

1 PHILIP J. GRAVES (SBN 153441)
philipg@hbsslaw.com
2 HAGENS BERMAN SOBOL SHAPIRO LLP
301 North Lake Avenue, Suite 203
3 Pasadena, CA 91101
Telephone: (213) 330-7150
4 Facsimile: (213) 330-7152
5 Ivy Arai Tabbara (*pro hac vice*)
ivy@hbsslaw.com
6 Barbara Mahoney (*pro hac vice*)
barbaram@hbsslaw.com
7 HAGENS BERMAN SOBOL SHAPIRO LLP
1918 8th Avenue, Suite 3300
8 Seattle, WA 98101
Telephone: (206) 623-7292
9 Facsimile: (206) 623-0594

10 Attorneys for Plaintiff Joseph Neev

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13

14 JOSEPH NEEV

15 Plaintiff,

16 v.

17 ALCON LABORATORIES, INC., a
18 Delaware Corporation; and WAVELIGHT,
19 GmbH, a German Corporation,

20 Defendants.
21

Lead Case No. 8:15-cv-336-JVS-
JCG
(Consolidated with 8:15-cv-624-
JVS-JCG)

**JOSEPH NEEV'S FIRST
AMENDED COMPLAINT, AND
DEMAND FOR JURY TRIAL**

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DR. NEEV'S FIRST

1 Plaintiff Joseph Neev (“Dr. Neev”), by and through his undersigned attorneys,
2 pleads as follows:

3 **I. PARTIES**

4 1. Dr. Neev is an individual residing in Laguna Beach, California.

5 2. Alcon Laboratories, Inc. (“Alcon Labs”) is a corporation organized and
6 existing under the laws of the State of Delaware, having a principal place of business
7 in Fort Worth, Texas.

8 3. WaveLight, GmbH (“Wavelight”) is, on information and belief, a
9 corporation organized and existing under the laws of Germany, having a principal
10 place of business in Erlangen, Germany.

11 **II. JURISDICTION AND VENUE**

12 4. This Court has subject matter jurisdiction for this action pursuant to 28
13 U.S.C. §§ 1331 and 1338.

14 5. This Court has personal jurisdiction over Alcon Labs for the reasons,
15 among others, that Alcon Labs transacts business by facilitating sales and maintenance
16 of the infringing products in California, as well as by maintaining an agent for service
17 of process in California.

18 6. This Court has personal jurisdiction over WaveLight for the reason,
19 among others, that WaveLight acts through its agents to transact business in
20 California. On information and belief, WaveLight manufactures products with the
21 intention of selling and marketing those products in California through an affiliated
22 company, namely Alcon Labs.

23 7. Venue is proper in this District pursuant to 28 U.S. Code §§ 1391 and
24 1400(1).

III. FACTUAL BACKGROUND

A. Dr. Neev

8. Dr. Joseph Neev is a physicist and an inventor of revolutionary applications of lasers in the ophthalmic, dermatological, dental and cardiovascular fields.

9. Dr. Neev's career in advancing the use of laser technology to optimize surgical applications began in the late 1980s. His contributions to augment the use of lasers in medical and other applications is well-recognized in the industry, and can be seen through his numerous publications and his affiliation with reputable institutions such as Lawrence Livermore National Laboratory ("Livermore"), the University of California at Irvine ("UCI"), the Beckman Laser Institute, the University of California at San Diego, the University of California at San Francisco, Cornell University School of Medicine, the University of Texas at Austin, Stanford University's School of Medicine and Duke University's School of Medicine.

10. In the mid and late 1990s, Dr. Neev worked as an assistant professor of surgery at the Beckman Laser Institute and Medical Clinic, which was part of the Department of Surgery at UCI. At the time, Dr. Neev worked with other University of California scientists at Livermore on research and development projects relating to ultrashort pulse lasers. Livermore, which was managed by the University of California at the time, is a federally funded research laboratory, entrusted with strengthening the United States' security through the development and application of world-class science and technology.

11. Dr. Neev and his collaborators at Livermore developed foundational technology relating to ultrashort pulse lasers with various applications. The Regents of the University of California ("The Regents") applied for and received various patents relating to this foundational technology. Among these patents is U.S. Patent Nos. 5,720,894 (the "'894 patent"), entitled "Ultrashort Pulse High Repetition Rate

1 Laser System for Biological Tissue Processing,” which was issued by the U.S. Patent
2 and Trademark Office on February 24, 1998.

