IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN ALUMNI RESEARCH FOUNDATION,

OPINION AND ORDER

Plaintiff,

05-C-242-C

v.

XENON PHARMACEUTICALS, INC.,

Defendant.

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This is a civil action for injunctive and declaratory relief and money damages arising out of contracts signed by plaintiff Wisconsin Alumni Research Foundation and Xenon Pharmaceuticals, Inc., covering sponsored research at the University of Wisconsin and a licensing agreement for a joint patent application for inventions derived from the research. Among other allegations, plaintiff alleged that defendant had breached the parties' Exclusive Licensing Agreement in sublicensing the jointly owned patent rights to Novartis Pharma A.G. without informing plaintiff and without making the payments due plaintiff under the agreement.

Jurisdiction is present. Plaintiff is a Wisconsin citizen; defendant is a Canadian corporation with its principal place of business in Vancouver; and more than $75,000 is in dispute. 28 U.S.C. § 1332(a)(2).

The parties raised numerous claims and counterclaims against each other that were decided on the parties' cross motions for partial summary judgment in an order entered on May 3, 2006. The only issue left for trial was that of damages. After three days of trial, the jury returned a verdict in favor of plaintiff in the amount of $1,000,000, representing the jurors' view of how much defendant owed plaintiff for plaintiff's percentage of the license fee Novartis had paid defendant for the sublicense. Judgment was entered on May 25, 2006, in favor of plaintiff, but stayed in an order entered on June 13, 2006, pending resolution of the motions filed by defendant on June 9, 2006 for reconsideration of the court's summary judgment ruling, for judgment as a matter of law and alternatively, for remittitur or a new trial on damages.

In support of the motion for reconsideration of the summary judgment order, defendant contends that it was error for the court to address plaintiff's contention that defendant had violated the parties' exclusive license agreement when it assigned its undivided ownership interest in the parties' joint patent application to Novartis. (To keep things straight: in the May 3, 2006 opinion and order, I held that defendant breached the exclusive license agreement when it *granted a sublicense* of the jointly owned patent

application to Novartis without specifying that the sublicense was to be subject to the termination of the exclusive licensing agreement and without advising plaintiff of the sublicense. I held also that defendant breached the agreement when it *assigned* its undivided ownership interest in the joint patent application. In this motion, defendant challenges only the ruling relating to the assignment.) Defendant is correct when it points out that plaintiff did not raise this argument until it filed its brief in reply on its motion for summary judgment. Defendant had no opportunity to brief the issue and, for that reason, I should not have addressed plaintiff's contention in the May 3 summary judgment order. I will grant the motion for reconsideration and amend the May 3 order to reflect the change in the ruling.

Defendant raises a second issue, that the court erred in declaring that plaintiff could terminate the exclusive license agreement. Again, it is correct. Plaintiff never moved for summary judgment on the question of its right to terminate the agreement. Defendant's motion for reconsideration will be granted on this ground as well.

In support of the motion for judgment as a matter of law, defendant argues that plaintiff failed to adduce sufficient evidence at trial to support the jury's damages verdict. I agree that plaintiff's evidence fell short of proving that defendant's license fee was $15,000,000 and not $4,000,000; I disagree that plaintiff failed to prove that it is entitled to a percentage of the entire cash price paid to defendant for the intellectual property it

licensed to Novartis. Because it is not clear how much money the jury would have awarded to plaintiff had it been considering only the $4,000,000 as the license fee (its award of $1,000,000 was $125,000 less than 7.5% of $15,000,000), it will be necessary to hold a new trial on damages. However, I will first give plaintiff the choice of accepting a remittitur to $300,000.

