

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

OCUSOFT, INC.

Plaintiff,

v.

**WALGREEN CO., and
WALGREENS.COM, INC.
Defendants.**

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CIVIL ACTION NO. 4:17-cv-01037

JURY DEMAND

**PLAINTIFF OCUSOFT, INC.’S ORIGINAL COMPLAINT AND REQUEST FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff OCuSOFT Inc. (“Ocusoft”) files this Original Complaint for preliminary and permanent injunctive relief and damages for false advertising, unfair competition, patent infringement, and violations of Texas law against Defendants Walgreen Co. (“Walgreen”) and Walgreens.com, Inc. (“Walgreens.com”) (collectively, “Walgreens” or “Defendants”). Ocusoft and Defendants are direct competitors in the market for eyelid cleansing pads. As explained in greater detail below, Defendants have violated Ocusoft’s intellectual property rights by making false statements and assertions in interstate commerce and infringing Ocusoft’s patent, U.S. Patent No. 7,951,387. As a result of Defendants’ unlawful conduct, Ocusoft has lost, and continues to lose, valuable market share and sales, and Ocusoft’s reputation as the manufacturer of innovative and quality products has been and continues to be irreparably injured. Ocusoft’s allegations are set forth below in greater detail.

NATURE OF THE CASE

1. This is an action for patent infringement arising under the patent law of the United States, 35 U.S.C. § 101 *et seq.*, for violation of the Lanham Act § 43(a), codified at 15 U.S.C. § 1125(a), and for violation of Texas common law.

PARTIES

2. Plaintiff Ocusoft is a Texas corporation with its corporate headquarters in Rosenberg, Texas.

3. Defendant Walgreen is an Illinois Corporation, with its principal place of business (on information and belief) at 104 Wilmot Road, Deerfield, Illinois.

4. Defendant Walgreens.com is an Illinois Corporation, with its principal place of business (on information and belief) at 108 Wilmot Road, Deerfield, Illinois. On information and belief, Walgreen has authorized Walgreens.com to operate and sell through the website Walgreens.com, and Walgreens.com is responsible for all sales and offers for sale on that website.

JURISDICTION AND VENUE

5. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 1338(a). This Court has supplemental jurisdiction over Ocusoft's state law claims pursuant to 28 U.S.C. § 1367(a).

6. This Court has personal jurisdiction over Walgreen because Walgreen maintains multiple places of business in this judicial district, has continuous and systematic contacts with this district, has committed and continues to commit acts of patent infringement and violations of the Lanham Act in this judicial district, and has harmed and continues to harm Ocusoft in this judicial district by, among other conduct, selling and offering to sell products in this judicial district which infringe Ocusoft's patent rights, and by making false statements and misrepresentations in violation of the Lanham Act § 43(a) in this judicial district.

7. This Court has personal jurisdiction over Walgreens.com because Walgreens.com has done business in this judicial, has continuous and systematic contacts with this district, has committed and continues to commit acts of patent infringement and violations of the Lanham

Act in this judicial district, and has harmed and continues to harm Ocusoft in this judicial district by, among other conduct, offering to sell products in this judicial district which infringe Ocusoft's patent rights, and by making false statements and misrepresentations in violation of the Lanham Act § 43(a) in this judicial district.

8. Venue is proper in the Southern District of Texas and this judicial district pursuant to 28 U.S.C. § § 1391 and 1400 because, among other reasons, Defendants are subject to personal jurisdiction and have committed acts of patent infringement and violations of the Lanham Act § 43(a) in this judicial district.

FACTUAL BACKGROUND

A. History of Ocusoft

9. Ocusoft is a privately held research, development, and supply company specializing in eye and skin care, with its corporate headquarters in Rosenberg, Texas. Ocusoft was formed in 1986, and started with a vision to address the needs of those suffering from ocular surface disease. In 1987, recognizing the need for a convenient and patient friendly product to effectively manage eyelid irritations, Ocusoft introduced the first commercially available eyelid cleanser, OCuSOFT® Lid Scrub®. Prior to 1997, OCuSOFT® Lid Scrub® was available solely from eye care professionals. In that year, Ocusoft made OCuSOFT® Lid Scrub® available through consumer retail outlets for the first time.

10. OCuSOFT® is the #1 doctor recommended brand of eyelid cleansers and remains the preferred distributor of ophthalmic products and supplies by eye care professionals. Ocusoft accomplishes this designation with superior customer service and a highly trained sales force that calls on medical professionals nationwide. With unparalleled commitment, Ocusoft maintains its reputation as one of the most trusted and respected companies on ophthalmology.

11. A pioneer in the industry, Ocusoft introduced OCuSOFT® Lid Scrub® PLUS, the first antibacterial “leave-on” eyelid cleanser formula on the market, in 2006. Together, OCuSOFT® Lid Scrub® and OCuSOFT® Lid Scrub® Plus will be referred to herein as “Ocusoft’s Lid Scrub Products.” Ocusoft also introduced the first topical anesthetic gel, and the first supplement proven to enhance botulinum toxin injections. In 2012, Ocusoft launched OCuSOFT® Baby™, the first and only eyelid and eyelash cleanser for children of all ages. In 2015, Ocusoft launched the next generation OCuSOFT® Lid Scrub® PLUS PLATINUM with antibacterial and anti-inflammatory properties.

12. Ocusoft has invested millions of dollars over the years in researching, developing, and marketing its products to eye care professionals. Each year, Ocusoft provides over 14 million samples to eye care professionals all over the United States. Ocusoft employs a large network of marketing professionals who travel to thousands of offices of individual eye care professionals each year to identify, explain, and promote the usefulness of Ocusoft’s products, including both OCuSOFT® Lid Scrub® and OCuSOFT® Lid Scrub® PLUS. In addition to its efforts to promote its products directly to eye care professionals, Ocusoft also promotes its products through retail channels. In the most recent year for which figures are available, Ocusoft spent over ten million dollars to identify and explain the usefulness of its products to potential customers. As a result, the OCuSOFT® brand has come to signify quality, innovation, and effectiveness in the ophthalmic community and to consumers of ophthalmic products.

