenues, and harm to Allergan's goodwill. A generic launch will permanently alter the market for Combigan® even if Sandoz were later forced to withdraw its

generic product after a finding that it infringes the ’453, ’801, and ’802 patents.

To avoid irreparable harm to Allergan, which substantially outweighs any harm to Sandoz, and because injunctive relief will promote the public interest, Plaintiffs respectfully submit that this Court should issue a preliminary injunction barring Sandoz from making, offering for sale, or selling its generic Combigan® product until the resolution of this action.

II. STATEMENT OF FACTS

A. Allergan’s Innovative Combigan® Product, Just the Second Ever Combination Product for Lowering Intraocular Pressure Approved by FDA

Aqueous humor is the fluid in the front of the eye, which provides nourishment to the eye’s structures, and, because it is under pressure, helps maintain the shape of the eyeball. The pressure of this fluid inside the eye is known as intraocular pressure (“IOP”).

When IOP is elevated, damage to the optic nerve can occur. Patients with elevated IOP but no detectable nerve damage are said to have “ocular hypertension.” If nerve damage becomes detectable, the patient with elevated IOP now has glaucoma. Left untreated, glaucoma gradually robs patients of their vision, and can eventually blind them. Three million people in the United States have glaucoma, and unknown numbers more have ocular hypertension.

Whether they have been diagnosed with ocular hypertension or have advanced to glaucoma, patients with elevated IOP are considered to be in the same disease continuum and are treated the same way: with medication to lower elevated IOP. (Walsh Decl., Ex. A, *Allergan Sales, LLC v. Sandoz, Inc.*, No. 2:12-CV-207-JRG, slip op. at 13-14 (Dec. 30, 2016 E.D. Tex.).) By lowering elevated IOP, doctors can reduce a patient’s risk of the vision loss associated with glaucoma.

Combigan® is a “fixed combination” product—two drugs that are formulated together in one bottle and dosed at the same time—used to treat elevated intraocular pressure (“IOP”) in

patients with either ocular hypertension or glaucoma. The FDA approved Combigan® in October of 2007, after eight years of development by Allergan. At the time, it was just the second ocular combination product ever approved by FDA, and the first in nine years. (Noecker Decl., Ex. 28 at 46:10-23.) While most patients with elevated IOP use more than one medicine to treat their disease, attempts to develop combination products have largely failed. (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 15-16.) Frequently, the combination of two drugs is less effective than either of the two drugs used individually, and unwanted or exacerbated side effects are common. (*Id.* at 22-23.)

The active ingredients in Combigan® are brimonidine, added to the formulation as 0.2% brimonidine tartrate, and timolol, added to the formulation as 0.68% timolol maleate, but also commonly referred to in the art as 0.5% timolol (measuring the active ingredient as its free base, rather than salt, form). *Allergan, Inc. v. Sandoz Inc.*, 818 F. Supp. 2d. 974, 989 (E.D. Tex. Aug. 22, 2011); (*see also* Noecker Decl. ¶ 33.) Both drugs had been previously sold individually: Merck & Co. developed 0.5% timolol and sold it as Timoptic® beginning in 1978, while Allergan developed 0.2% brimonidine and sold it as Alphagan® beginning in 1996. *Allergan*, 818 F. Supp. 2d at 978. Like all other IOP-lowering drugs, both Timoptic® and Alphagan® were approved to lower IOP in patients with either ocular hypertension or glaucoma, as Sandoz well knows as it has long sold generic versions of both. (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 34-36.)

While the FDA approved Timoptic® for convenient twice-daily dosing, once in the morning and once in the evening, Alphagan® was a different story. In order to maintain consistent IOP-lowering efficacy throughout the day, the FDA approved Alphagan® only for three times per day dosing because twice-daily dosing resulted in reduced IOP-lowering efficacy

in the afternoon (referred to as the "afternoon trough"). *Id*. at 979. Alphagan® also had serious side effects that limited its utility. (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 17.) Chief among these was an allergy to brimonidine, which required patients to stop taking the medicine. (*Id.*)

In the clinical trials for Combigan®, Allergan surprisingly discovered that the dosing for brimonidine could be reduced from three to two times daily in the specific Combigan® formulation, without losing IOP-lowering efficacy. *Allergan, Inc. v. Sandoz Inc.*, 818 F. Supp. 2d 974, 999-1000 (E.D. Tex. Aug. 22, 2011) (*rev'd on other grounds*); *Allergan*, *Inc. v. Sandoz Inc.*, 726 F.3d 1286, 1293-94 (Fed. Cir. 2013); (Noecker Decl. ¶¶ 48-65, 115-121.) Allergan also discovered that the Combigan® formulation dosed twice daily resulted in reduced side effects when compared with brimonidine three times daily, even though a skilled artisan would have expected the side effects to be as bad or worse because of the addition of timolol. *Allergan Sales, LLC v. Sandoz, Inc.*, Nos. 2017-1499, et al., 2017 WL 6547648, at *5-6 (Fed. Cir. Dec. 22, 2017); (Noecker Decl. ¶¶ 38-40.) These discoveries led to Allergan's patents on Combigan®, including the patents-in-suit.

The surprising clinical trial results Allergan achieved with Combigan®, in large part, appear on Combigan®'s label as approved by FDA. Those results, and the trials that underlay them, make no distinction between patients diagnosed with ocular hypertension and patients diagnosed with glaucoma. (Noecker Decl., Ex. 10; Noecker Decl. ¶¶ 40, 76-87.)

B. Allergan's '453, '801, and '802 Patents-In-Suit Claim the Unexpected Results Achieved Using the Combigan® Formulation

The patents-in-suit claim the unexpected results discovered by Allergan during the clinical trials on Combigan®. The first claim of each of the three patents is exemplary. Claim 1 of the '453 patent reads as follows:

> 1. A method of treating a patient with glaucoma or ocular hypertension comprising topically administering twice daily to an affected eye a single composition comprising 0.2% w/v brimonidine tartrate and 0.68% w/v timolol maleate, wherein the method is as effective as the administration of 0.2% w/v brimonidine tartrate monotherapy three times per day and wherein the method reduces the incidence of one of more adverse events selected from the group consisting of conjunctival hyperemia, oral dryness, eye pruritus, allergic conjunctivitis, foreign body sensation, conjunctival folliculosis, and somnolence when compared to the administration of 0.2% w/v brimonidine tartrate monotherapy three times daily.