OPINION

I. MOTION FOR RECONSIDERATION

A. Nature of Motion

Although defendant brought its motion for reconsideration pursuant to Fed. R. Civ. P. 60, it is more appropriately raised under Fed. R. Civ. P. 59(e), which has as its purpose allowing the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings. Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996); Charles v. Daley, 799 F.2d 343, 348 (7th Cir. l986). Rule 60 has a different purpose, of allowing a court to correct a judgment where there has been a "mistake, inadvertence, surprise, or excusable neglect," or "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(1), (2). It is not intended to cover legal errors by the court. Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002) ("A contention that the judge erred with

respect to the materials in the record is not within Rule 60(b)'s scope, else it would be impossible to enforce the time limits for appeal."). See also Wesco Products Co. v. Alloy Automotive Co., 880 F.2d 981, 984 (7th Cir. 1989) (holding that Rule 60 used properly for "changes that implement the result intended by the court at the time the order was entered"' whereas for "changes that alter the original meaning to correct a legal or factual error," the parties "must seek another source of authority to correct the mistake." Thus, '[i]f the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction . . . if the judgment captures the original meaning but is infected by error," Rule 60 is inapplicable.) (citing United States v. Griffin, 782 F.2d 1393, 1396-97 (7th Cir.1986)) (internal citations omitted)).

Because defendant filed this motion within the proper time period for a Rule 59(e) motion, that is, within 10 days after the entry of judgment, I will treat it as having been brought under Rule 59 and not Rule 60. Gleash, 308 F.3d at 761; Bank of California, N.A. v. Arthur Andersen & Co., 709 F.2d 1174, 1176 (7th Cir. 1983) (caption of post-judgment motion is irrelevant; substance controls determination whether it is Rule 59(e) or Rule 60 motion).

B. Assignment to Novartis

In its opening brief in support of its motion for partial summary judgment, dkt. #33,

plaintiff argued that the exclusive license agreement prohibited defendant from licensing its undivided interest in the joint patent application to third parties without also sublicensing plaintiff's interest. In support of its argument, plaintiff wrote:

> Xenon contends that because the WARF/Xenon license [the exclusive license agreement] does not explicitly state in some separate provision that it was not to cut WARF out and only license its own interest in the Licensed Patents in this manner, that it is free to do so. However, when the document is read as a whole, it is obvious that this was not the intent. Rather, as WARF contends, the WARF/Xenon License was intended to cover all Xenon licenses to third parties.
>
> First, specific language in the WARF/Xenon License provides that neither party may assign its undivided interest in the intellectual property without consent of the other. Xenon does not apply any specific legal definition of "assign" in this provision. (PFF 98). Rather, the word means "assign" in its common, ordinary sense. In ordinary terms, to "assign" something is to "transfer" it. *See* Mirriam-Websters [sic] Online Dictionary, www.m-w.com/dictionary/assign. Xenon did "assign" its interest when it granted the "exclusive, worldwide" license to Novartis. Obviously, when one grants a "worldwide, exclusive" right, it transfers some rights. For example, the right to exclude is transferred by an exclusive license. *Rite-Hite*, 56 F.3d at 1551. This provision makes it clear that the parties were not to deal independently with third parties with respect to the jointly owned intellectual property without having some accountability to each other.
>
> Second, that this License Agreement was intended to govern how the joint intellectual property owners would deal with each other in all cases where a third party is licensed by Xenon is obvious by the very existence of the agreement.

Plt.'s Br., dkt. #33, at 30. In its motion for summary judgment, dkt. #32, plaintiff requested relief on seventeen different grounds. A number of these related to defendant's

sublicensing of the jointly owned patents; none concerned an assignment of the joint patent application from defendant to Novartis.

It was only in plaintiff's reply brief, dkt. #50 at 15, that plaintiff argued that "the Novartis Agreement included not only a sublicense of the WARF/Xenon License, *but also legally an impermissible assignment of Xenon's undivided ownership interest in the [joint patent application]*" (emphasis added) because defendant granted to Novartis every right defendant had in the joint patent application. Although plaintiff did allude to the prohibition on assignment provision in the exclusive license agreement in the excerpt of its opening brief reproduced above, it did so in the context of discussing plaintiff's and defendant's business relationship. This allusion was not sufficiently specific to constitute a claim that defendant had effected an assignment of the joint patent application to Novartis when defendant failed to retain any substantial rights in the joint patent application.

Plaintiff's failure to raise this argument until its reply brief deprived defendant of a fair chance to respond to it. Therefore, I will strike that portion of the summary judgment opinion and order, dkt. #147, in which I discussed whether defendant assigned the joint patent application to Novartis, and I will amend the judgment entered on May 25, 2006, to conform to this ruling.