3 **B. The ‘199 and ‘926 Patents**

4 12. Following his departure from UCI, Dr. Neev continued his research
5 concerning medical applications of laser technology. Among many other patents that
6 resulted from Dr. Neev’s work, U.S. Patent No. 6,482,199 (the “’199 Patent”), entitled
7 “Method and Apparatus for High Precision Variable Rate Material, Removal and
8 Modification,” was issued to Dr. Neev by the U.S. Patent and Trademark Office on
9 November 19, 2002. A true and correct copy of the ‘199 Patent is attached hereto as
10 Exhibit 1.

11 13. Dr. Neev is the sole inventor and owner of U.S. Patent No. 8,523,926
12 (“’926 Patent”), entitled “Devices and Methods for Generation of Subsurface
13 Microdisruptions for Biomedical Applications,” which issued to Dr. Neev on
14 September 3, 2013. A true and correct copy of the ‘926 Patent is attached hereto as
15 Exhibit 2.

16 14. Dr. Neev holds all right, title and interest in and to the ‘199 Patent and the
17 ‘926 Patent.

18 15. On information and belief, Alcon Labs and Wavelight are and have been
19 aware of the ‘199 Patent and the ‘926 Patent. In or about January 2009, Dr. Ron
20 Kurtz, the President and CEO of LenSx Lasers, Inc. (“LenSx”), informed Dr. Neev
21 that LenSx was interested in obtaining a license under the ‘199 Patent. Dr. Neev and
22 LenSx engaged in discussions and negotiations concerning a license under the ‘199
23 Patent over the course of 2009 and into 2010. In the course of those discussions Dr.
24 Neev informed LenSx that he had filed an application that later issued as the ‘926
25 Patent, and provided LenSx with a copy of the application. LenSx licensed the ‘199
26 Patent in February 2010 and assisted Dr. Neev in responding to invalidity arguments
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1 raised during the reexamination procedures and in drafting new claims. LenSx was
2 later acquired by Alcon, Inc., an affiliate of Alcon Labs and Wavelight.

3 **C. The Wavelight FS200 Laser System**

4 16. Alcon, Inc. or another affiliate of Alcon Labs acquired WaveLight AG, a
5 Germany company, in or around November 2007.

6 17. On information and belief, WaveLight is the successor company to
7 WaveLight AG. As a subsidiary of Alcon, Inc., WaveLight continues to develop and
8 manufacture various ophthalmic medical devices, including the WaveLight FS200
9 laser system (“Wavelight FS200”).

10 18. In or around October 2010, Alcon Labs received FDA approval to market
11 its WaveLight FS200 femtosecond laser in the United States for certain indicated uses
12 in connection with eye surgery.

13 19. On information and belief, Alcon Labs and Wavelight began marketing
14 and selling the WaveLight FS200 in the United States for certain indicated uses in
15 connection with eye surgery in late 2010 or early 2011.

16 20. On information and belief, the WaveLight FS200 is used to ablate and/or
17 modify eye tissue.

18 21. On information and belief, the WaveLight FS200 operates with a pulse
19 duration of at least 1 femtosecond but less than 100 picoseconds, and at a pulse
20 repetition rate greater than 0.1 pulses per second.

21 22. On information and belief, when the WaveLight FS200 is used for an
22 indicated use in accordance with instructions provided by Alcon Labs and/or
23 Wavelight, laser energy is directed below the surface of the eye, creating a plurality of
24 cavitation bubbles below the surface of the eye in a three-dimensional pattern.

25 23. On information and belief, when the WaveLight FS200 is used for an
26 indicated use in accordance with instructions provided by Alcon Labs and/or
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1 Wavelight, laser energy is directed at the surface of the eye, creating incisions or
2 tunnels in the cornea.

3 24. On information and belief, when the WaveLight FS200 is used for an
4 indicated use in accordance with instructions provided by Alcon Labs and/or
5 Wavelight, an absorption and/or scattering characteristic of the material of the target
6 region of the eye is varied, for example, as a result of the application of suction to the
7 eye by a patient interface.

