

IN THE
Supreme Court of the United States

ARTHREX, INC.,

Petitioner,

v.

SMITH & NEPHEW, INC. AND
JOHN O. HAYHURST, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Following an 8-day trial, a jury unanimously found that (i) petitioner sold suture anchor products that were especially made or adapted for use in methods that infringed respondents' patent; (ii) petitioner actually intended to cause acts that constitute direct infringement of respondents' patent; (iii) petitioner actually knew or was willfully blind to the fact that its actions were causing direct infringement of respondents' patent; and (iv) petitioner's wrongful actions diverted sales from respondent Smith & Nephew, Inc. to petitioner and caused tens of millions of dollars in damage to Smith & Nephew's business. The decision below holds that the jury's findings on these matters were supported by substantial evidence.

The decision below is non-precedential and does not purport to characterize, extend, or alter existing law. On September 12, 2013 – two weeks after the filing of the within petition – the district court denied a motion by petitioner for a new trial, entered judgment on the jury's verdict, and issued a permanent injunction against further sales of the accused suture anchor products after hearing and rejecting factual arguments that petitioner now seeks to put before this Court in a different guise.

The question presented is:

Whether the decision below is subject to reversal on the basis of a theory of non-liability that (i) was never raised, argued, or passed upon below, and (ii) contradicts affirmed factual findings of the jury in this case.

CORPORATE DISCLOSURE STATEMENT

Respondent Smith & Nephew, Inc. is an indirect wholly-owned subsidiary of Smith & Nephew plc whose shares are publicly traded.

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Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Arthrex, Inc.

OPINIONS AND ORDERS BELOW

The jury's verdict in this case is unreported and reproduced in Appendix A. The district court's jury instructions concerning contributory and induced infringement are unreported and reproduced in Appendix B. The district court's final judgment issued September 12, 2013, is unreported and reproduced in Appendix C. The district court's Statement of Reasons Supporting Permanent Injunction issued September 12, 2013, is available at 2013 WL 5206244 and reproduced as Appendix D. The district court's Amended Order of Permanent Injunction issued September 18, 2013, is unreported and reproduced as Appendix E. Docket entries reflecting events in the district court since issuance of the Court of Appeals' mandate on April 12, 2013, are reproduced in Appendix F.

STATEMENT OF THE CASE

The background of this case is accurately summarized in the district court's Statement of Reasons Supporting Permanent Injunction issued September 12, 2013, reproduced in Appendix D hereto.

Respondent John O. Hayhurst, M.D. is the owner of U.S. Patent No. 5,601,557 (the "557 patent"). The '557 patent discloses and claims novel methods that Dr. Hayhurst developed for performing orthopedic surgery. The patented methods comprise use of a resilient structural member¹ that is softer than cortical bone and

¹ Petitioner erroneously suggests that the claimed methods of the '557 patent are limited to use of suture anchors that have "legs."

adapted (i) to compress when pressed through a smaller pre-formed hole in cortical bone and (ii) to resile (*i.e.*, to tend to expand) in softer interior cancellous bone located below the outer cortical bone layer, thereby (iii) lodging within the bone and providing an anchor for holding an attached suture. Use of the patented methods enables surgeons to attach soft tissue to bone with much less trauma to patients than prior art techniques had caused.

Respondent Smith & Nephew, Inc. (“Smith & Nephew”) holds an exclusive license to practice the methods claimed in the ‘557 patent. Smith & Nephew manufactures and sells suture anchors that are especially adapted for use in practicing the methods of the ‘557 patent. Smith & Nephew has also licensed Johnson & Johnson to make and sell suture anchors that are especially made or adapted for use in the methods claimed in the ‘557 patent.

Petitioner entered the business of making and selling suture anchor products in 1996 or 1997. Petitioner’s original suture anchor products were made of metal and designed to be screwed into bone by rotational movement. Petitioner’s original screw-in type suture anchors “were not very successful.” App. 15a. “To change that” (*id.*), in or about 2000, petitioner developed a new suture anchor product called the “Bio-SutureTak.” This product was made of plastic 40 times softer than cortical bone and was adapted (i) to compress when pressed through a smaller pre-formed hole

Pet. at 4. In fact, the ‘557 patent claims recite use of a resilient *member* which can but need not have “legs.”

in cortical bone and (ii) to resile in softer interior cancellous bone located below the outer cortical bone layer, thereby (iii) lodging within the bone and providing an anchor for holding an attached suture – the precise inventive concept disclosed and claimed in the ‘557 patent.

Respondents Sue Petitioner for Induced and Contributory Patent Infringement

Respondents sued petitioner for infringement of the ‘557 patent in 2004. Respondents’ complaint invoked both 35 U.S.C. §§ 271(b) and (c). The former statute imposes liability on a person who “actively induces infringement of a patent.” The latter statute imposes liability on a person who “sells . . . apparatus for use in practicing a patented process, constituting a material part of the invention, *knowing* the same *to be especially made or especially adapted* for use in *an infringement of such patent*. . . .” (emphasis added).

From the very beginning, a central disputed factual issue in this case was whether this petitioner *knew* that use of the accused suture anchor products resulted in performance of the methods claimed in the ‘557 patent. The factual issue of petitioner’s knowledge of the ‘557 patent and the bio-mechanical properties of the accused suture anchor products was the subject of extensive pretrial and trial proceedings.

During the trial below, petitioner did not come forward with any contemporaneous documentary evidence showing what petitioner *actually knew* with respect to the ‘557 patent or the likelihood, if not certainty, that use of the accused suture anchors would result in per-

formance of methods claimed in the patent. Instead, petitioner put forward extremely weak and suspect evidence on this subject.² In the district court’s words, petitioner “took a position that it was not relying on an advice-of-counsel defense” and “*presented no other evidence of good faith.*” App. 25a (emphasis added).

Respondents, in contrast, presented evidence that (i) petitioner’s senior management had actual knowledge of the ‘557 patent by not later than December 2000; (ii) the accused suture anchors were made of resilient plastic that was 40 times softer than cortical bone; (iii) the accused suture anchors were adapted to compress when pressed through a smaller pre-formed hole in cortical bone and to resile or expand in the softer interior cancellous bone located below the outer cortical bone layer, thereby lodging within the bone and providing an anchor for holding an attached suture; (iv) these facts were readily determinable by physical testing;

² Citing an unsworn and equivocal e-mail dated March 27, 2007, from one of its former trial attorneys (C.A. App. 31902), petitioner asserts that “there was evidence that, upon learning of the ‘557 patent, Arthrex analyzed it and subjectively determined there was no infringement.” Pet. at 18 n.9. But by presenting and relying on this extremely weak “evidence” while suppressing all *contemporaneous documentary* evidence of any non-infringement analysis that petitioner may have undertaken or commissioned prior to the commercial launch of the Bio-SutureTak product in 2001, petitioner invited the inference that it actually knew at all relevant times that use of the accused suture anchors would infringe respondents’ patent – as the jury eventually found. *Cf. Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000) (a court may not nullify a jury’s verdict based on testimony that the jury “was not required to believe.”).

and (v) petitioner nevertheless “made no attempt to compare its anchors to the claims of the ‘557 patent.” Pet. App. 10a. In the district court’s words, petitioner “elected to ignore the ‘557 patent in the first place without the benefit of any reliable opinion of counsel.” App. 25a

The credibility of petitioner’s claimed lack of knowledge that it was causing infringement of respondents’ patent was vigorously attacked during the trial below, including on the basis that petitioner presented shifting, inconsistent, and non-credible factual positions during the course of the litigation. From time to time between 2004 and 2011, petitioner asserted:

-- Use of the accused anchors does not infringe the ‘557 patent because the anchors *do not deform* when pressed through a smaller hole in cortical bone.³

-- Use of the accused anchors does not infringe the ‘557 patent because the anchors *permanently deform* when pressed through a smaller hole in cortical bone.⁴

-- Use of the accused anchors does not infringe the ‘557 patent because, although the anchors deform and resile when pressed through a smaller hole in cortical bone, the resilient expansion ends *before* the anchor is *lodged*.⁵

-- Use of the accused anchors does not infringe the ‘557 patent because, although the anchors deform and

³ C.A. App. 31922-29.

⁴ District Court Docket Item 83 filed September 28, 2006.

⁵ District Court Docket Item 316 filed June 13, 2007.

resile when pressed through a smaller hole in cortical bone, the resilient expansion is not *sufficient to cause lodging* of the anchors in bone.⁶

The first three of these theories were abandoned by petitioner by the time of the trial below. The fourth theory was the one that petitioner asserted at the *beginning* of the trial below, based on how the Federal Circuit had construed the ‘557 patent in two previous decisions.⁷ On the sixth day of trial, however, petitioner asked the district court to *re-construe* the claims of the ‘557 patent.

Nearly a decade after petitioner had started selling the accused suture anchors and nearly a decade after the Federal Circuit had provided a detailed construc-

⁶ District Court Docket Item 750 at 21 of 86.

⁷ In *Smith & Nephew, Inc. v. Ethicon, Inc.*, 276 F.3d 1304, 1307-08 & n.* (Fed. Cir. 2001), the court provided a detailed construction of the ‘557 patent including a connotation that the claimed “lodging” occurs when a resilient member is first pressed into a pre-formed bone hole. During a previous trial held in June 2008, the district court had instructed the jury that the ‘557 patent claim word “resile” meant “to return to or tend to return to a prior or original position in a manner *that contributes, at least in part, to* the lodging of the member in the hole.” Pet. App. 18a-19a (emphasis added). Following a jury verdict and judgment of infringement in respondents’ favor, petitioner appealed to the Federal Circuit and persuaded that court to hold that the district court should have instructed the jury that the ‘557 patent claim word “resile” meant “to return to or tend to return to a prior or original position in a manner *sufficient to cause* the lodging of the member in the hole.” *Id.* at 20a. The court accordingly vacated the judgment that had been entered following the June 2008 trial and remanded for a new trial under the clarified meaning of “resile.” *Id.* at 21a-22a.

tion of the meaning of the ‘557 patent claim words “lodged” and “lodging” in a formal published opinion (see note 7 *supra*), petitioner for the first time in mid-June 2011 asked the district court to instruct the jury: “*For an anchor to be ‘lodged,’ it must be able to withstand all of the forces of surgery.*” District Court Docket Items 921-1 at 3 (emphasis added). In fact, as the Court of Appeals would eventually hold, “[n]othing in the claim language, the prosecution history, or our precedent suggest[d] that lodging must be sufficient to withstand all the forces of surgery.” Pet. App. 7a.

The district court declined to give petitioner’s newly proposed jury instruction but instead closely adhered to a variant of the detailed construction of the claim word “lodging” which the Federal Circuit had provided in earlier litigation involving the ‘557 patent, *Smith & Nephew, Inc. v. Ethicon, Inc.*, 276 F.3d 1304, 1307-08 & n.* (Fed. Cir. 2001). Cf. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390-91 (1996) (citing “uniformity in the treatment of a given patent as an independent reason to allocate all issues of construction to the court.”).

Petitioner remained free to present evidence of what its “understanding” (Pet. at i) of the ‘557 patent had actually been between 2001 and the time of trial in 2011. Indeed, in a failed attempt to prove that it lacked “knowledge that the induced acts constitute[d] patent infringement,” *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011), petitioner presented the jury with an unsworn e-mail dated March 27, 2007, authored by one of petitioner’s former trial attorneys. C.A. App. A31902. The trial attorney e-mail (dated

more than six (6) years after petitioner had started selling the accused suture anchor products) stated that petitioner learned of ‘557 patent on December 13, 2000, and thereafter “did not make any design changes to the Bio-SutureTak for the purpose of avoiding infringement. Such changes were unnecessary, as the Bio-SutureTak *does not* infringe the ‘557 patent.” *Id.* (emphasis added).⁸ The author of this e-mail did not testify at trial and was not shown to have had personal knowledge of the matters referred to therein. The e-mail also provided no explanation of the equivocal and conclusory assertion in the present tense: “the Bio-SutureTak *does not* infringe the ‘557 patent” (emphasis added).

In fact, the ‘557 patent claims *methods*, not suture anchors *per se*; and the quoted statement of petitioner’s former trial counsel was fully consistent with an inference that petitioner had taken frivolous, uninformed positions and “willfully blinded itself to the infringing nature of” its actions, *Global-Tech*, 131 S. Ct. at 2072, as the jury would soon find as a factual matter.

The Jury’s Findings of Infringement

In a unanimous verdict rendered June 22, 2011, the jury in this case found that:

(i) the accused suture anchor products were “especially made or adapted for use in methods that [petitioner] knew to be infringing” respondents’ patent (App. 3a, 6a);

⁸ The petition relies on the e-mail quoted in the text (Pet. at 18 n.6), but cites to a grossly inaccurate and misleading transcription of the e-mail (C.A. App. A19466-68) rather than the e-mail itself.

(ii) petitioner “actually intended to cause the acts that constitute direct infringement and . . . actually knew – or was willfully blind to the fact – that the induced acts constitute[d] direct infringement” of respondents’ patent (App. 3a-4a);

(iii) petitioner’s infringement of respondents’ patent was “willful” (App. 5a); and

(iv) petitioner’s infringement of respondents’ patent resulted in diversion of product sales from Smith & Nephew to petitioner and approximately \$84 million in damage to Smith & Nephew’s business through mid-June 2011. App. 4a-5a.

With regard to the legal standard for determining whether the accused suture anchor products were “especially made or adapted for use in a method [petitioner] knew to be infringing” (App. 6a, adapted from 35 U.S.C. § 271(c)), and whether petitioner was rightly deemed one who “actively induces infringement of a patent,” 35 U.S.C. § 271(b), the district court charged the jury as requested by petitioner and in language that closely tracked the language of this Court’s decision in *Global-Tech*, 131 S. Ct. at 2070. C.A. App. at 161-62.

In a footnote to the jury verdict form itself, the district court had stated: “As explained in Jury Instruction No. 19, the requirements for proving willful blindness are: (1) Arthrex subjectively believed that there was a high probability that the induced acts constituted infringement, and (2) Arthrex took deliberate actions to avoid learning of that fact.” App. 4a. The petition raises no question as to the correctness this jury instruction defining “willful blindness.”