C. Termination of Exclusive License Agreement

In the complaint, plaintiff requested a declaration that defendant had breached the exclusive license agreement and that plaintiff could terminate the agreement. However, as both parties now concede, plaintiff never moved for summary judgment on its right to terminate the agreement. Therefore, it was inappropriate for the court to include the clause "and therefore plaintiff may terminate the agreement" at the end of paragraph 4 of the judgment, dkt. #193, which reads in its entirety, [plaintiff's motion for summary judgment is granted] "on its claim for declaratory judgment that defendant breached the exclusive license agreement and therefore plaintiff may terminate the agreement." The judgment will be amended to strike the clause beginning with "and." However, the error is immaterial because the critical issue before the court was not whether plaintiff could terminate the agreement but whether defendant had breached the agreement. Plaintiff has always had the right to terminate the agreement when the conditions of § 7(C) of the agreement are met:

> If Xenon at any time defaults in the timely payment of any monies due to WARF or the timely submission to WARF of any Development Report, fails to actively pursue the Summary Development Plan, or commits any breach of any other covenant herein contained, and Xenon fails to remedy any such breach or default within ninety (90) days after written notice thereof by WARF, or if Xenon commits any act of bankruptcy, becomes insolvent, is unable to pay its debts as they become due, files a petition under any bankruptcy or insolvency act, or has any such petition filed against it which is not dismissed within sixty (60) days, or offers any component of the Licensed Patents to its creditors, WARF may, at its option, terminate this Agreement by giving notice of termination to Xenon.

Exclusive License Agreement, § 7(C). Plaintiff is correct when it asserts that "the fact that

[plaintiff] has the right to terminate in the event of breach and a failure to cure by [defendant] has never been in dispute in this litigation." Plt.'s Opp. Br., dkt. #212 at 18.

As I explained in an order dated July 18, 2006, dkt. #228, plaintiff brought this court into the dispute over the breach of the agreement. Having done so, plaintiff is bound by the court's decision that a breach occurred. However, plaintiff is wrong in its belief that it may terminate the agreement independently of the court's finding of breach. Therefore, although plaintiff's ability to terminate stems from the agreement itself, when plaintiff filed this lawsuit it hinged its ability to terminate on a finding by the court that defendant breached the agreement. Now that the court has found that defendant breached the agreement, plaintiff is free to trigger the termination provision of the agreement. Even when the court declared by mistake that plaintiff had the right to terminate the agreement, this did not mean that plaintiff could bypass the procedures of § 7(C) and terminate the agreement automatically. The finding meant only that plaintiff was free to send defendant a notice of breach. Plaintiff must afford defendant a 90-day cure period in accordance with § 7(C). If defendant does not cure the breach, plaintiff may terminate the agreement.

It appears that the only communication plaintiff sent defendant after the court determined the breach was a May 17, 2006 letter terminating the agreement. Neither this termination letter nor the purported notices of breach that plaintiff sent defendant *before* the court issued its ruling meet the notice requirement. The notices of breach preceded the

necessary conclusion by the court that a breach had occurred. Plaintiff will have to start again and send defendant proper notice of breach.

II. MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL OR REMITTITUR

A. Plaintiff's Right to a Share of Novartis Sublicense Fee

In the May 3, 2006 decision on the parties' cross motions for summary judgment just discussed, I concluded that (1) defendant sold PPA Compounds to Novartis that constituted "products" under § 4B(i) of the parties' exclusive license agreement, entitling plaintiff to royalties; and (2) defendant owed plaintiff royalties under § 4B(ii) of the agreement because defendant had negotiated a sublicensing agreement with Novartis. The order did not say explicitly that plaintiff had the right to any portion of the fee that Novartis paid defendant for the sublicensing agreement. However, it did say that defendant's failure to pay sublicensing royalties to plaintiff "is a breach of the exclusive license agreement." May 3, 2006, Op. & Order, dkt.#147, at 3. Similar statements appear at pp. 4, 29 and 36. In the order section, I specified that plaintiff's motion for summary judgment was granted on its claims that defendant "owes plaintiff royalties because defendant negotiated a sublicensing agreement with Novartis Pharma AG"; on plaintiff's claim that defendant breached the exclusive license agreement when it granted a sublicense to Novartis; and on plaintiff's claim

that defendant owed it royalties under §§ 4B(i) and (ii) of the exclusive license agreement. (It would have been more accurate to say that defendant owed Novartis a percentage of the licensing fee rather than royalties.)