B. Ocusoft Lid Scrub Original

13. Due to the introduction of OCuSOFT® Lid Scrub® PLUS, Ocusoft’s original lid scrub product, OCuSOFT® Lid Scrub®, is now marketed as OCuSOFT® Lid Scrub® Original, and is hereafter referred to as “Lid Scrub Original”. The Lid Scrub Original formula comprises the following, in decreasing order of concentration, as listed on the product packaging: Water,

PEG-80 Sorbitan Laurate, Sodium Trideceth Sulfate, Cocamidopropyl Hydroxysultaine, PEG-150 Distearate, Sodium Lauroamphoacetate, Sodium Laureth-13 Carboxylate, Sodium Chloride, 1-2 Hexanediol, Caprylyl Glycol, Polyaminopropyl Biguanide, Potassium Sorbate, PEG-15 Cocopolyamine. Ocusoft sells Lid Scrub Original in interstate commerce across the country.

C. Ocusoft Lid Scrub Plus

14. The formula for OCuSOFT® Lid Scrub® PLUS (hereafter referred to as “Lid Scrub Plus”) comprises the following, in decreasing order of concentration, as listed on the product packaging: Modified Ringer’s Solution (a solution of water, sodium chloride, potassium chloride, and calcium chloride), POE-80 Sorbitan Monolaurate, Methyl Gluceth-20, PEG-120 Methyl Glucose Dioleate, Decyl Polyglucosid, 1,2-Hexanediol and 1,2-Octanediol, Cocoamphodiacetate Disodium, d-panthenol, Polyaminopropyl Biguanide. Ocusoft sells Lid Scrub Plus in interstate commerce across the country.

D. U.S. Patent No. 7,951, 387

15. Ocusoft also owns U. S. Patent No. 7,951,387 B2 (the “387 Patent”), titled “Eyelid Scrub Composition,” which was filed on November 3, 2006 and issued on May 31, 2011. The ‘387 Patent is attached as Exhibit 1. Claim 1 is representative:

An eyelid scrub composition comprising: polyhexamethylene biguanide; 1,2-hexanediol; 1,2-octanediol; about 60 wt. % to about 98 wt. % modified Ringer's solution: and a surfactant solution comprising: one or more amphoteric surfactants present in an amount effective to control a pH of the composition to within a desired pH range, the one or more amphoteric surfactants comprising: one or more pH compensating surfactants comprising about 0.1 wt. % to about 25 wt. % cocoamphodiacetate disodium, the surfactant solution further comprising: a mixture of one or more foam-producing surfactants comprising at least one of: about 0.1 wt. % to about 10 wt. % polyoxyethylene-80 sorbitan monolaurate: and about 0.2 wt. % to about 10 wt. % decyl polyglucoside, wherein an amount and a type of each of the pH compensating surfactants is determined based on a measured pH of the mixture of foam-producing surfactants.

E. Walgreens Private Label Products

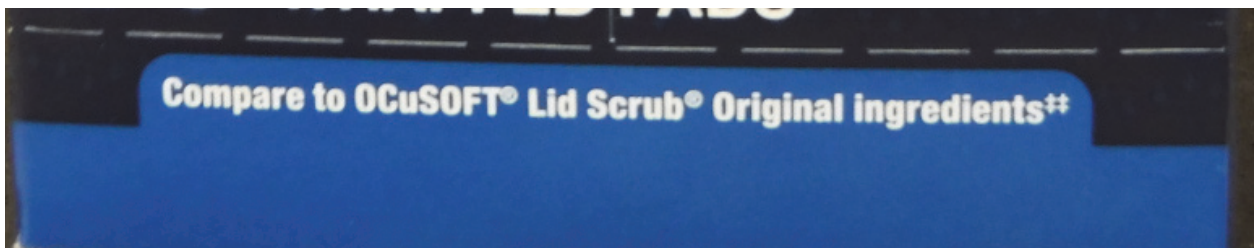
16. Walgreens sells multiple products for eyelid cleansing which compete with Ocusoft's Lid Scrub Original and Lid Scrub Plus. Walgreens sells at least one version of a product called "Cleansing Eyelid Pads," and two versions of a product called "Cleansing Eyelid Pads Rinse-free formula." Collectively, these products will be referred to as "Walgreens' Private Label Products." Walgreens typically and routinely places Walgreens' Private Label Products immediately next to Ocusoft's products, as shown here:



F. Walgreens Original Pads

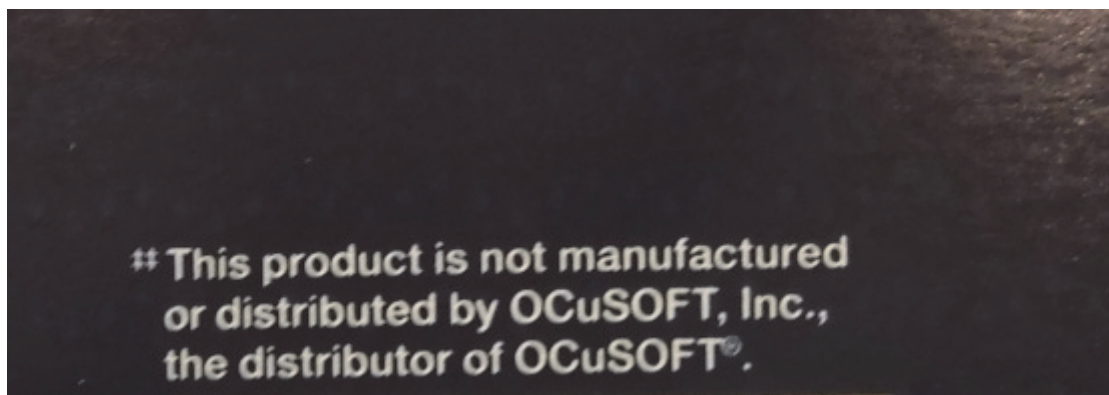
17. Walgreens' Cleansing Eyelid Pads will hereafter be referred to as "Walgreens Original Pads".

18. The product packaging for Walgreens Original Pads displays prominently, in bold script, on the front of the packaging the statement, "Compare to OcuSOFT® Lid Scrub® Original Ingredients," as shown in the image below:



19. As can be seen in the foregoing image, immediately following these statements in a small superscript are two "double dagger" symbols, to wit: "**". On another, different, face of

Walgreen's product packaging from the one containing this statement, the following image appears:



20. Walgreens Original Pads, according to the product packaging, contains the following ingredients: Water, PEG-80 Sorbitan Laurate, Sodium Trideceth Sulfate, Cocamidopropyl Hydroxysultaine, PEG-150 Distearate, Sodium Lauroamphoacetate, Sodium Laureth-13 Carboxylate, Quaternium-15, PEG-15 Cocopolyamine, Citric Acid, Sodium Chloride.