The District Court's Post-Trial Rulings

On December 16, 2011, the district court held a telephonic hearing on a motion by petitioner for judgment as a matter of law under Federal Rule of Civil Procedure 50. The district court first considered whether, under the (correct) instructions it had given to the jury at the trial concerning the meaning of certain terms in the claims of the '557 patent, the evidence was sufficient to support the jury's verdict. The district court held that it was (C.A. App. at 124):

Arthrex, among the various theories for its motion for judgment as a matter of law, seeks judgment as a matter of law even under Smith & Nephew's claim construction, arguing that even on that theory, no rational jury could find for plaintiff.

And I deny the motion for judgment as a matter of law on that particular theory. In other words, I would uphold the jury's verdict on the claim construction presented to it, which we've called Smith & Nephew's claim construction.

The district court went on, however, to adopt what it called "Arthrex's theory of claim construction" (*id.* at 125) under which the '557 patent claim words "lodged" and "lodging" were deemed to require a certain qualitatively defined level of holding force, namely, holding force "sufficient to withstand all the forces of surgery." District Court Docket Items 921-1 at 3. Based on that (erroneous) construction of the '557 patent, the district court held that the evidence was insufficient to support the jury's findings of direct infringement. The district

court also ruled that “for the reasons stated by Arthrex,” the evidence was also insufficient to support the jury’s findings of indirect infringement.

The Proceedings in the Court of Appeals

Respondents timely appealed the district court’s decision to the Court of Appeals for the Federal Circuit. Respondents argued that the district court had erred in its narrow construction of the claim words “lodged” and “lodging” and that under the correct construction, the jury’s verdict was supported by substantial evidence. Respondents further argued that, even under the district court’s errant new construction of the claim words “lodged” and “lodging,” the evidence was sufficient to show that the accused suture anchors “lodged” in patients’ bones as claimed in the ‘557 patent. Pet. App. 7a.

In its brief to the Court of Appeals, petitioner argued that the district court’s post-trial construction of the claim words “lodged” and “lodging” was correct and that the district court’s judgment should be affirmed on that basis. On this view there was no direct infringement and it was, thus, irrelevant what petitioner might have believed or understood was the scope of the invention claimed in the ‘557 patent during the time of its challenged actions between 2001 and mid-June 2011.

In the alternative, petitioner argued that even if the district court’s post-trial construction of the ‘557 patent had been erroneous, its judgment should still be affirmed because the evidence was assertedly insufficient to support the jury’s findings that petitioner knew that actions were actively inducing and contributing to in-

fringement of respondents' patent between 2001 and mid-June 2011, whether on a theory that petitioner "actually knew" that it was causing direct infringement during this period or on a theory that petitioner was "willfully blind" to that fact. *Global Tech*, 131 S. Ct. at 2070.

Petitioner never, however, urged upon the Court of Appeals the novel theory it urges now, which is that if its "actions" could be *characterized* as "consistent with" a "not unreasonable understanding" of "relevant *legal requirements*" at unspecified times (Pet. at i; emphasis added), such a characterization would purportedly immunize petitioner from liability for contributory or induced patent infringement *no matter what* petitioner's *actual* knowledge of relevant facts might have been at the time it caused direct infringement to occur. Tellingly, petitioner's brief to the Court of Appeals never once cited *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), the case which petitioner now makes the centerpiece of the petition including on page i as part of the Question Presented. The phrase "not objectively unreasonable" also appears nowhere in petitioner's brief to the Court of Appeals.

In a non-precedential decision issued January 13, 2013, the Court of Appeals reversed the district court's judgment and reinstated the jury's verdict. The court held that the jury instructions in this case (C.A. App. at 141-182) contained a correct construction of the '557 patent (C.A. App. at 156) and, under that construction, the evidence was sufficient to support the jury's direct infringement verdict in respondents' favor. The court characterized petitioner's "withstand all the forces of

surgery” construction – a non-infringement theory put forward for the first time in 2011 nearly a decade after petitioner had started selling the accused suture anchors – as supported by “[n]othing in the claim language, the prosecution history, or our precedent.” Pet. App. 7a (emphasis added). The court also stated that even under petitioner’s newly-fashioned “withstand all the forces of surgery” construction, “the resilience testing evidence offered at trial sufficiently shows the anchors to be lodged.” Pet. App. 7a.

After thus determining that the evidence was sufficient to support the jury’s findings that use of the accused suture anchors resulted in use of methods disclosed and claimed in the ‘557 patent, the Court of Appeals turned to the question whether evidence was also sufficient to support the jury’s findings that (i) petitioner “actually intended to cause acts that constitute direct infringement” of respondents’ patent and (ii) petitioner “actually knew – or was willfully blind to the fact – that the induced acts constitute direct infringement.” App. 3a-4a. Based on its review of the entire record and “its special expertise,” *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997), the court held (Pet. App. 10a):

Arthrex indisputably knew of the ‘557 patent prior to any infringement. The jury heard evidence that the president and owner of Arthrex as well the chief engineer and group director for one of the accused products, the Bio-SutureTak anchors, knew of the ‘557 patent. J.A. 31900-03. The jury was also presented with evidence that, after personally learning

of the '557 patent, the group director drafted instructions for use of the accused Bio-SutureTak anchor that paralleled the patented method steps of the '557 patent. J.A. 32012-17. Finally, the jury heard that Arthrex made no attempt to compare its anchors to the claims of the '557 patent. After weighing that evidence against Arthrex employees' testimony, the jury resolved the factual issue of knowledge against Arthrex, concluding that Arthrex had the necessary knowledge for both induced and contributory infringement. We see no reason to disturb that finding by the jury.

In a two-page dissenting opinion, Judge Clevenger characterized the majority opinion as having correctly "acknowledge[d]" that "to be guilty of indirect infringement" under 35 U.S.C. §§ 271(b) or (c), "the accused infringer must either actually know of, or be willfully blind to, both the existence of the patent and the fact of infringement." Pet. App. 11a. In Judge Clevenger's view, however, respondents "did not present substantial evidence that [petitioner] *subjectively believed* that they infringed." Pet. App. 12a (emphasis added). The dissent thus disagreed with the majority in its view of the permissible factual inferences the jury could draw from the evidence in this case, but not as to the legal standard that the jury was asked to apply.

The Petition for Rehearing En Banc

Petitioner timely petitioned the Court of Appeals for rehearing en banc. Like petitioner's opening brief to the Court of Appeals, the petition for rehearing en banc

focused on petitioner’s subjective knowledge and the sufficiency of the evidence supporting the jury’s factual findings on that point. Petitioner asserted that its “product designers subjectively believed they did not infringe”; “the majority identified no facts to the contrary”; petitioner “did not avoid knowledge, but performed a test”; “[t]hat test only confirmed [petitioner’s] subjective belief that its anchors did not ‘lodge’ through ‘resilience’”; “the evidence cannot satisfy *Global-Tech*’s more demanding willful blindness standard”; and respondents “did not present substantial evidence that [petitioner] subjectively believed that they infringed.” Petition for Rehearing at 8-10.

The Court of Appeals did not even call for a response to the petition and summarily denied it.

The District Court Proceedings on Remand

The Court of Appeals issued its mandate on April 12, 2013. Respondents then promptly moved for entry of judgment on the jury’s verdict and for permanent injunctive relief. App. 37a (Docket Items 1050, 1051). Petitioner opposed respondents’ motion and filed multiple counter-motions including a motion for a new trial under Federal Rule of Civil Procedure 59 which asserted in part: “the clear weight of the evidence supports that [petitioner] did not have sufficient knowledge of the infringement to be liable for indirect infringement.” App. 42a (Docket Item 1069 at 22 of 34).

Following extensive briefing and oral argument, the district court denied petitioner’s motion for a new trial, entered final judgment in respondents’ favor under Federal Rule of Civil Procedure 58, and issued a per-

manent injunction against petitioner based in part on a factual finding that: “Arthrex cannot now claim hardship because it elected to ignore the ‘557 patent in the first place without the benefit of any reliable opinion of counsel.” App. 25a ¶ 66.

On October 15, 2013, petitioner filed a notice of appeal from the district court’s final judgment. App. 60a (Docket Item 1132). That appeal has yet to be briefed or argued.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied for several reasons.

First, the question purportedly presented by the petition was not raised, argued, or passed upon in the Court of Appeals. That fatal defect in the petition can be demonstrated in many ways, but one of the clearest is that *Safeco Insurance of America v. Burr*, 551 U.S. 47 (2007) – a decision that petitioner cites as part of the Question Presented on page i of the petition – was never cited by petitioner in its brief to the Court of Appeals and, thus not surprisingly, the Court of Appeals also never cited or discussed the possible relevance of *Safeco* in its non-precedential opinion below. Having failed to persuade the Court of Appeals that the evidence was insufficient to support the jury’s specific finding that petitioner actually knew or was willfully blind to the fact that its actions were causing direct infringement of respondents’ patent, petitioner now argues for the first time that 35 U.S.C. §§ 271(b) and (c) should be interpreted to exclude, as a matter of law, any person whose “actions” can be characterized as “consistent with” a

“not objectively unreasonable” “understanding” of “relevant legal requirements” at unspecified times (Pet. at i), *regardless* of what a defendant’s *actual* knowledge of relevant facts may have been at *relevant* times. This Court does not ordinarily take up questions that were never pressed or passed upon below. It would be especially inappropriate to do so in this case which involves (i) complex bio-mechanical subject matter, and (ii) a proposed new legal rule that the Federal Circuit has never been asked to consider.

Second, insofar as *this petitioner* is concerned, the question purportedly presented by the petition is foreclosed by the jury’s verdict in this case. Under legal instructions whose correctness is not challenged, the jury here found that the accused suture anchors were *especially made or adapted* for use in methods that petitioner *knew were infringing* of respondents’ patent. To reach this verdict, the jury necessarily found that petitioner either had *actual knowledge* that use of the accused suture anchors infringed respondents’ patent or was “*willfully blind*” to that *fact*. The petition does not challenge the sufficiency of the evidence supporting the jury’s factual findings on these points (and, of course, the issue whether the jury’s verdict is supported by sufficient evidence does not meet this Court’s standards for granting certiorari). Petitioner’s purported “understanding” of “relevant legal requirements” between 2001 and mid-2011 was part of its defense to respondents’ claims and was presented to the jury by way of oral testimony that was unsupported by contemporaneous documentary evidence. “The jury rejected that testimony.” Pet. App. 10a.

Third, the decision below is non-precedential; it does not purport to characterize, extend, or alter any principle of law; and it does not conflict with any other circuit's interpretation of 35 U.S.C. § 271(b) or (c). The petition does not challenge the legal standard of “willful blindness” as articulated in the jury instructions that were given in this case. The decision below merely holds that the evidence was sufficient to support the jury’s verdict under correctly stated legal standards. The correctness of this holding does not reach beyond the particular litigants here. An alleged misapplication of a properly stated rule does not ordinarily support a grant of certiorari. *See* Sup. Ct. R. 10. The petition here does not even ask the Court to review the sufficiency of the evidence supporting the jury’s verdict.

Fourth, the petition rests on an erroneous and false analogy between 35 U.S.C. §§ 271(b) and (c) and a very different statute, 15 U.S.C. § 1681n(a), which authorizes awards of enhanced statutory or punitive damages for “willful” misuse of consumer credit reports. Liability for induced or contributory liability for patent infringement has never been limited to “willful” infringers. Petitioner’s contrary suggestion is erroneous.

**I. THE THEORY OF NON-LIABILITY NOW
ASSERTED WAS NOT RAISED, BRIEFED,
OR PASSED UPON BELOW.**

In its statement of the question presented, petitioner cites *Safeco Insurance of America v. Burr*, 551 U.S. 47 (2007), as purportedly supplying case law doctrine that governs this case. *Safeco* is in fact inapposite to this case, but more importantly, petitioner never cited

Safeco in its brief to the Court of Appeals and never pressed the novel theory of non-liability that the petition now asks this Court to adopt for the first time.

Petitioner's procedural default is evident on the face of the Court of Appeals' decision below, which also does not cite *Safeco* or consider the theory of non-liability that petitioner now seeks to raise. The decision below does not characterize, as "objectively reasonable" or "not objectively unreasonable" or otherwise, any "understanding" of "relevant legal requirements" that petitioner might have adopted between 2001 and mid-2011 Pet. at i. The reason for this omission is clear: petitioner never asked the Court of Appeals to make any such characterization or to hold that, if such a characterization were permissible⁹ and were made here, it would nullify the jury's verdict and immunize petitioner to liability under 35 U.S.C. §§ 271(b) and (c) no matter what petitioner's actual knowledge might have been during the period of its challenged actions.

In the Court of Appeals petitioner argued that the district court's post-trial construction of the claim

⁹ As noted above, petitioner adopted shifting and inconsistent non-infringement positions during the pendency of this litigation. It was not until mid-2011 that petitioner first proposed the "withstand all the forces of surgery" construction that the district court adopted in December 2011 without opinion. The Court of Appeals rejected that theory as supported by "[n]othing in the claim language, the prosecution history, or our precedent." Pet. App. 7a (emphasis added). Given this language, it is fanciful to suppose that the court would have characterized the "withstand all the forces of surgery" theory as "not objectively unreasonable" according to prevailing norms of patent legal practice.

words “lodging” and “lodged” was correct and, under that construction, there was no direct infringement so it made no difference what petitioner might have understood about the ‘557 patent or “relevant legal requirements” between 2001 and mid-2011. Petitioner also argued that its claimed lack of subjective knowledge that use of the accused suture anchors resulted in direct infringement of the ‘557 patent provided a complete defense to liability under the legal standard announced in *Global-Tech*, 131 S. Ct. at 2068.