Claim 1 of the '801 patent reads as follows:

> A method of treating a patient with glaucoma or ocular hypertension comprising topically administering twice daily to an affected eye of the patient a single composition comprising 0.2% w/v brimonidine tartrate and 0.68% w/v timolol maleate as the sole active ingredients, wherein said method reduces the incidence of one or more adverse events, as compared to the administration of 0.2% w/v brimonidine tartrate monotherapy three times per day, wherein the adverse event is selected from the group consisting of conjunctival hyperemia, oral dryness, eye pruritus, allergic conjunctivitis, foreign body sensation, conjunctival folliculosis, and somnolence.

Claim 1 of the '802 patent reads as follows:

> A method of treating a patient with glaucoma or ocular hypertension comprising topically administering twice daily to an affected eye of a patient a single composition comprising 0.2% w/v brimonidine tartrate and 0.68% w/v timolol maleate as the sole active ingredients, wherein the method is as effective at reducing intraocular pressure as the administration of 0.2% w/v brimonidine tartrate monotherapy three times per day.

The unexpected nature of the clinical results claimed in the '453, '801, and '802 patents has been litigated by Sandoz and Allergan over the multiple trials and appeals before this case for the past nine years. In these cases, Sandoz repeatedly argued that these clinical results were not surprising or were inherent from the prior art and that Allergan's patents should therefore be found invalid as obvious or anticipated. Each time, the courts have rejected those arguments and affirmed the validity of Allergan's method claims, including twice by the Federal Circuit. *Allergan,* 726 F.3d at 1293-94 ("The record firmly establishes that when brimonidine is dosed

twice per day as opposed to three times per day, there is a loss of efficacy in the afternoon—the so called, afternoon trough. Sandoz has failed to point to evidence in the prior art that would allow us to conclude that the addition of timolol to brimonidine dosed twice per day would eliminate the afternoon trough issue."); *Allergan Sales*, 2017 WL 6547648, at *5-6 ("Those efficacy limitations are not disclosed by any prior art reference in the record. To the contrary, the prior art shows that the combination dosed twice daily produces a loss of efficacy in the afternoon. The efficacy limitations are also not inherent in the administration of the ophthalmic composition, a finding adequately supported by the record." (internal citations omitted)).

C. The Extensive Litigation History Over Sandoz's Generic Copy of Combigan®

i. *Combigan® I*: Infringement and Non-Obviousness of the "Without Loss of Efficacy" Limitation

In November 2008, Sandoz filed an Abbreviated New Drug Application ("ANDA") seeking approval for a generic version of Combigan® for reducing IOP in both glaucoma and ocular hypertension patients. [redacted]

After Sandoz notified Allergan of its ANDA, Allergan sued for infringement of four patents: U.S. Patent Nos. 7,030,149 (the "'149 patent"), 7,320,976 (the "'976 patent"), 7,323,463 (the "'463 patent"), and 7,642,258 (the "'258 patent") ("*Combigan® I*"). The '149 and '976 patents are method patents; the '463 and '258 patents are formulation patents. Relevant to this case, claim 4 of the '149 patent recites the surprising clinical result that Combigan® dosed twice daily does not lose efficacy in comparison to brimonidine dosed three times daily:

> A method of reducing the number of daily topical ophthalmic doses of brimonidine administered topically to an eye of a person in need thereof for the treatment of glaucoma or ocular hypertension from 3 to 2 times a day without loss

> of efficacy, wherein the concentration of brimonidine is 0.2% by weight, said method comprising administering said 0.2% brimonidine by weight and 0.5% timolol by weight in a single composition.

In *Combigan® I*, Sandoz admitted to infringement the day before trial (Walsh Decl., Ex. B at 8:20-9:5), and stipulated that "the proposed product described in ANDA No. 91-087 meets all the limitations" of the then-asserted claims of the '149, '463, '976, and '258 patents. (Walsh Decl., Ex. D at 2.) After a four-day bench trial in August 2011, the *Combigan® I* district court found that Sandoz's generic version of Combigan® infringed the asserted claims and that claims were not invalid, and thus enjoined Sandoz from the manufacture, use, or sale of its generic product. *Allergan, Inc.*, 818 F. Supp. 2d at 977; (Walsh Decl., Ex. E.)

On appeal, the Federal Circuit in *Combigan® I* affirmed in part. *Allergan*, 726 F.3d at 1288, 1295. The Federal Circuit affirmed the district court's conclusion that claim 4 of the '149 patent is infringed and not invalid as anticipated or obvious, thereby affirming the injunction against Sandoz's generic product. *Id*. In its discussion of claim 4, and relevant to the claims at issue here, the Court found that "while it is true that the prior art shows concomitant administration of brimonidine and timolol was dosed twice per day, this art ***does not show*** that there was no loss of efficacy associated with that treatment, let alone an elimination of the afternoon trough." *Id.* at 1294. The Court also agreed with the district court's findings that the efficacy and side effect results for Combigan® were unexpected and supported the non-obviousness of the '149 patent's method of treatment claims. *Id.* at 1293.

In its opinion, the Federal Circuit declined to address the validity of the '258 and '976 patents. *Id.* at 1294 n.2. As to the '463 patent, that patent did not claim a method of treatment or any of Combigan®'s surprising clinical results or even Combigan®'s specific formulation. *Id.* at 1289. Instead, it covered generally any formulation of 0.2% brimonidine and 0.5% timolol used

with benzalkonium chloride, a common ophthalmic preservative. *Id.* Because of this breadth, the Federal Circuit held the '463 patent's formulation claims obvious. *Id.* at 1291-94.

ii. *Combigan® II*: No Obviousness of Efficacy or Side Effect Limitations and Non-Infringement Based on 0.68% Timolol Maleate vs. 0.5% Timolol Free Base

[redacted]

This amendment was purely a legal tactic—known in the industry as a "carve out" or "skinny label"—and not responsive to any medical issue. As discussed above and has already been found by the prior courts, ocular hypertension and glaucoma are two diagnoses on the same disease continuum, and both are treated by lowering IOP with drugs like Combigan®. Indeed, Judge Gilstrap found that Sandoz knows and intends that physicians will prescribe the Sandoz generic for ***both*** ocular hypertension and glaucoma if its generic drug comes to market, even though it will only be labeled for use for ocular hypertension. (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 35-36; Noecker Decl., Ex. 17 at 131:4-132:6; 134:21-135:10.) [redacted]

