19-1201

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALFRED E. MANN FOUNDATION FOR SCIENTIFIC RESEARCH,
ADVANCED BIONICS, LLC,

Plaintiffs-Appellees,

v.

COCHLEAR CORPORATION, COCHLEAR LTD.,

Defendants-Appellants.

Appeal from the United States District Court for the Central District of California, No. 2:07-cv-08108-FMO-SH, District Judge Fernando M. Olguin.

PETITION FOR REHEARING EN BANC

J. Michael Jakes
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April 15, 2020

CERTIFICATE OF INTEREST

Counsel for Defendants-Appellants Cochlear Corporation (n/k/a Cochlear Americas) and Cochlear Ltd. certify the following:

1. The full name of every party represented by us is:

Cochlear Corporation (n/k/a Cochlear Americas)
Cochlear Ltd.

2. The name of the real party in interest (not including any party identified in Question 3) represented by us is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by us are:

Cochlear Ltd.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this Court) are:

Bruce G. Chapman, Laura M. Burson, Scott R. Miller,
Manuel C. Nelson, Dennis J. Smith, Bradley C. Graveline,
Manish K. Mehta
SHEPPARD MULLIN RICHTER & HAMPTON LLC

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& DUNNER LLP

5. The title and number of any cases known to counsel to be pending in this or any other court or agency that may directly affect or be directly affected by this Court's decision in the pending appeal are:

None

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to at least the following decision of the Supreme Court of the United States and the precedents of this Court:

Garretson v. Clark, 111 U.S. 120 (1884);

Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201 (Fed. Cir. 2014);

Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301 (Fed. Cir. 2009);

ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 860 (Fed. Cir. 2010);

Riles v. Shell Expl. & Prod. Co., 298 F.3d 1302 (Fed. Cir. 2002).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1. Whether the "book of wisdom" permits a party seeking damages for patent infringement to rely on an unforeseeable stock price six years after the hypothetical negotiation date to grossly inflate the royalty rate, and to ignore an actual stock valuation that existed at the time of the hypothetical negotiation, which would have resulted in a much lower royalty rate.

2. Whether apportionment can be achieved through a license agreement where a damages expert relies *solely* on out-of-court, conclusory conversations with employees who apparently said, without personal knowledge or any investigation, that the asserted patents provided *all the value* of the license agreement, and where the expert declined to consider that the agreement covered other patents, patent

applications, and institutional "know-how" that *the plaintiffs' own witnesses* admitted were commercially valuable.

/s/ J. Michael Jakes
J. Michael Jakes

ATTORNEY OF RECORD FOR DEFENDANTS-APPELLANTS
COCHLEAR CORPORATION AND COCHLEAR LTD.

INTRODUCTION

The Supreme Court has required apportionment in patent cases for over 130 years. Yet this Court allowed a $268 million damages award to stand that had *no apportionment*. And it did so through a Rule 36 affirmance without comment. As a result, the district court's opinion, *Alfred E. Mann Found. for Sci. Research v. Cochlear Corp.*, 2018 WL 6190604, 2018 U.S. Dist. LEXIS 223877 (C.D. Cal. Nov. 4, 2018), which this Court tacitly approved, now serves as a roadmap for other patent owners to skirt the law and present inflated damage requests to juries without apportioning.

The plaintiffs used two improper levers to grossly inflate their damages request, both of which violated Supreme Court and this Court's precedent. First, they relied on a license agreement that covered thirteen patents, two patent applications, and certain "know-how." While this agreement included the two patents at issue, it also covered other technologies that *the plaintiffs' own witnesses admitted were commercially valuable*. Rather than valuing these other technologies and carving them out of the damages analysis, the plaintiffs' expert ignored them completely and instead relied solely on out-of-court, conclusory conversations with the plaintiffs' employees. Those employees, who never testified at trial, apparently told the expert, without having any personal knowledge or doing any investigation, that the two asserted patents provided *all the value* of the license agreement.

The plaintiffs then compounded this error by violating the "book of wisdom." They picked an unforeseeable stock price from six years after the hypothetical negotiation date to inflate the royalty rate even more, instead of an actual stock valuation that existed at the time of the negotiation, which would have resulted in a much lower royalty rate.