But at no time did petitioner argue below that, even if petitioner had subjectively believed that there was a high probability that the induced acts constituted infringement and it had taken deliberate actions to avoid learning of that fact (and that was the petitioner’s subjective state of mind as found by the jury’s verdict, which is supported substantial evidence), petitioner should nevertheless escape liability if, “whatever [its] subjective intent may have been” (Pet. at i (quoting *Safeco*, 551 U.S. at 70 & n.20)), petitioner’s actions could be characterized as being “consistent with” an erroneous but nonetheless “not objectively unreasonable” “understanding” of “relevant legal requirements.” *Id.* In other words, the petitioner’s position in this Court, but not below, is that even if petitioner subjectively and correctly understood that its actions were causing infringement of respondents’ patent, petitioner can still escape liability under 35 U.S.C. §§ 271(b) and (c).

Petitioner’s brief to the Court of Appeals expressly (and correctly) stated that “[t]o prove willful blindness, a plaintiff must prove that: (1) the defendant subjectively believes that there is a high probability that a

fact—i.e., infringement—exists, and (2) the defendant takes deliberate actions to avoid learning of that fact.” Appellee Br. at 48. The remainder of that section of the petitioner’s brief filed below—part IV.A, the only part in the argument section of the brief to address willful blindness—was devoted to arguing the sufficiency of the evidence to support the two prongs of that test.

But under the petitioner’s newly-minted position, that two-pronged standard put forward in its own brief below—a standard taken from this Court’s decision in *Global-Tech* and specifically incorporated into the jury instructions proposed by petitioner at trial—is not correct. Rather, petitioner’s new position is that, in addition to the two requirements set forth in *Global-Tech*, a plaintiff invoking 35 U.S.C. §§ 271(b) or (c) must also satisfy a third requirement derived from *Safeco*, to wit: that regardless of what a defendant’s *actual* understanding of relevant facts might have been, a defendant’s challenged “actions” must also be shown to have been not “consistent with” any potential “not objectively unreasonable” understanding of the “relevant legal requirements” at any time (including understandings never actually held by the defendant at any time).

This Court does not ordinarily take up questions that were neither pressed nor passed upon below, *see, e.g., Global-Tech*, 131 S. Ct. at 2071 n.10; *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007), and there is nothing exceptional about this case to warrant a departure from this practice. In fact, the opposite is true. This case involves patent law and complex questions of anatomy and bio-mechanical engineering. The Court of Appeals for the Federal Cir-

cuit is “a specialized court,” *Dickinson v. Zurko*, 527 U.S. 150, 163 (1999), and exercises “sound judgment in this area of its special expertise.” *Warner-Jenkinson*, 520 U.S. at 40. If petitioner had pressed its new *Safe-co*-based theory to the Court of Appeals, the judges of Court of Appeals (with their specialized expertise in patent law) could have provided an evaluation of a necessary predicate to petitioner’s new theory—that a particular very late surfacing proposed construction of the claims of the ‘557 patent, while legally incorrect, was nonetheless “not objectively unreasonable.” As it is, no judge on the Court of Appeals addressed that issue. The two judges in the majority ruled that the claim interpretation pressed by the petitioner on appeal (which, to be clear, is not necessarily what the petitioner believed when it was inducing and contributing to infringement) was legally wrong; the dissenting judge did not opine on the claim interpretation. No judge thought to address the “objective reasonableness” of the position because petitioner had not argued the theory presented in the Petition as a ground for non-liability.

Furthermore, the petitioner’s failure to press its *Safe-co*-based theory below also reflects on the inherent weakness of the theory. Petitioner undoubtedly knew better than to try and persuade the Federal Circuit that liability for contributory or induced patent infringement was dependent on complex analysis of whether a defendant’s “actions” could be characterized as “consistent with” a “not objectively unreasonable” “understanding” of “relevant legal requirements” irrespective of the actual facts of a case. The novel theory of

non-liability now put forward by petitioner is not grounded in any patent precedent of this Court and, in fact, is directly contrary to that precedent.

For example, in *Leeds & Catlin Co. v. Victor Talking Machine Co. (No. 2)*, 213 U.S. 325 (1909), the Court considered a fact pattern having many parallels to the one presented in this case. In *Leeds & Catlin*, the patent-in-suit claimed a method and apparatus for reproducing sounds from a record that end users would perform when records were placed on a turntable and played. The petitioner in *Leeds & Catlin*, like the petitioner here, was sued for contributory infringement arising from the petitioner’s sale of flat round grooved disks (*i.e.*, phonograph records) that were especially made or adapted for use in practicing the method and apparatus disclosed and claimed in the respondent’s patent.

The petitioner in *Leeds & Catlin*, like the petitioner here, asserted that it did not *believe* that the end user conduct it was inducing constituted infringement of the respondent’s patent based on its understanding of relevant legal requirements,¹⁰ and one judge on the Court

¹⁰ The petitioner in *Leeds & Catlin* argued, among other things, that the respondent’s patent had expired due to the expiration of certain counterpart non-United States patents under then-existing United States patent law. See *Leeds & Catlin v. Victor Talking Mach. Co. (No. 1)*, 213 U.S. 301, 314-25 (1909). That argument could readily have been characterized as “not objectively unreasonable” under the facts presented there, had that characterization been relevant to the issue of basic liability (as distinguished from enhanced or punitive liability for “willful” misconduct). It was not.

of Appeals actually agreed with the petitioner. *See* 154 F. 61 (Wallace, J. dissenting). But the petitioner’s erroneous understanding of the respondent’s patent was held not to exonerate the petitioner from *liability* for contributory patent infringement, even if that understanding might have been relevant to assessing the size of any *penalty* for violation of an injunction. After noting and rejecting the petitioner’s non-frivolous defense theories, 231 U.S. at 330, this Court affirmed both a preliminary injunction against the petitioner and a contempt order as the activity in question had been “an entirely voluntary and intentional” act of “contributory infringement.” *Id.* at 337 (quoting 150 F. at 147).

Leeds & Catlin is but an application of “the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.” *Jerman v. Carlisle, McNelli, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) (quoting *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (Story, J.)). This principle has long and traditionally been applied to conduct that invades property rights. *Id.* at 583 (“intentional tort of trespass can be committed despite the actor’s mistaken belief that she has a legal right to enter the property”). *See Union Naval Stores Co. v. United States*, 240 U.S. 284, 290 (1916) (person who conducted unauthorized turpentine operations on land, under mistaken belief in his right to do so, was “willful trespasser” who “acted with full notice of the facts, and his mistake of law cannot excuse him.”).

Contributory and inducement liability for patent infringement has never been held subject to avoidance based on whether there is any possible “not objectively

unreasonable” understanding of relevant legal requirements that the defendant could have (but were not actually) held at the time infringement occurred. The Patent Act was comprehensively amended in 2011 and 2013, *see* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011); Leahy-Smith America Invents Technical Corrections Act, Pub. L. No. 112-274, 126 Stat. 1246 (2013), but Congress did not revise the text of 35 U.S.C. §§ 271(b) or (c).

Petitioner effectively asks this Court to do that which Congress did not, and without the matter even having been litigated in the lower courts or the specialized court for patents, the Federal Circuit, having been asked for its views on the subject.

II. THE PREMISE OF THE THEORY NOW ASSERTED WAS REJECTED BY THE JURY IN THIS CASE AS A FACTUAL MATTER.

As noted above, the jury in this case found that the accused suture anchors were *especially made or adapted* for use in methods that petitioner *knew were infringing* respondents’ patent. App. 3a, App.6a. This verdict necessarily implies subsidiary findings that petitioner either had actual knowledge that use of the accused suture anchors infringed respondents’ patent or that petitioner was “willfully blind” to that fact. The petition does not challenge the correctness of the jury instructions on indirect infringement (including the requirement of actual knowledge or “willful blindness”) and also does not challenge the sufficiency of the evidence supporting the jury’s factual findings on that point.

“Infringement is a question of fact.” *Stilz v. United States*, 269 U.S. 144, 147 (1925). “Indeed, the whole subject-matter of a patent is an embodied conception outside of the patent itself.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 386 (1996) (quoting *Bisshoff v. Wethered*, 76 U.S. (9 Wall.) 812, 815 (1870)). The jury here found that use of the accused suture anchors resulted in use of methods disclosed and particularly pointed out by the claims of the ‘557 patent. The jury heard all of petitioner’s arguments regarding its forces of surgery defense and its purported understanding of the invention disclosed and claimed in the ‘557 patent, and was fully entitled to reject those arguments as litigation-inspired post hoc pettifoggery. *Cf. Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000) (a court may not nullify a jury’s verdict based on testimony that the jury “is not required to believe.”).

In its exclusive focus on a posited hypothetical misunderstanding of “legal requirements” (Pet. at i), the petition misconceives the factual and physical nature of patent infringement. “*It is not the construction of the instrument, but the character of the thing invented, which is sought in questions of identity and diversity of inventions.*” *Markman*, 517 U.S. at 386 (emphasis in original in *Markman*). Here “the thing invented” by Dr. Hayhurst was a valuable method for attaching surgical anchors to bone that comprised use of resilient members that were softer than cortical bone and adapted to compress when pressed through a smaller pre-formed hole in cortical bone and thereafter to tend to expand and lodge in softer cancellous bone below the

outer cortical layer, thereby providing holding force for the anchor with its attached suture.

This Court has never held that misunderstanding of “*legal requirements*,” as distinct from lack of knowledge of *facts*, was a defense to liability for induced or contributory patent infringement; but in any event, to the extent that a mistaken “understanding” of “legal requirements” might be constituted a defense to liability for contributory or induced patent infringement, this case does not present any occasion for the Court to consider any such question because the premise of petitioner’s new theory contradicts affirmed express and implied factual findings of the jury in this case.

In reinstating the jury’s verdict of contributory and induced infringement, the Court of Appeals was fully aware that in December 2011 – a full decade after petitioner’s infringement had begun – petitioner persuaded a single district judge to adopt an errant and short lived “construction” of the claim words “lodging” and “lodged” as words that a person skilled in the art of the ‘557 patent would read as connoting a certain level of holding force that would “withstand” certain counterforces.

In holding that this post-trial event did not justify nullification of the jury’s verdict, the Court of Appeals did the only thing that it could properly do, which was to determine whether the evidence submitted at trial was sufficient to support the jury’s express and implied factual findings with respect to petitioner’s knowledge of the infringement it was causing *between 2001 and mid-2011*. As if to underscore the meritless character

of the “withstand all the forces of surgery” construction that petitioner put forward for the first time in mid-2011, the Federal Circuit noted that petitioner would lose even if that after-the fact, litigation-inspired construction were assumed. Pet. App. 7a.

On remand from the Court of Appeals in this case, the district court entered a permanent injunction against petitioner on September 12, 2013, and noted at the time (App. 25a; emphasis added):

65. Arthrex ultimately took a position at trial that it was not relying on an advice-of-counsel defense. *It presented no other evidence of good faith.* The jury found that Arthrex “knew or should have known” that it was infringing. The jury also found that Arthrex “actually knew—or was willfully blind” as to its infringement. (Dkt. No. 936 at 2.)

66. Arthrex cannot now claim hardship because it elected to ignore the ’557 patent in the first place without the benefit of any reliable opinion of counsel.

Given the jury’s affirmed factual findings, petitioner is simply not in a position to be arguing that its actions in this case, which caused massive direct infringement and damage to Smith & Nephew’s business, were outside the remedial scope of 35 U.S.C. §§ 271(b) and (c). The jury having been tasked with applying correctly stated law to the facts, its verdict is binding on petitioner. *Cf. City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-23 (1999) (jury verdict applying law to facts held binding).

III. THE DECISION BELOW DOES NOT CONFLICT WITH THAT OF ANY OTHER CIRCUIT AND HAS NO PRECEDENTIAL VALUE EVEN IN THE FEDERAL CIRCUIT.

The decision below is not argued to conflict with that of any other circuit. Although the Federal Circuit currently has exclusive appellate jurisdiction over civil actions “arising under” federal patent law, *see Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002), the regional courts of appeals adjudicated claims invoking 35 U.S.C. §§ 271(b) and (c) for nearly 30 years before the Federal Circuit’s creation in October 1982. In past cases, this Court has cited the existence of conflict between Federal Circuit and regional circuit precedent as relevant to a grant of certiorari. *E.g., Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 60 (1998). The converse is equally true.

The decision below is unreported in the *Federal Reporter* and has no precedential value even in the Federal Circuit. As is apparent on its face, the decision below merely holds that the evidence received below was sufficient to support the jury’s verdict which was rendered under correctly stated legal standards. The decision below does not purport to characterize, extend, or alter any principle of induced or contributory liability for patent infringement. As noted above, the decision below does not address the new theory of non-liability that petitioner now seeks to raise and does not pass on that theory.

Finally, although petitioner now argues “the Federal Circuit’s solitary focus on subjective belief has now

diluted willful blindness to a requirement less demanding than mere recklessness” (Pet. at 14), this Court’s two-year-old decision in *Global-Tech* itself articulated a willful blindness standard that focused on the defendant’s subjective beliefs. Before revisiting that subjective standard, this Court should await for more experience with how the subjective standard works in practice and how it is being applied by the lower courts. The Court should not accept one litigant’s declaration that the standard has failed. And if this Court should ultimately see a need to revisit its *Global-Tech* decision, it should certainly select a case in which the relevant arguments were fully presented to the judges below and discussed in the lower court’s opinion.

In sum, this case is a singularly poor vehicle for addressing the new legal theory that petitioner is now asking this Court to adopt. *Cf. Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006) (dismissing writ as improvidently granted where issue of patent-eligible subject matter had not been raised below).

IV. THE SAFECO DECISION, INVOLVING THE MEANING OF “WILLFUL” IN A STATUTE AUTHORIZING PUNITIVE DAMAGES, IS INAPPOSITE TO THE PROPER SCOPE OF 35 U.S.C. §§ 271(b) AND (c).

As this Court recently held in *Jerman*, only very clear statutory language will be interpreted as overcoming the principle that ignorance or mistake of law is no defense to civil or indeed criminal liability for conduct that actually violates a person’s rights. 559 U.S.

at 583-84 (“when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here”). Nothing in the text of §§ 271(b) or (c), or this Court’s precedents, supports an interpretation of those statutes that would engraft on them an exclusion for persons whose “actions” are “consistent with” a “not objectively unreasonable” “understanding” of “relevant legal requirements” at the time induced or contributory infringement occurs.

Safeco Insurance Co. of America v. Burr, 551 U.S. 47 (2007), on which petitioner heavily relies, in fact serves to illustrate the emptiness of the petition. Unlike the text of 35 U.S.C. §§ 271(b) and (c), the statute at issue in *Safeco* distinguished between “negligent” and “willful” violations of its provisions and authorized awards of enhanced statutory and punitive damages against persons who committed “willful” violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2006) (the “FCRA”). As noted in *Jerman*, the statutory term “willful” is one that often *does* excuse mistakes of law. 559 U.S. at 584. *See, e.g., Safeco*, 551 U.S. at 53 (noting statutory distinction between remedies for “negligent” as distinct from “willful” violations); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 129 (1988) (construing the term “willful” in the context of an extended statute of limitations for “willful” violations of the Fair Labor Standards Act).

Safeco held that a defendant’s “not objectively unreasonable” “understanding” of the meaning of a phrase in the FCRA (namely, the meaning of the phrase “adverse action” in 15 U.S.C. § 1681m(a)) supported entry of summary judgment holding that the defendant’s vi-

olation of the FCRA was not “willful.” 551 U.S. at 69-70. *Safeco* did *not* hold that such a mistaken “understanding” of the FCRA meant that no violation of the FCRA had occurred at all. The holding in *Safeco* was concerned with the meaning of the word “willful” in the context of a civil remedy authorizing awards of punitive damages.

Neither the holding nor the Court’s reasoning in *Safeco* provides any support for the sweeping argument that petitioner would have this Court adopt. Unlike the statute at issue in *Safeco*, 35 U.S.C. §§ 271(b) and (c) do not use the term “willful.” Equally importantly, this Court’s decision in *Global-Tech* spoke in terms of a defendant’s knowledge of *facts*, not *law*. See 131 S. Ct. at 2070 (“a high probability that a *fact* exists”; “deliberate actions to avoid learning of that *fact*.”) (emphasis added). The *Global-Tech* opinion nowhere states or suggests that ignorance or mistake of *law* is a defense to liability under §§ 271(b) and (c). See 131 S. Ct. at 2072 (affirming inducement liability where petitioner subjectively believed there was a “high probability that SEB’s fryer was patented” and “took deliberate steps to avoid knowing that *fact*.”) (emphasis added).

Further, unlike the petitioner here, the defendant in *Safeco* came forward and revealed what its actual understanding of the subject legal question was at relevant times. By contrast, petitioner here suppressed whatever contemporaneous documentary evidence it might have had concerning the issue of infringement and put forward strikingly weak and unusual evidence – an e-mail from one of its former trial lawyers – as supposed proof of what petitioner’s purported “under-

standing” of the ‘557 patent was six years earlier. The issue of statutory construction in *Safeco* was one that did not involve any specialized knowledge of engineering or a specialized court’s views on technical issues, whereas that is not true here.

In sum, the *Safeco* decision is inapplicable to the standard of liability that was applied below and, if anything, serves to illustrate why 35 U.S.C. §§ 271(b) and (c) are not rightly interpreted as prescribing liability that is dependent on a characterization of “actions” as “consistent with” a “not objectively unreasonable” “understanding” of “relevant legal requirements.” Even if the Court were inclined to look past the petitioner’s failure to raise this theory below, it is clear that the theory has no basis in the statutory text or this Court’s precedents.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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APPENDIX

**APPENDIX A — JURY VERDICT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON, PORTLAND DIVISION,
FILED JUNE 22, 2011**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. CV 04-029-MO

SMITH & NEPHEW, INC., and
JOHN O. HAYHURST, M.D.,

Plaintiffs,

v.

ARTHREX, INC.,

Defendant.

VERDICT

We, the jury, being first duly empaneled and sworn in the
above entitled cause, do find as follows:

DIRECT INFRINGEMENT

1. Did Plaintiffs prove that it is more likely true
than not true that surgeons directly infringe
any of the claims in the '557 patent by using the

2a

Appendix A

Bio-SutureTak anchors?

ANSWER: YES X NO

2. Did Plaintiffs prove that it is more likely true than not true that surgeons directly infringe any of the claims in the '557 patent by using the PEEK SutureTak anchors?

ANSWER: YES X NO

3. Did Plaintiffs prove that it is more likely true than not true that surgeons directly infringe any of the claims in the '557 patent by using the PEEK PushLock anchors?

ANSWER: YES X NO

4. Did Plaintiffs prove that it is more likely true than not true that surgeons directly infringe any of the claims in the '557 patent by using the Bio-PushLock anchors?

ANSWER: YES X NO

If you answered “no” to Questions 1-4, you are done. Please sign the verdict form and alert the court that you have reached a verdict. If you answered “yes” to any of Questions 1-4, proceed to Questions 5 and 6.

Appendix A

INDIRECT INFRINGEMENT

A. Contributory Infringement

5. Did Plaintiffs prove that it is more likely true than not true that Arthrex engaged in contributory infringement regarding the acts that constitute direct infringement?

ANSWER: YES X NO

Regardless of your answer to Question 5, please proceed to Question 6.

B. Induced Infringement

6. Did Plaintiffs prove that it is more likely true than not true that Arthrex actually intended to cause the acts that constitute direct infringement and that Arthrex knew or should have known that its actions would lead to direct infringement?

ANSWER: YES X NO

If you answered “no” to Question 6, please skip Question 7 and go to Question 8. If you answered “yes” to Question 6, please answer Question 7. The standard in Question 7 may appear similar to that in Question 6, so please consider the differences carefully.

7. Did Plaintiffs prove that it is more likely true than not true that Arthrex actually intended to

4a

Appendix A

cause the acts that constitute direct infringement and that Arthrex actually knew—or was willfully blind¹ to the fact—that the induced acts constitute direct infringement?

ANSWER: YES X NO

If you answered “no” to both Question 5 and Question 6, you are done. Please sign the verdict form and alert the court that you have reached a verdict. If you answered “yes” to any one or more of Questions 5-7, please proceed to Questions 8, 9 and 10.

DAMAGES

8. Did Smith & Nephew prove that it is more likely true than not true that it is entitled to lost profit damages?

ANSWER: YES X NO

If “yes,” what amount is Smith & Nephew entitled to recover for lost profit damages?

ANSWER: \$67,793,868.00

1. As explained in Jury Instruction No. 19, the requirements for proving willful blindness are: (1) Arthrex subjectively believed that there was a high probability that the induced acts constituted infringement, and (2) Arthrex took deliberate actions to avoid learning of that fact.

5a

Appendix A

9. What amount of reasonable royalty damages do you find Plaintiffs entitled to? As explained in Jury Instruction No. 31, if you found indirect infringement (by answering “yes” to any of Questions 5-7), you must calculate reasonable royalty damages, but only as to portions of Arthrex’s sales for which you did not award lost profit damages in Question 8.

ANSWER: \$16,987,556.00

WILLFUL INFRINGEMENT

10. Did Smith & Nephew prove by clear and convincing evidence that Arthrex’s indirect infringement of the ’557 patent was willful?

ANSWER: YES X NO

Please have your foreperson sign and date this Verdict Form.

DATED this 22nd day of June, 2011.

/s/ _____
Foreperson

**APPENDIX B — JURY INSTRUCTIONS
CONCERNING WILLFUL INFRINGEMENT AND
INDUCING PATENT INFRINGEMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON, PORTLAND DIVISION,
FILED JUNE 22, 2011**

Instruction No. 18

CONTRIBUTORY PATENT INFRINGEMENT

The first type of indirect infringement Smith & Nephew alleges is contributory infringement. Smith & Nephew asserts that Arthrex contributed to another's infringement.

Smith & Nephew has the burden to prove that it is more likely true than not true that there was contributory infringement. Smith & Nephew alleges that surgeons using Arthrex anchors have directly infringed. If there is no direct infringement by surgeons, Arthrex cannot have contributed to the infringement of the patent.

If you find surgeons have directly infringed the '557 patent, then contributory infringement exists only if:

1. Arthrex sold or supplied;
2. a material component of the patented invention that is not a staple article of commerce capable of substantial non-infringing use; and
3. with knowledge that the component was especially made or adapted for use in a method Arthrex knew to be infringing.

Appendix B

Smith & Nephew can prove Arthrex had knowledge of infringement either by showing Arthrex actually knew the surgeons were directly infringing or by showing Arthrex was willfully blind to whether surgeons were directly infringing. In order to show that Arthrex was willfully blind, Smith & Nephew must prove that it was more likely true than not true that: (1) Arthrex subjectively believed that there was a high probability that the surgeons would directly infringe; and (2) Arthrex took deliberate actions to avoid learning of that fact.

A “staple article of commerce capable of substantial non-infringing use” is something that has uses other than in the patented method, and those other uses are not occasional, farfetched, impractical, experimental or hypothetical.

Instruction No.19**INDUCING PATENT INFRINGEMENT**

The second type of indirect infringement is infringement through inducement. Smith & Nephew asserts that Arthrex actively induced surgeons to directly infringe the '557 patent.

To show induced infringement, Smith & Nephew must prove that it is more likely true than not true that the surgeons have directly infringed the '557 patent and that Arthrex has actively and knowingly aided and abetted that direct infringement.

You will be asked to analyze induced infringement in two separate ways.

Appendix B

First, you must determine whether Smith & Nephew has shown that it is more likely true than not true that Arthrex actually intended to cause the encouraged acts that constitute direct infringement, that Arthrex knew of the '557 patent, and that Arthrex knew or should have known that the encouraged acts constituted infringement of the patent.

Second, you must determine whether Smith & Nephew has shown that it is more likely true than not that Arthrex actually intended to cause the acts that constitute direct infringement, that Arthrex knew of the patent, and that Arthrex actually knew or was willfully blind to the fact that its actions would lead to actual infringement.

In order to show that Arthrex was willfully blind, Smith & Nephew must prove that it was more likely true than not true that (1) Arthrex subjectively believed that there was a high probability that the induced acts constituted infringement, and (2) Arthrex took deliberate actions to avoid learning of that fact.

Intent to cause the acts that constitute direct infringement may be demonstrated by evidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use.

Smith & Nephew alleges that surgeons using Arthrex anchors directly infringed. If you find there is no direct infringement by surgeons, there can be no induced infringement.

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**APPENDIX C — JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF OREGON, PORTLAND DIVISION,
FILED SEPTEMBER 12, 2013**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. 3:04-cv-00029-MO

SMITH & NEPHEW, INC. and
JOHN O. HAYHURST, M.D.,

Plaintiffs,

v.

ARTHREX, INC.,

Defendant.

JUDGMENT

PATENT CASE

MOSMAN, J.,

Based upon the hearing held September 9, 2013 [1110],
in which I GRANTED plaintiffs' Motion for Entry of
Judgment [1050],

IT IS ORDERED AND ADJUDGED that judgment
be and is hereby entered in favor of the plaintiffs, Smith &

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Nephew, Inc. and John O. Hayhurst, M.D., and against the defendant, Arthrex, Inc.: that surgeons directly infringe U.S. Patent No. 5,601,557 (“the ’557 patent”) by using the Bio-SutureTak anchors; that surgeons directly infringe the ’557 patent by using the PEEK SutureTak anchors; that surgeons directly infringe the ’557 patent by using the PEEK PushLock anchors; that surgeons directly infringe the ’557 patent by using the Bio-PushLock anchors; that Arthrex engaged in contributory infringement regarding the acts that constitute direct infringement; that Arthrex induced infringement by actually intending to cause the acts that constitute direct infringement and that Arthrex knew or should have known that its actions would lead to direct infringement; that Arthrex induced infringement by actually intending to cause the acts that constitute direct infringement and that Arthrex actually knew—or was willfully blind to the fact—that the induced acts constitute direct infringement; that based on the sales information presented at trial, the plaintiffs are entitled to \$67,793,868.00 in lost profits damages and \$16,987,556.00 in reasonable royalty damages; and that plaintiffs are awarded prejudgment interest for the period up through June 30, 2011 in the amount of \$3,533,450, further interest to be calculated; and further damages to be calculated.

DATED this 12th day of September, 2013.

/s/
MICHAEL W. MOSMAN
United States District Court

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**APPENDIX D — STATEMENT OF REASONS
SUPPORTING PERMANENT INJUNCTION
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON, PORTLAND
DIVISION, FILED SEPTEMBER 12, 2013**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. 3:04-cv-00029-MO

SMITH & NEPHEW, INC. and
JOHN O. HAYHURST, M.D.,

Plaintiff,

v.

ARTHREX, INC.,

Defendant.

**STATEMENT OF REASONS SUPPORTING
PERMANENT INJUNCTION**

PATENT CASE

MOSMAN, J.,

On September 12, 2013, this Court issued an Order of Permanent Injunction in this action. The following is the Court's Statement of Reasons Supporting that Injunction.

*Appendix D***I. Background**

1. On January 12, 2004, plaintiffs Smith & Nephew, Inc., and Dr. John O. Hayhurst commenced this action against defendant Arthrex, Inc., for infringement of U.S. Patent No. 5,601,557 (“the ’557 patent”). In their Complaint, plaintiffs requested an injunction to stop Arthrex’s continued infringement. (Dkt. No. 1.)

2. Dr. Hayhurst is the owner and Smith & Nephew is his exclusive licensee of the ’557 patent. (Dkt. No. 1.)

3. Following an initial trial which resulted in a hung jury, the issues of infringement, willful infringement, and damages were tried to a jury in the 2008 re-trial of this case from June 3, 2008, to June 11, 2008. On June 11, 2008, the jury in the re-trial of this case returned a verdict of infringement in favor of the plaintiffs. (Dkt. No. 489.) Specifically, the jury found that Arthrex infringed claims 1 through 7 of the ’557 patent by marketing and selling four suture anchors: 1) the Bio-SutureTak; 2) the PEEK SutureTak; 3) the PEEK PushLock; and 4) the Bio-PushLock. In addition, Arthrex’s infringement was found to be willful. (*See* Dkt. No. 489.)

4. Following the Federal Circuit’s remand following the 2008 verdict, the issues of infringement, willful infringement, and damages were tried to a jury in the 2011 re-trial of this case from June 13, 2011 to June 22, 2011.

5. On June 22, 2011, the jury in the 2011 re-trial of this case returned a verdict of infringement in favor of the plaintiffs. (Dkt. No. 936.)

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6. Specifically, the jury found that Arthrex infringed claims 1 through 7 of the '557 patent by marketing and selling four suture anchors: 1) the Bio-SutureTak; 2) the PEEK SutureTak; 3) the PEEK PushLock; and 4) the Bio-PushLock. In addition, Arthrex's infringement was found to be willful. (*See* Dkt. No. 936.)

7. The jury also found both that Arthrex "knew or should have known" that it was infringing and that Arthrex "actually knew—or was willfully blind" as to its infringement. (Dkt. No. 936 at 2.)

8. In its decision dated January 16, 2013, the Federal Circuit found in favor of plaintiffs and reinstated the jury's verdict. *Smith & Nephew, Inc. v. Arthrex, Inc.*, No. 2012-1265, 2013 WL 163823 (Fed. Cir. Jan. 16, 2013).

9. Previously, this Court had dismissed, or Arthrex had abandoned, all of Arthrex's invalidity and unenforceability defenses. (Dkt. No. 241; Dkt. No. 278.)

10. Thus, the Court finds that the '557 patent is valid, enforceable, and infringed.

11. The jury also awarded the plaintiffs monetary damages in the amount of \$84,781,424. This included \$67,793,868 to compensate the plaintiffs for Smith & Nephew, Inc.'s lost profits for lost sales through the end of June, 2011, as a result of Arthrex's infringement. (Dkt. No. 936.)

*Appendix D***II. *The Patented Invention and Competition Between the Parties***

12. The '557 patent is directed to certain methods of using a medical device called a suture anchor. Suture anchors allow a surgeon to repair soft tissue (such as ligaments, tendons or capsules) that has torn away from the bone, by re-attaching the tissue back to the bone so it can heal.

13. In about 1992, Dr. Hayhurst's original exclusive licensee, Acufex Microsurgical Inc., began marketing and selling Dr. Hayhurst's patented suture anchors, which were implanted using the claimed methods of the '557 patent. These licensed anchors were all plastic, and they all pushed in or tapped into a pre-drilled hole in the bone. (2008 Trial Trans. p. 211, line 6 to p. 212, line 14, Dkt. No. 524, Exhibit 2; Mahoney Decl., Dkt. No. 523, ¶ 4; 2011 Trial Trans. p. 199, line 13 to p. 200, line 25; 2013 Mahoney Decl. ¶ 4.)

14. Smith & Nephew acquired Acufex and thereby became Dr. Hayhurst's exclusive licensee. (2008 Trial Trans. p. 212, lines 15-17, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 201, lines 1-3.)

15. Arthrex introduced its first suture anchor in 1996 or 1997. (2008 Trial Trans. p. 800, line 22 to p. 801, line 5, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 676, lines 1-25.)

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16. The original Arthrex anchors fell into a different market niche than Dr. Hayhurst's plastic, push-in anchors. Arthrex's initial anchors, called FASTak, were metal, and they were screwed into the bone. (2008 Trial Trans. p. 259, line 19 to p. 260, line 10, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 675, line 13 to p. 677, line 2.)

17. Arthrex's screw-in anchors were not very successful. By 1999, Arthrex was still at the "bottom of the pack" with only a "very small market share" according to Arthrex's marketing witness at the 2008 and 2011 trials, William Benavitz. (2008 Trial Trans. p. 766, lines 3-8, Dkt. No. 524, Exhibit 2; 2011 Trial Tr. p. 1304, lines 2-6.)

18. To change that, Arthrex began making plastic, push-in suture anchor products. In the year 2000, Arthrex did not have any of that part of the market. (2008 Trial Trans. p. 810, lines 5-13, Dkt. No. 524, Exhibit 2; 2011 Trial Tr. p. 1319, lines 1-12.) Arthrex introduced its first infringing anchor, the plastic, push-in Bio-SutureTak, in late 2001. (2008 Trial Exhibit 175, Dkt. No. 524, Exhibit 3; 2008 Trial Trans. p. 742, line 7 to p. 743, line 24, Dkt. No. 524, Exhibit 2; 2011 Trial Exhibit 136; 2011 Trial Trans. p. 939, line 2 to p. 940, line 2.)

19. At the time of such introduction, Arthrex was already aware of the '557 patent. This awareness was at the highest level of the company, including by its President Reinhold Schmieding. (2008 Trial Exhibit 175, Dkt. No. 524, Exhibit 3; 2008 Trial Trans. p. 742, line 7 to p. 745, line 4, Dkt. No. 524, Exhibit 2; 2011 Trial Exhibit 136; 2011 Trial Trans. p. 939, line 2 to p. 940, line 2.)

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20. Arthrex credits the Bio-SutureTak with turning around its fortunes in the suture anchor market.

21. The other major designs in addition to the Bio-SutureTak included Arthrex's other three plastic, push-in anchors that were also found to infringe: the PEEK SutureTak; the PEEK PushLock; and the Bio-PushLock anchors.

22. Two of Arthrex's three largest selling suture anchors as of 2008 were the infringing Bio-SutureTak and the infringing PushLock anchors, according to Arthrex's Mr. Benavitz (2008 Trial Trans. p. 767, line 24 to p. 768, line 1, Dkt. No. 524, Exhibit 2), and the Bio-SutureTak remained one of Arthrex's best-selling suture anchors as of the 2011 trial. (2011 Trial Trans. p. 1327, lines 13-15.)

23. Along with the anchors, Arthrex produced and distributed surgical instructions showing how its infringing anchors could be used to repair exactly the same dislocated shoulder injury (Bankart lesion) for which Dr. Hayhurst had made his invention in the first place. (*See* 2008 Trial Exhibits 26, 27 and 42, Dkt. No. 524, Exhibits 4-7; 2008 Trial Trans. p. 194, lines 6-25, Dkt. No. 524, Exhibit 2; 2011 Trial Exhibits 13, 14 and 28; 2011 Trial Trans. p. 176, line 17 to p. 177, line 23; p. 186, line 13 to p. 187, line 16.)

III. Irreparable Harm

24. The first factor in determining whether to award an injunction is to determine whether there would be irreparable harm without an injunction.

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25. Arthrex is Smith & Nephew's biggest competitor for suture anchors throughout the United States. (2008 Trial Trans. p. 265, lines 2-8, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 680, lines 2-8; 2013 Mahoney Decl. ¶ 8.)

26. The actual competition between Arthrex and Smith & Nephew is in a specific segment of that market—plastic, push-in anchors—which Dr. Hayhurst and his licensees, Acufex and Smith & Nephew, created, and which Arthrex has now taken over as a result of its ongoing infringement of Dr. Hayhurst's '557 patent.

27. When Arthrex gained market share, it did so by taking that market share from other competitors, including Smith & Nephew and the plaintiffs' other licensee, Johnson & Johnson (Mitek). (2008 Trial Trans. p. 765, line 22 to p. 766, line 19, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 1303, line 23 to p. 1305, line 15.)

28. Smith & Nephew continues to market the Acufex suture anchors implanted by Dr. Hayhurst's patented method, and has invested significant time, money, and effort in developing an additional suture anchor, called the BioRaptor, which is also covered by Dr. Hayhurst's patents and implanted by the methods covered by his '557 patent. (Mahoney Decl., Dkt. No. 523, ¶¶ 4, 5, and 7; 2013 Mahoney Decl. ¶¶ 4, 5, and 7.)

29. The new Smith & Nephew BioRaptor was introduced to the market in late 2004. (2008 Trial Trans. p. 734, lines 3-17, Dkt. No. 524, Exhibit 2; Mahoney Decl., Dkt. No. 523, ¶ 5; 2011 Trial Trans. p. 759, lines 16-24; 2013 Mahoney Decl. ¶ 5.) The BioRaptor is also a plastic,

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push-in anchor, and it comes pre-loaded with a suture and mounted on its own installation tool. (2008 Trial Trans. p. 271, line 3 to p. 272, line 21, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 686, lines 22-25; p. 767, line 20 to p. 768, line 5.)

30. In addition, since that time, Smith & Nephew has continued to invest substantial time and money in developing still other plastic, push-in anchors. These include the KINSA anchor which was introduced in the fall of 2006, the BioRaptor 2.3 PK and Footprint PK anchors, both of which were introduced in early 2008, the OSTEORAPTOR anchor which was introduced in late 2008, the Dynamite and Raptormite anchors, both of which were introduced in early 2009, and the BioRaptor Knotless and Footprint Ultra PK anchors, both of which were introduced in 2010. Including the BioRaptor, Smith & Nephew has invested over \$6 million in development costs for these new anchors. (2013 Mahoney Decl. ¶¶ 5, 6, 7.)

31. In terms of product-to-product competition, Smith & Nephew's BioRaptor suture anchor matches up almost exactly with Arthrex's Bio-SutureTak. Both the Bio-SutureTak and the BioRaptor are made of bio-absorbable plastic, and both are push-in anchors. Both include pre-attached sutures, and both anchors are pre-mounted on installation tools. Further, both are sold for the same surgeries. (*See, e.g.*, 2008 Trial Trans. p. 271, line 6 to p. 272, line 21, p. 706, line 24 to p. 707, line 10, and p. 734, line 20 to p. 735, line 2, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 686, lines 22-25; p. 767, line 20 to p. 768, line 5.)

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32. This identity of form and function between the BioRaptor and Bio-SutureTak was the basis for Smith & Nephew's lost profits claim at the 2008 and 2011 trials (2008 Trial Trans. p. 703, line 24 to p. 705, line 11 and p. 706, line 24 to p. 707, line 15, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 683, line 4 to p. 684, line 21; p. 686, lines 22-25; p. 759, lines 16-24; p. 764, lines 2-15; p. 767, line 20 to p. 768, line 5), and the evidence on this issue was not challenged by Arthrex, either in cross-examination of Smith & Nephew's expert, Richard Troxel (*see* 2008 Trial Trans. p. 734, line 18 to p. 739, line 1, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 843, line 12 to p. 848, line 2), or in the examination of its own damages experts, David Paris and Russell Parr (2011 Trial Trans. p. 1369, line 14 to p. 1377, line 17; 2008 Trial Trans. p. 1089, lines 3-7; p. 1093, lines 5-18, Dkt. No. 524, Exhibit 2).

33. The jury found, as a fact, that Smith & Nephew had lost almost \$68 million in sales of its BioRaptor suture anchor from late 2004 when the BioRaptor was introduced through the end of June, 2011, as a result of Arthrex's infringement. (*See* Re-Trial Exhibit 130, Exhibit D, Dkt. No. 524, Exhibit 9; Dkt. No. 936.)

34. Arthrex continues to be Smith & Nephew's major competition in the plastic push-in anchor market, and Smith & Nephew continues to lose BioRaptor sales as a result of Arthrex's ongoing infringement. (Mahoney Decl., Dkt. No. 523, ¶¶ 11, 12; 2013 Mahoney Decl. ¶¶ 8-11.)

35. Due to Arthrex's infringement, Smith & Nephew cannot sell the BioRaptor suture anchor as extensively as

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it could if the infringement were not ongoing. (Mahoney Decl., Dkt. No. 523, ¶¶ 4, 7 and 11; 2013 Mahoney Decl. ¶¶ 5-11.)

36. Arthrex's infringement is ongoing, including after the jury's June, 2011 verdict in this case, and therefore Smith & Nephew has lost additional sales after June, 2011, to Arthrex and continues to lose sales to Arthrex.

37. These lost sales translate into lost market share in the suture anchor market for Smith & Nephew.

38. Smith & Nephew's lost sales extend beyond that of the suture anchors themselves, as Smith & Nephew and Arthrex both also sell drills, drill guides, and other associated products for use with their suture anchors. (Mahoney Decl., Dkt. No. 523, ¶ 12; 2013 Mahoney Decl. ¶ 12.)

39. The loss of sales of such other associated products was an unchallenged factor in the plaintiffs' expert's setting the reasonable royalty damages rate at the 2008 and 2011 trials. (2008 Trial Trans. p. 719, line 18 to p. 720, line 4, Dkt. No. 524, Exhibit 2; 2008 Trial Exhibit 130, Exhibit D, Dkt. No. 524, Exhibit 9; 2011 Trial Trans. p. 806:10-23.)

40. Thus, Arthrex's continuing infringement also costs Smith & Nephew its profits and market share from these additional, related products.

41. The plaintiffs have licensed Johnson & Johnson under the '557 patent. Johnson & Johnson's Ethicon

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division (formerly Mitek) pays the plaintiffs an ongoing royalty on its sales of its licensed anchors. (2008 Trial Trans. p. 721, lines 7-24, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 808, line 2 to p. 809, line 7.)

42. Arthrex's infringing suture anchors have allowed Arthrex to displace Johnson & Johnson (Mitek) as the market leader and greatly reduce Johnson & Johnson's market share. (2008 Trial Trans. p. 766, lines 3-16, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 1303, line 23 to p. 1305, line 6.)

43. Any such reduction in Johnson & Johnson's market share also reduces the royalties paid to the plaintiffs under this license and represents a further harm in the form of ongoing loss of income to the plaintiffs as a result of Arthrex's infringement.

44. In addition to new product development, in 2004, Smith & Nephew began investing millions of dollars in clinical marketing and surgeon education to try to recapture and increase market share. (2008 Trial Trans. p. 257, line 5 to p. 258, line 13, Dkt. No. 524, Exhibit 2; 2011 Trial Trans. p. 672, line 12 to p. 673, line 19.)

45. But Smith & Nephew had a difficult time trying to make any inroads against Arthrex. In fact, third-party marketing reports indicate that with Arthrex's big "lead" in this market, Smith & Nephew was not making much progress. (2008 Trial Trans. p. 735, line 18 to p. 736, line 2, Dkt. No. 524, Exhibit 2; Mahoney Decl., Dkt. No. 523, ¶¶ 8, 9, 10; 2008 Trial Exhibit 134B, Dkt. No. 524, Exhibit 8; 2013 Mahoney Decl. ¶¶ 8, 9, 10.)

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46. Thus, Arthrex, due to its infringement, now has such a large piece of the suture anchor market and is so firmly entrenched in it that Smith & Nephew's efforts to increase market share, despite its investment of millions of dollars in additional marketing efforts, and new product introductions, have largely been unsuccessful.

47. Arthrex's leading position in the suture anchor market was obtained, at least in part, through its conduct which it knew or should have known was infringing the '557 patent, and through its willful blindness of its infringement of the '557 patent.

48. Smith & Nephew's predecessor company, Acufex, marketed the first plastic, push-in suture anchors, and Smith & Nephew itself has spent a great deal of money in bringing new suture anchors to the market. (Mahoney Decl., Dkt. No. 523, ¶ 6; 2013 Mahoney Decl. ¶¶ 6-7.)

49. Arthrex's reputation as the market leader and as an innovator in the suture anchor market was built largely on the infringing suture anchors. This has directly detracted from Smith & Nephew's reputation as an innovator in the marketplace.

50. As a result of Arthrex's infringement, it appears to others as if it is Arthrex that is the "innovator" in the suture anchor market instead of Smith & Nephew.

51. Arthrex's infringement has harmed Smith & Nephew's reputation as an innovator in the suture anchor market.

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52. Arthrex's continued infringement will result in substantially reduced sales revenue for Smith & Nephew, as well as lost market share, lost investment in new product development, lost sales of collateral products and licensing revenue, and loss of reputation, customer relationships, and goodwill.

53. Irreparable harm exists in this case, because the infringement is by a direct competitor and the infringement has caused the patentee to suffer losses of sales, market share, investment in new product development, sales of collateral products, licensing revenue, reputation, customer relationships, and goodwill.

54. In view of all of the foregoing, the Court finds that the irreparable harm factor is clearly established.

IV. Adequacy of Monetary Relief

55. The second factor in determining whether to award an injunction is whether money damages would be inadequate. This factor is closely related to the irreparable harm factor discussed above.

56. Arthrex and Smith & Nephew are major competitors in the market for plastic press-in suture anchors.

57. The plaintiffs cannot quantify the damage they will incur, particularly in terms of lost market share, lost reputation, and lost customer relationships and goodwill, if forced to continue to share the '557 technology with Arthrex for the remainder of the '557 patent's life.

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58. It is not Smith & Nephew's general policy to grant licenses to competitors. (2008 Trial Trans. p. 723, lines 13-15, Dkt. No. 561, Exhibit 1; 2011 Trial Trans. p. 811, line 21 to p. 812, line 12.)

59. The license that Smith & Nephew granted to Ethicon in 2002, in settlement of a prior patent infringement lawsuit, does not demonstrate that monetary relief is adequate. The Ethicon license includes restrictions on the types of suture anchors that Ethicon can sell, which precludes suture anchors like Arthrex's. (*See* 2008 Trial Trans. p. 722, lines 8-13, Dkt. No. 61, Exhibit 1; 2011 Trial Trans. p. 808, line 2 to p. 809, line 11.) In addition, the Ethicon license was granted in 2002, before Smith & Nephew introduced the BioRaptor suture anchor, and so at the time of the Ethicon license Smith & Nephew was not in the same competitive position as it now is with Arthrex.

60. Accordingly, the Court finds that monetary damages are insufficient to adequately compensate Smith & Nephew for the lost market share, lost business opportunities, and damage to reputation, customer relationships and goodwill described above.

61. Thus, this factor also favors an injunction.

V. *Balance of Hardships*

62. The third factor in determining whether to award an injunction involves assessing the balance of hardships.

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63. Arthrex started its infringing activities with full knowledge at the highest level of the company, including by its President Reinhold Schmieding, of the '557 patent. (2008 Trial Exhibit 175, Dkt. No. 524, Exhibit 3; 2011 Trial Exhibit 136, 2011 Trial Trans. p. 939, line 2 to p. 940, line 3.)

64. Despite such knowledge, Arthrex went ahead with its infringing activities. (2008 Trial Exhibit 175, Dkt. No. 524, Exhibit 3; 2011 Trial Exhibit 136, 2011 Trial Trans. p. 939, line 2 to p. 940, line 3.)

65. Arthrex ultimately took a position at trial that it was not relying on an advice-of-counsel defense. It presented no other evidence of good faith. The jury found that Arthrex “knew or should have known” that it was infringing. The jury also found that Arthrex “actually knew—or was willfully blind” as to its infringement. (Dkt. No. 936 at 2.)

66. Arthrex cannot now claim hardship because it elected to ignore the '557 patent in the first place without the benefit of any reliable opinion of counsel.

67. By its infringement Arthrex has improperly benefited for about twelve years, to the direct detriment of the patentee and his licensee, Smith & Nephew.

68. While there will be some impact on Arthrex's business, Arthrex was well aware of that risk when it started and continued to market the accused products from 2001 until even today.

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69. Arthrex is a large company, which operates worldwide and had U.S. sales in fiscal year 2008 of about \$444 million. (Benavitz Decl., Dkt. No. 545, ¶ 7.) Since then, its sales have increased substantially, and it now has nearly \$997 million in annual sales. (April 12, 2013 Decl. of Susan Pitchford in Support of Plaintiffs' Motion for Permanent Injunction Exhibit 12.)

70. Arthrex describes itself as having locations worldwide and over 3000 products as of 2008 (Arthrex website, Dkt. No. 524, Exhibit 10), and over 6000 products at the current time. (April 12, 2013 Decl. of Susan Pitchford in Support of Plaintiffs' Motion for Permanent Injunction Exhibit 11.)

71. The issuance of a permanent injunction in this case will not even come close to driving Arthrex out of business.

72. An injunction would not even drive Arthrex out of the suture anchor business because Arthrex continues to sell non-infringing suture anchors.

73. In terms of the practical effect of the injunction on the marketplace, the injunction will only impact Arthrex's SutureTak family of anchors (consisting of the Bio-SutureTak and PEEK SutureTak anchors).

74. The injunction will not have the effect of removing Arthrex's "small eyelet" PushLock anchors from the market, since Arthrex changed the design of those anchors during the course of this lawsuit. Instead, the

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PushLock anchors that are currently on the market are the subject of a new lawsuit, *Smith & Nephew, Inc. v. Arthrex, Inc.*, Civil Action No. 08-00714-MO.

75. Arthrex's U.S. sales of suture anchors in its SutureTak family in fiscal year 2008 were about \$38.6 million. (*See* Troxel Decl. filed Nov. 17, 2008, Dkt. No. 602, ¶ 6.) Given that Arthrex's total U.S. sales over that time period amount to \$444 million, this represents about 8.7% of Arthrex's U.S. sales. (*See Id.* at ¶¶ 4-6.)

76. Thus, an injunction in this case will not impose any unreasonable hardship on Arthrex.

77. On the other hand, the burden on Smith & Nephew, if an injunction does not issue, will be far greater than any harm to Arthrex.

78. Smith & Nephew has experienced over twelve years of infringement by Arthrex.

79. Without an injunction, other competitors may feel free to infringe the '557 patent.

80. Without a permanent injunction, Smith & Nephew will continue to suffer lost sales, lost market share, lost investment in new product development, lost sales of collateral products, lost licensing revenue, lost reputation, and lost customer relationships and goodwill.

81. These harms significantly tip the balance of hardships in favor of the plaintiffs.

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82. Thus, the Court finds that the balance of harms factor supports grant of a permanent injunction.

VI. *The Public Interest*

83. The final factor in determining whether to award an injunction is determining where the public interest lies.

84. First of all, the Court recognizes that there is substantial public interest in enforcing valid patents, and this public interest favors the grant of an injunction.

85. Arthrex's customers, the surgeons and their patients, will not be harmed by an injunction because there are a variety of other acceptable substitute anchors available, as its 2008 damages expert, Mr. Parr, and its 2011 damages expert, Mr. Paris, suggested. (Parr Expert Report at pages 7, 9, Dkt. No. 524, Exhibit 11; 2008 Trial Trans. p. 1316, line 10 through p. 1318, line 6, Dkt. No. 524, Exhibit 12; 2011 Trial Trans. p. 1375, lines 4-9; p. 1377, lines 1-17; p. 1383, lines 10-22.)

86. Arthrex's 2008 damages expert, Mr. Russell Parr, took the position, with Arthrex's approval, that the surgeons are completely indifferent to which anchor they use. (Parr Expert Report at pages 7, 9, Dkt. No. 524, Exhibit 11; 2008 Trial Trans. p. 1316, line 10 through p. 1318, line 6, Dkt. No. 524, Exhibit 12.) Arthrex's 2011 damages expert, Mr. David Paris, took a similar position. (2011 Trial Trans. p. 1375, lines 4-9; p. 1377, lines 1-17.)

87. Arthrex itself has admitted that there are many available substitute anchors on the market. In

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its Opposition to Plaintiffs' 2008 Motion for Permanent Injunction, Arthrex admitted that there are many other acceptable suture anchors on the market that surgeons can select in order to replace the SutureTak and PushLock anchors:

If forced to do without the benefits of the PushLock anchors or SutureTak anchors, a surgeon could turn to anchors made by Ethicon, Linvatec, Arthrocare, Biomet and Arthrotek. These companies all offer anchors that a surgeon would find at least as desirable, if not more, to the Smith & Nephew BioRaptor and are useable for the same surgeries as Arthrex's SutureTak and PushLock anchors.

(Arthrex Br., Dkt. No. 543, at 5).

88. Arthrex also submitted a declaration from its expert Dr. Greenleaf, who is an orthopedic surgeon, which includes the very same admission. (Greenleaf Decl., Dkt. No. 547, ¶ 8.)

89. Arthrex's expert, Dr. Burkhead, who is also an orthopedic surgeon, testified at his deposition that if a surgeon could not use the Bio-SutureTak anchor, that surgeon would be able to instead use "metal anchors that are very reliable and have been used for years." Dr. Burkhead also testified that he personally "would probably go back to the Mitek G2 because I know it is relatively inexpensive and consistently works." (*See* Burkhead Dep. at p. 284, lines 3-19, attached as Exhibit 2 to Legaard Decl. filed Nov. 17, 2008, Dkt. No. 596.)

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90. Smith & Nephew suture anchors are also available on the market and can be substituted for Arthrex's SutureTak anchors. For example, as set forth above, Smith & Nephew's BioRaptor suture anchors are comparable to Arthrex's Bio-SutureTak anchors.

91. As set forth above, the jury found as a fact that Smith & Nephew has lost sales of its BioRaptor anchors to Arthrex's infringing anchors. Necessary to and implicit in that finding is the fact that such anchors may be used as substitutes for each other.

92. In fact, during the permanent injunction hearing of October 28, 2008, Arthrex's counsel admitted that the jury's 2008 verdict on lost profits damages, which has been upheld by this Court, was conclusive on the issue that Arthrex's infringement took sales directly from Smith & Nephew due to the infringing features. (Tr. of Inj. Hrg. of 10/28/08, at 31-32, attached as Exhibit 1 to Legaard Decl. filed Nov. 17, 2008, Dkt. No. 596.)

93. In addition, Smith & Nephew has the capacity to increase suture anchor production to more than meet all the demands for the enjoined anchors. (O'Connor Decl., Dkt. No. 522, ¶¶ 4, 7; 2013 O'Connor Decl. ¶¶ 4, 7.)

94. As set forth above, due to changes in their design, this injunction will not impact the versions of the Arthrex PushLock anchors that are currently on the market.

95. Accordingly, the Court finds that there would be either no or minimal adverse effect on surgeons or patients as a result of the injunction.

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96. Thus, the Court finds that the public interest factor also supports granting a permanent injunction in this case.

DATED this 12th day of September, 2013.

/s/
MICHAEL W. MOSMAN
United States District Court

**APPENDIX E — AMENDED ORDER OF
PERMANENT INJUNCTION OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF OREGON, PORTLAND DIVISION,
FILED SEPTEMBER 18, 2013**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. 3:04-cv-00029-MO

SMITH & NEPHEW, INC. and
JOHN O. HAYHURST, M.D.,

Plaintiffs,

v.

ARTHREX, INC.,

Defendant.

**AMENDED ORDER OF
PERMANENT INJUNCTION**

PATENT CASE

MOSMAN, J.,

IT IS HEREBY ORDERED that, effective 14 days
after the date of this Order, the defendant, Arthrex, Inc.,
its subsidiaries and related companies, and its officers,

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agents, servants, employees, and attorneys, and those persons in active concert or participation with any or all of them who receive actual notice of this Order, are hereby permanently enjoined from inducing the infringement of, and/or contributing to the infringement of Claims 1, 2, 3, 4, 5, 6 and/or 7 of U.S. Patent No. 5,601,557 (“the ’557 patent”) by end users in the United States and its territories, until the expiration of the patent, or the cancellation of or final ruling of invalidity, after exhaustion of all possible appeals, of all claims of the patent, by using, importing, selling, and/or offering to sell in the United States and its territories any of the following products for use in the United States and its territories:

(i) Bio-SutureTak suture anchors of all sizes, including the Bio-SutureTak, 2.4 mm Bio-SutureTak, 3.7 mm Bio-SutureTak, Mini Bio-SutureTak, and Micro Bio-SutureTak;

(ii) PEEK SutureTak suture anchors;

(iii) 3.5 mm Bio-PushLock suture anchors, except those which are excluded as being of the “large eyelet” variety as set forth below;

(iv) 3.5 mm PEEK PushLock suture anchors, except those which are excluded as being of the “large eyelet” variety as set forth below; and

(v) any suture anchors not more than colorably different from said infringing suture anchors listed in (i), (ii), (iii) and/or (iv) above.

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No other anchors are included in this Order and the following suture anchors are not included in the above list:

- (i) Bio-Composite SutureTak;
- (ii) All Pushlock suture anchors in sizes other than 3.5 mm; and
- (iii) 3.5 mm “large eyelet” Bio-PushLock and PEEK PushLock suture anchors, which include an eyelet member having a diameter of at least 2.4 mm.

IT IS FURTHER ORDERED that, effective 14 days after the date of this Order, the defendant, Arthrex, Inc., shall either (1) remove all advertising material for the infringing suture anchors listed in (i), (ii), (iii) and (iv) above from its website, or (2) post a disclaimer on its website stating that any use of the infringing suture anchors listed in (i)-(iv) above must not occur in the United States until the expiration of the '557 patent pursuant to an injunction entered against Arthrex.

IT IS FURTHER ORDERED that, effective 30 days after the date of this Order, the defendant, Arthrex, Inc., its subsidiaries and related companies, and its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with any or all of them who receive actual notice of this Order, recall all infringing suture anchors listed in (i), (ii), (iii) and (iv) above that Arthrex has distributed in any way and for which Arthrex has not yet sent an invoice, unless such anchors have already been used in surgery. Arthrex may

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use the recalled anchors in any way that does not violate this injunction.

IT IS FURTHER ORDERED that the defendant, Arthrex, Inc. promptly provide a copy of this Order to each of its distributors and sales representatives, who are or have been involved in the sale of Arthrex suture anchors, whether or not such persons are employees of Arthrex, Inc.

DATED this 18th day of September, 2013.

/s/
MICHAEL W. MOSMAN
United States District Court

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**APPENDIX F — CIVIL DOCKET FOR CASE
NO. 3:04-CV-00029-MO, U.S. DISTRICT COURT,
DISTRICT OF OREGON (PORTLAND 3),
DATED OCTOBER 22, 2013**

U.S. DISTRICT COURT
DISTRICT OF OREGON (PORTLAND (3))

CIVIL DOCKET FOR CASE #: 3:04-CV-00029-MO

SMITH & NEPHEW INCORPORATED *et al.*

v.

ARTHREX, INCORPORATED

ASSIGNED TO: JUDGE MICHAEL W. MOSMAN
CAUSE: 35:145 CIVIL ACTION TO OBTAIN
PATENT

Date Filed: 01/12/2004
Date Terminated: 09/12/2013
Jury Demand: Both
Nature of Suit: 830 Patent
Jurisdiction: Federal Question

Date Filed	#	Docket Text
04/12/2013	<u>1049</u>	MANDATE of the Court of Appeals for the Federal Circuit, USCA # 2012-1265 , re Notice of Appeal (# <u>1044</u>). The decision of the District Court is

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REVERSED AND REMANDED.
(Attachments: # 1 Judgment, # 2
Opinion) (eo) (Entered: 04/12/2013)

04/12/2013 1050 Motion for Judgment *PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT*. Filed by All Plaintiffs. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Pitchford, Susan) (Entered: 04/12/2013)

04/12/2013 1051 Motion for Permanent Injunction . Filed by All Plaintiffs. (Pitchford, Susan) Modified to remove duplicate text on 4/16/2013 (sss). (Entered: 04/12/2013)

04/12/2013 1052 Explanation for Filing Memorandum Under Seal. Filed by All Plaintiffs. (Related document(s): Motion for Permanent Injunction 1051 .) (Pitchford, Susan) Modified text on 4/16/2013 (sss). (Entered: 04/12/2013)

04/12/2013 1053 Memorandum in Support of Motion for Permanent Injunction . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion for Permanent Injunction 1051 .) (Attachments: # 1 Appendix

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A, # 2 Appendix B, # 3 Appendix C)
(Pitchford, Susan) Modified text on
4/16/2013 (sss). (Entered: 04/12/2013)

04/12/2013 1054 Explanation for Filing Declaration
Under Seal. Filed by All Plaintiffs.
(Related document(s): Motion
for Permanent Injunction 1051 .)
(Pitchford, Susan) Modified text on
4/16/2013 (sss). (Entered: 04/12/2013)

04/12/2013 1055 Declaration of Susan D. Pitchford
in Support of Motion for Permanent
Injunction. (DOCUMENT
RESTRICTED ACCORDING TO
PROTECTIVE ORDER) Filed by
All Plaintiffs. (Related document(s):
Motion for Permanent Injunction
1051 .) (Attachments: # 1 Exhibit
1, # 2 Exhibit 2, # 3 Exhibit 3,
4 Exhibit 4, # 5 Exhibit 5, # 6
Exhibit 6, # 7 Exhibit 7, # 8 Exhibit
8, # 9 Exhibit 9, # 10 Exhibit 10,
11 Exhibit 11, # 12 Exhibit 12,
13 Exhibit 13, # 14 Exhibit 14)
(Pitchford, Susan) Modified text on
4/16/2013 (sss). (Entered: 04/12/2013)

04/12/2013 1056 Declaration of Paul O'Connor .
Filed by All Plaintiffs. (Related
document(s): Motion for Permanent
Injunction 1051 .) (Attachments:

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1 Exhibit A) (Pitchford, Susan)
(Entered: 04/12/2013)

- | | | |
|------------|-------------|---|
| 04/12/2013 | <u>1057</u> | Explanation for Filing Declaration Under Seal. Filed by All Plaintiffs. (Related document(s): Motion for Permanent Injunction <u>1051</u> .) (Pitchford, Susan) Modified text on 4/16/2013 (sss). (Entered: 04/12/2013) |
| 04/12/2013 | <u>1058</u> | Declaration of John Mahoney . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion for Permanent Injunction <u>1051</u> .) (Attachments: # <u>1</u> Exhibits A-D) (Pitchford, Susan) (Entered: 04/12/2013) |
| 04/16/2013 | <u>1059</u> | Bill of Costs . Filed by All Plaintiffs. (Pitchford, Susan) (Entered: 04/16/2013) |
| 04/16/2013 | <u>1060</u> | Memorandum in Support of <i>Plaintiffs' Bill of Costs</i> . Filed by All Plaintiffs. (Related document(s): Bill of Costs <u>1059</u> .) (Pitchford, Susan) (Entered: 04/16/2013) |
| 04/16/2013 | <u>1061</u> | Declaration of Mark J. Hebert <i>in Support of Plaintiffs' Bill of Costs</i> . |

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Filed by All Plaintiffs. (Related document(s): Bill of Costs 1059 .) (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E) (Pitchford, Susan) (Entered: 04/16/2013)

04/23/2013 1062 Unopposed Motion for Extension of Time to *Respond to Plaintiffs' Motions for Judgment and for Permanent Injunction*. Filed by Arthrex, Incorporated. (Heuser, Peter) (Entered: 04/23/2013)

04/25/2013 1063 **ORDER:** GRANTING Motion for Extension of Time 1062 . Responses due by 5/6/2013. Replies is due by 5/20/2013. Ordered by Judge Michael W. Mosman. (dls) (Entered: 04/25/2013)

05/03/2013 1064 Objections / *Response* to Bill of Costs 1059 . Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 05/03/2013)

05/06/2013 1065 Motion for Summary Judgment *Of Invalidity (Double Patenting) Or To Reopen The Judgment Of Validity Under Fed. R. Civ. P. 60(B)*. Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 05/06/2013)

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- 05/06/2013 1066 Memorandum in Support . Filed by Arthrex, Incorporated. (Related document(s): Motion for Summary Judgment 1065 .) (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1067 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s): Motion for Summary Judgment 1065 .) (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11) (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1068 Motion for New Trial *Pursuant To Fed. R. Civ. P. 59*. Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1069 Memorandum in Support . Filed by Arthrex, Incorporated. (Related document(s): Motion for new trial 1068 .) (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1070 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s):

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Motion for new trial 1068 .)
(Attachments: # 1 Exhibit 1, # 2
Exhibit 2, # 3 Exhibit 3, # 4 Exhibit
4, # 5 Exhibit 5, # 6 Exhibit 6, # 7
Exhibit 7, # 8 Exhibit 8, # 9 Exhibit
9, # 10 Exhibit 10, # 11 Exhibit 11,
12 Exhibit 12, # 13 Exhibit 13,
14 Exhibit 14, # 15 Exhibit 15,
16 Exhibit 16) (Saber, Charles)
(Entered: 05/06/2013)

05/06/2013 1071 Motion for Judgment *As A Matter
Of Law Or Alternatively A New
Trial On The Issue Of Lost Profits*.
Oral Argument requested. Filed
by Arthrex, Incorporated. (Saber,
Charles) (Entered: 05/06/2013)

05/06/2013 1072 Memorandum in Support . Filed by
Arthrex, Incorporated. (Related
document(s): Motion for judgment
1071 .) (Saber, Charles) (Entered:
05/06/2013)

05/06/2013 1073 Declaration of Charles W.
Saber . Filed by Arthrex,
Incorporated. (Related document(s):
Motion for judgment 1071 .)
(Attachments: # 1 Exhibit 1) (Saber,
Charles) (Entered: 05/06/2013)

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- 05/06/2013 1074 Motion for New Trial *On Prior Art Invalidity And/Or To Reopen The Validity Judgment Under Fed. R. Civ. P. 60(B)*. Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1075 Memorandum in Support . Filed by Arthrex, Incorporated. (Related document(s): Motion for new trial 1074 .) (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1076 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s): Motion for new trial 1074 .) (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23) (Saber, Charles) (Entered: 05/06/2013)

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- 05/06/2013 1077 Memorandum in Opposition to Motion for Judgment *PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT* 1050 Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1078 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s): Memorandum in Opposition 1077 .) (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24) (Saber, Charles) (Entered: 05/06/2013)
- 05/06/2013 1079 Response in Opposition to Motion for Permanent Injunction *PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION* 1051 Oral Argument requested. (DOCUMENT RESTRICTED ACCORDING

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TO PROTECTIVE ORDER)
 Filed by Arthrex, Incorporated.
 (Attachments: # 1 Ex A—Statement
 Of Reasons, # 2 Ex B—Edits to
 Proposed Injunction-Redline, # 3 Ex
 C—Edits to Proposed Injunction—
 Clean) (Saber, Charles) (Entered:
 05/06/2013)

05/06/2013 1080 Declaration of Charles W.
 Saber . (DOCUMENT
 RESTRICTED ACCORDING TO
 PROTECTIVE ORDER) Filed by
 Arthrex, Incorporated. (Related
 document(s): Response in Opposition
 to Motion, 1079.) (Attachments: # 1
 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit
 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6
 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit
 8, # 9 Exhibit 9, # 10 Exhibit 10, #
11 Exhibit 11, # 12 Exhibit 12, #
13 Exhibit 13, # 14 Exhibit 14, #
15 Exhibit 15, # 16 Exhibit 16, #
17 Errata 17, # 18 Exhibit 18, # 19
 Exhibit 19, # 20 Exhibit 20, # 21
 Exhibit 21, # 22 Exhibit 22, # 23
 Exhibit 23, # 24 Exhibit 24, # 25
 Exhibit 25, # 26 Exhibit 26, # 27
 Exhibit 27, # 28 Errata 28, # 29
 Exhibit 29, # 30 Exhibit 30) (Saber,
 Charles) (Entered: 05/06/2013)

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- 05/06/2013 1081 Explanation for Filing Under Seal re Response in Opposition to Motion, 1079 *Explanation for Filing Opposition 1079 and Declaration 1080 Under Seal* Filed by Arthrex, Incorporated (Related document(s): Response in Opposition to Motion, 1079 .) (Saber, Charles) Modified text on 5/9/2013 (sss). (Entered: 05/06/2013)
- 05/13/2013 1082 Reply to Bill of Costs 1059 . Filed by All Plaintiffs. (Pitchford, Susan) (Entered: 05/13/2013)
- 05/13/2013 1083 N o t i c e o f A t t o r n e y Substitution:Attorney Devon Zastrow Newman is substituted as counsel of record in place of Attorney Brantley C. Shumaker Filed by Arthrex, Incorporated (Newman, Devon) (Entered: 05/13/2013)
- 05/20/2013 1084 Reply to Motion for Judgment *PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT 1050* . Filed by All Plaintiffs. (Pitchford, Susan) (Entered: 05/20/2013)
- 05/20/2013 1085 Declaration of Susan D. Pitchford *in Support of Plaintiffs' Reply Briefre its Motion for Entry of Judgment.* Filed by All Plaintiffs. (Related

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document(s): Motion for judgment 1050 .) (Attachments: # 1 Exhibit 1) (Pitchford, Susan) (Entered: 05/20/2013)

- 05/20/2013 1086 Reply to Motion for Permanent Injunction *PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION* 1051 . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Attachments: # 1 Appendix A) (Pitchford, Susan) (Entered: 05/20/2013)
- 05/20/2013 1087 Declaration of John Mahoney . Filed by All Plaintiffs. (Related document(s): Motion for Permanent Injunction 1051 .) (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Pitchford, Susan) (Entered: 05/20/2013)
- 05/20/2013 1088 Declaration of Susan D. Pitchford . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion for Permanent Injunction 1051 .) (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit

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6, # 7 Exhibit 7) (Pitchford, Susan)
(Entered: 05/20/2013)

- 05/21/2013 1089 Supplemental Notice re Reply to Motion, 1086 *New Authority* Filed by All Plaintiffs (Related document(s): Reply to Motion, 1086.) (Attachments: # 1 Exhibit A) (Pitchford, Susan) (Entered: 05/21/2013)
- 05/23/2013 1090 Response in Opposition to Motion for New Trial *Pursuant To Fed. R. Civ. P. 59* 1068 . Filed by All Plaintiffs. (Pitchford, Susan) (Entered: 05/23/2013)
- 05/23/2013 1091 Declaration of Susan D. Pitchford *in Support of Plaintiffs' Opposition to Arthrex's Renewed Motion for a New Trial Pursuant to Fed.R.Civ.P. 59*. Filed by All Plaintiffs. (Related document(s): Motion for new trial 1068 .) (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Pitchford, Susan) (Entered: 05/23/2013)
- 05/23/2013 1092 Response in Opposition to Motion for Judgment *As A Matter Of Law Or Alternatively A New Trial On The Issue Of Lost Profits* 1071 . Filed by All Plaintiffs. (Pitchford, Susan) (Entered: 05/23/2013)

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- 05/23/2013 1093 Declaration of Susan D. Pitchford *in Support of Plaintiffs' Opposition to Arthrex's Renewed Motion for JMOL or Alternatively a New Trial on Lost Profits*. Filed by All Plaintiffs. (Related document(s): Motion for judgment 1071 .) (Attachments: # 1 Exhibit 1) (Pitchford, Susan) (Entered: 05/23/2013)
- 05/23/2013 1094 Response in Opposition to Motion for Summary Judgment *Of Invalidity (Double Patenting) Or To Reopen The Judgment Of Validity Under Fed. R. Civ. P. 60(B)* 1065 , Motion for New Trial *On Prior Art Invalidity And/Or To Reopen The Validity Judgment Under Fed. R. Civ. P. 60(B)* 1074 . Filed by All Plaintiffs. (Pitchford, Susan) (Entered: 05/24/2013)
- 05/24/2013 1095 Declaration of Susan D. Pitchford . Filed by All Plaintiffs. (Related document(s): Motion for Summary Judgment 1065 , Motion for new trial 1074 .) (Attachments: # 1 Exhibit 1) (Pitchford, Susan) (Entered: 05/24/2013)
- 05/24/2013 1096 Unopposed Motion *to Accept Late Filing of Dkt. Nos. 1094 and 1095 .*

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Filed by All Plaintiffs. (Pitchford, Susan) Modified links on 6/3/2013 (sss). (Entered: 05/24/2013)

- 06/07/2013 1097 **ORDER:** GRANTING Unopposed Motion to Accept Late Filing of Dkt. Nos. 1094 and 1095 1096 . Ordered by Judge Michael W. Mosman. (dls) (Entered: 06/07/2013)
- 06/10/2013 1098 Reply to Motion for Summary Judgment *Of Invalidity (Double Patenting) Or To Reopen The Judgment Of Validity Under Fed. R. Civ. P. 60(B)* 1065 Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 06/10/2013)
- 06/10/2013 1099 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s): Reply to Motion 1098.) (Attachments: # 1 Ex 12, # 2 Ex 13, # 3 Ex 14, # 4 Ex 15, # 5 Ex 16, # 6 Ex 17, # 7 Ex 18) (Saber, Charles) (Entered: 06/10/2013)
- 06/10/2013 1100 Reply to Motion for New Trial Pursuant To Fed. R. Civ. P. 59 1068 Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 06/10/2013)

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- 06/10/2013 1101 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s): Reply to Motion 1100.) (Attachments: # 1 Ex 17, # 2 Ex 18, # 3 Ex 19, # 4 Ex 20, # 5 Ex 21, # 6 Ex 22, # 7 Ex 23) (Saber, Charles) (Entered: 06/10/2013)
- 06/10/2013 1102 Reply to Motion for Judgment As *A Matter Of Law Or Alternatively A New Trial On The Issue Of Lost Profits* 1071 Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 06/10/2013)
- 06/10/2013 1103 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s): Reply to Motion 1102.) (Attachments: # 1 Ex 2, # 2 Ex 3, # 3 Ex 4) (Saber, Charles) (Entered: 06/10/2013)
- 06/10/2013 1104 Reply to Motion for New Trial On *Prior Art Invalidity And/Or To Reopen The Validity Judgment Under Fed. R. Civ. P. 60(B)* 1074 Oral Argument requested. Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 06/10/2013)

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- 06/10/2013 1105 Declaration of Charles W. Saber . Filed by Arthrex, Incorporated. (Related document(s): Reply to Motion 1104 .) (Attachments: # 1 Ex 24, # 2 Ex 25) (Saber, Charles) (Entered: 06/10/2013)
- 06/25/2013 1106 Notice of Filing by Arthrex in a Collateral Proceeding which is Relevant to Plaintiffs' Motion for Entry of Judgment Filed by All Plaintiffs (Attachments: # 1 Exhibit A) (Pitchford, Susan) (Entered: 06/25/2013)
- 07/01/2013 1107 Scheduling Order by Judge Michael W. Mosman. Oral Argument is set for 9/9/2013 at 02:00PM–04:00PM in Portland Courtroom 16 before Judge Michael W. Mosman, regarding all pending motions. Ordered by Judge Michael W. Mosman. (dls) (Entered: 07/01/2013)
- 07/17/2013 1108 Notice re Motion for new trial 1068 Notice of Supplemental Authority on Indirect Infringement in Support of Arthrex's Motion for New Trial Filed by Arthrex, Incorporated (Related document(s): Motion for new trial 1068 .) (Attachments: # 1 Attachment) (Saber, Charles) (Entered: 07/17/2013)

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- 07/26/2013 1109 Response to *Arthrex's Notice of Supplemental Authority*. Filed by All Plaintiffs. (Related document(s): Notice, 1108 .) (Pitchford, Susan) (Entered: 07/26/2013)
- 09/09/2013 1110 **MINUTES of Proceedings:** Motion Hearing Held. Order DENYING Smith & Nephew, Inc. et al v. Arthrex, Inc. (#1068), Motion for Judgment As A Matter Of Law Or Alternatively A New Trial On The Issue Of Lost Profits (#1071) and Motion for New Trial On Prior Art Invalidity And/ Or To Reopen The Validity Judgment Under Fed. R. Civ. P. 60(B) (#1074); Order DENYING Motion for Summary Judgment Of Invalidity (Double Patenting) Or To Reopen The Judgment Of Validity Under Fed. R. Civ. P. 60(B) (#1065); Order GRANTING Motion for Judgment PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT (#1050), Motion for Permanent Injunction PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION (#1051) and Motion for Permanent Injunction PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION (#1059) and Bill of Costs (#1059), as stated on the

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record. John M. Skenyon, Mark J. Hebert, and Susan Pitchford present as counsel for plaintiff(s). Charles W. Saber, Salvatore P. Tamburo, Megan Sunkel Woodworth and Devon Zastrow Newman present as counsel for defendant(s). (Court Reporter Bonita Shumway.) (dls) (Entered: 09/10/2013)

- 09/11/2013 1111 Notice of Attorney Withdrawal: Filed by All Plaintiffs (Pitchford, Susan) (Entered: 09/11/2013)
- 09/12/2013 1112 Order of Permanent Injunction. Signed on 9/12/13 by Judge Michael W. Mosman. (dls) (Entered: 09/13/2013)
- 09/12/2013 1113 Statement of Reasons Supporting Permanent Injunction. Signed on 9/12/13 by Judge Michael W. Mosman. (dls) (Entered: 09/13/2013)
- 09/12/2013 1114 Judgment. IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the plaintiffs, Smith & Nephew, Inc. and John O. Hayhurst, M.D., and against the defendant, Arthrex, Inc. Signed on 9/12/13 by Judge Michael W. Mosman. (dls) (Entered: 09/13/2013)

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- 09/16/2013 1115 OFFICIAL COURT TRANSCRIPT OF PROCEEDINGS FILED Oral Argument held on 9/9/2013 before Judge Michael W. Mosman, Court Reporter Bonita J. Shumway, telephone number 503-326-8188. Transcript may be viewed at Court's public terminal or purchased from the Court Reporter before the deadline for Release of Transcript Restriction. Afterwards it may be obtained through the Court Reporter or PACER—See Policy at ord.uscourts.gov. Notice of Intent to Redact Transcript is due by 9/26/2013. Redaction Request due 10/10/2013. Redacted Transcript Deadline set for 10/21/2013. Release of Transcript Restriction set for 12/19/2013. (Shumway, Bonita) (Entered: 09/16/2013)
- 09/16/2013 1116 Motion to Supplement *PLAINTIFFS' MOTION FOR SUPPLEMENTAL DAMAGES AND ADDITIONAL PRE-JUDGMENT INTEREST*. Filed by All Plaintiffs. (Pitchford, Susan) (Entered: 09/16/2013)
- 09/16/2013 1117 Memorandum in Support *PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR*

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MOTION FOR SUPPLEMENTAL DAMAGES AND ADDITIONAL PRE-JUDGMENT INTEREST. Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1116 .) (Pitchford, Susan) (Entered: 09/16/2013)

09/16/2013 1118 Supplement *EXPLANATION FOR FILING UNDER SEAL.* Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1116 .) (Pitchford, Susan) (Entered: 09/16/2013)

09/16/2013 1119 Declaration of Richard B. Troxel . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1116 .) (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit E-1, # 7 Exhibit E-2, # 8 Exhibit E-3, # 9 Exhibit F, # 10 Exhibit F-1, # 11 Exhibit F-2, # 12 Exhibit F-3, # 13 Exhibit G, # 14 Exhibit H-1, # 15 Exhibit H-2, # 16 Exhibit I-1, # 17 Exhibit I-2, # 18 Exhibit J, # 19 Appendix 2, # 20 Appendix 4, # 21 Appendix 5, # 22 Appendix 6a,

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23 Appendix 6b, # 24 Appendix 6c, # 25 Appendix 9, # 26 Appendix 10) (Pitchford, Susan) (Entered: 09/16/2013)

- 09/16/2013 1120 Supplement *EXPLANATION FOR FILING UNDER SEAL*. Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1116 .) (Pitchford, Susan) (Entered: 09/16/2013)
- 09/16/2013 1121 Declaration of Susan D. Pitchford . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1116 .) (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) (Pitchford, Susan) (Entered: 09/16/2013)
- 09/18/2013 1122 A M E N D E D O R D E R O F P E R M A N E N T I N J U N C T I O N. Signed on 9/18/13 by Judge Michael W. Mosman. (dls) (Entered: 09/18/2013)
- 09/26/2013 1123 Motion to Supplement *Plaintiffs' Amended Motion for Supplemental Damages and Additional Pre-Judgment Interest*. Filed by All

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Plaintiffs. (Pitchford, Susan)
(Entered: 09/26/2013)

- 09/26/2013 1124 Memorandum in Support of *Plaintiff's Amended Motion for Supplemental Damages and Additional Pre-Judgment Interest*. Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1123 .) (Pitchford, Susan) (Entered: 09/26/2013)
- 09/26/2013 1125 Declaration of Susan D. Pitchford *in Support of Plaintiffs' Amended Motion for Supplemental Damages and Additional Pre-Judgment Interest*. (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1123 .) (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) (Pitchford, Susan) (Entered: 09/26/2013)
- 09/26/2013 1126 Notice *Explanation for Filing Under Seal* Filed by All Plaintiffs (Pitchford, Susan) (Entered: 09/26/2013)
- 09/26/2013 1127 Declaration of *Richard B. Troxel in Support of Plaintiffs' Amended*

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Motoin for Supplemental Damages and Additional Prejudgment Interest. (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1123 .) (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H-1) (Pitchford, Susan) (Entered: 09/26/2013)

- 09/26/2013 1128 Notice *Explanation for Filing Under Seal* Filed by All Plaintiffs (Pitchford, Susan) (Entered: 09/26/2013)
- 09/27/2013 1129 Notice *Explanation for Filing Under Seal* Filed by All Plaintiffs (Pitchford, Susan) (Entered: 09/27/2013)
- 09/27/2013 1130 Declaration of Richard B. Troxel *Corrected (Dkt 1127) in Support of Plaintiffs' Amended Motion for Supplemental Damages and Additional Prejudgment Interest.* (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by All Plaintiffs. (Related document(s): Motion to Supplement 1123 .) (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3

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Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H-1, # 9 Exhibit H-2, # 10 Exhibit I-1, # 11 Exhibit I-2, # 12 Exhibit J, # 13 Appendix 2, # 14 Appendix 4, # 15 Appendix 5, # 16 Appendix 6a, # 17 Appendix 6b, # 18 Appendix 6c, # 19 Appendix 9, # 20 Appendix 10) (Pitchford, Susan) (Entered: 09/27/2013)

10/11/2013 1131 **ORDER:** DENYING AS MOOT Motion to Supplement 1116. Ordered by Judge Michael W. Mosman. (dls) (Entered: 10/11/2013)

10/15/2013 1132 Notice of Appeal to the United States Court of Appeals for the Federal Circuit from Order on Motion for Judgment, Order on motion for permanent injunction, Order on Cost bill, Order on motion for summary judgment, Order on motion for new trial, Motion Hearing Held, 1110 , Permanent Injunction 1122 , Permanent Injunction 1112 , Judgment 1114 Filing fee \$455 collected; Agency Tracking ID 0979-3453503: . Filed by Arthrex, Incorporated. (Saber, Charles) Modified on 10/17/2013 (sss). (Entered: 10/15/2013)

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- 10/15/2013 1133 Response in Opposition to Motion to Supplement *Plaintiffs' Amended Motion for Supplemental Damages and Additional Pre-Judgment Interest* 1123 Oral Argument requested. (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by Arthrex, Incorporated. (Saber, Charles) (Entered: 10/15/2013)
- 10/15/2013 1134 Declaration of Charles W. Saber . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by Arthrex, Incorporated. (Related document(s): Response in Opposition to Motion, 1133 .) (Attachments: # 1 Exhibit 01, # 2 Exhibit 02, # 3 Exhibit 03) (Saber, Charles) (Entered: 10/15/2013)
- 10/15/2013 1135 Declaration of William Benavitz . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by Arthrex, Incorporated. (Related document(s): Response in Opposition to Motion, 1133 .) (Attachments: # 1 Ex 01, # 2 Ex 02, # 3 Ex 03, # 4 Ex 04, # 5 Ex 05, # 6 Ex 06, # 7 Ex 07, # 8 Ex 08, # 9 Ex 09, # 10 Ex 10, #

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11 Ex 11) (Saber, Charles) (Entered: 10/15/2013)

- 10/15/2013 1136 Declaration of David N. Paris . (DOCUMENT RESTRICTED ACCORDING TO PROTECTIVE ORDER) Filed by Arthrex, Incorporated. (Related document(s): Response in Opposition to Motion, 1133 .) (Attachments: # 1 Appendix, # 2 Exs A-L) (Saber, Charles) (Entered: 10/15/2013)
- 10/15/2013 1137 Explanation for Filing Under Seal re Response in Opposition to Motion, 1133 , Declaration, 1135 , Declaration, 1134 , Declaration, 1136 Filed by Arthrex, Incorporated (Related document(s): Response in Opposition to Motion, 1133 , Declaration, 1135 , Declaration, 1134 , Declaration, 1136 .) (Saber, Charles) Modified text on 10/18/2013 (sss). (Entered: 10/15/2013)
- 10/22/2013 1138 Transcript Designation and Order Form regarding Notice of Appeal,, 1132 *A transcript is not needed for the appeal.* Filed by Arthrex, Incorporated. Transcript is due by 11/25/2013. (Saber, Charles) (Entered: 10/22/2013)