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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ALFRED E. MANN FOUNDATION FOR SCIENTIFIC RESEARCH, *et al.*,

Plaintiffs,

v.

COCHLEAR CORPORATION, *et al.*,

Defendants.

AND RELATED COUNTERCLAIMS.

Case No. CV 07-08108 FMO (SHx)

[PROPOSED] THIRD AMENDED SPECIAL VERDICT FORM

Hon. Fernando M. Olguin

Trial: Jan. 14, 2014
Time: 9:00 a.m.
Place: Ctrm 22, 5th Floor

We, the jury, unanimously find as follows:

I. United States Patent No. 5,609,616 ("the '616 patent")

A. Infringement of Claim 1

1. Have plaintiffs proven, by a preponderance of the evidence, that defendants directly infringe claim 1 of the '616 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

2. Have plaintiffs proven, by a preponderance of the evidence, that defendants directly infringe claim 1 of the '616 patent under the doctrine of equivalence by making, using, selling, offering for sale or importing into the USA any of the accused products? [1]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and		

[1] Delete if the Court does not allow the Jury to consider.

CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

3. **Have plaintiffs proven, by a preponderance of the evidence, that a third party uses any of the Cochlear Defendants' accused products to directly infringe claim 1 of the '616 patent?** [2]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants. (skip to Question B. 1 below)

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

4. **Have plaintiffs proven, by a preponderance of the evidence, that defendants induced the third party to infringe claim 1 of the '616 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?** [3]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		

[2] Delete if the Court does not allow the Jury to consider.
[3] Delete if the Court does not allow the Jury to consider.

Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

5. **Have plaintiffs proven, by a preponderance of the evidence, that defendants contributed to the infringement by another of claim 1 of the '616 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?** [4]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

B. Infringement of Claim 10

1. **Have plaintiffs proven, by a preponderance of the evidence, that defendants directly infringe claim 10 of the '616 patent by making,**

[4] Delete if the Court does not allow the Jury to consider.

using, selling, offering for sale or importing into the USA any of the accused products? [5]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

2. **Have plaintiffs proven, by a preponderance of the evidence, that defendants directly infringe claim 10 of the '616 patent under the doctrine of equivalence by making, using, selling, offering for sale or importing into the USA any of the accused products?** [6]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

[5] Delete if the Court does not allow the Jury to consider.
[6] Delete if the Court does not allow the Jury to consider.

3. **Have plaintiffs proven, by a preponderance of the evidence, that a third party uses any of the Cochlear Defendants' accused products to directly infringe claim 10 of the '616 patent?**

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants. (skip to Question C. 1 below)

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

4. **Have plaintiffs proven, by a preponderance of the evidence, that defendants induced others to infringe claim 10 of the '616 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?**

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

5. **Have plaintiffs proven, by a preponderance of the evidence, that defendants contributed to the infringement by another of claim 10 of**

the '616 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

C. Validity

1. **Have defendants proven, by clear and convincing evidence, that claim 10 of the '616 patent is invalid due to anticipation?**

Checking "NO" below indicates a finding for plaintiffs.
Checking "YES" below indicates a finding for defendants.

Claim	YES	NO
10		

2. **Have defendants proven, by clear and convincing evidence, that any asserted claim of the '616 patent is invalid due to obviousness?**

Checking "NO" below indicates a finding for plaintiffs.
Checking "YES" below indicates a finding for defendants.

Claim	YES	NO
1		
10		

D. Inequitable Conduct

1. **Have defendants proven, by a preponderance of the evidence, that the inventors and/or patent attorney withheld from the U.S. Patent and Trademark Office prior art that was material to the prosecution of the '616 patent?**

Checking "NO" below indicates a finding for plaintiffs.
Checking "YES" below indicates a finding for defendants.

YES	NO

2. **Have defendants proven, by clear and convincing evidence, that the inventors and/or patent attorney that prosecuted the application for the '616 patent intentionally withheld the prior art in an attempt to deceive the U.S. Patent and Trademark Office?**

Checking "NO" below indicates a finding for plaintiffs.
Checking "YES" below indicates a finding for defendants.

YES	NO

II. United States Patent No. 5,938,691 ("the '691 patent")

A. Infringement of Claim 6

1. **Have plaintiffs proven, by a preponderance of the evidence, that defendants directly infringe claim 6 of the '691 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?**

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

2. **Have plaintiffs proven, by a preponderance of the evidence, that defendants directly infringe claim 6 of the '691 patent under the doctrine of equivalence by making, using, selling, offering for sale or importing into the USA any of the accused products?** [7]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

[7] Delete if the Court does not allow the Jury to consider.

3. Have plaintiffs proven, by a preponderance of the evidence, that a third party uses any of the Cochlear Defendants' accused products to directly infringe claim 6 of the '691 patent? [8]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants. (skip to Question B. 1 below)

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

4. Have plaintiffs proven, by a preponderance of the evidence, that defendants induced others to infringe claim 6 of the '616 patent by making, using, selling, offering for sale or importing into the USA any of the accused products? [9]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		

[8] Delete if the Court does not allow the Jury to consider.
[9] Delete if the Court does not allow the Jury to consider.

Custom Sound software		

5. **Have plaintiffs proven, by a preponderance of the evidence, that defendants contributed to the infringement by another of claim 6 of the '691 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?** [10]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

B. Infringement of Claim 7

1. **Have plaintiffs proven, by a preponderance of the evidence, that defendants directly literally infringe claim 7 of the '691 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?**

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		

[10] Delete if the Court does not allow the Jury to consider.

Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

2. Have plaintiffs proven, by a preponderance of the evidence, that defendants directly infringe claim 7 of the '691 patent under the doctrine of equivalence by making, using, selling, offering for sale or importing into the USA any of the accused products? [11]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

3. Have plaintiffs proven, by a preponderance of the evidence, that a third party uses any of the Cochlear Defendants' accused products to directly infringe claim 7 of the '691 patent? [12]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants. (skip to Question III A. 1 below)

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		

[11] Delete if the Court does not allow the Jury to consider.
[12] Delete if the Court does not allow the Jury to consider.

Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

4. **Have plaintiffs proven, by a preponderance of the evidence, that defendants induced others to infringe claim 7 of the '691 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?** [13]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

5. **Have plaintiffs proven, by a preponderance of the evidence, that defendants contributed to the infringement by another of claim 7 of the '616 patent by making, using, selling, offering for sale or importing into the USA any of the accused products?** [14]

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

PRODUCT	YES	NO
Nucleus 24 (CI24 series) cochlear implants		
Nucleus Freedom (CI24RE series and		

[13] Delete if the Court does not allow the Jury to consider.
[14] Delete if the Court does not allow the Jury to consider.

CI422) cochlear implants		
Nucleus 5 (CI500 series) cochlear implants		
Sprint (SP5) sound processors		
Freedom (SP12) sound processors		
Nucleus 5 (SP15) sound processors		
WinDPS software		
Custom Sound software		

C. Validity

1. Have defendants proven, by clear and convincing evidence, that claim 6 of the '691 patent is invalid due to anticipation?

Checking "NO" below indicates a finding for plaintiffs.
Checking "YES" below indicates a finding for defendants.

Claim	YES	NO
6		

2. Have defendants proven, by clear and convincing evidence, that any asserted claim of the '691 patent is invalid due to obviousness?

Checking "NO" below indicates a finding for plaintiffs.
Checking "YES" below indicates a finding for defendants.

Claim	YES	NO
6		
7		

III. Damages

A. Notice and Marking

1. **If you find that defendants have infringed a valid claim of the '616 patent, when did plaintiffs give defendants notice of the alleged infringement?**

_____[Date]

2. **If you find that defendants have infringed a valid claim of the '691 patent, when did plaintiffs give defendants notice of the alleged infringement?**

_____[Date]

B. Reasonable Royalty

1. **If you find that defendants have infringed a valid claim of either the '616 patent or the '691 patent, what is the reasonable royalty rate (if any) that defendants should pay to plaintiffs based on the making, using, selling, offering for sale or importing into the USA any of the accused products?**

PRODUCT	Rate, if any
Nucleus 24 (CI24 series) cochlear implants	
Nucleus Freedom (CI24RE series and CI422) cochlear implants	
Nucleus 5 (CI500 series) cochlear implants	
Sprint (SP5) sound processors	
Freedom (SP12) sound processors	
Nucleus 5 (SP15) sound processors	
WinDPS software	
Custom Sound software	

2. If you find that defendants have infringed a valid claim of either the '616 patent or the '691 patent, what are the total damages that defendants should pay to plaintiffs based on the making, using, selling, offering for sale or importing into the USA any of the accused products?

PRODUCT	Total Damages, if any	Date range for damages, if any	
Nucleus 24 (CI24 series) cochlear implants		`616 patent:	`691 patent:
Nucleus Freedom (CI24RE series and CI422) cochlear implants		`616 patent:	`691 patent:
Nucleus 5 (CI500 series) cochlear implants		`616 patent:	`691 patent:
Sprint (SP5) sound processors		`616 patent:	`691 patent:
Freedom (SP12) sound processors		`616 patent:	`691 patent:
Nucleus 5 (SP15) sound processors		`616 patent:	`691 patent:

WinDPS software		`616 patent:	`691 patent:
Custom Sound software		`616 patent:	`691 patent:

C. Willfulness (answer only if you found infringement of a valid claim)

1. Did the Foundation prove, by clear and convincing evidence, that the defendants failed to raise any substantial question of whether the infringed patent is not infringed, invalid or, as to the '616 patent, that the inventors and/or patent attorney that prosecuted the application for the '616 patent engaged in inequitable conduct?

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants (*and you should skip down to the end below*).

YES	NO

2. Did the Foundation prove, by clear and convincing evidence, that the defendants knew or should have known that their actions constituted infringement of a valid and enforcible patent?

Checking "YES" below indicates a finding for plaintiffs.
Checking "NO" below indicates a finding for defendants.

YES	NO

Dated: January 15, 2014

Respectfully submitted,

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By /s/ Scott R. Miller
SCOTT R. MILLER
Defendants and Counterclaimants
COCHLEAR LIMITED and COCHLEAR AMERICAS