8 25. On information and belief, certain parameters of the Wavelight FS200
9 may be manipulated, such as spot size, depth and energy delivery of the laser beam.

10 26. On information and belief, when the WaveLight FS200 is used for an
11 indicated use in accordance with instructions provided by Alcon Labs and/or
12 Wavelight, thermal energy resulting from each pulse decays after each said pulse, and
13 no thermal damage is caused further than five microns below the disrupted area.

14 27. On information and belief, when the WaveLight FS200 is used for an
15 indicated use in accordance with instructions provided by Alcon Labs and/or
16 Wavelight, modification or ablation of eye tissue occurs as a result of the interaction
17 of laser energy with eye tissue.

18 **COUNT I**
19 **INFRINGEMENT OF THE '199 PATENT**
20 **(Against Alcon Labs And Wavelight)**

21 28. Plaintiff restates and incorporates by reference his previous allegations
22 above, as if fully set forth herein.

23 29. Alcon Labs and Wavelight have infringed and continue to infringe one or
24 more claims of the '199 Patent by using, selling or offering to sell in the United States
25 and/or by importing into the United States the Wavelight FS200.

26 30. Alcon Labs and Wavelight have induced and continue to induce
27 infringement of one or more claims of the '199 Patent in the United States by, among
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1 others, ophthalmic surgeons performing eye surgery using the Wavelight FS200.
 2 Alcon Labs and Wavelight have known of the '199 Patent since at least February
 3 2009, when Dr. Neev's counsel sent a letter to Alcon Labs informing it of the '199
 4 Patent and attaching a copy of the patent. In addition, LenSx, which was licensed
 5 under the '199 Patent, was acquired by an affiliate of Alcon Labs and Wavelight in
 6 2010. Alcon Labs and Wavelight have known or acted with willful blindness to the
 7 likelihood that the use of the Wavelight FS200 by ophthalmic surgeons infringes the
 8 '199 Patent.

9 31. Alcon Labs' and Wavelight's infringing Wavelight FS200 are configured
 10 such that the use of the lasers for eye surgery constitutes infringement, and Alcon Labs
 11 and Wavelight instruct and encourage users to use the infringing lasers for eye
 12 surgery. For example, Alcon's website states:

13 a. "The WaveLight® Refractive Suite is the fastest refractive surgery
 14 platform available in the U.S."

15 b. "Featuring the world's fastest flap creation times, the 200 KHz
 16 WaveLight® FS200 Femtosecond Laser delivers precise, predictable outcomes."

17 c. "The WaveLight® FS200 Femtosecond Laser combines a small
 18 focus with low pulse energy and a unique cutting pattern for accurate flap creation:

- 19 • Sharp cutting edges
- 20 • Smooth stromal beds
- 21 • Easy to lift flaps
- 22 • Minimized opaque bubble layer."

23 32. Alcon Labs and Wavelight intend that the infringing products be used in a
 24 manner that infringes the '199 Patent. Alcon Labs has obtained FDA approval for
 25 infringing uses and markets these products for infringing uses. On information and
 26 belief, Alcon Labs and Wavelight directly or indirectly create and provide manuals,
 27 brochures or other documentation instructing and enabling infringing uses.
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1 33. Alcon Labs and Wavelight have contributed to and continue to contribute
2 to infringement of one or more claims of the '199 Patent in the United States by,
3 among others, ophthalmic surgeons performing eye surgery using the Wavelight
4 FS200. Alcon Labs and Wavelight have known of the '199 Patent since at least 2010.
5 The infringing products embody a material part of the claimed invention of the '199
6 Patent, and Alcon Labs and Wavelight know that these products are especially made
7 or adapted for uses that infringe the '199 Patent. The infringing products are not a
8 staple article or commodity of commerce suitable for substantially non-infringing
9 uses.

10 34. Alcon Labs' and Wavelight's infringement of the '199 Patent has been
11 and continues to be willful. Alcon Labs and Wavelight have known of the '199 Patent
12 since 2010. Alcon Labs and Wavelight knew or should have known that the
13 Wavelight FS200 infringe the '199 Patent, and they have proceeded despite an
14 objectively high likelihood that a court would find the products to be infringing.

15 35. Neither Alcon Labs nor Wavelight now has or has ever had a license
16 under the '199 Patent.