At the start of trial, plaintiff asked the court to bar defendant from arguing that royalties were not yet due plaintiff under §§ 4B(ii) of the exclusive license agreement or that defendant had not breached the exclusive license agreement by failing to pay the royalties. Plaintiff contended that it was entitled not only to future royalties for product sales by Novartis but to a percentage of the full sublicense fee Novartis paid defendant and that the fee should be valued at $15,000,000, the sum of the $4,000,000 cash purchase price for the intellectual property plus the $11,000,000 that Novartis paid for shares of defendant's stock. Defendant challenged this contention on the ground that a fair reading of § 4B(ii) of the exclusive license agreement showed that defendant's agreement was to pay plaintiff a percentage of royalties or of a sublicense fee *only when the sublicensee had sold products*. According to defendant, this reading was mandated by the clause prefacing § 4B(ii), which reads in full as follows:

> *For all Products sold by Xenon sublicensees*, Xenon shall pay to WARF a percentage of any license fees, milestones, and royalty payments received by Xenon in consideration for the sublicense granted to such sublicensees under Section 2B. The percentage shall remain fixed at a rate of ten percent (10%) for years one (1) and two (2) of this Agreement and seven and one-half percent (7.5%) thereafter until this Agreement is terminated.

(Emphasis added.)

Although this provision is not an exemplar of felicitous drafting, it does not bear the reading that defendant urges. The prefatory clause is surplusage, not restrictive in the manner defendant urges. Reading it as taking effect only after sales of product are made would render the provision largely nonsensical. License fees and milestones are not paid by the sale; they are paid upfront by a licensee or sublicensee for the right to make sales of product in the future. They are distinguishable from royalties, which are generally tied to sales of product and paid after a sale rather than before. E.g., Black's Law Dictionary, 8th ed. at 938, 1356 ("license, *n.* 1. A permission, usu. revocable, to commit some act that would otherwise be unlawfuI"; "royalty, *n.* A payment made to an author or inventor for each copy of a work or article sold under a copyright or patent")

It would make no sense to read the provision as disentitling defendant to a license fee (and thereby relieving it of its obligation to pay a percentage of the fee to plaintiff) until Novartis has made a sale of a product. We know that neither defendant nor Novartis interpreted "license" as not payable until after sales were made, because Novartis paid defendant at least $4,000,000 at the time of its purchase of defendant's intellectual property. I confirm the ruling I made at the start of trial that § 4B(ii) entitles plaintiff to a percentage of any sublicense fee that Novartis paid to defendant for the sublicensing of the parties' jointly owned intellectual property. The next question, and the one on which the

parties focused at trial, is the actual license fee paid for the sublicense.

B. Sublicense Fee

At trial, plaintiff contended that the sublicensing fee paid by Novartis included both the cash fee of $4 million dollars *and* the $11 million that Novartis paid to buy 1,333,333 shares of defendant's preferred stock. It took the position that (1) the joint patent application was the dominant asset transferred to Novartis; (2) the $11,000,000 payment for "stock" was a smokescreen to conceal the real value Novartis attached to the sublicense for the joint patent application; and (3) even if Novartis wanted to buy the stock for its own sake, it paid such a high price that most of it must have been intended as additional consideration under the Xenon/Novartis Collaboration and License Agreement. It appears that the jury adopted plaintiff's position. It was instructed to determine what sum of money, if any, plaintiff was entitled to for defendant's sale of the PPA compounds and second, what sum of money it was entitled to as a percentage of the license fee Novartis paid to defendant. It found that $0 was attributable to the sale of the PPA Compounds and that $1,000,000 was attributable to the sublicense. Therefore, it must have found that the total price of the license fee was slightly less than $15,000,000, because $1,000,000 is only $125,000 less than 7.5% of $15,000,000.