This type of damages analysis does not come close to meeting the apportionment required under Supreme Court or this Court's precedent. En banc review is necessary to realign this case with the governing law and correct the injustice of upholding a damage award that grossly exceeds the value of the patented technology. If left in place, the Court's ruling will allow other patent owners to avoid apportionment and drive up patent damages through blatant misapplications of license agreements and stock values.

BACKGROUND

The technology at issue in this appeal involves cochlear implants and specifically, the communication that occurs between the implant inside the patient's head and the external processor positioned behind the patient's ear. "Forward telemetry" is when the external processor wirelessly transmits information (e.g., processed speech signals) to the implanted component. Appx1299; Appx1276. "Back telemetry" is when the implanted component wirelessly transmits information in the reverse direction back to the external processor, which allows for feedback on whether the implanted component is working properly. Appx1299.

The plaintiffs, Alfred E. Mann Foundation for Scientific Research ("AMF") and Advanced Bionics, LLC ("AB"), did not invent back telemetry. In the 1980s, Cochlear, which had already been a market leader in the cochlear implant field, worked with University of Melbourne researcher Hugh McDermott to develop a cochlear implant with back telemetry, which was implanted in a patient in 1988. Appx1674-1683; Appx3973-3986(2:44-52, 8:13-18); Appx3991-3997; Appx4062-4071. This work predated the earliest priority dates of the two patents asserted in this case: U.S. Patent Nos. 5,609,616 and 5,938,691.

The '616 and '691 patents have different scopes. Claims 1 and 10 of the '616 patent—the two remaining claims at issue in this appeal—require using back telemetry to *externally display* values associated with the implanted components (a physician can view these values during surgery or checkups and confirm that the implant is working properly). Appx289; Appx287-288(32:34-33:22). The examiner allowed the claims in the '616 patent because of this external display requirement, and AMF relied on this limitation to preserve the patent's validity. Appx4542-4543; Appx4494. Claims 6 and 7 of the '691 patent, which are now invalid, were much broader. While they could include manual operations such as those described above, they also covered *automated* cochlear implant embodiments where the system is under microprocessor control during everyday operation (e.g., automated self-tests performed during initialization and voltage regulation/power conservation measures that allowed for increased efficiency). Appx273-275(3:24-8:52); Appx279(15:15-22); Appx282(22:30-36); Appx284-287(26:31-32:30).

At trial, the plaintiff's damages expert, Cate Elsten, selected a royalty rate of 7.5% and applied it to the '691 and '616 patents together, despite their differences in scope. Appx1609-1610(23:21-24:16). Ms. Elsten based her royalty rate primarily on a 1999 license agreement between the plaintiffs AMF and AB where AMF granted exclusive rights to AB in thirteen patents, two patent applications, and "know-how." Appx3883-3900; Appx2098-2102; Appx1566(126:8-11). This license grant included the '691 and '616 patents. Appx3898-3900. In return, AB agreed to pay AMF a 2-3% royalty rate on product sales plus one million shares of AB stock. Appx1568(128:4-10); Appx3886.

Ms. Elsten confined her analysis to the '616 and '691 patents. She did not consider or value the thirteen other patents and applications, or the know-how. Appx1566-1567(126:22-127:20); Appx1614-1615(28:16-29:6). She "assumed" the '691 and '616 patents drove the royalty rate all by themselves because certain AB and AMF employees—none of whom had personal knowledge or testified at trial—apparently told her so. Appx1566-1567(126:8-127:20); Appx1614-1615(28:24-29:6); Appx1628-1631(42:5-45:15).

Regarding the stock, Ms. Elsten discarded a stock valuation that existed near the hypothetical negotiation date in favor of a stock price from *six years later*. Appx1569-1570(129:14-130:18). The stock's value by then had been inflated by Boston Scientific's interest in acquiring AB, which was not only unforeseeable at the time of the hypothetical negotiation, but *unexpected*. Appx1176-1177(73:19-74:10). After conducting these flawed analyses, Ms. Elsten concluded that the AB-AMF agreement supported a royalty rate range of 4.6-8.8% for the '691 and '616 patents. Appx1569-1570(129:14-130:18); Appx1577-1578(137:24-138:16).

Ms. Elsten also compared various profit values arising after the hypothetical negotiation date, Appx1578-1594, and summarily analyzed the *Georgia-Pacific* factors, Appx1594-1610, but she ultimately moored her royalty rate to the AMF-AB license agreement. Appx1604-1606(18:24-20:7) (discarding rates associated with the profit comparison analysis because they exceeded the 8.8% upper value of the AB-AMF agreement). Ms. Elsten settled on a 7.5% royalty rate and applied it to a damages base of over $1.8 billion, which was the entire revenue attributed to the accused products as a whole. Appx1609-1610(23:21-24:16). This flawed analysis resulted in the jury's $134 million damages award. Appx002.

After the jury trial, the district court held that claim 1 of the '616 patent and claims 6 and 7 of the '616 patent were invalid for indefiniteness, leaving only claim 10 of the '616 patent. The district court granted a new damages trial noting that such is the "normal rule." Appx422-429; Appx445-446. The court also granted Cochlear's motion for JMOL of no willful infringement. Appx441-442. In moving for a new trial on damages, Cochlear specifically challenged Ms. Elsten's flawed analyses on the stock value and the AB-AMF license agreement. Appx4621-4628; Appx445-446.

In the 2016 appeal, this Court affirmed the judgment of invalidity for claims 6 and 7 of the '691 patent but reversed on claim 1 of the '616 patent. *Alfred E. Mann Found. for Sci. Research v. Cochlear Corp.*, 841 F.3d 1334, 1344-45 (Fed. Cir. 2016). The Court also vacated and remanded the district court's determination of no willful infringement because of *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1934 (2016), which issued during the pendency of the appeal. *Id.* at 1346-48. The case proceeded back to district court with only two of the four patent claims remaining: claims 1 and 10 of the '616 patent.

On remand, the district court reversed itself and reinstated the damages award, finding the verdict form allowed the jury to award damages based on "either" the '616 patent "or" the '691 patent, and that Cochlear waived its right to challenge damages by agreeing to the verdict form. Appx016-025. The court then reversed itself a second time by reinstating the jury verdict of willful infringement, despite previously relying on the *same evidentiary record* to conclude that Cochlear had no subjective belief of infringement. Appx044-050. The court then *doubled* the

$134 million damages award, erroneously basing this enhancement in part on Cochlear's filing of a reexamination request that it was fully authorized to make under statute. Appx050-069 (erroneously characterizing Cochlear's reexamination request as "litigation misconduct"). The district court entered judgment in the amount of $268,057,078. Appx002.

In this appeal, Cochlear raised the failure to apportion, including the improper stock valuation and the AB-AMF license agreement, as well as the violation of the entire market value rule by calculating a damages base by using the sales value of the accused products as a whole, without proving the requisite demand for doing so. Cochlear Opening Br. 27-50; Cochlear Reply Br. 2-23. AMF and AB responded with several waiver arguments based on the jury verdict form and the fact that Cochlear's expert, like Ms. Elsten, calculated damages by relying on the value of the accused products as a whole. AMF Br. 18-26, 48-51. None of these waiver arguments, however, applies to the stock and AB-AMF license issues that Cochlear raises in this en banc petition. Cochlear Reply Br. 5-6, 11-16.

ARGUMENT

The Supreme Court has required apportionment in patent cases for over 130 years. *Garretson v. Clark*, 111 U.S. 120 (1884). A patentee "must *in every case* give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features." *Id.*

at 121 (emphasis added). This Court has likewise recognized that the *Garretson* apportionment rule ensures a patentee receives compensation only for what its patented invention adds to the accused products. *See Mentor Graphics Corp. v. EVE-USA, Inc.*, 870 F.3d 1298, 1300-01 (Fed. Cir. 2017) (Dyk, J., dissenting from denial of rehearing en banc) ("For over a century, it has been established by both the decisions of the Supreme Court and this court that . . . reasonable royalties for patent infringement must be apportioned between patented and unpatented features."). This panel here failed to follow *Garretson* and allowed a $268 million damages award to stand that had *no apportionment*.

The plaintiffs' expert based her supposed apportionment analysis on the AB-AMF agreement, which she could have relied on if done properly. Instead, she attributed the entire value of the agreement to the two asserted patents without considering or valuing the numerous other patents, patent applications, and know-how covered by the agreement. She then compounded this error and turned the "book of wisdom" into the "book of speculation" by cherry-picking an unforeseen stock price from six years after the hypothetical negotiation date to further inflate the royalty rate, instead of an actual stock valuation that existed at the time of the negotiation.

This type of analysis does not constitute apportionment under the Supreme Court's or this Court's precedent and does not support the $268 million verdict that the panel erroneously affirmed. It is inconsistent with not only *Garretson*, but also this Court's precedent requiring that an expert asserting comparable licenses "must account for . . . distinguishing facts when invoking them to value the patented invention," including that the licenses "cover more patents than are at issue." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1227 (Fed. Cir. 2014).

En banc review is necessary to correct this injustice and realign this case with the governing law. By placing its stamp of approval on the district court's legally flawed damages analysis, *Alfred E. Mann Found. for Sci. Research v. Cochlear Corp.*, 2018 WL 6190604, 2018 U.S. Dist. LEXIS 223877 (C.D. Cal. Nov. 4, 2018), the panel's Rule 36 affirmance will only invite other plaintiffs to follow the same playbook and drive up patent damage awards by flouting this Court's and the Supreme Court's precedents on apportionment.

I. The Panel Violated Apportionment Precedent by Endorsing a Damages Award that Captured the Value of Licensed Features Not Covered by the Asserted Patents

There can be no dispute that the 1999 AB-AMF agreement drove Ms. Elsten's selection of the royalty rate. *See, e.g.*, Appx1566(126:8-11). Her analysis of this agreement, however, in no way amounted to the legally required apportionment. It starts with the incorrect assumption that the '616 and '691 patents provided all the value for the agreement. Appx1566-1567(126:25-127:15); Appx1614-1615(28:24-29:6); Appx1629-1630(43:22-44:8). This cannot be true because the agreement granted rights in thirteen other patents and applications, many of which covered important and valuable cochlear implant designs besides back telemetry *that the plaintiffs' own witnesses admitted were commercially valuable*. Appx3898-3900; Cochlear Opening Br. 32-35; Cochlear Reply Br. 11-14.

For example, U.S. Application No. 08/447,455, which is covered by the agreement, discloses special circuitry for controlling current flow to the electrodes implanted inside the patient. AMF admitted at trial that the way the implanted electrodes stimulate the patient contributes to the success of the product in the marketplace. Appx1274-1275. U.S. Patent No. 4,991,582 is directed to a hermetic, or airtight, seal for the implant, which AMF told the jury was an important feature for keeping fluids out. Appx1271-1272; Appx1297-1298. So important, in fact, that AMF devoted an entire design team to developing it. Appx1297-1298. Next, U.S. Patent No. 5,443,493 covers a tool used for implanting the electrodes into the cochlea. AMF testified that proper electrode placement was critical to the operability of a cochlear implant and contributed to the product's success in the market. Appx1274-1275; Appx1237. None of these features relate to back-telemetry, and it is undisputed that they all have commercial value. Moreover, AMF marked its products with every patent mentioned in the 1999 AB-AMF agreement, including those described above, which confirms their commercial value. Appx4130.

Ms. Elsten also failed to value the "know-how" that AMF transferred to AB through the 1999 agreement, which covered "technology," "trade secrets," "scientific knowledge" such as "experimental results," and employees who developed AMF's technology. Appx3884-3885; Appx2100. A letter exchanged between AMF and AB in 2003 shows that, after the parties entered into their agreement in 1999, Alfred Mann (founder of AMF) accused AB of failing to pay royalties for this transferred know-how. Appx1631-1633; Appx2100-2101. This alone shows that the know-how had independent value.

Instead of properly analyzing the AB-AMF agreement, Ms. Elsten took a shortcut. She "assumed" the '691 and '616 patents provided *all the value* of the 1999 agreement because certain AB and AMF employees—who did not even work at these companies when the 1999 agreement was negotiated and did not testify at trial—apparently told her so. Appx1566-1567(126:25-127:15); Appx1614-1615(28:24-29:6); Appx1629-1630(43:22-44:8). Ms. Elsten never talked to Alfred Mann, Appx1628-1630(42:10-44:18), who played a pivotal role in negotiating the AB-AMF agreement, Appx4107-4109; Appx3884-3885; Appx1631-1633(45:24-47:10); Appx2099-2102(26:24-29:6), even though Mr. Mann was deposed in the case and testified at trial about the AMF-AB business relationship just two days before Ms. Elsten, Appx1153(50:16-23); Appx1176-1177(73:16-74:10).

AMF's deliberate ignorance of so many relevant, undisputed facts, and Ms. Elsten's blind acceptance of the conclusory and self-serving statements from AB's and AMF's employees do not even come close to the apportionment required by long-standing precedent. For example, in *Apple Inc. v. Motorola, Inc.*, Motorola's damages expert based a proposed royalty rate on statements from a Motorola employee who assigned a disproportionately high value (a 40%-50% royalty rate) to one patent in a multi-patent portfolio because it was a standard-essential patent and one of the "first few patents" in the portfolio. 757 F.3d 1286, 1322-25 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (en banc). Because the value he assigned to the patent was not "tied to the claimed invention," this Court found the Motorola witness and the expert opinion relying on him "inherently unreliable." *Id.* at 1324. The Court also explained that Motorola's failure to adjust its 40%-50% rate when one of the other licensed patents "dropped out of the case" further suggested "that the rate was never tied to the specific patents at issue." *Id.* at 1325 n.5; *see also Trell v. Marlee Elecs. Corp.*, 912 F.2d 1443, 1445-47 (Fed. Cir. 1990); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1328 (Fed. Cir. 2009); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 871-72 (Fed. Cir. 2010).

AMF and AB could have attempted to meet their burden of proving apportionment with a thorough analysis of the AB-AMF agreement—one that meaningfully considered the value of *all* technology covered by the agreement. Instead, their expert relied solely on off-the-record, self-serving statements from their employees to ignore the other technology, effectively capturing the value of this technology and inflating the royalty rate far beyond what is permissible given the narrow scope of the claims at issue (claims 1 and 10 of the ’616 patent). Permitting this type of analysis to support a $268 million verdict is contrary to both Supreme Court and this Court’s precedent on apportionment, and en banc review is necessary to correct it.

II. The Panel Violated the “Book of Wisdom” by Approving an Inflated Damages Award that Relied on an Unforeseeable Stock Price Six Years After the Hypothetical Negotiation

In the AB-AMF agreement, AB agreed to pay a 2-3% running royalty on future sales and give AMF one million shares of stock. Appx3886. At the time of the agreement, AMF recorded in its own financial statement that the value of the stock was $2.80/share. Appx3909; Appx1621-1622(35:7-36:15); Appx2098(25:10-26:19). This 1999 stock valuation occurred shortly after the June 1998 hypothetical negotiation and was the closest contemporaneous valuation. Appx1563(123:2-12).

Ms. Elsten increased the 2-3% rate expressly stated in the AB-AMF agreement to account for the stock component of the agreement. While including the stock value may have been allowable in theory, the plaintiffs took it and ran with it beyond anything the law allows. Ms. Elsten disregarded the contemporaneous

$2.80 stock value from 1999 and instead cherry-picked a grossly inflated stock price from 2004—*six years after the hypothetical negotiation date*. The stock's value at that time had been inflated by Boston Scientific's interest in acquiring AB, which ultimately resulted in a highly favorable but previously unforeseeable deal for AB. Even Mr. Mann testified that, although companies were paying a lot for acquisitions in 2004, he "personally did not see" the deal as having as much value as Boston Scientific did, calling it a "crazy deal" that made no business sense. Appx1176-1177(73:19-74:10).

Ms. Elsten relied on the inflated stock price to increase her proposed royalty rate for the AB-AMF agreement from 2-3% to 4.6-8.8%. Appx1569-1570(129:14-130:18); Appx1577-1578(137:24-138:7). This resulted in AMF requesting over $130 million in damages. Had Ms. Elsten used the contemporaneous 1999 stock valuation instead, her proposed royalty rate would have been significantly less (i.e., between 2.5 and 3%), which would have dropped AMF's damage request from over $130 million to around $50 million. Appx2098-2099(25:17-26:23); Appx2102-2104(29:7-31:15).

The district court erroneously allowed AMF's inflated stock-based analysis to stand, citing the "book of wisdom." Appx034. But the book of wisdom is not a crystal ball used to replace highly relevant contemporaneous evidence. *Riles v. Shell Expl. & Prod. Co.*, 298 F.3d 1302, 1313 (Fed. Cir. 2002) ("A reasonable royalty determination . . . must relate to the time infringement occurred, and not be an after-the-fact assessment.”). While some information arising after the hypothetical negotiation can be considered, it must be related to matters that “*the parties would frequently have estimated during the negotiation*.” *See Lucent*, 580 F.3d at 1333-34 (Fed. Cir. 2009) (emphasis added).

Stock prices arising years after the hypothetical negotiation, in contrast, are inherently unpredictable and unforeseeable. Their values change *virtually every day* over a period of years. The book of wisdom precludes plaintiffs from relying on such information to inflate damages requests. *See, e.g.*, *Riles*, 298 F.3d at 1313 (remanding on damages where certain valuations were performed using information from the time of trial, as opposed to when infringement began, because the reasonable royalty cannot be “an after-the-fact assessment” and “must relate to the time infringement occurred”); *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1276 (Fed. Cir. 1999) (affirming decision excluding license agreements negotiated “four and five years” after the date of first infringement as “much, much, too late” and “after the financial landscape has changed remarkably”).

While any reliance on a future stock price presupposes some degree of unpredictability, two facts make Ms. Elsten’s cherry-picked stock price especially unreliable. The first is Mr. Mann’s testimony that his company’s stock value after the 2004 Boston Scientific deal was not merely unforeseeable, it was totally unexpected. Appx1176-1177(73:19-74:10). The greater than thirty-fold increase in the stock price—it went from $2.80 to over $100 a share—could not have been reasonably predicted six years earlier at the time of the hypothetical negotiation. Second, Ms. Elsten chose her inflated stock price over a contemporaneous one that was available (the $2.80 stock value from 1999). Ms. Elsten flouted the book of wisdom, defiantly testifying that the 1999 stock price was "not a valid number to consider" and that she "would not consider it" in her analysis. Appx1622(36:22-24).

Allowing a $268 million verdict to stand on these facts violates this Court's precedent, and en banc review is necessary to correct this error. If left uncorrected, the district court's opinion, affirmed by this Court, will allow other courts and damages experts to flout this Court's precedent and use the "book of wisdom" as a loophole to rely on entirely unforeseeable events that occur years after the hypothetical negotiation.

CONCLUSION

This appeal presents important legal questions on damages and apportionment, which this Court should rehear en banc to correct injustice and realign this case with the governing law. The district court's judgment, which the panel upheld by Rule 36 affirmance without comment, is contrary to both Supreme Court and this

Court's precedent. Allowing the district court's opinion to stand unchecked is not only unfair to Cochlear, but it provides a roadmap for other patent owners to easily avoid apportionment and present inflated damage awards to juries.

Date: April 15, 2020

Respectfully submitted,

/s/ J. Michael Jakes

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ADDENDUM

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALFRED E. MANN FOUNDATION FOR SCIENTIFIC RESEARCH, ADVANCED BIONICS, LLC,
Plaintiffs-Appellees

v.

COCHLEAR CORPORATION, COCHLEAR LTD.,
Defendants-Appellants

2019-1201

Appeal from the United States District Court for the Central District of California in No. 2:07-cv-08108-FMO-SH, Judge Fernando M. Olguin.

JUDGMENT

THOMAS M. PETERSON, Morgan Lewis & Bockius LLP, San Francisco, CA, argued for plaintiff-appellee Alfred E. Mann Foundation for Scientific Research. Also represented by MICHAEL JOHN LYONS, MICHAEL FRANCIS CARR, JASON EVAN GETTLEMAN, Palo Alto, CA.

DONALD MANWELL FALK, Mayer Brown, LLP, Palo Alto, CA, for plaintiff-appellee Advanced Bionics, LLC. Also represented by DAVID E. WANG.

J. MICHAEL JAKES, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, argued for defendants-appellants. Also represented by AARON GLEATON CLAY, DAVID MROZ.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (NEWMAN, LINN, and HUGHES, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

March 16, 2020	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. Rule App. Proc. 40(b):

This brief contains 3,862 words, excluding the parts of the brief exempted by Federal Circuit Rule 35(c)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6):

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/s/ J. Michael Jakes
J. Michael Jakes

Attorney for Defendants-Appellants
Cochlear Corporation and Cochlear Ltd.