21. The following table compares the ingredient lists of Ocusoft's Lid Scrub Original formula and the formula used in Walgreens Original Pads:

Lid Scrub Original	Walgreens Original Pads
Water	Water
PEG-80 Sorbitan Laurate	PEG-80 Sorbitan Laurate
Sodium Trideceth Sulfate	Sodium Trideceth Sulfate
Cocamidopropyl Hydroxysultaine	Cocamidopropyl Hydroxysultaine
PEG-150 Distearate	PEG-150 Distearate
Sodium Lauroamphoacetate	Sodium Lauroamphoacetate
Sodium Laureth-13 Carboxylate	Sodium Laureth-13 Carboxylate

Sodium Chloride	Sodium Chloride.
1-2 Hexanediol	[Not present]
Caprylyl Glycol	[Not present]
Polyaminopropyl Biguanide	[Not present]
Potassium Sorbate	[Not present]
PEG-15 Cocopolyamine	PEG-15 Cocopolyamine
[Not present]	Citric Acid
[Not present]	Quaternium-15

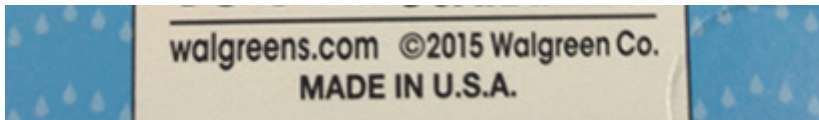
22. As can be seen by comparing these ingredients with Ocusoft's Lid Scrub Original formula, the formula used in Walgreens Original Pads differs from that of Ocusoft's Lid Scrub Original formula. Specifically, Walgreens Original Pads include Quaternium-15 and Citric Acid, neither of which are included in the formula for Ocusoft's Lid Scrub Original. Furthermore, Walgreens Original Pads do not include 1-2 Hexanediol, Caprylyl Glycol, Polyaminopropyl Biguanide, or Potassium Sorbate, which are included in the composition of Ocusoft's Lid Scrub Original. Furthermore, on information and belief, even those ingredients found in both Walgreens Original Pads and Ocusoft's Lid Scrub Original are not present in each product in the same percentages or proportions. Thus, in no way can the ingredients for Walgreens Original Pads and Ocusoft's Lid Scrub Original be considered to be the same or "comparable," in terms of formulation or effectiveness.

G. Walgreens' Rinse-Free Pads

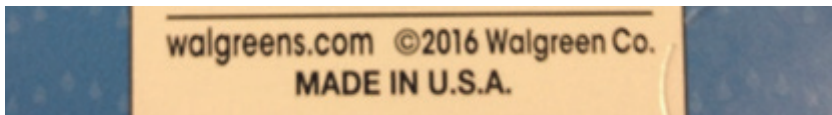
23. As previously mentioned, Walgreens also sells at least two versions of a product called "Cleansing Eyelid Pads Rinse-free formula." The first version discussed includes on the

product packaging a copyright notice which states “©2015 Walgreen Co.”, as shown in the first image below, and is referred to hereafter as “Walgreens 2015 Rinse-Free Pads.” The second version discussed includes on the product packaging a copyright notice which states “©2016 Walgreen Co.”, as shown in the second image below, and is referred to hereafter as “Walgreens 2016 Rinse-Free Pads.”

2015:

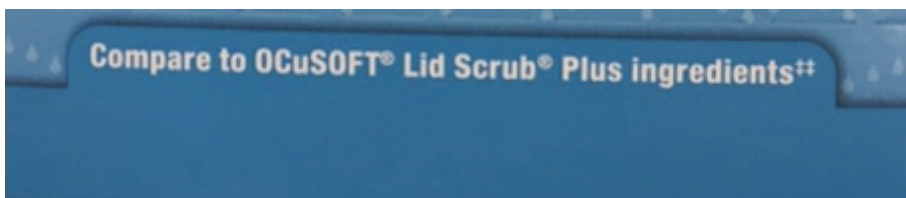


2016:

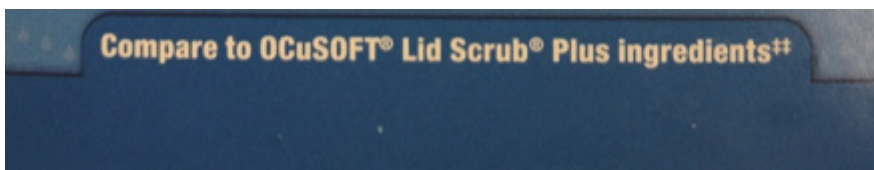


24. The product packaging for both Walgreens 2015 Rinse-Free Pads and Walgreens 2016 Rinse-Free Pads displays prominently, in bold script, on the front of the packaging the statement, “Compare to OCuSOFT® Lid Scrub® Plus ingredients,” as shown in the images below:

2015:

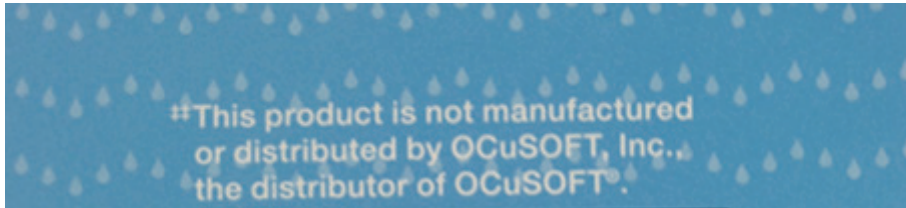


2016:

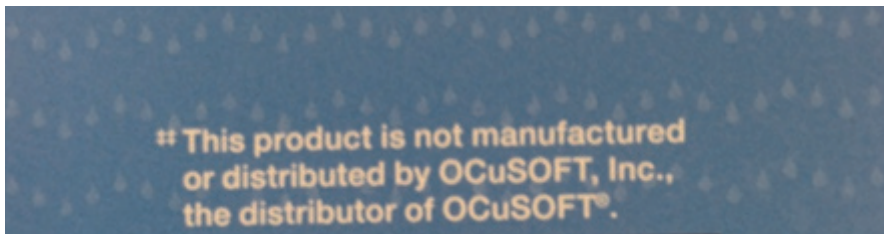


25. As can be seen in the foregoing image, immediately following these statements in a small superscript are two “double dagger” symbols, to wit: “^{‡‡}”. On another, different, face of Walgreen’s product packaging from the one containing this statement, the following images appear:

2015:



2016:



1. Formulation of Walgreens 2015 Rinse-Free Pads

26. Walgreens 2015 Rinse-Free Pads, according to the product packaging, contains the following ingredients: Water, PEG-80 Sorbitan Laurate, Methyl Gluceth-20, Panthenol, Potassium Chloride, Calcium Chloride, Sodium Chloride, Sodium Bicarbonate, Disodium Cocoamphodiacetate, Propylene Glycol, Decyl Glucoside, PEG-120 Methyl Glucose Trioleate, Propanediol, Polyaminopropyl Biguanide, 1,2 Hexanediol, Caprylyl Glycol.

27. The following table lists the ingredients of Walgreens 2015 Rinse-Free Pads:

Walgreens 2015 Rinse-Free Pads
Water
Sodium Chloride

Walgreens 2015 Rinse-Free Pads
Potassium Chloride
Calcium Chloride
PEG-80 Sorbitan Laurate
Methyl Gluceth-20
Decyl Glucoside
1,2 Hexanediol
Disodium Cocoamphodiacetate
Panthenol
Polyaminopropyl Biguanide
Sodium Bicarbonate
Propylene Glycol
PEG-120 Methyl Glucose Trioleate
Caprylyl Glycol
Propanediol

28. The Walgreens 2015 Rinse-Free Pads formula infringes Ocusoft's '387 Patent. Specifically, Walgreens 2015 Rinse-Free Pads infringe at least claims 1, 4, 7, and 8 of the '387 patent because the formula contains claimed ingredients polyhexamethylene biguanide (which is pseudonymous with polyaminopropyl biuguanide), 1,2-hexanediol, 1-2-octanediol, modified Ringer's solution (which is sodium chloride, potassium chloride, calcium chloride, and water), and a surfactant solution including cocoamphodiacetate disodium and polyoxyethylene-80 sorbitan monolaurate (a synonym of PEG-80 Sorbitan Laurate) and decyl polyglucoside (a

synonym of decyl glucoside), methyl gluceth-20, panthenol, and PEG-120 Methyl Glucose Trioleate (a foam stabilizer).

2. Formulation of Walgreens 2016 Rinse-Free Pads

29. Walgreens 2016 Rinse-Free Pads, according to the product packaging, contains the following ingredients: Water, PEG-80 Sorbitan Monooleate, Methyl Gluceth-20, Sodium Chloride, Potassium Chloride, Calcium Chloride, Sodium Bicarbonate, Panthenol, Decyl Glucoside, Polyglyceryl-10 Caprylate/Caprate, Coco Glucoside, Glyceryl Oleate, PEG-120 Methyl Glucose Trioleate, Propanediol, Citric Acid, 1,2 Hexanediol, Sodium Benzoate, Caprylyl Glycol, Polyaminopropyl Biguanide.

30. The following table compares the ingredient lists of Ocusoft's Lid Scrub Plus and the formula used in Walgreens 2016 Rinse-Free Pads:

Lid Scrub Plus	Walgreens 2016 Rinse-Free Pads
Water (included in Modified Ringer's Solution)	Water
Sodium Chloride (included in Modified Ringer's Solution)	Sodium Chloride
Potassium Chloride (included in Modified Ringer's Solution)	Potassium Chloride
Calcium chloride (included in Modified Ringer's Solution)	Calcium Chloride
POE-80 Sorbitan Monolaurate	[Not Present]
Methyl Gluceth-20	Methyl Gluceth-20
PEG-120 Methyl Glucose Dioleate	[Not Present]
Decyl Polyglucoside	Decyl Glucoside
1,2-Hexanediol	1,2 Hexanediol

Lid Scrub Plus	Walgreens 2016 Rinse-Free Pads
1,2-Octanediol (a.k.a. Caprylyl Glycol)	Caprylyl Glycol
Cocoamphodiacetate Disodium	[Not Present]
d-panthenol	Panthenol
Polyaminopropyl Biguanide	Polyaminopropyl Biguanide
[Not Present]	PEG-80 Sorbitan Monooleate
[Not Present]	Sodium Bicarbonate
[Not Present]	Polyglyceryl-10 Caprylate/Caprate
[Not Present]	Coco Glucoside
[Not Present]	Glyceryl Oleate
[Not Present]	PEG-120 Methyl Glucose Trioleate
[Not Present]	Propanediol
[Not Present]	Citric Acid
[Not Present]	Sodium Benzoate
[Not Present]	

31. As can be seen by comparing these ingredients with Ocusoft's Lid Scrub Plus, the formula used in Walgreens 2016 Rinse-Free Pads differs from that of Ocusoft's Lid Scrub Plus formula. Walgreens 2016 Rinse-Free Pads include ingredients not found in the formula for Ocusoft's Lid Scrub Plus, specifically, PEG-80 Sorbitan Monooleate, Polyglyceryl-10 Caprylate/Caprate, Coco Glucoside, Glyceryl Oleate, PEG-120 Methyl Glucose Trioleate, Propanediol, Citric acid, and Sodium Benzoate. Furthermore, Walgreens 2016 Rinse-Free Pads do not include POE-80 Sorbitan Monolaurate, PEG-120 Methyl Glucose Dioleate, or Cocamphodiacetate Disodium, which are included in the composition of Ocusoft's Lid Scrub

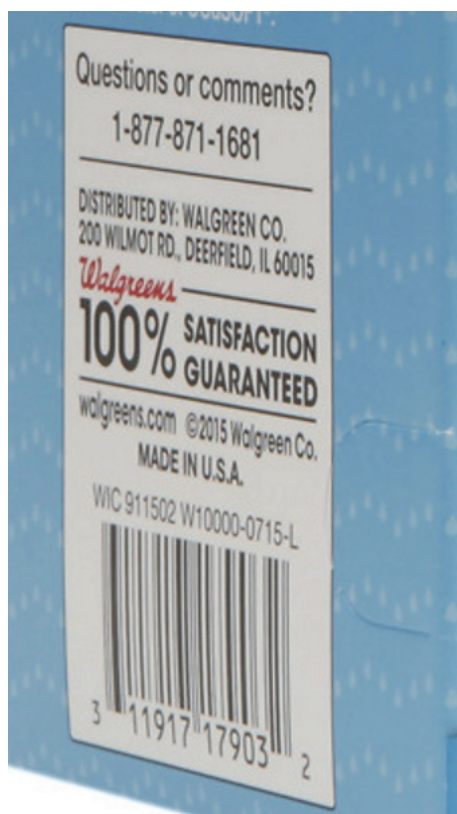
Plus. Furthermore, on information and belief, even those ingredients found in both Walgreens 2016 Rinse-Free Pads and Ocusoft's Lid Scrub Plus are not present in each product in the same percentages or proportions. Thus, in no way can the ingredients for Walgreens 2016 Rinse-Free Pads and Ocusoft's Lid Scrub Plus be considered to be the same or "comparable," in terms of formulation or effectiveness.

H. Walgreens' Passing Off of its Private Label Products as Identical to Ocusoft's Lid Scrub Products

32. In addition to the false statements found on Walgreens' products, Walgreen store employees have falsely promoted Walgreens' Private Label Products as being identical to, or the same as, Ocusoft's Lid Scrub Products. Walgreen store employees have falsely stated to potential customers that Walgreens' Private Label Products are made in the same factory as Ocusoft's Lid Scrub Products, and/or that Walgreens' Private Label Products have the same formulas as Ocusoft's Lids Scrub Products. *See* Declaration of J. David Cabello ¶¶ 3-6 and Declaration of Marilyn Parker ¶¶ 3-6, both attached to OcuSoft's Motion for Temporary Restraining order and Preliminary Injunction ("Motion"), filed concurrently with OcuSoft's Original Complaint. Moreover, Walgreen has failed to properly train its employees regarding the differences between Walgreens' Private Label Products and Ocusoft's Lid Scrub Products, and failed to properly train its employees to refrain from falsely stating that the products are the same, identical, made in the same factory or by the same manufacturer.


I. Walgreens.com's Offers to Sell Walgreens 2015 Rinse-Free Pads and Substitution of Walgreens 2016 Rinse-Free Pads

33. As of the filing of this Complaint, customers seeking "eyelid pads" on Walgreens.com's website, www.walgreens.com, are presented with, among other choices, an image of Walgreens 2015 Rinse-Free Pads:



When this product is selected for purchase, the same image appears:

Shopping Cart

	Walgreens Cleansing Eyelid Pads 30.00 ea Weight: 0.20LBS \$13.99	Save for later Remove
		Qty <input type="text" value="1"/>
		\$13.99

Delivery options
Arrives in 1-3 business days*

☒ Ship one time
 ☐ Ship every

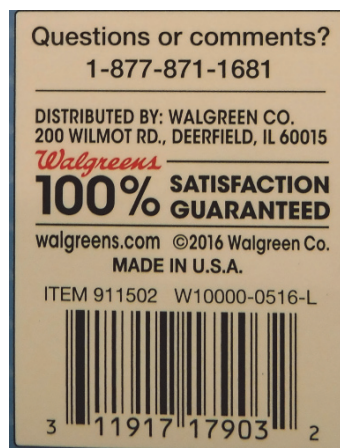
[?](#)

The ingredients listed on the website for this product are also those of Walgreens 2015 Rinse-Free Pads:

Description	Shipping	Warnings	Ingredients	Reviews
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Ingredients: Water, PEG-80 Sorbitan Laurate, Methyl Gluceth-20, Panthenol, Potassium Chloride, Calcium Chloride, Sodium Chloride, Sodium Bicarbonate, Disodium Cocoamphodiacetate, Propylene Glycol, Decyl Glucoside, PEG-120 Methyl Glucose Trioleate, Propanediol, Polyaminopropyl Biguanide, 1,2 Hexanediol, Caprylyl Glycol

34. However, on information and belief, those that place such an order for Walgreens 2015 Rinse-Free Pads receive, instead, Walgreens 2016 Rinse-Free Pads, as shown in the images below, which as previously noted have a different formulation. *See* Declaration of Sherri Brunner ¶¶ 3-6, attached to OcuSoft's Motion.



INGREDIENTS:

Water, PEG-80 Sorbitan Monooleate, Methyl Gluceth-20, Sodium Chloride, Potassium Chloride, Calcium Chloride, Sodium Bicarbonate, Panthenol, Decyl Glucoside, Polyglyceryl-10 Caprylate/Caprates, Coco Glucoside, Glyceryl Oleate, PEG-120 Methyl Glucose Trioleate, Propanediol, Citric Acid, 1,2 Hexanediol, Sodium Benzoate, Caprylyl Glycol, Polyaminopropyl Biguanide.

35. Furthermore, on information and belief, as late as January 2017, Walgreen was still selling Walgreens 2015 Rinse-Free Pads at least in located in Las Vegas, Nevada and Houston, Texas.

J. Walgreens' Products Cause Discomfort and Burning

36. On information and belief, users of Walgreens Original Pads and Walgreens 2016 Rinse-Free Pads have experienced discomfort, including burning sensations, after using these products. Users of Ocusoft's Original Lid Scrub and Lid Scrub Plus do not experience such discomfort.

K. Walgreens.com Falsely Advertises Ocusoft's' Lid Scrub Prices and the Savings from Purchasing Walgreens' Private Label Products

37. As of at least March 30, 2017, Walgreen's falsely advertises Ocusoft's' Lid Scrub prices, and the savings associated with purchasing the Walgreens Cleaning Pads. More specifically, at least at the Walgreens store located at 2221 Fulton St., Houston, Texas 77009, Walgreens advertises the Ocusoft Lid Scrub Products and Walgreen Private Label Products as shown in the image below:



See Declaration of Stephen Zinda ¶¶ 3-4, attached to OcuSoft’s Motion. As clearly shown above, Walgreens advertises the Ocusoft Lid Scrub Original as selling for \$18.99 on the “red tag” immediately beneath Walgreens Cleansing Pads. However, the Ocusoft Lid Scrub Original product is *actually* being offered for sale at a price of \$15.49, as shown to the immediate left of the Walgreens Cleansing Pads. Thus, Walgreens falsely advertises the price of the Ocusoft Lid Scrub Original products by overstating the price by \$3.50 (or 18.43%).

38. Moreover, Walgreens falsely advertises the consumer savings of buying the Walgreens’ Cleansing Pads instead of the Ocusoft Lid Scrub Original when it claims “You save \$7” on the red tag. The real savings would be \$3.50 (i.e., half of the advertising savings).

L. Settlement Agreement Between Ocusoft and Diamond Wipes International

39. In February of 2016, Ocusoft and Diamond Wipes International Inc., the maker of Walgreens' Private Label Products, entered into a confidential agreement (the "Settlement Agreement") regarding Ocusoft's trade dress and the manufacture of certain products which Ocusoft accused of infringing the '387 Patent. The Settlement Agreement relates to the appropriate trade dress, not including any of the statements referenced on the packaging of Walgreens' Private Label Products, and the sale of products that infringe the '387 Patent. On information and belief, any products with a formulation which would otherwise be an infringement of the '387 Patent were to be sold by Walgreens no later than September 30, 2016. Accordingly, any sales or sales offers of any of Walgreens' Private Label Products having the a formula claimed in the '387 Patent since September 30, 2016 are infringements of the '387 Patent which are not affected in any way by the Settlement Agreement.

COUNT ONE: FALSE ADVERTISING – 15 U.S.C § 1125(A)

40. Ocusoft repeats the allegations in the foregoing paragraphs as if fully set forth herein.

41. Walgreens' assertions on the packages of Walgreens Original Pads and Walgreens 2016 Rinse-Free Pads that those products "Compare to" Ocusoft's Original Lid Scrub and Lid Scrub Plus are false and misleading statements because they suggest that these products have the same or equivalent formulation as Ocusoft's Lid Scrub Products, and/or the same or equivalent efficacy as Ocusoft's Lid Scrub Products.

42. More specifically, Walgreens' assertion on the package (and as reproduced on the website of Walgreens.com) of Walgreens Original Pads that they "Compare to OCuSOFT® Lid Scrub® Original Ingredients," is false and misleading because it suggests that Walgreens Original

Pads have the same or equivalent formulation as Ocusoft's Lid Scrub Original, and/or the same or equivalent efficacy as Ocusoft's Lid Scrub Original, when in fact they do not.

43. Furthermore, Walgreens' assertion on the package (and as reproduced on the website of Walgreens.com) of Walgreens 2016 Rinse-Free Pads that they "Compare to OCUSOFT® Lid Scrub® Plus ingredients," is false and misleading because it suggests that Walgreens 2016 Rinse-Free Pads have the same or equivalent formulation as Ocusoft's Lid Scrub Plus, and/or the same or equivalent efficacy as Ocusoft's Lid Scrub Plus, when in fact they do not.

44. Furthermore, Walgreens' misrepresentations on its red tags regarding the sale price of Ocusoft's Lid Scrub Products and the savings associated with purchasing Walgreens Private Label products over the Lid Scrub products are literally false.

45. Furthermore, Walgreens' oral misrepresentations that the Ocusoft Lid Scrub Products and the Walgreens Private Label Products are "the same" is literally false, and deceives consumers into believing those products are the same, when in fact they are not.

46. Furthermore, Walgreens representation on the Walgreens Original Pads packaging that the product is "non-irritating" is literally false. On information and belief, users of Walgreens Private Label Products experience discomfort, including but not limited to burning sensations, after use. Users of Ocusoft's Lid Scrub Products do not experience similar discomfort.

47. Furthermore, Walgreens.com offers to sell Walgreens 2015 Rinse-Free Pads on its website www.walgreens.com. Walgreens 2015 Rinse-Free Pads share certain ingredients with Ocusoft's Lid Scrub Plus, such as Cocoamphodiacetate Disodium. However, users of the site who order and pay for Walgreens 2015 Rinse-Free Pads are shipped, instead, Walgreens 2016

Rinse-Free Pads, which do not share the same ingredients with Ocusoft's Lid Scrub Plus.

Walgreens.com's advertisement of Walgreens 2015 Rinse-Free Pads is literally false given that customers ordering that product are shipped Walgreens 2016 Rinse-Free Pads instead.

48. On information and belief, because of differences in the ingredients, such customers do not have the same experience or results using Walgreens 2016 Rinse-Free Pads that they would have had they used a product containing ingredients such as Cocoamphodiacetate Disodium. However, due to Walgreens.com's false statements in purporting to provide such a product, such users would be under the false impression that products containing ingredients such as Cocoamphodiacetate Disodium are not effective or satisfactory. These potential customers of Ocusoft's Lid Scrub Plus which contains such ingredients would thus be dissuaded from purchasing and trying Ocusoft's Lid Scrub Plus on that basis.

49. Walgreens.com's statements on its website that it was selling Walgreens 2015 Rinse Free Pads and supply in lieu of that product of Walgreens 2016 Rinse Free Pads either deceived, or has the capacity to deceive, mislead, and/or confuse a substantial segment of potential consumers, because they misrepresent the nature, characteristics, and qualities of both Walgreens' 2015 Rinse Free Pads, Walgreens' 2016 Rinse Free Pads, and Ocusoft's Lid Scrub Plus.

50. Each of Walgreens' statements, including on its packaging and website, either deceived, or has the capacity to deceive, mislead, and/or confuse a substantial segment of potential consumers, because they each misrepresent the nature, characteristics, and qualities of both Walgreens' Private Label Products and Ocusoft's Lid Scrub Original and Lid Scrub Plus.

51. Moreover, users of Walgreens Original Pads and Walgreens 2016 Rinse-Free Pads that have experienced discomfort or burning sensations after use are likely deceived or

confused regarding the likelihood of similar experiences were they to use Ocusoft's Lid Scrub Products, causing damage to the reputation of Ocusoft's Lid Scrub Products.

52. Each of Walgreens' statements, including on its packaging and website, are material, in that they are likely to influence purchasing decisions, and on information and belief have influenced purchasing decisions of consumers. Specifically, on information and belief, customers will likely purchase Walgreens' Private Label Products based on Walgreens' false and misleading statements based on the mistaken belief that they have the same or equivalent formula or efficacy as Ocusoft's Lid Scrub Products. Furthermore, on information and belief, potential Ocusoft customers dissatisfied with Walgreens' Private Label Products will not purchase Ocusoft's Lid Scrub Products based on Walgreens' false statements, incorrectly believing that Walgreens' Private Label Products and Ocusoft's Lid Scrub Products have the same or equivalent formulation or efficacy. Also, on information and belief, customers have determined that they will not purchase Ocusoft's Lids Scrub Products, based on the discomfort and burning experienced as a result of using Walgreens Private Label Products, and the mistaken belief based on Walgreens' false statements that Walgreens' Private Label Products have the same formula or efficacy as Ocusoft's Lid Scrub Products. Moreover, on information and belief, consumers have determined, based on their use of Walgreens 2016 Rinse Free Pads that they will not use products having similar ingredients to Walgreens 2015 Rinse Free Pads, such as Ocusoft's Lid Scrub Plus, due to Walgreens' false statements on its packaging and website.

53. Walgreens' Private Label Products, as well as each of the false and misleading statements included on its packaging and website, are sold and made in interstate commerce. Walgreens.com's false and misleading statements, including on its website and its supply of a

different product than the one ordered by its customers, are also made and done in interstate commerce.

54. Walgreens' actions constitute false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

55. Walgreens' actions have caused, and will continue to cause, irreparable harm to Ocusoft, and will continue to so harm Ocusoft unless preliminarily and permanently enjoined.

56. Furthermore, Walgreens is realizing profit and will continue to realize a profit from its unlawful actions. Walgreens' unlawful actions are causing and will cause Ocusoft monetary damage in amounts to be determined at trial.

COUNT TWO: UNFAIR COMPETITION– 15 U.S.C § 1125(A)

57. Ocusoft repeats the allegations in the foregoing paragraphs as if fully set forth herein.

58. Walgreen has, through its store employees, falsely stated in connection with the sale of Walgreens Private Label Products that they are identical to or the same as Ocusoft's Lid Scrub Products, and/or that Walgreens Private Label Products are made in the same factory as Ocusoft's Lid Scrub Products, and/or that Walgreens Private Label Products have the same formulas as Ocusoft's Lid Scrub Products. These statements are all false and misleading designations of origin and false and misleading descriptions of fact or representations of facts.

59. Walgreen's false statements create a likelihood of confusion among the potential purchasers of Ocusoft's Lid Scrub Products, including at least a likelihood of confusion regarding the similarity and differences between Walgreens' Private Label Products and Ocusoft's Lid Scrub Products, their formulas, and their source, and/or the affiliation, connection or association of Ocusoft with the manufacturer of Walgreens' Private Label Products, and/or the origin, sponsorship, or approval of Walgreens' Private Label Products by Ocusoft.

60. Walgreen further makes literally false statements regarding the price of Ocusoft's Lid Scrub Products and the savings associated with purchasing Walgreens' Private Label Products over those Lid Scrub Products. These false statements confuse and deceive consumers into believing that there is a greater price difference between the Ocusoft Lid Scrub Products and the Walgreens' Private Label products.

61. Walgreen's false statements have a substantial effect on interstate commerce because they have the potential to affect the relative sales of Walgreens' Private Label Products and Ocusoft's Lid Scrub Products, all of which are sold in interstate commerce.

62. Walgreen's actions constitute unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

63. Walgreen's actions have caused, and will continue to cause, irreparable harm to Ocusoft, and will continue to so harm Ocusoft unless preliminarily and permanently enjoined.

64. Furthermore, Walgreen is realizing profit and will continue to realize a profit from its unlawful actions. Walgreen's unlawful actions are causing and will cause Ocusoft monetary damage in amounts to be determined at trial.

COUNT THREE: PATENT INFRINGEMENT

65. Ocusoft repeats the allegations in the foregoing paragraphs as if fully set forth herein.

66. Walgreens.com has been and continues to infringe the '387 Patent by offering to sell Walgreens 2015 Rinse-Free Pads. Walgreens 2015 Rinse-Free Pads infringe one or more valid claims of the '387 Patent. Moreover, Walgreen has been and, on information and belief, continues to infringe the '387 Patent by selling and offering to sell Walgreens 2015 Rinse-Free Pads. Walgreens has not been authorized or licensed by Ocusoft to sell such pads beyond certain

amounts included in the Settlement Agreement. Walgreens continued sales and/or offers to sell Walgreens 2015 Rinse-Free Pads are outside the scope of the Settlement Agreement.

67. Walgreens had notice of the '387 Patent at least as of the date of the November 2015. Walgreens also had notice that Walgreens 2015 Rinse Free Pads infringed one or more claims of the '387 Patent. Accordingly, Walgreens' infringement has been willful and deliberate.

68. As a result of Walgreens' infringing activities, Ocusoft has suffered actual damages in an amount to be determined at trial. Additionally, as a result of the willful and deliberate nature of Walgreens' infringing activities, Ocusoft is entitled to a trebling of its actual damages and is entitled to recover its attorneys' fees and costs incurred in prosecution this action pursuant to 35 U.S.C. §§ 284–85.

69. Moreover, Walgreens' acts of infringement have caused irreparable harm to Ocusoft for which there is no adequate remedy at law, and will continue to so harm Ocusoft unless preliminarily and permanently enjoined. Ocusoft and Walgreens are direct competitors in the market for eyelid cleansing products, and Walgreens' continuing infringement causes Ocusoft to lose market share and further harms Ocusoft's reputation in the market as the innovator of the patented formula.

COUNT FOUR: UNFAIR COMPETITION UNDER TEXAS LAW

70. Ocusoft repeats the allegations in the foregoing paragraphs as if fully set forth herein.

71. Walgreens' conduct amounts to palming off of Walgreens Private Label Products as Ocusoft's Lid Scrub Products which constitutes unfair competition under Texas law.

72. Walgreens' actions have caused, and will continue to cause, irreparable harm to Ocusoft, and will continue to so harm Ocusoft unless preliminarily and permanently enjoined.

73. Furthermore, Walgreens is realizing profit and will continue to realize a profit from its unlawful actions. Walgreens' unlawful actions are causing and will cause Ocusoft monetary damage in amounts to be determined at trial.

COUNT FIVE: DILUTION OF GOOD WILL

74. Ocusoft repeats the allegations in the foregoing paragraphs as if fully set forth herein.

75. Walgreens' false assertions on the packages of each of its Private Label Products that those products "Compare to" Ocusoft's Original Lid Scrub and Lid Scrub Plus confuse or are likely to confuse potential customers, causing them to believe that Walgreens Private Label Products and Ocusoft's Lid Scrub Products are the same or identical in formulation or efficacy.

76. Walgreen's false assertions regarding the source of, and similarities between the formulas and efficacies of, Walgreens Private Label Products and Ocusoft's Lid Scrub Products are also likely to confuse or mislead customers into believing that the products are the same in source, formulation, and/or efficacy.

77. On information and belief, customers who purchase Walgreens Private Label Products and do not have a positive experience will not purchase Ocusoft's Lid Scrub Products, believing Walgreens' false assertions that they are the same as Walgreens Private Label Products in source, formulation, or efficacy.

78. Walgreens' false statements accordingly diminish the goodwill associated with Ocusoft's Lid Scrub Products, and potentially other products carrying the Ocusoft® brand.

79. Walgreens' conduct amounts to dilution of good will which constitutes unfair competition under Texas law.

80. Walgreens' actions have caused, and will continue to cause, irreparable harm to Ocusoft, and will continue to so harm Ocusoft unless preliminarily and permanently enjoined.

81. Furthermore, Walgreens is realizing profit and will continue to realize a profit from its unlawful actions. Walgreens' unlawful actions are causing and will cause Ocusoft monetary damage in amounts to be determined at trial.

COUNT SIX: MISAPPROPRIATION OF GOODWILL

82. Ocusoft repeats the allegations in the foregoing paragraphs as if fully set forth herein.

83. Walgreens' false assertions on the packages of each of its Private Label Products that those products "Compare to" Ocusoft's Original Lid Scrub and Lid Scrub Plus confuse or are likely to confuse potential customers, causing them to believe that Walgreens Private Label Products and Ocusoft's Lid Scrub Products are the same or identical in formulation or efficacy.

84. Walgreen's false assertions regarding the source of, and similarities between the formulas and efficacies of, Walgreens Private Label Products and Ocusoft's Lid Scrub Products are also likely to confuse or mislead customers into believing that the products are the same in source, formulation, and/or efficacy.

85. By using Ocusoft's name, as well as telling potential customers that Walgreens Private Label Products "Compare to" Ocusoft's Lid Scrub Products, Walgreens is misappropriating Ocusoft's good will, which was earned through the significant expenditure of labor, skill, and money.

86. Walgreens' conduct amounts to misappropriation of good will which constitutes unfair competition under Texas law.

87. Walgreens' actions have caused, and will continue to cause, irreparable harm to Ocusoft, and will continue to so harm Ocusoft unless preliminarily and permanently enjoined.

88. Furthermore, Walgreens is realizing profit and will continue to realize a profit from its unlawful actions. Walgreens' unlawful actions are causing and will cause Ocusoft monetary damage in amounts to be determined at trial.

COUNT SEVEN: UNJUST ENRICHMENT

89. Ocusoft repeats the allegations in the foregoing paragraphs as if fully set forth herein.

90. Walgreens' conduct in making false assertions on the packages of each of its Private Label Products that those products "Compare to" Ocusoft's Original Lid Scrub and Lid Scrub Plus, and repetition of such false assertions on www.walgreens.com, have caused and likely will continue to cause customers and potential customers to purchase Walgreens Private Label Products instead of Ocusoft's Lid Scrub Products.

91. As a result of Walgreens' false assertions and diversion of potential customers from Ocusoft's Lid Scrub Products to Walgreens Private Label Products, Walgreens has been unjustly enriched, to Ocusoft's loss. There is no justification for Walgreens unjust enrichment.

92. Walgreens' actions have caused, and will continue to cause, irreparable harm to Ocusoft, and will continue to so harm Ocusoft unless preliminarily and permanently enjoined. Furthermore, there is no available remedy at law sufficient to make Ocusoft whole. Accordingly, Ocusoft is entitled to restitution from Walgreens for the unjust benefits Walgreens has received as a result of its conduct.

JURY DEMAND

93. Ocusoft hereby demands that all issues so triable be determined by a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Ocusoft prays for judgment and seeks relief against Defendants Walgreen and Walgreens.com as follows:

(a) For a judgment that Defendants have committed false advertising and/or unfair competition under § 43(a) of the Lanham Act;

(b) For a judgment that Defendants have committed unfair competition, dilution of good will, and/or misappropriation of good will under Texas law;

(c) For a judgment that one or more claims of the '387 Patent has been and continues to be infringed by Defendants;

(d) A temporary restraining order enjoining Defendants, and their agents, servants, officers, directors, employees, and persons or entities acting in concert with Defendants, from false advertising including the literally false statements that Walgreens' Private Label Products are identical to, or the same as, Ocusoft's Lid Scrub Products or are made in the same factory, and from offering to sell Walgreens 2015 Rinse-Free Pads and substituting Walgreens 2016 Rinse-Free Pads;

(e) An award of a preliminary and permanent injunctions enjoining Defendants, and their agents, servants, officers, directors, employees, and persons or entities acting in concert with Defendants, from further conduct constituting false advertising and/or unfair competition under § 43(a) of the Lanham Act, and/or unfair competition, dilution of good will, or misappropriation of good will under Texas law;

(f) An award of a preliminary and permanent injunctions enjoining Defendants, and their agents, servants, officers, directors, employees, and persons or entities acting in concert with Defendants, from infringing directly or indirectly, inducing others to infringe, and/or contributing to the infringement of the '387 patent.

(g) For a judgment and an award of all damages sustained by Ocusoft as the result of Defendants' unlawful conduct, including supplemental damages for any continuing post-verdict infringement up until entry of the final judgment, with an accounting as needed;

(h) For a judgment that Defendants have been unjustly enriched to Ocusoft's detriment and that Ocusoft is entitled to restitution of the benefits Defendants have received due to their unlawful and unjustified conduct;

(i) For a judgment and an award of enhanced damages for willful infringement of the '387 patent;

(j) For a judgment that this is an exceptional case and an award of attorneys' fees pursuant to 35 U.S.C. § 285;

(k) For a judgment that this is an exceptional case and an award of attorneys' fees pursuant to 15 U.S.C. § 1117(a);

(l) For an accounting of Defendants' profits derived from its illegal acts;

(m) For a judgment and an award of all interest and costs; and

(n) For a judgment and an award of such other and further relief as the Court may deem just and proper.

April 5, 2017

/s/ J. David Cabello

J. David Cabello

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**ATTORNEYS FOR
PLAINTIFF OCUSOFT,
INC.**

Certificate of Service

The undersigned certifies that on April 5, 2017, counsel for Ocusoft initiated service of the foregoing document by process server on:

- Prentice Hall Corporation System registered agent of Walgreen Co., 211 E. 7th Street, Suite 620 Austin, TX 78701-3218
- Illinois Corporation Service Company, registered agent of Walgreens.com, Inc., 801 Adlai Stevenson Drive Springfield, IL 62703

An executed proof of service will be filed with the Court promptly upon receipt of such executed proof of service. The undersigned further certifies that, upon issuance of a summons by the Clerk of this Court, the undersigned shall immediately initiate service of process of the foregoing document by process server on the same entities set forth above. An executed proof of service will be filed with the Court promptly upon execution.

The undersigned further certifies that it has initiated hand-delivery of the aforementioned document on the following individuals:

- Mr. Adhi Dhar, President of Walgreens.com, Inc., 108 Wilmot Rd, Deerfield 60015
- Mr. Alexander W. Gourlay, President/CEO of Walgreens Co., 300 Wilmot Rd, Deerfield, IL 60015
- Ms. Elana Kraus, Senior Vice President and General Counsel, 200 Wilmot Rd, Deerfield, IL 60015.

/s/ Stephen D. Zinda
Stephen D. Zinda