At trial and again in this motion, defendant contends that a price of $4,000,000 is

too high for Novartis's purchase of the joint patent application because the deal was not limited to the PPA Compounds and a sublicense of the parties' joint patent application, but included other assets having nothing to do with any intellectual property in which plaintiff had an interest. These included a license to several other patent applications, including one for a new high through-put assay, a license of Xenon Know-How, and compounds (other than the PPA Compounds) that had been identified though use of plaintiff's high through-put assay. Moreover, defendant challenges plaintiff's assertion that the purchase price of the intellectual property included the $11 million dollars that Novartis paid for defendant's stock. Defendant argues that the verdict cannot stand because plaintiff called no expert witnesses who could assess the value of the PPA Compounds or the sublicense of the joint patent application and the value of those assets in comparison to the value of the others that defendant conveyed to Novartis.

Defendant relies on cases such as Plywood Oshkosh, Inc. v. Van's Realty & Construction of Appleton, Inc., 80 Wis. 2d 26, 31, 257 N.W.2d 847, 849 (1977), and Maslow Cooperage Corp. v. Weeks Pickle Co., 270 Wis. 179, 191, 70 N.W. 2d 577, 583 (1955), for the proposition that evidence introduced at trial must establish sufficient information from which a jury can properly estimate the amount of damages. Defendant is correct in stating that "[t]he claimant generally has the burden of proving by credible evidence to a reasonable certainty his damage, and the amount thereof must be established

at least to a reasonable certainty." Plywood, 80 Wis. 2d at 31, 257 N.W.2d at 849 (citing Naden v. Johnson, 61 Wis. 2d 375, 387, 212 N.W.2d 585, 590 (1973)). However, it is also true that a plaintiff's burden is lessened when the defendant is responsible for the difficulty in proving damages with specificity. See, e.g., Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565 (1931) ("'Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced.'") (quoting Gilbert v. Kennedy, 22 Mich. 117, 130 (1871); see also Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363, 1373 (7th Cir. 1990) (where it was not plaintiff's fault that damages "could not be estimated with precision, the jury was allowed to guess . . . ") (internal citations omitted); Novo Industrial Corp. v. Nissen, 30 Wis. 2d 123, 133, 140 N.W.2d 280, 285 (1966) ("having caused the uncertainty of proof, the contract breacher is precluded from demanding a more precise measure of damages") (citing Schubert v. Midwest Broadcasting Co., 1 Wis. 2d 497, 503 n.17, 85 N.W.2d 449, 452 (1957), 22 Am. Jur. (2d), Damages, p. 42, sec. 23).

Defendant failed to do what was required of it in the exclusive license agreement, which was to provide:

> A full accounting showing how any amounts owing to WARF under Section 4B have been calculated shall be submitted to WARF on the date of each such payment. Such accounting shall be on a per-country and product line, model

> or tradename basis and shall be summarized on the form shown in Appendix C of this Agreement. In the event no payment is owed to WARF, a statement setting forth that fact shall be supplied to WARF.

Exclusive License Agreement, § 4E(iii). It was defendant's duty to properly account for its sales, including the transfer to Novartis under the Collaboration and Licensing Agreement. It was defendant who had all the transferred items in its possession and negotiated the sales price with Novartis and who apparently failed to assign a separate price for each item it transferred. In these circumstances, plaintiff cannot be held to the same standard it would have to meet had defendant disclosed the information as the exclusive license agreement directed.

Defendant offered Novartis a package deal of all its "SCD1 program patented intellectual property" and its unpatented know-how pertaining to the SCD1 program. Plt.'s exh. #44. It did not separate out the value of each of the program items or know-how, and it is unlikely that it could have done so. In this circumstance, it would not be unreasonable for a jury to find that the value of the deal resided in the entire program and not in any separate part of it. I conclude that the jury had sufficient evidence to award plaintiff 7.5% of the full $4,000,000 that Novartis paid in cash for defendant's intellectual property.