17 36. Femto-Sec has sustained significant damages as a direct and proximate
18 result of Alcon Labs' and Wavelight's infringement of the '199 Patent.

19 37. Femto-Sec will suffer and is suffering irreparable harm from Alcon Labs'
20 and Wavelight's infringement of the '199 Patent. Femto-Sec is entitled to an
21 injunction against Alcon Labs' and Wavelight's continuing infringement of the '199
22 Patent. Unless enjoined, Alcon Labs and Wavelight will continue their infringing
23 conduct.

24 38. Alcon Labs' and Wavelight's infringement of the '199 Patent is
25 exceptional and entitles Femto-Sec to attorneys' fees and costs incurred in prosecuting
26 this action.

COUNT II
INFRINGEMENT OF THE '926 PATENT
(Against Alcon Labs And Wavelight)

39. Plaintiff restates and incorporates by reference his previous allegations above, as if fully set forth herein.

40. Alcon Labs and Wavelight have infringed and continue to infringe one or more claims of the '926 Patent by using, selling or offering to sell in the United States and/or by importing into the United States the Wavelight FS200.

41. Alcon Labs and Wavelight have induced and continue to induce infringement of one or more claims of the '926 Patent in the United States by, among others, ophthalmic surgeons performing eye surgery using the Wavelight FS200. Alcon Labs and Wavelight have known of the '926 Patent since at least September 3, 2013, the date the '926 Patent issued, at least as a result of (i) the fact that Dr. Neev's counsel sent a letter to Alcon Labs in or about February 2009 informing Alcon Labs of the existence of the PCT application from which the '926 Patent issued, and (ii) the acquisition of LenSx by an affiliate of Alcon Labs and Wavelight in 2010. Alcon Labs and Wavelight have known or acted with willful blindness to the likelihood that the use of the Wavelight FS200 by ophthalmic surgeons infringes the '926 Patent.

42. Alcon Labs' and Wavelight's infringing Wavelight FS200 are configured such that the use of the lasers for eye surgery constitutes infringement, and Alcon Labs and Wavelight instruct and encourage users to use the infringing lasers for eye surgery. For example, Alcon's website states:

a. "The WaveLight® Refractive Suite is the fastest refractive surgery platform available in the U.S."

b. "Featuring the world's fastest flap creation times, the 200 KHz WaveLight® FS200 Femtosecond Laser delivers precise, predictable outcomes."

1 c. “The WaveLight® FS200 Femtosecond Laser combines a small
2 focus with low pulse energy and a unique cutting pattern for accurate flap creation:

- 3 • Sharp cutting edges
- 4 • Smooth stromal beds
- 5 • Easy to lift flaps
- 6 • Minimized opaque bubble layer.”

7 43. Alcon Labs and Wavelight intend that the infringing products be used in a
8 manner that infringes the ‘926 Patent. Alcon Labs has obtained FDA approval for
9 infringing uses and markets these products for infringing uses. On information and
10 belief, Alcon Labs and Wavelight directly or indirectly create and provide manuals,
11 brochures or other documentation instructing and enabling infringing uses.

12 44. Alcon Labs and Wavelight have contributed to and continue to contribute
13 to infringement of one or more claims of the ‘926 Patent in the United States by,
14 among others, ophthalmic surgeons performing eye surgery using the Wavelight
15 FS200. Alcon Labs and Wavelight have known of the ‘926 Patent since at least
16 September 3, 2013, the date the ‘926 Patent issued, as a result of the acquisition of
17 LenSx by an affiliate of Alcon Labs and Wavelight. The infringing products embody
18 a material part of the claimed invention of the ‘926 Patent, and Alcon Labs and
19 Wavelight know that these products are especially made or adapted for uses that
20 infringe the ‘926 Patent. The infringing products are not a staple article or commodity
21 of commerce suitable for substantially non-infringing uses.

22 45. Alcon Labs’ and Wavelight’s infringement of the ‘926 Patent has been
23 and continues to be willful. Alcon Labs and Wavelight have known of the ‘926 Patent
24 since at least September 3, 2013, the date the ‘926 Patent issued, as a result of the
25 acquisition of LenSx by an affiliate of Alcon Labs and Wavelight. Alcon Labs and
26 Wavelight knew or should have known that the Wavelight FS200 infringe the ‘926
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1 Patent, and they have proceeded despite an objectively high likelihood that a court
2 would find the products to be infringing.

3 46. Neither Alcon Labs nor Wavelight now has or has ever had a license
4 under the '926 Patent.

5 47. Femto-Sec has sustained significant damages as a direct and proximate
6 result of Alcon Labs' and Wavelight's infringement of the '926 Patent.

7 48. Femto-Sec will suffer and is suffering irreparable harm from Alcon Labs'
8 and Wavelight's infringement of the '926 Patent. Femto-Sec is entitled to an
9 injunction against Alcon Labs' and Wavelight's continuing infringement of the '926
10 Patent. Unless enjoined, Alcon Labs and Wavelight will continue their infringing
11 conduct.

12 49. Alcon Labs' and Wavelight's infringement of the '926 Patent is
13 exceptional and entitles Femto-Sec to attorneys' fees and costs incurred in prosecuting
14 this action.

15 **DEMAND FOR JURY TRIAL**

16 50. Plaintiff hereby demands a jury trial on all claims, damages and any other
17 issues presented herein that are triable to a jury.

18 **RELIEF REQUESTED**

19 WHEREFORE, Dr. Neev prays that the Court enter judgment as follows:

20 A. That Alcon Labs and Wavelight have infringed and continue to infringe
21 the '199 Patent and that the '199 Patent is not invalid and is enforceable;

22 B. That Alcon Labs and Wavelight have infringed and continue to infringe
23 the '926 Patent and that the '926 Patent is not invalid and is enforceable;

24 C. Awarding Dr. Neev damages adequate to compensate him for Alcon
25 Labs's and Wavelight's infringement of the '199 Patent, in an amount to be
26 determined at trial, but in no event less than a reasonable royalty for the use made of
27 the claimed inventions by them;
28

1 D. Awarding Dr. Neev damages adequate to compensate him for Alcon
2 Labs's and Wavelight's infringement of the '926 Patent, in an amount to be
3 determined at trial, but in no event less than a reasonable royalty for the use made of
4 the claimed inventions by them;

5 E. Awarding a preliminary and permanent injunction restraining and
6 enjoining Alcon Labs and Wavelight, and their officers, agents, servants, employees,
7 attorneys, and any persons in active concert or participation with them who receive
8 actual notice of the order by personal service or otherwise, from any further
9 manufacture, use, sales, offers to sell, or importations of any and all of the products
10 and services identified above;

11 F. Trebling all damages awarded to Dr. Neev under the '199 and '926
12 Patents;

13 G. Finding this case exceptional and awarding to Dr. Neev his reasonable
14 attorneys' fees incurred in prosecuting his claims for patent infringement;

15 H. Costs and interest;

16 I. Such other relief as the Court determines to be just and proper.

17
18 DATED: September 4, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

19 By: /s/ Philip Graves

20 Philip Graves

21 philipg@hbsslaw.com

22 301 N. Lake Ave #203

23 Pasadena, CA 91101

24 Telephone: (213) 330-7147

25 Ivy Arai Tabbara (*pro hac vice*)

26 ivy@hbsslaw.com

27 Barbara Mahoney (*pro hac vice*)

28 barbaram@hbsslaw.com

HAGENS BERMAN SOBOL SHAPIRO LLP

1 1918 8th Avenue, Suite 3300
2 Seattle, WA 98101
3 Telephone: (206) 623-7292
4 Facsimile: (206) 623-0594
5
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DEMAND FOR JURY TRIAL

Femto-Sec requests a jury trial for all issues triable to a jury.

DATED: September 4, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Philip J. Graves

Philip J. Graves (SBN 153441)

philipg@hbsslaw.com

301 North Lake Avenue, Suite 203

Pasadena, CA 91101

Telephone: (213) 330-7150

Facsimile: (213) 330-7152

Ivy Arai Tabbara (*pro hac vice*)

ivy@hbsslaw.com

Barbara Mahoney (*pro hac vice*)

barbaram@hbsslaw.com

HAGENS BERMAN SOBOL SHAPIRO LLP

1918 8th Avenue, Suite 3300

Seattle, WA 98101

Telephone: (206) 623-7292

Facsimile: (206) 623-0594

Counsel for Plaintiff and Counterdefendant
FEMTO-SEC TECH, INC.