[redacted]

While the district court in the Eastern District of Texas disparaged Sandoz's amendment as "less a design around [of] Allergan's patents and more a hypertechnical, if not illegal, end run around the injunction" issued in the first lawsuit, the court nonetheless ruled that collateral estoppel did not apply under the law and that Sandoz was permitted to re-litigate validity and infringement of the *Combigan® I* patents. (Walsh Decl., Ex. C, at 7.) For similar reasons, the court ruled that Sandoz was not bound by some of the prior claim constructions from the first case, and allowed Sandoz to argue for different claim constructions. *Id.*

The district court held a bench trial in October 2016 on the literal infringement and invalidity of claim 4 of the '149 patent and claim 1 of the '976 patent from the *Combigan® I* litigation, and claims 1-8 of the later issued U.S. Patent No. 8,748,425 ("the '425 patent"), which covered the unexpected reduction in side effects achieved by Combigan®.[1] Each of those claims are method claims requiring a fixed combination of 0.2% brimonidine or 0.2% brimonidine tartrate, and 0.5% timolol or 0.5% timolol free base.

At trial, Sandoz argued that it did not infringe any of the asserted claims because its product did not contain 0.5% w/v timolol free base, despite earlier stipulating that it had, but instead contained 0.68% timolol maleate. (Noecker Decl., Ex. 28 at 21:3-23; Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 8.) Sandoz offered little evidence on the other limitations of the three patents, whether it be the '425 patent limitations that the recited method reduces the incidence of certain adverse events or claim 4 of the '149 patent's "without loss of efficacy"

[1] To streamline litigation, Allergan dropped the '258 patent, giving Sandoz a covenant not to sue on that patent, and two other patents, U.S. Patent Nos. 8,133,890 and 8,354,409, that Allergan had asserted while the appeal in *Combigan® I* was pending.

limitation that had driven the outcome of the previous case. (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 24.) With respect to the latter, Sandoz argued that, in ocular hypertension patients, its proposed generic product would not perform "without loss of efficacy" as compared to 0.2% brimonidine administered three times per day, as required by claim 4 of the '149 patent, the same defense to infringement it raises in its Answer and Counterclaims here. The district court gave little weight to this argument, stating in its final opinion that Sandoz's non-infringement arguments at trial "had absolutely no relation to the amendment it made to its ANDA." (Walsh Decl., Ex. C, *Allergan Sales*, Opinion and Final Judgment at 7.)

As for validity, Sandoz raised a variety of arguments, some of which were the same as it had raised previously, and some of which were new. Relevant to this case, all of the arguments raised here in Sandoz's Answer and Counterclaims, Paragraph IV letters, and invalidity contentions are encompassed within the arguments litigated at the October 2016 trial.

Post-trial, the district court once again rejected each of Sandoz's validity challenges, and found that Sandoz's product infringed the '425 patent. As to the '149 and '976 patents, the district court found that Sandoz's product, made with 0.68% timolol maleate and 0.2% brimonidine tartrate, did not meet the limitations of those patents requiring 0.2% "brimonidine" and 0.5% "timolol." (*Id.* at 18-21.)

Both parties appealed. At oral argument, Federal Circuit Judge Hughes characterized the issues surrounding whether Allergan's patents covered Combigan® (and, consequently, Sandoz's product) as a "claiming problem." (Oral Arg. Rec. at 6:14, Nos. 17-1499 (Fed. Cir. Oct. 2, 2017) (available at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2017-1499.mp3.) Consistent with this comment, on December 22, 2017, the Federal Circuit found non-infringement of all of the asserted claims on the grounds that Sandoz's generic product does

not contain 0.5% timolol free base, despite Sandoz's prior admission that it did, but instead contains 0.68% timolol maleate. *Allergan Sales*, 2017 WL 6547648, at *9-10. In doing so, the Federal Circuit explicitly held that "the proposed generic, however, contain[s] 0.68% timolol maleate" and that "the proposed generic contains 0.2% brimonidine tartrate." *Id*. The Federal Circuit did not disturb the district court's finding that Sandoz's product, when administered, would reduce the incidence of certain adverse events compared to the administration of 0.2% brimonidine tartrate monotherapy. *Id*.

On validity, the Federal Circuit affirmed all of the district court's findings on all three patents. *Id.* at *6. With respect to Combigan®'s unexpected results, the Federal Circuit was emphatic that those limitations, which it grouped together as "efficacy limitations," were not obvious over the prior art. *Id.* at *5-6 ("Those efficacy limitations are not disclosed by any prior art reference in the record" and are "not inherent in the administration of the ophthalmic composition"); *id*. at *10 ("[W]e affirm the district court's finding of no invalidity of the asserted claims…").

D. Combigan®'s Commercial Success, Goodwill and the Employees Associated With it

Because of its clinical benefits, Combigan® has achieved wide success. (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 59, 62-63.) [redacted]

([redacted][2] [redacted]

[2] To the extent any of the statements in Mr. LeCause's declaration are considered expert opinion, such opinions are permitted under Fed. R. Civ. P. 26(a)(2)(C) and Fed. R. Evid. 702 because Mr. LeCause has specialized knowledge and experience regarding the matters set forth in his declaration, and the declaration sets forth the subject matter, facts and opinions on which Mr. LeCause is expected to present evidence. Fed. R. Civ. P. 26(a)(2)(C); Fed. R. Evid. 702.

[redacted] (*Id*. ¶ 7.)

Allergan employs approximately [redacted] people in the U.S. Eye Care Sales force who support the sales of Allergan's eye care products, including Combigan®. (LeCause Decl. ¶ 16.) A number of other Allergan employees [redacted] are responsible for the marketing, operations and manufacturing of Combigan®. (*Id*.)

Allergan supports its research and development efforts to develop new medications through revenues from sales of existing products. (LeCause Decl. ¶ 15.) Allergan currently reinvests approximately [redacted] of revenue from Allegan product sales into research and development. (*Id*.) U.S. sales of Combigan® currently represent approximately [redacted] of Allergan U.S. Eye Care's net sales. (*Id*.)

If launched, Sandoz's generic product will capture nearly all of Combigan®'s sales. In prior instances where a generic version of a pharmaceutical product enters the market, the generic version has often captured up to 90% of prescriptions of the branded drug within several months of generic entry. (LeCause Decl. ¶ 9; Maness Decl. ¶¶ 20-23.) This loss of market share occurs for a variety of reasons, including the lower price of the generic product, the presence of mandatory generic substitution laws in many states, and preferred formulary status given to generic products. (Maness Decl. ¶¶ 25-31; LeCause Decl. ¶ 10.) The loss of formulary status for the branded product that occurs upon generic launch also typically results in erosion of the price of the branded product, as the brand often resorts to offering large rebates or price concessions to attempt to preserve some of its market share. (Maness Decl. ¶¶ 26-27.)

III. ARGUMENT

A court may grant a preliminary injunction "to prevent the violation of any right secured by patent." 35 U.S.C. § 283; Fed. R. Civ. P. 65; *see also AstraZeneca LP v. Apotex, Inc.*, 633

F.3d 1042, 1049 (Fed. Cir. 2010). In deciding a motion for a preliminary injunction, the court must balance four factors: (1) the patentee's likelihood of success on the merits; (2) the irreparable harm the patentee will suffer if the injunction is not granted; (3) the balance of the hardships between the parties; and (4) the public interest. *See AstraZeneca LP*, 633 F.3d at 1049; *Titan Tire Corp. v. Case New Holland, Inc*., 566 F.3d 1372, 1375-76 (Fed. Cir. 2009). Here, all four factors weigh strongly in favor of the grant of a preliminary injunction.

A. Allergan Is Likely To Succeed on the Merits

In order to establish the first factor—a reasonable likelihood of success on the merits—Allergan need only show that it is likely to prove that launch of Sandoz's generic product will induce and contribute to direct infringement by physicians practicing the methods claimed in the patents-in-suit, and that Sandoz cannot raise a substantial question as to invalidity, considering that Sandoz will bear the burden of showing invalidity by clear and convincing evidence at trial. *Pfizer Inc. v. Teva Pharms., USA, Inc*., 429 F.3d 1364, 1372 (Fed. Cir. 2005); *Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1365 (Fed. Cir. 2002). The Federal Circuit's prior validity findings on claims that present the same validity issues strongly supports the grant of a preliminary injunction here. *See Solarex Corp. v. Advanced Photovoltaic Sys. Inc.*, No. 93-CV-229-JJF, 1995 WL 314742, at *3 (D. Del. Jan 6, 1995) ("The grant of a preliminary injunction is strongly supported where the patent's validity has been previously upheld following a fully litigated trial addressing the same issues of fact and law.") (citing *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 388 (Fed. Cir. 1987)).

i. Claim Construction

The first step in determining infringement is the proper construction of the claims. *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1358 (Fed. Cir. 2008). Allergan's positon on claim construction is fully set forth in its opening and responsive claim construction briefs filed on

April 3, 2018 and April 17, 2018, respectively. (Dkt. 57, 69, 70.) In sum, all terms can be given their plain and ordinary meaning, with the exception that the Court should respectfully adopt the constructions adopted by the Eastern District of Texas for identical terms in related patents. None of those constructions impact the infringement analysis.

Sandoz will argue here that the "wherein" clauses in the claims of the patents-in-suit are not limiting. We respectfully refer the Court to Allergan's *Markman* briefs for the details of why Sandoz's position lacks merit, and note again here that the claims of the patents-in-suit were allowed by the examiner specifically because the "wherein" clauses were limiting. (*See* Walsh Decl., Ex. F at 2-4); *see also* Walsh Decl., Exs. G-H, respectively, at 3-4.) As demonstrated in Allergan's *Markman* briefs, the parties and the prior courts have always treated other "wherein" and similar clauses as limiting. There is no reason for this to change now.

ii. Allergan Is Likely to Succeed in Showing Infringement

All of the claims of the patents-in-suit are method of treatment claims. Thus, here Allergan must show that it is likely to prove at trial that Sandoz will induce or contribute to direct infringement by physicians treating patients with the Sandoz generic.

Direct Infringement - Identical Covered Formulation. [redacted]

[redacted]

Direct Infringement - Identical Treatment Protocol. Sandoz's generic product likewise meets the other limitations of the claims of the '453, '801, and '802 patents. [redacted]

Direct Infringement – Identical Treatment Effect. Unremarkably, an ophthalmic solution identical to the brand, administered in the same way as the brand, will demonstrate the same efficacy and side effect profiles as the brand, as described and claimed in the patents-in-suit ('453 and '801 – side effects) ('453 and '802 – efficacy) that cover the brand. [redacted] In his declaration, Dr. Noecker details the clinical evidence supporting his opinion that Combigan® meets the efficacy (*id.* ¶¶ 48-59, 73) and side effects (*id.* ¶¶ 60-65) limitations of the claims, and why the Sandoz generic will also meet those limitations (*id.* ¶¶ 66-87). The evidence Dr. Noecker cites is the same evidence he relied on in the prior litigations and formed the basis of the district court's findings that Combigan® reduced the amount of brimonidine doses from three to two without loss of efficacy (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 24-26) and reduced the incidence of side effects compared to brimonidine three times daily (*id.* at 26-30). The

district court relied on that same evidence to find that the Sandoz generic is clinically identical to Combigan®, including with respect to efficacy and side effects. (*Id.* at 32). Those findings establish likelihood of success on the merits with respect to the limitations concerning efficacy and side effects.

Indirect Infringement. In addition, the evidence demonstrates that Sandoz will induce and contribute to infringement of the claims. Sandoz has knowledge of all three patents-in-suit. If a proposed drug's label instructs users to perform a patented method, then the label provides evidence of an affirmative intent to induce infringement of the patented method. *Astrazeneca, LP v. Apotex, Inc.*, 633 F.3d 1042, 1058-61 (Fed. Cir. 2010). "There is no requirement that the language used to induce infringement mirror the language of the claim." *See Hoffman LaRoche v. Apotex*, Nos. 07-CV-4417l., *et al.*, 2010 WL 3522786, at *3 n.2 (D.N.J. Sept. 2, 2010).

Sandoz's label, which it expects and intends that patients will follow, encourages doctors and patients to use its proposed product in an infringing manner. (Noecker Decl., Ex. 17 at 11:22-13:14 ("Q. Does Sandoz intend that patients would use their product in compliance with that instruction? A. If that was our labeling, that's the intent."); *see also* Noecker Decl. ¶¶ 90-93.) [redacted]

[redacted]

As for contributory infringement, again, there is no dispute that Sandoz knows about the '453, '801, and '802 patents. As set forth above, the use of its product will directly infringe the claims of those patents. There is no substantial non infringing use for the product (Noecker Decl. ¶ 96), and that product is a material part of the invention claimed in those patents (*id.* ¶ 95). *See also* 35 U.S.C. § 271(c); ***i4i Ltd. P'ship v. Microsoft Corp.***, 598 F.3d 831, 850-51 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011); ***Eli Lilly & Co. v. Actavis Elizabeth LLC***, 435 Fed. Appx. 917, 927 (Fed. Cir. 2011) (holding generic defendants liable for contributory infringement where the FDA-authorized use was patented because "defendants are restricted from selling a federally regulated drug for unapproved uses").

Finally, the same reasoning and evidence relied on by the district court in the related litigation are also sufficient for this Court to find Allergan is likely to succeed on the merits of showing that Sandoz will induce (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 34-36) and contribute (*id*.) to infringement of the patents-in-suit.

Sandoz's Non infringement Argument Carries No Weight. Based on Sandoz's Paragraph IV letters and non-infringement contentions, as well as Sandoz's counterclaims, its primary non-infringement argument appears to relate to an alleged distinction in treatment

efficacy and adverse events depending on whether a given patient is diagnosed with ocular hypertension or glaucoma. Sandoz's argument is without merit.

The Sandoz proposed label relies on data from two pivotal clinical trials ("12T" and "13T") conducted on ***both*** ocular hypertension and glaucoma patients for regulatory approval for Combigan®, even though Sandoz's product is labeled for ocular hypertension only. In other words, Sandoz makes no distinction between the efficacy and adverse events experienced by ocular hypertension and glaucoma patients on its label. And neither did FDA, which has approved Sandoz's proposed label with data from mixed clinical trials including ***both*** ocular hypertension and glaucoma patients even though Sandoz's product is labeled only for ocular hypertension patients. (Noecker Decl., Ex. 20 at SDZ(33)0003363-64, SDZ(33)0003371.)

As Dr. Noecker explains in his declaration, these data and the corresponding label show significant decreases in IOP at hours 0, 2 and 7 for patients treated with Combigan® twice daily as opposed to brimonidine alone three times daily. (Noecker Decl. ¶¶ 48-59.) At hour 9, which is not present on the label, these data show that Combigan® and three times daily brimonidine perform the same. (*Id.*.)

All of the above more than demonstrates that Allergan is likely to succeed in showing that Combigan® (and the Sandoz generic) is as efficacious as brimonidine three times daily in treating patients with ocular hypertension and glaucoma as required by the claims of the '453 and '802 patents and that Sandoz's label indicates as much. In response, Sandoz has pointed to an analysis prepared by an Allergan statistical expert where, if the patients are separated into ocular hypertension and glaucoma groups—contrary to the presentation on the Combigan® and Sandoz label and contrary to how FDA treated the data—there are three time points where the numbers for the mean IOP lowering for Combigan® are 0.1 or 0.2 mm Hg less than patients on

three times a day brimonidine. (Dkt. 18 at Counterclaim ¶¶ 63-74; Noecker Decl. ¶¶ 80-85.) But the same statistician who prepared the analysis concluded that, in her opinion, these differences in mean values were not differences at all, but showed that the two treatments were the same at these time points. (Walsh Decl., Ex. I ¶ 31; *see also*, Walsh Decl., Ex. J at, *e.g.*, 93-96.) And as Dr. Noecker explains, those alleged "differences" are not clinical differences at all. (Noecker Decl. ¶¶ 81-83.)

Accordingly, there is no principled basis to distinguish between the effect of the Sandoz generic on IOP lowering in glaucoma versus ocular hypertension patients. Physicians do not make this distinction in treating the patients: as described above, glaucoma and ocular hypertension are part of the same disease continuum, and patients with these conditions are expected to experience the same efficacy and side effect profile from a given treatment. (*Id.* ¶ 76.) Nor does the FDA make this distinction when it requests data for regulatory approval; although FDA requires separation of clinical data along certain lines, including age, race, sex, and iris color, it has never asked for separate analysis of glaucoma and ocular hypertension patients. (Noecker Decl., Ex. 28 at 38:8-39:10; Noecker Decl. ¶ 77.)

Finally, there is the question of Sandoz's actual intended course of conduct here. In considering Sandoz's "skinny label," the court in the Eastern District of Texas already found that Sandoz's intent is to sell the product equally to glaucoma patients, as well as ocular hypertension patients. (Walsh Decl., Ex. A, *Allergan Sales*, slip op. at 35-36.) Discovery provided in this case demonstrates the same. [redacted] (

[redacted] Sandoz's protestations about ocular hypertension have already been adjudged by one court to be a [redacted]

In sum, Allergan has met its burden of showing Sandoz's generic products more likely than not infringe at least one claim of each of the '453, '801, and '802 patents. *Pfizer*, 429 F.3d at 1372; *Tate Access Floors*, 279 F.3d at 1365.

iii. Sandoz Cannot Raise Any Substantial Questions on the Validity of the Claims

Sandoz is unlikely to meet its burden of proving that the'453 patent claims are invalid. As explained above, the Federal Circuit has upheld the validity of the '149, '976, and '425 patents, all of which are in the same family as the '453 patent, rejecting the same arguments that Sandoz makes here in its counterclaims, its Paragraph IV letters, and its invalidity contentions. *Allergan*, 726 F.3d at 1294; *Allergan Sales*, 2017 WL 6547648, at *2-4. The related patents that the Federal Circuit found not invalid contain the same clinical limitations—equivalent therapeutic efficacy and reduction in the incidence of side effects compared to 0.2% brimonidine monotherapy dosed three times daily—as claim 1 of the '453 patent, as shown in the table below: (*See also* Section IV.B.iii.)

Limitations in the '453, '801, and '802 Patents	**Non-Obvious Claim Limitations from the '149, '976, and '425 Patents**
Claim 1 of the '453 patent claims "wherein the method is as effective as the administration of 0.2% w/v brimonidine tartrate monotherapy three times per day."	Claim 4 of the '149 patent claims administration of a fixed combination "without loss of efficacy" as compared to 0.2% brimonidine administered 3 times per day." Claim 1 of the '976 patent claims administering a "therapeutically effective amount."
Claim 1 of the '453 patent claims "wherein the method reduces the incidence of one of more adverse events selected from the group consisting of conjunctival hyperemia, oral dryness, eye pruritus, allergic conjunctivitis,	Claim 1 of the '425 patent claims "wherein said method reduces the incidence of one or more adverse events, as compared to the administration of 0.2% w/v brimonidine tartrate monotherapy three times per day

foreign body sensation, conjunctival folliculosis, and somnolence when compared to the administration of 0.2% w/v brimonidine tartrate monotherapy three times daily."	wherein the adverse event is selected from the group consisting of conjunctival hyperemia, oral dryness, eye pruritus, allergic conjunctivitis, foreign body sensation, conjunctival folliculosis, and somnolence.

Like claim 1 of the '453 patent, the claims of the '801 patent recite reduced adverse events, and the claims of the '802 patent recite maintained efficacy.

In the previous litigations, Sandoz had argued that the '149, '976, and '425 claims were obvious over the prior art use of serial therapy with brimonidine and timolol, dosed in separate bottles, twice per day—while FDA only approved 0.2% brimonidine for three times daily use, some doctors prescribed it to their patients for twice a day usage. But the Federal Circuit has found that the claimed "efficacy limitations[3] are not disclosed by any prior art reference in the record. To the contrary, the prior art shows that the combination dosed twice daily produces a loss of efficacy in the afternoon." *Allergan Sales*, 2017 WL 6547648, at *2; *see also Allergan*, 726 F.3d at 1293-94. This prior art included twice per day timolol/brimonidine serial therapy. *Allergan*, 726 F.3d at 1294. The Court similarly rejected Sandoz's argument that the limitations are "inherent" in the prior art. *Allergan Sales*, 2017 WL 6547648, at *2.

Sandoz's arguments here, as set forth in its counterclaims, Paragraph IV letter, and invalidity contentions, rely on the very same prior art and are no different than the arguments the Federal Circuit has twice rejected. For example, Sandoz's counterclaims allege that it was not "unexpected" that Combigan® twice-daily was as effective as brimonidine alone three times daily because "Combigan® included brimonidine BID and timolol BID, and adding two doses of

[3] The Court grouped both the "without loss of efficacy" and reduced incidence of adverse events limitations as "efficacy limitations" and discussed them together. *Allergan Sales*, 2017 WL 6547648, at *2.

timolol would have been expected to make up for one less dose of brimonidine." (Dkt. 18 ¶ 39.) But the Federal Circuit ***expressly*** rejected that argument when it found that "Sandoz has failed to point to evidence in the prior art that would allow us to conclude that the addition of timolol to brimonidine dosed twice per day would eliminate the afternoon trough issue." *Allergan*, 726 F.3d at 1293-94. [redacted] Again, the Federal Circuit ***expressly*** rejected that argument, finding that "[t]he efficacy limitations are also not inherent in the administration of the ophthalmic composition." *Allergan Sales*, 2017 WL 6547648, at *2. The Federal Circuit's findings as to what the prior art does and does not teach, and as to limitations that are not obvious over that art, apply equally to the claims of the patents-in-suit, which recite similar efficacy and side effect limitations as the prior claims.[4]

iv. Sandoz Has Not Raised Substantial Questions as to Enforceability

Finally, in its recently-filed Amended Answer and Counterclaims, Sandoz alleges inequitable conduct by Allergan in obtaining its entire family of patents, including the patents-in-

[4] While the Court need not determine it to grant preliminary injunctive relief, Sandoz's arguments about whether Combigan®'s improvement over the prior art was unexpected, or whether those results are inherent, has been litigated to final judgment, and should be barred by the doctrine of issue preclusion. "Under the doctrine of issue preclusion, also called collateral estoppel, a judgment on the merits in a first suit precludes relitigation in a second suit of issues actually litigated and determined in the first suit." *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994); *see, e.g.*, *Power Integrations, Inc. v. Fairchild Semiconductor Int'l., Inc.*, 763 F. Supp. 2d 671, 676-77 (D. Del. 2010) (finding defendant estopped from asserting obviousness of claim where claim issue was litigated in prior suit concerning obviousness of different claim containing same limitation). Because the very same factual issues Sandoz attempts to raise here have already been rejected by the Federal Circuit, Sandoz should be barred from raising them again here. *B & B Hardware, Inc. v. Hargis Indus.*, Inc., 135 S. Ct. 1293, 1302-03 (2015) ("[O]nce a court has decided an issue, it is forever settled as between the parties.").

suit. Despite their sound and fury, and interminable length—they go on for 130 pages—these allegations are based on a narrative that is false factually and, legally, is no barrier to a preliminary injunction. While Allergan intends to move to dismiss these allegations when its responsive pleading is due on May 15, 2018, other courts in this district have previously found that denying a preliminary injunction on the basis of inequitable conduct allegations, especially given the high burden on Sandoz to prove those allegations, is rare. *See Curlin Med. Inc. v. Acta Med., LLC*, 228 F. Supp. 3d 355, 359 (D.N.J. 2017); *Eisai Co., Ltd v. Teva Pharm. USA, Inc.*, No. 05-5727 (HAA) (ES), 2008 WL 1722098, at *3, *9 (D.N.J. March 28, 2008) (granting preliminary injunction in face of inequitable conduct defense).

We first note that Sandoz raises these allegations nine years after the parties began litigating the family of patents that led to the patents-in-suit. According to Sandoz, this alleged misconduct "pervades the entire Allergan Patent Family beginning with the first patent of this family, the '149 patent" (Dkt. 73, Counterclaim ¶ 16), yet Sandoz waited nine years—and only after losing two full trials and two appeals on the validity of the method patents—to raise it. Sandoz makes no allegation that it could not have discovered this "pervasive" inequitable conduct before now.

Accordingly, Sandoz's belated assertions of inequitable conduct should be seen for what they are—a final, desperate attempt to avoid Allergan's valid patent rights. And while space limits Allergan's ability to address the specious facts alleged by Sandoz, as a legal matter, Sandoz should not be heard to raise these claims now. Inequitable conduct claims related to the prosecution of any patent other than those in suit here are barred by the doctrine of claim preclusion. Claims of inequitable conduct on those earlier patents in the Combigan® patent family were compulsory counterclaims in earlier litigations between the parties. Sandoz failed to

raise them, and it is "forever barred" from doing so now. *Goodman Mfg. Co., L.P. v. Carrier Corp.*, Civ. No. 13-2014-SLR, 2014 WL 4954281, at *1-2 (D. Del. Sept. 23, 2014) ("[T]he fraudulent procurement of a patent claim, whether asserted as a defense to an infringement suit or brought separately as an antitrust claim, is logically related to a claim for patent infringement. As such, that claim must be presented under Rule 13(a) or it is forever barred.") (quoting *Rohm & Haas Co. v. Brotech Corp.*, 770 F. Supp. 928, 931 (D. Del. 1991)).

Here, nearly the entirety of the "pattern of conduct" that Sandoz relies upon to support its inequitable conduct allegations relates to events that occurred during prosecution of the patents that the parties have ***already litigated*** to final judgment. For example, Sandoz alleges that "[d]uring prosecution of the ***'149 patent***, Mr. Johnson represented that treatment presented in the Goni reference 'is not the closest prior art regimen.'" (Dkt. 73, Counterclaim ¶ 196; *see also, e.g.*, *id.* ¶¶ 16, 34, 66, 90-91, 99-100, 167, 176, 183, 196-97.) In fact, with a single exception, each of the alleged acts of "misconduct" that Sandoz alleges is inequitable conduct occurred not during the prosecution of the patents-in-suit here, but during the prosecution of earlier patents in the same family. But there can be no dispute that Allergan and Sandoz have already fully litigated multiple patents in this family to finality, including the '149 and '463 patents in *Combigan® I* and the '149, '976, and '425 patents in *Combigan® III*. If Sandoz wanted to argue that Allergan had committed inequitable conduct as to any of those previously litigated patents, then the proper time to do it was when those patents were being litigated. And while Sandoz did file a counterclaim for unclean hands in the *Combigan® I* litigation, it never pursued that theory. (Walsh Decl., Ex. N at 10.) Sandoz's failure to bring compulsory counterclaims of inequitable conduct in earlier litigations precludes it from doing so now.

A number of courts that have analyzed this issue have found that inequitable conduct and antitrust counterclaims that relate to patent infringement claims are compulsory counterclaims in a patent infringement case concerning those same patents. *See, e.g.*, *Goodman Mfg.*, 2014 WL 4954281, at *1-2 (dismissing inequitable conduct claims in a later-filed declaratory judgment action as "forever barred" because they were compulsory counterclaims in an earlier patent infringement action); *Am. Packaging Corp. v. Golden Valley Microwave Foods, Inc.*, Civ. A. No. 94-1839, 1995 WL 262522, at *4 (E.D. Pa. May 1, 1995) (granting summary judgment that antitrust claims based on inequitable conduct were compulsory counterclaims in an earlier patent litigation, and thus barred); *Rohm & Haas*, 770 F. Supp. at 931, 935 (finding antitrust counterclaims based on allegations of fraudulent procurement of patent were compulsory counterclaims in earlier patent infringement suit). Sandoz's claims here are no different. Any inequitable conduct claim that it wished to bring relating to any of the previously-litigated patents, including the '149, '976, '463, and '425 patents, should have been brought in the prior litigations. Sandoz failed to raise them, and claim preclusion prevents it from doing so now.

Sandoz's inequitable conduct claims also carry little weight here because it has previously litigated the issues underlying them and lost. With a single exception, Sandoz's inequitable conduct allegations depend on an argument that Allergan somehow misled the PTO into thinking that the clinical results for the claimed invention were unexpected. (*See, e.g.*, Dkt. 73, Counterclaim ¶¶ 183, 196, 205, 239, 288, 303, 323, 325.) Sandoz's argument thus relies on its position that the efficacy and side effect results of Combigan® were, in fact, expected, a position the Federal Circuit has rejected multiple times.

Whether formally barred for issue preclusion, *see* n.4 *supra*, or whether they simply fail basic pleading tests of plausibility, *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564-66

(2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009), Sandoz's allegations that the clinical trial results were "expected" fail the materiality and intent requirements for inequitable conduct as a matter of law. To prove materiality, Sandoz must demonstrate that "but for" the allegedly misleading conduct, the PTO would not have allowed the claims. *Therasense, Inc. v. Becton Dickinson & Co.*, 649 F.3d 1276, 1291-95 (Fed. Cir. 2011) (en banc). But Sandoz has argued that the efficacy and safety results of Combigan® were not unexpected in each of the litigations between the parties, and it has lost that issue four times—twice before the Eastern District of Texas and twice before the Federal Circuit. In addressing the issue of unexpected results, the Federal Circuit expressly found that the efficacy and adverse event limitations "are not disclosed by any prior art reference in the record." *Allergan Sales*, 2017 WL 6547648, at *2-3; *see also Allergan*, 726 F.3d at 1293 ("We agree with the court's finding that this [efficacy] result was unexpected."). Because the results have already been found unexpected, and on voluminous records at that, and Sandoz is precluded from arguing the contrary, there can be no materiality as a matter of law. And as for intent, how persons associated with the prosecution could have intended to deceive the PTO by arguing unexpected results that have been four times found unexpected is hard to understand.

As for the lone exception in Sandoz's allegations that was not already litigated, Sandoz alleges inequitable conduct based on its own flawed reading of the expert report of Allergan's statistical expert from the *Combigan® III* district court case. As noted above, according to Sandoz, this expert's report supposedly shows that Combigan® is not as effective as 0.2% brimonidine three times daily at three particular time points out of numerous measured in ocular hypertension patients. (Dkt. 73, Counterclaim ¶¶ 250-265.) But Sandoz's allegation, based on supposed "differences" of a tiny fraction of a mmHg, is contrary to the expert's own conclusions

(Walsh Decl., Ex. I ¶ 31; *see also* Walsh Decl., Ex. J at e.g., 93-96), to how physicians understand the data, and to general common sense. (Noecker Decl. ¶¶ 79-81; Noecker Decl., Ex. 20 at SDZ(33)0003363-64, SDZ(33)0003371.) Threadbare allegations like this cannot raise a substantial question of enforceability sufficient to defeat a preliminary injunction. Sandoz's unenforceability claims are no bar to preliminary injunctive relief in this case.

B. Allergan Will Suffer Imminent and Irreparable Harm Unless Injunctive Relief is Granted

As described in the declarations of Robert Maness and David LeCause, a launch of Sandoz's generic products into the marketplace will have significant and irreparable consequences for Allergan, its position in the glaucoma market, its reputation, and its employees. (LeCause Decl. ¶ 14.) [redacted] Sandoz's entry into the market will result in an immediate reduction in Allergan's market share, as well as significant price erosion. (Maness Decl. ¶¶ 19-28; LeCause Decl. ¶¶ 8-13.) Even if Sandoz were later forced to withdraw its products from the market, Allergan would not be able to regain its market position or pricing with managed care organizations. (Maness Decl. ¶ 27; LeCause Decl. ¶13.)

The Federal Circuit has found that loss of market share, loss of revenue, and price erosion caused by generic entry constitutes irreparable harm justifying the entry of temporary injunctive relief. *Mylan Institutional LLC v. Aurobindo Pharma Ltd.*, 857 F.3d 858, 872-73 (Fed. Cir. 2017) (affirming a finding that generic launch would cause "lost sales, lost research and development, price erosion, and having to directly complete with an infringer"); *Abbott Labs*., 544 F.3d at 1361-62; *Sanofi-Synthelabo v. Apotex, Inc*., 470 F.3d 1368, 1382 (Fed. Cir. 2006); *Purdue Pharma. L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed. Cir. 2001).

Moreover, a generic launch would force Allergan to cease promotion of Combigan® and

to reduce the size of the sales and marketing team required to promote Combigan®. (Maness Decl. ¶¶ 29-30; LeCause Decl. ¶16.) The damage caused by this loss of institutional knowledge, as well as the damage caused to Allergan's reputation and employee confidence could not be compensated by monetary damages constitutes irreparable harm. *See, e.g.*, *AstraZeneca LP v. Apotex, Inc*., 623 F. Supp. 2d 579, 612 (D.N.J. 2009) ("[T]he damage caused by a loss in personnel and the impact this would have on the company are indeed significant and unquantifiable."); *Research Found. of State Univ. of N.Y. v. Mylan Pharm., Inc.*, No. 09-184, 2012 WL 1901267, at *2 (D. Del. May 25, 2012); *Hoffman-La Roche Inc. v. Cobalt Pharms, Inc.*, No. 07-4539, 2010 WL 4687839, at *11−12 (D.N.J. Nov. 10, 2010).

A generic launch will also have an irreparable impact on Allergan's research and development programs because Allergan invests approximately [redacted] of its sales revenue into research and development, and U.S. sales of Combigan® represent about [redacted] of Allergan U.S. Eye Care's net sales. (Maness Decl. ¶¶ 33-34; LeCause Decl. ¶ 15.) *Fresenius Kabi USA, LLC v. Fera Pharms*., LLC, No. 15-cv-3654, 2016 U.S. Dist. LEXIS 128126, at *38 (D.N.J. Sept. 20, 2016) ("[P]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm." (internal quotation marks omitted)); *Eisai Co. v. Teva Pharms. USA, Inc.*, No. 05-5727, 2008 WL 1722098, at *11 (D.N.J. Mar. 28, 2008) ("[I]f there is a reasonable likelihood that research on future drugs . . . will be eliminated, or even reduced or delayed, then the harm is irreparable."); *see also Sanofi-Synthelabo*, 470 F.3d at 1382; *Bio-Tech. Gen. Corp. v. Genentech, Inc*., 80 F.3d 1553, 1566 (Fed. Cir. 1996).

Moreover, even if Sandoz's generic products were later removed from the market as a result of a court decision affirming Allergan's patent rights, consumers and physicians would

likely believe that Allergan caused or directed the removal, and would consequently view Allergan less favorably. (Maness Decl. ¶ 32; LeCause Decl. ¶ 18.); *Fresenius Kabi*, 2016 U.S. Dist. LEXIS 128126, at *38; *Bio-Tech. Gen. Corp*., 80 F.3d at 1566.

C. The Balance of Hardships Favor Injunctive Relief

The balance of hardships in this case strongly favors the issuance of injunctive relief. Without injunctive relief, Allergan would be subject to premature generic competition that would result in a devastating and permanent loss of revenues, market share, and good will. (*See supra* Section III.B.) In contrast, granting Allergan's motion will cause Sandoz only minimal hardship since Allergan is merely asking this Court to maintain the status quo pending the outcome of this litigation. *See ., Inc. v. Aventis Pharm., Inc.,* 235 F. Supp. 2d 390, 396 (D. Del. 2002) (finding that granting a motion for a preliminary injunction "will cause Impax only minimal hardship since doing so will leave Impax in the same position as it was before the injunction was granted, i.e., excluded from the riluzole market"); *see also In re Cyclobenzaprine*, No. 09-MD-2118-SLR, 2011 WL 1980610, at *4 (D. Del. May 20, 2011). Additionally, should Allergan ultimately lose this dispute on the merits, Sandoz's potential loss of revenue, if any, could be compensated with money damages, which could be secured by a bond.[5] *See Research Found. of State Univ. of N.Y. v. Mylan Pharm. Inc.*, 723 F. Supp. 2d 638, 662 (D. Del. 2010); *Abbott Labs v. Sandoz, Inc.*, 500 F. Supp. 2d 807, 845 (N.D. Ill. 2007).

D. The Public Interest Favors Granting Injunctive Relief Pending the Resolution of This Action

Finally, granting injunctive relief pending resolution of this appeal will serve the public

[5] [redacted]

interest by enforcing patent rights and encouraging innovation. *See Abbott Labs.*, 544 F.3d at 1362-63. The Supreme Court has explained that "[t]he patent laws promote this progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974); *Sanofi-Synthelabo*, 470 F.3d at 1383-84 (upholding a finding that "the significant public interest in encouraging investment in drug development and protecting the exclusionary rights conveyed in valid pharmaceutical patents" favored an injunction (internal quotation marks omitted)). Allergan invested years of research and millions of dollars to develop the technology embodied in Combigan® and claimed in the Patents-in-Suit. (Noecker Decl., Ex. 28 at 60:24-61:17.) And it now uses the revenues from Combigan® to fuel additional research and development for additional drugs. (LeCause Decl. ¶ 15.) The public interest favors strong patent protection to encourage these types of investments that are necessary for the development of new drugs that benefit society. *See Abbott Labs.*, 544 F.3d at 1362-63.

Granting injunctive relief will also serve the public interest by promoting judicial efficiency. If Sandoz is allowed to market their generic Combigan® product now, a finding by this Court that any claim of the patents-in-suit is valid and infringed will require the parties and the Court to engage in the difficult task of quantifying the injury caused by Sandoz's conduct and may require additional litigation to determine damages.

IV. CONCLUSION

For the reasons set forth above, Allergan respectfully requests that the Court grant its motion for preliminary injunctive relief.

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Respectfully submitted,

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