The rest of the jury's award is considerably more questionable. I am not persuaded that plaintiff adduced sufficient evidence to support the jury's award of a percentage of the $11,000,000 that Novartis paid for 1,333,333 shares of defendant's preferred stock. In its

effort to show that the $11,000,000 was assigned to the stock purchase when it was really part of the license fee, Plaintiff relied on a Letter of Intent, plt.'s exh. #44, that included a paragraph (5) entitled "Upfront Payment," which read as follows: "$15,000,000 which may consist of a combination of cash and equity investment by Novartis in Xenon." Plaintiff introduced documents showing that the parties chose ultimately to allocate $4,000,000 of the payment to cash and $11,000,000 to a purchase of defendant's equity. It introduced additional evidence that at the time of the stock purchase, defendant had never earned a profit; its stock was closely held; and it did not obligate itself to buy back Novartis's investment at any time. However, plaintiff did not show that the stock purchase was either a total sham or that a purchase price of $11,000,000 for 1,333,333 shares of preferred stock was so far out of line with the reasonable value of the stock as to suggest that defendant was using the sale to "park" a large part of the purchase price for the intellectual property. To make such a showing, plaintiff would have needed expert testimony about the fair market value of defendant's preferred stock as of the date of the stock purchase. It was not enough to argue to the jury that Novartis paid an "inflated price," without providing the jury an evidentiary basis for finding such inflation. Showing that another purchaser paid a lower price for the stock at some later time was not enough to show that the price Novartis paid was inflated at the time of the sale. It is common knowledge that stock prices are subject to sharp declines, especially when the stock in question belongs to a small company hoping to

find an edge in the field of biotechnology. According to the testimony of Karen Corraini, defendant's general counsel, defendant's sale of preferred stock to Novartis at a price per share of $8.25 was in line with a 2001 sale of the same class of shares. In Canadian currency, both sales were for $10.64 a share; however, the 2001 sale was worth $6.85 a share in United States currency because the exchange rate was less favorable to Canadians at the time. With this evidence, a reasonable jury should not have found the price of defendant's stock inflated.

Moreover, a review of the Collaboration and License Agreement executed by defendant and Novartis, plt.'s exh. #47, shows that the two parties expected to work closely together on a number of research projects and product development efforts that would last for a minimum of two years. Such an arrangement provides many valid business reasons for Novartis to take an equity stake in defendant. As a shareholder, it can insure that defendant continues its research in areas that will benefit Novartis and implement the Collaboration and License Agreement; it will be in a position to oversee defendant's operation and learn promptly of business problems and research setbacks; and it can exert influence in the selection of officers of the company. Certainly, the mere fact of buying shares gives rise to no suspicion of "parking" license fees.

The jury might have avoided the error it fell into had it been given an instruction that it could not treat any portion of the $11,000,000 stock purchase price as part of the license

fee for intellectual property unless it first found that the stock purchase price was inflated. It was an error to refuse defendant's request for such an instruction.

I cannot separate the valid amount of damages from the invalid, but I will offer plaintiff a remittitur of $300,000, which is 7.5% of the amount the jury could reasonably have found to be a sublicense fee for the parties' jointly owned intellectual property. If plaintiff declines the remittitur, the case will be scheduled for a new trial on damages.

ORDER

IT IS ORDERED that defendant Xenon Pharmaceutical Inc.'s motion for reconsideration is GRANTED. The judgment, dkt. #193, will be amended to delete paragraphs 2 through 4 and replace them with the following paragraphs:

> (2) on its claim for declaratory judgment that defendant granted a sublicense to Novartis;
>
> (3) on its claim for declaratory judgment that defendant breached the exclusive license agreement by (a) failing to make royalty and license payments due under §§ 4(B)(i) and 4 (B)(ii) of the exclusive license agreement; (b) failing to provide plaintiff with biographical and contact information regarding sublicensee Novartis; and (c) failing to include a statement in the Xenon/Novartis Collaboration and License Agreement that the agreement is subject to termination of the Exclusive License Agreement.

The remaining paragraphs in the judgment will be renumbered as necessary but otherwise

remain unchanged.

If plaintiff Wisconsin Alumni Research Foundation wishes to terminate the Exclusive License Agreement pursuant to § 7(C) of that agreement it must provide defendant notice and give defendant 90 days to cure.

FURTHER, IT IS ORDERED that defendant's motion for a new trial is GRANTED, conditionally. Plaintiff is to advise the court and defendant no later than September 15, 2006, whether it will accept an award of damages reduced to $300,000. If plaintiff chooses not to accept the remittitur, a scheduling conference will be held to determine a date for a new trial on the damages due plaintiff under § 4B(ii) of the exclusive license agreement.

Entered this 25th day of August, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge